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SANCTIONS – MAINTAINING OR DEFENDING PROCEEDING IN BAD FAITH OR WITHOUT SUBSTANTIAL JUSTIFICATION – STANDARD OF REVIEW

Facts:

In 2008, the Maryland-National Capital Park and Planning Commission ("the Commission") hired the Fort Myer Construction Corporation ("Fort Myer") to build a bridge in Montgomery County. Several problems arose during construction, delaying completion of the bridge by several months. Blaming these problems on flaws in the design documents, Fort Myer sued the Commission for damages. The Commission impleaded the creator of the design documents, the URS Corporation ("URS"), claiming that URS had a duty to defend the Commission against Fort Myer's claims and that, if the Commission were found liable to Fort Myer, URS had a duty to indemnify the Commission for that liability. URS, in turn, countersued the Commission, claiming that the Commission had wrongly withheld contract payments.

After some dispute over whether Fort Myer was required by statute to file a certificate of a qualified expert ("CQE") with its complaint, Fort Myer agreed to a dismissal of its claims without prejudice. The claims between the Commission and URS went to trial, resulting in awards to both parties. After those proceedings, the Commission and URS successfully moved for sanctions against Fort Myer under Maryland Rule 1-341 for litigating a complaint "without substantial justification."

While the trial court set forth the judgments against the Commission and Fort Myer in separate documents, it failed to do so in memorializing the judgment against URS.

All three parties appealed to the Court of Special Appeals. In an initial opinion, that court *sua sponte* dismissed the appeals by the Commission and URS for being too late –*i.e.*, for being filed more than thirty days after those parties' claims were resolved in the Circuit Court. After

reconsideration, in a revised opinion, the court dismissed the appeals by the Commission and URS for being too early – *i.e.*, for being filed before a separate document was created memorializing the judgment against URS. In both versions of the opinion, the court held that the sanctions award against Fort Myer should be reversed.

The Commission and URS successfully petitioned the Court of Appeals for a writ of *certiorari*. Before the Court of Appeals, those parties claimed that the Circuit Court's failure to memorialize the judgment against URS in a separate document meant that there was no final judgment in the case and that the Court of Special Appeals therefore lacked jurisdiction over Fort Myer's appeal. In the alternative, those parties claimed that, if the Court of Special Appeals did have jurisdiction over that appeal, it was error to reverse the sanctions imposed against Fort Myer.

Held:

Because the separate document requirement of Maryland Rule 2-601 may be waived, the Court of Special Appeals had jurisdiction over Fort Myer's appeal and properly reversed the sanctions imposed against Fort Myer.

Appellate jurisdiction is defined by statute and implemented by rule and case law. In general, litigants may not appeal a trial court ruling until entry of final judgment in the case – *i.e.*, until the trial court follows certain procedures and adjudicates all claims against all parties. As part of this process, as indicated in Rule 2-601, the trial court must "set forth" a final judgment "on a separate document." The separate document requirement was created in order to provide litigants a clear date from which the deadline for filing an appeal would be computed.

Because the purpose of the separate document requirement is to define the deadline for filing an appeal, it may be waived when no party would be prejudiced and when its application would make an appeal too early. Waiver may be appropriate where the trial court has adjudicated all claims against all parties, the judgment is reflected in the docket entries, and no party has objected to the failure to enter a separate document. Those circumstances were present in this case. As a result of this waiver, the Court of Special Appeals properly had jurisdiction over Fort Myer's appeal.

Rule 1-341 allows a court to impose sanctions on a party for "maintaining or defending any proceeding . . . without substantial justification"; in other words, for taking a position that is not fairly debatable, not colorable, or not within the realm of legitimate advocacy. Such sanctions should not be imposed if a party has a reasonable basis on which to base its argument or offers an arguable interpretation of an ambiguous statute, even if that party is ultimately unsuccessful in its advocacy.

In this case, the Circuit Court's findings did not support a conclusion that Fort Myer maintained its case "without substantial justification." Although Fort Myer filed its complaint without attaching a CQE, argued initially that a CQE was not required, and eventually conceded that the

absence of a CQE was fatal to its complaint, this course of action does not mean that its complaint was filed "without substantial justification." It was – and remains – at least fairly debatable whether or not the CQE requirement applied to Fort Myer's complaint. Additionally, although the Circuit Court alluded to Fort Myer's "discovery violations" when awarding sanctions, it chose not to impose sanctions as provided in the discovery rules. And finally, although the Circuit Court dismissed Fort Myer's claims, it did so without prejudice, and specifically noted that the claims may have merit if they were brought again. Because there was no support for the Circuit Court's conclusion that Fort Myer maintained its case "without substantial justification," the Court of Special Appeals properly reversed the sanctions award against Fort Myer.

Terrance J. Brown v. State of Maryland, No. 64, September Term 2015, filed March 27, 2017. Opinion by Hotten, J.

Barbera, C.J., and McDonald, J. dissent.

http://www.mdcourts.gov/opinions/coa/2017/64a15.pdf

CRIMINAL PROCEDURE – FIFTH AMENDMENT – ENTITLEMENT TO *MIRANDA* WARNINGS – DETERMINATION OF CUSTODY FOR PURPOSES OF *MIRANDA*

Facts:

Following an early morning report of a shooting in Cambridge, Maryland, police dispatch received a report that an unidentified male had called 911, indicated that he had been injured driving from Cambridge to the Hurlock Village Apartments and "didn't want to go to jail." A Maryland State Police trooper proceeded to the apartment complex, where he observed "what he believed to be the vehicle of interest[.]" The trooper approached the vehicle after one of the occupants exited and initiated communication with the three remaining passengers. When one of the passengers opened the door, the trooper observed dried blood in the passenger area. One of the passengers indicated that they had gone to Cambridge to "pick up T.J. Brown and bring him home to his mother's [house]" in the Hurlock Village complex. At some point, the Petitioner, Terrance J. Brown, returned, wearing a shirt with blood on it and had blood dripping from his earlobe. Petitioner advised the trooper that "he had been at a party in Cambridge when he heard gunshots. Upon hearing the gunshots . . . he began to duck and run." The trooper observed that Petitioner "had a nick to his earlobe[,]" "a graze to his shoulder blade area and what appeared to be like a through and through [gunshot wound] on . . . his upper chest." Petitioner was transported to Peninsula Regional Medical Center in Salisbury for treatment, and his vehicle was towed to the Cambridge Police Department.

Detective Howard of the Cambridge Police Department traveled to the hospital to meet with Petitioner. Detective Howard "advised [Petitioner] that his purpose [at the hospital] was to 'obtain'" Petitioner "and ask him if he would consent to coming back" to the Cambridge Police Department "to 'get[]' a statement."

Detective Howard transported Petitioner in a marked police car directly from the hospital to the Cambridge Police Department. He was wearing disposable hospital garments and boots. His head was bandaged. Petitioner was questioned for several minutes before the issuance of any *Miranda* warning.

During a suppression hearing, the court found that "Detective Howard advised [Petitioner] numerous times that he was not under arrest, but never advised him that he was free to refuse transportation back to the Cambridge Police Department." The court further stated:

> Although [Petitioner] acquiesced to traveling back to Cambridge and at no time articulated that he did not want to go, he did express concern about how he would get home, especially after being advised once he was in the police car that his vehicle had been taken to the Cambridge Police Department after Tpr. Fellon found blood in the vehicle. Detective Howard assured [Petitioner] that the proper arrangements would be made.

Upon arrival to the police station, the suppression court noted that Detective Howard entered through a door in the north tower located "apart from the entrance for the general public. Detectives Flynn and Curran were waiting for Detective Howard and [Petitioner] on the second floor." Petitioner was then taken to an interview/interrogation room. The suppression court found that "[Petitioner] was left alone in the room for approximately 15 minutes before Detective Flynn appeared for the interview." Detective Flynn was the sole interviewer.

Eventually, Petitioner was issued *Miranda* warnings and provided a written statement. Relevant here is the exchange between Detective Flynn and Petitioner that occurred during the approximately six minutes of interrogation that preceded the issuance of *Miranda* warnings. Petitioner was subsequently charged with two counts of first-degree murder and related counts stemming from the shooting.

The circuit court granted Petitioner's motion to suppress the statements. The Court of Special Appeals reversed the ruling of the suppression court in an unreported opinion. The Court of Appeals granted Petitioner's petition for writ of certiorari, and after briefing and argument, ordered that the matter be remanded, without affirmance or reversal, to the suppression court, for the sole purpose of the entry of findings of fact on the issue of custody. After receipt of the suppression court's findings, supplemental briefing, and reargument, the Court considered one question—whether Petitioner was in custody for *Miranda* purposes during the interrogation that took place at the Cambridge Police Department.

Held: Reversed.

The Court of Appeals of reversed the judgment of the Court of Special Appeals. In examining the totality of the circumstances surrounding the Petitioner's interrogation, the Court held that a reasonable person in the Petitioner's position would not have felt free to end the encounter and leave. Petitioner's freedom of movement was curtailed to the degree associated with a formal arrest. Further, the circumstances of Petitioner's interrogation presented the same concerns as those presented in *Miranda*.

The Court of Appeals determined Petitioner was in custody for *Miranda* purposes when: (1) Petitioner was approached by detective during early morning hours at the hospital where Petitioner was being treated for multiple gunshot wounds; (2) detective told Petitioner that detective's purpose in coming to the hospital was to "obtain" Petitioner; (3) detective transported Petitioner from the hospital directly to the police station where Petitioner was interrogated; (4)

Petitioner was told by detective that Petitioner's car had been seized by police because of dried blood found in the car; (5) Petitioner was escorted directly to second floor of police department into an isolated interrogation room upon his arrival at the police station; (6) Petitioner was transported in rear seat of a marked police cruiser; (7) Petitioner was wearing hospital garb with his head still bandaged during the interrogation; and (8) Petitioner was formally arrested following the interrogation. Based on these facts, a reasonable person in Petitioner's position would not have felt at liberty to terminate the interrogation and leave. The totality of the circumstances of Petitioner's interrogation demonstrated that the restraint on Petitioner's freedom of movement was to the degree associated with a formal arrest. Thus, the trial court properly granted Petitioner's motion to suppress his statements.

Rahul Gupta v. State of Maryland, No. 36, September Term 2016, filed March 24, 2017. Opinion by Getty, J.

Barbera, C.J., Adkins and McDonald, JJ., concur.

http://www.mdcourts.gov/opinions/coa/2017/36a16.pdf

CONSTITUTIONAL CRIMINAL PROCEDURE – FIFTH AMENDMENT – RIGHT TO COUNSEL – INVOCATION

CRIMINAL LAW & PROCEDURE – JURY COMMUNICATIONS

Facts:

The Petitioner, Rahul Gupta, went out drinking in Washington, D.C., with his girlfriend, Taylor Gould, and two of his friends, Mark Waugh and Josh White. After visiting three different bars, Mr. Gupta and Ms. Gould decided to return to their apartment in Silver Spring, Maryland, accompanied by Mr. Waugh. Approximately one and a half hours after returning to the apartment, Ms. Gould called 911 and told the operator that there was blood everywhere and that her friend was not breathing. When the police arrived, they found Mr. Gupta covered in blood, lying on the floor next to Mr. Waugh's body. Mr. Gupta told the police that he caught Mr. Waugh and his girlfriend cheating and, "I killed my buddy."

Police officers transported Mr. Gupta and Ms. Gould to the Major Crimes Division of the Montgomery County Police Department, where they placed Mr. Gupta in a holding cell to await interrogation. Officer Andrew Richardson was stationed near the holding cell to monitor Mr. Gupta while he waited for the detectives to arrive to begin the interrogation. While in the holding cell, Mr. Gupta shouted two to three times at Officer Richardson that he wanted a lawyer. Officer Richardson relayed these requests to the detectives when they arrived, approximately ten to thirty minutes later.

Approximately three hours after Mr. Gupta had demanded a lawyer from his holding cell, the detectives moved him into an interrogation room and began to ask him questions. Detective Paula Hamill read Mr. Gupta his *Miranda* rights and asked him if he understood. Mr. Gupta responded, "Yes." After about eight seconds of silence, Mr. Gupta began to ask, "When do I get to talk . . .," before being interrupted by Detective Hamill. Mr. Gupta proceeded to cooperate with the detectives and answer their questions throughout the fifty-five-minute interrogation. Mr. Gupta did not ask for a lawyer at any point after being moved into the interrogation room.

The State charged Mr. Gupta with first- and second-degree murder in the Circuit Court for Montgomery County. Prior to trial, Mr. Gupta filed a motion to suppress the statements he made to the detectives during the interrogation, arguing that they were obtained in violation of his *Miranda* rights. The circuit court denied the motion.

Approximately one week into the trial, a juror communicated to the trial judge's law clerk that she would not be able to continue serving if the trial lasted beyond two weeks because she was scheduled to be a keynote speaker at a conference in Las Vegas. Without notifying the parties of the communication or providing them an opportunity to offer input on how to respond, the trial judge responded to the juror's communication, through his law clerk, by stating that they were "not going to stand in the way of her going to her conference." The trial judge informed the parties of this exchange the next business day, and had three separate discussions with the parties over the course of a week regarding how to resolve the juror's scheduling conflict. Ultimately, the trial judge dismissed the juror and replaced her with an alternate prior to the start of deliberations so that she could attend her conference without having to delay the trial.

The jury convicted Mr. Gupta of first-degree murder, and the circuit court sentenced him to life in prison. Mr. Gupta appealed his conviction to the Court of Special Appeals, which affirmed the judgment of the circuit court. Mr. Gupta petitioned the Court of Appeals for a writ of certiorari, which the Court granted in part.

Held: Affirmed.

Mr. Gupta did not invoke his *Miranda* right to counsel by demanding to see a lawyer while in a holding cell awaiting interrogation, where no such demands were made to the detectives who interrogated him at any point after being advised of his rights and the interrogation began. Therefore, the circuit court did not err in denying Mr. Gupta's motion to suppress the statements he made to the detectives during the interrogation.

In addition, the juror's communication to the trial judge's law clerk that she would be unable to continue serving if the trial lasted beyond two weeks "pertained to the action" under Maryland Rule 4-326(d)(2). The trial judge violated the Rule by responding to the juror's inquiry off the record and without notifying the parties of the communication. However, the violation was harmless because the trial judge subsequently notified the parties of the juror's communication and the response, provided the parties an opportunity to offer input on how to resolve the situation with the juror, and considered and rejected defense counsel's suggestions on the record prior to ultimately dismissing the juror before deliberations.

Clifford Cain, Jr. v. Midland Funding, LLC, No. 45, September Term 2016, filed March 24, 2016. Opinion by Adkins, J.

Getty and Harrell, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2017/45a16.pdf

CONTRACTS – ARBITRATION CLAUSE – WAIVER

Facts:

In 2003, Clifford Cain, Jr., opened an AT&T Universal Savings and Rewards Card account with Citibank. Cain's contract with Citibank included an arbitration provision that allowed either party to "elect mandatory, binding arbitration for any claim, dispute, or controversy between [Cain] and [Citibank]." Additionally, it provided that the arbitration clause would survive "any transfer, sale or assignment of [Cain's] account, or any amounts owed to [his] account, to any other person or entity." In 2007, Cain stopped making payments on his Citibank account. In 2008, Citibank sold all of the rights, title, and interest in Cain's account to Midland Funding, LLC ("Midland").

On March 30, 2009, Midland filed a small claims action against Cain in the District Court of Maryland, sitting in Baltimore City, for the outstanding balance on his Citibank account ("the collection action"). The court entered a default judgment against Cain for $4,520.54. Under the Maryland Collection Agency Licensing Act ("MCALA"), with limited exceptions, companies doing business as a "collection agency" must be licensed by the State. Md. Code (1957, 2015 Repl. Vol.), § 7-301 of the Business Regulation Article ("BR"). Although the MCALA required Midland to be licensed when it brought suit against Cain, it did not become licensed until almost a year later.

On June 23, 2013, the Court of Special Appeals issued an opinion allowing debtors to collaterally attack judgments obtained by unlicensed collection agencies. *Finch v. LVNV Funding LLC*, 212 Md. App. 748 (2013). On July 30, 2013, Cain filed a class action complaint against Midland in the Circuit Court for Baltimore City for its unlawful debt collection practices. Cain argued that the judgments Midland obtained against him and the other class members were void under *Finch*.

Shortly after Cain brought suit, Midland and Cain filed a consent motion to stay the class action pending the appeal of *Finch* to the Court of Appeals. The Circuit Court granted the stay. On October 8, 2013, the Court denied *certiorari* in *Finch*, and two weeks later the Circuit Court lifted the stay in Cain's class action. Midland then moved to compel arbitration and stay the court proceedings, or, alternatively, dismiss Cain's complaint. The Circuit Court stayed discovery and held a trial on the existence of an arbitration agreement between Cain and

Midland. After finding that such an agreement did exist, the Circuit Court granted Midland's motion to compel arbitration.

Cain appealed to the Court of Special Appeals, which affirmed. The intermediate appellate court held that Midland did not waive its right to arbitrate by pursuing a small claims action against Cain, seeking court approval of two class settlements, or filing a consent motion to stay Cain's class action pending the appeal of Finch. *Cain v. Midland Funding, LLC*, 2016 WL 1597179, at *13 (Apr. 21, 2016). It concluded that the Circuit Court properly granted Midland's motion to compel arbitration.

Held: Reversed

The Court of Appeals held that when Midland litigated a collection action against Cain in district court, it acted inconsistently with an intent to enforce the arbitration provision, and therefore waived the right to arbitrate any "related claims" under *Charles J. Frank, Inc. v. Associated Jewish Charities of Baltimore, Inc.*, 294 Md. 443 (1982). The Court first considered Midland's argument that the arbitration agreement required it to litigate its collection action against Cain. The agreement provided for arbitration of "any claim, dispute, or controversy." But it also provided a narrow exception from arbitration for suits filed in small claims court: "Claims filed in a small claims court are not subject to arbitration, so long as the matter remains in such court . . . ." Analyzing this provision, the Court concluded that "claims filed" meant that the collection action was subject to arbitration or litigation until Midland filed the claim in small claims court. Therefore, Midland was not required to litigate the collection action and, in doing so, it waived its right to arbitrate "related claims" under *Frank*.

Next, the Court distinguished *Frank* from the facts of this case. The Court explained that the *Frank* cases involved two completely separate issues—a contractor's failure to pay a subcontractor for rock removal and an owner's failure to pay the contractor the balance due on the construction project. Neither suit was dependent on the other. But Cain's current claims depend on Midland's 2009 collection action and money judgment. Cain seeks declaratory and injunctive relief to recover the judgment against him and pre- and post-judgment interest and costs. He also brings unjust enrichment, Maryland Consumer Debt Collection Act, and Maryland Consumer Protection Act claims against Midland. Put simply, if Midland had not pursued its 2009 collection action, Cain's current claims would not exist. Thus, the claims are part of "one basic issue" of whether Midland was entitled to a money judgment against Cain, and therefore are related. Consequently, Midland waived its right to arbitrate Cain's claims when it filed and pursued the 2009 collection action.

Finally, the Court concluded that Cain did not have to show that he would be prejudiced if the arbitration clause is enforced to establish waiver. Waiver is "the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, and may result from an express agreement or be inferred from circumstances." *Hovnanian Land Inv. Grp., LLC v. Annapolis Towne Ctr. at Parole, LLC*, 421 Md. 94, 122–23 (2011) (citation

omitted). The Court explained that it has clarified the elements of waiver by distinguishing it from the related doctrine of estoppel—"waiver does not necessarily imply that one has been misled to his prejudice or into an altered position," whereas "estoppel always involves this element." *Benson v. Borden*, 174 Md. 202, 219 (1938). Under Maryland law, although "the same conduct may constitute both an implied waiver and an estoppel," waiver does not require a showing of prejudice. *Gould v. Transamerican Assocs.*, 224 Md. 285, 295 (1961). Because the United States Supreme Court has instructed state courts to apply the same principles of contract law to arbitration agreements as they do to all other contracts, *Perry v. Thomas*, 482 U.S. 483, 492–93 n.9 (1987), the Court declined to distinguish waiver of the right to arbitrate from other types of contractual waiver. The Court further concluded that there was no reason to depart from Maryland precedent on contractual waivers generally.

State of Maryland v. Douglas Ford Bey II, No. 49, September Term 2016, filed March 27, 2017. Opinion by Hotten, J.

Watts, J., joins in judgment only.
Barbera, C.J., McDonald, and Getty, JJ., concur.

http://www.mdcourts.gov/opinions/coa/2017/49a16.pdf

CRIMINAL LAW – STATUTORY INTERPRETATION – PLAIN LANGUAGE

CRIMINAL LAW – STATUTORY INTERPRETATION – AMBIGUITY – RULE OF LENITY

Facts:

Douglas Ford Bey II, Respondent, was charged with sexual abuse of a minor and related counts. The female victim testified that she had been sexually abused by Bey, her putative father, for approximately four years.

The first instance of abuse occurred when Bey performed cunnilingus on the victim, who was ten years old. Thereafter, Bey exposed the victim to pornography and forced her to engage in fellatio and vaginal intercourse. When the victim was eleven years old, the sex acts—vaginal intercourse, fellatio, and cunnilingus—occurred multiple times per week. These acts continued with the same frequency when the victim was twelve and thirteen years old.

When the victim learned that she was pregnant, Bey took her to the University of Maryland Medical Center to have the fetus aborted. Bey continued to sexually abuse the victim. The victim ultimately reported Bey's sexual abuse to a therapist, who brought the matter to the attention of the authorities.

During the course of an investigation, the victim gave a recorded statement. When Detective Ronald Dement of the Frederick County Sheriff's Office learned that Bey had forced the victim to perform fellatio the same day of the victim's statement, the detective obtained a search warrant to conduct a forensic sexual assault exam of Bey. Subsequent testing showed that the victim's DNA was present on Bey's penis.

Fetal tissue from the victim's abortion was obtained. DNA testing revealed that Bey was the biological father of the fetus. The State introduced into evidence recorded calls that Bey made while incarcerated in the Frederick County Detention Center. During those calls, Bey admitted to having his daughter perform oral sex on him.

Bey challenged the sentences imposed by the circuit court. In a reported opinion, the Court of Special Appeals affirmed Bey's convictions, but vacated the sentences and remanded for a new sentencing proceeding. *Bey v. State*, 228 Md. App. 521, 139 A.3d 1113 (2016).

Held: Affirmed.

The Court of Appeals determined that the plain language of the statute provides that separate types of prohibited sexual acts do not constitute separate units of prosecution. The Court held that the State's interpretation regarding this discrete issue was unreasonable under the plain language of the statute. Thus, the statute prohibited separate convictions and sentences for each type of sexual act as a separate course of conduct during an uninterrupted statutorily-defined course of conduct.

Moreover, the statute is ambiguous as to whether multiple convictions and sentences may be obtained for multiple ninety-day minimum intervals of an uninterrupted continuing course of conduct. Crim. Law § 3-315(a) provides that "[a] person may not engage in a continuing course of conduct which includes three or more acts . . . over a period of 90 days *or more*[.]" (emphasis added). The plain language provides that a course of conduct must be ninety days, at a minimum. It is reasonable to interpret the plain language of subsection (a) as providing that the State is limited to one conviction for one continuing course of conduct—even when that course of conduct persists for consecutive intervals of ninety days or more. It is also reasonable to interpret subsection (a) as setting forth a unit of prosecution as a course of conduct that is at least ninety days. The latter interpretation would allow for multiple course of conduct units of prosecution for consecutive ninety-day intervals when there has not been an interruption in the course of conduct.

The Court of Appeals determined that the legislative history and purpose of the statute did not absolve the statute of ambiguity in favor of a party's proffered interpretation. Contradictory, reasonable interpretations subsisted with equal force even after the tools of statutory construction were exhausted. Thus, the rule of lenity compelled the result. The Court stated, "'ambiguous units of prosecution . . . , pursuant to the rule of lenity, must normally be construed in favor of the defendant,' effectively merging the offenses." *Triggs v. State*, 382 Md. 27, 43, 852 A.2d 114, 124 (2004) (quoting *Melton v. State*, 379 Md. 471, 488, 842 A.2d 743, 753 (2004)). Therefore, the sentences for the continuing course of conduct counts must be merged on remand.

Keisha Ann Hartman v. State of Maryland, No. 15, September Term 2016, filed March 27, 2017. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/coa/2017/15a16.pdf

CRIMINAL LAW – PLEA AGREEMENTS – STANDARD OF REVIEW

CRIMINAL LAW – REPRESENTATIONS, PROMISES, OR COERCION; PLEA BARGAINING

CRIMINAL LAW – PRESERVATION – APPELLATE DISCRETION

CONSTITUTUTIONAL LAW – DUE PROCESS – PLEA AGREEMENTS – FAIRNESS AND ADEQUACY OF PROCEDURAL SAFEGUARDS

CONSTITUTUTIONAL LAW – DUE PROCESS – PLEA NEGOTIATIONS – REALISTIC LIKELIHOOD OF VINDICTIVENESS

Facts:

On June 14, 2014, Keisha Ann Hartman was observed stealing multiple items, valued at approximately $82.51, from a Walmart in Allegany County. Ms. Hartman was arrested and charged with theft under $100 in the District Court of Maryland. Ms. Hartman and the State entered into a plea agreement whereby Ms. Hartman agreed to plead guilty and in exchange, the State would recommend that she receive no executed jail time. At the plea hearing, Ms. Hartman pled guilty and the State recommended that she not receive any executed jail time. The District Court judge found Ms. Hartman guilty, but sentenced her to thirty days' incarceration. Ms. Hartman filed a *de novo* appeal to the circuit court pursuant to Courts and Judicial Proceedings Article §12-401.

On June 2, 2015, Ms. Hartman entered a plea of not guilty and requested a jury trial in the circuit court. The State subsequently offered Ms. Hartman a new plea agreement where in exchange for her guilty plea, the State would recommend thirty days' incarceration. On July 2, 2015, Ms. Hartman filed a Motion in the circuit court seeking to enforce the terms of the District Court plea agreement. During a hearing on July 28, 2015, the circuit court held the terms of the District Court plea agreement were no longer enforceable because on a de novo appeal, the circuit court considers the case anew. Ms. Hartman filed an interlocutory appeal to the Court of Special Appeals. Prior to briefing, the Court, *sua sponte*, transferred the case to the Court of Appeals pursuant to Maryland Rule 8-132.

Held: Affirmed.

The Court of Appeals has repeatedly held that plea agreements are akin to contracts. *See Cuffley v. State*, 416 Md. 568, 579, 7 A.3d 557, 563 (2010). In construing the terms of a plea agreement, the Court considers solely the record established at the plea hearing, including what was presented to the court, in the defendant's presence, and what the defendant reasonably understood to be the sentence that was negotiated. *See id*. at 582, 7 A.3d at 565. The Court held that, based on District Court record, a reasonable person in Ms. Hartman's position would not have expected the plea agreement to extend beyond the District Court proceeding. Additionally, the Court held that although the District Court judgment remained intact until the conclusion of the circuit court proceeding, the factual and procedural underpinnings that led to the judgment in the District Court did not.

The Court held that Ms. Hartman properly preserved her due process claim regarding the enforcement of the plea agreement, but did not properly preserve her due process claim regarding possible prosecutorial vindictiveness. Pursuant Maryland Rule 8-131(a), the Court invoked its discretion to consider the merits of Ms. Hartman's due process claim regarding possible prosecutorial vindictiveness.

The "[d]ue process concerns for fairness and the adequacy of procedural safeguards guide any interpretation of a court approved plea agreement." *Cuffley*, 416 Md. at 580, 7 A.3d at 564 (citation omitted). The Court held that it was not required to determine what the terms of a plea agreement were and whether they had been violated. Rather, the central issue before the Court was whether a plea agreement existed between the parties in the circuit court. Since Ms. Hartman had not detrimentally relied on the existence of an alleged plea agreement in the circuit court, and the State's conduct did not violate her constitutional rights, the due process concerns of fairness and the adequacy of procedural safeguards were not implicated.

The Court concluded that because the District Court plea agreement was not enforceable after Ms. Hartman noted a *de novo* appeal, the State's recommendation of thirty days' incarceration in exchange for a guilty plea was a plea offer that Ms. Hartman was free to accept or reject. In *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 668 (1978), the Supreme Court held that "in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." Since Ms. Hartman was free to accept or reject the State's new plea offer, there was no "realistic fear of 'vindictiveness'" that contravened the due process clause of the Fourteenth Amendment.

Joseph Norman, Jr. v. State of Maryland, No. 56, September Term 2016, filed March 27, 2017. Opinion by Watts, J.

Greene, J., joins the judgment only.
Barbera, C.J., and Adkins, J., concur.
McDonald and Getty, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2017/56a16.pdf

TRAFFIC STOPS – FRISKS/PAT DOWNS – REASONABLE ARTICULABLE SUSPICION – ARMED AND DANGEROUS – ODOR OF MARIJUANA

Facts:

In the Circuit Court for Somerset County ("the circuit court"), the State, Respondent, charged Joseph Norman, Jr. ("Norman"), Petitioner, with drug-related crimes. Norman moved to suppress marijuana and drug paraphernalia that had been found during a traffic stop of a vehicle in which Norman was a passenger.

At a hearing on the motion to suppress, as the only witness for the State, a Maryland State Police Trooper testified that he initiated a traffic stop of a vehicle with an inoperable taillight. In addition to the driver, Norman was in the vehicle's front passenger seat, and another passenger was in the backseat. The trooper called for backup, and two more troopers arrived. The trooper "made contact" with the driver, and detected a strong odor of fresh marijuana emanating from the vehicle's passenger compartment. The trooper told the vehicle's three occupants to exit the vehicle so that he could search the vehicle for marijuana. Before searching the vehicle, the trooper frisked the vehicle's occupants for weapons. The trooper frisked Norman, and felt what seemed like plastic- or cellophane-covered, individually packaged bags of drugs in Norman's pants pocket. The trooper "shook" Norman's pants pocket to make sure that what was in Norman's pants was not a weapon, and a bag of marijuana fell onto the ground. After frisking all three of the vehicle's occupants, the trooper searched the vehicle, and found a grinder with traces of marijuana, as well as a small amount of marijuana in the dashboard's center compartment, above the gear shift.

At the hearing, Norman's counsel contended that the trooper lacked reasonable articulable suspicion that Norman was armed and dangerous. The prosecutor argued that the trooper had reason to believe that criminal activity was afoot because possession of any amount of marijuana was criminal at the time of the traffic stop.

The circuit court denied the motion to suppress, finding that the trooper conducted a frisk of Norman as opposed to a search of his person, and concluding that the trooper had reasonable articulable suspicion that Norman was armed and dangerous.

Norman waived his right to a jury trial, and proceeded by way of a not guilty agreed statement of facts, reserving the right to appeal the circuit court's denial of his motion to suppress. The circuit court found Norman guilty of possession of marijuana, and the State nol prossed the remaining charges.

The majority of a panel of the Court of Special Appeals affirmed the circuit court's judgment, holding that, based on the odor of marijuana, it was reasonable for the trooper to frisk Norman for weapons before searching the vehicle. Judge Cathy Hollenberg Serrette, a judge of the Circuit Court for Prince George's County who had been specially assigned, dissented, concluding that there was insufficient evidence to support a finding that the trooper had reason to believe that Norman was armed and dangerous.

Norman filed a petition for a writ of *certiorari*, which the Court of Appeals granted.

Held: Reversed and remanded.

The Court of Appeals held that its recent decision in *Robinson v. State*, 451 Md. 94, 99, 152 A.3d 661, 665 (2017), was not determinative of the issue at hand. In *Robinson, id*. at 99, 152 A.3d at 665, the Court unanimously held that a law enforcement officer has probable cause to search a vehicle where the law enforcement officer detects an odor of marijuana emanating from the vehicle, as marijuana in any amount remains contraband, notwithstanding the decriminalization of possession of less than ten grams of marijuana; and the odor of marijuana gives rise to probable cause to believe that the vehicle contains contraband or evidence of a crime. In *Norman*, the Court explained that *Robinson* did not resolve the issue one way or another because *Robinson* did not involve frisks or other searches of persons, and did not address the circumstances under which a law enforcement officer may reasonably infer that a vehicle's occupant possesses a gun.

In *Norman*, the Court reaffirmed the basic principle that, for a law enforcement officer to frisk, *i.e.*, pat down, an individual, there must be reasonable articulable suspicion that the individual is armed and dangerous, even where a law enforcement officer detects the odor of marijuana emanating from a vehicle. The Court held that, where an odor of marijuana emanates from a vehicle with multiple occupants, a law enforcement officer may frisk an occupant of the vehicle if an additional circumstance or circumstances give rise to reasonable articulable suspicion that the occupant is armed and dangerous. Stated otherwise, for a law enforcement officer to have reasonable articulable suspicion to frisk one of multiple occupants of a vehicle from which an odor of marijuana is emanating, the totality of circumstances must indicate that the occupant in question is armed and dangerous. An odor of marijuana alone emanating from a vehicle with multiple occupants does not give rise to reasonable articulable suspicion that the vehicle's occupants are armed and dangerous and subject to frisk.

The Court explained that its holding in *State v. Wallace*, 372 Md. 137, 156, 812 A.2d 291, 302 (2002), was instructive. In *Wallace, id*. at 156, 812 A.2d at 302, the Court held that a narcotics

dog's alert to a vehicle in which the defendant was a backseat passenger did not establish probable cause to search the defendant, as there were no circumstances that would justify a search that were "specific to" the defendant—for example, the narcotics dog did not sniff and alert to the defendant's person, as opposed to the vehicle. The Court explained: "Without additional facts that would tend to establish [the defendant]'s knowledge and dominion or control over the contraband before his search, the K-9 sniff of the car was insufficient to establish probable cause for a search of a non-owner, non-driver for possession." *Id.* at 156, 812 A.2d at 302. In *Norman*, the Court determined that, just as a narcotics dog's alert to the presence of drugs in a vehicle with multiple occupants, alone, was insufficient to establish probable cause for a search of the vehicle's passengers in *Wallace*, an odor of marijuana emanating from a vehicle with multiple occupants, alone, was insufficient to establish reasonable articulable suspicion that the vehicle's occupants are armed and dangerous and therefore subject to frisk.

The Court explained that *Wallace* remained good law, and has not been vitiated by *Maryland v. Pringle*, 540 U.S. 366, 371-72, 374 (2003), in which the Supreme Court held that a law enforcement officer had probable cause to arrest a defendant after cocaine and cash were found in a vehicle in which the defendant had been a passenger. *Pringle* did not involve a search or frisk of a person; in *Pringle*, *id*. at 371-72, the issue was whether there was probable cause to arrest a vehicle's front seat passenger, who was within arm's reach of not only a wad of $763 in cash in the glove compartment, but also bags of cocaine behind the backseat armrest. In other words, in *Pringle*, the precise location of incriminating evidence—namely, cash and cocaine—was known, and the question was whether that constituted evidence of the front seat passenger's possession of contraband. By contrast, in *Wallace* and *Norman*, the issue was whether a law enforcement officer was permitted to search or frisk a vehicle's passenger at a point when the vehicle had not been searched, and no contraband had been found.

The Court found unpersuasive the State's reliance on *Stokeling v. State*, 189 Md. App. 653, 666, 985 A.2d 175, 182 (2009), *cert. denied*, 414 Md. 332, 995 A.2d 297 (2010), and cases in which courts in other jurisdictions upheld frisks of vehicles' occupants where an odor of marijuana emanated from the vehicles. The Court distinguished *Stokeling* and the cases from other jurisdictions on the ground that, in those cases, there were circumstances other than the odor of marijuana that contributed to reasonable articulable suspicion that the vehicles' occupants were armed and dangerous. By contrast, in *Norman*, the trooper relied solely upon the odor of marijuana to establish reasonable articulable suspicion, and there were no other circumstances to heighten the trooper's suspicion or apprehension that Norman was armed and dangerous.

The Court acknowledged that, in earlier cases, both it and the Court of Special Appeals had recognized a connection between guns and drugs. The Court observed that its earlier cases recognizing that connection were distinguishable because, in those cases, the Court did not purport to resolve the issue of whether the odor of marijuana emanating from a vehicle gave rise to reasonable articulable suspicion that the vehicle's occupants are armed and dangerous. Additionally, the Court explained that simply associating guns and drugs did not resolve the issue that *Norman* presented because a law enforcement officer cannot reasonably infer that a particular occupant of a vehicle is armed and dangerous just because an odor of marijuana indicates that marijuana may be somewhere in the vehicle.

Applying its holding to *Norman*'s facts, the Court concluded that the trooper lacked reasonable articulable suspicion to frisk Norman because the trooper's testimony was devoid of a description of any circumstance that, prior to the frisk, gave rise to reasonable articulable suspicion that Norman was armed and dangerous; prior to the frisk, all that the trooper knew was that he detected an odor of marijuana emanating from the vehicle. Accordingly, the circuit court erred in denying the motion to suppress.

In re Cody H., No. 27, September Term 2016, filed March 24, 2017. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2017/27a16.pdf

JUVENILE JUSTICE – RESTITUTION

Facts:

A family magistrate of the Circuit Court for Baltimore County found that the petitioner, Cody H., had committed the delinquent act of assault by punching a sixteen year-old victim, Zachary F., in the face and breaking his jaw. On behalf of Zachary, the State sought a restitution award of $1,492.61 for Zachary's medical expenses and $6,400.00 for Zachary's loss of earnings. Zachary and his father testified at the restitution hearing that Zachary planned to participate in a work-study program at Roseda Farm for the duration of the 2014-2015 school year. The State also introduced a letter from Zachary's employer that Zachary would have worked at Roseda Farms for approximately 20 hours a week for approximately 40 weeks, and would have earned $6,400.00. After a restitution hearing, the magistrate recommended a restitution award of $1,489.61 for medical expenses and did not recommend any restitution for Zachary's lost earnings. The State filed exceptions to the magistrate's recommendation and the juvenile court judge ordered loss of earnings restitution in the amount of $5,000. Cody appealed this order, arguing that the judge abused his discretion because the Maryland restitution statute does not permit awards for "future loss of earnings" and that the restitution award was not supported by competent evidence. The Court of Special Appeals affirmed the restitution order. Cody petitioned to the Court of Appeals for review.

Held: Affirmed.

The Court of Appeals held that the restitution award was proper. The restitution in this case was not an award for "future" loss of earnings because the award represented loss of earnings accounting from the date of the injury to the date of the restitution hearing. However, the General Assembly did not create an express limitation on restitution for future loss of earnings in § 11-603(a)(2)(iii), and an award for future loss of earnings *could* have been proper in this case—as long as it was not speculative and did not cover losses not reasonably certain to occur. Restitution for loss of earnings is proper so long as it meets the express statutory requirements that the loss or expense must be a direct result of the crime or delinquent act and that the claim for restitution must be shown by competent evidence. Moreover, in order for restitution to be proper, the claim for restitution cannot be speculative and the restitution cannot cover things that are not reasonably certain to occur in the future.

Relying on *McDaniel v. State*, 205 Md. App. 551, 558, 45 A.3d 916, 920 (2012), the Court held that Zachary's claim for loss of earnings was not speculative because the employment was for a definite period of time and there was evidence to support the amount of hours Zachary would work and the amount of wages he would earn. Moreover, Zachary's loss of earning was reasonably certain to be incurred because his loss was in fact incurred at the moment he became incapacitated to perform his job and earn wages. Moreover, the restitution awarded in this case was for wages lost during the period of time between the assault and the restitution hearing, and not for the future (*i.e*. beyond the restitution hearing). Thus, the Court held that the restitution award was proper considering the statutory and decisional law limitations.

The Court also held that the restitution claim was supported by competent evidence. Both Zachary and his father testified that Zachary was scheduled to work in the program at Roseda Farm for the school year and that he would work twenty hours per week at a compensation rate of $8.00 per hour. The Roseda Farm letter provided evidence that Zachary was scheduled to work at the farm for approximately 20 hours per week for approximately 40 weeks. The letter also provided evidence as to the approximate amount Zachary would have earned. The letter was signed by Marcia Bryant, who signed the letter in her capacity as the "office manager" at Roseda Farm. Zachary's father testified that he obtained the letter by asking Zachary's "boss" at Roseda Farm for "something in writing to confirm that [Zachary] was part of the program." Moreover, the information contained in the letter was consistent with the testimony of Zachary and his father. Therefore, the letter served to corroborate and enhance the reliability of the testimonial evidence.

Daniel S. Yuan v. Johns Hopkins University, No. 35, September Term 2016, filed March 29, 2017. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2017/35a16.pdf

LABOR & EMPLOYMENT – WRONGFUL TERMINATION – RESEARCH MISCONDUCT – TORTS – CONVERSION

Facts:

Petitioner, Daniel S. Yuan, M.D. ("Dr. Yuan"), challenges the Court of Special Appeals' holding that there was no clear public policy mandate to support a claim for wrongful discharge for reporting research misconduct in a federally funded project at Respondent institution Johns Hopkins University School of Medicine ("JHU"). Dr. Yuan, an employee of JHU, alleges he was wrongfully terminated in retaliation for reporting research misconduct in violation of federal statutes and regulations, 42 U.S.C. § 289b and 42 C.F.R. Part 93, that prohibit research misconduct.

Additionally, Dr. Yuan asserts a conversion claim. He alleges that JHU violated its own policy when he was first told that he could have access to the research materials he collected at JHU, but was later denied such access.

Under Maryland law, an at-will employment contract may be terminated by either the employer or employee at any time. However, there exists a public policy exception to the at-will employment rule for wrongful termination "when the motivation for the discharge contravenes some clear mandate of public policy[.]" *Adler v. Am. Standard Corp*., 291 Md. 31, 47, 432 A.2d 464, 473 (1981). Limitations to this public policy exception include that the policy relied on by the terminated employee should be clearly discernible and that the policy should not otherwise provide a legal remedy, such as damages, to the employee.

Held: Affirmed.

We do not recognize the federal regulations prohibiting research misconduct as a clear public policy to support a tort claim for wrongful termination of employment. Congress has made it clear by outlining a self-regulatory scheme under federal laws. The provisions direct the federally funded institutions to ensure research misconduct does not take place through an internal procedure established by the institution. The institutions are required to provide procedures to investigate misconduct, take appropriate action, and address retaliation. *See* 42 C.F.R. §§ 93.300–93.304. The scientific institution, not this Court, is in the best position and has the expertise to determine whether the research results of its employees amounted to impermissible research misconduct or permissible error or differences of opinion. Dr. Yuan did

not follow the protocol outlined in JHU's policies for such claims. Under the circumstances presented in the case at bar, there was no clear violation of the research misconduct regulations to warrant a cause of action for wrongful termination.

Moreover, Dr. Yuan notes that the federal regulations do not provide him a legal remedy in the form of damages and that by allowing a wrongful termination claim based on a public policy against research misconduct we would be granting such a remedy to employees. However, because the public policy that Dr. Yuan is alleging is not clearly discernible, as we cannot determine if a research misconduct violation occurred, we do not recognize the policy to establish his claim for wrongful termination. Thus, Dr. Yuan's at-will employment simply ended due to the expiration of his employment contract.

Finally, a party may not convert property that it owns. As a matter of law, JHU owned the frozen cells generated while Dr. Yuan was employed by JHU according to JHU's guidelines regarding ownership of research materials. Thus, it was proper for JHU to prevent Dr. Yuan's access to such materials.

Sheila M. Breck v. Maryland State Police, No. 13, September Term 2016, filed March 27, 2017. Opinion by Barbera, C.J.

http://www.mdcourts.gov/opinions/coa/2017/13a16.pdf

STATE EMPLOYEE LAW – LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS – DEFINITION OF SECONDARY EMPLOYMENT

Facts:

In 2012, former Maryland State Police ("MSP") Sergeant Sheila Breck was found guilty, through an agency administrative process, of causing a report to be filed that contained false statements. While her police powers were temporarily suspended, Ms. Breck continued working for the MSP and her police powers were eventually restored. Later, Ms. Breck began working overtime shifts securing federal National Security Agency ("NSA") facilities in Maryland. These overtime shifts were conducted pursuant to a reimbursable agreement between the MSP and the NSA. During those shifts, Ms. Breck was in uniform, supervised by MSP personnel, and was paid through MSP payroll.

In January 2014, Ms. Breck's supervisor provided her with a letter from the Superintendent of MSP explaining that, due to a then-recent Court of Appeals decision, *Fields v. State*, 432 Md. 650 (2013), MSP was altering its personnel practices. In *Fields*, the Court of Appeals clarified criminal defendants' rights to information regarding any prior untruthfulness finding on the record of police officers who would offer evidence for trial. Because state prosecutors were unlikely to move forward on cases where the police officer witness was impeachable on his or her truthfulness, MSP made the decision to place officers with untruthfulness findings in roles where they would not be called upon to testify in court—in practice, this meant removing such officers from active law enforcement roles. Ms. Breck was then informed that, due to her prior untruthfulness finding, she would not be permitted to work in law enforcement roles.

At the time Ms. Breck discussed this letter with her supervisor, her primary, 40-hour-a-week job was a non-law enforcement position in the Facilities Management Division of MSP. Her overtime work in law enforcement securing the NSA was not discussed during Ms. Breck's meeting with her supervisor, and she continued working in that role following the discussion. In March 2014, Ms. Breck was contacted again by agency management and informed that she could not continue working those overtime shifts because the new agency policy prohibited her from working in law enforcement roles.

Ms. Breck then filed a complaint to show cause in the Circuit Court for Baltimore County. She argued that the Law Enforcement Officers' Bill of Rights ("LEOBR"), Md. Code Ann., Public Safety § 3-101 *et seq*., guaranteed her the right to work "secondary employment", subject to reasonable regulation, and her work securing the NSA was such secondary employment. At the hearing on the complaint, she added a claim that MSP had taken punitive action against her

based on her inclusion on a list of police officers with untruthfulness findings on their record—such punitive action is prohibited by LEOBR § 3-106.1.

The circuit court dismissed the complaint and the Court of Special Appeals affirmed. The Court of Special Appeals held that "secondary employment" for purposes of the LEOBR meant off-duty work and did not include overtime, such as Ms. Breck's work securing the NSA facilities. The court ruled that MSP did not take punitive action against Ms. Breck in prohibiting her from working in this role.

Held: Affirmed.

After noting that the term "secondary employment" is undefined in the LEOBR, the Court of Appeals examined legislative history and concluded that secondary employment for purposes of the LEOBR means off-duty work for a third party, and does not include overtime work. The court noted that the original proposed text of the secondary employment provision was concerned with conflicts of interest, and that police department personnel manuals in the state dealing with secondary employment are focused on preventing conflicts of interest. Conflict of interest concerns are fitting where a police officer works independently from the agency for a third party, but make little sense when the police officer is working in agency-controlled overtime work.

In addition, the Court reasoned that, should it conclude that secondary employment included on-duty overtime, it would undermine another section of the LEOBR, § 3-102(c). That section provides that the LEOBR does not limit the authority of law enforcement agencies to regulate the competent and efficient operation and management of the agency, so long as the agencies' actions are not punitive in nature and are made in the best interests of internal institutional management. Because the LEOBR grants a statutory right to secondary employment, the Court reasoned that if secondary employment included on-duty overtime, law enforcement agencies would be hamstrung in their ability to determine what overtime work is available and appropriate for each officer and to assign it accordingly.

The Court further held that MSP had not engaged in unlawful punitive action prohibited by LEOBR § 3-106.1 by preventing Ms. Breck from working overtime at the NSA in a law enforcement role. A court's analysis of what constitutes a punitive action turns on the agency's motivation for that action. If based on an investigation and hearing process addressing an alleged wrongful act, potentially leading to punishment for that act, the action is punitive. But if based only in the pursuit of sensible agency administration in the best interests of internal management, the action is managerial, not punitive. Here, MSP was acting reasonably in its managerial capacity. The agency was making duty assignments that corresponded with the abilities of its officers, not seeking to punish Ms. Breck for past violations.

Laura Lynn Hughes v. Stephen Moyer, Secretary of Public Safety and Correctional Services, No. 21, September Term 2016, filed March 29, 2017. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2017/21a16.pdf

STATE PERSONNEL LAW – EMPLOYEE DISCIPLINE – ADMINISTRATIVE APPEALS

Facts:

Petitioner Laura Lynn Hughes was terminated from her job as a probation officer with the Department of Public Safety and Correctional Services ("DPSCS") after a drug test that showed use of illegal drugs. The personnel law governing an employee like Ms. Hughes requires, among other things, that the agency advise a disciplined employee of the employee's appeal rights. Maryland Code, State Personnel Pensions Article, § 11-101 *et seq*. That statute allows a disciplined employee to seek to overturn the discipline through a two-tier administrative appeal process with tight timelines. Under the statute, a failure of an agency official to respond to a first-tier appeal by the statutory deadline is deemed to be a denial of that appeal, thereby allowing the employee to move to the next level of appeal, at which there is an opportunity for a hearing. In *Fisher v. E. Corr. Inst.*, 425 Md. 699, 703, 43 A.3d 338, 341 (2012), the Court of Appeals held that such a deemed denial triggered the 10-day timeline within which a second-tier appeal must be filed.

In Ms. Hughes' case, the agency sent her a notice of termination that informed her of the first tier of the administrative appeal process – an appeal to the Respondent Secretary of DPSCS. However, the notice was silent as to the second tier of the process. Nor did the notice inform her that a failure of the Secretary of DPSCS to respond to her first-tier appeal within the time limit would trigger the time for her to invoke the second tier.

Ms. Hughes followed the directions for invoking the first tier of the administrative appeal process. The Secretary of DPSCS failed to respond within the statutory time limit, thus denying her first-tier appeal. Apparently unaware that this silent denial triggered the limited time for her to invoke a second-tier appeal, Ms. Hughes did nothing before the deadline passed. When she belatedly attempted to pursue her administrative appeal almost a year later, the agency did not respond, and she commenced this mandamus action in the Circuit Court.

The Circuit Court dismissed her complaint on the ground that she had failed to exhaust her administrative remedies by not appealing the first-tier denial in a timely manner. The Court of Special Appeals affirmed that ruling in an unreported opinion. The Court of Appeals granted a petition for writ of *certiorari*.

Held:

In order for an agency to discharge its responsibility to provide a disciplined employee with notice of the employee's administrative appeal rights, an agency must advise the employee of the possibility of a second-tier appeal and alert the employee as to the significance of agency silence in response to a first-tier appeal. The plain language of the statute speaks of notice of "appeal rights" and its legislative history shows that the statute was designed to provide a disciplined employee with procedural due process- i.e., notice and an opportunity to be heard.

Here, DPSCS provided Ms. Hughes with notice of her first-tier appeal rights. However, the notice did not inform Ms. Hughes that agency inaction would trigger a timeline for Ms. Hughes to pursue her second-tier appeal right. Since the agency is not required to respond to the first-tier appeal, the notice provided to Ms. Hughes was not complete. Advising an employee of the possibility of a second-tier appeal and alerting the employee as to the significance of silence in response to a first-tier appeal provides an employee appropriate notice of employee's appeal rights. The Court remanded the case to the Circuit Court to consider whether the agency had other valid defenses to Ms. Hughes's action and what, if any, relief should be awarded.

Spaw, LLC v. City of Annapolis, No. 2, September Term 2016, filed March 27, 2017. Opinion by Getty, J.

http://www.mdcourts.gov/opinions/coa/2017/2a16.pdf

ZONING LAW - HISTORIC DISTRICT ZONING VIOLATION PROCEEDINGS

ZONING LAW - HISTORIC DISTRICT ZONING CITATIONS

ZONING LAW - LIMITATION OF ACTIONS - MARYLAND CODE, COURTS AND JUDICIAL PROCEEDINGS ARTICLE § 5-107

ZONING LAW - LIMITATION OF ACTIONS - MARYLAND CODE, COURTS AND JUDICIAL PROCEEDINGS ARTICLE § 5-101

ZONING LAW - LIMITATION OF ACTIONS – LACHES

ZONING LAW – RELIEF GRANTED

ZONING LAW – MOTION FOR A NEW TRIAL, OR IN THE ALTERNATIVE, MOTION TO ALTER OR AMEND THE JUDGMENT

Facts:

Spaw, LLC ("Spaw"), Petitioner, a Delaware limited liability company, owns and manages an apartment building located within the historic district of Annapolis, Maryland. Ms. Lisa Craig, the Chief of the Annapolis Historic Preservation Commission ("Commission"), issued two historic preservation municipal infraction citations to Spaw alleging that Spaw replaced historic wood windows with vinyl windows prior to obtaining the required Certificate of Approval from the Commission.

Spaw requested a trial, which took place at the District Court of Maryland, sitting in Anne Arundel County. After the district court found in favor of the City, Spaw appealed the decision of the district court to the Circuit Court of Maryland for Anne Arundel County. In the *de novo* appeal, Spaw admitted to replacing historic wood windows with vinyl windows without prior approval by the Commission, as required by law. Based upon this admission, the court granted summary judgment to the City.

Spaw filed a timely petition for a writ of certiorari with the Court of Appeals, which was granted. In summary, Spaw argued: (1) the circuit court trial for a historic preservation municipal citation should have been conducted as a criminal proceeding, not a civil proceeding; (2) the two historic preservation municipal citations should have been 2 dismissed for generality and a lack of specificity; (3) the statute of limitations precluded the City's enforcement of the historic preservation zoning violations; (4) the relief awarded was overly broad; and (5) the circuit court

should have granted Spaw a new trial or amended the judgment in light of recent amendments to Maryland Rule 2-501.

Held: Affirmed.

The Court of Appeals held that historic preservation municipal citations are civil offenses as evidenced by the plain language of the Maryland Code, Local Government Article and the Annapolis City Code. The Court also stated that this conclusion was supported by the non-punitive purpose of historic preservation in both the Maryland and Annapolis Code. Thus, historic preservation municipal infraction citations are subject to Title 2 of the Maryland Rules, which permits the parties to engage in discovery.

The Court of Appeals held that a historic preservation municipal infraction citation is sufficient under Maryland Code, Land Use Article § 11-203 when it includes the location and date citation was issued. In this case, the property address and a general description of the violation was sufficient, and the citation was not required to list each window that allegedly violated the historic preservation ordinance.

The Court of Appeals also held that the statute of limitations did not bar enforcement of the citations. First, as to Maryland Code, Courts and Judicial Proceedings Article ("CJP") § 5-107, the Court held that the relief sought here, abatement, was not a "penalty" within the meaning of the statute. Thus, CJP § 5-107 did not apply. Second, as to CJP § 5-101, the Court held that this statute of limitations section was not available as a defense in a suit by a municipality when it is enforcing zoning regulations, which is the exercise of a strictly governmental function. Lastly, the City of Annapolis was not barred by laches from enforcing local historic preservation ordinances against a property owner since there was not an unreasonable delay in issuing the citations or prejudice to the property owner.

The Court of Appeals held that abatement, in the form of an after-the-fact Certificate of Approval, was the appropriate relief afforded to the City of Annapolis for a historic preservation zoning violation where Spaw admitted that work was performed without applying for a Certificate of Approval from the Historic Preservation Commission. Spaw alleged that the relief was overly broad since Spaw admitted to replacing approximately ten windows, and the trial court's order required Spaw to submit an application for all of the wood windows removed and replaced. The Court held that the number of windows replaced was not relevant since if there was at least one window replacement, then a Certificate of Approval was required. Thus, Spaw is required to go through the original administrative process and submit an after-the-fact Certificate of Approval.

Lastly, the Court of Appeals held that the trial court did not abuse its discretion in denying Spaw's motion for a new trial, or in the alternative, motion to alter or amend the judgment when a mid-trial motion for summary judgment was granted in favor of the City despite the newly amended Rule 2-501, which precludes mid-trial motions for summary judgment, since the case

was pending before the Rule came into effect and it was not practicable for the trial court to implement the new Rule.

COURT OF SPECIAL APPEALS

Edward G. Modell, et al. v. Waterman Family Limited Partnership, et al., No. 2104, September Term 2015, filed March 2, 2017. Opinion by Eyler, James R., J.

http://www.mdcourts.gov/opinions/cosa/2017/2104s15.pdf

ADMINISTRATIVE LAW – PETITION FOR JUDICIAL REVIEW– TIMELINESS

Facts:

The Town of Queenstown annexed a parcel of land and rezoned it. The rezoning was subject to the approval of the Queen Anne's County Commissioners. See Md. Code (2013 Repl. Vol., 2014 Supp.), § 4-416(b) of the Local Government Article. On November 25, 2014, the commissioners passed Resolution 14-31, approving the rezoning. Shortly thereafter, on December 2, 2014, the commissioners passed Resolution 14-33, rescinding its prior approval. On July 21, 2015, the Circuit Court for Queen Anne's County held that the commissioners lacked the authority to rescind Resolution 14-31, thus reviving it. Timely motions for reconsideration were filed and denied. Thereafter, on October 9, 2015, appellants filed a petition for judicial review of the adoption of Resolution 14-31. Appellees challenged its timeliness.

Held:

The Court of Special Appeals held that the petition for judicial review was timely. In reaching that conclusion, the Court recognized that a petition filed prior to the revival of Resolution 14-31 by the circuit court's decision to invalidate Resolution 14-31 would have been moot. The time for filing the petition for judicial review of Resolution 14-31 began to run when Resolution 14-31 was revived.

Jesus Garduno Cruz v. State of Maryland, No. 18, September Term 2016, filed March 3, 2017. Opinion by Graeff, J.

http://www.mdcourts.gov/opinions/cosa/2017/0018s16.pdf

CRIMINAL PROCEDURE – COMPETENCY OF A WITNESS

Facts:

The victim testified that, on May 22, 2015, she was abducted by appellant, who drove her to a field, pulled her out of the vehicle, and raped her at gunpoint. She described how she struggled with appellant during the rape and eventually managed to escape.

On cross-examination, defense counsel asked whether the victim, who admitted that she was a heroin addict, had used heroin the day of trial. The victim responded that she had used $40 worth of heroin at 6:30 that morning. Defense counsel moved to strike her testimony on the ground that she was not "competent to testify due to the fact that she has been using heroin.". The court denied the motion.

Held: Affirmed.

The use of drugs, without more, does not render a witness incompetent to testify. Thus, a witness who is a drug addict, or who testifies while under the influence of drugs, is not incompetent *per se*. Rather, to be deemed incompetent to testify, there must be a showing that the witness' mental capacity is impaired to such an extent that the witness lacks "sufficient capacity to observe, recollect and recount pertinent facts" or does not understand the duty to tell the truth.

Here, the trial judge, who had ample opportunity to observe the victim on the stand throughout her direct and cross examination, found that her answers to questions had been "very responsive," that she had "handled herself very well," and that she did not appear to be "in any way under the influence" during her testimony. And there is nothing in the record to suggest that the victim did not understand the duty to tell the truth. Under these circumstances, the circuit court did not abuse its discretion in determining that the witness was competent to testify.

Harold Eugene Williams v. State of Maryland, No. 537, September Term 2016, filed March 30, 2017. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2017/0537s16.pdf

CRIMINAL LAW – REBUTTAL EVIDENCE OF GOOD CHARACTER – CROSS-EXAMINATION OF CHARACTER WITNESSES REGARDING DEFENDANT'S PRIOR CONVICTION

CRIMINAL LAW – JURY INSTRUCTION – REFUSAL TO GIVE REINSTRUCTION

Facts:

Harold Eugene Williams had an altercation with his girlfriend after reading a series of text messages on her cell phone between her and other men. His girlfriend claimed that Mr. Williams had hit her, kicked her, pushed her down the stairs, and held a gun to her head. While speaking with a police officer about the assault, she was informed by a friend that nude photographs of her had been posted on her Facebook page.

Mr. Williams was charged with first- and second-degree assault, reckless endangerment, a number of weapons offenses, and posting revenge porn.

Testifying in his own defense, Mr. Williams denied punching, kicking, or threatening his girlfriend with a gun. He also called three character witnesses, all of whom testified to his reputation for peacefulness, based on their experiences over as much as 15 years.

During cross-examination of the first character witness, the State sought to introduce evidence of Mr. Williams's 1990 conviction for common-law battery. The defense objected. The trial court permitted the State to use the prior conviction pursuant to Maryland Rule 5-404(a)(2)(A). The State asked the character witness if she was aware of Mr. Williams's prior conviction, and if she was not, whether that knowledge would cause her to change her opinion of him. She answered "no" to both questions.

Mr. Williams called two more character witnesses. On direct examination, they were both asked whether they knew of Mr. Williams's battery conviction and, if they did not, whether it would change their opinion of him. Both said, "No." The State revisited that topic on cross-examination, and the witnesses reiterated their earlier answers.

During deliberations, the jury requested the definition of second-degree assault. At that time, defense counsel asked the court to include a reinstruction on the defense of property. The court refused to "highlight" it, and instead, recited the second-degree assault instruction given earlier.

Mr. Williams was convicted of second-degree assault. The court sentenced him to three years' imprisonment, with all but six months suspended, to be followed by two years of probation.

Mr. Williams appealed.

In the instant appeal, Mr. Williams challenged the court's admission of evidence of his prior conviction for common-law battery and refusal to give the jury a reinstruction.

Held: Affirmed.

Relying on dicta in *State v. Watson*, 321 Md. 47 (1990), Mr. Williams contended that the trial court abused its discretion in admitting evidence of his prior conviction for two reasons. First, he argued that the conviction was too remote in time to be relevant. Second, he said that the conviction was "hardly probative at all" because it occurred a decade or more before any of the character witnesses knew him.

In *Watson*, the Court of Appeals suggested that the trial court should "determine that the acts are not too remote in time to be relevant cross-examination" before allowing the State to cross-examine a character witness with evidence of a defendant's prior misconduct. 321 Md. at 55. The Court, however, offered no guidance about when an act would be too remote to be relevant cross-examination, about how a trial court is supposed to judge whether the act is too remote, or about how an appellate court is supposed to review the trial court's decision.

The Court of Special Appeals held that, because the issue of remoteness usually lies within the trial court's sound discretion, an appellate court should review the decision for only abuse of discretion. In reaching this conclusion, the Court noted that the trial court is not constrained by the 15-year time limit under Maryland Rule 5-609(b), which concerns the use of criminal convictions to impeach the defendant's own credibility.

The Court held that the trial court did not abuse its discretion in admitting Mr. Williams's 25-year-old conviction on cross-examination. Because Mr. Williams had called three character witnesses, one of whom had known him for 15 years, to testify about his character for peacefulness, it was not unreasonable for the trial court to permit the State to use his prior conviction to challenge the basis for the witnesses' testimony.

In addition, Mr. Williams argued that the court's refusal to give a reinstruction on the defense of property "left jurors with an incomplete instruction" that inhibited his defense.

The Court held that the trial court did not abuse its discretion in refusing to give a reinstruction on the defense of property. Because the jury had asked only for the definition of second-degree assault, and not for any further information concerning how the defense related to the charge of assault, the trial court was not required to provide the reinstruction.

Hartford Fire Insurance Company v. Estate of Robert L. Sanders, No. 2013, September Term 2015, filed March 2, 2017. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2017/2013s15.pdf

PERSONAL REPRESENTATIVE SURETY BOND – *DE NOVO* APPEAL TO CIRCUIT COURT OF ORPHANS' COURT'S DECISION TO CONDEMN BOND – IN BANC REVIEW OF CIRCUIT COURT'S JUDGMENT – STANDARD OF REVIEW IN APPEAL FROM JUDGMENT OF IN BANC COURT

Facts:

Personal representative of Estate obtained a $20,000 surety bond from Hartford. The orphans' court later removed her, upon allegations that she had misappropriated Estate funds, and directed her to turn over all known Estate assets to the successor personal representative, which she did not do. The successor personal representative petitioned for return of Estate funds. The orphans' court held an evidentiary hearing and entered an order determining that the former personal representative had misappropriated $13,566.23 in Estate funds ("Order"). Hartford was not on notice of the petition, the hearing, or the Order. The successor personal representative brought an action to condemn the bond in that amount. Hartford was on notice and participated. The orphans' court condemned the bond in that amount. Hartford appealed the orphans' court's order condemning the bond to the circuit court, which held a trial *de novo*. The Estate moved the Order into evidence but did not otherwise present proof that the former personal representative had misappropriated $13,556.23 in Estate funds. Hartford took the position that the most the bond could be condemned for was the amount of Estate funds misappropriated after the date of the bond. After closing arguments, the trial court ruled that the Order could not be used as proof that the former personal representative had misappropriated $13,556.23 in Estate funds, and the Estate had not otherwise submitted proof of misappropriations. It further ruled that Hartford had shown that there had been $3,256.96 in misappropriations after the date of the bond and entered an order condemning the bond in that amount.

The Estate filed a notice for in banc review by a three-judge panel of the circuit. The in banc panel reversed, holding that the bond should be condemned for $13,556.23 because the surety had not appealed the Order and therefore was bound by the orphans' court's finding that the former personal representative had misappropriated that sum. The in banc court further held that the bond applied retroactively to misappropriations before the date of the bond. Hartford noted an appeal to this Court from the judgment of the in banc court.

Held: Affirmed.

The in banc court functions as an appellate tribunal. When this Court reviews a judgment entered by an in banc court, we are in a position analogous to the Court of Appeals reviewing a decision of this Court. Ordinarily, we review the decision of the trial court, although we may discuss the in banc court's reasoning and accept or reject it. We are not bound by the in banc court's legal analysis or determinations of questions of law. Our focus is on the decision of the trial court.

The trial court erred as a matter of law in ruling that the Order could not serve as proof that the former personal representative had misappropriated $13,556.23 from the Estate. The in banc court also erred as a matter of law in reasoning that Hartford was bound by the Order, and therefore the trial court should have accepted it without exception. Under well-established law governing sureties, Hartford was prima facie bound by the Order. Because it was not on notice of the petition against its principal and did not participate in the hearing that resulted in the Order, it was not conclusively bound by it. However, it was bound unless it produced creditable evidence to rebut the orphans' court's finding, embodied in the Order, of the misappropriation. It was prima facie bound in the action to condemn the bond in the orphans' court, and it remained prima facie bound in the appeal de novo from the order condemning the bond. Hartford did not produce any evidence in the trial de novo to rebut the Order. On the contrary, it presented evidence that some misappropriations had taken place.

The circuit court in the trial de novo erred as a matter of law in accepting Hartford's argument that the bond only could be condemned for sums misappropriated after the date of the bond and basing its judgment on that principle. The in banc court also erred as a matter of law in ruling that the bond could be condemned retroactively. Upon her removal, the former personal representative was under a duty to account for and produce all the assets that should have been in the Estate. Her breach of that duty took place after the date of the bond. The bond was properly condemned for $13,566.23, which was the amount of assets that should have been in the Estate when the duty was breached. This is not a retroactive application of the bond.

Elizabeth Haring Coomes v. Maryland Insurance Administration, No. 2158, September Term 2015, filed March 30, 2017. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2017/2158s15.pdf

"VOLUNTARY SURRENDER" OF INSURANCE PRODUCER LICENSE –"ADVERSE ADMINISTRATIVE ACTION" – REQUIRED REPORTS TO THE MARYLAND INSURANCE ADMINISTRATION

Facts:

In 2004, Elizabeth Coomes ("Coomes") received an insurance producer license from the Commonwealth of Virginia, as well as a non-resident producer license from the State of Maryland. Approximately seven years later, in 2011, the Virginia Department of Insurance ("VDI") began investigating Coomes for allegedly mishandling money sent to her in error by Anthem Blue Cross and Blue Shield of Virginia ("Anthem").

Sometime prior to August of 2011, Anthem mistakenly sent two checks to Coomes's agency in Leesburg, Virginia. Both checks were made out to "EBCA" ("Employee Benefit Corporation of America") and, together, totaled around $20,000. Coomes testified that she had previously received bonus checks from insurers and assumed the money was hers. Either Coomes or one of her employees deposited the checks into her agency's bank account. On August 18, 2011, Anthem notified Coomes of the error, but Coomes informed Anthem that she had already spent the money on business expenses. Coomes and Anthem communicated back and forth regarding the method of Coomes's repayment, until Anthem ultimately filed a complaint against Coomes with the VDI.

The VDI began investigating Coomes's conduct in September of 2011 based on allegations of misappropriating money through acts of fraud, deception or dishonesty. In February and March of 2012, Coomes repaid Anthem all of the money owed except for $2,000, which she claimed Anthem owed to her for unrelated advertising costs. The investigation was resolved without a hearing in December of 2012, when Coomes agreed to a "voluntary surrender" of her Virginia producer's license. Coomes executed the surrender agreement with the VDI, which became effective March 11, 2013. In the agreement, Coomes acknowledged that she voluntarily surrendered her Virginia license "in lieu of a hearing before the State Corporation Commission," which can "result in revocation or suspension of [a licensee's] authority" and monetary penalties. The agreement provided that, "[i]n consideration of the Commission's acceptance of [Coomes's] voluntary surrender of [her] license authority," Coomes agreed not to apply to "transact the business of insurance in Virginia for a period of one year," and to only reapply once she resolved all of her "financial obligations" owed to Anthem.

In a letter sent by Coomes to the MIA in March of 2013, Coomes requested that her Maryland license status be updated to resident producer. Coomes stated in the letter "I have notified the

Virginia Insurance Bureau of my address change and have requested a voluntary surrender of my Virginia resident license." Coomes did not offer any indication of an investigation into her conduct or that she had agreed to a voluntary surrender in lieu of a hearing on her conduct as an insurance producer.

Held: Affirmed.

The Commissioner found that Coomes violated I.A. § 10-126(f) when she "failed to report to the Commissioner [an] adverse administrative action taken against" her within 30 days. The Commissioner's decision was based on the fact that she failed to report to MIA that she had voluntarily surrendered her license and submit the relevant legal documents. By failing to report the administrative action to the MIA, the Commissioner found further that Coomes had violated I.A. § 10-126(a)(13), which provides that a license may be revoked if the licensee "has otherwise shown a lack of trustworthiness or competence to act as an insurance producer."

In addition, the Commissioner found that Coomes's license could be revoked under § 10-126(a)(1), (6), and (12), based on evidence of Coomes's conduct in Virginia, including Coomes's handling of Anthem's checks, which she deposited in error and failed to immediately return. The dispositive question in this case is whether the VDI's investigation and Coomes's acceptance of the voluntary surrender agreement in lieu of a hearing constitutes an "adverse action" for purposes of I.A. § 10-126(f). If so, Coomes was required to report the action and submit relevant legal documents. Similarly, Coomes's failure to notify the MIA of the voluntary surrender and submit relevant legal documents as the statute requires would "show[] a lack of trustworthiness or competence to act as an insurance producer." I.A. § 10-126(a)(13).

The Court agreed that Coomes's agreement with VDI to voluntarily surrender her license in lieu of a hearing -- for a minimum of one year and until she had repaid the money to Anthem -- falls within the meaning of "adverse" as the word is used in the statute. The only reasonable interpretation of the terms of the surrender agreement as a whole are that the voluntary surrender was adverse in nature. The agreement benefitted Coomes only by allowing her to avoid a hearing, which could have resulted in the revocation of her license rather than leaving open the opportunity to reapply for her license a year later.

Additionally, the Court held that the Commissioner did not err by determining that Coomes's conduct in Virginia violated three additional subsections of the statute. Section 10-126(a)(12) provides that the Commissioner may revoke a license after notice and the opportunity for a hearing if the licensee "has failed or refused to pay over on demand money that belongs to an insurer . . . or other person entitled to the money." Subsection (a)(6) allows revocation where the licensee "has committed fraudulent or dishonest practices in the insurance business." Finally, subsection (a)(1) allows revocation when the licensee "has willingly violated [the Insurance Article] or another law of the State that relates to insurance." Based on Coomes's mishandling of Anthem's money, the Commissioner's finding that Coomes violated these subsections is supported by evidence in the record.

Kathleen B. Boomer, et al. v. Waterman Family Limited Partnership, et al., No. 1783, September Term 2015, filed March 2, 2017. Opinion by Eyler, James R., J.

http://www.mdcourts.gov/opinions/cosa/2017/1783s15.pdf

LOCAL GOVERNMENT – PUBLIC LOCAL LAW – AUTHORITY OF COUNTY COMMISSIONERS TO RESCIND PUBLIC LOCAL LAWS

Faacts:

The Town of Queenstown annexed a parcel of land and rezoned it. The rezoning was subject to the approval of the Queen Anne's County Commissioners. See Md. Code (2013 Repl. Vol., 2014 Supp.), § 4-416(b) of the Local Government Article. On November 25, 2014, the commissioners passed Resolution 14-31, approving the rezoning. On December 2, 2014, the commissioners passed Resolution 14-33, rescinding its prior approval. On July 21, 2015, the Circuit Court for Queen Anne's County held that the commissioners lacked the authority to rescind Resolution 14-31, thus reviving it. Timely motions for reconsideration were filed and denied.

Held:

The Court of Special Appeals reversed the judgment of the Circuit Court for Queen Anne's County. Relying on *Kent Island Def. League, LLC v. Queen Anne's County Bd. of Elections*, 145 Md. App. 684, *cert. denied*, 371 Md. 615 (2002), the Court held that Resolutions 14-31 and 14-33 were public local law adopted pursuant to Article XI-F, § 6 of the Maryland Constitution. The Court also held that the Queen Anne's County commissioners had the inherent authority to reverse its own action with respect to a public local law. It recognized, however, that the authority to rescind a resolution is not without limitation. Relying on *Dal Maso v. Bd. of County Comm'rs of Prince George's County*, 182 Md. 200 (1943), the Court noted that if rights were to vest during the interim between the enactment of a resolution and its rescission, the County would lose its ability to rescind, at least to the extent that rights had vested.

William Dabbs, et al. v. Anne Arundel County, MD, No. 2653, September Term 2015, filed March 30, 2017. Opinion by Wright, J.

http://www.mdcourts.gov/opinions/cosa/2017/2653s15.pdf

ZONING AND PLANNING – FEES, BONDS AND IN LIEU PAYMENTS

STATUTES – EFFECT ON VESTED RIGHTS

TAXATION – NATURE AND FORM OF REMEDY

MUNICIPAL CORPORATIONS – CONCURRENT AND CONFLICTING EXERCISE OF POWER BY STATE AND MUNICIPALITY

ACCOUNT – EQUITABLE JURISDICTION

STATUTES – RIGHTS ACCRUED

Facts:

This appeal arises from the Circuit Court for Anne Arundel County's entry of a declaratory judgment in favor of appellee, Anne Arundel County (the "County"), as to all counts and claims stated in a class action complaint filed against it on November 4, 2011, by appellants, William Dabbs, Sally Trapp, Samuel Craycraft, and Roberta Craycraft, "individually and on behalf of all others similarly situated." Appellants had sought refunds of impact fees that, following the fiscal year ("FY") of collection, were not expended or encumbered within six FYs. Following a hearing on November 20, 2014, and after receiving memoranda from the parties, the circuit court entered judgment in the County's favor on January 27, 2016, ordering that appellants "take nothing in this action." The court also denied appellants' motion to revise class definition, as well as their motion for an accounting of County impact fee collections, expenditures, and encumbrances. On February 11, 2016, appellants noted this appeal.

Held: Affirmed.

The "rough proportionality" or "rational nexus test" enunciated by the Supreme Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), does not apply to a development impact tax imposed by legislative enactment and not by adjudication, especially where the tax is not a regulation that goes too far so as to be recognized as a taking under the Fifth Amendment. In this case, the prospective repeal of the substantive right to assert a claim for a refund of impact fees barred any claim that could not have been made as of the effective date of the repeal.

In addition, because modern rules of discovery have superseded the once necessary equitable claim for an accounting, the court properly denied appellants' motion for an accounting.

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ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated January 30, 2016, the following attorney has been suspended by consent for 120 days, effective March 1, 2017:

ROLANDO VINCENT LEE

*

By an Order of the Court of Appeals dated March 2, 2017, the following attorney has been suspended:

SEAN PATRICK McMULLEN

*

By an Order of the Court of Appeals dated February 3, 2017, the following attorney has been indefinitely suspended by consent, effective March 6, 2017:

MARC GREGORY SNYDER

*

By an Order of the Court of Appeals dated March 16, 2017, the following non-admitted attorney is excluded from exercising the privilege of practicing law in this State:

ELENA TILLY

*

By an Order of the Court of Appeals, dated February 16, 2017, the following attorney has been indefinitely suspended by consent, effective March 20, 2017:

GARY MICHAEL ANDERSON

*

*

By an Order of the Court of Appeals dated March 21, 2016, the following attorney has been indefinitely suspended by consent:

JUDE CHUKWUMA EZEALA

*

By an Order of the Court of Appeals dated February 22, 2017, the following attorney has been indefinitely suspended by consent, effective March 24, 2017:

STEVEN EDWARD MIRSKY

*

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

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