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APPEALS – ADMINISTRATIVE PROCEDURE ACT – TRANSFERS BETWEEN APPELLATE COURTS – CASES ARISING UNDER MARYLAND VEHICLE LAW

ADMINISTRATIVE PROCEDURE ACT – JUDICIAL ENFORCEMENT ACTION – FINAL ADMINISTRATIVE DECISION

Facts:

Maryland Code, Transportation Article ("TR"), § 16-106(c) requires that an applicant for a learner's permit or driver's license provide the applicant's social security number ("SSN") or certify that the applicant is ineligible to have a SSN. TR §16-103.1(11) prohibits the Motor Vehicle Administration ("MVA") from issuing a license to an applicant who fails to do so.

Karl Geppert, who did not have a SSN although he was eligible for one, applied for a learner's permit but his application was rejected by the MVA. He was granted a hearing with an administrative law judge ("ALJ") from the Office of Administrative Hearings ("OAH"), who MVA has designated as its final agency decision maker. The ALJ concluded that, although Mr. Geppert had failed to comply with the SSN requirement in the statute, the MVA was required to issue him a learner's permit because an agency regulation codified in COMAR (that unbeknownst to the ALJ had been repealed) required only that an applicant certify that the applicant does not have a SSN. The MVA did not seek judicial review of the ALJ's final decision.

Following the ALJ's decision, the MVA continued to refuse to issue a learner's permit to Mr. Geppert. Mr. Geppert filed an enforcement action in the Circuit Court for Baltimore County under the Administrative Procedure Act ("APA"), seeking a writ of mandamus to compel the MVA to comply with the ALJ's decision. The Circuit Court denied Mr. Geppert's request, reasoning that he had failed to show a "clear legal right" to his desired relief, as required for the issuance of a writ of mandamus, because the ALJ's decision was contrary to the statute.

Mr. Geppert timely appealed to the Court of Special Appeals. After the filing of the appeal, the MVA requested that the intermediate appellate court dismiss or, in the alterative, transfer the appeal to the Court of Appeals. This request was denied.

A panel of the Court of Special Appeal reversed the Circuit Court. The intermediate appellate court held that, upon the MVA's failure to seek judicial review, the ALJ's decision became a "final judgment," which was entitled to preclusive effect in the enforcement action in the Circuit Court. However, the court revised the relief granted by the ALJ to require the MVA to issue a learner's permit to Mr. Geppert only if he passed the learner's permit exam. The court also held that a proceeding to enforce such a decision was distinguishable from judicial review of an administrative order, which it agreed was not appealable to the Court of Special Appeals under the APA.

Held: Reversed

The Court of Appeals held that, under the APA, the only statutory route for an appeal of a circuit court decision in an enforcement action that arises under Title 16 of the Maryland Vehicle Law, is by petition of a writ of *certiorari* to the Court of Appeals. An incorrectly filed notice of appeal with the Court of Special Appeals should be transferred to the Court of Appeals pursuant to Maryland Rule 8-132 and should be considered as a petition for a writ of *certiorari*.

The Court next explained that when the prevailing party in an administrative hearing seeking to enforce that decision requests a writ of mandamus in the circuit court pursuant to Maryland Code, State Government Article, §10-222.1, the circuit court is bound by the fact finding made by the final agency decision maker, but not its conclusions of law. This means that, even when no party has sought judicial review of the final agency decision, the circuit court is not required to afford preclusive effect to an erroneous legal analysis in determining whether the plaintiff in the enforcement action has established a "clear legal right" to a writ of mandamus.

Attorney Grievance Commission of Maryland v. Arlene Adasa Smith-Scott, Misc. Docket AG Nos. 8 & 64, September Term 2018, filed June 29, 2020. Opinion by Getty, J.

https://www.courts.state.md.us/data/opinions/coa/2020/8a18ag.pdf

ATTORNEY DISCIPLINE – SANCTION – DISBARMENT

Facts:

The Attorney Grievance Commission of Maryland (the "Commission"), acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action with this Court alleging that Arlene Adasa Smith-Scott violated the Maryland Lawyers' Rules of Professional Conduct. This petition concerned Ms. Smith-Scott's actions during her personal, nearly three-year long bankruptcy case. The Commission filed a second petition related to Ms. Smith-Scott's representation of seven separate clients in bankruptcy proceedings.

Together, the Commission's petitions alleged that Ms. Smith-Scott violated the following provisions of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") and the Maryland Attorneys' Rules of Professional Conduct ("MARPC"): 1.1 (Competence); 1.2 (Scope of Representation and Allocation of Authority); 1.3 (Diligence); 1.4 (Communication); 1.5 (Fees); 1.6 (Confidentiality of Information); 1.15 (Safekeeping Property); 1.16 (Declining or Terminating Representation); 3.1 (Meritorious Claims and Contentions); 3.2 (Expediting Litigation); 3.3 (Candor Toward the Tribunal); 3.4 (Fairness to Opposing Party and Attorney); 4.1 (Truthfulness in Statements to Others); 8.1 (Bar Admission and Disciplinary Matters); 8.4 (Misconduct); 19-403 (Duty to Maintain Account); and 19-404 (Trust Account—Required Deposits).

The Court of Appeals transmitted this matter to the Circuit Court for Prince George's County and designated the Honorable Peter K. Killough (the "hearing judge") to conduct an evidentiary hearing and make findings of fact and recommended conclusions of law. The hearings took place on June 17, 18, 19, 20 and 28, 2019.

The hearing judge found the following pertinent facts. Ms. Smith-Scott represented herself in a bankruptcy proceeding that lasted almost three years. Ms. Smith-Scott filed countless frivolous pleadings, motions, and appeals, intentionally hindered the court-appointed trustee's ability to administer the case, and knowingly made false statements of fact in filings and appeals before the Bankruptcy Court and United States District Court for the District of Maryland. Further, Ms. Smith-Scott's representation of several clients in Maryland's courts led her to misappropriate client funds, make knowing misrepresentations to and intentionally conceal information from clients, and fail to prosecute clients' motions and appeals.

Held: Disbarred.

The Court of Appeals concluded that Ms. Smith-Scott violated the following MLRPC: 1.1 (Competence); 1.2 (Scope of Representation and Allocation of Authority); 1.3 (Diligence); 1.4 (Communication); 1.5 (Fees); 1.6 (Confidentiality of Information); 1.15 (Safekeeping Property); 1.16 (Declining or Terminating Representation); 3.1 (Meritorious Claims and Contentions); 3.2 (Expediting Litigation); 3.3 (Candor Toward the Tribunal); 3.4 (Fairness to Opposing Party and Attorney); 4.1 (Truthfulness in Statements to Others); 8.1 (Bar Admission and Disciplinary Matters); 8.4 (Misconduct); and 19-404 (Trust Account—Required Deposits).

The Court concluded that disbarment is the appropriate sanction for Smith-Scott's numerous violations. Ms. Smith-Scott engaged in intentional dishonest conduct and she misappropriated client funds entrusted to her. The magnitude of Ms. Smith-Scott's misconduct is exacerbated by the fact that she violated sixteen different rules of professional conduct, often numerous times and across the representation of multiple clients. Moreover, in her personal bankruptcy matter, Ms. Smith-Scott willfully disregarded lawful orders of the Bankruptcy Court and U.S. District Court and was found in civil contempt by those courts. Therefore, in light of the existence of aggravating factors and the absence of mitigating factors, the Court concluded that a reprimand or suspension would not be sufficient to protect the public or serve as a deterrent to other attorneys; the only appropriate sanction is disbarment.

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William H. Plank, II, et al. v. James P. Cherneski, et al., Misc. No. 3, September Term 2019, filed July 14, 2020. Opinion by Booth, J.

https://www.courts.state.md.us/data/opinions/coa/2020/3a19m.pdf

FIDUCIARY DUTIES – MANAGING MEMBERS OWED TO LIMITED LIABILITY COMPANY AND MEMBERS – AGENCY

BREACH OF FIDUCIARY DUTY AS AN INDEPENDENT CAUSE OF ACTION

BREACH OF FIDUCIARY DUTY – SUFFICIENCY OF EVIDENCE

ATTORNEYS' FEES ARISING UNDER FEE-SHIFTING PROVISION IN OPERATING AGREEMENT

Facts:

This case involved a dispute between the members of Trusox, LLC, a Maryland Limited Liability Company. Minority members, William H. Plank, II and Sanford R. Fisher ("Minority Members"), filed direct and derivative claims against James P. Cherneski, Trusox's President, Chief Executive Officer, and majority member, seeking monetary and injunctive relief as well as an order dissolving the LLC or appointing a receiver. Following a bench trial, the judge entered judgment in favor of Mr. Cherneski on claims of dissolution, receivership, and breach of fiduciary duty and in favor of the Minority Members on certain other claims. With respect to the breach of fiduciary duty claim, prior to entering judgment in favor of Mr. Cherneski, the court indicated in its comments from the bench that under its reading of *Kann v. Kann*, 344 Md. 689 (1997), Maryland might not recognize an independent cause of action for breach of fiduciary duty. Ultimately, the court ruled in favor of Mr. Cherneski on that count, concluding that there was insufficient evidence to show that there had been a breach. After deciding each count in the Complaint, the judge found that Mr. Cherneski and Trusox prevailed on the most significant claims and awarded the defendants their attorneys' fees in their entirety pursuant to the fee-shifting clause of the Operating Agreement.

The Minority Members appealed asserting that the circuit court committed errors in resolving the breach of fiduciary duty claim and erred in awarding attorneys' fees under the Operating Agreement. After hearing oral arguments, the Court of Special Appeals filed a Certification pursuant to Maryland Rule 8-304, requesting that the Court of Appeals answer the question of whether Maryland recognizes a breach of fiduciary duty claim as an independent cause of action. The Court granted the Certification and, pursuant to Maryland Rule 8-304(c)(3), issued a writ of *certiorari* that included the entire action.

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Held: Certified Questions Answered; Affirmed Judgment of the Circuit Court

The Court held that managing members of an LLC owe a common law fiduciary duty to the LLC and the other members based on the principles of agency. Managing members are agents for the LLC and each of its members, which creates a fiduciary position under common law. Maryland's LLC Act's silence with respect to fiduciary duties leaves the common law fiduciary duties in place unless altered by the operating agreement.

With respect to the certified questions, the Court held that under *Kann v. Kann*, 344 Md. 689 (1997), and the jurisprudence that followed, a breach of fiduciary duty may be actionable as an independent cause of action. To establish a breach of fiduciary duty, a plaintiff must demonstrate: (1) the existence of a fiduciary relationship; (2) breach of the duty owed by the fiduciary to the beneficiary; and (3) harm to the beneficiary. The Court explained that the litigants and the trial court should consider the nature of the fiduciary relationship and the possible remedies for a breach, on a case-by-case basis. However, the Court clarified that this does not mean that every breach will sound in tort, with an attendant right to a jury trial and monetary damages. The remedy for a breach is dependent upon the type of fiduciary relationship, and the remedies provided by law, whether by statute, common law, or contract.

Having answered the certified questions, the Court held that the circuit court did not err in concluding that there had been no breach of the fiduciary duty. The circuit court's resolution of the claim was a factual determination based upon a thorough review of the evidence, not an erroneous conclusion of law.

Finally, the Court affirmed the circuit court's award of attorneys' fees under the fee-shifting provision of the Operating Agreement. Given the plain language of the Operating Agreement, the fee-shifting provision applied to claims arising under the contractual umbrella of the Operating Agreement or between the parties. The Court determined that the circuit court correctly interpreted the language of the provision and, applying the common core of facts doctrine, found Mr. Cherneski and Trusox to be the prevailing parties.

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7222 Ambassador Road, LLC v. National Center on Institutions and Alternatives, Inc., No. 66, September Term 2019, filed July 27, 2020. Opinion by McDonald, J. Biran, J., concurs.

https://mdcourts.gov/data/opinions/coa/2020/66a19.pdf

LIMITED LIABILITY COMPANIES – FORFEITURE OF RIGHT TO DO BUSINESS – APPEALS

Facts:

7222 Ambassador Road, LLC ("Ambassador Road") initiated a breach-of-contract lawsuit against its former tenant, National Center on Institutions and Alternatives, Inc. ("NCIA") in the Circuit Court for Baltimore County. Following a discovery dispute that arose between the parties, NCIA filed a motion to exclude testimony of Ambassador Road's witnesses. The Circuit Court granted the motion. As a result, Ambassador Road was unable to present its case and the Circuit Court entered judgment in favor of NCIA.

Ambassador Road filed a timely appeal, arguing that the Circuit Court had abused its discretion in granting the motion. A divided panel of the Court of Special Appeals affirmed the ruling of the Circuit Court. Following the issuance of the mandate of the intermediate appellate court, Ambassador Road filed a petition for certiorari with the Court of Appeals, which was granted.

However, NCIA later discovered that before Ambassador Road filed its petition for *certiorari* with the Court of Appeals, it failed to file an annual personal property report with the State Department of Assessment and Taxation ("SDAT"), thus forfeiting its right to do business in the State pursuant to the Maryland LLC Act, codified at Maryland Code, Corporations & Associations Article ("CA"), §4A-101 *et seq*. It also failed to fix this delinquency within the statutory 60-day grace period. CA §4A-912. Accordingly, NCIA filed a motion to dismiss the appeal, arguing that Ambassador Road could no longer proceed with the litigation having forfeited its right to do business in the State.

Held: Appeal dismissed.

The Court of Appeals held that when an LLC fails to fulfill its statutory filing and payment obligations, as required by the Maryland LLC Act, it forfeits its right to do business in the State, thereby losing its ability to fully exercise its powers, including pursuing an appeal of adverse decisions in the Circuit Court and Court of Special Appeals. The Court explained that, although the Maryland LLC Act provides that a delinquent LLC may still "defend any action, suit, or proceeding," that statutory provision was intended to protect the interests of third parties who have transacted with the LLC and does not allow for pursuing affirmative litigation during the

period of forfeiture. Accordingly, based on the particular facts of this case, the Court was required pursuant to Maryland Rule 8-602(b)(1) to dismiss the appeal because the appeal was not permitted by law.

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Daniel Joseph Greene v. State of Maryland, No. 7, September Term 2019, filed June 9, 2020. Opinion by Barbera, C.J.

https://www.courts.state.md.us/data/opinions/coa/2020/7a19.pdf

CRIMINAL LAW – CONSTITUTIONAL IDENTIFICATION LAW – NON-EYEWITNESS IDENTIFICATION – CONFIRMATORY IDENTIFICATION

Facts:

Petitioner, Daniel Greene, was charged with the murder of Jon Hickey. Detectives recovered surveillance footage that showed someone attempting to enter Mr. Hickey's apartment. To identify the person on the surveillance footage, detectives questioned Jennifer McKay, Petitioner's ex-lover, who said that the person on the surveillance footage "looks like" Petitioner. However, Ms. McKay vacillated throughout the interview, so the detectives pressed Ms. McKay to be more certain of her identification. Petitioner filed in the Circuit Court for Baltimore City a motion to suppress Ms. McKay's identification of him. Petitioner argued to the circuit court that the identification was obtained during "an impermissibly suggestive process," rendering the identification inadmissible at trial. The circuit court agreed and suppressed the out-of-court and potential in-court identification of Petitioner. The State noted a direct appeal of that decision.

The Court of Special Appeals in a reported opinion reversed the circuit court's order granting the motion to suppress Ms. McKay's identification of Petitioner. The Honorable Charles E. Moylan, Jr., Senior Judge, held on behalf of the court that the police-initiated procedure was not governed by constitutional law concerning out-of-court identifications made by an eyewitness. Judge Moylan explained that Ms. McKay's identification of Petitioner was of an altogether different sort; it was a "confirmatory identification," not subject to constitutional scrutiny. Petitioner thereafter sought, and this Court granted, a writ of certiorari to review the judgment of the Court of Special Appeals.

Held: Affirmed

The Court of Appeals affirmed the Court of Special Appeals and held that the identification by a non-eyewitness who knew the suspect was not governed by constitutional identification law, but rather was a "confirmatory identification." The focus of the Supreme Court's "identification law" jurisprudence, beginning with *Stovall v. Denno*, 388 U.S. 293 (1967), is on efforts by the police to obtain from an eyewitness an identification of a criminal suspect. Conversely, nothing in that line of cases, which includes *Neil v. Biggers*, 409 U.S. 188 (1972), and *Manson v. Brathwaite*, 432 U.S. 98 (1977), even intimates that the due process analysis also governs procedures for non-eyewitnesses who assist the police in ascertaining a suspect's identity. Consequently, the circuit court erred as a matter of law in applying the due process analysis of

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Neil v. Biggers, 409 U.S. 188 (1972), and *Manson v. Brathwaite*, 432 U.S. 98 (1977) to Ms. McKay's identification of Petitioner.

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Rasherd Lewis v. State of Maryland, No. 44, September Term 2019, filed July 27, 2020. Opinion by Barbera, C.J.

https://mdcourts.gov/data/opinions/coa/2020/44a19.pdf

CRIMINAL PROCEDURE – ODOR OF MARIJUANA – PROBABLE CAUSE – SEARCH INCIDENT TO LAWFUL ARREST EXCEPTION – DECRIMINALIZATION OF LESS THAN TEN GRAMS OF MARIJUANA

Facts:

Petitioner, Rasherd Lewis, was arrested at a convenience store in Baltimore City after law enforcement officers smelled the odor of marijuana emanating from his person. Incident to that arrest, the officers searched Petitioner's person and the bag he carried. The search uncovered a non-criminal amount of marijuana from Petitioner's pockets and a handgun from the bag. Petitioner was charged with wearing, carrying, or transporting a handgun.

Petitioner filed a motion to suppress and argued that the search incident to arrest exception to the Fourth Amendment's warrant requirement—the justification propounded by the State—did not justify the arrest and search of Petitioner. Petitioner asserted that the police officers did not have probable cause to arrest him and conduct a search incident to that arrest because, following the decriminalization of marijuana in 2014, someone in possession of less than ten grams of marijuana may be issued a civil citation but cannot be arrested. The State responded that the odor of marijuana provided the officers with probable cause to arrest and search Petitioner because marijuana in any amount remains contraband.

Relying on *Robinson v. State*, a case involving the vehicle exception to the Fourth Amendment's warrant requirement, the Circuit Court for Baltimore City denied the motion to suppress. The court ruled that the odor of marijuana gave the police officers probable cause to arrest Petitioner and, incident to such arrest, conduct a full search of his person. 451 Md. 94, 99 (2017) (holding that the odor of marijuana provides police officers with probable cause to search a vehicle because marijuana in any quantity remains contraband). Following the suppression hearing, the court found Petitioner guilty of the handgun charge based on an agreed statement of facts.

Petitioner appealed the denial of the motion to suppress to the Court of Special Appeals. In a fractured opinion, a majority of the three-judge panel affirmed the circuit court based on its interpretation of *Robinson*. The dissent countered that *Robinson* could not justify the arrest and search of Petitioner because that case only applies to the vehicle exception, not the search incident to arrest exception, to the warrant requirement.

Held: Reversed.

The Court of Appeals reversed the Court of Special Appeals and reiterated that a lawful arrest is the prerequisite for a search justified by the search incident to arrest exception. As explained in *Pacheco v. State*, 465 Md. 311 (2019), police officers cannot know based on the odor of marijuana alone the quantity of marijuana, if any, in someone's possession. Rather, for a search incident to arrest to be reasonable, the police must possess information indicating possession of a criminal amount of marijuana. In the instant matter, the record did not suggest that Petitioner was in possession of a criminal amount of marijuana, merely that he smelled of marijuana.

Walter Elenils Portillo Funes v. State of Maryland, No. 65, September Term 2019, filed June 30, 2020. Opinion by Getty, J.

https://www.courts.state.md.us/data/opinions/coa/2020/65a19.pdf

CRIMINAL LAW – DRIVING WHILE IMPAIRED – DRIVING UNDER THE INFLUENCE – STANDARDIZED FIELD SOBRIETY TESTS – ADMISSIBILITY – MARYLAND RULE 5-701 – LAY WITNESS TESTIMONY

CRIMINAL LAW – DRIVING WHILE IMPAIRED – DRIVING UNDER THE INFLUENCE – STANDARDIZED FIELD SOBRIETY TESTS – MARYLAND RULE 5-403 – UNFAIR PREJUDICE

CRIMINAL LAW – DRIVING WHILE IMPAIRED – DRIVING UNDER THE INFLUENCE – STANDARDIZED FIELD SOBRIETY TESTS – EQUAL PROTECTION – EXCLUSIONARY RULE

Facts:

A police officer awakened an asleep Petitioner Walter Elenils Portillo Funes while his pick-up was stopped and running on the right northbound lane of New Hampshire avenue. The officer noticed that Mr. Portillo had his foot on the vehicle's brake, and the vehicle was in drive. Additionally, a Corona beer sat in the center console. The officer removed Mr. Portillo from his vehicle and began questioning him, but it became apparent that English was not Mr. Portillo's primary language.

The police officer's body cam footage showed that Mr. Portillo was confused during questioning. Mr. Portillo repeated multiple times his language was Spanish. After questioning, the officer proceeded to conduct field sobriety tests. The officer provided instructions on the horizontal gaze nystagmus ("HGN") test, the "walk-and-turn test," and the "one-leg stand" test. These tests all required verbal instructions, and Mr. Portillo showed confusion to the directions. Regardless, the officer proceeded with the tests. The officer observed several clues in these tests of Mr. Portillo's intoxicated state, so he placed Mr. Portillo under arrest and took him to the police station.

At the police station, the officer read the DR-15 "Advice of Rights" form to Mr. Portillo in English which had a Spanish translation printed on the back. However, the officer could not confirm if Mr. Portillo followed along on the identical version of the DR-15 form supplied to him. The DR-15 is a lengthy, single-spaced form that explains, in great detail, an individual's right to withdraw consent to a breath test, as well as the penalties associated with certain test results, the criminal and administrative consequences of declining the test, the individual's administrative rights to challenge those consequences, and other matters. The English side of the form includes at the bottom several important sentences translated into Spanish, one of which

requires a police officer to certify and sign he/she provided the DR-15 "Advice of Rights" in English and Spanish. Mr. Portillo also had to sign off certifying that he had read the DR-15 "Advice of Rights" and understood the requested breath test. Mr. Portillo displayed confusion, but ultimately signed the form. An officer then administered the breath test which registered a blood alcohol concentration of .15, above the legal blood alcohol concentration of .08.

The Respondent State charged Mr. Portillo with driving under the influence of alcohol, driving while impaired by alcohol, driving under the influence of alcohol per se, and negligent driving. Mr. Portillo was convicted in the District Court of Maryland sitting in Montgomery County. Mr. Portillo then appealed to the Circuit Court for Montgomery County.

Before trial in the circuit court, Mr. Portillo filed two motions— styled as "Motions in Limine"—the first to suppress the chemical breath test evidence and the second to suppress evidence of the field sobriety tests. Mr. Portillo argued for the exclusion of the breath test because the advisement of his rights in English rendered the test involuntary in violation of Courts and Judicial Proceedings Article § 10-309 and Transportation Article ("TR") § 16-205.1 of the Maryland Code. The motion to suppress the evidence of the field sobriety tests coincided with Mr. Portillo's first argument—Mr. Portillo's inability to understand English made the nature of the tests unreliable. Mr. Portillo also argued the field sobriety tests violated his constitutional right to equal protection. The circuit court heard arguments and denied both motions. The case then proceeded to trial. At trial, Mr. Portillo renewed his motions to suppress the field sobriety tests and chemical breath test. The court denied the motions reasoning that the arguments go to the weight of the evidence, but do not rule out the admissibility of the tests. The jury returned a guilty verdict to driving under the influence of alcohol, driving while impaired by alcohol, and driving under the influence of alcohol per se.

The Court of Appeals granted Mr. Portillo's petition for writ of certiorari (1) the circuit court erred in denying Mr. Portillo's motion to exclude the chemical breath test when Mr. Portillo was advised of his right to decline the test in English and (2) the circuit court erred in denying Mr. Portillo's motion to exclude the standardized field sobriety tests, where Mr. Portillo was asked to perform the tests in English.

Held: Affirmed in part, reversed in part, and remanded.

The Court of Appeals (1) reversed the circuit court's decision to deny Mr. Portillo's motion to exclude the breath test as well as the circuit court's refusal to hear evidence on the sufficiency of the advice of rights. In consideration of Maryland's Implied Consent Statute TR § 16-205.1, the Court of Appeals explained for a breath test to be admissible, the police officer must adhere to TR § 16-205.1's procedural and "advice of rights" requirements. Among the procedural requirements, TR § 16-205.1(b)(2) directs the police officer to advise the suspect, through the DR-15 form, of the sanctions and criminal penalties that come as a consequence to refusing to take the test or a test that is above the legal blood alcohol concentration.

Under a reasonableness standard, the Court of Appeals found that it is not unreasonable to expect Maryland police officers, like the Motor Vehicle Adminstration, to accommodate non-English-speaking drivers, like Mr. Portillo. The Court of Appeals found the trial court erred because it should have exercised its discretion to take evidence on Mr. Portillo's motion prior to trial; and should have made an assessment, based on evidence before it, whether Mr. Portillo understood English sufficiently in order to make a reasonably informed decision. The Court of Appeals therefore found the officer's provision of the DR-15 form to Mr. Portillo was not objectively reasonable. Therefore, the Court of Appeals ordered a limited remand, finding that substantial evidence existed that Mr. Portillo did not understand the DR-15 form advisements, and Mr. Portillo should have been provided a Spanish version of the DR-15.

The Court of Appeals (2) affirmed the trial court's decision to deny Mr. Portillo's motion to suppress the field sobriety test. The Court of Appeals reasoned that the field sobriety tests, unlike the breath test, are not protected by the "advice of rights" requirements. The field sobriety tests were relevant and admissible as evidence because the tests showed Mr. Portillo was impaired by alcohol. Further, the Court of Appeals found the field sobriety tests were not unduly prejudicial under Rule 5-403, so the trial court did not abuse its discretion by admitting the evidence of the field sobriety tests. The Court of Appeals additionally denied Mr. Portillo's claim that he was entitled to suppress the field sobriety test under Equal Protection Clause of Fourteenth Amendment because no opinion exists of any Maryland or Supreme Court authority recognizing an exclusionary remedy for violations of the Equal Protection Clause.

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Jonathan Hemming v. State of Maryland, No. 48, September Term 2019, filed June 26, 2020. Opinion by Greene, J.

https://mdcourts.gov/data/opinions/coa/2020/40a18ag.pdf

CRIMINAL LAW – JOINT OR SEPARATE TRIAL OF SEPARATE CHARGES – BIFURCATION

Facts:

In 2016, officers of the Montgomery County Police Department executed an arrest warrant on Petitioner, Jonathan Hemming. While the officers attempted to arrest Mr. Hemming in a parked car, Mr. Hemming resisted and became combative. Mr. Hemming retrieved an improvised firearm colloquially known as a "zip gun" from inside the vehicle, pointed it towards one of the arresting officers, and attempted to discharge the firearm by striking the bottom of it with a thin metal object. The improvised firearm did not fire, Mr. Hemming was tased and subsequently arrested. Upon searching Mr. Hemming and the vehicle, police recovered a second improvised firearm from Mr. Hemming's rear pant pocket and several twelve-gauge 00 "buckshot" shells from within the vehicle.

Mr. Hemming was charged by indictment with two counts of attempted first-degree murder (counts one and two), two counts of attempted second degree murder (counts three and four), two counts of first-degree assault (counts five and six), two counts of use of a firearm in the commission of a crime of violence (counts seven and eight), possession of a firearm after having been convicted of a felony drug crime (count nine), possession of ammunition by a person who is prohibited from possessing a regulated firearm (count ten), two counts of possession of a regulated firearm after having been convicted of a crime of violence (counts eleven and twelve), and resisting arrest (count thirteen). The Circuit Court for Montgomery County held a trial in the matter on February 5, 2018.

At the onset of trial, Mr. Hemming requested that counts nine through twelve, the possession of a regulated firearm and ammunition counts be bifurcated from the remaining charges in the indictment. He suggested that the jury should first determine his guilt as to counts one through eight and thirteen, and the judge determine his guilt on the possession of a regulated firearm by a prohibited person counts. Mr. Hemming argued that the bifurcation procedure would result in a single hybrid trial and would eliminate potential prejudice he may experience from the introduction of evidence concerning his prior disqualifying convictions.

The trial court found that it had no authority under Maryland Rule 4-253(c) or *Galloway v. State*, to bifurcate multiple counts into a hybrid judge/jury trial. The State and Mr. Hemming then agreed to stipulate that Mr. Hemming was a "prohibited person"—one that was prohibited from possessing regulated firearms. The stipulation read to the jury informed it that Mr. Hemming was previously convicted of a crime that disqualified him from possessing a regulated firearm,

because Mr. Hemming's counsel noted that Mr. Hemming had prior convictions during his opening statement.

The jury found Mr. Hemming guilty of one count of attempted first-degree murder, one count of first-degree assault, two counts of use of a firearm in the commission of a crime, one count of possession of a regulated firearm by a prohibited person, one count of possession of ammunition by a person who is prohibited from possessing a regulated firearm, and one count of resisting arrest. The court sentenced Mr. Hemming to life in prison, plus an additional forty years imprisonment. Mr. Hemming then appealed the circuit court's judgment to the Court of Special Appeals, which did not determine whether the hybrid judge/jury trial procedure is permitted but held that the circuit court appropriately exercised its discretion in denying Mr. Hemming's motion to bifurcate.

Held: Affirmed

The Court of Appeals held that, under Rule 4-253(c), a trial court does not have the discretion to bifurcate separate counts between judge and jury in a single hybrid trial. In examining federal decisions analyzing bifurcation under Federal Rule of Criminal Procedure 14, upon which Rule 4-253(c) is patterned, the Court determined that the bifurcation of counts in a hybrid judge/jury trial is not permissible under Rule 4-253(c). The Court noted that permitting this procedure would require a defendant to partially waive his or her right to a jury trial with respect to only some counts contained within a multicount indictment, a procedure that is not supported by Rule 4-246 and the surrounding caselaw. In addition, the Court determined that adopting the bifurcated hybrid trial procedure would invite a host of procedural issues including the potential of inconsistent verdicts.

The Court, however, held that a *Joshua*-style bifurcated proceeding, under which the possession by a prohibited person counts may be bifurcated from the remaining counts of a multicount indictment, if a defendant's guilt as to all counts is determined by the same factfinder. *See United States v. Joshu*a, 976 F.2d 844 (3d Cir. 1992). Lastly, the Court held that the circuit court did not abuse its discretion in denying Mr. Hemming's motion to bifurcate.

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State of Maryland v. Kaleem Michael Frazier, No. 45, September Term 2019, filed July 14, 2020. Opinion by Hotten, J.

https://www.courts.state.md.us/data/opinions/coa/2020/45a19.pdf

CRIMINAL LAW – MERGER – FOURTH DEGREE SEXUAL OFFENSE – SECOND DEGREE ASSAULT

Facts:

In October 2016, a victim alleged that her then-boyfriend, Kaleem Michael Frazier ("Respondent"), sexually and physically assaulted her. At trial, the victim testified that Respondent became angry, called the victim several disparaging names, grabbed her by the shirt, "pulled [her] up," forcibly pulled her hair, ripping out some of her extensions, and repeatedly called her a liar and a slut. The victim also testified that, over the course of the evening, Respondent repeatedly raped her. The victim testified that she was crying as she told Respondent "no" and asked him to "please stop," but was afraid to scream for fear of waking her sons.

The victim further testified that the following morning, Respondent asked whether the relationship was over and she assured him that "everything [was] fine[]" and that they would "work through this." The victim alleged that Respondent responded, "[i]f you are lying, I'm going to kill you." Thereafter, the victim went to the home of her sister, where she reported the physical and sexual assaults to the police. The officer who conducted the preliminary interview testified that she observed red bruises on the victim's chest and neck that were consistent with the victim's statement of events and sent the victim to a local hospital for examination. Subsequently, the victim filed for and was granted a protective order.

Respondent testified in his defense. He denied sexually or physically assaulting the victim, and argued that he and the victim had consensual sex. The jury, however, convicted Respondent of second-degree assault and fourth-degree sexual offense. At sentencing, the State argued that the trial judge should exceed the sentencing guidelines, given the "egregious nature of the harm," and impose a sentence of ten years for the second-degree assault count and one year for the fourth-degree sexual offense count to run consecutively—suspending all but six years. Defense counsel argued that the conviction for second-degree assault was the lesser included offense of the fourth-degree sexual offense conviction and, as such, both offenses should merge for purposes of sentencing. The sentencing judge, rejecting the merger argument, imposed a sentence of ten years, suspending all but five years for the second-degree assault and one year for the fourth-degree sexual offense, to run consecutively, followed by five years of supervised probation. Respondent noted a timely appeal to the Court of Special Appeals. *Frazier v. State*, No. 344, Sept. Term, 2018, 2019 WL 2539288 (Md. App. June 20, 2019).

The issue before the Court of Special Appeals was whether a jury found that the two offenses were based on the same act, or separate acts that could sustain the convictions for second-degree assault and fourth-degree sexual offense. The Court of Special Appeals found that it was "unable [] to specifically determine, which act or acts were the basis for [Respondent's] convictions[,]" because "the prosecutor muddled the second-degree assault elements and the fourth-degree sexual offense elements in her last and final words to the jury." *Id*. at *5–6. The Court of Special Appeals observed that the jury could have determined that the sexual offense and the physical assault were one continuous act—not two distinct acts. The court also noted that the fourth-degree sexual offense bore a distinct element that the offense of second-degree assault lacked, and as such, the assault conviction merged into the sexual offense conviction under the required evidence test. *Id*. The court acknowledged that the greater offense carried a lesser penalty than the lesser included offense and reiterated that the prosecutor could, and should have, clarified whether Respondent was being charged with two distinct acts of assaultive behavior or one, leaving no ambiguity regarding whether the jury convicted Respondent for one continuous act or two separate acts. *Id*. at *6.

Held: Affirmed.

The Court of Appeals affirmed and held that the convictions for fourth-degree sexual offense and second-degree assault merged for purposes of sentencing, and that the only permissible punishment was the sentence for fourth-degree sexual offense—the offense having the additional element.

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State of Maryland v. Muriel Morrison, No. 56, September Term 2019, filed July 28, 2020. Opinion by Hotten, J.
Barbera, C.J., Watts, and Booth, JJ., concur.
McDonald, Getty, and Biran, JJ., dissent.

https://www.courts.state.md.us/data/opinions/coa/2020/56a19.pdf

SUFFICIENCY OF THE EVIDENCE – INVOLUNTARY MANSLAUGHTER – GROSS NEGLIGENCE

SUFFICIENCY OF THE EVIDENCE – RECKLESS ENDANGERMENT – SUBSTANTIAL RISK

Facts:

Respondent, Muriel Morrison ("Ms. Morrison"), was convicted in the Circuit Court for Baltimore City of involuntary manslaughter, reckless endangerment, and neglect of a minor, stemming from the death of her four-month-old infant ("I.M."). I.M. died as a result of "asphyxia from probable overlay" after Ms. Morrison accidentally rolled on top of I.M., following a virtual evening of drinking beer and a portion of malt liquor with friends on Facebook.

Ms. Morrison testified that she prepared her daughters for bed, and later sat outside on the porch and consumed the alcohol over a period of two-and-a half hours, and then she "pumped" breastmilk for I.M., took the trash out, locked the doors, and turned the television to PBS, before getting into bed and falling asleep. As reflected from the trial testimony, Ms. Morrison awoke the next morning to find I.M. unresponsive at the end of the bed she shared with I.M. and her four-year-old daughter ("the four-year-old"). The four-year-old testified that Ms. Morrison was in a "deep sleep," during which, she rolled on I.M, and that she unsuccessfully attempted to awaken Ms. Morrison.

Ms. Morrison was convicted and sentenced to a total of twenty years with all suspended—ten years for involuntary manslaughter to be served consecutive to a five-year term for reckless endangerment and a five-year term for neglect of a minor—followed by the imposition of a five-year period of supervised probation. Ms. Morrison appealed to the Court of Special Appeals. *Morrison v. State*, No. 1859, Sept. Term 2017, 2019 WL 3992051 (Md. App. Aug. 23 2019).

Ms. Morrison argued that (1) the evidence was insufficient to support her convictions for involuntary manslaughter, reckless endangerment and neglect of a minor, and (2) any remaining convictions should merge for sentencing purposes. *Id*. at *1. Regarding the sufficiency issue, the Court of Special Appeals held that Ms. Morrison's conduct was insufficient to support a finding of "gross negligence," which was required for the involuntary manslaughter conviction. *Id*. at *5. The court reasoned that Maryland appellate courts had not addressed the question of

gross negligence as it pertains to the sleeping arrangement between a mother and her children. *Id.* The court observed that, "Ms. Morrison drank beer and fell deeply asleep, but there was no reason on this record for her to believe that her drinking or co-sleeping, individually or in combination, posed a deadly threat to her child." *Id*. The court did not determine that her conduct rose to the level of "wanton and reckless disregard for human life[]" that is required to sustain a conviction for involuntary manslaughter. *Id*. The Court of Special Appeals held that the evidence was insufficient to sustain the conviction for reckless endangerment, because in "[v]iewing the evidence in the light most favorable to the [prosecution]," the evidence could not support the conviction beyond a reasonable doubt. *Id*. at *6. According to the court, "there was no evidence either that she was intoxicated when she co-slept when her infant daughter, or that imbibing . . . beer posed a substantial risk to [I.M.]'s continued health." *Id*. Accordingly, the State appealed to the Court of Appeals.

Held: Affirmed.

The Court of Appeals affirmed the Court of Special Appeals, holding that the evidence was insufficient to support the convictions for involuntary manslaughter and reckless endangerment. To the extent that the conduct created a risk of harm, the attendant factors in conjunction with the associated risk did not support a finding of gross negligence or criminal recklessness, nor did it constitute a gross departure from the conduct of a reasonably prudent person.

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State of Maryland v. James Kareen Day, No. 67, September Term 2019, filed July 10, 2020. Opinion by Watts, J.

https://www.mdcourts.gov/data/opinions/coa/2020/67a19.pdf

INEFFECTIVE ASSISTANCE OF COUNSEL – MOTION FOR MODIFICATION OF SENTENCE – MARYLAND RULE 4-345(e) – REMAND – MARYLAND RULE 8-604(d)

Facts:

In the Circuit Court for Montgomery County, a jury convicted James Kareen Day, Respondent, of first-degree burglary, robbery, and conspiracy to commit robbery, and the circuit court sentenced Day to a total of fifty years of imprisonment. After unsuccessfully pursuing a direct appeal and sentence review by a three-judge panel, Day petitioned for postconviction relief, contending that trial counsel provided ineffective assistance of counsel by failing to file a motion for modification of sentence pursuant to Maryland Rule 4-345(e) when he had allegedly asked trial counsel to do so. At a hearing on the petition, Day gave seemingly inconsistent testimony concerning whether he asked trial counsel to file a motion for modification on his behalf. Day testified that trial counsel did not advise him of options for attempting to have his sentence modified and that he learned about the possibility of filing a motion for modification of sentence through a jailhouse lawyer, but that he asked trial counsel at the sentencing proceeding to "do a reconsideration." For his part, trial counsel testified that he had no recollection of Day asking him to do anything to try to modify the sentence or specifically asking him to file a motion for modification of sentence.

The circuit court denied postconviction relief. The circuit court found that Day's assertion that he asked trial counsel to file a motion for modification of sentence was "not supported by the record[,]" and that, even if Day had made such a request, the claim for ineffective assistance of counsel "would fail nonetheless." Day filed an application for leave to appeal. In a four-paragraph order, the Court of Special Appeals summarily reversed and remanded with instruction to permit Day to file a belated motion for modification of sentence. The State, Petitioner, filed a petition for a writ of *certiorari*, which the Court of Appeals granted.

Held:

Remanded to the Court of Special Appeals without affirming or reversing for further action consistent with the opinion.

The Court of Appeals concluded that the case potentially presented the issue of whether a petitioner for postconviction relief seeking the right to file a belated motion for modification of sentence pursuant to Maryland Rule 4-345(e), based on ineffective assistance of counsel, must

establish that he or she timely requested that trial counsel file such a motion. As such, the matter potentially involved the issue of whether *State v. Adams*, 171 Md. App. 668, 912 A.2d 16 (2006), *aff'd in part and rev'd in part*, 406 Md. 240, 958 A.2d 295 (2008), stands for the proposition that, to establish ineffective assistance of counsel based on the failure to file a motion for modification of sentence, a postconviction petitioner need not demonstrate that he or she requested that trial counsel file such a motion, and whether that is good law. Although the case raised issues of importance, the Court was unable to reach the merits because it was unable to determine the basis underlying the Court of Special Appeals's order reversing and remanding the matter for the filing of a belated motion for modification of sentence. The Court was unable to tell from the Court of Special Appeals's order whether that Court concluded that the circuit court did not find Day's testimony credible and that the circuit court's determination was clearly erroneous, or whether the Court of Special Appeals concluded that a request that trial counsel file a motion for modification of sentence was not necessary to establish ineffective assistance of counsel.

Accordingly, pursuant to Maryland Rule 8-604(a) and (d), the Court of Appeals remanded the case, without affirming or reversing, to the Court of Special Appeals with instruction to explain the basis of its order of September 12, 2019, reversing the judgment of the circuit court denying postconviction relief and remanding and granting permission for the filing of a belated motion for modification of sentence. Specifically, the Court of Special Appeals was to: (1) clarify whether *Adams* stands for the proposition that a defendant is not required to request that trial counsel file a motion for modification of sentence in order for trial counsel to be required to file such a motion, *i.e.*, that it is *per se* deficient performance for trial counsel to fail to timely file a motion for modification of sentence absent express instructions to not do so; (2) explain whether, in reversing the circuit court's judgment, it relied on *Adams*; and (3) provide any other explanation that clarifies its September 12, 2019 order, e.g., that the circuit court's finding that Day's assertion was not supported by the record was clearly erroneous. The Court of Special Appeals was to file its explanation on or before Friday, July 31, 2020.

The Court of Appeals explained that determining that the Court of Special Appeals held in *Adams* that a defendant need not request that trial counsel file a motion for modification in order for trial counsel to be found deficient for not doing so and that that holding is good law or in the alternative overruling the holding would be premature. The Court would address the validity of *Adams* without knowing whether the Court of Special Appeals applied *Adams*. From the start, Day maintained that he requested that trial counsel file a motion for modification and that the circuit court was clearly erroneous in not finding his request credible. Day consistently argued that his case did not involve an issue as to whether *Adams* was rightly or wrongly decided. On the other hand, the State argued that the Court of Special Appeals either found the circuit court's factual determination to be clearly erroneous or relied on *Adams* to conclude that no request that trial counsel file a motion for modification was necessary. Adding to the confusion as to whether the Court of Special Appeals applied *Adams*, was the circumstance that, after *Adams*, in *Rich v. State*, 230 Md. App. 537, 551 n.5, 148 A.3d 377, 385 n.5 (2016), the Court of Special Appeals concluded that a postconviction petitioner failed to establish ineffective assistance of counsel by not establishing that a request to file a motion for modification had been made. The

Court of Appeals concluded that addressing the validity of *Adams* at that point would be to address the matter without knowing whether the Court of Special Appeals applied *Adams*.

Desiree Berry and State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Co. v. Andrae Queen, and others similarly situated, Misc. No. 10, September Term 2019; *Maryland Insurance Administration v. State Farm Mutual Automobile Insurance Co.*, No. 63, September Term 2019, filed July 27, 2020. Opinion by Getty, J.

https://www.courts.state.md.us/data/opinions/coa/2020/10a19m.pdf

INSURANCE LAW – UNINSURED MOTORIST STATUTE – STATUTORY INTERPRETATION – DAMAGE TO PROPERTY

Facts:

Desiree Berry and State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Co. v. Andrae Queen ("Misc. No. 10") arrived at the Court of Appeals as a certified question from the United States District Court for the District of Maryland. *Maryland Insurance Administration v. State Farm Mutual Automobile Insurance Co*. ("No. 63") was an appeal from the Circuit Court for Baltimore City. The Court issued one opinion for both cases because they involved similar underlying facts and identical legal issues.

In Misc. No. 10, Andrae Queen purchased a motor vehicle liability insurance policy from State Farm Fire and Casualty Company ("State Farm"). On February 15, 2018, an uninsured motorist struck Mr. Queen's vehicle, damaging his vehicle and causing him to obtain a rental car for $306.23 while his was being repaired. Mr. Queen submitted a claim with State Farm under the Uninsured Motorist Vehicle Property Damage Coverage portion of his policy, which State Farm denied. Mr. Queen then filed suit against State Farm in the Circuit Court for Baltimore City. State Farm removed the case to the United States District Court for the District of Maryland. The U.S. District Court certified a question of law to this Court, which this Court accepted.

In No. 63, Andrea Hoyle purchased a motor vehicle liability insurance policy through State Farm, which included Car Rental Expense Coverage of eighty percent of rental expenses up to the policy's limit. On January 5, 2018, an unidentified vehicle struck and damaged Ms. Hoyle's car while it was parked. Ms. Hoyle submitted a claim to State Farm. While her car was being repaired, she rented a replacement car, which cost $264.07. State Farm paid the rental company eighty percent of the cost but did not pay Ms. Hoyle the remaining twenty percent balance. Ms. Hoyle filed a complaint with the Maryland Insurance Administration (the "Administration"). The Administration determined that State Farm acted without just cause and in an arbitrary and capricious manner when it denied Ms. Hoyle's claim for rental car expenses. The Administration directed State Farm to pay Ms. Hoyle the out-of-pocket rental expenses. State Farm requested a hearing with an Administrative Law Judge, which affirmed the Administration's decision. State Farm then filed a petition for judicial review in the Circuit Court for Baltimore City, which determined that the Administration premised its decision on an

error of law and granted summary judgment in favor of State Farm. The Administration noted an appeal to the Court of Special Appeals, and, while the case was pending, this Court granted certiorari.

In these cases, the Court considered whether the Maryland Uninsured Motorist statutory provision of Md. Code Ann., Ins. § 19-509(e)(1), and the provisions of Title 17 of the Transportation Article ("TR") and Title 20 Subtitle 6 of the Insurance Article ("IN") incorporated therein, require an insurer to pay benefits for loss of use of a vehicle damaged by an uninsured driver, regardless of any limitations or omissions that may exist in the applicable policy. IN § 19-509(e)(1) requires that a motor vehicle liability insurance policy contain uninsured motorist coverage equal to at least the amounts set out in Maryland's financial responsibility law—TR§ 17-101 *et seq*.—and the MAIF statute—IN § 20-601 *et seq*. TR § 17-101 *et seq*. requires payment of claims up to $15,000 for property damaged or destroyed, and IN § 20-601 *et seq*. requires payment of claims up to $15,000 for damage to property greater than $250.

Held:

U.S. District Court certified question answered in the affirmative. Judgment of the Circuit Court for Baltimore City reversed and remanded for further proceedings.

The Court of Appeals held that the phrase "damage to property"—as incorporated by Maryland's Uninsured Motorist Statute—includes loss of use damages such as rental costs. The Court determined that the ordinary and popular meaning of the words "damage" and "property," this Court's prior interpretation of property damage, and the context and purpose of the uninsured motorist statute supported its decisions that "damage to property" included loss of use damages such as rental costs. As a result, an insurer is required to provide uninsured motorist coverage for loss of use damages, such as rental costs, caused by an uninsured driver.

The plain and ordinary meaning of the word "damage," both in the legal and non-legal context, indicates that "loss" is customarily associated with damage. Additionally, the legal and non-legal definitions indicate that "property" is something that an individual owns and may use as he or she sees fit. The essence of the phrase "damage to property" means that the lawful owner is deprived of the ability to apply the object in a manner that he or she desires—i.e., a loss of use.

The Court analyzed prior Maryland case law involving damage to personal property that is not completely destroyed. Those cases indicated that recoverable damages for injury to property includes both the cost of repairing the property and the value of the use of the property during the time it is repaired. Additionally, the Court relied on *D'Ambrogi v. Unsatisfied Claim and Judgment Fund Board*. There, the Court previously interpreted the predecessor to the uninsured motorist statute and concluded that damages sustained from the loss of use of a motor vehicle was payable by the Unsatisfied Claim and Judgment Board, which was responsible for claims caused by an uninsured motorist when the insured was not covered under an uninsured motorist

endorsement. In *D'Ambrogi*, the Court noted the liberal interpretation of the statute to promote relief and determined that the statutory language "damage to property" implicitly encompassed loss of use damages. Without a clear indication that the legislature intended to abrogate the *D'Ambrogi* decision, the current uninsured motorist state must be deemed to account for *D'Ambrogi*'s interpretation of "damage to property" as including loss of use damages.

Furthermore, House Bill 144 of the 2020 Maryland General Assembly Session confirmed the legislature's intent to include loss of use damages in "damage to property." The bill amended the language of the uninsured motorist statute to include payment for loss of use damages in response to the circuit court's decision in *No. 63*. The amendment now expressly incorporates loss of use damages into the statute. The legislative history and the bill's purpose paragraph indicate that the bill was not meant to change the prior meaning but rather to clarify that loss of use was always intended to be included in "damage to property." This confirms that loss of use damages have always been included in the phrase "damage to property."

Therefore, Maryland's Uninsured Motorist Statute requires an insurer to pay benefits for loss of use of a vehicle damaged by an uninsured motorist as a component of "damage to property" notwithstanding the insurer's attempt to provide less coverage than statutorily mandated.

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Steamfitters Local Union No. 602 v. Erie Insurance Exchange, et al.; Steamfitters Local Union No. 602 v. Cincinnati Insurance Company, et al., No. 40, September Term 2019, filed July 27, 2020. Opinion by Booth, J.

https://mdcourts.gov/data/opinions/coa/2020/40a19.pdf

TORT LIABILITY – PROPERTY OWNERS' DUTY OF CARE TO NEIGHBORS

EXPERT TESTIMONY – MATTERS WITHIN COMMON KNOWLEDGE

SPOLIATION INSTRUCTION

CONTRACTUAL INDEMNIFICATION

Facts:

Steamfitters Local Union No. 602 owns and maintains a union hall in Capitol Heights, Maryland. Steamfitters has apprentice union members who pay dues and receive training, among other benefits. Steamfitters contracted with the Heating, Piping and Refrigeration Training Fund ("Training Fund") to conduct training classes for union apprentices out of the union hall.

Steamfitters' union hall property includes a parking lot where apprentices would congregate before training classes, often for several hours. Apprentices often smoked cigarettes while waiting for classes to begin and would discard their cigarette butts in a landscaped mulched strip along the side of the union hall parking lot that abutted Steamfitters' neighbors' property. Steamfitters was aware that apprentices habitually smoked on its property.

In April 2015, a lit cigarette discarded in the mulched strip ignited other material in the area, causing a fire that spread to Steamfitters' neighbors' properties, causing approximately $1.3 million in damage. Steamfitters' neighbors brought actions for negligence, and a jury returned a verdict in the plaintiffs' favor.

Steamfitters appealed and argued that they could not be liable for negligence because they did not owe their neighbors a duty of care because mulch is not a dangerous condition. Steamfitters also asserted that, even if they did owe a duty, the plaintiffs failed to establish it because doing so required expert testimony. Steamfitters also argued that the trial court erred by instructing the jury on intentional and negligent spoliation regarding security camera footage that Steamfitters destroyed, and that an agreement between the Training Fund and Steamfitters required the Training Fund to indemnify Steamfitters for the damage caused by the fire.

The Court of Special Appeals affirmed the trial court, and Steamfitters filed a petition for writ of *certiorari*, which was granted by the Court of Appeals.

Held: Affirmed.

The Court of Appeals held that property ownership and maintenance includes a common law duty to use reasonable care to avoid causing harm to neighboring property owners. This duty is implicated when, under the totality of the circumstances, a property owner is aware of a dangerous condition on their property. Under the facts of the case, there was evidence from which a jury could conclude that Steamfitters had actual or constructive knowledge that individuals were habitually discarding cigarettes in mulch abutting their neighbors' property, which created a foreseeable risk of fire. It was for a jury to resolve conflicts in the evidence presented to determine whether the defendant breached its duty of care to neighboring property owners to avoid the likely spread of fire arising from a cigarette discarded in mulch.

The Court of Appeals also held that expert testimony was not required to establish this duty and the reasonable steps that Steamfitters could have taken to remove the dangerous condition. The risk of fire caused by habitually discarding lit cigarettes into combustible material is within the understanding of an average person, as are reasonable steps that Steamfitters could have taken to mitigate that risk.

The Court held that the trial court did not abuse its discretion when it instructed the jury on spoliation. The security camera footage Steamfitters destroyed was relevant because it would have shown an area close to the fire's origin and likely any persons nearby when the fire began. It was for the jury to decide whether the destruction of evidence was a mistake or intentional.

Lastly, the Court held that the agreement between the Training Fund and Steamfitters did not provide for the Training Fund to indemnify Steamfitters for Steamfitters' own negligence. The indemnity provision of the contract provided for indemnification where damages arise from the Training Fund's use of the premises. However, the damage here arose from Steamfitters' failure to exercise due care in the management of its property.

COURT OF SPECIAL APPEALS

Larry S. Chavis, et al. v. Blibaum Associates, P.A., No. 334, September Term 2019; *Bryione K. Moore, et al. v. Peak Management LLC*, No. 528, September Term 2019, filed July 2, 2020. Opinion by Berger, J.

https://mdcourts.gov/data/opinions/cosa/2020/0334s19.pdf

COMMERCIAL LAW – CONSUMER DEBTS – MARYLAND CONSUMER DEBT COLLECTION ACT – MARYLAND CONSUMER PROTECTION ACT

Facts:

Tenants defaulted on their residential leases with their landlord Peak Management LLC ("Peak"). Peak hired Blibaum & Associates ("Blibaum"), who sought to collect on the judgments entered against the Tenants. In connection with their collection efforts, Blibaum and Peak utilized a 10% pre-judgment and post-judgment interest rate. Following the Court of Appeals's decision in *Ben-Davies v. Blibaum & Assocs., P.A.*, 457 Md. 228, 232–33 (2018), which held the proper post-judgment interest rate at 6%, the Tenants challenged the debt collection activities of Peak and Blibaum in separate actions in Baltimore City and Baltimore County. The Tenants sought damages for violations of the Maryland Consumer Debt Collection Act ("MCDCA"), the Maryland Consumer Protection Act ("MCPA"), as well as declaratory and injunctive relief. The Tenants also sought to maintain a class action against Peak.

The Circuit Court for Baltimore City dismissed the Tenants' MCDCA and MCPA claims and denied their motion for class certification. Further, the court granted judgment in favor of Peak with respect to two of the Tenants' unjust enrichment claims, and entered judgment in favor of three of the Tenants with respect to their restitution claims. The Circuit Court for Baltimore County dismissed all claims against Blibaum.

Held: Affirmed.

Pursuant to the MCDCA, § 14-202(8) of the Commercial Law Article ("CL"), "[i]n collecting or attempting to collect an alleged debt a collector may not . . . [c]laim, attempt, or threaten to enforce a right with knowledge that the right does not exist[.]" The Tenants asserted that

Blibaum and Peak violated the MCDCA, CL § 14-202(8), for their collection of two "unauthorized charges." First, that it was a violation of the MCDCA to collect 10% pre-judgment and post-judgment interest when the legal rate was 6%. Second, that it was a violation of the MCDCA to collect the filing fees associated with obtaining writs of garnishments by adding those fees to the amounts it sought to collect through the garnishments.

The Court of Special Appeals held that Blibaum and Peak's collection of 10% post-judgment and pre-judgment interest was not a violation of the MCDCA § 14-202(8). Although the Tenants were correct in their assertion that Blibaum and Peak charged the incorrect interest rates, the Court held that did not result in a cognizable claim under the MCDCA. The Court compared its holdings in *Allstate Lien & Recovery Corp. v. Stansbury*, 219 Md. App. 575, 577 (2014) and *Mills v. Galyn Manor Homeowner's Ass'n, Inc.*, 239 Md. App. 663, 676 (2018), aff'd sub nom., *Andrews & Lawrence Prof'l Servs., LLC v. Mills*, 427 Md. 126, No. 5 (Sept. Term 2019) to the instant case. It explained that in both *Allstate* and *Mills*, the creditors sought to collect fees that it did not have the *right* to collect at all, no matter the amount. Further, the Court observed that neither case suggested that a debtor may use the MCDCA to challenge the *amount* of a debt, which the creditor had a *right* to collect. Because here, there was no dispute that Blibaum and peak had the right to collect pre-judgment and post-judgment interest, there was no violation of the MCDCA. The Court additionally held that Blibaum and Peak had the right to collect the filing fee for a writ of garnishment, and, therefore, it did not constitute a violation of the MCDCA § 14-202(8). Blibaum and Peak correctly utilized the district court's form in connection with filing a writ of garnishment, which includes a space for "[t]otal court costs, including this writ."

The Court of Special Appeals also considered whether Peak violated the MCPA, CL § 13-301(1). The MCPA prohibits creditors from engaging in "any unfair, abusive, or deceptive trade practice . . . in . . . [t]he collection of consumer debts." CL § 13-303. This includes "any [f]alse, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers[.]" CL § 13-301. The Tenants asserted that because reports sent to Appellees when it garnished their wages included 10% post-judgment interest and misstates the amount of the court costs, this was "deceptive" pursuant to CL § 13-303. The Court held that Peak did not violate the MCPA. In doing so, it rejected the Tenants' reliance *on Powell v. Palisades Acquisition XVI, LLC*, 782 F.3d 119 (4th Cir. 2014) and explained that Peak could not be liable under the MCPA for asserting a legal position on a novel issue of law, which turned out to be incorrect.

The Court further held that the 2018 amendments to the MCDCA, which added CL 14-202(11), did not apply retroactively. In 2018, the Maryland General Assembly amended the MCDCA to include protections for consumers under federal law. The Court of Special Appeals explained that there was no clear legislative mandate to apply the statute retroactively, and therefore, it refused to do so.

The Court next addressed the Tenants' arguments regarding the circuit court's denial of their motion for class certification. The Court rejected the Tenants' argument that they were entitled to a hearing on their second motion for class certification, pursuant to Maryland Rule 2-231(d).

Although the Tenants were entitled to, and given, a hearing when they filed their first motion for class certification, the circuit court was not required to grant them another hearing before it denied their second motion for class certification. The Court of Special Appeals further held that the circuit court reviewed each of the requirements for class certification and did not abuse its discretion in denying Appellant's first motion for class certification.

Finally, the Court of Special Appeals held that the Tenants were not entitled to attorneys' fees because they had not prevailed on their MCDCA or MCPA claims.

Kevin Whittington v. State of Maryland, No. 2591, September Term 2018, filed July 1, 2020. Opinion by Leahy, J.

https://mdcourts.gov/data/opinions/cosa/2020/2591s18.pdf

FOURTH AMENDMENT – SEARCHES – GPS TRACKING

FOURTH AMENDMENT – SEARCHES – WARRANTS – SUFFICIENCY OF THE WARRANT

FOURTH AMENDMENT – EXCLUSIONARY RULE – GOOD FAITH EXCEPTION

Facts:

In early 2016, Detectives in the Harford County Sheriff's Office were able to identify Mr. Whittington as part of a large-scale drug investigation because of his association with a suspected narcotics distributor named David Hall. As part of the investigation, the detectives wiretapped Mr. Hall's phone and discovered that Mr. Whittington was the most frequent caller. Then they observed the two men engaged in activity that was consistent with the distribution of controlled dangerous substances (CDS). The detectives applied for and obtained an "Electronic Device Location Information Order" (hereinafter "GPS Order") under Maryland Code (2018 Repl. Vol., 2019 Supp.), Criminal Procedure Article ("CP"), § 1-203.1. The GPS Order authorized the detectives to install a GPS mobile tracking device on Mr. Whittington's car for a 30-day period.

The detectives observed Mr. Whittington over a period of weeks with the help of the GPS tracking device. His pattern of movements further bolstered their assessment that he was engaged in CDS activity in and around Harford County, and that he maintained a residence in Baltimore County. Detectives then applied for and received a warrant to search Mr. Whittington's person, car, and apartment. Upon executing the warrant, they found four baggies of cocaine totaling about eight grams in Mr. Whittington's car; and they found two bags of cocaine weighing approximately 145.9 grams, ten Alprazolam pills, and $1,222 in his residence. Officers apprehended Mr. Whittington at another location and found $1,406 and two cellular telephones on his person. Mr. Whittington was arrested and later indicted on January 18, 2017, in the Circuit Court for Baltimore County, on two counts of Possession of CDS with the Intent to Distribute and two counts of Possession of CDS.

Mr. Whittington filed a motion to suppress the evidence derived from the searches conducted pursuant to the search warrant. He contended that the warrant was issued upon evidence obtained from an "unconstitutional" order authorizing the detectives' use of the GPS tracking device. He argued that the GPS Order lacked probable cause and was unconstitutional under the holding in *United States v. Jones*, 565 U.S. 400 (2012), which, he claimed, requires law enforcement to obtain a valid warrant in order to attach a GPS tracking device to a suspect's

vehicle. He further argued that the evidence presented to the warrant court failed to establish a nexus between his alleged drug dealings and the residence, as required under *Agurs v. State*, 415 Md. 62 (2010). The circuit court denied the motion, and Mr. Whittington timely appealed.

Held:

The Court of Special Appeals held that the GPS Order issued under CP § 1-203.1 met the requisites of a warrant under Fourth Amendment law. The GPS Order was signed by a neutral and detached magistrate; upon an application signed under oath by someone with personal knowledge of the facts; which set forth the basis for probable cause to believe that a crime had been, or was going to be committed; and identified with particularity the person about whom location information was being sought and the vehicle on which the GPS device would be installed. The court noted that, in enacting this statute, the Maryland General Assembly took the initiative to identify technology that infringes on the privacy rights of the people and to manifest its intention that law enforcement officers meet additional requirements before collecting electronic location information. The court noted, for example, that CP § 1-203.1 adds the requirements that an application for an order, such as the GPS Order in this case, be limited to 30 days and describe with reasonable particularity the type of electronic device to be employed by law enforcement, in order to provide further protection to Maryland citizens. The court concluded, therefore, that the court-authorized GPS Order allowing the Harford County Sheriff's Office to collect location information by affixing a GPS tracking device to Mr. Whittington's vehicle met the requisite constitutional requirements.

Second, the Court of Special Appeals affirmed the circuit court's ruling that the detectives relied in good faith on the search warrant. The court concluded that the warrant application clearly presented facts and circumstances that the detectives could have reasonably believed related to a present and continuing violation of the law. The court explained that this was not one of the exceptional cases in which an officer should have second guessed the warrant issuing judge's probable cause determination. Based on this conclusion, the court did not need to reach the question of whether the warrant application failed to establish a nexus between Mr. Whittington's alleged drug dealings and his residence.

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Corey Cunningham, et al. v. Baltimore County, Maryland, et al., No. 3461, September Term 2018, filed July 1, 2020. Opinion by Graeff, J.

https://mdcourts.gov/data/opinions/cosa/2020/3461s18.pdf

42 U.S.C. § 1983 – MARYLAND DECLARATION OF RIGHTS ARTICLE 24 AND 26 – ENTRY INTO HOME TO SERVE ARREST WARRANT – COLLATERAL ESTOPPEL – EXCESSIVE FORCE – QUALIFIED IMMUNITY – GRANT OF MOTION FOR NEW TRIAL CONDITIONED UPON REVERSAL OF JUDGMENT NOTWITHSTANDING THE VERDICT – IRRECONCILABLY INCONSISENT VERDICT

Facts:

On the morning of August 1, 2016, Officers Griffin and Dowell attempted to serve two arrest warrants on Korryn Gaines and Kareem Courtney at Ms. Gaines' apartment. The officers had previously confirmed that Ms. Gaines was the leasee at that address on the warrant and that she had two small children. They knocked on the door and heard noises indicating that someone was coming up to the door and moving things, a brief baby cry, and the sound of someone coughing inside. When no one answered, the officers entered the apartment and found Ms. Gaines seated inside with a shotgun. Mr. Courtney peacefully exited with their two-year-old daughter.

The officers called for backup. This led to a six-hour long standoff between numerous police officers and Ms. Gaines, who remained armed and refused to leave the apartment with her five-year-old son. Corporal Ruby testified that, after hours of requests for Ms. Gaines to put down the gun, she moved to the kitchen, raised her shotgun to firing position, and pointed it toward the officers positioned by the doorway. At that point, Corporal Ruby, who testified that he believed he and the other officers were in danger, fired a shot that killed Ms. Gaines, and the bullet exited her body and injured her son.

Ms. Gaines' family and her estate, appellants, sued Baltimore County, Corporal Ruby, and other law enforcement officers on numerous grounds related to Ms. Gaines' death. Prior to trial, the court granted a motion for summary judgment and dismissed the claims against all defendants except Baltimore County and Corporal Ruby, appellees. In particular, the court granted summary judgment to Officers Griffin and Dowell because it found that the argument that the initial entry to serve the arrest warrants was unconstitutional was barred by collateral estoppel and without merit.

At trial, appellants presented evidence questioning Corporal Ruby's testimony that Ms. Gaines raised the shotgun towards the officers in the doorway. A jury returned a verdict in favor of appellants, awarding more than $38 million in combined economic and non-economic damages. Appellees filed a Motion for Judgment Notwithstanding the Verdict, for a New Trial and for Remittitur of Judgment. The circuit court granted appellees' motion for judgment notwithstanding the verdict ("JNOV") on the basis that Corporal Ruby was entitled to qualified

immunity and that the County was not a proper defendant. In the alternative, if that ruling did not withstand appellate scrutiny, the court granted the appellees' motion for a new trial on the ground that the verdict was defective because it did not apportion damages between the state law claims, which are subject to a damages cap under the Local Government Tort Claims Act, and federal claims, which are not capped. The court further found that the non-economic damages awarded were excessive and shocked the conscience, and, but for the other rulings, it would remit the jury's award.

Held: Affirmed in part and reversed/vacated in part.

Case remanded for further proceedings consistent with this opinion.

With respect to the motion for summary judgment by Officers Griffin and Dowell for the initial entry, the court erred in finding that the issue was barred by collateral estoppel. Under these circumstances, when a defendant is acquitted of criminal charges and there is no ability to seek appellate review of a pretrial suppression ruling, there is no final judgment for collateral estoppel purposes. Accordingly, because Mr. Courtney had no opportunity to appeal the denial of his motion to suppress in his criminal case, he was not collaterally estopped from challenging the entry in the civil case. Additionally, the other appellants who were not parties to the criminal case did not have a full opportunity to be heard on the issue, and therefore, collateral estoppel did not preclude them from litigating the constitutionality of the initial entry either. On the merits, however, the circuit court properly granted the motion for summary judgment to the officers because, under these circumstances, it was reasonable for the officers to believe that the warrant subject was inside the residence at the time. Accordingly, the entry was lawful.

In regard to the post-trial motions, the court erred in granting the motion for JNOV, with the exception of its ruling dismissing the 42 U.S.C. § 1983 claims against the County. Where there was a dispute of fact regarding what happened in the moments leading up to when the officer fired the fatal shot, it was for the jury to determine, based on the evidence, what occurred, and whether, in light of its finding, the officer acted reasonably. Because the jury decided that Corporal Ruby's actions were not reasonable in this case, the circuit court erred in usurping the jury's finding and granting JNOV to appellees.

With regard to the portion of the JNOV dismissing the claims against the County, the circuit court failed to address the fact that, pursuant to *Prince George's County v. Longtin*, 419 Md. 450 (2011), municipalities have *respondeat superio*r liability for civil damages resulting from state constitutional violations. As a result, we vacate the JNOV for the state claims against the County and remand for the circuit court to consider and make any necessary factual findings.

The circuit court abused its discretion by granting a conditional new trial on the basis that the verdict was irreconcilably inconsistent because the verdict, finding that Corporal Ruby's action was unreasonable and awarding damages, was consistent. Although an order granting a new trial

generally is not an appealable final judgment, when the order for a new trial is conditioned on the reversal of the grant of judgment notwithstanding the verdict, the judgment is appealable.

Finally, we remand to the circuit court for consideration of remaining issues relating to damages. Those issues include, but are not limited to, the damages cap and remittitur.

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Dwayne Scott Lockard v. State of Maryland, No. 3289, September Term 2018, filed July 29, 2020. Opinion by Beachley, J.

https://mdcourts.gov/data/opinions/cosa/2020/3289s18.pdf

TERRY FRISK – REASONABLE ARTICULABLE SUSPICION – TOTALITY OF CIRCUMSTANCES – PRESENCE OF A KNIFE – OFFICER'S SUBJECTIVE LACK OF FEAR

Facts:

On the night of July 23, 2018, a Frederick County Deputy stopped a vehicle for following another vehicle too closely. Appellant Dwayne Lockard was the front seat passenger; Jenna Clark was the driver.

Shortly thereafter, K-9 officer Corporal Adkins and two other officers arrived on the scene. Because Corporal Adkins prefers vehicles to be unoccupied when he performs canine scans, he ordered both Ms. Clark and Lockard to exit the vehicle.

Once Lockard exited the vehicle, Corporal Adkins instructed him to walk to the three other officers who were on the scene. As Lockard began to walk in their direction, Corporal Adkins observed a knife in Lockard's pocket.

After another officer secured the knife, Corporal Adkins asked Lockard if he would consent to a pat-down for weapons. Without verbally responding, Lockard turned away from Corporal Adkins and placed his hands in the air. Corporal Adkins began frisking Lockard by feeling around his waistband area, and in doing so, immediately felt what he recognized to be narcotics.

Lockard moved to suppress the narcotics, arguing that Corporal Adkins discovered them as the result of an illegal frisk. At the hearing on Lockard's motion, the suppression court found that Lockard's possession of the knife constituted reasonable articulable suspicion to justify the *Terry* frisk. Lockard timely appealed.

Held: Vacated.

In order for a *Terry* frisk to be lawful under the Fourth Amendment of the United States Constitution, the officer must have reasonable articulable suspicion that the person with whom he or she is dealing is armed and dangerous. In reviewing whether there is reasonable articulable suspicion, suppression courts must consider the totality of the circumstances, including reasonable inferences from particularized facts in light of the officer's experience. The test is objective; the validity of the frisk is determined by whether the record discloses articulable objective facts to support the frisk.

Although the test is objective, an officer's subjective belief that the suspect is (or is not) armed and dangerous is also a relevant consideration in the totality of circumstances calculus.

Here, Corporal Adkins did not subjectively believe that he had reasonable articulable suspicion to conduct a protective frisk. Although the test is whether the officer objectively had a reasonable belief that the suspect was armed and dangerous, an officer's subjective belief is a relevant consideration in the totality of circumstances calculus.

In addition to the fact that Corporal Adkins did not subjectively believe Lockard was armed, the other circumstances failed to support a *Terry* frisk: the knife had already been secured, there were four police officers on the scene to control Lockard and Ms. Clark, and Lockard was polite and cooperative. Corporal Adkins's assertion that "if there's one weapon, there could be more," was insufficient to justify a *Terry* frisk.

Judgment vacated, and case remanded for a new trial.

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Roberto Carlos Arias-Rivera v. State of Maryland, No. 3223, September Term 2018, filed July 2, 2020. Opinion by Nazarian, J.
Friedman, J., dissents.

https://mdcourts.gov/data/opinions/cosa/2020/3223s18.pdf

SENTENCING – ILLEGAL SENTENCE – EXTENDED SEXUAL OFFENDER PAROLE SUPERVISION

Facts:

In April 2010, a jury sitting in the Circuit Court for Montgomery County convicted Roberto Carlos Arias-Rivera of sexual abuse of a minor, rape, and other offenses for, among other things, having vaginal intercourse with his eleven-year-old step-daughter. The circuit court sentenced Mr. Arias-Rivera to fifty years' imprisonment. We affirmed his convictions on direct appeal. *Roberto Carlos Arias-Rivera v. State*, No. 930, Sept. Term 2010, slip op. (Md. App. Mar. 14, 2012).

On November 27, 2018, Mr. Arias-Rivera filed a motion to correct an illegal sentence, arguing that the circuit court failed to include in his sentence a term of extended parole supervision under Maryland Code, § 11-723 of the Criminal Procedure Article ("CP"), as it was in effect between approximately 2006 and 2010. The circuit court summarily denied the motion without a hearing or explanation.

Held: Vacated and remanded.

Mr. Arias-Rivera argued that his sentence must be amended to include a specific term of extended sexual offender parole supervision. (His ultimate aim in filing the appeal appears to be a reduction of the unsuspended portion of his sentence; but the Court did not reach that question because it was not at issue in this appeal.)

The Court held that that the version of CP § 11-723 in effect from approximately 2006 to 2010 requires the sentence of an individual who meets the definition of "extended parole supervision offender" to include a term of extended sexual offender parole supervision of not less than three years and not more than life. The court reasoned the statute was unambiguous in that it expressly provided that "a sentence for an extended parole supervision offender shall include a term" of supervision. It was undisputed that Mr. Arias-Rivera met the definition of an "extended parole supervision offender" by virtue of his particular convictions, and the circuit court's omission of such a term from his sentence therefore rendered his sentence illegal. Unlike with sex offender registration, which is not part of a sentence, and which is imposed regardless of whether the trial court expressly includes it in a sentence, extended sex offender parole supervision *is* part of a

sentence, and therefore the circuit court should have expressly included in the sentence a term of such supervision of not less than three years and not more than life.

Maryland Department of Health v. Jamal Lateef Sheffield, No. 1046, September Term 2019, filed July 29, 2020. Opinion by Berger, J.

https://mdcourts.gov/data/opinions/cosa/2020/1046s19.pdf

MOTION TO TRANSFER TO PSYCHIATRIC FACILITY – POST-CONVICTION PROCEEDING – COMPETENCE

Facts:

Jamal Lateef Sheffield was convicted of second-degree murder and associated offenses in 1997. In 2016, Sheffield filed a *pro se* petition for post-conviction relief, which was subsequently referred to the Office of the Public Defender. In 2018, Sheffield, through counsel, filed a Petition for Post-Conviction Relief and an accompanying motion seeking his transfer from Western Correctional Institute to Clifton T. Perkins Hospital Center ("Perkins"), an inpatient psychiatric facility operated by the Maryland Department of Health ("MDH").

The circuit court held a hearing on Sheffield's motion to transfer on June 20, 2019. MDH was not notified of and did not appear at the hearing. The court heard testimony from psychiatrist Dr. Solomon Melzer, who opined that Sheffield had schizophrenia, was not competent, and lacked the ability to participate in post-conviction proceedings. At the conclusion of the hearing, the trial court issued an oral ruling granting the motion to transfer which was docketed the same day. The trial judge asked Sheffield's counsel to provide a written order memorializing the oral ruling. A written order was signed by the trial judge on June 24, 2019, and a second written order was signed on June 28, 2019. Both the June 24 and June 28 orders were entered by the clerk on July 3, 2019. The prosecutor subsequently contacted the trial judge and asked that the court issue two additional orders in a specific format requested by MDH. The parties agreed to two additional orders for the court to sign, and the two orders were signed on July 5, 2019. The July 5, 2019 orders were never docketed.

On July 11, MDH moved to vacate the orders transferring Sheffield to Perkins. MDH argued that there was no statutory authority to support the order of a competency determination, evaluation, or commitment in a post-conviction proceeding. Before the motion to vacate had been ruled upon by the trial court, MDH noted an appeal of the orders granting the motion to transfer on July 26, 2019. Sheffield filed a motion to dismiss the appeal, which was denied by the Court of Special Appeals on September 3, 2019.

Held: Vacated

Order of the Circuit Court for Prince George's County granting Sheffield's motion to transfer vacated.

The Court of Special Appeals first addressed Sheffield's assertion that MDH's appeal was untimely. Sheffield asserted that the notice of appeal was due on or before July 20, 2019 because the trial court orally granted the motion to transfer at the June 20, 2019 hearing. The Court of Special Appeals disagreed, emphasizing that the trial court's written orders dated June 24, 2019 and June 28, 2019 were entered on the docket by the clerk on July 3, 2019. The Court further observed that the electronic docket entry cited by Sheffield in support of his assertion that the notice of appeal was untimely specifically provided that an "Order [was] to be submitted by Counsel for Defendant." Because the notice of appeal was filed within thirty days of July 3, 2019, the Court rejected Sheffield's assertion that the appeal was untimely.

The Court then considered whether the circuit court had the authority to issue an order transferring Sheffield from Western Correctional Institution to Perkins. The Court observed that Title 3 of the Criminal Procedure Article governs incompetency in criminal cases and refers to a "defendant in a criminal case or violation of probation proceeding." Md. Code (2001, 2018 Repl. Vol.), § 3-104 of the Criminal Procedure Article ("CP"). A court is required to determine "whether the defendant is incompetent to stand trial" and may consider a defendant's competence "[a]t any time before final judgment." *Id*.

The Court of Special Appeals observed that the case on appeal was not a criminal case and did not involve a criminal defendant. Rather, the appeal stemmed from a petition for post-conviction relief and accompanying motion to transfer. The Court of Special Appeals emphasized that a post-conviction proceeding is not a criminal case and that this was not a situation in which, "before final judgment," concerns arose about the competence of a "defendant in a criminal case or violation of probation proceeding." CP § 3-104(a), (c). The Court determined that there was no statutory authority in CP § 3-104 or elsewhere for the trial court's order.

Both parties cited the United States Supreme Court case of *Ryan v. Gonzalez*, 568 U.S. 57 (2013), in support of their assertions. In *Ryan*, the Supreme Court addressed "whether the incompetence of a state prisoner require[d] suspension of the prisoner's federal habeas proceedings" and held that the petitioners did not have a statutory right to the suspension of habeas proceedings under such circumstances. *Id*. at 60-61. The Court of Special Appeals explained that, in the Court's view, *Ryan* provided limited persuasive value in support of or against either party's argument. The Court explained that whether a stay would or would not have been appropriate was not at issue on appeal. Rather, the sole issue was whether the trial court had the authority to order Sheffield's transfer.

The Court was further unpersuaded by Sheffield's reliance on *Washington v. Warden*, 243 Md. 316 (1966). *Washington* involved a different appellate issue, but the *Washington* Court noted that "sufficient grounds existed" for the trial court to "order a continuance while the petitioner underwent psychiatric care" at Perkins. The Court of Special Appeals emphasized that *Washington* was entirely silent as to how the petitioner came to be at Perkins and concluded that Sheffield's reliance on the case was misplaced. The Court found additional authority cited by Sheffield similarly unpersuasive.

Finally, the Court considered that even if it were to assume *arguendo* that a petitioner in a post-conviction proceeding has a right to be found competent, it does not necessarily follow that the trial court has the authority to order a petitioner's transfer to Perkins for treatment. The Department of Public Safety and Correctional Services provides health care, including mental health services, to inmates, and, if necessary, prisons may utilize the involuntary admissions provisions set forth in Md. Code (1982, 2019 Repl. Vol.), § 10-614 of the Health-General Article.

The Court of Special Appeals emphasized that it was not insensitive to the issue of inmate mental health, but held that absent statutory authority, the circuit court may not transfer a post-conviction petitioner from a correctional institution to a psychiatric hospital operated by MDH for the purposes of achieving competency. Accordingly, the Court vacated the order of the Circuit Court for Prince George's County granting Sheffield's motion to transfer and remanded the case for further proceedings.

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Luke Daniel Johnson v. State of Maryland, No. 1134, September Term 2019, filed July 29, 2020. Opinion by Arthur, J.

https://mdcourts.gov/data/opinions/cosa/2020/1134s19.pdf

CRIMINAL PROCEDURE – PROBATION REVOCATION – JUSTICE REINVESTMENT ACT

Facts:

In 1980, at the age of nineteen, Luke Daniel Johnson was convicted of first-degree rape of a seventeen-year-old woman in the Circuit Court for Washington County. The court sentenced him to life in prison. In 2015, the court vacated Mr. Johnson's conviction. A year later, the court accepted Mr. Johnson's guilty plea and sentenced him to life in prison, but suspended all but the 36 years that he had already served. He was released, subject to five years of supervised probation.

In August 2017, Mr. Johnson was reincarcerated and charged with violating two conditions of his probation: obtaining employment at a carnival without his supervising agent's permission and traveling out of state three times without permission.

Under the Justice Reinvestment Act (2016 Md. Laws, ch. 515), Mr. Johnson's violations of probation were "technical" in nature. The Act presumes that the maximum sentence of incarceration is 15 days for a first technical violation, 30 days for a second technical violation, and 45 days for a third technical violation. Md. Code (2001, 2018 Repl. Vol.), § 6-223(d)(2) of the Criminal Procedure Article ("CP"). That presumption can be rebutted, however, if the court finds and states on the record, after considering the nature of the probation violation, the circumstances of the original crime, and the probationer's history, that adhering to that limit "would create a risk to public safety, a victim, or a witness." CP § 6-223(e)(2).

At Mr. Johnson's probation revocation hearing, he acknowledged that he had committed two technical violations for which the presumptive maximum sentence is 15 days of incarceration. The court found that Johnson had violated the conditions of his probation but did not announce a decision to revoke the probation.

Before considering the statutory factors, and over Mr. Johnson's objection, the court received unsworn testimony from a witness who was not subject to cross-examination. The witness, a seventeen-year-old woman who had worked at the carnival with Mr. Johnson, recounted that he had repeatedly propositioned her at work and made her feel uncomfortable. Based on that testimony, the court concluded that Mr. Johnson had committed a "public safety violation." It did not, however, state on the record that adhering to the presumptive limit of 15 days would create a risk to public safety. The court revoked Mr. Johnson's probation and sentenced him to life in prison, with all but 10 years suspended, followed by three years of supervised probation.

Mr. Johnson appealed.

Held: Vacated and remanded.

The Court of Special Appeals vacated Mr. Johnson's sentence and remanded the case to the Circuit Court for Washington County for further probation revocation proceedings.

On appeal, Mr. Johnson argued that the State failed to provide sufficient evidence to rebut the statutory presumptive limit on incarceration. Mr. Johnson also argued that the court committed reversible error by failing to explicitly make certain findings on the record as required by the statute. Finally, Mr. Johnson claimed that the court violated his due process rights when it allowed a witness to address the court in an unsworn statement that was not subject to cross-examination.

First, the Court held that the statutory presumption in CP § 6-223(e) is not an evidentiary presumption that the State must submit evidence to rebut. Rather, it is a limitation on the circuit court's discretion. For the court to depart from the presumption, it must consider the factors enumerated in CP § 6-223(e)(2). The court may base its decision on information that satisfies the technical rules of evidence and on other reliable information, such as undisputed facts and the record of a probationer's criminal trial.

Second, the Court concluded that a probationer must make a timely objection if the circuit court does not expressly find and state on the record that adhering to the presumptive limits on incarceration will pose a threat to public safety, a victim, or a witness. Because Mr. Johnson did not make a contemporaneous objection challenging the court's failure to make express findings on the record, this issue was not preserved for appellate review.

Finally, the Court held that Mr. Johnson had a due process right to confront and cross-examine the witness at his probation revocation proceeding whose testimony formed a basis for the court's findings. By creating presumptive sentences for technical violations of probation, the Justice Reinvestment Act has altered the procedural landscape. Now, before the court may impose a sentence in excess of the presumptive limits, the court must engage in additional factfinding. When the court permitted the witness to testify, it had not yet announced a decision to revoke probation, nor had it considered the CP § 6-223(e)(2) factors or made any finding as to whether Mr. Johnson's release would create a risk to public safety, a victim, or a witness. Therefore, the "factfinding" stage was not completed, and Mr. Johnson had a right to cross-examine the adverse witness.

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Estate of Peter Castruccio, et al. v. Sadie M. Castruccio, No. 1023, September Term 2018, filed July 29, 2010. Opinion by Arthur, J.

https://www.mdcourts.gov/data/opinions/cosa/2020/1023s18.pdf

ESTATE ADMINISTRATION – ATTORNEYS' FEES PAID OUT OF ESTATE

EVIDENCE – ADMISSIBILITY OF STATEMENTS MADE IN MEDIATION

Facts:

Dr. Peter Castruccio died on February 19, 2013, and was survived by his wife of 62 years, Sadie Castruccio.

Dr. Castruccio's attorney, John Greiber Jr., petitioned the register of wills to probate Dr. Castruccio's will. The will was admitted to administrative probate in the orphans' court. The register of wills appointed Mr. Greiber as the personal representative of the estate under the terms of the will.

Mr. Greiber, as personal representative, hired Robert H.B. Cawood of the Annapolis law firm Cawood and Cawood LLC to serve as counsel for the estate. Soon after, Mrs. Castruccio filed a petition to caveat in the orphans' court, in which she sought to invalidate the will. Because of the caveat action, Mr. Greiber's status changed from personal representative to special administrator. In response to that proceeding and the likelihood of additional proceedings, Mr. Greiber promptly engaged attorneys at the Baltimore office of the international law firm DLA Piper LLP (US) to serve as lead litigation counsel.

Within the next two years, Mrs. Castruccio initiated several lawsuits against the estate to contest its administration and her late-husband's will. Shortly after the caveat petition, Mrs. Castruccio filed an action in the Circuit Court for Anne Arundel County to quiet title on real property held in the name of her late husband, alleging that Dr. Castruccio fraudulently conveyed the properties from the Castruccios as tenants by the entireties to himself alone. A month later, Mrs. Castruccio petitioned the orphans' court to remove Mr. Greiber as special administrator of the estate. Less than a year after the caveat petition, Mrs. Castruccio filed another action in the circuit court, seeking a declaration that she, rather than Ms. Barclay, was the will's residuary beneficiary. A few months after, Mrs. Castruccio filed another "emergency" petition to remove Mr. Greiber as special administrator. The parties were unable to reach a settlement for any of the actions.

The estate successfully defended every action that Mrs. Castruccio brought. The estate filed an interim petition for attorneys' fees and expenses incurred during the period of March 1, 2013, through March 15, 2015. Mrs. Castruccio filed exceptions, arguing that counsel fees could not be paid out of the estate because Mr. Greiber required court approval to hire counsel as special

administrator. Ms. Barclay also filed an exception, seeking to shift the fees to Mrs. Castruccio's share of the estate because of Mrs. Castruccio's alleged bad faith. The orphans' court denied both exceptions and granted the petition.

Ms. Barclay and Mrs. Castruccio filed de novo appeals of the orphans' court's order to the circuit court. After a six-day trial, the circuit court approved an interim award of attorneys' fees and expenses. Because the court determined that the proposed fees were only "partially fair, reasonable, and necessary," the court approved less than 50 percent of the requested fees and about 80 percent of the requested expenses. The circuit court also rejected Ms. Barlcay's and Mrs. Castruccio's exceptions.

The estate and Ms. Barclay noted timely appeals. Mrs. Castruccio noted a timely cross-appeal.

Held: Vacated in part and affirmed in part.

The Court of Special Appeals vacated the circuit court's attorneys' fees award but affirmed the judgment in all other respects.

The Court first addressed Mrs. Castruccio's contention that the circuit court erred in awarding any fees out of the estate. The Court held that Mr. Greiber, as special administrator of the estate, did not need court approval to hire the DLA Piper attorneys to represent the estate. The court rejected Mrs. Castruccio's contention that section 6-403 of the Estates and Trusts Article limited the powers of a special administrator. A special administrator may engage counsel to prosecute or defend litigation on behalf of the estate under its power to "collect, manage, and preserve property" of the estate.

The Court further rejected Mrs. Castruccio's contention that the estate's petition for attorneys' fees was deficient because the estate declined to make an estimate of future fees. The Court held that a fiduciary of an estate is not required to make such an estimate if he or she cannot make a reasonable, good faith prediction under the circumstances.

The Court lastly held that, by defending against Mrs. Castruccio's will construction action, Mr. Greiber acted in good faith and with just cause and was permitted to shift the fees for that action to the estate.

The Court then considered the estate's dispute of the circuit court's reduction of the requested attorneys' fees. The circuit court was correct to use Maryland Rule 19-301.5, rather than Md. Rule 2-703 or the lodestar method, to evaluate a claim for attorneys' fees under section 7-603 of the Estates and Trusts Article. The circuit court, however, erred in applying the "locality" factor of Rule 19-301.5. Because Mr. Greiber could not have found local counsel to undertake the complex and substantial litigation, the relevant locality was not limited to Anne Arundel County.

The Court also held that the circuit court erred in reducing nearly 40 percent of the hours billed by the estate's attorneys. The court failed to give the estate an opportunity to address its

concerns with the hours billed, erroneously denied all fees related to several unsuccessful pre-trial motions, and denied certain billed hours without giving any reviewable explanation. The Court, therefore, vacated the attorneys' fees award and remanded the case.

The Court identified further aspects for the circuit court to consider in determining an appropriate attorneys' fee award on remand. First, the circuit court should consider the actions of the beneficiaries in relation to the litigation, such as if the beneficiaries prolonged or complicated the litigation. Second, the court should consider whether the beneficiaries approved of or instigated the litigation. Finally, the court may consider whether the personal representative had an opportunity to reach a reasonable settlement with the opposing party.

Finally, the Court affirmed the circuit court's denial of Ms. Barclay's request to apportion the attorneys' fees to Mrs. Castruccio's share of the estate. The record contained ample evidence to support the circuit court's finding that Mrs. Castruccio did not act in bad faith by instigating the various actions against the estate.

The Court further held that the circuit court did not err in excluding testimony regarding a statement made by Mrs. Castruccio in mediation that was offered to demonstrate Mrs. Castruccio's alleged bad faith in pursuing the litigation. Section 3-1804 of the Courts and Judicial Proceedings Article, part of the Maryland Mediation Confidentiality Act, bars the admission of all statements made in a court-ordered mediation, unless the prospect of injustice or harm to the public interest outweighs the interest in upholding the integrity of the confidential mediation.

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In re: M.C., No. 1273, September Term 2019, filed April 1, 2020. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2020/1273s19.pdf

APPEAL AND REVIEW – MOOTNESS – EVASION OF REVIEW

CHILDREN IN NEED OF ASSISTANCE – MODIFICATION OF VISITATION – HEARING

Facts:

The Circuit Court for Montgomery County declared M.C. a child in need of assistance ("CINA") as part of an agreed disposition between the Department of Social Services (the "Department") and M's mother, D.P. ("Mother"). As part of the agreed disposition, Mother was to get *unsupervised* visitation with M as long as she tested negative for illicit substances.

A little over a month later, the Department filed a motion to amend the disposition order to change Mother's visitation to *supervised* because it came to believe that Mother violated a protective order, failed to complete several urinalyses, and tested positive for cocaine. It attached an unsworn memorandum from a social worker describing the various violations, and the memorandum included a police report describing the protective order incident but contained no other primary source material.

Mother responded by filing an opposition and request for discovery. She also asked for a hearing to address these matters. But the juvenile court granted the Department's motion without a hearing, making Mother's visits *supervised*. Mother renewed her motion later at a status hearing, but that was denied again by the juvenile court. At the status hearing, the court reaffirmed that M remained a CINA and visitation between Mother and M would be *supervised*.

Held: Reversed and remanded.

The Court of Special Appeals decided the appeal even though it was moot. The order appealed was no longer the operative order because the juvenile court in the meantime had entered a superseding order concerning visitation. However, because juvenile courts conduct CINA review hearings every six months, orders such as the one reviewed here would almost always be replaced by a subsequent order before an appeal would be completed. *In re Justin D.*, 357 Md. 431, 444 (2000). Declining to review such orders would therefore "have the perverse effect of negating [a parent's] ability to further challenge" them. *In re Ashley S.*, 431 Md. 678, 706 (2013). And because Mother raised important due process questions in her appeal, the Court exercised its discretion to hear the appeal.

The Court reversed the juvenile court's denial of Mother's motion for a hearing because modifying Mother's visitation without a hearing violated Mother's due process rights. First, when the Department seeks to change the status quo of a juvenile court's order, it bears the burden of proof. *Garrett v. State*, 124 Md. App. 23, 28 (1998). Second, when the juvenile court is presented with conflicting proffers and one party requests a hearing to resolve them, the juvenile court must hold a hearing unless the disputed allegations are immaterial to whether the child is in serious immediate danger or modification is required for the safety and welfare of the child. *In re Damien F.*, 182 Md. App. 546, 583 (2008).

Merryman and Fraternal Order of Police Lodge 146 v. University of Baltimore, No. 649, September Term 2019, filed July 13, 2020. Opinion by Kehoe, J.

https://www.courts.state.md.us/data/opinions/cosa/2020/0649s19.pdf

LABOR AND EMPLOYMENT – LABOR CONTRACTS – CONSTRUCTION

LABOR AND EMPLOYMENT – DISPUTES – STATUTORY PROVISIONS

Facts:

The University of Baltimore changed police officers' work schedules from five eight-hour days to four ten-hour days each week. A dispute arose as to how this change would affect the number of holiday-leave hours officers accrued for the paid holidays specified in an agreement between the university and the officers' union. Would officers receive eight hours of paid leave for each holiday (as before)? Or would they now receive ten (a full workday's worth)?

To settle the dispute, the union invoked a three-step statutory grievance procedure (Md. Code, Educ. § 13-203) provided for in that same agreement. Under the agreement's terms, "[i]n the event of an alleged violation or disagreement over any of the provisions of [the agreement]," officers had "the right to file a grievance in accordance with [Educ. § 13-203]." The agreement also incorporated the statutory definition of "grievances" subject to the statutory procedure (Educ. § 13-201(c)). That definition made grievable, among other things, complaints about the "interpretation or application of University rules or departmental procedures over which the University management has control." The definition also explicitly rendered *not grievable* complaints "pertain[ing] to the general level of . . . fringe benefits."

At all steps of the grievance process, the university raised a jurisdictional defense, arguing that the holiday-leave dispute was not subject to the statutory grievance procedure incorporated into the parties' agreement. It was a dispute about "the general level of . . . fringe benefits," which meant it was not a "grievance" within the meaning of Educ. § 13-201. This defense proved successful at steps one and two of the grievance process. But it was a loser at step three, where the administrative law judge tasked with hearing the grievance concluded that the issue before her was one of "contract interpretation," grievable because the parties' agreement provided that a "disagreement over any of the [agreement's] provisions" would give an employee the right to file a grievance in accordance with the Educ. § 13-203 procedures. The administrative law judge ultimately sided with the union on the merits too, concluding officers were entitled to ten hours of paid leave for each predetermined holiday and ordering the parties to determine the number of holiday hours wrongfully withheld from officers so that the university could credit those hours to the affected officers.

The University sought judicial review of the administrative law judge's decision, maintaining the Office of Administrative Hearings had lacked jurisdiction and that even if the administrative law

judge could properly hear the case and was right on the merits, the administrative law judge had no authority under the statutory grievance procedures to provide a *remedy* that would "change the scope of fringe benefits" and "impact the finances and management control of the University."

Convinced, at least, by this third argument, the circuit court reversed the administrative law judge's decision in part and affirmed it in part.

Held: Vacated and remanded.

The issue before the Court of Special Appeals was (1) whether the administrative law judge erred in concluding that the officers' complaint was properly before her—that is, that the dispute was a "grievance" subject to resolution through the procedures outlined in Md. Code, § 13-203 of the Education Article. If so, the Court also had to decide (2) whether the administrative law judge's interpretation of the memorandum of understanding was legally correct and (3) if the administrative law judge had the authority to order the university to award officers paid holiday hours as a remedy for the grievance.

The Court of Special Appeals held the university–union dispute was not a "grievance" to be resolved through the procedures outlined in Educ. § 13-203. Accordingly, the administrative law judge was without jurisdiction, and the remaining issues on appeal did not need to be resolved.

First, the Court concluded that the dispute did not fit within the default statutory definition of "grievance." As the union appeared to concede with its reading of *Walker v. Department of Human Resources*, 379 Md. 407 (2004), by contracting about holiday-leave hours, the parties placed what once might have been a policy *within* the University management's control to one *outside* of that control.

Second, the Court rejected the union's argument that the dispute was nonetheless grievable because parties' agreement purported to subject to the Educ. § 12-203 grievance procedures disputes involving "an alleged violation or disagreement over any of the provisions of [the agreement]." The scope of the statutory dispute-resolution mechanism provided for in the parties' memorandum of understanding was fixed by the General Assembly. The union's suggestion that the parties' memorandum effectively "amended" an incorporated statutory definition to expand the scope of issues grievable under the incorporated statutory procedure is conceptually untenable. Unless the General Assembly provides that statutorily prescribed jurisdictional limits are a mere default, parties cannot expand the jurisdiction of an administrative agency by contract.

Finally, the Court said that even if the parties could, by mutual agreement, expand the jurisdiction conferred upon the administrative law judge, the holiday-leave dispute would be one about "the general level of . . . fringe benefits." The statutory text is clear that such a dispute falls

outside the definition of grievances in Educ. § 13-201(c), expressly incorporated into the parties' agreement.

Carbond, Inc., et al. v. Comptroller of the Treasury, No. 2767, September Term 2018, filed July 29, 2020. Opinion by Zarnoch, J.

https://mdcourts.gov/data/opinions/cosa/2020/2767s18.pdf

TAX-GENERAL – STATUTORY INTERPRETATION – ADMISSIONS AND AMUSEMENT TAX

Facts:

Appellants ("Carbond") were assessed by the Comptroller of the Treasury for millions of dollars that they had failed to pay in Admissions and Amusement Taxes ("A&A Tax") related to certain electronic gaming devices that Carbond had licensed as "coin-operated amusement devices." Carbond challenged the assessment on the basis that the machines at issue were not the sort of "games of entertainment" that are subject to the A&A Tax under the Tax-General Article. Specifically, Carbond argued that because the Attorney's General office had previously concluded that pre-printed pull-tab "Instant Bingo" tickets should not be considered "games of entertainment" for the purposes of the A&A Tax, Carbond's machines ought to be similarly excluded from the A&A Tax, given that its machines were allegedly indistinguishable from Instant Bingo machines and not located in either jurisdiction (Anne Arundel County or Calvert County) where licensed Instant Bingo machines are subject to the A&A Tax.

The Comptroller, the Maryland Tax Court, and the Circuit Court for Baltimore City all denied Carbond's refund claim. The Maryland Tax Court, in particular, upheld the assessment on the basis that Carbond's machines were "games of entertainment" that are subject to the A&A Tax.

Held: Affirmed.

The Court of Special Appeals held that Carbond's machines—being refrigerator-sized *machines* that entertain customers with spinning wheels and lights—are not only the sort of "recreational equipment" that have long been subject to the A&A Tax (as "equipment") but are the sort of recreational equipment that the statutory phrase "game of entertainment" was intended to refer.

The appellate court first determined that when the General Assembly added the phrase "games of entertainment" to the A&A Tax statute's list of taxable charges in 1979, the phrase was merely intended to clarify that the A&A Tax applied to those "games of entertainment" that required the use or rental of recreational or sports equipment. Accordingly, the Court concluded that Carbond's machines—given their spinning wheels and lights, and very nature as refrigerator-sized machines—are precisely the sort of coin-operated amusement devices that have been recognized as falling under the A&A Tax.

The Court next determined that Carbond's attempt to avoid the tax implications of this conclusion by conflating its machines with Instant Bingo was unavailing. Although the Attorney General had previously concluded that pre-printed pull-tab Instant Bingo tickets were not covered by the A&A Tax because they did not require the use of facilities or equipment for their "play," Carbond's machines, in contrast, inherently involved the use of such equipment. Moreover, Carbond's machines were not officially licensed as Instant Bingo; as such, notwithstanding any similarities to licensed Instant Bingo machines, Carbond's machines were still "games of entertainment" for the purposes of the A&A Tax.

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ATTORNEY DISCIPLINE

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By an Opinion and Order of the Court of Appeals dated June 8, 2020, the following attorney has been suspended for sixty days, effective July 8, 2020:

NATALIE THRYPHENIA COLLINS

*

By an Order of the Court of Appeals dated July 24, 2020, the resignation of

MARGARET VAN EKEREN BIERWIRTH

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

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

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