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https://mdcourts.gov/data/opinions/coa/2018/13a17ag.pdf

ATTORNEY GRIEVANCE COMMISSION – DISCIPLINE – DISBARMENT

Facts:

Attorney failed to demonstrate competent representation, displayed a lack of diligence in handling his client's matters, failed to communicate with his client, failed to properly terminate representation, made material misrepresentations to Bar Counsel and his client, and failed to respond to Bar Counsel's requests for information. He committed this misconduct while representing one client in two separate personal injury matters.

Held: Attorney disbarred from the practice of law.

The Court concluded that Respondent violated the Maryland Attorneys' Rules of Professional Conduct 19-301.1, 19-301.3, 19-301.4, 19-301.16, 19-308.1, and 19-308.4. The Court held that disbarment was the appropriate sanction in light of the attorney's intentional misrepresentations to Bar Counsel and his client, his abandonment of his client, and the several aggravating factors present in the case. The decision to disbar the attorney was consistent with the Court's holding in *Attorney Grievance Comm'n v. Dunietz*, where the Court held that disbarment was warranted for an attorney who demonstrated "disregard for the attorney grievance process, [] indifference to the tenets of his chosen profession, [] dereliction of his duties to his client, and [an] ostensible lack of remorse for his misconduct[.]" 368 Md. 419, 431 795 A.2d 706, 712 (2002).

Attorney Grievance Commission of Maryland v. Benjamin N. Ndi, Misc. Docket AG No. 14, September Term 2017, filed May 1, 2018. Opinion by McDonald, J.

https://mdcourts.gov/data/opinions/coa/2018/14a17ag.pdf

ATTORNEY DISCIPLINE – MISAPPROPRIATION OF CLIENT FUNDS – UNAUTHORIZED PRACTICE OF LAW – MISREPRESENTATIONS TO CLIENTS AND BAR COUNSEL – DISBARMENT

Facts:

Respondent Benjamin N. Ndi, an attorney admitted in New York, but not in Maryland, conducted a law practice theoretically limited to federal immigration law from various locations in Maryland and the District of Columbia. However, some of the letterhead used by him or his firm did not state the jurisdictional limitations on his practice. Nor did a website that advertised his firm.

Bar Counsel initiated an investigation of Mr. Ndi as a result of two client complaints. In one instance, Mr. Ndi represented an immigration client seeking asylum before the federal immigration court in Baltimore. In connection with that case, Mr. Ndi failed to comply with an order of that court requiring him to re-file the asylum application in proper format with appropriate documentation. As a result, the court deemed the application to be abandoned and issued an order that could result in the client's arrest and deportation. Mr. Ndi filed an untimely motion for reconsideration that cited cases not pertinent to the issue before the immigration court. As a result, the motion was denied.

The second complaint concerned Mr. Ndi's settlement of a potential personal injury action arising out of an automobile accident in Maryland. He failed to account fully for the disposition of settlement proceeds that he received from the insurance company and failed to pay a medical provider, as he had indicated he would do in his settlement statement. He also neglected to respond to the client's inquiries concerning the status of the settlement proceeds.

Mr. Ndi failed to respond in a timely manner to Bar Counsel's inquiries. It was later determined that Mr. Ndi had been in "delinquent status" with the New York bar during 2015-17 for failure to pay required fees. When Bar Counsel brought charges against him, Mr. Ndi initially retained counsel and filed an answer. However, counsel later withdrew and Mr. Ndi did not appear for the evidentiary hearing in the circuit court or for oral argument in the Court of Appeals.

Held:

Mr. Ndi was disbarred following oral argument on April 10, 2018. The Court later filed an opinion in which it accepted the fact findings of the circuit court and agreed with the circuit

court's recommended legal conclusions that Mr. Ndi had violated Rules 1.1 (competence), 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.15 (safekeeping property), 1.16 (declining or terminating representation), 5.5 (unauthorized practice of law), 7.1 (communications concerning lawyer's services), 7.5 (firm names and letterheads), 8.1 (bar admission and disciplinary matters), and 8.4 (misconduct) of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC"), as well as Maryland Rule 19-308.1 (bar admission and disciplinary matters) and Maryland Rule 19-308.4 (misconduct) of the Maryland Attorneys' Rules of Professional Conduct ("MARPC"), and former Maryland Rule 16-604 (trust account – required deposits). In considering the appropriate sanction, the Court noted that numerous aggravating factors applied and that the sole mitigating factor that appeared applicable – lack of a prior disciplinary record in Maryland – had minimal weight.

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Attorney Grievance Commission of Maryland v. Samuel Sperling and Jonathan Daniel Sperling, Misc. Docket AG Nos. 40 & 76, September Term 2016, filed May 21, 2018. Opinion by Adkins, J.

Greene and Watts, JJ., concur and dissent.

https://mdcourts.gov/data/opinions/coa/2018/40a16ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – 90-DAY SUSPENSION

ATTORNEY DISCIPLINE – SANCTIONS – INDEFINITE SUSPENSION

Facts:

Petitioner, Attorney Grievance Commission ("AGC"), acting through Bar Counsel, filed Petitions for Disciplinary or Remedial Action against Respondents Samuel Sperling and Jonathan Daniel Sperling based on their conduct while employed by The Sperling Law Office, P.C. ("Firm"), and against Jonathan Sperling based on his representation of Luvenia Jeter. Bar Counsel charged Samuel with violations of MLRPC 1.15(a) and (d) (Safekeeping Property); 5.3(a)–(d) (Responsibilities Regarding Nonlawyer Assistants) as to Jonathan and Leonard Sperling; 5.4(a) and (d)(1) (Professional Independence of a Lawyer); 5.5(a) (Unauthorized Practice of Law; Multijurisdictional Practice of Law); 8.1(a) and (b) (Bar Admission and Disciplinary Matters); and 8.4(a)–(d) (Misconduct). Bar Counsel charged Jonathan with violating MLRPC 1.1 (Competence); 1.2(a) (Scope of Representation and Allocation of Authority Between Client and Lawyer); 1.3 (Diligence); 1.4(a)–(b) (Communication); 1.15(a)–(b) (Fees); 1.16(d) (Declining or Terminating Representation); 5.3(d)(3) (Responsibilities Regarding Nonlawyer Assistants); 8.1(a)–(b) (Bar Admission and Disciplinary Matters); and 8.4(a)–(d) (Misconduct).

Jonathan and Samuel were employed at the Firm, a professional corporation owned by their father, Leonard Sperling. Leonard was the sole shareholder and ran the Firm. Jonathan, Leonard, and Samuel were the signatories on the Firm's trust account. In July 2013, the Court of Appeals suspended Jonathan from the practice of law. Jonathan began employment with the Firm as a paralegal and made efforts towards reinstatement. Samuel agreed to act as his supervisory attorney. In September 2013, Leonard was suspended from the practice of law, effective October 2013.

Bar Counsel received notices that the Firm's trust account was overdrawn in April and May 2014. Bar Counsel sent Samuel a letter asking about his supervision of Jonathan, any changes to the trust account, and Leonard's role during the suspension. Samuel retained counsel and responded to Bar Counsel with a letter and affidavit.

In August 2014, Bar Counsel filed for a Temporary Restraining Order, Preliminary and Permanent Injunction in the Circuit Court for Baltimore County. The TRO was granted, which prohibited further operations by the Firm and appointed an interim receiver, Edward Gilliss. Gilliss discovered that Leonard had misappropriated substantial funds from the trust account and had not disbursed funds to clients or third-party lienholders. With insufficient funds to pay these obligations, Gilliss referred many of the Firm's clients to the Client Protection Fund. Leonard was disbarred shortly after the TRO went into effect. Bar Counsel later received a complaint from Luvenia Jeter regarding Jonathan Sperling. After further investigation, Bar Counsel filed charges. The Court of Appeals designated the Honorable H. Patrick Stringer of the Circuit Court for Baltimore County to hear the matter and make findings of fact and conclusions of law.

The hearing judge made the following findings after a five-day hearing. After their suspensions, Leonard and Jonathan remained signatories on the trust account and continued writing checks on the trust account. Samuel deposited client funds in the trust account. Samuel claimed that he did not know that Leonard and Jonathan were writing checks until June 2014. The Firm's policies required that all checks be recorded in a register. Samuel did not review the Firm's bank records or reconcile the trust account. Based on the number of checks Leonard and Jonathan wrote, Samuel should have known that others were writing checks on the Firm's trust account and a cursory review of the Firm's bank records would have confirmed it. Samuel did not provide adequate supervision of Jonathan's activities with regard to the escrow account. Samuel and Jonathan were not aware of Leonard's misappropriation, did not assist his misappropriation, and did not misappropriate funds.

Hesselbacher submitted draft documents on Jonathan's behalf to Bar Counsel for review as part of Jonathan's obligations as a suspended attorney. A paralegal at the AGC notified Hesselbacher that Jonathan had not submitted an employment agreement as required by MLRPC 5.3(d)(3) within the thirty days required by the Rule. An employment agreement was prepared in November or December 2013. Samuel and Jonathan signed it and Hesselbacher sent Jonathan's Rule 16-760 affidavit, Rule 16-781(g) affidavit, and 16-781(d) statement and the employment agreement to Bar Counsel in January 2014. In his 16-781(g) affidavit, Jonathan asserted that he had complied with the requirements of Rule 16-760. In fact, Jonathan had written checks on the trust account after his suspension and failed to submit his employment agreement on time in violation of that Rule.

Hesselbacher had advised Jonathan that he could not perform law-related activities for the Firm. Jonathan performed clerical and administrative duties while suspended, but did not meet with clients, take depositions, do legal research, or draft legal documents. He did write checks on the trust account and he sent an e-mail to a Firm client asking her to call the office to answer interrogatories. Jonathan used his computer at the Firm for work, but a forensic analysis of the contents of his computer did not demonstrate that he had engaged in law-related activities.

Jonathan filed a Petition for Reinstatement. Bar Counsel opposed the Petition and later filed a Supplemental Response to Jonathan's Petition, stating that Jonathan had written checks on the trust account payable to cash after his suspension. Jonathan filed a Reply, which included an affidavit that stated that he had written checks on the escrow account on "several" occasions to

cash for payment of fees the Firm had eared to avoid delays in transferring the funds to the Firm's operating account. Jonathan stated he had written the checks at Leonard's direction. During his suspension, Jonathan wrote approximately 86 checks. The Court of Appeals denied Jonathan's reinstatement in July 2014.

After his suspension, Leonard continued to run the Firm, settle cases, and wrote checks on the trust account. Despite Leonard's suspension, Samuel continued working at the Firm. Samuel had not agreed to supervise his father and his position in the Firm did not change. Samuel was never a partner in the Firm. Although he took on more responsibility after Leonard's suspension, the two other attorneys associated with the Firm testified that everyone was doing more, and they did not consider Samuel to be their supervisor. Samuel ultimately confronted Leonard in June 2014 and told him to stop signing checks on the escrow account and that settlements needed to be handled by an attorney. Samuel formed a new practice and began transitioning out of the Firm.

In the investigation that followed the entry of the TRO, Bar Counsel requested that Samuel save all computers that Jonathan might have used. Samuel complied, but in June 2015, the Firm was the victim of a ransomware attack. Samuel contacted an IT specialist to restore the Firm's files. After the restoration, all documents had the same creation date—the date of restoration—and metadata was missing. Bar Counsel's forensic expert, agreed that a ransomware attack occurred, but claimed that the metadata was not restored by the Sperlings' technician. Samuel did not ask the technician to omit or delete metadata.

Bar Counsel alleged that both Samuel and Jonathan had made multiple misrepresentations during the course of the investigation and communications with Bar Counsel. Bar Counsel also alleged that Jonathan had made misrepresentations to the Court of Appeals in his efforts at reinstatement. The hearing judge found that Samuel had not made any misrepresentations, and that Jonathan had made two misrepresentations in his 16-781 affidavit and one in his affidavit filed with the Court of Appeals about his check-writing activities.

Before his suspension, Jonathan represented Luvenia Jeter, who was referred by the Baltimore County Referral Service in January 2012 after being terminated from the Practical Nursing Program at Hagerstown Community College. Jeter asserted that her termination was unfair and met with Jonathan at the Firm twice. She paid Jonathan a fee for the initial consultation and a retainer. Jeter gave Jonathan documents from the College for review, including her Clinical Performance Assessment and her own notes on the assessment. Jonathan contacted two individuals associated with the college and learned that Jeter failed a course for safety and academic reasons, had not contacted the program director with any issues, or initiated the grievance process. Jonathan sent Jeter a draft Complaint against the College. He spoke with program staff at the college around May 2012 and learned that Jeter's termination was justified. After further investigation, Jonathan concluded that Jeter did not have a good faith basis to go forward with her claim and notified her that there was no basis to move forward with the claim. Jeter claimed Jonathan never called her after sending the draft complaint and that she did not

learn until 2016 that Jonathan had not filed suit and submitted a complaint to the AGC. Jeter's explanation of the matter was inconsistent, and she represented to Bar Counsel that she was "virtually an 'A' student," when in fact she had never earned an A. Jonathan performed legal services for Jeter and even though he found there was no basis for a suit, his investigation had sufficient value.

The hearing judge found no aggravating factors for Samuel, multiple aggravating factors for Jonathan, and substantial mitigation for both Respondents.

From these facts, the hearing judge concluded that Bar Counsel had proved, by clear and convincing evidence that Samuel violated MLRPC 1.15; 5.3(b) and (d)(3) as applied to Jonathan; 5.4(d)(1); and 8.4(a). He found that Jonathan had violated MLRPC 8.1(a); 8.4(a) and (c); and Maryland Rules 16-760(c)(11) and (d)(3); and Maryland Rule 16-609(b). He found that Bar Counsel failed to prove the other charged violations by clear and convincing evidence. Both parties filed exceptions.

Held:

Samuel violated MLRPC 1.15(a) because he had an affirmative duty to safeguard client funds and he took no action to protect the funds he deposited in the trust account. Samuel was on notice that there were irregularities with the account as early as April 2014 when Bar Counsel made inquiries, but he did not act. That Samuel directed Leonard and Jonathan to consult with their attorney and follow his advice did not render his inaction reasonable. There was no clear and convincing evidence that Samuel violated 1.15(d) because the record did not show that he failed to notify clients or third-party lienholders of the receipt of settlement funds within a reasonable time.

The Court overruled Bar Counsel's exceptions as to MLRPC 5.3(a)–(d) as applied to Leonard because Samuel did not have managerial authority in the Firm, did not employ or supervise Leonard, and did not order or ratify Leonard's conduct. Samuel did not violate 5.4(a) because there was no evidence that Samuel shared legal fees with Leonard. Samuel did not violate 5.5(a) because there was no evidence that Samuel delegated legal activities to Leonard or assisted him in the unauthorized practice of law. Samuel violated 5.4(d)(1) when he continued working in a professional corporation owned by a suspended attorney. Samuel did not adequately supervise Jonathan's activities or take any steps to prevent him from writing checks. Therefore, he violated 5.3(b) and 5.3(d)(2)(F). Samuel and Jonathan violated 5.3(d)(3) by failing to submit the employment agreement within 30 days of Jonathan's employment with the Firm as a paralegal.

The Court overruled Bar Counsel's exceptions to 8.1(a), concluding that Samuel did not make any misrepresentations. The Court also overruled Bar Counsel's exceptions to 8.4(b)–(d) because there was no evidence that Samuel assisted his father in criminal activities, committed perjury, or engaged in dishonest conduct. Samuel violated 8.4(a) by violating MLRPC 1.15(a),

5.3(b), (d)(2)(F), and (d)(3), and 5.4(d)(1). The Court sustained two of Bar Counsel's exceptions to aggravating factors and overruled all exceptions to mitigating factors and concluded that the appropriate sanction was a 90-day suspension from the practice of law.

Jonathan violated Md. Rule 16-609(b) because he wrote checks on the Firm's trust account to cash. The Court overruled all exceptions to MLRPC 8.1(a) as applied to Jonathan. The Court found that Jonathan made misrepresentations as to his compliance with Md. Rule 16-760. Jonathan had not engaged in the unauthorized practice of law or attempted to do so during his suspension, so his statements to that effect in his affidavit were not misrepresentations. Jonathan's use of the word "several" to describe the number of checks he wrote in his affidavit submitted to the Court of Appeals was a misrepresentation. Jonathan also misrepresented the activities he engaged in at the Firm to Bar Counsel by omitting that he was also writing checks on the escrow account.

Bar Counsel's allegation that Jonathan had committed perjury was insufficiently specific in the Petition to make Jonathan aware of which activities constituted perjury, therefore he did not violate 8.4(b). Jonathan violated 8.4(c) by making misrepresentations to Bar Counsel in his efforts to be reinstated. The Court sustained Bar Counsel's exception to 8.4(d) because making multiple misrepresentations to Bar Counsel in an attempt to be reinstated is conduct that brings the legal profession into disrepute and is prejudicial to the administration of justice. Jonathan violated 8.4(a) by violating MLRPC 5.3(d)(3), 8.1(a), and 8.4(c)–(d). The Court overruled all exceptions to aggravating and mitigating factors as to Jonathan and concluded that the appropriate sanction was to continue Jonathan's indefinite suspension.

Both Bar Counsel and the Respondents submitted statements of costs and objected to each other's costs. The Court concluded that Bar Counsel proved several violations of the MLRPC and was entitled to a costs award. Pursuant to Md. Rule 19-709, the Court declined to award certain costs to Bar Counsel that were not reasonable and necessary.

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Young Electrical Contractors, Inc., v. Dustin Construction Inc., No. 8, September Term 2017, filed May 24, 2018. Opinion by McDonald, J.

https://mdcourts.gov/data/opinions/coa/2018/8a17.pdf

CONTRACTS – INTERPRETATION – CONSTRUCTION CONTRACTS– CONDITIONAL PAYMENT PROVISIONS

CIVIL PROCEDURE – SUMMARY JUDGMENT

Facts:

George Mason University (George Mason), a Virginia state university, sought to renovate one of its buildings. George Mason entered into a contract with Respondent Dustin Construction Inc. (Dustin) as the general contractor for the project. Dustin in turn entered into a subcontract with Petitioner Young Electrical Contractors, Inc. (Young) for certain electrical work. Both contracts were governed by Virginia law.

During the course of construction, George Mason made several changes to the work. These changes caused the project to take longer than originally expected, and at a greater cost. Young submitted requests for change orders to Dustin seeking additional compensation, which Dustin forwarded to George Mason. The change order requests referred to "owner-initiated" changes. George Mason did not pay the entire amount requested, and Dustin in turn did not pay Young all that young requested. Young filed suit against Dustin in the Circuit Court for Montgomery County.

In its complaint, Young alleged that Dustin was responsible for delays in organizing and sequencing the work, as well as for the expense of additional work and overtime that Dustin ordered. Dustin raised multiple affirmative defenses, including two provisions in the Subcontract governing payment related to changes, §§13(c) and 27(f). According to Dustin, these were "pay-if-paid" clauses that absolved Dustin of liability because George Mason initiated those changes and had not paid Dustin. Young did not dispute that Dustin had not been paid, but disagreed that George Mason was responsible for the entire cost of the changes and interpreted those provisions of the Subcontract differently.

Dustin moved for summary judgment. In granting summary judgment in Dustin's favor, the Circuit Court agreed that Dustin did not have to pay Young unless and until George Mason had paid Dustin. It relied on contractual provisions that neither party had cited, §2(c) of the Subcontract and §37(a)(1) of the Prime Contract.

The Court of Special Appeals affirmed, relying on the provisions on which Dustin had originally based its motion, as well as §2(c) of the Subcontract. The Court of Appeals granted a writ of *certiorari*.

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Held: Reversed.

The Court of Appeals first reviewed different types of payment clauses. It described one type as a "pay-when-paid" clause, in which timing of a subcontractor's payment by a contractor is linked to the contractor's payment by the project owner. Such a clause governs *when*, but not *if*, the subcontractor gets paid. Another type is referred to as a "pay-if-paid" clause, in which the contractor's obligation to pay the subcontractor is contingent on payment to the contractor by the project owner. If the general contractor does not get paid, neither does the subcontractor.

Virginia law recognizes both types of clauses. Under Virginia law, if a subcontract makes clear that payment by the owner to the contractor is a condition precedent for the contractor's obligation to pay the subcontractor, it is a "pay-if-paid" provision. If there is not clear language establishing a condition precedent, other language contemplating eventual payment to the subcontractor may make it a "pay-when-paid" provision. If neither language appears in the contract, Virginia courts view a conditional payment provision as "latently ambiguous," and look to parol evidence to determine the intent of the parties.

The Court of Appeals agreed with the lower courts that §2(c) of the Subcontract was a pay-if-paid clause because it explicitly included the phrase "condition precedent." However, the Court ruled that it was error to apply that provision to all of the damages sought by Young. Although the lower courts held §2(c) of the Subcontract was "generally applicable," the Court of Appeals noted that §39 of the Subcontract explicitly makes Dustin liable for delay damages, and §2(c) applies only to payments of the "Subcontract Sum." Some of Young's alleged damages were for delay, and the record was insufficient to say that others were part of the Subcontract Sum. Thus, it could not be said, as a matter of law, that §2(c) applied to any or all damages to which Young might be entitled.

Citing Maryland precedent on appellate review of grants of summary judgment, the Court also declined to affirm summary judgment on alternative grounds. The Court noted that the Circuit Court had awarded summary judgment prior to discovery, depriving Young of the opportunity to obtain information relevant to Dustin's original argument regarding §§13(c) and 27(f) of the Subcontract, which apply only to owner-initiated changes.

Although Young had referred to "owner-initiated" changes in the change requests that were forwarded to George Mason, the Subcontract provided that such documents were not to be viewed as admissions or declarations against interest in litigation. These statements in the change requests were capable of more than one permissible inference, and, in the context of a motion for summary judgment by Dustin, should be read in the light most favorable to Young, the non-moving party.

The Court also held that a pay-when-paid clause could not support summary judgment in Dustin's favor, but reiterated that §§13(c) and 27(f) of the Subcontract must be interpreted under

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Virginia law, which could require consideration of other contractual provisions or parol evidence before construing them as either type of clause.

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Thoyt Hackney v. State of Maryland, No. 53, September Term 2017, filed May 9, 2018. Opinion by Barbera, C.J.

https://mdcourts.gov/data/opinions/coa/2018/53a17.pdf

CRIMINAL PROCEDURE – POST-CONVICTION PETITIONS – FILING

Facts:

On October 23, 1998, Petitioner Thoyt Hackney was convicted of multiple crimes. Nearly ten years later, incarcerated and proceeding without the assistance of counsel, he attempted to file a petition for post-conviction relief in the Circuit Court for Baltimore City. Under the Maryland Uniform Postconviction Procedure Act, Md. Code Ann., Crim. Proc. § 7 103, post-conviction petitions are subject to a ten-year limitations period.

Petitioner testified that on October 20, 2008, three days before the ten-year deadline, he deposited his petition with prison authorities for forwarding to the circuit court. The envelope was stamped by prison authorities and the United States Postal Service on October 22, 2008, and sent the same day. The petition arrived at the circuit court and was stamped by the clerk on October 24, 2008, one day past the expiration of the limitations period. The circuit court dismissed the petition as untimely filed.

Held:

The Court of Appeals held that the prison mailbox rule, under which an unrepresented and incarcerated litigant's petition for post-conviction relief is deemed to be filed at the time it is formally delivered to prison authorities for forwarding to the circuit court, applies in Maryland. Following the U.S. Supreme Court's decision in *Houston v. Lack*, 487 U.S. 266 (1988), the Court of Appeals determined that, in contrast to other litigants, unrepresented prisoners lose control over their filings as soon as they are deposited with prison authorities. Based on Maryland precedent, the Court reasoned that the post-conviction statute and Maryland Rule 1-322 allowed for filing to occur at a moment other than receipt by the clerk. Therefore, because Petitioner submitted his post-conviction petition to prison authorities before the ten-year limitations period expired, his petition was timely filed.

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Rina Calvo v. Montgomery County, Maryland, No. 48, September Term 2017, filed May 21, 2018. Opinion by Adkins, J.

Barbera, C.J., Greene, and Getty, JJ., dissent.

https://mdcourts.gov/data/opinions/coa/2018/48a17.pdf

WORKERS' COMPENSATION – TRAVELING EMPLOYEE

WORKERS' COMPENSATION – GOING AND COMING RULE – SPECIAL MISSION OR ERRAND EXCEPTION – SUMMARY JUDGMENT

Facts:

Rina Calvo was employed by Montgomery County as a bus driver for approximately 20 years. She regularly worked Monday through Friday out of the Silver Spring Depot. Calvo received a letter on May 6, 2015, notifying her that she had been scheduled to attend an "important mandatory training" involving customer service on Saturday, May 16, 2015 at the Gaithersburg Depot. The training ran from 8:00 a.m. to 4:30 p.m. and Calvo did not have to wear her uniform. The County required its employees to attend this training annually. Calvo was rear-ended by another car while waiting at a traffic light on the way to the training. Calvo filed a claim with the Workers' Compensation Commission. Calvo testified about the injury at a hearing and stated that the training was mandatory and that she believed if she missed the training that she might be suspended or prevented from going back to work on full duty. The Commission found that Calvo sustained an accidental injury arising out of and in the course of employment and awarded compensation.

The County sought judicial review in the Circuit Court for Montgomery County and asked for a jury trial. Shortly thereafter, the County filed for summary judgment asserting that there was no dispute of material fact, and that the going and coming rule prohibited recovery. Calvo opposed the motion, arguing that compensation was proper either because she was a traveling employee, and therefore the going and coming rule did not apply, or the special mission exception permitted recovery. After a hearing, the Circuit Court concluded that as a matter of law, the going and coming rule precluded recovery, Calvo was not a traveling employee, and granted summary judgment for the County. The Court of Special Appeals affirmed in an unreported opinion, *Calvo v. Montgomery Cty*., No. 1036, 2017 WL 2666161 (Md. Ct. Spec. App. June 21, 2017).

Held:

The Circuit Court did not err in its conclusion that the going and coming rule, rather than the traveling employee doctrine controlled Calvo's case. But, because the undisputed facts permitted a reasonable conclusion that the special mission exception to the going and coming

rule applied, the Circuit Court erred in granting summary judgment. Because Calvo had not filed a cross-motion for summary judgment, the appropriate remedy was a remand to the Circuit Court for trial before a jury to assess whether, under the facts and circumstances, Calvo's injury was compensable.

Because the County asked for a jury, the Court reviewed the case similarly to a motion for summary judgment following an original civil complaint brought in a circuit court. On review, the Commission's decision is presumed to be prima facie correct, and the party challenging the decision has the burden of proof. If the claimant wins before the Commission, then he or she may rely on the Commission's decision as his or her prima facie case. The Commission's decisions are presumed correct, but that presumption does not apply to questions of law.

If the Commission's decision involves considering conflicting evidence over facts or deduction of inferences from such evidence, its decision is presumed correct. If the undisputed facts do not permit a conclusion or any permissible inference supporting the Commission's award, then it is a question of law. The question of whether an injury arose out of or in the course of employment is a mixed question of law and fact. Summary judgment is improper against a prevailing claimant if the moving party does not carry the burden or if there is any evidence that can rationally permit the Commission's determination.

To be compensable, an injury must both arise out of and in the course of employment. Applying the positional risk test set forth in *Livering v. Richardson's Restaurant*, 374 Md. 566 (2003), the Court explained that Calvo's injury arose out of her employment because it would not have occurred but for the fact that the conditions and obligations of her employment placed her in the position where she was injured. Whether Calvo's injury occurred in the course of her employment depended on the time, place, and circumstances of her injury relative to her employment. Under the going and coming rule, injuries sustained while going to or coming from work are not ordinarily in the course of employment.

The traveling employee rule, as set forth in *Mulready v. Univ. Research Corp*., 360 Md. 51 (2000), was not applicable to Calvo. That rule applies to situations in which an employee is injured on premises where the employee was staying to carry out the employer's business.

The special mission exception may apply to a case in which compensation would ordinarily be barred by the going and coming rule. That exception applies when the trouble and time of making the journey, or special inconvenience, hazard, or urgency of making it in the particular circumstances is sufficiently substantial to be an integral part of the service itself. The Court concluded that because the evidence created permissible inferences from which a jury could rationally have concluded that the special mission exception applied, the Circuit Court erred in granting summary judgment.

The Court explained that a multi-factor test set forth in *Barnes v. Children's Hosp*., 109 Md. App. 543 (1996), can be used to assess whether a journey is sufficiently special to fall within the exception. A court should consider: (1) the relative regularity or unusualness of the particular journey in the context of the employee's normal duties; (2) the relative onerousness of the

journey compared with the task to be performed; and (3) the suddenness of the call to work, or whether the journey was made under an element of urgency. Urgency may support application of the special mission but is not dispositive.

Although Calvo was required to attend the training as a condition of her employment, it was not regular in relation to her employment duties because it took place on a day she did not usually work and at different location that her usual work site. That the task was part of Calvo's employment was not dispositive because the special mission has applied in cases when employees had to occasionally come to work during their off hours. The Court concluded that it would not have been unreasonable for a jury to find that Calvo's travel was sufficiently unusual.

Appropriate factors for assessing onerousness include all facts and circumstances of the journey—the burden of the journey in comparison with the task to be completed, suddenness, urgency, the length and time of the journey, and whether the employee was required to work on a day she did not normally work. Although Calvo was to spend a full day in training after her trip, she worked on a day she did not normally work, which weighed in favor of onerousness. Further, the County did not offer any information about the length of the journey Calvo was required to make in its motion for summary judgment.

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Jason Nathaniel Carter v. State of Maryland, No. 290, September Term 2017, filed April 2, 2018. Opinion by Fader, J.

https://mdcourts.gov/data/opinions/cosa/2018/0290s17.pdf

CONSTITUTIONAL LAW – REASONABLE LENGTH OF DETENTION FOR TRAFFIC STOP

CONSTITUTIONAL LAW – PROBABLE CAUSE – SEARCH INCIDENT TO ARREST

CRIMINAL LAW – MANUFACTURE, DISTRIBUTION, DISPENSING, OR POSSESSION OF SPECIFIED AMOUNTS OF CONTROLLED DANGEROUS SUBSTANCES – ELEMENTS OF THE OFFENSE

Facts:

At approximately 12:52 a.m., Montgomery County Patrol Officer Michael Mancuso pulled over a car being driven by Jason Nathaniel Carter for failure to completely stop at a stop sign and speeding. Upon returning to his cruiser at 12:57 a.m. with Mr. Carter's license and registration, Officer Mancuso requested a K-9 unit to conduct a scan for narcotics and ran a records check. The check, revealed that Mr. Carter's license was valid and that he did not have any outstanding warrants. Officer Mancuso then began to write Mr. Carter electronic warning citations for both traffic violations.

When K-9 Officer Jason Buhl arrived at 1:07 a.m., Officer Mancuso had not yet finished writing the citations. At approximately 1:09 a.m., Officer Mancuso removed Mr. Carter from his car. Within 15-20 seconds, the drug-sniffing dog alerted to the presence of narcotics. After a search of the car yielded nothing illegal, another officer conducted a pat-down of Mr. Carter. The search ultimately produced two plastic baggies containing more than 70 grams of crack cocaine and three grams of cocaine. The officers then placed Mr. Carter under arrest.

At a hearing on Mr. Carter's motion to suppress the drugs, the Circuit Court for Montgomery County made findings of fact, including that: (1) Officer Buhl arrived before Officer Mancuso finished writing the warning citations; (2) Officer Mancuso did not purposefully delay effectuating the traffic stop; and (3) the drug-sniffing dog alerted almost immediately on Mr.

Carter's car. The court also concluded that the search of Mr. Carter was incident to his arrest, and so denied the motion to suppress.

Mr. Carter was tried before a Montgomery County jury on charges of possession of crack cocaine, possession with intent to distribute crack cocaine, and possession of 50 grams or more of crack cocaine. At the conclusion of the trial, the court rejected Mr. Carter's contention that the jury should be instructed that the crime of possession of 50 grams or more of crack cocaine—commonly referred to as "volume dealer"—required the State to prove that Mr. Carter intended to distribute the crack cocaine. The jury acquitted Mr. Carter of possession with intent to distribute but convicted him of both simple possession and possession of 50 grams or more of crack cocaine. The trial court merged the two convictions and sentenced Mr. Carter to the mandatory minimum sentence of five years' incarceration for possession of 50 grams or more of crack cocaine.

Held: Affirmed.

The Court of Special appeals concluded that the officers did not impermissibly delay the traffic stop. A traffic stop cannot last any longer than required to effectuate the purpose of that stop, but officers may pursue investigation of both the traffic violation and another crime simultaneously so long as they do not purposefully delay or completely abandon the traffic stop. *Charity v. State*, 132 Md. App. 598, 614-15 (2000). Giving proper deference to the suppression court's first-level findings of fact, Officer Mancuso did not unnecessarily delay the traffic stop. Officer Mancuso's participation in the removal of Mr. Carter from the vehicle was only a momentary and permissible pause.

The Court also concluded that Officer Mancuso's search of Mr. Carter was incident to his arrest. The Court noted that it has repeatedly found both (1) that a canine alert provides probable cause to arrest and (2) that a search is considered incident to an arrest so long as it was "essentially contemporaneous" with the arrest, *Barrett v. State*, 234 Md. App. 653, 672 (2017). Here, the canine alert provided probable cause to arrest Mr. Carter and the search of his person was essentially contemporaneous with his arrest. Under the Court's precedent, therefore, this was a search incident to arrest.

Finally, the Court rejected Mr. Carter's argument that the trial court erred by not instruction the jury that the crime of possession of 50 grams or more of crack cocaine required the State to prove an intent to distribute. Md. Code Ann., Crim. Law § 5-612(a). The Court concluded that the plain language of § 5-612(a) requires only two elements for a conviction: "(1) manufacturing, distributing, dispensing or possessing [a controlled dangerous substance]; and (2) in the requisite quantity." *Kyler v. State*, 218 Md. App. 196, 227 (2014). That conclusion is bolstered by legislative history. Before it was amended in 2005, § 5-612(a) provided a penalty enhancement for someone convicted of possession with intent to distribute. In 2005, the General Assembly changed the statute to create a new, standalone offense that does not require proof of an intent to distribute.

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Danny Blankenship v. State of Maryland/MTA, et al., No. 179, September Term 2017, filed May 31, 2018. Opinion by Berger, J.

https://mdcourts.gov/data/opinions/cosa/2018/0179s17.pdf

WORKERS' COMPENSATION – APPLICABILITY OF STATUTORY OFFSETS – STATE PERSONNEL AND PENSION OFFSET – LABOR AND EMPLOYMENT OFFSET – ADMINISTRATION OF MTA PENSION SYSTEM

Facts:

Maryland Transit Administration ("MTA") employee Danny Blankenship ("Claimant"), appellant, suffered an accidental injury at work. Claimant applied for and was granted MTA disability retirement. Claimant also applied for workers' compensation benefits and received an award.

Before the Commission, the MTA requested that the Commission allow an offset from the permanent partial disability benefits pursuant to Md. Code (1991, 2008 Repl. Vol.), § 9-610 of the Labor & Employment Article ("LE"). The Commission denied the MTA's request. The MTA filed a petition for judicial review in the Circuit Court for Baltimore City. The circuit court reversed the Commission, determining that the LE § 9 610 offset applied.

Held: Affirmed.

The purpose of statutory offsets for workers' compensation benefits is to avoid double recovery for a single injury. *Zakwieia v. Baltimore Cty., Bd. of Educ.*, 231 Md. App. 644, 651, *cert. denied*, 454 Md. 676 (2017). There are two statutory offsets implicated in this case: the statutory offset set forth in LE § 9-610 and the statutory offset set forth in Md. Code (1993, 2015 Repl. Vol.), § 29-118 of the State Personnel & Pensions Article ("SPP"). The LE § 9-610 offset applies to benefits except for those benefits "subject to an offset under [SPP] § 29 118."

The Court of Special Appeals observed that although LE § 9-610 and SPP § 29-118 each operate to prevent double recovery, they operate differently. The LE § 9-610 offset operates by reducing workers' compensation benefits and leaving pension benefits unaffected. Pursuant to LE § 9-610, the Commission reduces a workers' compensation award by the amount of an injured employee's disability retirement pension. The SPP § 29-118 offset, in contrast, reduces pension benefits but leaves workers' compensation benefits unaffected.

The SPP § 29-118 offset applies to pensions that are part of the State Retirement and Pension System. SPP § 21-102 provides a list of various pensions that are part of the State Retirement and Pension System, and further provides that "any other system or subsystem that the Board of Trustees [for the State Retirement and Pension System] administers" is part of the State

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Retirement and Pension System. Claimant asserted that the MTA pension is administered by the Board of Trustees, and, therefore, the SPP § 29 118 offset applies. The MTA argued that the MTA administered its own pension, and, therefore, the LE § 9-610 offset applies.

The Court of Special Appeals observed that the MTA was authorized to establish its own pension system pursuant to Md. Code (1977, 2015 Repl. Vol.), § 7-206(b)(2)(ii), which was set forth in the collective bargaining agreement between the Local 1300 Amalgamated Transit Union and the MTA. The Court observed that both parties recognize that the State Personnel and Pensions System is responsible for the investment of the MTA pension's assets, but explained that the administration of MTA pension funds does not constitute "administration" of the MTA pension plan pursuant to SPP § 21-102(11). The Court emphasized that the Memorandum of Understanding between the Maryland State Retirement Board and the MTA provides that the MTA continues to administer its own plan.

The Court determined that the MTA, and the MTA alone, is responsible for the day to-day administration of the MTA pension plan, including the payment of pension benefits and determination of participant eligibility. The Court held, therefore, that the MTA pension is separate and distinct from the Maryland State Retirement and Pension System. Accordingly, the Court held that Claimant's benefits were not subject to an offset under SPP § 29-118 and were subject to the LE § 9-610 offset.

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ATTORNEY DISCIPLINE

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By an Order of the Court of Appeals dated March 23, 2018, the following attorney has been suspended by consent for thirty days, effective May 3, 2018:

SUNG KOOK CHUN

*

This is to certify that the name of

VERNON CHARLES DONNELLY

has been replaced upon the register of attorneys in this State as of May 8, 2018.

*

By an Opinion and Order of the Court of Appeals dated May 10, 2018, the following attorney has been indefinitely suspended:

ROSS D. HECHT

*

By an Order of the Court of Appeals dated May 18, 2018, the following attorney has been disbarred by consent:

BO LEE

*

By an Order of the Court of Appeals dated May 21, 2018, the following attorney has been indefinitely suspended by consent:

SUZANNE NICOLE HULTHAGE

*

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*

By an Opinion and Order of the Court of Appeals dated May 21, 2018, the following attorney has been indefinitely suspended:

JONATHAN DANIEL SPERLING

*

By an Opinion and Order of the Court of Appeals dated May 21, 2018, the following attorney has been suspended for ninety days:

SAMUEL SPERLING

*

By an Order of the Court of Appeals dated May 22, 2018, the following attorney has been disbarred:

PHILIP M. KLEINSMITH

*

By an Order of the Court of Appeals dated May 17, 2018 the following attorney has been disbarred by consent, effective May 31, 2018:

RICHARD WELLS MOORE

*

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JUDICIAL APPOINTMENTS

*

On April 11, 2018, the Governor announced the appointment of **MAGISTRATE KAREN R. KETTERMAN** to the District Court of Maryland – Talbot County. Judge Ketterman was sworn in on May 10, 2018 and fills the vacancy created by the retirement of the Hon. William H. Adkins, III.

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RULES ORDERS AND REPORTS

A Rules Order pertaining to amendments to the One Hundred Ninety-First Report of the Standing Committee on Rules of Practice and Procedure was filed on May 8, 2018.

http://mdcourts.gov/sites/default/files/rules/order/ro191050818.pdf

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UNREPORTED OPINIONS

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

https://mdcourts.gov/appellate/unreportedopinions

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