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COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Vernon Charles Donnelly, Misc. Docket AG No. 3, September Term 2016, filed February 15, 2018. Opinion by Watts, J.

https://www.mdcourts.gov/data/opinions/coa/2018/3a16ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – THIRTY-DAY SUSPENSION

Facts:

On the Attorney Grievance Commission's behalf, Bar Counsel filed in the Court of Appeals a "Petition for Disciplinary or Remedial Action" against Vernon Charles Donnelly, Respondent, a member of the Bar of Maryland, charging him with violating Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), 1.4 (Communication), 1.5(a), (b), and (c) (Fees), 1.7 (Conflict of Interest: General Rule), 1.8(i) (Conflict of Interest: Current Clients: Specific Rules: Proprietary Interest), 1.13 (Organization as Client), 1.15(a) and (d) (Safekeeping Property), 1.16(a) and (d) (Terminating Representation), 3.1 (Meritorious Claims and Contentions), 3.3(a)(1) and (2) (Candor Toward the Tribunal), 4.2(a) (Communication with Person Represented by Counsel), 4.4(a) (Respect for Rights of Third Persons), 8.1 (Disciplinary Matters), 8.4(b) (Criminal Act), 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation), 8.4(d) (Conduct That Is Prejudicial to the Administration of Justice), and 8.4(a) (Violating the MLRPC).

A hearing judge found the following facts. Donnelly was one of six people who formed Solomons One, LLC. The other five people were: Deborah Steffen, who is Donnelly's girlfriend; Dr. Alfred Greenberg and Halina Greenberg, who are spouses; and Christine McNelis and Catherine Erickson-File. Solomons One's members had the following interests: Donnelly, 24 1/3%, Steffen, 24%, the Greenbergs jointly, 48 1/3%, Erickson-File, 2 1/3%, and McNelis, 1%. Solomons One's members signed a Memorandum of Understanding and Agreement ("the MOU"), in which Solomons One retained Donnelly as its counsel. Solomons One's purpose was to purchase and develop a piece of real property that was adjacent to the Patuxent River. Solomons One and McNelis acquired ownership interests in the property; Solomons One owned a 70% interest in the property, and McNelis owned a 30% interest. Donnelly and Steffen owned an adjoining property. It was Donnelly's understanding that he, Steffen, Solomons One, and

McNelis had the right to build a pier over the Patuxent River, adjacent to the two properties. On behalf of himself and Solomons One, Donnelly submitted to Calvert County and the State a joint application to build such a pier. Calvert County and the State denied the joint application.

Solomons One's members debated whether to sue Calvert County and the State to secure its right to build a pier. Donnelly drafted, and he and Steffen signed, an Attorney-Client Agreement, naming Solomons One as the client and Donnelly as the attorney for Solomons One. On behalf of himself and Solomons One, Donnelly filed a complaint against Calvert County and the State, seeking the right to build a pier ("the Pier Case"). Donnelly contended that he forwarded to the Greenbergs and Daniel Guenther, the lawyer for Erickson-File and McNelis, a cover letter describing the Attorney-Client Agreement, with the Agreement and the complaint as attachments. While the Pier Case was pending, Donnelly drafted an Assignment of Contract Rights, in which Solomons One purportedly assigned its right to build a pier to Donnelly to hold as a trustee for Solomons One's members. The Assignment of Contract Rights changed the contingency fee arrangement that was set forth in the Attorney-Client Agreement. Donnelly and Steffen were the only members of Solomons One who signed the Assignment of Contract Rights.

On Solomons One's behalf, without authorization of the members of Solomons One, Donnelly filed a complaint against McNelis, seeking a partition of the property owned by Solomons One and McNelis ("the Partition Case"). Subsequently, at a meeting of Solomons One's members, members who owned a majority of Solomons One voted to revoke the MOU and discharge Donnelly as Solomons One's counsel. Donnelly, however, continued to act on Solomons One's behalf in the Pier Case. Donnelly's position was that, although the revocation of the MOU terminated him as Solomons One's counsel for general purposes, the Attorney-Client Agreement independently authorized him to continue to represent Solomons One in the Pier Case. Solomons One was ultimately successful in the Pier Case, with Solomons One gaining the right to build a pier.

Jennifer Kneeland, counsel for the Greenbergs, and Laurence W.B. Cumberland, counsel for Erickson-File and McNelis, filed complaints against Donnelly with Bar Counsel. In the complaints, Kneeland and Cumberland alleged that, among other misconduct, Donnelly acted without Solomons One's authorization in continuing to represent Solomons One in the Pier Case, drafting and executing the Assignment of Contract Rights, and filing the complaint to seek a partition of Solomons One's and McNelis's property. Bar Counsel requested from Donnelly a response to Kneeland's and Cumberland's complaints. In his response, Donnelly stated that he had served as Solomons One's counsel until he was discharged on the date on which the MOU was revoked.

The hearing judge concluded that Donnelly had violated MLRPC 1.2, 1.4, 1.5, 1.8(i), 1.13(a), 1.15(d), 1.16(a)(3) and (d), 3.1, 3.3(a)(1), 8.1, and 8.4(c), (d), and (a), but had not violated MLRPC 1.7, 4.2(a), 4.4(a), or 8.4(b).

Held: Suspended from the practice of law in Maryland for thirty days.

The Court of Appeals denied a request by Donnelly for a new hearing on the grounds that Bar Counsel failed to conduct an independent investigation of Kneeland's and Cumberland's complaints against him; that Bar Counsel inappropriately dismissed a complaint against another attorney who represented Erickson-File and McNelis in a matter; that Bar Counsel engaged in discovery violations; that it was improper for Bar Counsel to call a lawyer who represented Erickson-File and McNelis as a rebuttal witness at the hearing; and that Donnelly had lacked sufficient notice of the allegations that he made false statements in his letters to Bar Counsel. Donnelly did not bring to the Court's attention any authority that supported his contention that a new hearing was warranted because of alleged flaws in Bar Counsel's investigation, or because Bar Counsel chose not to charge another lawyer for allegedly similar misconduct. Bar Counsel's decision not to charge another lawyer had no bearing on the question of whether Donnelly violated the MLRPC. The Court explained that, although the allegation that Bar Counsel failed to conduct an independent investigation was worrisome, it was not a defense to Donnelly's alleged violations of the MLRPC that Bar Counsel allegedly did not conduct a thorough investigation. Any MLRPC violations that the Court concluded were supported by clear and convincing evidence were substantiated by the hearing judge's findings of fact, testimony from the disciplinary hearing, and other evidence in the record. The Court determined that Donnelly's allegations concerning Bar Counsel's discovery violations were troubling, but did not persuade the Court that a new hearing was warranted. Donnelly did not identify the documents that he sought, or why the documents would have been helpful to his case. In the Petition for Disciplinary or Remedial Action, Bar Counsel alleged that the documents that contained false statements by Donnelly in violation of MLRPC 8.1 were his responses to Kneeland's and Cumberland's complaints against him. Although Bar Counsel did not identify the particular false statements attributable to Donnelly, the allegations were specific enough to provide adequate notice of the nature of the alleged violations.

The Court concluded that the hearing judge did not clearly err to the extent that he found that members who owned a majority of Solomons One did not expressly authorize Donnelly to execute the Attorney-Client Agreement. The Court determined, however, that Dr. Greenberg received notice of the Attorney-Client Agreement via a letter in which Donnelly described the Attorney-Client Agreement. The Court noted that a person accepts an offer of services through silence where the person knows the terms on which the services are offered, receives the benefit of the services, and does not reject the offer despite having a reasonable opportunity to do so. The Court concluded that the Attorney-Client Agreement was accepted by Dr. Greenberg after his receipt of Donnelly's letter, notifying him of the existence of the Attorney-Client Agreement and its relevant terms with respect to attorney's fees. Dr. Greenberg received the benefit of the legal services that Donnelly provided to Solomons One. Indeed, Solomons One ultimately prevailed in the Pier Case, in which a circuit court entered a declaratory judgment that Solomons One had a right to build a pier.

The Court concluded that the hearing judge did not clearly err in finding that the Assignment of Contract Rights was unauthorized. The Greenbergs, McNelis, and Erickson-File testified that they did not authorize Donnelly to execute the Assignment of Contract Rights. The hearing judge found that, on the issue of whether Donnelly was authorized to execute the Assignment of Contract Rights, Bar Counsel's witnesses were more credible than Donnelly's witnesses.

The Court concluded that the hearing judge did not clearly err in finding that the complaint in the Partition Case was unauthorized. The Greenbergs and Erickson-File testified that they did not authorize Donnelly to file the complaint. Without the consent of either of the Greenbergs or Erickson-File to file the complaint in the Partition Case, Donnelly could not have obtained the consent of members who owned a majority of Solomons One.

The Court sustained Donnelly's exceptions to the hearing judge's findings that he engaged in dishonesty and misrepresentation with regard to: attempting to bind Solomons One to the Attorney-Client Agreement; continuing to represent Solomons One in the Pier Case after the meeting of Solomons One's members at which the MOU was revoked; stating in his response to Kneeland's and Cumberland's complaints that he had served as Solomons One's counsel until he was discharged on the date on which the MOU was revoked; filing the complaint in the Partition Case without authorization; and executing the Assignment of Contract Rights, which he purportedly used to divest Solomons One of its right to build a pier, and to enable himself to pursue the Pier Case without acting as Solomons One's counsel. Given that Donnelly provided notice of the Attorney-Client Agreement in his letter to Dr. Greenberg, testified that he sent the Attorney-Client Agreement to Erickson-File's and McNelis's counsel, and sent bills and updates to the members of Solomons One concerning his representation of the company in the Pier Case, the Court was not convinced that there was a sufficient basis for the hearing judge's finding that Donnelly engaged in dishonesty or deceit in executing the Attorney-Client Agreement, or in stating to Bar Counsel that the Attorney-Client Agreement was valid. Although Donnelly's general role as Solomons One's counsel ended when the MOU was revoked, Donnelly contended that the Attorney-Client Agreement provided an independent source of authority for him to continue to act as Solomons One's counsel in the Pier Case; under these circumstances, the evidence did not support the hearing judge's determination that Donnelly was dishonest in continuing to represent Solomons One in the Pier Case. Donnelly's statement to Bar Counsel that he had served as Solomons One's counsel until he was discharged on the date on which the MOU was revoked was accurate. The circumstance that members who owned a majority of Solomons One did not authorize the complaint in the Partition Case did not automatically lead to the conclusion that Donnelly acted with dishonesty or made a misrepresentation; the Court declined to conclude that taking an action on behalf of a client absent explicit authorization, without any additional evidence of dishonesty, fraud, deceit, or misrepresentation, was per se an act of dishonesty. There was no evidence that Donnelly's purpose in executing the Assignment of Contract Rights was to divest Solomons One of its right to build a pier.

The Court overruled Bar Counsel's exceptions to the hearing judge's finding that Donnelly's misconduct was mitigated by the circumstance that the Assignment of Contract Rights did not cause Solomons One substantial financial harm, and the hearing judge's failure to find that Donnelly's misconduct was aggravated by a dishonest or selfish motive, false statements, and other deceptive practices during the attorney discipline proceeding. The Court sustained Bar Counsel's exception to the hearing judge's failure to find that Donnelly's misconduct was aggravated by substantial experience in the practice of law.

The Court concluded that Donnelly violated MLRPC 1.2(a) by filing the complaint in the Partition Case and executing the Assignment of Contract Rights without authorization. Donnelly

violated 1.4(a)(2) by failing to provide the complaint in the Partition Case and the Assignment of Contract Rights to Solomons One's other members. Donnelly violated MLRPC 1.5(b) by failing to communicate changes to the fee arrangement that were set forth in the Assignment of Contract Rights. Donnelly violated MLRPC 1.5(c) by not having the Attorney-Client Agreement, which called for a contingency fee, signed by members who owned a majority of Solomons One. Donnelly violated MLRPC 1.16(a)(3) by failing to withdraw from the Partition Case after the MOU was revoked, and after he was expressly told to do so. Donnelly violated MLRPC 1.16(d) by failing to promptly surrender Solomons One's papers to its new counsel. Donnelly violated MLRPC 8.4(d) by engaging in conduct that would negatively affect the public's perception of the legal profession.

The Court noted four aggravating factors: substantial experience in the practice of law, a pattern of misconduct, multiple violations of the MLRPC, and a refusal to acknowledge the misconduct's wrongful nature. The Court noted two mitigating factors: the absence of prior attorney discipline, and unlikelihood of repetition of the misconduct.

In light of the absence of substantial financial harm to Solomons One, the lack of prior attorney discipline, and the circumstance that Donnelly's conduct was unlikely to recur, the Court concluded that a thirty-day suspension was the appropriate sanction for Donnelly's misconduct. In the Court's view, that sanction would impress upon Donnelly, and all other members of the Bar of Maryland, the necessity of obtaining clients' authorization before taking important actions, providing important documents to clients, communicating changes in fee arrangements to clients, and withdrawing from cases and surrendering files in a timely manner after clients terminate the representation.

Concerning the circumstance of a lawyer filing with Bar Counsel a complaint against another lawyer regarding his or her conduct in ongoing litigation in which the complaining lawyer is opposing counsel, the Court stated that it would be advisable for Bar Counsel to await the conclusion of the underlying litigation before determining whether an attorney discipline proceeding is warranted. Following this procedure would avoid any perception that Bar Counsel and the attorney disciplinary process are being used to further the complaining attorney's interest in ongoing litigation. The Court stated that, regardless of whether Bar Counsel awaits the disposition of litigation in which a lawyer allegedly engaged in misconduct, Bar Counsel should conduct an investigation that is independent of the existing litigation.

Martaz Johnson v. State of Maryland, No. 6, September Term 2017, filed February 21, 2018. Opinion by McDonald, J.

Adkins and Watts, JJ., dissent.

https://mdcourts.gov/data/opinions/coa/2018/6a17.pdf

EVIDENCE – EXPERT TESTIMONY – BUSINESS RECORDS – G.P.S.

Facts:

Petitioner Martaz Johnson, a former officer with the Maryland Transit Administration ("MTA") police, was charged with assaulting and raping a young woman shortly after she had been involved in a traffic accident with an MTA bus. According to the young woman, Mr. Johnson had responded to the scene of that accident in his official capacity and drove her home, where the offense occurred. Among the equipment that Mr. Johnson carried that evening as part of his job was a mobile GPS device, which allowed the MTA to keep track of the locations of its officers.

At the trial in the Circuit Court for Baltimore City, the State introduced GPS data from Mr. Johnson's device that matched the itinerary given by the woman in her testimony at trial. That evidence was introduced by a custodian of records of the MTA police.

Mr. Johnson's defense counsel objected to admitting that evidence on several bases. These included the personal knowledge of the witness, whether the information was generated for the purpose of trial, the completeness of the record, whether the record was kept in the ordinary course of business, and the witness's lack of technical expertise.

The Circuit Court declined to admit the entire report at that time, but overruled Mr. Johnson's objection. The Court found that the records were kept in the ordinary course of business, and permitted the State to question the witness about the two entries that corroborated the young woman's testimony.

The State asked the witness to read those two entries. Each contained the date, a time, a duration of time, and an address. The State asked the witness what the entries meant, and the witness said they meant Officer Johnson was on those locations at those times. Mr. Johnson did not object to this testimony or move to strike it from the record.

The jury convicted Mr. Johnson of misconduct in office and two counts of second-degree assault. Mr. Johnson filed a timely appeal to the Court of Special Appeals, where he raised issues with the admissibility of GPS evidence through a lay witness and opinion testimony. The State argued the issues were not preserved because objections to the report were not framed that way at trial. The Court of Special Appeals assumed without deciding that the matter was preserved, and affirmed the convictions. Mr. Johnson petitioned the Court of Appeals for a writ of certiorari, to which the State cross-petitioned on the preservation issue. We granted both.

Held: Affirmed.

The Court of Appeals held that Mr. Johnson preserved the issue of whether GPS records require expert testimony to be admissible. The Court described the question as close considering the panoply of other issues identified in the objection, but noted that this case is one of the rare instances that would have justified addressing an unpreserved issue. However, it also held that Mr. Johnson had not preserved his argument regarding opinion testimony because nothing in the record could be fairly read as raising the issue.

The Court also held that expert testimony was unnecessary because a juror could understand the significance of this particular GPS data through their own experience. The Court compared GPS technology to other common devices, such as clocks, scales and thermometers. Like GPS, they are pervasive and generally reliable tools of measurement. Although the public does not necessarily understand how they work, the technology is familiar enough that people understand their approximate margin of error and common sources of error.

The Court distinguished this case from its decision in *State v. Payne*, 440 Md. 680 (2014), which required an expert witness for testimony regarding cell tower location information. The records in *Payne* did not list locations, but cell towers and the amount of time it took to send and receive signals. The data was meaningless to the average juror without a specialized process to translate it into a general location. No process was necessary here because the location information was recorded as a street address.

State of Maryland v. Robert Clifford Weddington, No. 52, September Term 2017, filed February 21, 2018. Opinion by Greene, J.

https://mdcourts.gov/data/opinions/coa/2018/52a17.pdf

CRIMINAL LAW – MARYLAND RULE 4-215 – RIGHT OF DEFENDANT TO REQUEST DISCHARGE OF COUNSEL

CRIMINAL LAW – MARYLAND RULE 4-215 – WAIVER OF REQUEST TO DISCHARGE COUNSEL

Facts:

Mr. Weddington was charged with various counts of sexual and child abuse. While awaiting trial, Mr. Weddington sent a letter to the Circuit Court for Baltimore City in which he complained of his trial counsel and requested that he be referred to a panel attorney. Mr. Weddington's letter was sent on October 26, 2015. The Circuit Court held a hearing on Mr. Weddington's letter, pursuant to Md. Rule 4-215(e), which mandates the steps a trial court must take when a defendant has requested to discharge his trial counsel. After a hearing on the October 26, 2015 letter, the Circuit Court ruled that there was no meritorious reason for Mr. Weddington to discharge counsel and denied his request. Thereafter, Mr. Weddington mailed two additional letters to the Circuit Court. One letter was received by the Circuit Court on November 24, 2015. The Circuit Court received his second letter on January 20, 2016. In each letter, Mr. Weddington expressed his dissatisfaction with his counsel, including allegations that he and his counsel were not getting along and that his attorney's gender made her biased towards him due to the nature of the charges against him. The Circuit Court took no action on either of Mr. Weddington's letters. After separate trials, on February 2, 2016 and February 5, 2016, Mr. Weddington was convicted of various counts of child and sexual abuse of a minor. On March 14, 2016, the Circuit Court held a hearing on Mr. Weddington's January 20, 2016 letter. After inquiring into the reasons for Mr. Weddington's request, the Circuit Court deferred making a ruling so that the trial judge could read the transcript of the previous Rule 4-215(e) hearing. The Circuit Court reconvened, and at the outset of the hearing, the hearing judge acknowledged that Mr. Weddington's January 20 letter was not in the Court's file prior to his February 2, 2016 trial. Again, the Court asked Mr. Weddington for his reasons for wanting to discharge his counsel and asked Mr. Weddington why he did not bring up the existence of his letter with the judge prior to trial. At the conclusion of the hearing, the Circuit Court denied Mr. Weddington's request to discharge his counsel.

Mr. Weddington noted an appeal to the Court of Special Appeals. In an unreported opinion, the Court of Special Appeals vacated the judgments of the trial court and remanded for new trials. The intermediate appellate court held that *Williams v. State*, 435 Md. 474 (2013), was directly on point and that Mr. Weddington's January 20, 2016 letter was sufficient to trigger Md. Rule 4-215(e).

Held: Affirmed.

The Court of Appeals held that the Circuit Court did not comply with the strict mandates of Rule 4-215(e). Mr. Weddington's November 24, 2015 and January 20, 2016 letters were clear in their expressions of a desire to discharge his counsel. That the Circuit Court neglected to take any action on two letters that Mr. Weddington sent to the Circuit Court prior to his trials was error. The Circuit Court's post-trial hearing on the January 20, 2016 Letter did not cure the violation of Rule 4-215(e) because a post-trial hearing does provide a defendant the opportunity to decide whether he wants to discharge counsel and represent himself.

Additionally, the Court of Appeals held that the defendant's failure to bring to the Court's attention orally or in open court the existence of the two letters that he had sent to the Circuit Court did not constitute a waiver of his right to discharge counsel. The Court of Appeals reaffirmed its previous holding in *Williams v. State*, 435 Md. 474 (2013), that Rule 4-215(e) does not require that a request to discharge counsel be made orally or in open court.

Barrington Dean Watts v. State of Maryland, No. 17, September Term 2017, filed February 20, 2018. Opinion by Greene, J.

https://www.mdcourts.gov/data/opinions/coa/2018/17a17.pdf

APPELLATE PROCEDURE – PRESERVATION – RULE 4-325(e) – SUBSTANTIAL COMPLIANCE

CRIMINAL LAW – SECTION 3-201(b) – STATUTORY INTERPRETATION – ASSAULT STATUTE – DEFINITION OF SECOND DEGREE ASSAULT

CRIMINAL LAW – CRIMINAL PROCEDURE – JURY INSTRUCTIONS – UNANIMITY INSTRUCTION FOR ASSAULT

Facts:

In the Circuit Court for Montgomery County, Barrington Dean Watts, Petitioner, was charged and convicted of seven crimes, including two counts of first degree assault. When instructing the jury prior to deliberations, the trial judge explained the law as it pertained to assault by delivering the pattern jury instruction for assault in the modality of intent to frighten as well as battery. The trial judge delivered instructions about a unanimous jury decision, but the trial judge did not instruct the jury to reach a unanimous decision as to which modality of assault was committed. Petitioner's attorney objected but did not offer a curative instruction. The Court of Special Appeals affirmed the trial court in an unreported opinion, holding that, assuming the issue was preserved, the assault statute consisted of one crime that could be carried out through various modalities.

Held: Affirmed.

The Court of Appeals held that a trial court's alleged error when giving jury instructions was preserved when the party alleging the error substantially complied with Maryland Rule 4-325(e). The issue was preserved based upon substantial compliance when, as in this case, the objection is made after the instructions were given, the basis was stated, the trial judge noted the exception on the record, and then overruled the objection. A particular curative instruction did not need to be requested to preserve the issue.

Further, the Court of Appeals held that, consistent with the decision in *Lamb v. State*, 93 Md. App. 422, 428, 613 A.2d 402, 404 (1992), *cert. denied*, 329 Md. 110, 617 A.2d 1055 (1993), the term "assault" in Section 3-201(b) of the Criminal Law Article of the Maryland Code includes the following modalities of second degree assault: battery, attempted battery, and intent to frighten. The common law previously defined assault, battery, and assault and battery, and the common law understandings of these crimes were incorporated into Section 3-201(b).

Additionally, the Court of Appeals held that each particular modality of committing a second degree assault was not an independent and distinct crime, but merely a single violation of the assault statute. Previously, this Court in *Robinson v. State* determined that the legislative revisions and consolidation of the assault statute in 1996 intended to create a singular scheme for assault law in Maryland, necessarily abrogating the common law. 353 Md. 683, 701, 728 A.2d 698, 706 (1999). The legislative history of the 1996 revisions to the assault statute revealed that the Maryland General Assembly intended to replicate what it had accomplished when it revised and consolidated the theft statute. Consistent with this Court's interpretation of the theft statute in *Rice v. State*, 311 Md. 116, 126, 532 A.2d 1357, 1361 (1987), a unanimous jury instruction as to the specific modality was not required because violations of the statute only constituted distinct modalities of one crime. Therefore, Petitioner was not entitled to have the trial judge instruct the jury to unanimously agree to which modality of assault Petitioner had committed.

State of Maryland v. Neiswanger Management Services, LLC et al., No. 28, September Term 2017, filed February 20, 2017. Opinion by Adkins, J.

https://mdcourts.gov/data/opinions/coa/2018/28a17.pdf

HEALTH – INJUNCTIVE RELIEF – EFFECT OF STATUTORY AUTHORIZATION

HEALTH – INJUNCTIVE RELIEF – AUTHORITY TO ENFORCE

Facts:

Neiswanger Management Services, LLC ("Neiswanger") operates several Maryland nursing facilities. On December 21, 2016, the State of Maryland, through the Attorney General, filed a two-count Complaint in the Circuit Court for Montgomery County against Neiswanger and other related defendants. The State alleged violations of the Maryland Patient's Bill of Rights, Md. Code (1982, 2015 Repl. Vol.), §§ 19-343 et seq. of the Health General ("HG") Article, and the Maryland False Health Claims Act, HG §§ 2-601, et seq. Count One related to allegedly unlawful involuntary discharges of residents from Neiswanger facilities.

The State alleged that Neiswanger engages in a pattern of unlawful involuntary discharges of residents from their nursing facilities in violation of HG §§ 19-345, 19-345.1, and 19-345.2 that threaten hundreds of individuals residing in Neiswanger facilities. The State provided detailed factual narratives of eight Neiswanger residents' discharges between October 2015 and August 2016, asserting that the residents were improperly discharged to family members' homes, homeless shelters, or predatory unlicensed assisted living facilities in violation of the Patient's Bill of Rights. The State claimed that Neiswanger failed to communicate with residents and their family members regarding discharge plans. Three of the identified residents had been evicted from Neiswanger facilities on multiple occasions over a period of several years. Some residents required hospitalization after serious or life-threatening medical complications caused by the evictions.

The State asserted that Neiswanger engages in unlawful discharge practices to benefit from the public insurance payment system for residents of nursing facilities in Maryland. The Complaint charged that Neiswanger discharges residents when their coverage changes from a higher Medicare reimbursement rate to the lower Medicaid reimbursement rate. The State also claimed that Neiswanger unlawfully discharges Medicaid recipients to ensure spaces for more lucrative Medicare recipients in violation of the Patient's Bill of Rights.

Neiswanger's allegedly unlawful practices include improper procedures surrounding discharge notices to both residents and families. The State also contended that Neiswanger fails to properly document discharges, or provide residents and families with statutorily-required information about the discharge. Neiswanger also allegedly fails to comply with provisions of the Patient's Bill of Rights governing discharge planning. The State also alleged that

Neiswanger violates a provision of the Patient's Bill of Rights requiring nursing facilities to cooperate with and assist residents' agents in applying for long-term coverage from Medicaid.

Relying on HG § 19-344(c)(6)(iii) and HG 19-345.3(c), Count One of the State's complaint sought an injunction prohibiting Neiswanger from engaging in further violations of the Patient's Bill of Rights, HG §§ 19-344 through 19-345.2 and COMAR 10.07.09, and preventing Neiswanger from engaging in certain alleged discharge practices.

After the State filed its Complaint, in a separate administrative action, the Department of Health prohibited Neiswanger facilities from admitting or re-admitting residents. After a hearing, an administrative law judge recommended that the Secretary of Health rescind the ban. Neiswanger entered into a Consent Agreement, which required Neiswanger to implement certain changes to its procedures. Neiswanger also entered into a Memorandum of Understanding to implement the Consent Agreement, which expired after three months.

Neiswanger and the other defendants moved to dismiss the Complaint. The Circuit Court dismissed Count One of the State's Complaint for failure to state a claim upon which relief can be granted. It concluded that HG § 19-345.3(c) did not authorize a broad injunction against company practices, but only permitted injunctive relief to prevent or redress an individual resident's unlawful involuntary discharge or transfer. It also determined that the State lacked authority to seek injunctive relief under HG § 19-344(c)(6)(iii) because the statute did not specify injunctive relief as an available means of enforcement. The State appealed. Before the Court of Special Appeals issued a scheduling order, the State petitioned the Court of Appeals for a writ of certiorari, which the Court granted.

Held: Reversed.

Neiswanger asserted that it was no longer operating the facilities and that the Consent Agreement and Memorandum of Understanding rendered the case moot. The Court concluded that because there was insufficient information before it to determine if the matter was moot, the matter should be addressed by the Circuit Court on remand. Even if it was moot, the Court determined that it could resolve the case through two exceptions to mootness: voluntary cessation, or an issue of important public interest.

HG § 19-345.3(c) authorizes the Attorney General, on behalf of the resident, to seek injunctive relief if the Attorney General believed that an involuntary discharge or transfer in violation of HG §§ 19-345 through 19-345.2 had taken place or was imminent. Observing that there was a lack of Maryland authority interpreting the phrase "on behalf of," the Court turned to the legislative history of the 1995 Amendments to the Patient's Bill of Rights. These Amendments established the relevant statutory provisions as well as a broad policy of according legislative protection to vulnerable residents of nursing homes, with specific procedures before an involuntary discharge or transfer could take place. The Court concluded that the statutes were remedial, and should therefore be read broadly.

Federal precedent relating to remedial statutes suggested that a court interpreting legislatively-authorized injunctive relief should not construe a statute narrowly when doing so would be inconsistent with the legislative policy animating the statute. Maryland precedent on statutorily authorized injunctions demonstrated that such statutes establish standards for circuit courts reviewing a request for injunctive relief. Statutes authorizing equitable relief are presumed to authorize a court to exercise its traditional equitable powers to provide complete relief in light of statutory purposes unless those powers are specifically restricted by the statute. The Court explained that HG § 19-345.3(c) did not operate as a limitation on available remedies, but was how the legislature had circumscribed the traditional showing a party was required to make before a court could issue an injunction.

The Court held that HG § 19-345.3(c) authorized the Attorney General to bring suit on behalf of multiple unnamed residents who have been subjected to, or awaited, imminent, unlawful involuntary discharges, provided that at least one individual's statutory rights had been violated. A court could issue complete injunctive relief reaching a facility's policies for violations of HG §§ 19-345, 19-345.1, and 19-345.2.

Turning to the second statute, HG § 19-344(c)(6)(iii), which authorized the Attorney General to enforce and prosecute violations of specific provisions of HG § 19-344(c), the Court explained that while the majority of those provisions addressed residents' agents' obligations, HG § 19-344(c)(5)(ii) established a mandatory obligation for a facility to cooperate with and assist residents' agents in seeking assistance from Medicaid. The Court observed that injunctions are a common tool of statutory enforcement.

The Court explained that statutes authorizing enforcement carried some implied powers, and that an explicit authorization of injunctive relief in one provision did not necessarily foreclose injunctive relief to enforce other provisions, particularly when enforcing such statutes was consistent with the intent of the Legislature. Because the Attorney General had exclusive power to enforce agents' obligations, it was only logical that the Attorney General could enforce facilities' obligations as well. The Court held that HG § 19-344(c)(6)(iii) permitted the Attorney General to seek injunctive relief to require a facility to comply with its statutory obligation to cooperate with and assist a resident's agent in seeking assistance from Medicaid.

Precision Small Engines, Inc. et al. v. City of College Park et al., No. 43, September Term 2017, filed February 21, 2018. Opinion by Hotten, J.

https://mdcourts.gov/data/opinions/coa/2018/43a17.pdf

ZONING – COUNTY AUTHORITY – DELEGATION OF POWER

ZONING – MUNICIPAL AUTHORITY – RETENTION OF POWER

CONTRACTS – INTERPRETATION – MEMORANDUM OF UNDERSTANDING

Facts:

Petitioners, Precisions Small Engines ("PSE"), Gregory Hnarakis ("Hnarakis"), and Thomas Stokes ("Stokes") challenged citations issued by Respondent, the City of College Park in the District Court of Maryland sitting in Prince George's County. PSE and other occupants of shared property received citations after failing to obtain required City permits. PSE challenged its fines, arguing that portions of a Memorandum of Understanding ("MOU"), entered into by Respondents, the City of College Park ("the City") and Prince George's County ("the County"), prohibited the City from issuing any occupancy and building permits, including permits authorized under the City Code. On this basis, some, but not all, of the fines were dismissed. Hnarakis employed the same argument, but it was not successful.

On December 1, 2014, while the disputes were still pending before the District Court for Prince George's County, Petitioners filed an action for declaratory judgment in the Circuit Court for Prince George's County. Petitioners sought a declaration that the terms of the MOU restricted the City from requiring City non-residential occupancy or building permits where occupants previously obtained use and occupancy, or building permits, from the County. Respondents filed a Motion for Summary Judgment on December 4, 2015. On February 18, 2016, the circuit court held a hearing.

In a Memorandum Opinion and Order, issued May 24, 2016, the circuit court decided that the MOU restricted the City from requiring owners or occupants of non-residential properties within the municipal corporate limits to obtain non-residential occupancy permits issued by the City, where such persons have obtained County use and occupancy permits. The court also determined that the MOU restricted the City from requiring owners or occupants of non-residential property within the municipal corporate limits to obtain building, grading, or other construction permits from the City, where persons have obtained permits from the Department of Permits, Inspection, and Enforcement. The circuit court opined that the City's and County's permits virtually serve the same purpose, and the only difference between the permits is that the City permit must be renewed annually after re-inspection, whereas the County permit is issued upon changes in property use or occupancy. However, the circuit court held that the City could

exercise its police powers for the purpose of health, safety, and welfare, including annual inspections, and any other purpose not specifically addressed in the Order.

Respondents noted a timely appeal. The Court of Special Appeals issued a reported opinion on June 6, 2017, reversing the circuit court's decision. The Court reasoned that the plain language of the MOU clearly dictated that the City did not give up any of its power to adopt and enforce its own building code, or its own health, safety, and welfare regulations. *City of College Park v. Precision Small Engines*, 233 Md. App. 74, 87, 161 A.3d 728, 735, *cert. granted sub nom*. *Precision Small Engines v. Coll. Park*, 456 Md. 57, 170 A.3d 292 (2017). The Court of Special Appeals reasoned that the circuit court's ruling deviated from the MOU's plain language, and projected an interpretation outside of the parties' intention. *Id*.

In noting their appeal to the Court of Appeals, Petitioners requested that the Court determine whether the Court of Special Appeals erred in declaring that the MOU does not restrict the authority of the City to issue non-residential building and occupancy permits.

Held: Affirmed.

The Court of Appeals determined that the Court of Special Appeals properly concluded that the MOU does not limit the City's power to enact additional ordinances. The City is granted enactment power pursuant to several statutes, including Local Gov't § 5-211. Under these statutes, the City may enact regulations that control the issuance of permits. The MOU only controls power that the County delegated to the City, not power that originates from other sources of law. The City's authority to regulate zoning matters is reserved by various sources of City and State law. Although the MOU at issue here empowers the City to enforce the County's zoning laws, the City additionally reserves the authority to enforce its own zoning laws. The MOU's plain language elucidates that the parties never intended that the City cede its authority and power to create its own city zoning laws.

The plain language of the MOU does not relegate the City's preexisting powers to require building and use permits issued by the City. This Court follows an "objective theory of contract interpretation, giving effect to the clear terms of agreements, regardless of the intent of the parties at the time of contract formation." *Myers v. Kayhoe*, 391 Md. 188, 198, 892 A.2d 520, 526 (2006). "[I]f the language employed is unambiguous, 'a court shall give effect to its plain meaning and there is no need for further construction by the court.'" *Walker v. Dep't of Human Resources*, 379 Md. 407, 421, 842 A.2d 53, 61 (2004). If feasible, we will construe a contract as a whole, "to interpret their separate provisions harmoniously, so that, if possible, all of them may be given effect." *Id*. "[T]he determination of whether a contract is ambiguous ... is a question of law ... subject to de novo review." *Precision Small Engines*, 233 Md. App. at 85, 161 A.3d at 734 (quoting *Sy–Lene of Washington, Inc. v. Starwood Urban Retail II, LLC*, 376 Md. 157, 163, 829 A.2d 540, [544] (2003)). In sum,

> A court construing an agreement under [the objective theory] must first determine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated. In addition, when the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed. In these circumstances, the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.

Dennis v. Fire & Police Employees' Ret. Sys., 390 Md. 639, 656–57, 890 A.2d 737, 747 (2006). Thus, we must first ascertain the reasonable interpretation of the parties' intent from the MOU's language. If the language is unambiguous, we only need apply the terms.

Paragraph 2(c) states, in part, that "the City is not authorized to issue building, grading, use and occupancy, or other permits now issued by the County…" Paragraph 3(b), partially explains, "[n]othing in the Memorandum authorized the City to impose standards or requirements which the Zoning Ordinance does not establish…." These sections do not contain any relinquishment of power by the City in order to gain concurrent enforcement power. Rather, the plain language of the contract demonstrates that the County imposed limitations of the City's enforcement in an effort to maintain its own power with regard to zoning. In doing so, the County ensured that the City could enforce the law, while requiring it to submit to the County's authority.

A reading of the MOU in its entirety, demonstrates that the parties intended that the City maintain its authority to enforce its own building and use permit laws, specifically in light of paragraphs 1(a) and 1(b). We have explained that "[e]ffect must be given to each clause so that a court will not find an interpretation which casts out or disregards a meaningful part of the language of the writing unless no other course can be sensibly and reasonably followed." *Clancy v. King*, 405 Md. 541, 557, 954 A.2d 1092, 1101 (2008) (quoting *Sagner v. Glenangus Farms, Inc.*, 234 Md. 156, 167, 198 A.2d 277, 283 (1964)). At the outset, in paragraph 1(a) of the MOU, the agreement states that the City gained "all enforcement powers then possessed by County government [.]" Paragraph 1(b) states that "[t]he City's assumption of these zoning enforcement powers and duties shall not be deemed to diminish any City power or authority under §§ 8-112.1 or 8-112.3 of the Regional District Act, or any other law." The plain language of paragraph 1(a) dictates that the City may undertake the same powers to enforce permitting that the County possessed. Paragraph 1(b) expressly reserves that the City has authority enumerated by any other laws. These paragraphs, considered with paragraphs 2(c) and 3(b), plainly demonstrates that both parties were cognizant of other sources of municipal power and intended for the City to retain that power, while gaining additional power from the County. Thus, the plain language of the MOU dictates that the parties reasonably intended for the City to retain the right to create and enforce its own zoning laws.

Due to the express language of the MOU and the City's statutorily granted power, the circuit court went beyond the expressed intent of the parties, and failed to apply the objective theory of contract interpretation, thereby applying a meaning inconsistent with the plain language of the agreement.

Finally, the circuit court disregarded the express authority of the City granted under Local Gov't §§ 5-202, 5-209, and 5-211. Per these sections, the power of the City to enact regulations is separate and distinct from power granted by the County in the MOU.

Patricia Lamalfa v. Janis Hearn et al., No. 39, September Term 2017, filed February 2, 2018. Opinion by Watts, J.

http://www.mdcourts.gov/data/opinions/coa/2018/39a17.pdf

EXPERT WITNESS TESTIMONY – BASES OF OPINION TESTIMONY BY EXPERT – MARYLAND RULE 5-703 – FACTS OR DATA REASONABLY RELIED UPON BY TESTIFYING EXPERT – DISCLOSURE TO JURY – ELEMENTS FOR DISCLOSURE

Facts:

On October 14, 2011, Patricia Lamalfa, Petitioner, a resident of Brooklyn, New York, was in Maryland to attend a family member's wedding. On the way to the wedding, Petitioner was sitting in the rear passenger seat of a small SUV that was being driven by her son. Her son drove the SUB southbound on Interstate 95 and onto an exit ramp, where it came to a complete stop. While stopped, the SUV was rear-ended by a vehicle that was being driven by Janis Hearn, Respondent. Emergency medical technicians responded to the scene, but Petitioner did not seek medical treatment at that time. The next morning, Petitioner went to the emergency room at Mercy Medical Center ("Mercy") in Baltimore City complaining of lower back pain and some pain in her left forearm. Petitioner was treated at Mercy, released that same day, and returned to New York that night.

On October 21, 2011, a week after the accident, Petitioner sought medical treatment from Yury Koyen, M.D., of Relief Medical, P.C. in Brooklyn, New York, who specializes in physical medicine and rehabilitation. Petitioner complained of upper and lower back pain, pain in both arms, pain in her left hip, periodic numbness in her right hand, pain in her right shoulder, weakness in her left arm, tailbone pain that was worsened by sitting, and emotional distress related to the accident, including flashbacks, fear of sitting in a car, and claustrophobia. Dr. Koyen recommended that Petitioner undergo physical therapy and chiropractic treatment, as well as diagnostic testing in the form of MRIs and X-rays.

In October of 2011, Petitioner also started experiencing severe abdominal pain; however, a CT scan of Petitioner's abdomen and pelvis performed on October 31, 2011, was normal. Later, on March 7, 2012, Sampath Kumar, M.D., performed surgery on Petitioner to repair an epigastric hernia. Apparently, the epigastric hernia was a recurrent issue for Petitioner, who had surgery to repair an epigastric hernia in 1984. In the meantime, on November 7, 2011, Petitioner had an MRI of her right shoulder performed, which revealed a rotator cuff injury. In December 2014, over three years later, Petitioner visited Jaspreet Sekhon, M.D., who ordered another MRI, which revealed a rotator cuff tear. Thereafter, Petitioner underwent arthroscopic surgery on her right shoulder.

On September 23, 2014, Petitioner filed in the Circuit Court for Baltimore City ("the circuit court") a complaint against Respondent, alleging negligence. Petitioner sought damages in

excess of $75,000. From February 16 to 18, 2016, the case was tried before a jury. At trial, as part of the plaintiffs' case, Petitioner and her son testified, and videotaped de bene esse depositions of Dr. Koyen, Dr. Kumar, and Dr. Sekhon were played for the jury.

On Petitioner's behalf, Dr. Koyen testified by video deposition that, to a reasonable degree of medical certainty, among other things, Petitioner's hernia and the rotator cuff tear to her right shoulder were caused by the October 14, 2011 accident. Dr. Kumar testified by video deposition that, to a reasonable degree of medical certainty, Petitioner's epigastric hernia was caused by the accident, and, specifically, the pressure of the seat belt against Petitioner's abdominal wall during the accident. Dr. Sekhon testified by video deposition that, several years after the accident, he examined Petitioner and ordered an MRI of her right shoulder, which revealed a rotator cuff tear.

Respondent's case consisted of her testimony and the testimony of Louis Halikman, M.D., an orthopedic surgeon. The circuit court accepted Dr. Halikman as an expert in orthopedic surgery, and ruled that Dr. Halikman would be permitted to testify "as a physician" as to other matters, but would not be permitted to offer an opinion outside of the field of orthopedic surgery. Dr. Halikman testified that, on December 28, 2015, at Respondent's counsel's request, he examined Petitioner. During his examination, Dr. Halikman noted that Petitioner is left-handed, and that her upper arms each measured the same circumference. According to Dr. Halikman, these observations were important because he would have expected Petitioner's right arm to have been substantially smaller in girth than the left, given that her right arm was not her dominant arm and that she had recently had surgery on her right shoulder. Dr. Halikman testified that "[t]he fact that her muscle bulk is the same on both sides [told him] that she is probably using both of her arms in as close to natural fashion as possible."

Dr. Halikman testified that he also reviewed and relied upon four of Petitioner's post-accident medical treatment records in formulating his opinions as to Petitioner's injuries. Specifically, Dr. Halikman testified that he relied upon the following four medical records: (1) the Mercy record; (2) the Koyen record; (3) an "Initial Chiropractic Examination" report prepared on October 25, 2011, by an unidentified chiropractor ("the Chiropractic record"); and (4) an "Initial Consultation" report dated December 13, 2011, by Aleksandr Levin, M.D., of Diagnostic Medicine, P.C. ("the Levin record").

Respondent's counsel offered the Mercy record into evidence and Petitioner's counsel objected, contending that the document was "a hearsay document" that contained hearsay statements, and that "permitting some records in and not others also [wa]s far more prejudic[ial] than probative in that it[would] allow certain documents to go back to the jury room without the benefit of having all of the documents." The circuit court stated: "Objection's overruled. So admitted. It's being relied on by this expert in his review and opinion." The circuit court reiterated: "Objection is noted. However, Court overrules the objection and allows its admission. As the witness testified that he reviewed this and relied on it in reaching his opinion." Thus, the Mercy record was admitted into evidence. Respondent's counsel offered into evidence the other three medical records that Dr. Halikman relied upon in forming his opinion—i.e., the Koyen record, the Chiropractic record, and the Levin record. Petitioner's counsel made the "[s]ame objection" as

to admission of those medical records, and the circuit court overruled the objections and admitted the medical records into evidence.

The Mercy record, dated October 15, 2011, consisted of sixteen pages. A section labeled "History of Present Illness," stated that, over the course of the afternoon and evening following the accident, Petitioner began to experience "the onset of left-sided lower back pain[,]" and, at the time of her visit to Mercy, was complaining of left-sided lower back pain and "of a much lighter pain in the left forearm." In a section labeled "Physical Examination: General," the Mercy record noted that Petitioner "ambulate[d] . . . with a slight limp but not much difficulty[,]" and that Petitioner "appear[ed] in no acute distress." The "Physical Examination: General" section stated that Petitioner's abdomen was "[s]oft[,]" and that there was "positive straight leg raising, [but that] she ha[d] difficulty with the lateral oblique motion on the left side." As to Petitioner's extremities, the Mercy record reported that Petitioner had "full range of motion of all joints."

The Koyen record, prepared on November 22, 2011, consisted of five pages. In the Koyen record, Dr. Koyen stated that he first examined Petitioner on October 21, 2011, one week after the accident, and that Petitioner reported "sustain[ing] injuries to the head, left shoulder[,] and coccyx[, i.e., tailbone]." In a section labeled "Chief Complaints," Dr. Koyen observed, among other things, that Petitioner complained of: neck pains radiating to the right arm and upper back, and to the left arm and forearm; low back pains; left hip pains; periodical numbness in the right hand; right shoulder pains; weakness in the left arm; and tailbone pains worsened by sitting. In a "Review of Systems" section, Dr. Koyen noted: "Patient admits to sharp neck pains radiating to the left upper extremity and associated with numbness; sharp lumbosacral pains [that are] provoked by sitting." As to Petitioner's generalized appearance during the physical examination, Dr. Koyen observed that Petitioner was "in acute pain distress[,]" and was experiencing pain getting on and off the examination table. As to the physical examination of Petitioner's shoulders, Dr. Koyen noted, in relevant part, "[r]ight rotator cuff area tenderness[,]" that the "[r]ight shoulder's joint showed tenderness[,]" and that "[s]houlders' motion is painful bilaterally, right more than left." Dr. Koyen observed that Petitioner was "[p]ositive" on tests for nerve impingement of her right shoulder. Dr. Koyen's physical examination showed "[n]o remarkable tenderness" in Petitioner's chest or abdomen. Dr. Koyen diagnosed Petitioner with, among other things, "[r]ight shoulder trauma with rotator cuff tear and impingement" and "[a]bdominal trauma."

The Chiropractic record, consisting of five pages, was completed by an unidentified chiropractor on October 25, 2011, the date that Petitioner was examined. The Chiropractic record contained handwritten notations describing the reasons for Petitioner's visit, Petitioner's past medical history, and Petitioner's then-present complaints. In the "Present Complaints" section, the chiropractor circled "Neck Pain & Stiffness Left/Right" that "Radiates" to the "Left . . . Shoulder[,]" right shoulder pain, and left arm pain with "Numbness & Tingling Down to . . . Forearm[.]" The section labeled "Orthopedic & Neurologic Tests" showed that the chiropractor did not perform a "Shoulder Depression Test" used to detect "the presence of adhesions or injury to the soft tissues of the cervical spine[,]" or three other shoulder tests used to detect "impingement, tears or pathology[.]" In the "Diagnosis" section, the chiropractor circled

diagnostic codes and diagnosed Petitioner with thoracolumbar radiculopathy, lumbar, thoracic, and cervico-thoracic joint dysfunction, a whiplash injury, headaches, and spinal subluxation. The chiropractor did not circle the diagnostic codes for shoulder injury or shoulder pain.

The Levin record, dated December 13, 2011, consisted of three pages, and was titled an "Initial Consultation" and was addressed to Dr. Koyen. Dr. Levin reported that Petitioner complained "of right shoulder pain, lower back pain radiating to the left leg, left knee pain, and weakness in the left leg." In the section labeled "Physical Examination," Dr. Levin noted that Petitioner was "in no acute distress[,]" that her abdomen was "[s]oft, not distended, no tenderness[,]" and that an examination of Petitioner's shoulders and upper extremities revealed "[n]o tenderness on palpation or decreased range of motion of both shoulders, elbows, wrists, and hands." Dr. Levin observed, however, "tenderness" of the lumbar spine. Dr. Levin recorded his "Initial Impressions" as follows: "1. Post-traumatic lumbosacral sprain/strain[and] 2. Rule-out lumbar radiculitis." (Paragraph break omitted).

Based on his review of these medical records and his examination of Petitioner, at trial, Dr. Halikman opined, to a reasonable degree of medical certainty, that Petitioner "did not sustain an injury to her right shoulder as a result of th[e] accident." Additionally, Dr. Halikman opined that the MRI of Petitioner's right shoulder from November of 2011 showed degeneration, and not an acute injury. Dr. Halikman testified that, if a rotator cuff tear had occurred at the time of the accident, he would have expected Petitioner "to have had treatment, injections, physical therapy and so forth and so on[,]" but that none of those things occurred. According to Dr. Halikman, Petitioner's medical records showed that Petitioner did not initially complain of abdominal pain, and that both Dr. Koyen and Dr. Levin reported that Petitioner's abdomen was normal. Dr. Halikman opined that, when the Levin record was prepared on December 13, 2011, almost two months after the accident, "it would be reasonable to conclude that if a patient had a problem referable to those areas, it would have been evident by th[en], but it was not."

The circuit court granted Petitioner's motion for judgment as to negligence, and denied Respondent's motion for judgment as to the issue of damages. The circuit court instructed the jury, and counsel made closing arguments. During closing argument, Respondent's counsel argued that the evidence did not show that the accident caused Petitioner's hernia and right shoulder rotator cuff tear, and Respondent's counsel mentioned the four medical records admitted into evidence. The jury returned a verdict in Petitioner's favor as to damages, and awarded Petitioner all of her past medical expenses totaling $9,926.05, as well as non-economic damages totaling $650.00, for a total award of $10,576.05. Consistent with the jury's award, on February 25, 2016, the circuit court entered judgment in Petitioner's favor against Respondent in the amount of $10,576.05.

Petitioner noted an appeal, contending that the circuit court erred in admitting the four medical records into evidence. On June 28, 2017, in a reported opinion, the Court of Special Appeals affirmed the circuit court's judgment and held that the circuit court did not abuse its discretion in admitting the medical records into evidence under Maryland Rule 5-703. *See Lamalfa v. Hearn*, 233 Md. App. 141, 155, 163 A.3d 205, 213 (2017). Thereafter, Petitioner filed in the Court of

Appeals a petition for a writ of certiorari, which the Court granted on September 12, 2017. *See Lamalfa v. Hearn*, 456 Md. 55, 170 A.3d 291 (2017).

Held: Affirmed.

The Court of Appeals held that the circuit court did not abuse its discretion or err in admitting the medical records—the Mercy record, the Koyen record, the Chiropractic record, and the Levin record—into evidence under Maryland Rule 5-703. Specifically, the Court concluded that "disclosure" means that evidence is admissible under Maryland Rule 5-703(b) where the evidence satisfies the four elements set forth in Maryland Rule 5-703(b), and that such evidence may, in a trial court's discretion, be disclosed to the jury to explain the factual bases for an expert's opinion. Additionally, the Court determined that, under the circumstances of the case, the medical records satisfied the four elements for disclosure under Maryland Rule 5-703(b) because they were trustworthy, unprivileged, reasonably relied upon by Dr. Halikman in forming his opinions, and necessary to illuminate Dr. Halikman's testimony. And, the Court concluded that, even if disclosure, i.e., admission, of the medical records under Maryland Rule 5-703 was error, such error was harmless, as Petitioner had failed to demonstrate that she was prejudiced by admission of the medical records or their use at trial; the record contained no indication that the jury placed undue weight on the medical records.

The Court of Appeals observed that Maryland Rule 5-703(b) refers to the term "disclosed" to the jury, and not to the term "admitted" with respect to facts or data reasonably relied upon by a testifying expert. The Court was unpersuaded, however, that the plain language of Maryland Rule 5-703(b), and the use of the term "disclosed," somehow distinguished between "disclosure" and "admission" such that "disclosed" does not mean "admitted" for purposes of the Rule where the four elements of Maryland Rule 5-703(b) are satisfied. Rather, the Court concluded that, for purposes of Maryland Rule 5-703(b), "disclosure" of facts or data reasonably relied upon by an expert witness means "admission" of the information at issue provided that the four elements of the Rule are fulfilled. The Court noted that nothing in Maryland Rule 5-703 purported to limit disclosure to either allowing an expert to testify about the facts or data that the expert relied upon or permitting the jury to review the facts or data only during the expert's testimony.

The Court of Appeals concluded that disclosure means admission for purposes of Maryland Rule 5-703 where the four elements of Maryland Rule 5-703(b) are satisfied. The Court stated that it was obvious, however, that what makes the difference with respect to admission of facts or data reasonably relied upon by a testifying expert under Maryland Rule 5-703(b), as opposed to the admission of evidence generally, is the limiting instruction provided for in Maryland Rule 5-703(b)—namely, that facts or data reasonably relied upon by a testifying expert are not admitted as substantive evidence, unless otherwise admissible for their substance, but rather are to be used "only for the purpose of evaluating the validity and probative value of the expert's opinion or inference."

The Court of Appeals also determined that Petitioner's failure to request a limiting instruction at any point with respect to the medical records—either at the time of their admission, at the close of the evidence, or during Respondent's counsel's closing argument—constituted a waiver of any issue as to the weight that the jury may have accorded the medical records. Stated otherwise, Petitioner had the opportunity to request a limiting instruction so that the jury would be instructed to consider the medical records only for the purpose of evaluating the validity and probative value of Dr. Halikman's opinion, and not as substantive evidence, but failed to do so. Thus, Petitioner waived any contention that the jury may have considered the medical records as substantive evidence.

The Court of Appeals determined that the record demonstrated that the medical records in the case satisfied the four elements for disclosure under Maryland Rule 5-703(b) because they were trustworthy, unprivileged, reasonably relied upon by Dr. Halikman in forming his opinions, and necessary to illuminate Dr. Halikman's testimony. The Court noted that, although it would have been the better practice for the circuit court to announce that the four elements set forth in Maryland Rule 5-703(b) had been satisfied or to make findings with respect to the four elements, the lack of such an announcement or findings, in the case, did not preclude a determination that the prerequisites for disclosure of the medical records were satisfied.

The Court of Appeals concluded that, even if admission of the medical records was error, such error was harmless. Petitioner had failed to demonstrate prejudice from admission of the medical records, or to otherwise show that the jury placed undue weight on the medical records. And, the record was completely devoid of any indication that the jury placed undue weight on the medical records, or even that the jury placed more weight on the medical records than on the other evidence adduced at trial.

COURT OF SPECIAL APPEALS

Mark Campbell v. State of Maryland, No. 1285, September Term, 2016, filed December 5, 2017. Opinion by Moylan, J.

https://mdcourts.gov/data/opinions/cosa/2017/1285s16.pdf

MOTION FOR SUMMARY JUDGMENT – DECLARATORY JUDGMENT LAW – TAKING THE PROCEDURAL CONTEXT FOR GRANTED

Facts:

While serving in the United States Air Force, Mark Campbell ("appellant") pled guilty in a Court Martial proceeding to two counts of child sexual abuse pursuant to Article 120b of the Uniform Code of Military Justice. After serving a four-month sentence, he was ordered to register as a Tier II sex offender in Maryland. Appellant filed a Complaint for Declaratory Judgment in the Circuit Court for Baltimore City, contending that the offenses to which he pled guilty would not, had they been committed in Maryland, require him to register as a Tier II sex offender. In response to the State's answer to that complaint, appellant filed an amended complaint. The State, in turn, filed an amended answer, followed by a Motion for Summary Judgment. The court granted the State's motion. Neither the record extract nor appellant's brief addresses the basis for the court's ruling. Moreover, appellant omitted all of the pleadings from the record extract.

Held: Affirmed.

Appellant asks this Court to consider the merits of his claim while taking for granted two antecedent procedural issues: (i) the basis for the court's granting the State's Motion for Summary Judgment and (ii) whether he satisfied the procedural requirements for invoking Declaratory Judgment law. Appellant's neglect of these threshold issues renders his question (i.e., whether the offenses to which he pled guilty would, had they been committed in Maryland, require him to register as a Tier II sex offender?) purely hypothetical.

Contrary to Maryland Rule 8–501, appellant failed to include in his record extract "all parts of the record that are reasonably necessary for the determination of the questions presented by the appeal." First, appellant omitted any information regarding the State's basis for requesting and

the court's reason for granting Summary Judgment. There are no grounds, therefore, for this Court to conclude that the motion involved the adequacy of appellant's request for Declaratory Judgment rather than some procedural defect (e.g., lack of standing or subject matter jurisdiction). Absent evidence to the contrary, appellate courts presume that a motion's court knew and properly applied the law.

Appellant also omitted from the record extract his complaints for declaratory relief—the central pleading around which the litigation gravitated—and the State's responses thereto. Appellant's brief likewise fails to address Maryland Declaratory Judgment law, focusing instead on the distinctions between State and federal child sexual abuse statutes. Even if, therefore, the court addressed the adequacy of appellant's Motion for Declaratory Judgment, there is no basis on which an appellate court could reasonably determine whether the court properly applied Declaratory Judgment law. There are, therefore, no grounds for reasonably concluding that the court ever arrived at the merits of appellant's underlying claim.

Wesley Cagle v. State of Maryland, No. 2329, September Term 2016, filed February 2, 2018. Opinion by Shaw Geter, J.

https://mdcourts.gov/data/opinions/cosa/2018/2329s16.pdf

EVIDENCE – RELEVANCY – STATEMENTS BY PUBLIC OFFICIALS

Facts:

On December 28, 2014, Officers Wesley Cagle, Dancy Debrosse, Isiah Smith, and Kevin Leary responded to a call for service for a triggered silent alarm at a convenience store in Baltimore, Maryland. As the officers were investigating the method of entry the suspect, later identified as Michael Johansen, opened the side door and observed one of the officers. Officer Smith then yelled "let me see your hands" several times. Johansen ignored the commands, walked towards the officers, and reached into his waistband. Officer Smith testified that he could see Johansen grab "something silver" and begin to pull it out of his pants. Fearing it was a knife or a gun, Officer Smith fired his weapon a total of four times. When Officer Leary heard the gunshots and saw Officer Smith jerk from the recoil of the weapon, he did not know whether Officer Smith had fired his gun or been shot. Believing that Officer Smith may have been shot, Officer Leary fired three rounds at Johansen. Ten to twenty seconds after the last shot was fired, Officer Cagle approached Johansen, called him a "piece of sh*t," and fired one round at his groin.

Marilyn Mosby, the State's Attorney for Baltimore City, announced that Officer Cagle would be charged with the shooting of Michael Johansen at a press conference on August 19, 2015. The State's Attorney also mentioned that "three of the four officers acted justifiably and appropriately within the Baltimore police protocol including two officers who fired their service weapons [Officers Smith and Leary] upon confronting a masked suspect who has also been charged with burglary." Officer Cagle sought to admit these statements under the hearsay exception for a statement of a party-opponent during his trial in the Circuit Court for Baltimore City. The court found that Mosby's statements were irrelevant because she did not have personal knowledge of the incident and they were offered to prove the truth of the matter asserted.

Held: Affirmed.

The Court of Special Appeals noted that "police officers, when arresting a suspect, have the right to take reasonably necessary measures to make the arrest in a manner that protects both the public and themselves." *Tavakoli-Nouri v. State*, 139 Md. App. 716, 731 (2001). However, where an officer has been accused of using excessive force in the course of an arrest, the Court held that the test for relevancy is whether the officer's actions are objectively reasonable in light of the facts and circumstances confronting him. *Branch v. McGeeney*, 123 Md. App. 330, 348 (1998). "The 'reasonableness' of a particular use of force must be judged from the perspective

of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989).

The Court explained that State's Attorney Mosby's statement that Officers Smith and Leary acted reasonably could not have been known to Officer Cagle while he was "on the scene" because it concerned the results of an investigation that occurred after the shooting took place. Additionally, as noted by the trial court, Mosby did not have personal knowledge of Officer Cagle's actions, and Officer Cagle sought to introduce the statement to prove a negative—that he acted reasonably because the State's Attorney believed Officers Leary and Smith acted reasonably. The Court affirmed the trial judge's finding that Mosby's statement was irrelevant and therefore inadmissible.

State of Maryland v. Kevin Armstead, No. 1148, September Term 2016, filed February 1, 2018. Opinion by Harrell, J.

https://mdcourts.gov/data/opinions/cosa/2018/1148s16.pdf

POST CONVICTION – INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL – FAILING TO OBJECT TO CSI VOIR DIRE QUESTION

POST CONVICTION – INEFFECTIVE ASSISTANCE OF COUNSEL – FAILING TO OBJECT TO CSI VOIR DIRE QUESTION – PREJUDICE – HARMLESS ERROR

Facts:

On [the afternoon of 20 March 2007], Ricardo Paige was found dead on the living room floor of his residence at 502 East 43rd Street in Baltimore City, Maryland, having suffered multiple gunshot wounds. During the morning of 20 March 2007, Leroy Simon observed (and testified accordingly on behalf of the State) Kevin Armstead and either Tremaine or Trendon Washington and one other unidentified individual enter Paige's house. Simon heard some "tussling," then several gunshots echo, from Paige's house. After the shooting, Simon saw all of the individuals run from Paige's residence. Simon identified a photo of Armstead as a person who was present at the crime scene and had entered the residence. Detective James Lloyd testified that Armstead was arrested two weeks after the murder in Decatur, Georgia, living under the alias "James L. Jefferson." Detective Lloyd interviewed Armstead on 10 April 2008. Armstead stated (which was stipulated to by both parties) "I already looked up the case. Why am I not just charged with conspiracy, what about the other three?" The charging documents at that time did not mention conspiracy. Detective Lloyd testified that he had never told Armstead about a conspiracy charge or that there were other people involved in the crime.

Armstead was charged with conspiracy to commit murder, murder, use of a handgun in the commission of a felony and crime of violence, and wearing, carrying and transporting a handgun. His trial lasted from 25 March 2009 to 2 April 2009. During *voir dire* on the first day, the judge queried the venire, at the request of the State, as follows:

> Now I'm going to assume that many of you watch way too much television including those so-called realistic crime shows like Law and Order and CSI New York and CSI Miami and CSI Glenn Burnie and the rest of them. I trust you understand that these crime shows are fantasy and fiction and for dramatic effect to entertain you they claim to rely upon 'scientific evidence' to convict people. This is certainly acceptable as entertainment but you must not allow your entertainment to interfere with your solemn duties as a juror. Therefore, if you are currently of the view that you cannot convict the defendant without 'scientific evidence' regardless of all of the other evidence in the case and regardless of the instruction that I give you as the law, please stand. All right, I see no responses.

Armstead's trial counsel did not object to this question. The empaneled jury convicted Armstead of conspiracy to commit first-degree murder and second-degree murder. The court sentenced him to life imprisonment, plus a consecutive thirty years.

Armstead, through counsel, asserted five questions for review in his direct appeal. None of the questions implicated the failure to object to the pertinent *voir dire* question. The Court of Special Appeals affirmed Armstead's conviction in 2010. *See Armstead v. State*, 195 Md. App. 599, 605-9, 7 A.3d 169, 172-5 (2010), *cert. denied*, 418 Md. 191, 13 A.3d 798 (2011). On 1 July 2014, Armstead filed a petition for post-conviction relief, calling-out his trial counsel as ineffective for failing to object to the circuit court's posing of the CSI *voir dire* question. As he perceived the query, it deprived him of his Sixth Amendment right and his right under Article 21 of the Maryland Declaration of Rights.

The circuit court held a hearing on Armstead's post-conviction petition on 6 January 2016. The post-conviction court granted Armstead's petition and awarded a new trial. The court held, in relevant part:

> Although trial counsel is not required to object to every possible trial judge error, trial counsel is ineffective for failing to object to rulings where there is a reasonable probability of success during an appeal . . . the question propounded in [Armstead's] case, was inherently . . . prejudicial . . . Thus, the trial counsel rendered ineffective assistance of counsel by failing to preserve the issue for appeal because there is a reasonable probability that [Armstead] would have succeeded on appeal had trial counsel objected on the grounds that the question prejudiced the *voir dire* panel . . .

In this appeal, the State poses one question: Did the post-conviction court err when it determined, based on case law that issued after Armstead's trial, that Armstead's trial counsel was ineffective for failing to object to the circuit court's issuance of a CSI *voir dire* question?

Held: Reversed and remanded.

Judgment of the Circuit Court for Baltimore City reversed; case remanded with instructions to deny Armstead's post-conviction petition; costs to be paid by Armstead.

The Court of Special Appeals considered whether Armstead's trial counsel violated his right to effective assistance of counsel, under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), when she failed to object to the circuit court's CSI *voir dire* question, failing ultimately to preserve the issue for appellate review on direct appeal. In this regard, Armstead contended that he should benefit from the state of the law regarding the proper use of CSI instructions and *voir dire* questions that came into existence following his trial, *i.e.*, the later-decided case law should apply retrospectively. Armstead maintained that *Allen v. State*, 204 Md. App. 701, 42 A.3d 708 (2012), approved the retrospective application of *Stabb v. State*, 423 Md. 454, 31 A.3d

922 (2011), *Atkins v. State*, 421 Md. 434, 26 A.3d 979 (2011), and *Charles & Drake v. State*, 414 Md. 726, 733, 997 A.2d 154, 158 (2010), to the Court's analysis of his trial counsel's inaction.

The Court considered first the state of Maryland's anti-CSI effect jury message (*voir dire* and instruction) jurisprudence at the time of Armstead's trial, *see Evans v. State*, 174 Md. App. 549, 922 A.2d 620 (2007), and after, *Charles & Drake*, 414 Md. at 738, 997 A.2d at 161. The Court noted that there must be, at minimum, some form of relevant misstatement(s) of law or conduct by counsel for the court to issue an appropriate and curative anti-CSI effect jury instruction or similar anticipatory grounds to ask a *voir dire* question. *See Hall v. State*, 437 Md. 534, 540-41, 87 A.3d 1287, 1290-91 (2014); *Robinson v. State*, 436 Md. 560, 580, 84 A.3d 69, 81 (2014); *Stabb v. State*, 423 Md. 454, 31 A.3d 922 (2011); *Atkins v. State*, 421 Md. 434, 26 A.3d 979 (2011); *Charles & Drake v. State*, 414 Md. 726, 733, 997 A.2d 154, 158 (2010).

Regarding the first factor of the *Strickland* ineffective assistance of counsel standard, i.e., defective performance, the Court iterated that Armstead misunderstood the *Strickland* performance standard as applied to the failure of his trial counsel to object to the trial court's CSI *voir dire* question. Armstead had the burden to prove his trial counsel "made errors so serious that [she] was not functioning as the counsel guaranteed . . . by the Sixth Amendment [and the Maryland Declaration of Rights]." *Sanmartin Prado*, 448 Md. 664, 681-82, 141 A.3d 99, 109 (quoting *Strickland*, 466 U.S. at 687, 690, 104 S. Ct. at 2052) (quotation marks omitted). Armstead failed to meet this burden. He was the sole witness at his post-conviction hearing, but failed to remark on the CSI *voir dire* question. Armstead's trial counsel was unable to testify at the post-conviction hearing because she was ill, but, rather than seek a continuance, Armstead elected to continue without her testimony. Armstead opted also to proceed without testimony from any other attorney or witness as to the unreasonableness of his trial counsel's failure to object to the circuit court's issuance of the CSI effect *voir dire* question.

The Court rejected Armstead's argument demanding the benefit of *Charles & Drake* (2010) and *McFadden & Miles*, 197 Md. App. 238, 250-51, 13 A.3d 68, 75 (2011); that is, their holdings and reasoning should apply retrospectively to the ineffective counsel analysis in his post-conviction case, based on *Allen v. State*, 204 Md. App. 701, 42 A.3d 708 (2012). The Court held in *Allen* that *Atkins* and *Stabb* would apply retrospectively to then pending direct appeal cases where a proper trial objection preserved the challenge. *See Allen*, 204 Md. App. at 721-22, 42 A.3d at 720-21. Noting the differences inherent between *voir dire* questions and jury instructions, the Court concluded that Armstead's present case is a 2014-16 post-conviction challenge, not a direct appeal from his 2009 conviction. Thus, Armstead's current case fails each predicate of *Allen's* analysis to support retrospective application of the relevant post-2009 case law.

Assessing the second *Strickland* ineffective assistance of counsel factor, *i.e*., the prejudice component, the Court began by noting that the *voir dire* question was nearly identical to the question posed in *Charles & Drake*, *Kelly*, and *McFadden & Miles* (to which the court in each case found error). The Court concluded, however, that, had Armstead noted an objection to the trial judge's *voir dire* question and/or assuming the post-2009 relevant case law is applicable properly here, it was satisfied beyond a reasonable doubt that the supposed prejudice of the

question was harmless. Neither the trial court nor the parties' counsels repeated the anti-CSI effect message during the trial; the trial judge, after a seven-day jury trial and at the close of all the evidence, issued curative instructions affirming the State's high burden of proof; the trial court afforded counsel broad exuberance in arguing during closing the absence or insufficiency in the State's case of scientific evidence linking Armstead to Paige's murder; and, Armstead made a statement that was both voluntary and inculpatory to Detective Lloyd during his interrogation. Thus, the recovery of any DNA placing Armstead at the scene, though it would have bolstered Simon's testimony, would have been cumulative only. *Compare Hall*, 437 Md. at 540, 87 A.3d at 12, *and Evans*, 174 Md. App. at 570, 922 at 632-33, *with Atkins*, 421 Md. at 50, 26 A.3d at 988.

Brandon Payton v. State of Maryland, No. 2115, September 2016 Term, filed February 1, 2018. Opinion by Beachley, J.

https://mdcourts.gov/data/opinions/cosa/2018/2115s16.pdf

JUDICIAL IMPARTIALITY – REOPENING CASE FOR FURTHER EVIDENCE – TRIAL COURT DEPARTED FROM POSITION OF NEUTRALITY BY SUA SPONTE REOPENING THE STATE'S CASE WITH INSTRUCTIONS ON HOW TO AVOID JUDGMENT OF ACQUITTAL.

Facts:

Appellant was charged with murder and tried before a jury. After both sides rested, appellant made a motion for acquittal, arguing simply that the State had not proved its case. The trial court, concerned that a palm print had not been sufficiently linked to appellant, *sua sponte* reopened the State's case and stated that the motion for acquittal would be granted unless the State called its forensic expert back to the stand. Two days later, the trial resumed and the forensic expert testified again, clarifying that the palm print belonged to appellant. Appellant was subsequently convicted of first- and second-degree murder, as well as use of a firearm in the commission of a felony, and noted an appeal.

Held: Vacated and remanded for new trial.

An impartial and disinterested judge is fundamental to a criminal defendant's right to a fair trial, and the court abused its discretion by departing from that neutral role. Despite expressing concern about a perceived defect in the State's case and opining that it could "easily" grant the motion for acquittal, the court *sua sponte* reopened the State's case and gave the State specific instructions on how to avoid a judgment of acquittal.

While there is no *per se* rule that prohibits a court from *sua sponte* reopening a case, such a decision should be made cautiously and with a vigilant eye to ensure that the court does not cross the line of impartiality.

Stanley Ray Winston v. State of Maryland, No. 2838, September 2015; *Brian Cuffie Mayhew v. State of Maryland*, No. 70, September 2016; *Anthony Cannon v. State of Maryland*, No. 74, September Term 2016, filed February 2, 2018. Opinion by Arthur, J.

Meredith, J., concurs.

https://mdcourts.gov/data/opinions/cosa/2018/2838s15.pdf

CRIMINAL LAW – SEVERANCE – JOINDER OF MULTIPLE DEFENDANTS

CRIMINAL LAW – "OTHER CRIMES" EVIDENCE

CRIMINAL LAW – AUTHENTICATION OF JAILHOUSE CALLS

CRIMINAL LAW – HEARSAY – PLAIN ERROR EXCEPTION

CRIMINAL LAW – MOTION FOR MISTRIAL

CRIMINAL LAW – CLOSING ARGUMENTS

CRIMINAL LAW – SUFFICIENCY OF THE EVIDENCE

Facts:

On the morning of December 19, 2012, Nicoh Mayhew was returning to his mother's house with his two-year-old son when two men opened fire. Nicoh died from his wounds while his son was shot in the arm.

The apparent impetus for Nicoh's murder was that he was scheduled to appear as a witness against his cousin, Brian Mayhew, in a pending double-homicide prosecution. Jailhouse phone calls implicated Mayhew as well as Stanley Winston and Anthony Cannon. In the recordings, Mayhew communicated to Winston and Cannon, albeit in veiled language, when and where the murder should take place. Mayhew attempted to conceal his participation in the jailhouse calls in several ways. First, he used another detainee's identification number to place the calls. Second, he would typically call his girlfriend, Asha Smythe, who would connect him via a third-party call to Cannon, Winston, and others, thereby preventing the authorities from learning the telephone numbers of the persons with whom he was speaking.

Three weeks prior to the murder, Nicoh visited his brother at the Prince George's County Detention Center. During the visit, Mayhew, who was awaiting trial for a double-homicide in the same facility, happened to be in the visitor's area at the time and spoke with Nicoh as a correctional officer kept an eye on them. The conversation lasted about a minute and according to the officer seemed to be innocuous. After Nicoh's visit to the jail, his girlfriend described him

as "scared, more paranoid . . . [and] [w]orried that somebody was, like, going to do something to him." Nicoh's mother similarly described him as "scared." She added that he "didn't want to leave the baby." Less than a month later, Nicoh was murdered.

The case against Cannon, Mayhew, and Winston went to trial on February 1, 2016. After nine days of testimony, the jury returned a verdict of guilty on all counts.

Held: Affirmed.

Cannon and Winston argued that the trial court should have granted their motion to sever their trials from Mayhew because the State intended to introduce evidence regarding Mayhew's involvement in the double-homicide to prove motive for Nicoh's killing though neither Cannon nor Winston were implicated in the double-homicide. Cannon and Winston, in a related challenge, argued that the evidence was not admissible under Md. Rule 5-404(b) as improper other crimes evidence.

The Court of Special Appeals held that the circuit court appropriately denied the defendants' motion to sever after admitting evidence of the double-homicide in which two of the three defendants played no role because the trial judge gave a limiting instruction which sufficiently prevented any unfair prejudice to those two defendants.

When the State introduces evidence that is inadmissible against one of several co-defendants, the trial judge is not required to order a severance unless the admission would result in unfair prejudice that cannot be cured by other relief, such as limiting instructions or redacting evidence to remove any reference to the defendant against whom it is inadmissible. *State v. Hines*, 450 Md. 352, 369-70, 376 (2016). Here, the circuit court did not abuse its discretion in declining to sever the co-defendants' cases from Mayhew's because at least some of the evidence unquestionably would have been admissible in separate trials to establish motive. Furthermore, to the extent that some details of the murders might not have been admissible against the co-defendants had they been tried separately from Mayhew, the court satisfactorily addressed the potential problem of unfair prejudice by instructing the jury to consider the evidence only against Mayhew.

The Court of Special Appeals also held that Md. Rule 5-404(b) grounds could not be invoked by Winston or Cannon to prevent the admission of Mayhew's involvement in the double-homicide. Rule 5-404(b) is designed to protect the person who committed the "other crimes, wrongs, or acts" from the unfair inference that he or she is guilty not because of the evidence in the case, but because of a propensity for wrongful conduct. *Hurst v. State*, 400 Md. 397, 407 (2007); *see also Sessoms v. State*, 357 Md. 274, 281 (2000). However, because neither Cannon nor Winston participated in the earlier murders, the evidence of those crimes could not have been introduced to show that they acted in conformity with some criminal propensity to commit murder. Hence, the defendants had no basis to invoke Rule 5-404(b) and the circuit was not required to conduct the three-part test for assessing "other crimes" evidence.

During the trial, the defendants argued that the jailhouse phone calls were not properly authenticated and therefore were not admissible. This Court held that the State met the undemanding burden of authentication before admitting recordings of jailhouse phone calls. To meet the burden of authentication, a party need not rule out every theoretical possibility that the evidence is something other than what he or she says it is. The requirement of authentication or identification may be "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Md. Rule 5-901(a). By introducing witnesses who could and did identify the defendants' voices on the recordings, the State sufficiently authenticated the recordings.

Although failing to object at trial, the appellants argued that the plain error exception applied and that their perception of the trial court's erroneous admission of inadmissible hearsay evidence should be addressed. This Court held that the plain error exception did not apply in this case to permit our review of defendants' hearsay challenge because the defendants failed to identify what statements were in fact inadmissible hearsay. This failure left us unable to determine whether any alleged error, if any, affected the outcome or whether it seriously undermined the fairness, integrity, or reputation of the proceedings. *Newton v. State*, 455 Md. 341, 364 (2017) (outlining the conditions that must be met before an appellate court will reverse for plain error).

However, even if this Court were to address defendants' argument on the merits – that the State failed to establish when the conspiracy began, and as a result could not use Md. Rule 5-803(a)(5), the co-conspirator exception to hearsay – the evidence suggested that the conspiracy began when the defendants established a clandestine, back-channel means of communicating. The clandestine communications themselves were evidence of a conspiracy that began at least as early as the first communication. Hence, it was likely that whatever statements the defendants claimed to be wronged by were indeed properly admitted.

The defendants moved for a mistrial after the State played a brief excerpt of a recording that the trial court had arguably ordered redacted on the grounds that the excerpt was hearsay not within the co-conspirator exception, Md. Rule 5-803(a)(5), because the object of the conspiracy, a murder, had already occurred. This Court held that the defendants' motion was properly denied because the motion was based on a fallacious premise. In playing the recording, the State was not attempting to evade the court's earlier ruling in order to admit the defendant's statement to prove the truth of the matter asserted. Instead, the State played the recorded statement for the non-hearsay purpose of having its witness affirm that the voice on the recording was that of the defendant. Because there is no basis to find the recording inadmissible, the circuit court could not have abused its discretion in denying the motion for a mistrial.

During closing arguments, the State implied that Mayhew threatened Nicoh's son. This Court held that the circuit court did not abuse its discretion in permitting the State's comments. At trial, the State had presented witness testimony that, after an interaction between the victim and the defendant, the victim's behavior became "scared, more paranoid" and that the victim insisted on keeping his son close to him. This evidence was sufficient for the State to reasonably infer and thus, argue, that during this previous interaction the defendant threatened victim's son.

The appellants also argued that their convictions should not stand because the evidence presented during trial was insufficient to support their convictions. This Court held that the defendants' sufficiency challenge, which focused on a lack of jailhouse call recordings transcripts, failed for a number of reasons. First, defendants' arguments were waived because they were not based on the same grounds they raised at trial. Next, defendants could not ignore their obligation to produce transcripts and then rely on their absence to support sufficiency of the evidence claims. Rule 8-411(a)(1). Lastly, the State presented evidence of motive, voice recordings wherein the defendants orchestrated the murder, as well as cell phone tower records which implicated one of the defendants. Although a rational jury would not have been required to convict the defendants on the basis of this evidence, it was certainly permitted to do so.

Brenda Colbert v. Mayor and City Council of Baltimore, No. 1610, September Term 2016, filed February 2, 2018. Opinion by Eyler, James R., J.

https://mdcourts.gov/data/opinions/cosa/2018/1610s16.pdf

NEGLIGENCE – DUTY – ACTUAL NOTICE – CONSTRUCTIVE NOTICE – RES IPSA LOQUITUR

Facts:

On February 20, 2015, Brenda Colbert's home on Elmley Avenue in Baltimore City was flooded when a water main in close proximity to her house ruptured. Colbert filed a negligence claim against the Mayor and City Council of Baltimore alleging that it failed to properly maintain the water main and the City denied liability. Colbert argued that the City had a duty to maintain the water mains and protect residents from damages resulting from a lack of maintenance. She pointed to the fact that the City's water system was "quite old," that it had suffered years of neglect, that there was an increase in "non-seasonal breaks," that water leaks had occurred near her property in the months leading up to the February 20th break, and that the City had "an out-of-sight, out-of-mind attitude" that left it with "far too many crumbling water lines." Colbert argued that evidence of other leaks was "symptomatic of a broader problem" from which a trier of fact could infer that the City had notice that there were problems with the water main.

In addition, Colbert argued that the doctrine of res ipsa loquitur applied such that even if the circuit court determined that the City did not have actual or constructive knowledge of the water main's condition, a genuine dispute of material fact existed as to whether such a break would ordinarily not occur in the absence of negligence. The circuit court granted summary judgment on the ground that there was no evidence that the City had either actual or constructive notice of a defective condition in the water main on Elmley Avenue prior to the February 20, 2015 break and declined to apply the doctrine of res ipsa loquitur.

Held: Affirmed.

The Court held that notwithstanding complaints of other leaks in close proximity to Colbert's home, and even assuming the City had trouble keeping up with needed maintenance projects, there was insufficient evidence to establish that the City had actual notice of a defective condition in the water main on Elmely Avenue that ruptured on February 20, 2015. In addition, Colbert failed to present evidence to dispute the testimony of Arthur Shapiro, the chief of the office of engineering and construction at the Department of Public Works, who testified that the City did not have knowledge of a defective condition in the water main prior to the break.

Nor did the City have constructive notice that the water main was defective. There was no evidence to counter Shapiro's testimony that the water main, which was installed in 1939, had a life span of "upwards of 120 years." Nor was there any evidence of prior repairs or defects linked to the subject break. In addition, the water main, which was buried beneath the street, was not readily observable. As a result, there was no admissible evidence to suggest that the City could have learned of a defective condition in the subject water main by exercising reasonable care.

Finally, the Court of Special Appeals held that the circuit court did not err in declining to apply the doctrine of res ipsa loquitur. Adopting the reasoning in *Hartford Casualty Ins. Co. v. City of Baltimore*, 418 F.Supp.2d 790 (D. Md. 2006), the Court held that there was no evidence to suggest that a ruptured water main was a casualty that usually does not occur in the absence of negligence.

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ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated February 8, 2018, the following attorney has been disbarred by consent:

ANUJ SUD

*

By an Opinion and Order of the Court of Appeals dated January 19, 2018, the following attorney has been disbarred, effective February 19, 2018:

EDWARD SMITH, JR.

*

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JUDICIAL APPOINTMENTS

*

On December 21, 2017, the Governor announced the appointment of **AILEEN ELIZABETH OLIVER** to the District Court of Maryland – Montgomery County. Judge Oliver was sworn in on February 2, 2018 and fills the vacancy created by the retirement of the Hon. Eugene Wolfe.

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UNREPORTED OPINIONS

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

http://www.mdcourts.gov/appellate/unreportedopinions/index.html

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