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COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Anthony Maurice Harmon, AG No. 83, September Term 2011, filed October 21, 2013. Opinion by McDonald, J.

<http://www.mdcourts.gov/opinions/coa/2013/83a11ag.pdf>

ATTORNEY DISCIPLINE – SANCTION – INDEFINITE SUSPENSION

Facts:

Anthony Maurice Harmon was charged with violations of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.3, 1.4, 1.5(a), 1.15, and 8.4(d) arising out of his representation of three clients and with a violation of MLRPC 8.1(b) for failure to respond to Bar Counsel's requests for information as to the complaints of those clients.

As a sanction for his failure to timely respond to Bar Counsel's discovery requests, Mr. Harmon was deemed to have admitted facts that formed the basis of violations of MLRPC 1.3, 1.4, and 1.5(a). Based on the facts deemed admitted and the evidence presented at the evidentiary hearing, the hearing judge concluded that Mr. Harmon violated MLRPC 1.3, 1.4, 1.5(a), and 8.1(b), that no mitigating circumstances existed, and that several aggravating factors existed. The hearing judge did not make findings or recommend conclusions of law as to the alleged violations of MLRPC 1.15 and 8.4(d), because Bar Counsel withdrew the allegation involving MLRPC 1.15 and did not pursue the allegation concerning MLRPC 8.4(d). No exceptions were filed by either party as to the hearing judge's findings and conclusions.

Held:

The Court of Appeals held that Mr. Harmon violated MLRPC 1.3, 1.4, and 1.5(a) in his representation of the three clients. It also held that Mr. Harmon violated MLRPC 8.1(b) by failing to respond to Bar Counsel's repeated demands for information – in particular, the financial records of the payments Mr. Harmon received from two of his complaining clients.

The Court agreed with the hearing judge that mitigating circumstances did not exist because Mr. Harmon did not prove by a preponderance of evidence that his misconduct resulted from a mental or physical disorder. The Court agreed with the hearing judge that several aggravating factors were implicated, including multiple violations, bad faith obstruction of the disciplinary process,

and refusal to acknowledge the wrongful nature of his conduct. It also found additional aggravating factors, including a pattern of misconduct and prior discipline. In particular, the Court noted that, in a prior disciplinary action, Mr. Harmon was similarly found to be in violation of MLRPC 8.1(b) for failure to respond to Bar Counsel's lawful demands for information.

In light of Mr. Harmon's prior disciplinary record, the lack of mitigating circumstances, and the existence of several aggravating factors, the Court held that an indefinite suspension was the appropriate sanction.

Attorney Grievance Commission of Maryland v. Patrick Edward Vanderslice, AG No. 68, September Term 2012, filed October 21, 2013. Opinion by Greene, J.

<http://www.mdcourts.gov/opinions/coa/2013/68a12ag.pdf>

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

Patrick Edward Vanderslice (“Respondent” or “Vanderslice”) was a member of the Delaware and Maryland Bar. On October 12, 2012, the Supreme Court of the State of Delaware suspended Vanderslice from the practice of law in Delaware for a period of one year for violation of several Delaware Lawyers’ Rules of Professional Conduct. Respondent misappropriated funds eight times over a period of ten months from the law firm of which he was a partner, and generated deficiently drafted retainer agreements. Maryland Bar Counsel requested that reciprocal discipline not be imposed, and instead requested disbarment because of the existence of “exceptional circumstances” and because the established conduct “warrants substantially different discipline in this State.”

Held:

The Court of Appeals held that Respondent violated Rules 1.5(f), 1.15(a) and (b), and 8.4(b), (c), and (d) of the Maryland Lawyers’ Rules of Professional Conduct (“MLRPC” or “Rule”), and such violations qualified as “exceptional circumstances” that “warrant[] substantially different discipline in [Maryland]” than was imposed in Delaware, and therefore, ordered disbarment.

In reciprocal discipline cases, pursuant to Rule 16-773(g), we generally treat the factual findings and conclusions of law from the original jurisdiction as conclusive evidence of an attorney’s misconduct. Pursuant to Rule 16-773(e)(3) and (4), respectively, we do not order reciprocal discipline if there is clear and convincing evidence that either the imposition of corresponding discipline would result in grave injustice, or the conduct established warrants substantially different discipline in this State. This Court has previously pointed out that “we have become much less lenient towards any misconduct involving theft, misappropriation, fraud, or deceit.” *Attorney Grievance Comm’n v. Weiss*, 389 Md. 531, 551, 886 A.2d 606, 617.

In the present case, there are exceptional circumstances that warrant “substantially different discipline” in Maryland. “Absent compelling extenuating circumstances,” we have said, “intentional misappropriation of client funds or another’s funds is deceitful and dishonest conduct [and] justifies disbarment.” *Attorney Grievance Comm’n v. Carithers*, 421 Md. 28, 58, 25 A.3d 181, 199 (2011). While the Delaware Supreme Court relied on several mitigating factors,

including Respondent's personal and emotional problems and the fact that this was his first offense, when it imposed a lenient sanction, this Court did not find these mitigating factors convincing and chose not to deviate from the ordinary sanction imposed by this State for similar misconduct. Therefore, the Court concluded that disbarment was the appropriate sanction in Maryland.

Shelton Burris a/k/a Tyrone Burris v. State of Maryland, No. 79, September Term 2012, filed October 23, 2013. Opinion by Battaglia, J.

<http://www.mdcourts.gov/opinions/coa/2013/79a12.pdf>

CRIMINAL LAW – OTHER CRIMES, WRONGS, OR ACTS – GANG EVIDENCE

Facts:

Shelton Burris was convicted of first degree murder and use of a handgun in the commission of a crime of violence. According to the State's theory of the case, Burris killed the victim because he was ordered to by his gang boss to whom victim owed money. The State moved prior to trial to introduce the testimony of a gang expert, who would identify Burris as a member of the Black Guerrilla Family street gang (BGF), testify that BGF members would commit murder on the basis of a debt owed to one of its members, and was necessary to explain witness recantation of pre-trial statements implicating Burris were the State's witnesses to recant at trial, which the trial court granted.

At trial, several fact witnesses established that Burris and his alleged gang boss were members of BGF and that Burris killed the victim on the basis of a debt owed to his gang boss. The gang expert, thereafter over objection, testified extensively as to gangs in general, BGF specifically, and the import of Burris's tattoos in establishing that he was a gang member. There was no nexus, however, between that testimony and the State's theory of motive. The expert, moreover, said nothing with regard to the issue of witness recantation. The expert's testimony, rather, focused on topics not relevant to the case such as BGF's origins as a prison gang, the fact that BGF controls the narcotics trade in prisons, and that members learn to speak Swahili to conceal their illicit activities in prison, when the case had nothing to do with a prison environment. The expert also testified extensively as to the inflammatory content of Burris's tattoos, when none of those tattoos was identified as being specific to BGF.

The Court of Special Appeals affirmed Burris's convictions, determining, *inter alia*, that the probative value of the expert's testimony was not outweighed by its prejudicial effect.

Held:

The Court of Appeals reversed the Court of Special Appeals and vacated Burris's convictions. The trial court violated Rule 5-404(b) and the standard set forth in *Gutierrez v. State*, 423 Md. 476, 32 A.3d 2 (2011), which requires, as a threshold to admission of gang evidence, fact evidence showing the crime was related to gang membership and, assuming this threshold is met, a determination of whether the probative value of the gang evidence is substantially outweighed by

the danger of unfair prejudice. Although evidence in the case established that the crime was gang related, the probative value of the gang expert testimony was substantially outweighed by unfair prejudice: there was no nexus between that testimony and the State's theory of motive; the expert said nothing which would have elucidated for the jury why several of the State's witnesses recanted; the expert's testimony, however, linking Defendant with a gang that was known for controlling Maryland prisons, including drug trafficking within those prisons, when this case had nothing to do with a prison atmosphere, was unfairly prejudicial. The expert's testimony was also prejudicial because it described the inflammatory content of several of Defendant's tattoos, none of which was identified as being specific to the Black Guerrilla Family.

The gang expert's testimony, moreover, was not harmless error.

Roguell Blue v. Prince George's County, Md., No. 87, September Term 2012, filed September 27, 2013. Opinion by McDonald, J.

Greene and Adkins, J.J., and Bell, C.J. (ret.) dissent.

<http://www.mdcourts.gov/opinions/coa/2013/87a12.pdf>

HANDGUN LAW – PROHIBITION AGAINST CARRYING A HANDGUN – SUPERVISORY EMPLOYEE EXCEPTION

Facts:

On June 17, 2008, Roguell Blue was working as the head of security for Irving's Nightclub, a strip club in Capitol Heights, Maryland. Mr. Blue's employer required that he carry a handgun. During the evening of June 17, 2008, Mr. Blue came to believe there was illicit sexual activity taking place outside the club in a car in the nightclub's parking lot. Mr. Blue confronted the individuals involved, ordered a man out of the car, and attempted to pat the man down for weapons. The man ran from the scene.

Police officers from the Prince George's County Police Department arrived on the scene shortly thereafter as a result of a report that shots had been fired. Upon arrival, the officers learned that Mr. Blue was carrying a handgun. The officers asked Mr. Blue to produce a valid permit for the handgun. Mr. Blue handed the officers a copy of Maryland Code, Criminal Law Article ("CR") §4-203, and informed them that the club owner had given him permission to possess a handgun on the premises. Mr. Blue was arrested and charged with "wearing, carrying, or transporting a handgun in public" in violation of CR §4-203(a)(1). Those charges were later disposed of with the State's entry of a nolle prosequi.

On September 14, 2009, Mr. Blue filed a lawsuit in the Circuit Court for Prince George's County against the County and three of the police officers involved in his arrest. Mr. Blue alleged a violation of Article 24 of the Maryland Declaration of Rights, false arrest and imprisonment, and malicious prosecution. At trial, Mr. Blue asserted that he was legally permitted to carry the handgun under the "supervisory employee" exception of §4-203(b)(7), and that the officers did not have probable cause to arrest him. The trial court granted the defendants' motion for judgment on the malicious prosecution claim. The jury found in favor of Mr. Blue on his State constitutional claim and on the false arrest and imprisonment claim. He was awarded \$106,100 in damages. Both Mr. Blue and the defendants appealed.

The Court of Special Appeals upheld the dismissal of the malicious prosecution claim, but reversed the judgment based on the jury verdict. The intermediate appellate court reasoned that, because Mr. Blue had been carrying his handgun in the parking lot of the club and not "within the confines of the business establishment," which it construed to mean the interior of the building, the

officers had probable cause to arrest him. This precluded a finding in Mr. Blue's favor on his constitutional and false arrest and imprisonment claims. Mr. Blue subsequently filed a petition for writ of certiorari in the Court of Appeals.

Held: Affirmed.

Under Maryland law, an individual may not “wear, carry, or transport a handgun, whether concealed or open, on or about the person[.]” CR §4-203(a)(1)(i). There are numerous exceptions to this prohibition. One such exception can be found in CR §4-203(b)(7), which permits “supervisory employees” to wear, carry, or transport a handgun “(i) in the course of employment; (ii) within the confines of the business establishment in which the supervisory employee is employed; and (iii) when so authorized by the owner or manager of the business establishment[.]” At issue was whether CR §4-203(b)(7) authorized Mr. Blue to carry a handgun without a permit on the parking lot of Irving's Nightclub.

The Court found that the statute itself does not provide a specific definition for the phrase “within the confines of the business establishment.” Common dictionary definitions provide some direction. “Within” and “confines” are defined respectively as “in or into the interior” and “something (as borders or walls) that encloses.” “Business” is defined as “a commercial or sometimes an industrial enterprise” and an “establishment” is defined as “a place of business or residence with its furnishings and staff.” Finally, the statutory exception identifies the business establishment as the one “in which the supervisory employee is employed” – again placing the emphasis on interior space. CR §4-203(b)(7)(ii). “Within the confines of the business establishment” describes the interior space of the commercial enterprise, where one may find its furnishings and staff, enclosed by walls or other such similar bounds.

The Court also reviewed the legislative history of CR §4-203(b)(7). In 1972, the Governor submitted emergency legislation to the Legislature to curb the “widespread carrying of handguns on the streets and in vehicles by persons who have no legitimate reason to carry them.” The Legislature added a proviso to the handgun law that allowed an owner or lessor of a property to carry a handgun without a permit on owned or leased real estate. The legislative history indicates that the purpose of allowing individuals to carry firearms without a permit “within the confines” of a business establishment was to protect the business against robberies, or for self defense. The owner's ability to endow others with the right to carry a handgun without a permit was limited to the “supervisory employees” of a business and restricted to the “confines of the business establishment,” but not real estate generally.

The Court held that the supervisory employee exception should not be construed in a way that would defeat the purpose of the prohibition in the law. It was not meant to confer on a business the power to deputize a private citizen who lacks a handgun permit as a law enforcement officer.

Bashawn Montgomery Ray v. State of Maryland, No. 80, September Term 2012, filed September 27, 2013. Opinion by Barbera, C.J.

Greene and Adkins, JJ., dissent.

<http://mdcourts.gov/opinions/coa/2013/80a12.pdf>

CRIMINAL PROCEDURE – WAIVER UNDER MARYLAND RULE 4-252

APPELLATE PROCEDURE – PRESERVATION UNDER MARYLAND RULE 8-131(a)

Facts:

Petitioner Bashawn Montgomery Ray was convicted in the Circuit Court for Montgomery County of conspiracy to commit theft, making a false statement to a police officer, and related offenses. Before trial, he moved to prevent the introduction into evidence of fraudulent credit cards and other items obtained as a result of the October 5, 2010, stop of a car in which he was a passenger and the subsequent detention and search of that car's occupants. At the hearing on this motion, Petitioner advanced the theory that the police detention of the car's passengers was unlawful, and thus all evidence collected following this second stop should be suppressed. The Circuit Court disagreed and ruled that the evidence was admissible as the fruit of a consent search. Trial proceeded on an agreed statement of facts.

Before the Court of Special Appeals, Petitioner again argued that the evidence should have been suppressed, but at this stage he advanced a different theory. He asserted that the evidence against him was obtained as a result of his unlawful arrest. The State contended that this argument was not preserved for appellate review. The Court of Special Appeals found Petitioner's unlawful arrest argument sufficiently preserved for appellate review, but ultimately affirmed the Circuit Court's denial of the motion, finding that police did have probable cause to arrest Petitioner.

Held: Judgment of the Court of Special Appeals affirmed, but on a different ground than that relied upon by that court.

Maryland Rule 4-252 provides that certain matters are waived in the Circuit Court unless raised by motion, and that such motion must state the specific grounds upon which it is made. The Court of Appeals observed that the purpose of the Rule is to alert the court and the prosecutor to the precise nature of a complaint in order that they have a fair opportunity to rebut or consider it. As Petitioner did not deviate from the unlawful second stop theory in his written pleadings or during the motions hearing, the Court found that he never raised the issue of unlawful arrest. It was therefore waived.

Rule 8-131(a) provides for appellate jurisdiction over issues that plainly appear by the record to have been raised in or decided by the trial court. Again, the Court found that Petitioner did not raise the issue of unlawful arrest at the trial level. Further, the Court rejected the argument that a single reference by the State to the term “probable cause” put Petitioner’s arrest at issue in the motions hearing, as the lawfulness of the arrest was not disputed by the parties nor ruled upon by the court. Finally, the Court declined Petitioner’s invitation to exercise its discretion to address the merits of his claim.

Accordingly, the Court of Appeals held that Petitioner’s unlawful arrest claim was not preserved for appellate review under either Maryland Rule 4-252 or 8-131(a). The Court thus affirmed the judgment of the Court of Special Appeals, without pronouncing on the correctness of that court’s reasoning or conclusion on the merits.

State Board of Elections v. Clifford E. Snyder, Jr., on behalf of Carl Phillip Snyder, his son & State Board of Elections v. Richard D. Boltuck, on behalf of Sarah Elizabeth Boltuck, his daughter, No. 122, September Term 2007, filed September 27, 2013. Opinion by Bell, C.J. (ret.).

<http://www.mdcourts.gov/opinions/coa/2013/122a07.pdf>

ELECTION LAW – VOTER QUALIFICATIONS – VOTING AGE – COUNTY BOARD OF EDUCATION – PRIMARY ELECTIONS

Facts:

Appellees, Carl Snyder ("Snyder") and Sarah Boltuck ("Boltuck"), 17 year-olds, who would have been 18 by the 2008 general election, brought separate complaints against the appellant, the Maryland State Board of Elections ("MSBE"), seeking judicial relief concerning their eligibility to vote in non-partisan primary elections for county school boards in Frederick and Montgomery counties, respectively. Their complaints were subsequently consolidated in the Circuit Court of Anne Arundel County. The MSBE contended that the appellees were ineligible to vote because § 3-102 of the Maryland Election Law Article, which permits 17 year olds turning 18 by the time of the general election, to vote in primary elections, conflicted with a provision of Article I, § 1 of the Maryland Constitution as interpreted by *Lamone v. Capozzi*, 396 Md. 53, 912 A.2d 674 (2006), which held inter alia, that "primary elections are included within the meaning of the phrase, 'at all elections to be held in this State' in Article I, § 1."

Relying on *Hanna v. Young*, 84 Md. 179, 183, 35 A. 674, 675 (1896), stating that the Maryland Constitution does not apply to elections that are constitutionally required, the Circuit Court denied the MSBE's motion for summary judgment and granted the appellees' cross motion in part. The Circuit Court concluded that "the voter eligibility requirements of Article I, § 1 of the Maryland Constitution do not apply to non-partisan elections for Boards of Education, municipal elections, and local ballot questions that are not mandated by the Constitution." The MSBE appealed and the Court of Appeals exercised direct appellate jurisdiction over the action.

Held:

The Court of Appeals, vacating the Circuit Court decision and remanding the case to that court, concluded that pursuant to Article I, § 1 of the Maryland Constitution and § 3-102 of the Maryland Election Law Article, "17 year-olds who will turn 18 by close of voter registration before the next general election are...entitled to vote in primary elections, whether partisan or non-partisan, subject to all other provisions of the Constitution and statutory election law." The Court reasoned that its decision in *Hanna v. Young*, involved a municipal election or municipal office and was

therefore inapposite, and did not preclude the application of Article I, § 1 to the non-municipal school board primary election at issue in this case. The Court further rejected the MSBE's argument that the *Capozzi* decision required a conclusion that § 3-102 (a) was in conflict with Article I § 1. The Court instead concluded that like *Hanna*, the *Capozzi* decision, which addressed early voting and based upon a different clause within Article 1, § 1, was inapposite. Applying its canon rules of constitutional interpretation, the Court determined that although the term "the election," in Article 1, § 1, does not explicitly refer to a general election, any alternative construction would render the term nugatory and inconsistent with the use of that term in other sections of the Maryland Constitution.

David Scull, et al. v. Groover, Christie & Merritt, P.C., No. 71, September Term 2012, filed September 30, 2013. Opinion by McDonald, J.

<http://www.mdcourts.gov/opinions/coa/2013/71a12.pdf>

HEALTH MAINTENANCE ORGANIZATIONS – PROHIBITION AGAINST BALANCE BILLING OF HMO MEMBERS – IMPLIED PRIVATE RIGHTS OF ACTION

CONSUMER PROTECTION ACT – EXCEPTION FOR PROFESSIONAL SERVICES – MEDICAL BILLING PRACTICES

Facts:

In 2008, David Scull, an attorney, was having problems with his knee. At that time, Mr. Scull had health care insurance as a member of United Healthcare Select HMO (“HMO”). Among the services covered by the HMO were outpatient laboratory and x-ray services.

Mr. Scull visited his orthopedist, who was a member of the HMO’s physician network. The orthopedist referred him to Groover, Christie & Merritt, P.C. (“GCM”), a radiology practice, for an x-ray of his knee. On May 23, 2008, GCM took x-ray images of Mr. Scull’s knee.

Nearly a year later, GCM sent Mr. Scull a bill for \$121.00 for the x-ray exam. In explanation of that sum, the bill indicated an initial charge of \$242.00, with credits in the amounts of \$91.73 and \$29.27 for “Adjustments” and “Insurance Payment,” respectively.

Mr. Scull called GCM and was told that the HMO reversed his payment and that he should submit his claim to Medicare. When he contacted the HMO, Mr. Scull was told that he was covered for the x-ray exam, and that payment had been made to GCM. GCM’s billing agent then told Mr. Scull that he should disregard any statements and that his account had been adjusted to a zero balance.

Nonetheless, in June 2009, Mr. Scull received another bill from GCM for \$121.00. This time, Mr. Scull paid the bill by sending a check to GCM. Approximately three months later, Mr. Scull received a check from GCM for \$121.00 and a note indicating GCM had conducted an audit and found a credit owing to Mr. Scull. Mr. Scull did not cash this refund check.

Mr. Scull eventually filed a lawsuit alleging that GCM had engaged in the illegal practice of “balance billing,” that there was a private right of action under the State HMO law, and that GCM had violated the Maryland Consumer Protection Act (“the Act”). Mr. Scull also set forth a claim for unjust enrichment. The Circuit Court dismissed Mr. Scull’s complaint without prejudice. In an amended complaint, Mr. Scull elaborated on the alleged violations of the Maryland Consumer Protection Act. The Circuit Court dismissed this complaint with prejudice.

Mr. Scull appealed, and the Court of Special Appeals affirmed in a reported opinion. First, with respect to an implied private cause of action for violation of the prohibition against balance billing in the State HMO law, the intermediate appellate court held that there is no such cause of action and that, in any event, GCM's invoice fit within an exception related to Medicare patients. Second, with respect to the claim under the Consumer Protection Act, the court held that medical billing practices are not subject to the Act because they qualify as "professional services" of a medical or dental practitioner and are therefore excluded from the purview of the Act. The Court of Appeals granted Mr. Scull a writ of certiorari.

Held: Affirmed in part and reversed in part.

The Court of Appeals considered whether there is a private right of action under the State's HMO law, and whether medical billing practices qualify as "professional services" of a medical or dental practitioner and are therefore excluded from the purview of the Consumer Protection Act.

The Court had applied the test previously adopted by the Court to assess whether a statute contains a private right of action. When determining whether there has been a private right of action, the Court considers three questions: whether the plaintiff is "one of the class for whose especial benefit the statute was enacted," whether there is any legislative intent to create a remedy or to deny one, and whether it is consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff.

The Court found that Mr. Scull was a member of the class, that the statute was silent as to the issue of a private right of action, and that finding an implied private right of action would not be consistent with the larger regulatory scheme because there was already a cause of action in place for a plaintiff to obtain relief for violations of unlawful billing practices.

The Maryland Consumer Protection Act excludes "professional services" from the provisions of the Act. The question in this case was whether the billing practices of a health care provider fall within the category of "professional services." There is no definition of "professional services" contained in the Act. There is likewise no available legislative history pertaining to the enactment of the Act. There is, however, legislative history from 2003 pertaining to the related exemption in CL §13-408 concerning the "professional services" of health care providers. The proponents of that exemption confirmed that the exemption would not prohibit enforcement actions under the Consumer Protection Act for commercial or entrepreneurial actions that violate the Act, such as improper billing practices or false advertising. The Court also gave weight to the position of the Consumer Protection Division of the Attorney General's Office, which construes the Act as encompassing the billing practices of health care providers.

In sum, the Court held that an HMO member may bring an action under the Consumer Protection Act against a health care provider who improperly bills the member in violation of the State HMO law in a way that also violates the prohibition against unfair or deceptive trade practices in the Consumer Protection Act.

101 Geneva LLC v. Ethel E. Wynn, et al., No. 89, September Term 2012, filed October 18, 2013. Opinion by Harrell, J.

Barbera, C.J., McDonald & Watts, JJ., concur and dissent.

<http://www.mdcourts.gov/opinions/coa/2013/89a12.pdf>

REAL PROPERTY – FORECLOSURE PROCEEDINGS – MARYLAND RULE 14-207.1 –
POWER AND DUTY OF CIRCUIT COURT JUDGES

REAL PROPERTY – FORECLOSURE PROCEEDINGS – MARYLAND RULE 14-207.1 –
CIRCUIT COURT PROCEDURES FOR POST-SALE REVIEW

REAL PROPERTY – FORECLOSURE PROCEEDINGS – TRUSTEE’S FIDUCIARY DUTIES
– TERMS OF SALE – DEFAULTING PURCHASER – PERMISSIBLE ADDITIONAL FEES

Facts:

The Substitute Trustees under a deed of trust, in advertising a foreclosure sale, purported to impose upon the successful auction bidder a conditional, additional fee of \$750 (Trustees’ legal fees) which applied only if the bidder defaulted. At the foreclosure sale, the subject property was sold to Appellant, 101 Geneva LLC, a third party purchaser. After the sale, but prior to any ratification by the Circuit Court of the foreclosure sale, the Administrative Judge for the Circuit Court for Montgomery County took it upon himself, in the aftermath of *Maddox v. Cohn*, 424 Md. 379, 36 A.3d 426 (2012), to review the papers in all pending foreclosure actions, pursuant to the screening procedures authorized by Md. Rule 14-207.1(a), and concluded that the additional fee in this case was impermissible under *Maddox*, and issued a Rule 14-207.1 Notice of Non-Compliance stating so and proposing to vacate the sale. The Substitute Trustees and Geneva 101 LLC filed written responses excepting to this notice.

At the hearing to address these exceptions, a judge other than the Administrative Judge presided. She stated that she consulted, prior to the hearing, with the Administrative Judge and that she was bound by, what she perceived to be, his instructions to find the fee impermissible under *Maddox* and to rescind the sale without entertaining seriously the parties’ arguments. After the hearing concluded, the Circuit Court entered an order vacating the sale of the property to 101 Geneva and ordering a resale.

101 Geneva LLC appealed to the Court of Special Appeals. Prior to any decision by the Court of Special Appeals, this Court granted a writ of certiorari on motion by 101 Geneva. Because the borrowers/owners of the subject property, the Wynns, did not participate in this case at any level, the Court asked the Attorney General of Maryland to participate as an *amicus curiae* and to file a brief, as well as to participate in oral arguments, on behalf of the Administrative Judge.

Prior to briefing or argument, the Attorney General of Maryland filed, on behalf of the Administrative Judge, a motion to vacate the decision below and remand the case to the Circuit Court for further proceedings. We denied the motion. The case proceeded with briefing and argument, with the Attorney General's Office's participation.

The questions offered for the Court's consideration were:

- (1) Does the trial court, in a foreclosure sale involving a third-party purchase, have the authority to sua sponte undertake what are tantamount to "Exceptions to the Sale" when none are taken in a timely fashion by the Borrower nor any interested party, and thereafter, despite uncontested opposition, vacate the sale based on *Maddox v. Cohn*?
- (2) Is the trial court's issuance of a Notice of Non-Compliance pursuant to Rule 14-207.1 proper once a foreclosure sale has occurred and is Rule 14-207.1 applicable to the trial court, acting sua sponte, for post-foreclosure sale reviews performed beyond the timeframe of the Rules (i.e. Md. Rule 14-305(e)) which calls for the ratification of the sale?
- (3) Is the right of the trial court to act sua sponte in objecting to the "fairness or properness" of the sale barred by failing to undertake an equitable review within 60 days of the filing of the Report of Sale or the time when Exceptions were due and were not filed, or if they were filed, were denied?
- (4) Did the trial court err in setting forth a "policy" relative to the decision in *Maddox v. Cohn*, which it has improperly retroactively applied uniformly to all foreclosure sales in Montgomery County in violation of Md. Rule 1-102?
- (5) Does the imposition of this "policy" by the trial court in vacating the sale, in lieu of denying ratification for cause pursuant to Md. Rule 14-305(e), constitute a violation of the due process clauses of the Federal and State Constitutions, by effectively denying the (Substitute) Trustees the right of appeal?

Held: Reversed.

The Court of Appeals held first that the hearing judge was vested with the discretion to hear and decide the exceptions to the Rule 14-207.1 Notice of Non-Compliance. Because the hearing judge failed to appreciate and to exercise that discretion, by yielding deference to the Administrative Judge's apparent view, the Court concluded that she abused her discretion. Ordinarily, finding an abuse of discretion would lead directly to a remand; however, this Court found, in this case, that the record was sufficient to reach the two underlying main arguments regarding the scope of Md. Rule 14-207.1 and *Maddox* raised by Appellants.

This Court held that the screening procedures utilized here by the Circuit Court for Montgomery County, pursuant to Md. Rule 14-207.1, are permissible. In reaching this determination, the Court found that (1) the sua sponte, post-sale nature of the Circuit Court's review of the papers and pleadings filed in the foreclosure action is a permissible exercise of its authority under Rule 14-207.1; (2) the advertisement of sale constitutes a "paper" and, thus, is subject to review under Rule 14-207.1; (3) Rule 14-207.1 requires the plaintiffs to demonstrate compliance with the Maryland statutes and rules; and (4) the Circuit Court's procedures do not infringe upon the Substitute Trustees' fiduciary duties.

Next, this Court held *Maddox* inapposite on the grounds of the narrow holding alone, namely, that, unlike the fee in *Maddox*, the fee in the present case is contemplated by a court rule, Md. Rule 14-305(g). Moreover, the Court explained that an analysis of the reasoning in the majority opinion in *Maddox* distinguishes it further from the present case on several additional grounds. First, unlike the lender buy-in situation in *Maddox*, which caused the *Maddox* majority great concern, a third party purchaser bought the subject property in this case and, thus, the concerns expressed in *Maddox* do not apply here. Second, unlike the fee in *Maddox*, the fee here is subject to direct court review and approval. Third, a conditional fee which occurs only if the successful bidder defaults does not have a chilling effect on the efficient and timely obtaining of a maximum bidding price at the auction.

The Court reversed the order vacating the sale and remanded the case to the Circuit Court for further proceedings.

Flora E. Lipitz, et al. v. William A. Hurwitz, No. 2, September Term 2013, filed October 21, 2013. Opinion by McAuliffe, J.

<http://www.mdcourts.gov/opinions/coa/2013/2a13.pdf>

REAL PROPERTY – MARYLAND HOMEOWNERS ASSOCIATION ACT – DEFINITION OF ‘A MEMBER OF THE PUBLIC’

CONTRACTS – EQUITABLE ESTOPPEL

Facts:

Petitioners Flora and Roger Lipitz entered into a contract with Respondent William Hurwitz to sell him a home located in the Caves Valley Golf Club Development in Owings Mills, Maryland, where Respondent already owned two properties. This transaction was subject to the requirements of the Maryland Homeowners Association Act (“the Act”), codified in Title 11B of the Maryland Code, Real Property Article. During negotiations, the parties struck two disclosure documents from the sales contract, and Respondent stated that he was already in possession of the information contained therein. The day before closing, Respondent informed Petitioners that he was canceling the contract.

When Petitioners brought a breach of contract action against him in the Circuit Court for Baltimore County, Respondent asserted that their failure to make the disclosures provided for in § 11B-106(a) of the Act rendered the contract unenforceable. Petitioners, however, argued that Respondent was not entitled to receive the disclosures and thus could not assert this defense. The Act requires that certain disclosures be made to “a member of the public who intends to occupy or rent the lot for residential purposes,” and Respondent, Petitioners contended, was not a member of the public by virtue of his membership in the homeowners association. In the event Respondent did fall under the ambit of the Act, Petitioners argued, he should be estopped from raising as a defense their failure to make the disclosures because he affirmatively refused to receive the documents they offered to him.

Finding Respondent to be “a member of the public,” the Circuit Court granted his motion to dismiss and accordingly denied Petitioners’ motion for summary judgment. The Court of Special Appeals affirmed the judgment of the Circuit Court.

Held: Judgment of the Court of Special Appeals reversed.

The Court of Appeals first interpreted the meaning of the phrase “a member of the public,” finding no support in the plain language of § 11B-106, surrounding statutory provisions, or the Act’s

legislative history for Petitioners' suggestion that the statute draws a distinction between buyers who are already members of a homeowners association and those who are not. The Court thus held that Respondent qualified as "a member of the public" under the Act and so had been entitled to the disclosures.

On the issue of equitable estoppel, however, the Court concluded that the Circuit Court erred in granting the motion to dismiss. Equitable estoppel, the Court observed, may be asserted as a defense to a cause of action or used to avoid a defense, including a defense based on a statutory requirement. Petitioners alleged sufficient facts, the Court found, to give rise to a justiciable equitable estoppel issue and survive a motion to dismiss. The Court thus reversed the judgment of the Court of Special Appeals, remanding the case to the Circuit Court for adjudication of the equitable estoppel claim.

Susan Mummert, et al. v. Massoud B. Alizadeh, et al., No. 5, September Term 2013, filed October 18, 2013. Opinion by Harrell, J.

<http://www.mdcourts.gov/opinions/coa/2013/5a13.pdf>

WRONGFUL DEATH – LIMITATIONS – CLAIMANT’S RIGHT TO SUE

WRONGFUL DEATH – LIMITATIONS – CONSTRUCTION WITH OTHER STATUTES

Facts:

In March 2011, four family members (“the Beneficiaries”) of the decedent, Margaret Varner (“Mrs. Varner”), filed survival and wrongful death claims against Massoud B. Alizadeh, M.D., and his eponymous professional association employer (referred to collectively as “Dr. Alizadeh”) in the Health Care Alternative Dispute Resolution Office of Maryland. The parties waived arbitration, and the case was transferred to the Circuit Court for Washington County. The complaint filed in the Circuit Court contained four wrongful death counts alleging that, between 1997 and 2004, Dr. Alizadeh was negligent and careless in failing to conduct appropriate tests, despite alarming symptoms, that would have revealed a malignant tumor in Mrs. Varner’s colon. The complaint alleged further that Mrs. Varner was diagnosed consequently with Stage IV colorectal cancer in May 2004, which metastasized and caused her death nearly four years later in March 2008.

Dr. Alizadeh filed a motion to dismiss, arguing that, although the Beneficiaries filed their wrongful death claims within three years of Mrs. Varner’s death, their claims were precluded because Mrs. Varner had not brought timely a personal injury lawsuit against Dr. Alizadeh, nor could she have at the time of her death as it would have been time-barred by the statute of limitations applicable to medical negligence claims. After hearings, the Circuit Court entered an order granting the motion to dismiss. The Beneficiaries filed timely a notice of appeal to the Court of Special Appeals. The Court of Appeals issued a writ of certiorari, on its initiative, while the case was pending in the intermediate appellate court. *Mummert v. Alizadeh*, 429 Md. 528, 56 A.3d 1241 (2012). The questions to be considered were:

Under Maryland law, is a wrongful death beneficiary’s right to file a lawsuit contingent upon the decedent’s ability to bring a timely negligence claim on the date of her death?

In addition or in the alternative, does § 5-109 of the Courts and Judicial Proceedings Article apply directly to a wrongful death action arising out of alleged medical negligence and, if so, does it bar Appellants’ wrongful death action?

Held: Reversed and Remanded.

The Court of Appeals held that the wrongful death claimants' right to sue is not contingent on the decedent's ability to file a timely negligence claim before her death. The Court observed that the language in Maryland's wrongful death statute defining a "wrongful act" as one "which would have entitled the party injured to maintain an action and recover damages if death had not ensued" is ambiguous when read in the context of the entire statute. After reviewing the purpose of the statute and case law from other jurisdictions considering similar statutory language, the Court reasoned that the General Assembly created a new and independent action when it enacted the wrongful death statute, and thus the Legislature did not intend for the expiration of the statute of limitations against a decedent's claim before death to bar a wrongful death action brought subsequently by the decedent's beneficiaries within the limitations period for wrongful death actions. The Court also noted that it would be illogical to allow the statute of limitations applicable to the decedent's claim to bar a wrongful death claim before it could accrue.

Considering an additional argument raised by Dr. Alizadeh, the Court held further that § 5-109 of the Courts and Judicial Proceedings Article, the statute of limitations for claims against health care providers for professional negligence, does not apply to wrongful death claims based on alleged medical negligence, and therefore does not operate to bar the claims brought by the Beneficiaries. The Court reasoned that the Legislature did not intend for § 5-109(a) to apply to a wrongful death action because the plain language of that section refers to claims for "an injury," without referring to "death" or "wrongful death."

COURT OF SPECIAL APPEALS

Kimberly Pinsky, et al. v. Pikesville Recreation Council, et al., No. 52, September Term 2012, filed October 30, 2013. Opinion by Zarnoch, J.

<http://www.mdcourts.gov/opinions/cosa/2013/0052s12.pdf>

Eyler, James R., J., dissents.

UNINCORPORATED ASSOCIATIONS – INDIVIDUAL LIABILITY – COMMON LAW

UNINCORPORATED ASSOCIATIONS – INDIVIDUAL LIABILITY – STATUTORY MODIFICATION

UNINCORPORATED ASSOCIATIONS – INDIVIDUAL LIABILITY – BREACH OF CONTRACT

Facts:

In 2008, Pikesville Recreation Council (“PRC”), an unincorporated nonprofit association, hired appellants Kimberly Pinsky and Elizabeth Ann Burman to work in one of its pre-schools for the 2008-2009 school year. At the end of the school year, but before the end of their respective contract terms, PRC terminated Pinsky and Burman and stopped paying them. They sued PRC and the individual officers of PRC in the Circuit Court for Baltimore County to recover the payments still owed to them, plus treble damages, attorney’s fees, and costs. After a three-day bench trial, the circuit court entered judgment for Pinsky and Burman against PRC, but rejected the claims against the individual defendants, on the grounds that they were not personally liable. The court also declined to grant appellants’ motions for sanctions and for attorney’s fees and costs.

Held: Affirmed in part and reversed in part.

The Court of Special appeals affirmed in part and reversed in part, sending the case back to the Circuit Court for Baltimore County for further factfinding on the individual officers’ potential liability for PRC’s breach of contract. The Court first discussed the nature and status of unincorporated associations in general, concluding that unincorporated associations can sue, be sued, and contract in their own names. Regarding personal liability, the Court found that at common law, officers of an unincorporated association were personally liable for the association’s

debts. Because the Maryland statutes that established the legal status of unincorporated associations did not clearly eliminate individual liability, the Court concluded that the officers could be personally liable for PRC's breach of contract. It then examined the principles of liability and determined that liability depends on (a) whether the association is for-profit or nonprofit, and (b) whether the allegedly liable individuals authorized, assented to or ratified the contract in question. Because the circuit court did not ground personal liability on a showing that the individual defendants were officers who authorized, assented to, or ratified the contract, the Court remanded the case for further proceedings.

The dissent argued that the Maryland statute providing "sue and be sued" status to unincorporated associations and protecting members from being liable for association judgments evidenced a legislative intent that the mere status of member or officer acting as an agent for a disclosed legally cognizable principal within the scope of agency would not serve as a basis for liability to creditors. Under this reading, the individual officers would not be liable for PRC's debts. In the alternative, the dissent argued that, under agency principles, the officers of an unincorporated association were not personally liable because they were mere agents acting on behalf of the association, the latter being the principal.

Cory Jamaul Jones v. State of Maryland, No. 2224, September Term 2011, filed September 4, 2013. Opinion by Sharer, J.

<http://www.mdcourts.gov/opinions/cosa/2013/2224s11.pdf>

CRIMINAL PROCEDURE – SEARCH AND SEIZURE – SEARCH INCIDENT TO LAWFUL ARREST– EXIGENT CIRCUMSTANCES – GUNSHOT RESIDUE EVIDENCE

CRIMINAL LAW – SUFFICIENCY – ILLEGAL POSSESSION OF A REGULATED FIREARM

CRIMINAL LAW – TRIAL – JURY INSTRUCTIONS – FLIGHT/CONSCIOUSNESS OF GUILT INSTRUCTION

Facts:

Following a shooting, police, who fortuitously were nearby, pursued and apprehended Jones and seized the handgun that he was carrying. After Jones was booked, a gunshot residue test was performed on his hands. When tested, particles consistent with gunshot residue were found to be present on the swab taken from Jones’s left hand.

Jones’ motion to suppress the results of the gunshot residue test was denied. Following a jury trial in the Circuit Court for Wicomico County, Jones was convicted of attempted first degree murder, first degree assault, use of a firearm in the commission of a felony, illegal possession of a regulated firearm, and related offenses. He was sentenced to life imprisonment on the charge of attempted first degree murder, and two consecutive terms of five years, to be served without the possibility of parole, for the use of a firearm during the commission of a felony and illegal possession of a regulated firearm. Jones’s other convictions were merged for the purposes of sentencing.

On appeal, Jones argued that the collection of gunshot residue evidence constituted an illegal search in violation of his Fourth Amendment rights. He asserted that the circuit court erred in admitting the gunshot residue test results. He also asserted that the test was an involuntary self-incriminating statement admitted in violation of his Fifth Amendment rights, and that the evidence was collected without counsel present, a violation of his rights under the Sixth Amendment. The Fifth and Sixth Amendment assertions were not preserved for appellate review.

Held: Affirmed.

1. Fifth and Sixth Amendment assertions:

Regarding the asserted violations of Jones's Fifth and Sixth Amendment rights, arising for the first time in his appeal, the Court of Special Appeals first determined that these arguments were not properly preserved in the court below. The Court further opined that even had they been preserved, neither Amendment would provide any justification for excluding the gunshot residue evidence or reversing Jones's convictions, because the minimally invasive collection of the gunshot residue evidence, which has been repeatedly classified by other courts as non-testimonial evidence, occurred before any right to counsel had attached and did not involve any interrogation.

2. Fourth Amendment assertions:

As to Jones's preserved claim that in the absence of a search warrant, the collection of the gunshot residue evidence from his hands was an unconstitutional search and therefore, the circuit court erred in denying his motion to suppress, the Court of Special Appeals first recognized that while, generally, a search conducted without a warrant supported by adequate probable cause is unconstitutional, requiring any evidence seized in the course of the search to be excluded. However, exceptions exist allowing the admission of evidence seized in the course of a warrantless search conducted incident to a lawful arrest or collected without a warrant due to exigent circumstances. After reviewing opinions from federal courts and other states that have specifically addressed the admission of gunshot residue evidence collected without a warrant, the Court held that in the instant case, the warrantless intrusion upon Jones's person for the purpose of collecting gunshot residue evidence was a properly limited search incident to appellant's lawful arrest and was further justified by the exigency of the situation presented.

The Court opined that in light of the officers' observations of the shooting and Jones's subsequent actions when the officers attempted to question him, first threatening an officer with a handgun and then fleeing from apprehension, probable cause to arrest Jones was established. Because the arrest was legal, a search of Jones's person and those items in his immediate control were justified to preserve evidence of his criminal actions. The Court further noted that because the officers had probable cause to believe that Jones had recently fired a handgun, the minimally invasive swabbing of his hands to collect any highly evanescent gunshot residue evidence before it could be destroyed was justified by the exigent circumstances. Discerning no error in the circuit court's denial of his motion to suppress, the Court declined to overturn Jones's convictions on the basis of his Constitutional claims.

The Court further found no merit to either Jones's sufficiency argument or his challenge of the trial court's flight instruction.

Bernard Delaney McCree, Jr. v. State of Maryland, No. 525, September Term 2011, filed September 24, 2013. Opinion by Kehoe, J.

<http://www.mdcourts.gov/opinions/cosa/2013/0525s11.pdf>

CHALLENGING THE CONSTITUTIONALITY OF A STATUTE – CRIMINAL LAW
ARTICLE § 8-611 – VOID FOR VAGUENESS – OVERBREADTH

FOURTH AMENDMENT – LENGTH OF TRAFFIC STOP DETENTION – K-9 ALERT

RIGHT TO COUNSEL – RIGHT TO PROCEED PRO SE – MD. RULE 4-215(e)

SUFFICIENCY OF CHARGES AS STATED ON CRIMINAL INFORMATION SHEET

PLAIN ERROR REVIEW – JURY INSTRUCTIONS

Facts:

While driving in Queen Anne’s County, McCree was pulled over because the tag lights on his vehicle had burned out. While the stop was ongoing, the officer called a K-9 unit to the scene. The K-9 alerted, and, during a subsequent search of the vehicle, the officer recovered illegal substances and counterfeit DVDs. In addition to drug charges, McCree was charged with several offenses relating to the possession and distribution of goods bearing counterfeit marks. The jury convicted McCree of some, but not all, of the charged offenses.

On appeal, McCree argued that § 8-611 of the Criminal Law Article, which prohibits the willful manufacture, distribution, or marketing of goods or services that the defendant knows “are bearing or are identified by a counterfeit mark,” was void for vagueness and overbroad. McCree also argued that the length of the traffic stop was unreasonably long, that the trial court had violated his right to proceed pro se, that the charges as stated on the criminal information sheet were defective, and that the trial court had failed to properly instruct the jury as to reasonable doubt.

Held: Affirmed.

The appellate court explained that where the constitutionality of a statute has been challenged, we start with a presumption that the statute is valid. *Galloway v. State*, 365 Md. 599, 610 (2001). The challenging party bears the burden of overcoming the presumption by showing that the statute is: 1) vague, that is, insufficiently clear as to what conduct it prohibits; or 2) overbroad, i.e. it “sweeps within the ambit of constitutionally protected expressive or associational rights.” *Id.* at 611. The court held that § 8-611 was not void for vagueness, observing that the meanings of the terms

employed in the statute either had generally accepted or readily discernable meanings or their meanings were sufficiently clear when viewed in context and properly construed. The court also held that § 8-611(b) was not overbroad because it only criminalized the willful manufacture, distribution, or marketing of goods or services that the defendant knows “are bearing or are identified by a counterfeit mark,” the ambit of which was well removed from the constitutional concerns raised by McCree.

As to the length of the traffic stop, the appellate court explained that a legitimate traffic stop is of reasonable duration when it lasts no longer than is reasonably necessary to effectuate the purposes of the stop. *McKoy v. State*, 127 Md. App. 89, 101 (1999). It further stated that the reasonableness of a stop’s duration cannot be determined solely based on “the running of the clock,” *State v. Mason*, 173 Md. App. 414, 423 (2007), but, instead, focuses on whether the purposes of the stop had been fulfilled at the time of the K-9 alert, and if not, whether the officer was diligently pursuing those purposes at that time. See, e.g., *Byndloss v. State*, 391 Md. 462, 483, 492 (2006). The court concluded that McCree provided it with no legitimate reason as to how or why the officer had failed to act diligently in his efforts.

Lastly, the appellate court held that the trial court did not violate McCree’s right to proceed pro se, that certain inadequacies in the charging document did not deprive the trial court of jurisdiction over the matter, and that the trial court did not commit plain error in instructing the jury as to reasonable doubt.

Elizabeth Unger v. Marilyn Berger, Pers. Rep. of the Estate of Anne Freeman, et al., No. 1018, September Term, 2012, filed September 25, 2013. Opinion by Graeff, J.

<http://www.mdcourts.gov/opinions/cosa/2013/1018s12.pdf>

SUBJECT MATTER JURISDICTION – DEAD BODIES – DISINTERMENT

Facts:

Ann Freeman died in Georgia. After her death, her niece and Personal Representative of her estate, Marilyn Berger, arranged for Ms. Freeman’s body to be cared for in accordance with Jewish custom, and then had her transported from Georgia to Maryland and buried in Ms. Freeman’s family plot in Arlington Cemetery of Chizuk Amuno Congregation in Baltimore City. Ms. Berger asserted that Ms. Freeman was buried at Arlington because, after executing the Will, Ms. Freeman “clearly and unambiguously” instructed Ms. Berger to bury her there.

Elizabeth Unger, Ms. Berger’s sister, filed a petition to probate the Will with the Probate Court of DeKalb County, Georgia. In the petition, Ms. Unger sought to have the Will admitted to probate “so that she can petition for sanctions against [Ms. Berger] for failing to carry out the deceased’s burial instructions as set forth in . . . the Will.” Both Ms. Unger and Ms. Berger agreed that DeKalb County, Georgia was the appropriate forum to probate Ms. Freeman’s Will and administer the estate. Prior to a ruling by the DeKalb County Probate Court, Ms. Unger filed a voluntary dismissal of her petition, without prejudice.

Ms. Unger then filed a Petition for Disinterment and Complaint for Specific Performance in Baltimore City. Ms. Unger asserted that “[t]his case involves the willful disregard of Ann R. Freeman’s Last Will and Testament, wherein she directed her Personal Representative, Defendant Marilyn Berger, to bury her in New Jersey, in a burial plot next to her deceased husband.” Ms. Unger alleged that, in addition to the explicitly stated desires in the Will, Ms. Freeman also had expressed to Ms. Unger, in “multiple conversations,” her desire to be buried beside her husband. The Complaint contained three counts: (1) a petition for disinterment, alleging that the Will unequivocally reflected Ms. Freeman’s intention to be buried in New Jersey, but that Ms. Berger wrongfully had buried her in Maryland; (2) Ms. Berger had breached her fiduciary duty as Personal Representative by failing to carry out the express terms of the Will; and (3) specific performance against Ms. Berger and Arlington. The Complaint requested that Ms. Freeman be disinterred from her current burial site, that her remains be reinterred in New Jersey, and that Ms. Berger pay the costs associated with this relief.

Subsequently, Ms. Berger filed a motion to dismiss asserting, inter alia, that the circuit court did not have subject matter jurisdiction because the Georgia probate court had original, exclusive jurisdiction over controversies arising from the administration of Ms. Freeman’s estate. She

asserted that the proper procedure was to seek relief in the probate court, in Georgia, and in the event that Ms. Unger was successful, to then seek disinterment in Maryland.

After a hearing on the motion to dismiss, the court found that it lacked subject matter jurisdiction, noting that “the true subject matter in this case” was not where the body was buried, but rather, “the testamentary and estate issues,” which the court found should be litigated in the Georgia probate court. Accordingly, it granted Ms. Berger’s Motion to Dismiss.

Held:

Where a will is probated in one state and the deceased is buried in another state, jurisdiction to resolve a subsequent dispute regarding the proper place of burial depends on the nature of the claim raised. Appellant’s claim that the personal representative breached her fiduciary duty in failing to comply with the terms of the will regarding the place of burial was within the subject matter jurisdiction of the Georgia probate court, which has exclusive, original subject matter jurisdiction over all controversies in relation to the right of administration of wills and estates and all other matters and things as appertain or relate to estates of deceased persons. The Circuit Court for Baltimore City, however, had subject matter jurisdiction over other counts seeking an order of disinterment of the deceased’s body, located in Baltimore City. Once the body is buried, it forms no part of the decedent’s estate; thus, is not an estate issue subject to the exclusive jurisdiction of the Georgia court.

In determining if there is good cause justifying the disfavored relief of disinterment, the court should look to the terms of the Will and other evidence regarding the decedent’s wishes.

Stephen J. Miller, et al. v. Rosewick Road Development, LLC, et al., No. 1093, September Term, 2011, filed September 25, 2013. Opinion by Krauser, C.J.

<http://www.mdcourts.gov/opinions/cosa/2013/1093s11.pdf>

ESTATES & TRUSTS – REMOVING TRUSTEES

Facts:

On December 14, 1998, appellants—Stephen J. Miller, Mary Ebner, and Francis Lee Moreland—were appointed, by the Circuit Court for Charles County, as trustees of the Frank E. Connell Trust, under the terms of a consent order entered by that court. The trust’s principal asset was an undeveloped parcel of real property in Charles County. The consent order directed the trustees (that is, appellants) to sell the property and liquidate the trust, by distributing the proceeds from that sale to the trust’s beneficiaries, “as soon as said sale and liquidation may be prudently completed.”

Appellants soon learned that the parcel was very difficult to market, for several reasons: it had been extensively mined for gravel; it contained wetlands; and it lacked both highway access and water and sewer service. They hired legal counsel and consulted an engineering firm to determine how they should market the property, and they entered into negotiations with town and county planning officials in an attempt to obtain infrastructure improvements. The latter efforts met with partial success, as the trust and the county entered into a land swap agreement which resulted in a decision to route a new highway along the southern boundary of the parcel, thereby providing highway access.

Ultimately, the trust entered into two successive sales agreements for the parcel, each time at a sale price of \$10.5 million, but neither agreement led to a completed sale, through no fault of appellants. By then, in late 2007, the southern Maryland commercial real estate market had collapsed, and it remained depressed for several years afterwards. Appellants thereafter received only two distress offers for the property, one, in 2008, for \$5 million, and another, in late 2009, from an affiliate of Rosewick Road Development, LLC, appellee, for \$3.01 million. They rejected both offers.

In 2010, Rosewick Road, having by then acquired the interests of a number of trust beneficiaries, filed a motion in the Charles County circuit court, seeking removal of appellants as trustees and appointment of a successor trustee, who would “fulfill the express purpose” of the consent order by selling the property and liquidating the trust. That motion was supported by a number of beneficiaries, representing, collectively, nearly an eleven percent interest in the trust and who are parties to this appeal as appellees. The circuit court held three hearings on the motion and ultimately granted it, removing appellants as trustees and appointing a successor trustee. Appellants noted an appeal, raising several issues: whether Rosewick Road had standing to seek

their removal as trustees; whether the circuit court exceeded its authority in removing them as trustees; and whether the circuit court clearly erred in doing so.

Held:

Vacated and remanded with instructions to reinstate appellants as trustees. The Court of Special Appeals held that Rosewick Road had standing to seek removal of the trustees, because it had received its trust interest from beneficiaries who, under the express terms of the consent order, could freely alienate their interests, including their rights to enforce the terms of the consent order; and furthermore, contrary to appellants' contention, the motion to remove trustees was not in the nature of an appeal from a consent order but, rather, was an attempt to enforce its terms.

The Court of Special Appeals further held that the circuit court, exercising its general superintending power over a trust, had the authority to remove trustees, over their objection, under Estates and Trusts Article §§ 14-101 and 15-112, despite the fact that the consent order appears, on its face, to require the trustees' recommendation before a successor trustee may be appointed. And, contrary to appellants' assertion, the circuit court did not "unilaterally and impermissibly" alter the terms of the consent order.

On the merits of the circuit court's ruling removing appellants as trustees, however, the Court of Special Appeals held that the circuit court clearly erred in concluding either that appellants had "failed" to perform their fiduciary duties or that they had shown themselves "incapable" of properly performing those duties, the applicable legal standards under Estates and Trusts Article § 15-112(a)(2)(iii) and (a)(1)(iii), respectively. The only evidence supporting the circuit court's finding was the lengthy delay in selling the property combined with appellants' refusal to sell at a severely distressed price, but that evidence was overwhelmed by evidence that appellants had at all times acted diligently in attempting to market the property, maximize its value, and obtain a reasonable price for it.

In re: Priscilla B., No.349, September Term 2013, filed October 30, 2013. Opinion by Nazarian, J.

<http://www.mdcourts.gov/opinions/cosa/2013/0349s13.pdf>

CHILD CUSTODY – NEGLECT

CHILD CUSTODY – EVIDENCE

Facts:

Six-year-old Priscilla B. lived with her parents in a trailer in Berlin, Maryland that was badly in need of repair. She was removed from the home in September 2012 based not only on its condition, but also on her reported weight loss, her parents' neglect of her medical needs, domestic violence in the home, and Father's alcohol abuse. The Worcester County Department of Social Services ("DSS") had been involved with the family before, as Priscilla tested positive for the presence of cocaine at her birth in 2006 and therefore was a CINA for the first year of life, and she had been declared a CINA again and removed from the home in October 2010 after her parents had continuing problems with domestic violence, substance abuse, and housing.

The DSS investigator who came to the home in September 2012 saw an unsafe environment, with holes in the floor inside an unkempt trailer, a kitchen with a dirty refrigerator and clutter all about, and a mattress on the floor for Priscilla to sleep on that Father (who remained argumentative and hostile throughout the worker's visit) insisted was "comfortable." The investigator arranged for Priscilla to stay with her maternal grandmother ("Grandmother") and Carol P. and her family, friends of Grandmother who had kept Priscilla in the past. Mother and Father were to undergo substance abuse counseling and couples counseling, and undertake to repair the home.

At a hearing before a master, Father continued to deny vehemently that his home had ever been unsafe for Priscilla and that he had any substance abuse problems. Grandmother testified that Priscilla's parents fought most of the time. Carol P. testified to how differently Priscilla behaved when she returned from a visit with her parents (ill-at-ease, dirty, nervous) as opposed to when she had been staying at Carol P.'s home (calm, clean, knowing what was expected of her, happy). The master recommended that Priscilla be removed from the home based on its condition, the parents' failure to tend to her medical needs, and their turbulent history and continuing problems with domestic violence and substance abuse. She noted not only that the couple had appeared before her in the past in criminal and traffic proceedings (which she specifically did not rely on here), but also (and this was important to her recommendation) that the allegations in the present CINA proceeding were the same as those in the prior one.

The parents sought circuit court review and submitted their exceptions with a redacted version of the hearing that had taken place before the master. The circuit court clarified that it did not

consider hearsay evidence from the hearing, but that it was aware of the prior CINA proceeding that reflected many of the same allegations against the parents, and it determined that Priscilla did not feel safe in her home. The court noted the continuing presence of DSS and the substance abuse and domestic violence issues (which persisted even after the prior CINA proceeding had come to a close, with one incident the summer before the September 2012 investigation in which Mother called Carol P., hiding behind a trailer after she and Father had an argument, and asked Carol P. to take care of Priscilla if anything happened to her). He also stressed Priscilla's much-improved appearance, demeanor and overall attitude when staying with Carol P. and her family. Based on the totality of the circumstances the court denied the exceptions and found neglect on the part of the parents. Father appealed.

Held: Affirmed.

The Court of Special Appeals noted that poverty “does not render parents unfit or children unsafe.” It also pointed out, though, that neglect can be harder to prove than affirmative abuse, because it is more passive, and that a court must look at the totality of the circumstances to determine whether, by a preponderance of the evidence, a child is a CINA. The Court stressed the “broad discretionary powers” of the juvenile court, and the supporting role played by masters when they provide the first level of review in a CINA proceeding. The master's findings of fact (unlike the circuit court's discretionary disposition based on those facts) are reviewed under a “clearly erroneous” standard.

Proof of neglect can exist without actual harm to a child, and the Court of Special Appeals held that a court could (and should) consider prior history of neglect, as a pattern of inaction can be indicative of neglect. Here, the circuit court was careful to distinguish inadmissible information about prior records of, for example, Father's criminal history—which it did not consider—from admissible and relevant information about the parents' history with DSS. It also properly viewed Father's denial of his problem with alcohol as a credibility issue, and not just a question of prior conduct. (The Court of Special Appeals also noted the practical consideration that, at least in the county where this case took place, there was only one master who had in fact overseen the prior CINA case, and could not be expected to forget about its existence.) The circuit court also properly relied on testimony from Grandmother and Carol P. about continuing problems of domestic violence and substance abuse that unquestionably bore on whether Priscilla should remain with her parents.

The Court of Special Appeals concluded that the circuit court properly examined the totality of the circumstances—based on the condition of the home, Priscilla's improvement upon going to live with Carol P. and her family (and the anxiety that returned each time she visited her parents), medical neglect, and the parents' cycle of alcohol abuse and domestic violence—to find neglect and keep Priscilla in Carol P.'s and Grandmother's shared custody.

Barbara Ann Stewart v. James Edward Stewart, No. 249, September Term, 2011, filed October 3, 2013. Opinion by Krauser, C.J.

<http://www.mdcourts.gov/opinions/cosa/2013/0249s11.pdf>

FAMILY LAW – PRENUPTIAL AGREEMENTS

Facts:

The parties to this appeal, Barbara Ann Stewart, appellant, and James Edward Stewart, appellee, met in 1986 and thereafter engaged in an extramarital affair. At that time, she was a single, twenty-six-year-old working at a daycare center for minimum wage, while he was a married, twenty-four-year-old father of three who ran a successful construction business. Their affair led to the dissolution of Mr. Stewart’s marriage, and, shortly afterwards, they engaged to marry.

Because, at that time, he had approximately \$2 million in assets and his pending bride had practically none, Mr. Stewart informed the future “Mrs. Stewart” that he would not marry her unless she agreed to sign a prenuptial agreement, waiving any and all interest in his assets. His attorney thereafter drafted such an agreement, and Mr. Stewart presented it to Ms. Stewart for her consideration and signature before the wedding. Both parties executed the agreement, and, several days later, they were married. More than twenty years later, their marriage dissolved, and, during the ensuing divorce proceedings, in the Circuit Court for Charles County, Mr. Stewart attempted to enforce the prenuptial agreement they had executed just before the beginning of their marriage.

The circuit court held a hearing to determine whether that agreement was valid and enforceable. At that hearing, the parties disputed precisely when Ms. Stewart had been presented with the prenuptial agreement. The trial court, expressing a desire to avoid “getting into who struck John,” declared that it would assume the truth of Ms. Stewart’s version of events, for purposes of its analysis. It thus assumed that, as Ms. Stewart insisted, she had been presented with the prenuptial agreement four days before the planned wedding date and that she had signed it the same day.

The agreement listed most, but not all, of Mr. Stewart’s assets, though it did not indicate their values. Missing from the agreement was any mention of Mr. Stewart’s individual retirement account (“IRA”), then valued, according to him, at approximately \$60,000, which was approximately three percent of the value of his assets. The agreement was silent as to alimony or a possible monetary award upon dissolution of the marriage, and Mr. Stewart’s counsel conceded that, therefore, neither alimony nor a monetary award was precluded by the terms of the agreement.

At the conclusion of the hearing, the circuit court found, among other things, that Ms. Stewart had “three or four days,” prior to her marriage, during which she could have sought counsel but that

“she elected not to” do so; that she had admitted, during her testimony at the hearing, that “she loved [Mr. Stewart]” and that she “was gonna marry him regardless”; and that “she chose to sign” the prenuptial agreement. Then, it declared that the prenuptial agreement was valid and enforceable.

The parties thereafter entered into a property settlement and separation agreement that incorporated the terms of the prenuptial agreement but reserved Ms. Stewart’s right to appeal the circuit court’s validation of the prenuptial agreement. After a final judgment was entered granting an absolute divorce, Ms. Stewart appealed to the Court of Special Appeals, contending that the circuit court had erred in upholding the prenuptial agreement, because Mr. Stewart had engaged in “overreaching” in obtaining her assent to its terms, and because that agreement was unconscionable.

Held: Affirmed.

The Court of Special Appeals determined that there was not full, frank, and truthful disclosure of all of Mr. Stewart’s assets, as the prenuptial agreement omitted his IRA and did not indicate the values of the listed assets. The Court then assumed, without deciding, that Ms. Stewart did not have “actual” or “adequate” knowledge of the value of Mr. Stewart’s assets. It nonetheless determined, under the “overreaching” standard, as set forth in *Hartz v. Hartz*, 248 Md. 47 (1967), and reaffirmed in *Cannon v. Cannon*, 384 Md. 537 (2005), that the benefit Ms. Stewart obtained, by assenting to the prenuptial agreement, was commensurate with that which she relinquished so that the agreement was fair and equitable under the circumstances, and that, moreover, she entered into that agreement freely and understandingly.

The Court reasoned that the prenuptial agreement was neither substantively nor procedurally unfair, because the marriage conferred upon Ms. Stewart valuable rights that she did not waive under that agreement, namely, the right to receive alimony and a monetary award upon the dissolution of the marriage; and because the circuit court’s findings, that Ms. Stewart had the opportunity to seek the advice of counsel, prior to signing the agreement, but that she “elected not to,” and that she would have signed the agreement regardless of the circumstances attending its formation, were not clearly erroneous. It therefore held that there was no “overreaching.”

The Court also rejected Ms. Stewart’s unconscionability claim, finding that there was neither procedural nor substantive unconscionability. The text of the prenuptial agreement did not contain “fine print” or “convoluted or unclear language,” and the circumstances surrounding its formation were not characterized by “deception” or “a refusal to bargain over contract terms,” factors which typify procedural unconscionability. As to substantive unconscionability, the Court reasoned that the prenuptial agreement was only applicable to property and did not preclude Ms. Stewart from receiving either alimony or a monetary award upon divorce, and therefore, the agreement was not substantively unconscionable.

David Ross v. John Agurs and Progressive Casualty Insurance Company, No. 978, September Term 2012, filed September 9, 2013. Opinion by Bair, J.

<http://www.mdcourts.gov/opinions/cosa/2013/0978s12.pdf>

INSURANCE – WORKER’S COMPENSATION – REDUCTION IN UM/UIM BENEFITS

Maryland Code (1996, 2011 Repl. Vol.), § 19-513(e) of the Insurance Article allows an insurer to reduce the benefits payable under an uninsured/under-insured policy to the extent of the amount of unreimbursed workers’ compensation benefits recovered by the insured. In making this calculation, the insurer is not required to first reduce the unreimbursed workers’ compensation benefits by attorney fees under Md. Code (1991, 2008 Repl. Vol.), § 9-902 of the Labor & Employment Article.

Facts:

On December 8, 2006, David Ross’ (“Ross”) vehicle was struck from the rear by a vehicle driven by John Agurs (“Agurs”). The vehicle driven by Ross was insured with a commercial liability policy issued by Progressive that included uninsured/underinsured motorist (“UM/UIM”) coverage with policy limits of \$1,500,000. Ross’ company also had a workers’ compensation policy providing coverage for bodily injury and medical expenses. The vehicle driven by Agurs was insured by State Farm with third-party liability coverage of \$25,000/\$50,000. Ross sought relief for his injuries by filing a workers’ compensation claim, and a third-party claim against Agurs that was later amended to include Progressive.

Ross filed a third-party claim against Agurs for damages resulting from the accident caused by Agurs’ negligence in the Circuit Court for Prince George’s County on November 25, 2009. On December 23, 2009, Ross filed an amended complaint adding Progressive as a defendant. On June 17, 2011, prior to the trial in circuit court, Agurs offered his \$25,000 policy limits to Ross and Progressive eventually tendered a check in that amount to Ross within sixty days pursuant to Md. Code, § 19-511 of the Insurance Article.

On November 22, 2011, the circuit court jury returned a verdict in favor of Ross for a total of \$95,583.90 and the circuit court entered judgment in favor of Ross in that amount on November 30, 2011. As a result of the \$25,000 payment made by Progressive prior to trial, the remaining balance of the judgment was \$66,583.90. At the time of the trial, Ross’ workers’ compensation claim was closed, and the amount of the unreimbursed workers’ compensation lien was \$84,446.21.

On April 25, 2012, Ross filed a Motion to Enforce Judgment, requesting that the trial court enter an order directing Progressive to pay the sum of \$51,875.58, which Ross contended was the amount due and owing on the balance of the judgment after reduction for unreimbursed workers’

compensation benefits. Progressive subsequently filed an opposition to Ross' motion and the circuit court denied Ross' post-trial motion without a hearing. Ross noted a timely appeal on July 27, 2012.

Held: Affirmed.

Both parties agreed that the balance of the circuit court judgment was \$66,583.90, and that the amount of the workers' compensation lien was \$84,446.21, i.e. the amount Ross received under his workers' compensation claim. The parties also agreed that Progressive was entitled to reduce the benefits payable to Ross under its UIM coverage to the extent of the unreimbursed workers compensation benefits pursuant to § 19-513(e) of the Insurance Article. Ross, however, argued that in order to determine the extent to which UIM benefits must be reduced under § 19-513(e), the amount of reimbursement to the workers' compensation insurer must be reduced by a proportional amount of attorney's fees and costs under § 9-902 of the Labor Employment Article. As a result, Ross argued that what is due and owing as reimbursement under Ins. § 19-513(e) is the amount of the workers' compensation lien less attorney fees and costs. Progressive argued that there is nothing in Ins. § 19-513 or LE § 9-902 that allows the unreimbursed portion of a workers' compensation lien to be reduced by attorney fees and, given the fact that the amount of the lien in this case exceeds the circuit court judgment, they owed nothing to Ross.

The Court of Special Appeals first considered *Parry v. Allstate Insurance Co.*, 408 Md. 130 (2009) where the Court of Appeals explained the interplay between Ins. § 19-513 and LE § 9-902. The Court determined that *Parry* explained that the role of § 9-902 is prevent windfall recovery and restrict duplicative insurance benefits. The Court also addressed Ross' attempt to distinguish *Parry* from his own by arguing that the amount of the lien in *Parry* would have exceeded the available UM/UIM coverage after it was reduced for attorney fees. But the Court found that argument to be unpersuasive because Ross provided no explanation of why the Court of Appeals did not reduce the workers' compensation lien amount in *Parry* by attorney fees if it was as determinative of the outcome as Ross argued.

The Court then considered *Blackburn v. Erie*, 185 Md. App. 504 (2009) where the Court of Special Appeals interpreted the meaning of "reimbursement" under § 19-513(e) and found that one has not been fully reimbursed until all monies advanced had been repaid. Ross urged the Court to find that the legislature did not intend to require a dollar-for-dollar reimbursement, that it was left to the workers' compensation provider and beneficiary, and, thus, was ambiguous. The Court disagreed and found that *Blackburn* made clear that the amount of reimbursement under Ins. § 19-513(e) is determined by the total amount of workers' compensation benefits received.

The Court explained that in both *Parry* and *Blackburn*, the amount of workers' compensation benefits received by the injured employee, for which the carrier asserted a lien, was accepted by the Court as the reimbursement amount under Ins. § 19-513(e). Noting that Ross cited no authority and that the Court found no authority to support his argument that the proper amount is

the amount of workers' compensation lien less attorney's fees, the Court saw no reason to change the reimbursement calculation. Thus, because the amount of the unreimbursed workers' compensation lien exceeded the balance of the judgment, Progressive was not obligated to make payment to Ross under the UM/UIM provision of its policy.

People's Insurance Counsel Division v. State Farm Fire and Casualty Insurance Company, No. 1353, September Term 2012, filed September 26, 2013. Opinion by Eyster, Deborah S., J.

<http://www.mdcourts.gov/opinions/cosa/2013/1353s12.pdf>

INSURANCE – UNFAIR SETTLEMENT PRACTICES

Facts:

During a blizzard in February of 2010, Moira and Gregory Taylor's detached carport collapsed under the weight of ice and snow, landing on their vehicles and on personal property. The carport consisted of a roof and poles set on an asphalt pad. The Taylors filed a claim with State Farm, their homeowners insurance company, seeking recovery for the loss to the carport and the personal property within it. State Farm dispatched a catastrophe team to Maryland to adjust claims resulting from the blizzard. The catastrophe team members were verbally instructed by their on-site team managers about policy language, including being told that a building, as that word is used in State Farm's homeowners policy, means a structure with a roof and at least three walls. One of the catastrophe team members came to the Taylor's home and informed them, verbally and in writing, that their claim for loss to the carport was denied because loss to a detached structure caused by collapse only was covered under their Policy for buildings and a carport without any walls did not meet the definition of a building.

The homeowners filed a complaint with the Maryland Insurance Administration ("MIA"), alleging that the insurer had engaged in unfair settlement practices by making an arbitrary and capricious decision to deny the claim and by not acting in good faith by denying the claim. The People's Insurance Counsel Division ("PICD") of the Attorney General's Office intervened on behalf of insurance consumers before the MIA.

After an evidentiary hearing, the Insurance Commissioner issued a Memorandum and Final Order, making findings and concluding that the insurer had not denied the claim arbitrarily or capriciously and had not denied the claim without good faith. That final agency decision was upheld by the circuit court and then was appealed by the PICD.

Held: Affirmed.

The final agency decision was correct for two independent reasons. First, the Insurance Commissioner found that State Farm had instructed its claims adjusters uniformly about the meaning of the word "building" in its homeowners insurance policy, both in preparation for adjusting the claims resulting from the blizzard and other times, relying upon a lawful principle or

standard That it applied across the board. Therefore, State Farm had not acted arbitrarily, capriciously, or without good faith. These findings were on mixed questions of law and fact, which are reviewed on appeal under the substantial evidence standard. There was substantial evidence in the record to support the findings.

Second, the Insurance Commissioner found that the meaning of the word “building” in the policy was not ambiguous, that it means a structure that has a roof and some walls, and that the policy language is clear that there is no coverage for collapse of a detached structure unless the structure is a building. The Taylors’ carport, having no walls at all, was not a building. Therefore, the loss of the carport due to collapse was not a covered loss and State Farm did not deny the claim arbitrarily or capriciously, or without good faith. The question of whether the Insurance Commissioner correctly interpreted the policy is reviewed de novo. The Court ruled that the interpretation was legally correct.

Donzella Pelletier v. John S. Burson, et al, substitute trustees, No 1250, September Term 2011, filed August 30, 2013. Opinion by Sharer, J. (Retired, Specially Assigned).

<http://www.mdcourts.gov/opinions/cosa/2013/1250s11.pdf>

FORECLOSURE – UNTIMELY MOTION TO DISMISS – EXTRINSIC FRAUD –
DISPOSITIVE DECISION

Facts:

Appellant’s loan, secured by a mortgage on real estate, fell into default and foreclosure proceedings were instituted. A foreclosure sale was held and a timely report of sale and notice of sale were filed. Appellant filed, but later withdrew, a motion to stay ratification.

The sale was ratified and the case ordered “closed statistically.”

Some 65 days later, appellant moved to dismiss and requested a hearing. She asserted fraud, alleging that the substitute trustees signatures were “robo signed,” and bad faith on the part of the lending bank. The circuit court denied appellant’s motion to dismiss without a hearing.

Held: Affirmed.

Assuming the truth of appellant’s assertions of fraud, such irregularity does not constitute an extrinsic fraud that would entitle appellant to relief. Moreover, appellant’s assertions did not rise to the level of irregularity or mistake. Thus, the court did not err in denying her untimely, post-ratification, motion to dismiss.

Nor did the court err in dismissing the motion without a hearing. The dispositive action in the instant case was the court’s ratification of the foreclosure sale and proceedings, not the denial of the motion to dismiss. Hence, a hearing was not required.

Phuonglan Ngo v. CVS, Inc., et al., No. 807, September Term 2012, filed September 25, 2013. Opinion by Salmon, J.

<http://www.mdcourts.gov/opinions/cosa/2013/0807s12.pdf>

WORKER'S COMPENSATION – MAXIMUM MEDICAL IMPROVEMENT

A worker who has reached maximum medical improvement cannot continue to receive temporary total disability benefits under the Maryland Workers' Compensation Act. Instead, in order to continue to receive benefits, the worker must apply for, and be granted, either permanent partial disability or permanent total disability benefits.

Facts:

On December 21, 2010, exactly one year after the claimant, Phuonglan Ngo, was injured in the course of her employment with CVS, the Maryland Worker's Compensation, Commission issued its opinion and order, which read, in material part, as follows:

Hearing was held in the above claim in Beltsville, Maryland on December 1, 2010 on the following issues:

- 1) Maximum medical improvement.
- 2) Temporary total disability.
- 3) Vocational rehabilitation.

The Commission finds that as a result of the accidental injury sustained on December 21, 2009, claimant was paid compensation for temporary total disability from December 22, 2009 to July 26, 2010 inclusive. The Commission finds on the first issue presented that claimant is at maximum medical improvement. The Commission finds on the second issue presented that temporary total disability from July 27, 2010 to present and continuing is denied. The Commission finds on the third issue presented that a 60-day vocational rehabilitation program for job placement is authorized. The Commission further finds that claimant shall be paid compensation for vocational rehabilitation benefits at the temporary total disability rate during the period of vocational rehabilitation.

Claimant filed a petition for judicial review in the Circuit Court for Prince George's County and requested a jury trial. Shortly before trial, the employer/insurer filed a motion in limine, in which movants pointed out that in his video-taped deposition, which was to be shown to the jury at trial, claimant's own expert, Dr. Joel Falik, testified that claimant had reached "maximum medical improvement" in January, 2011. The employer - insurer contended that as a matter of law,

temporary total disability benefits must terminate when the claimant reaches maximum medical improvement. Movants asked the court to rule that “temporary total disability benefits should be limited to a closed period of benefits from July 27, 2010 to January 21, 2011 and not an open and continuous period.” The circuit court denied the motion *in limine*.

Trial was held on January 13, 2012. The video-tape deposition testimony of Dr. Falik was introduced. Dr. Falik testified that claimant reached maximum medical improvement on the date he last saw claimant, which was “in January of 2011.” At the conclusion of the evidentiary phase of the case, the employer/insurer made a motion for judgment based on the same grounds as those set forth earlier in their *in limine* motion. The motion for judgment was denied.

The jury, after deliberation, filled out a special verdict sheet and found as follows:

- 1) That the Claimant reached maximum medical improvement as of “January, 2011,”
- 2) That the Claimant was temporarily and totally disabled from performing any and all work for any period of time after July 27, 2010, solely as a result of the December 21, 2009 accidental injury, and
- 3) That the Claimant continued to be temporarily and totally disabled from July 27, 2010 “until she finds a job.”

The employer/insurer filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, based on the same arguments they had put forth in their *in limine* motion. That motion was granted. Claimant appealed.

Held: Affirmed

In her appeal, claimant relied on language in *Gorman v. Atlantic Gulf & Pacific Co.*, 178 Md. 71, 75 (1940) in support of her position that she could receive temporary total disability benefits even though she had reached maximum medical improvement if she were still totally disabled. This contention was rejected based on the language of several Court of Appeals cases decided after *Gorman* including: *Jackson v. Bethlehem-Fairchild Shipyard, Inc.*, 185 Md. 335, 399-40 (1945) and *Buckler v. Willett Construction*, 345 Md. 350, 360 (1997). The court ruled that once a claimant reaches maximum medical improvement, the claimant is no longer entitled to receive temporary total disability benefits.

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals dated October 9, 2013, the following attorney has been indefinitely suspended by consent:

JOHN GARY BILLMYRE

*

By an Order of the Court of Appeals dated October 9, 2013, the following attorney has been suspended:

JOHN ARTHUR SUTHERLAND, JR.

*

By an Order of the Court of Appeals dated October 11, 2013, the following attorney has been disbarred by consent:

KENNETH RAYMOND WHITE

*

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

BENJAMIN COLE SUTLEY

*

By an Order of the Court of Appeals dated October 17, 2013, the following attorney has been placed on inactive status by consent:

STEVEN MARK VOGELHUT

*

By an Order of the Court of Appeals dated October 18, 2013, the following attorney has been disbarred:

JOHN ARTHUR SUTHERLAND, JR.

*

By an Order of the Court of Appeals dated October 18, 2013, the following attorney has been suspended:

KENNETH MICHAEL ROBINSON

*

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

ANTHONY MAURICE HARMON

*

By an Order of the Court of Appeals dated October 21, 2013, the following attorney has been reprimanded by consent:

TABATHA KARINA CUADRA

*

By an Opinion and Order of the Court of Appeals dated September 27, 2013, the following attorney has been indefinitely suspended, effective October 28, 2013:

LEONARD JEROME SPERLING

*

By an Opinion and Order of the Court of Appeals dated September 30, 2013, the following attorney has been suspended for thirty days, effective October 30, 2013:

DANIEL QUINN MAHONE

*

JUDICIAL APPOINTMENTS

On September 19, 2013, the Governor Announced the appointment of **MICHELLE RENEE SAUNDERS** to the District Court of Maryland – Calvert County. Judge Saunders was sworn in on October 17, 2013 and fills the vacancy created by the elevation of the Honorable E. Gregory Wells to the Circuit Court for Calvert County.

*

On September 19, 2013, the Governor announced the appointment of **MARK STEPHEN CHANDLEE** to the Circuit Court for Calvert County. Judge Chandlee was sworn in on October 18, 2013 and fills the judicial position created by the Maryland Legislature.

*

On September 19, 2013, the Governor announced the appointment of **TERRY ALLEN MYERS** to the District Court of Maryland – Washington County. Judge Myers was sworn in on October 18, 2013 and fills the vacancy created by the elevation of the Hon. Dana Moylan Wright to the Circuit Court for Washington County.

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RULES ORDERS AND REPORTS

A Rules Order pertaining to the One Hundred Seventy-Seventh Report of the Standing Committee on Rules of Practice and Procedure was filed on October 17, 2013:

<http://mdcourts.gov/rules/rodocs/177ro.pdf>