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Attorney Grievance Commission of Maryland v. Eugene Ignatius Kane, Jr., Misc. Docket AG No. 5, September Term 2018, filed August 26, 2019. Opinion by Booth, J.

https://www.courts.state.md.us/data/opinions/coa/2019/5a18ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – INDEFINITE SUSPENSION

Facts:

The Attorney Grievance Commission, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action with the Court of Appeals alleging that Eugene Ignatius Kane, Jr., violated Rules 1.1 (Competence), 1.2 (Scope of Representation and Allocation of Authority Between Client and Attorney), 1.3 (Diligence), 1.4 (Communication), 1.7 (Conflict of Interest: General Rule), 1.15 (Safekeeping Property), 1.16 (Declining or Terminating Representation), 3.1 (Meritorious Claims and Contentions), 3.3 (Candor Toward the Tribunal), 3.4 (Fairness to Opposing Party and Counsel), 8.1 (Bar Admission and Disciplinary Matters), and 8.4 (Misconduct) of the Maryland Lawyers' Rules of Professional Conduct (MLRPC). The charges arise from Mr. Kane's representation of two clients, his personal bankruptcy filings, his personal tax returns, and related investigations by the Attorney Grievance Commission.

The hearing judge found that Mr. Kane failed to properly communicate and inform his clients, failed to comply with discovery deadlines, and failed to inform his clients of his conflicts of interest. Further, Mr. Kane provided uninformed advice to a client and, without notifying the client, allowed the statute of limitations to run on the client's claim.

In relation to his financial matters, the hearing judge found that Mr. Kane's frequent, incomplete and inaccurate bankruptcy petitions constituted an abuse of the system. Additionally, the hearing judge found that Mr. Kane included false information in his individual tax filings. The hearing judge also found that Mr. Kane did not timely respond to Bar Counsel's requests during the investigation.

Based on these findings, the hearing judge found that Mr. Kane violated MLRPC 1.1, 1.2, 1.3, 1.4, 1.7, 1.16, 3.1, 3.3, 3.4, 8.1, and 8.4. Bar Counsel recommended that the Court disbar Mr. Kane.

Held: Indefinite Suspension

The Court of Appeals sustained the hearing judge's findings of fact and found that Mr. Kane violated MLRPC 1.1, 1.2, 1.3, 1.4, 1.7, 1.16, 3.1, 3.3, 3.4, 8.1, and 8.4(a) and 8.4(d). The Court sustained Mr. Kane's objections to the hearing judge's conclusion that he violated Rule 8.4(b) and (c) arising from the hearing judge's conclusion that Mr. Kane's bankruptcy filings and tax returns violated federal criminal statutes. The Court found that although there is evidence that the actions were careless and reflect a lack of competence, the Court did not find by clear and convincing evidence that Mr. Kane committed a criminal act or engaged in intentional dishonest conduct.

Based on Mr. Kane's numerous violations, the Court imposed an indefinite suspension with the right to reinstate. The Court found that Mr. Kane's personal difficulties caring for his ailing in-laws constituted a mitigating factor. Additionally, the Court found that five aggravating factors existed: (1) prior discipline; (2) a pattern of misconduct; (3) multiple offenses; (4) refusal to acknowledge the wrongful nature of conduct; and (5) substantial experience in the practice of law. As a result of the Court's conclusions and sustaining Mr. Kane's exceptions to the Rule 8.4(b) and (c), the Court concluded that Mr. Kane's actions warranted an indefinite suspension.

Ronald F. Moser, et al. v. Kristi Heffington, et al., No. 62, September Term 2018, filed August 16, 2019. Opinion by Raker, J.

https://mdcourts.gov/data/opinions/coa/2019/62a18.pdf

FIFTH AMENDMENT – WAIVER OF PRIVILEGE AGAINST SELF-INCRIMINATION

CIVIL PROCEDURE – MOTION TO STAY

CIVIL PROCEDURE – MOTION FOR JUDGMENT

Facts:

Kristi Heffington was an employee of Ronald F. Moser, D.D.F., P.A. The owner of the practice, Dr. Ronald Moser, fired her in 2015 for stealing money from the practice. Mrs. Heffington and her husband ("the Heffingtons") alleged in a civil suit that Dr. Moser, Mrs. Moser, and their practice ("the Mosers") defamed the Heffingtons with statements that Mrs. Heffington committed identity theft and stole from their dental practice. In November 2016, as a part of discovery proceedings for her civil case, Mrs. Heffington willingly gave a deposition in which she testified at length to the acts at issue.

After her deposition, a grand jury indicted Mrs. Heffington for the crimes at issue in her civil suit. Her criminal trial was scheduled originally for two weeks before her civil trial. In June 2017, the court postponed her criminal trial at the State's request. It was postponed beyond her scheduled civil trial date of June 19, 2017. One week before her civil trial date, the Heffingtons filed a motion to stay the civil proceedings until the criminal charges were resolved, arguing that Mrs. Heffington would have to invoke her Fifth Amendment privilege against self-incrimination at her civil trial to protect herself in her criminal trial. They argued that she could not present her civil case without testifying. The circuit court denied their motion for a stay. The Heffingtons presented no evidence at trial, and the circuit court therefore granted the Mosers' motion for judgment.

On appeal, the Court of Special Appeals vacated the judgment below. The intermediate appellate court held that Mrs. Heffington did not waive her Fifth Amendment privilege by testifying at her deposition. The court reasoned that the criminal indictment created new grounds for apprehension that did not exist at the time Mrs. Heffington testified at her deposition. The court held also that the circuit court erred in denying the Heffingtons' motion for a stay. The Court of Special Appeals held that the circuit court should have balanced explicitly Mrs. Heffington's Fifth Amendment interest against the lesser interest of the Mosers in resolving the claims against them. The intermediate appellate court noted that the balance in such a case, "A stay should be granted to protect the plaintiff's constitutional rights unless it will cause undue prejudice to the civil defendant." The Court of Special Appeals vacated the judgment granted in favor of the Mosers and remanded the case to the circuit court for further proceedings.

Held: Reversed.

The Mosers petitioned for writ of certiorari, which the Court of Appeals granted. The Mosers argued in their petition that the Court of Special Appeals erred in vacating the judgment below. They contended that the circuit court did not abuse its discretion in denying the Heffingtons' motion to stay proceedings, arguing that Mrs. Heffington waived her Fifth Amendment privilege by testifying in her deposition.

The Court of Appeals held that for the purpose of the Fifth Amendment privilege against self-incrimination, a deposition and the trial for which it is given are part of the same "proceeding." *United States v. Parcel of Land*, 903 F.2d 36, 43 (1st Cir. 1990). Thus, when the plaintiff waived her Fifth Amendment privilege by testifying at a deposition, she waived the privilege to the same extent at her subsequent trial. That she was subsequently indicted did not "revive" the privilege, as she still faced the same apprehension she had at the time of her deposition—prosecution for theft and fraud.

The Court then reviewed the standard of review for a motion to stay, reaffirming that courts have considerable discretion when asked to stay proceedings. *Landis v. North American Co.*, 299 U.S. 248, 254–56, 57 S. Ct. 163, 166 (1936). When asked to stay proceedings, the Court held, a court must balance the rights and interests of the parties that are at stake. The court may consider also factors such as judicial efficiency and any interest of the public in the case at bar.

The Court of Appeals held that in this case, the circuit court did not abuse its discretion by denying the Heffingtons' motion to stay. The circuit court concluded correctly that Mrs. Heffington waived her Fifth Amendment privilege by testifying to the events at issue in her deposition. The circuit court considered the defendants' right to timely resolution of claims against them, the Heffingtons' right to access the courts, and judicial economy—the criminal trial might not have been resolved for years, causing repeated rescheduling of the civil trial. On those bases, it was not an abuse of discretion to deny the motion to stay.

Addressing the motion for judgment, the Court of Appeals held that because the Heffingtons presented no evidence at trial, the evidence could not legally support their claims. *Giant Food, Inc. v. Booker*, 152 Md. App. 166, 177, 831 A.2d 481, 487 (2003); Md. Rule 2-519. It was therefore appropriate to grant the Mosers' motion for judgment.

Wilfredo Rosales v. State of Maryland, No. 6, September Term 2018, filed April 17, 2019. Opinion by Getty, J.

https://mdcourts.gov/data/opinions/coa/2019/6a18.pdf

APPEAL AND ERROR – EFFECT OF DELAY OR FAILURE TO TAKE PROCEEDINGS

EVIDENCE – IMPEACHMENT BY PRIOR CONVICTION – PRIOR CRIMES, WRONGS OR ACTS

Facts:

Petitioner Wilfredo Rosales ("Rosales"), a member of the Mara Salvatrucha ("MS-13") gang, was charged with nine counts related to the assault of Hector Hernandez-Melendez.

At the trial for Rosales, Hernandez-Melendez testified about the assault and his prior experience as a member of MS-13. The State asked the trial court to prohibit admission of Hernandez-Melendez's prior RICO convictions for conspiracy to commit assault with a dangerous weapon in aid of racketeering and threatening to commit a crime of violence in aid of racketeering for impeachment purposes. The State argued that these crimes were neither infamous crimes nor relevant to his credibility and therefore could not be used to impeach his credibility. The trial court granted the State's motion.

Rosales was ultimately found guilty. Rosales filed a belated appeal which he voluntarily dismissed. Two years later, Rosales filed a Petition for Postconviction Relief, claiming that his trial counsel failed to timely file an appeal. The State agreed that Rosales was entitled to file a belated appeal and the court signed a proposed consent order authorizing a belated notice of appeal and ordered that the postconviction petition be withdrawn without prejudice.

Rosales' belated appeal was heard in the Court of Special Appeals. The Court of Special Appeals affirmed the judgment of the trial court, upholding the trial court's conclusion that Hernandez-Melendez's prior convictions involving violent crimes were not relevant to his credibility and were non-impeachable crimes.

Subsequently, Rosales appealed to the Court of Appeals, presenting the question of whether Hernandez-Melendez's prior convictions for violent crimes in aid of racketeering activity were admissible for purposes of impeachment under Maryland Rule 5-609. On appeal, the State also raised the issue of appellate jurisdiction for the first time, asking whether the Court of Special Appeals and this Court had jurisdiction due to the 30-day appeal deadline under Maryland Rule 8-202.

Held: Reversed.

The Court of Appeals first held that Maryland Rule 8-202 is a claim-processing rule, not a jurisdictional rule. In the past, Maryland Rule 8-202 was incorrectly considered jurisdictional. Therefore, noncompliance required dismissal. Upon a review of prior precedent, the Court of Appeals noted that the Rule was not statutorily based, and thus, was more properly classified as a claim-processing rule. As a claim-processing rule, the Maryland Rule 8-202 was subject to waiver and forfeiture.

In review of the belated appeal in this case, the Court noted that although ordinarily the Court would dismiss the appeal for failure to comply with the Rule's 30-day appeal deadline and the improper postconviction proceedings, Rosales' case could be considered on the merits due to the unique history of the proceedings and the consent of all parties.

As to the merits, the Court of Appeals held Hernandez-Melendez's prior convictions for violent crimes in aid of racketeering activity were admissible for purposes of impeachment under Maryland Rule 5-609. However, the admission of the prior convictions was harmless error, thus Rosales was not granted a new trial.

The Court considered whether the crime was an "infamous crime or other crime relevant to the witness' credibility." The Court engaged in a statutory analysis of the underlying crime for which Hernandez-Melendez had been found guilty. The Court determined that a violent crime in aid of racketeering goes beyond a typical act of violence, as it requires secrecy and poses a "grave danger to the fabric of society." Therefore, Hernandez-Melendez's prior convictions are relevant to his credibility and can be used to impeach a witness' credibility.

After determining the convictions were admissible, the Court addressed whether the lower court's error in failing to allow admission of the criminal convictions for impeachment was harmless beyond a reasonable doubt. The Court noted that the jury was able to assess Hernandez-Melendez's credibility at trial based on his testimony about his prior involvement with MS-13 even without the admission of the prior convictions. Although it was error to not admit the prior convictions, the error in no way influenced the jury's final verdict, and therefore was deemed "harmless" beyond a reasonable doubt.

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Michael Pacheco v. State of Maryland, No. 17, September Term 2018, filed August 12, 2019. Opinion by Barbera, C.J.

McDonald and Watts, JJ., concur and dissent.

https://www.courts.state.md.us/data/opinions/coa/2019/17a18.pdf

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

Facts:

One spring evening in 2016, two officers from the Montgomery County Police Department were conducting a foot patrol in Wheaton, Maryland. The officers noticed, what they called, a "suspicious vehicle" parked behind a laundromat "in a dark parking spot . . . with the windows down. . . . and nowhere near the business itself." As the officers approached the vehicle, they detected the odor of "fresh burnt" marijuana. Both officers could see that Petitioner Michael Pacheco was alone and seated in the driver's seat. One of the officers then observed a marijuana cigarette in the vehicle's center console, which the officer testified contained clearly less than ten grams. Immediately thereafter, the officers ordered Mr. Pacheco to exit the vehicle and searched him. During the search, the officers discovered cocaine in Mr. Pacheco's pocket. Mr. Pacheco was issued a civil citation for possession of less than ten grams of marijuana and charged with possession of cocaine with intent to distribute.

Mr. Pacheco moved to suppress the cocaine, arguing that the officers' warrantless search was illegal because the officers lacked probable cause to believe that Mr. Pacheco possessed more than ten grams of marijuana. The circuit court denied Mr. Pacheco's motion to suppress because, in its opinion, probable cause existed to arrest based on the possession of marijuana, and thus the officers were permitted to conduct a search incident to that lawful arrest. Mr. Pacheco then entered a conditional guilty plea, which preserved his right to withdraw the plea if he was successful in his appeal of the motion to suppress. The Court of Special Appeals affirmed the circuit court, ruling that probable cause to arrest Mr. Pacheco existed because he was "the driver and sole occupant of a vehicle that smelled of freshly burnt marijuana, and police observed a marijuana joint in the center console." Mr. Pacheco petitioned for a writ of certiorari, which the Court of Appeals granted.

Held:

In the post-decriminalization era, the mere odor of marijuana coupled with possession of what is clearly less than ten grams of marijuana, absent other circumstances, does not grant officers

probable cause to effectuate an arrest and conduct a search incident thereto. It is well established that individuals have a heighted expectation of privacy in their person as compared to their automobile, meaning the probable cause analysis for the search incident to arrest exception versus the automobile exception will often differ given the respective justifications for those exceptions and the facts and circumstances of each case. Thus, the Court of Appeals held that although Petitioner's possession of a marijuana cigarette along with the odor of marijuana may have given the officers probable cause to search his vehicle, it did not grant them probable cause to arrest him and conduct a search incident thereto.

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Travis Howell v. State of Maryland, No. 43, September Term 2018, filed August 22, 2019. Opinion by McDonald, J.

https://mdcourts.gov/data/opinions/coa/2019/43a18.pdf

CRIMINAL LAW – DURESS DEFENSE

CRIMINAL LAW – DURESS DEFENSE – EXCEPTIONS

CRIMINAL LAW – REFUSAL OF WITNESS TO TESTIFY – CONTEMPT – DURESS DEFENSE

Facts:

After being indicted on federal drug offenses, Travis Howell pled guilty and agreed to testify as a prosecution witness in the future. In accordance with that agreement, Mr. Howell appeared before a grand jury in the Circuit Court for Baltimore City and testified that Freddie Curry had confessed to a murder. Prior to his grand jury testimony, Mr. Howell claimed that a prosecutor promised him his identity as a witness against Mr. Curry would not be made public without advance notice.

A few years later, Mr. Curry's murder trial took place in the Circuit Court for Baltimore City. When Mr. Howell was called to testify, he asserted his Fifth Amendment privilege against compelled self-incrimination. The court granted the State's motion to immunize Mr. Howell and ordered him to testify. However, Mr. Howell refused to answer questions posed by the prosecutor.

The Circuit Court held Mr. Howell in contempt and held a hearing to consider any mitigating evidence. Mr. Howell and his attorney proffered the following facts:

Before he was called to the stand, Mr. Howell allegedly told his attorney that he feared for his life if he were to testify. The attorney called the Curry trial prosecutor to ask what form of witness protection the State could offer Mr. Howell. The prosecutor said the State could provide temporary relocation services at a hotel.

The day before Mr. Howell was due back in court to testify, the Baltimore Sun posted an article that identified Mr. Howell as a State's witness in the Curry's trial. Mr. Howell believed that he should have received advance notice of this publication from the State.

Mr. Howell also claimed that on the day he was scheduled to testify, five or six unidentified men verbally and physically assaulted him outside the courtroom and threatened him with further violence if he "snitched" before they were escorted from the courthouse.

Mr. Howell claimed that, during the evening after he was first called to the stand, while he was detained at the Central Booking and Intake Facility, several people again threatened him with violence if he "snitched."

A few days later after he refused to testify, Mr. Howell was indicted for criminal contempt for his refusal to testify. He requested a jury trial and the circuit court directed that further proceedings should be conducted in the same manner as constructive contempt.

In connection with the contempt trial, other judges of the circuit court rejected his attempts to present evidence of a duress defense, based on the facts summarized above. The court reasoned that a duress defense was not available to a witness who refuses to testify out of a fear of retribution.

Mr. Howell pled not guilty, submitted on an agreed statement of facts and of defense proffers allegedly in support of a duress defense. The circuit court found him guilty of contempt and, in accordance with an agreement of the prosecution and defense, sentenced him to five years in prison, suspending all but time served, plus three years of supervised probation.

Mr. Howell appealed. He sought to have the appellate court decide whether, as a matter of law, a witness who refuses to testify due to fear of retribution may raise the duress defense and, if so, whether his proffered evidence generated that defense. The Court of Special Appeals decided it need not answer Mr. Howell's first question because, it held, his proffered evidence would not have met the "some evidence" threshold necessary to generate a jury instruction on duress.

Held: Affirmed.

The obligation to testify and the power of a court to compel witness testimony is at the core of the proper functioning of the criminal justice system. However, a witness has a privilege against compulsory self-incrimination. But an immunized witness may not refuse to testify on the basis of that privilege. If a witness persists in refusing to testify, as Mr. Howell did here, he or she can be prosecuted for criminal contempt.

To successfully generate a jury instruction on a defense, the defendant must produce "some evidence" of the required elements of that defense. In Maryland, a key element of duress is a threatened harm that is "present, imminent, and impending." A threat of "future but not present personal injury" is not duress.

Even if Mr. Howell had presented his proffered evidence about the threats again him, those proffers would not have constituted "some evidence" of duress, because Mr. Howell did not face a "present, imminent, and impending" threat on the witness stand.

The Court observed that federal and state courts across the country generally agree that fear of reprisal may not excuse a witness from testifying. However, given its holding that Mr. Howell did not produce "some evidence" of duress, the Court did not reach the question of whether a

witness who refuses to testify due to fear of reprisal may ever, as a matter of law, successfully raise the defense of duress.

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In re S.K., No. 41, September Term 2018, filed August 28, 2019. Opinion by Getty, J.

Hotten, J., dissents.

https://mdcourts.gov/data/opinions/coa/2019/41a18.pdf

MINORS – SALE OR DISSEMINATION OF INDECENT MATERIALS TO CHILDREN

TELECOMMUNICATIONS – SOLICITING MINOR FOR SEX OR ILLEGAL ACT; CHILD PORNOGRAPHY

OBSCENITY – DEPICTIONS OF MINORS; CHILD PORNOGRAPHY

Facts:

During the 2016–17 school year, a sixteen-year-old female, S.K. sent a video recording via text message to her two juvenile friends of her nude and performing fellatio. Later that year, S.K. and the two friends to whom she sent the video had a falling out. As a result, the two juveniles contacted their school's resource officer and informed him about the incident. Thereafter, the school resource officer scheduled a meeting with S.K. in which she provided him with a written statement where she admitted that she was in the video and had sent it to her two friends. A police report was filed and referred to the State's Attorney for Charles County. After review, the State charged S.K., as a juvenile, with three counts as follows: Count 1: filming a minor engaging in sexual conduct in violation of Criminal Law Article ("CR") § 11-207(a)(2); Count 2: distributing child pornography in violation of CR § 11-207(a)(4); and Count 3: displaying an obscene item to a minor in violation of CR § 11-203(b)(1)(ii). The circuit court for Charles County sitting as a juvenile court held an adjudicatory hearing on April 27, 2017. The juvenile court dismissed Count 1 finding insufficient evidence that S.K. filmed the video and found S.K. involved as to Counts 2 and 3. As a result, S.K. was placed on electronic monitoring for a short period and subject to supervised probation administered by the Department of Juvenile Services. After fulfilling her probation requirements, this case was ordered closed and sealed.

Thereafter, S.K. appealed the juvenile court's decision to the Court of Special Appeals. In a reported opinion, the Court of Special Appeals held that CR § 11-207(a)(4), the child pornography statute, does not contain an exception for minors who self-distribute materials in which he or she is engaging in sexual conduct. With respect to Count 2 based on CR § 11-207(a)(4), prohibiting the display of an obscene item to minors, the Court of Special Appeals held a digital file did not come within the meaning of the term "item" as utilized within the statute. The intermediate appellate court therefore reversed the juvenile court with respect to Count 3. Subsequently, S.K. filed a petition for writ of certiorari with this Court, which the Court granted on October 9, 2018. The Court was tasked with determining whether: (i) the juvenile court erred in finding S.K. involved in distributing child pornography under CR § 11-

207(a)(4); and (ii) the juvenile court erred in finding S.K. involved in the offense of displaying an obscene item to a minor under CR § 11-203(b)(1)(ii).

Held: Affirmed in part and reversed in part.

The Court of Appeals held that: (i) CR § 11-207(a)(4) does not contain an exception under which juveniles who distribute content depicting themselves engaging in sexual conduct; and (ii) a digital video file falls within the meaning of an "item" under CR § 11-203(b)(1)(ii). As to the first issue, the Court rejected S.K.'s arguments that CR § 11-207(a)(4) is ambiguous based on the terms "person" and "individual" and the phrase "engaged as a subject." Although the Court recognized the increasing frequency at which sexting occurs in today's age, based on the plain language of the statute and the legislative intent behind its enactment, it contains no exception for a minor that distributes depictions of himself or herself engaging in sexual conduct. Accordingly, the Court affirmed the Court of Special Appeals with respect to the first issue.

As to the second issue, the Court of Appeals determined that S.K.'s conduct fell within that contemplated by CR § 11-203. First, the Court determined that the term "film," as utilized in CR § 11-203(a)(4), is expansive, includes digital media, and does not refer to the definition of "film" as a traditional analog medium. Instead, the legislative intent supporting the statute confirmed that the General Assembly intended to close any loopholes that may arise, with respect to distributing obscene materials to minors, based on subsequent post-enactment technological advancement. The Court also concluded that the content of the digital file that S.K. distributed to her two minor friends was "obscene" under the definition set forth in CR § 11-203(a)(4). Accordingly, the Court reversed the Court of Special Appeals with regards to the second issue and affirmed the juvenile court's delinquency finding.

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Donald Eugene Bailey v. State of Maryland, No. 77, September Term 2018, filed July 17, 2019. Opinion by Getty, J.

Hotten, J., concurs and dissents.

https://mdcourts.gov/data/opinions/coa/2019/77a18.pdf

CRIMINAL LAW – SUBSEQUENT OFFENDER ENHANCEMENT – PROCEDURAL DEFICIENCY WITH NOTICE

CRIMINAL LAW – INEFFECTIVE ASSISTANCE OF COUNSEL – DIRECT APPEAL

Facts:

Donald Eugene Bailey was convicted in the circuit court of driving while impaired by alcohol, reckless driving, negligent driving, and failure to control speed to avoid a collision. His sentence was enhanced as a subsequent offender under § 21-902(b)(1) of the Transportation Article of the Maryland Code. Prior to his jury trial, the State served its notice of increased penalty as a subsequent offender but it was filed five days later than required by Maryland Rule 4-245. At no point did Mr. Bailey object to the late notice or the sentence enhancement.

Held: Affirmed.

The Court of Appeals considered whether enhancement of a subsequent offender's sentence was permissible when the State filed a belated notice of the enhancement in violation of Maryland Rule 4-245(b). The Court of Appeals first considered whether the application of the enhancement was an imposition of an illegal sentence under Maryland Rule 4-345(a). The Court of Appeals determined that the sentence was not illegal as it was a procedural deficiency in the sentence, not one that the circuit court did not have the statutory power to impose. Therefore, Mr. Bailey's challenge on appeal to the enhancement was subject to preservation and waiver.

Even though Mr. Bailey's objection was not preserved, the Court of Appeals exercised its discretion to review the unpreserved issue pursuant to Maryland Rule 8-131(a). In reviewing the merits, the Court evaluated two prior Maryland cases addressing the notice requirement of Maryland 4-245—*King v. State*, 300 Md. 218 (1984) and Carter v. State, 319 Md. 618 (1990). The Court determined *King* applies when the notice is defective while Carter applies when there is no notice. Under *King*, the trial court reviews the defective notice for harmless error.

Here, the notice was defective, thus, *King* applied. The Court of Appeals evaluated whether the State's belated notice in any way influenced Mr. Bailey's pre-trial decisions. Mr. Bailey had actual notice and he did not allege that he sustained any prejudice as a result of the belated notice. Although the delay resulted in ten days of notice instead of fifteen days, Mr. Bailey was

still afforded adequate time to determine how to proceed in the underlying matter. Therefore, the error was harmless.

The Court of Appeals also was asked to consider Mr. Bailey's ineffective assistance of counsel claim on direct appeal. The Court of Appeals declined to hear that issue, determining that a post-conviction proceeding was the appropriate venue for Mr. Bailey's ineffective assistance of counsel claim.

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State of Maryland v. Hassan Emmanuel Jones, No. 52, September Term 2018, filed August 28, 2019. Opinion by Barbera, C.J.

McDonald, J., concurs and dissents.
Watts, J., concurs and dissents.
Hotten and Greene, JJ., concur and dissent.

https://mdcourts.gov/data/opinions/coa/2019/52a18.pdf

CRIMINAL PROCEDURE – SUFFICIENCY OF THE EVIDENCE – ACCOMPLICE CORROBORATION RULE

CRIMINAL PROCEDURE – ACCOMPLICE CORROBORATION RULE – ABROGATION

Facts:

Jones was implicated in a murder and carjacking by the accounts of three accomplices. At trial, the State presented evidence that generally corroborated the three accomplices' testimony regarding their movements and activities the night of the crime. However, only the accomplice testimony directly implicated Jones. The court correctly instructed the jury that accomplice testimony must be independently corroborated, and the jury convicted Jones of conspiracy to commit armed carjacking. The trial judge denied a motion for new trial and imposed a thirty-year sentence.

Jones appealed, and a panel of the Court of Special Appeals reversed the conviction. The court held that the accomplices' testimony was not independently corroborated by other evidence, leaving the remaining evidence legally insufficient to sustain Jones' conviction.

Held:

The Court of Appeals abrogated the accomplice corroboration rule but applied the accomplice corroboration rule as it was structured at the time of trial, thus affirming the judgment of the Court of Special Appeals.

The accomplice corroboration rule, in its most stringent form, precludes convicting a defendant based solely on the testimony of the defendant's accomplices. Slight corroborative evidence is required to sustain a conviction. The rule applies in a minority of states and is grounded in outdated legal reasoning. Presented with an opportunity to reevaluate the rule and after thorough examination of its utility, the Court of Appeals abrogated Maryland's accomplice corroboration rule, allowing the jury exclusively to assess the accomplices' credibility. In place of the now-abrogated rule, a trial judge is to give a cautionary jury instruction when the State introduces accomplice testimony.

The Court held this new rule applies solely prospectively. Because the change in law does not apply to Jones' case, the Court looked at the accomplice corroboration rule in place at the time of Jones' trial. The accomplice corroboration rule in place at the time of trial required evidence independent of accomplice testimony to implicate a defendant in a crime or identify the defendant with the perpetrators of the crime at or near the time it was committed. That evidence was not presented at Jones' trial, and thus the Court of Appeals affirmed the judgment of the Court of Special Appeals overturning Jones' conviction as legally insufficient.

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State of Maryland v. John Schlick, No. 63, September Term 2018, filed August 23, 2019. Opinion by Greene, J.

https://www.courts.state.md.us/data/opinions/coa/2019/63a18.pdf

CRIMINAL PROCEDURE – MARYLAND RULE 4-345 – REVISORY POWER

Facts:

In 2005, Respondent John Schlick ("Mr. Schlick") pleaded guilty in the Circuit Court for Baltimore City to a narcotics offense. On September 20, 2005, Mr. Schlick was sentenced to 16 years in prison, of which, 14 years and six months were suspended. He was also placed on five years of probation upon release. After Mr. Schlick's release on probation, he was convicted of another crime and appeared before the Circuit Court for Baltimore City for violation of probation on September 15, 2008. At that time, the Circuit Court revoked Mr. Schlick's probation and sentenced him to the previously suspended 14 years and six months stemming from his 2005 sentence. A motion to modify was not filed on Mr. Schlick's behalf.

On August 31, 2012, Mr. Schlick filed a petition for postconviction relief. Mr. Schlick argued that he received ineffective assistance of counsel because he directed his lawyer to file a motion for reduction of sentence after his 2008 hearing, but his lawyer failed to do so. Mr. Schlick's lawyer, in an affidavit, swore under oath that she failed to file the motion for modification as requested by Mr. Schlick. On March 20, 2013, the postconviction court concluded that Mr. Schlick had received ineffective assistance of counsel and permitted him to file a belated motion for modification within 90 days of its order. Mr. Schlick filed his belated motion for modification on May 24, 2013.

On May 30, 2013, without the assistance of counsel, Mr. Schlick filed a motion asking the court to hold his motion in abeyance until a later date. On January 6, 2014, the court scheduled a hearing for Mr. Schlick's motion on February 12, 2014. Mr. Schlick filed a motion to postpone the hearing, which the court granted. In doing so, the court ordered that Mr. Schlick's motion be held *sub curia* until Mr. Schlick requested a hearing. For the next two years, for various reasons, the court did not hold a hearing on Mr. Schlick's motion.

In December of 2016, the circuit court issued an order to show cause why Mr. Schlick's motion should not be dismissed on the ground that, under Maryland Rule 4-345(e), the five-year expiration for which a court can revise a sentence had expired. On August 8, 2017, the court dismissed Mr. Schlick's motion without ruling on its merits, reasoning that Mr. Schlick's sentence was originally imposed on September 15, 2008, and that the court's revisory power lapsed on September 15, 2013. The court concluded that Mr. Schlick's failure to obtain a hearing or ruling on his motion before September 15, 2013 was attributable to his own actions and not the fault or error of the court, nor the result of ineffective assistance of counsel.

The Court of Special Appeals concluded that despite the five-year limitation set forth in Maryland Rule 4-345(e), the trial court retained fundamental jurisdiction to rule on Mr. Schlick's motion. The Court of Special Appeals explained that there are a number of reasons that it may be impossible for a judge to act promptly and rule on a motion for modification prior to the expiration of the five-year period.

Held: Affirmed.

The Court of Appeals held that when the postconviction court granted Mr. Schlick 90 days from its order to file a motion for modification, implicit in the court's ruling was the circuit court's authority to exercise its revisory power over Mr. Schlick's sentence. Additionally, that revisory power would extend for five years following the postconviction court's final order. Given that Mr. Schlick was granted postconviction relief on March 20, 2013, the circuit court had revisory power over Mr. Schlick's sentence until March 20, 2018. Therefore, when the court dismissed Mr. Schlick's motion on August 8, 2017 because of a perceived lack of revisory power, the court dismissed Mr. Schlick's motion prematurely. As such, the court erred as a matter of law when it dismissed Mr. Schlick's motion. The Court reasoned that Mr. Schlick was entitled to the full benefit of Maryland Rule 4-345(e), which included the five-year period of a trial court to rule on a timely filed motion for modification. Because Mr. Schlick was deprived of effective counsel, implicit in the postconviction court's ruling was the power of the court to revise Mr. Schlick's sentence.

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April Ademiluyi v. Chizoba Egbuonu, et al., No. 34, September Term 2018, filed August 29, 2019. Opinion by Getty, J.

https://mdcourts.gov/data/opinions/coa/2019/34a18.pdf

ELECTION LAW – NOMINATIONS – NOMINATIONS BY POLITICAL PARTIES IN GENERAL

ELECTION LAW – LIMITATIONS AND LACHES

Facts:

In 2018, April T. Ademiluyi was nominated by the Libertarian Party of Maryland ("Libertarian Party") as a candidate for the office of Judge of the Circuit Court for Prince George's County in the 2018 Gubernational General Election. At all times relevant to the appeal, Ms. Ademiluyi was a registered Democrat. On June 19, 2018, the State Board of Elections ("State Board") certified the result of the 2018 Gubernatorial Primary Election and posted a list of candidates participating in the general election on its website. The same day, attorneys for Chizoba N. Egbuonu, Luther V. Watkins, Sr., Manuel R. Geraldo, and Stella A. Grooms (collectively "Appellees") submitted a Maryland Public Information Act ("MPIA") request to the State Board seeking Ms. Ademiluyi's voter registration records and records related to her candidacy for judicial office.

Five days later, Appellees received the documents requested from their MPIA request. The following day, Appellees brought action in the Circuit Court for Prince George's County against Ms. Ademiluyi, the State Board, the Libertarian Party, and several others involved seeking a writ of mandamus, declaratory judgment, and preliminary and permanent injunctive relief requesting that Ms. Ademiluyi removed from the ballot in the 2018 Gubernatorial General Election. Primarily, they argued that her candidacy was invalid because, as a registered Democrat, her candidacy failed to comport with the candidate qualifications established under the Libertarian Party's Constitution.

At the hearing before the circuit court, Ms. Ademilyui failed to appear, but members of the State Board and the Libertarian Party attended. The State Board argued that the doctrine of laches barred Appellees' suit. In particular, the State Board contended that Appellees failed to exercise adequate diligence in bringing their suit based on a twenty-one-day delay between the State Board publishing Ms. Ademiluyi's name as a candidate on its website and Appellees' MPIA request, and thus Ms. Ademiluyi would be unable to correct any deficiencies in her candidacy due to certain deadlines on the electoral calendar. The State Board also argued that it would be prejudiced if the court issued an order that it would be unable to comply with without disrupting the orderly administration of the election. The circuit court rejected the State Board's contentions and granted preliminary injunction in favor of Appellees. Ms. Ademiluyi then filed a notice of appeal pursuant to Election Law Article § 12-203(3) which, in certain instances,

permits a direct appeal to the Court of Appeals within five days of the circuit court's decision. In a *per curiam* order dated September 6, 2018, the Court of Appeals affirmed the circuit court's grant of preliminary injunction.

Held:

First, the Court of Appeals held that the Libertarian Party's nomination of Ms. Ademiluyi for Judge of the Circuit Court of Prince George's County was invalid, because she was a registered Democrat and the Libertarian Party of Maryland's Constitution requires that candidates for the party be registered as Libertarians. Moreover, based upon *Suessmann*, 383 Md. 697 (2004), and a review of the constitutional and statutory history the Court determined that, despite the fact that party affiliation is not displayed on the election ballot, Maryland's judicial electoral process is inherently partisan. Furthermore, the General Assembly granted to non-principal political parties the responsibility of determining the necessary qualifications for candidates for judicial offices through provisions in the non-principal party's constitution or bylaws. Therefore, the General Assembly implicitly endorsed the Libertarian Party's ability to restrict its nomination of candidates to voters registered with the Libertarian Party.

Second, the Court of Appeals held that Appellees' challenge to Ms. Ademiluyi's candidacy was not barred by the doctrine of laches. Primarily, the Court determined Appellees did not act improperly, because there was little media attention surrounding Ms. Ademiluyi's candidacy, documents concerning the her political affiliation were in the exclusive possession of the State Board of Elections, and Appellees brought action just one day after receiving the relevant documents through an MPIA Act request submitted to the State Board. Accordingly, the Court of Appeals affirmed the judgment of the circuit court.

Maryland Department of the Environment v. County Commissioners of Carroll County, Maryland, No. 5, September Term 2018; *Frederick County, Maryland v. Maryland Department of the Environment*, No. 7, September Term 2018, filed August 6, 2019. Opinion by McDonald, J.

Watts, Hotten, and Getty, JJ., dissent.

https://www.mdcourts.gov/data/opinions/coa/2019/5a18.pdf

ENVIRONMENTAL LAW – ADMINISTRATIVE LAW – CLEAN WATER ACT – STORMWATER DISCHARGE PERMITS

Facts:

The federal Clean Water Act ("Act") prohibits discharges of pollution into waterways, but an entity may obtain a "permit" authorizing such discharges. These permits include conditions aimed at limiting how much pollution is discharged. The Maryland Department of the Environment ("Department") may issue such permits, subject to the oversight of the United States Environmental Protection Agency ("EPA").

The Act employs several terms of art. A "water quality standard" is the benchmark of clean water for a given waterway. It includes, among other things, restrictions on the amount of certain pollutants in that waterway. To achieve water quality standards, permits must include two types of pollution limits. The minimum required limits are "technology based effluent limitations" which cap the amount of certain pollutants that the permittee may discharge based on the effectiveness of certain technology.

In a best case scenario, all the technology based effluent limitations required of all the permittees that discharge pollutants to a given waterway would achieve the water quality standard for that waterway. In fact, that rarely happens, which is why the Act authorizes supplemental pollutant limits called "water quality based effluent limitations." These limitations are designed based on what is necessary to achieve water quality standards in the receiving water body. In its simplest form, a water quality based effluent limitation is a numeric cap below the level of the pre-existing technology based effluent limitation.

When technology based effluent limitations alone fail to achieve water quality standards, the Act authorizes not only water quality based effluent limitations but also the creation of a plan to achieve water quality standards. Such a plan is called a "total maximum daily load" or "TMDL." For a given pollutant in a given waterway, a state agency like the Department first calculates the maximum amount of the pollutant that the waterway can tolerate without violating the applicable water quality standard – the TMDL limit. The agency then allocates the TMDL limit among the various sources of that pollutant in that waterway. The agency writes up its calculations and allocations in a document – the TMDL document – and submits that document to the EPA. If

the EPA approves the TMDL document, the agency must include water quality based effluent limitations in permits consistent with the applicable allocations in the TMDL document.

The EPA may also develop TMDLs, and in 2010 it finalized a uniquely complex TMDL for the Chesapeake Bay (the "Bay TMDL"). Since the Bay is fed by waters in several states, including Maryland, the EPA collaborated with those states to craft the Bay TMDL. The EPA tasked each state with writing a "Watershed Implementation Plan" ("WIP") that both allocated the Bay TMDL limits among pollutant sources in the state and included planned measures the state would use to achieve those allocations.

In the Maryland WIP, the Department committed to including certain conditions in the then-upcoming round of permits for Maryland's county-operated stormwater drainage systems (called "municipal separate storm sewer systems" or "MS4s"). In compliance with the requirement of consistency between TMDLs and permits, the Department wrote conditions in the MS4 permits corresponding to those WIP commitments. One condition requires each county to "restore" 20% of county-wide impervious surfaces. To restore an impervious surface means to retrofit it so that it allows stormwater to soak into the ground rather than collect pollution while running across the surface. Another condition requires each county to produce implementation plans to achieve certain allocations established by local TMDLs (as opposed to the multi-jurisdictional Bay TMDL).

In 2014, the Department issued MS4 permits containing these conditions to Frederick County and Carroll County (the "Counties"), which then sought judicial review of their permits on various grounds. The Circuit Court for Carroll County agreed with that County on some of those grounds and remanded its permit to the Department. The Department appealed, and the County cross-appealed. The Circuit Court for Frederick County largely rejected that County's arguments, but the court remanded its permit and directed the Department to correct some inconsistencies in the permit's wording. Frederick County appealed.

Prior to argument in the Court of Special Appeals, the Counties petitioned this Court to hear their cases, and this Court granted their petitions.

Held:

The Court upheld the Counties' MS4 permits. (Each Circuit Court's judgment was affirmed in part and reversed in part.)

The Act requires MS4 permits to include controls to reduce pollution to the "maximum extent practicable." That same statutory provision authorizes MS4 permits to include "such other provisions as the [EPA] or the State determines appropriate for the control of such pollutants." Based on this provision, Frederick County argued that the Department exceeded its authority by establishing the impervious surface restoration condition without considering practicability. The Court, however, found the statutory language ambiguous, and noted that the EPA and federal courts have construed it to allow permitting agencies to include water quality based conditions in

MS4 permits. Given the reasonableness of such constructions, and given that the impervious surface restoration condition is designed to help achieve water quality standards in the Bay, the Court affirmed the Department's authority to include the condition in the County's MS4 permit without reference to the "maximum extent practicable" standard.

Frederick County also argued that the impervious surface restoration condition was impossible for the County to achieve and that it was thus arbitrary and capricious for the Department to include that condition in the permit. The Court held that the Department had a rational basis to include the condition, in large part because the condition was important for achieving the pollution reductions in the Bay TMDL.

The impervious surface restoration condition directs each County to calculate a county-wide baseline of impervious surface area that has not already been restored to the maximum extent practicable. The condition further requires each County to restore 20% of that area over the five-year term of the permits. The Counties challenged the Department's authority to use a county-wide baseline, given that such a baseline includes areas that do not drain to either County's MS4. The Court rejected this challenge in light of the Department's discretion to establish water quality based permit conditions consistent with the Maryland WIP and the Bay TMDL.

The Counties challenged the permit condition requiring plans to achieve compliance with local TMDLs. To the extent the Counties were challenging final decisions contained in those local TMDLs, the Court held that the Counties should have raised those arguments in federal court in a challenge to the EPA's approval of the local TMDLs.

The Counties challenged the classification of their MS4 permits. Consistent with the Act, the EPA rolled out the MS4 permit requirement in two phases – "Phase I" and "Phase II." Phase I MS4 permittees generally are either the larger cities and counties or else jurisdictions "residually designated" by permitting agencies as Phase I MS4s because they generate significant amounts of pollution. The EPA classified certain counties as Phase I MS4 permittees based on their "unincorporated, urbanized" population sizes as of 1990. Since then, several other Phase I MS4 permittees have been residually designated.

Phase II went into effect in the 2000s, and Phase II MS4 permittees generally are jurisdictions with smaller populations. In Maryland, consistent with the State's WIP, Phase I MS4 permittees have had to restore 30% of county-wide untreated impervious surfaces by 2019, while Phase II MS4 permittees have had to restore only 20% of untreated impervious surfaces in urbanized areas by 2025.

Both Counties are Phase I MS4 permittees. They were not designated by EPA regulation; rather, they applied for and received their Phase I permits in the early 1990s. Both Counties argue that the Department misinterpreted the Act and EPA regulations in 1991 when it directed the Counties to apply for Phase I MS4 permits. However, the text of the Act and its regulations did not clearly leave the Counties out of Phase I entirely, and the Department had "residual designation" authority in the 1990s to direct the Counties to apply for Phase I MS4 permits. Indeed, the EPA interpreted the Department's actions as an exercise of its residual designation

authority. For these and other related reasons, the Court rejected the Counties' challenge on this ground.

Carroll County made an additional argument based on its classification. It argued that it was arbitrary and capricious for the Department *not* to treat the County like Washington County, which is a Phase II MS4 permittee despite being similar in size and rural character to Carroll County. In particular, Carroll County argued that it should be treated like Washington County rather than the State's other Phase I MS4 counties which generally are larger and more urban than either Carroll County or Washington County. In part because of the Bay TMDL development process, the Court held that the Department had a rational basis to treat Phase I MS4 counties alike, even though the smallest Phase I MS4 counties might have similar characteristics to the largest Phase II MS4 counties. Moreover, because the impervious surface restoration condition requires restoration of a *percentage* of a jurisdiction's impervious surfaces, the condition inherently requires more of larger Phase I MS4 jurisdictions than of smaller ones.

Both Counties argued that the Department arbitrarily and capriciously failed to authorize "water quality trading" as a compliance mechanism for the impervious surface restoration requirement. Water quality trading is a market-based strategy whereby a permittee may pay another party to achieve pollution reductions and credit those reductions towards the permittee's obligations. Maryland began developing a water quality trading program in 2013, a year before the Counties received the permits they challenged in this litigation. By 2018, knowing that the State's water quality trading program was soon slated to become law, the Department included trading as a compliance method for Phase II MS4 permittees. But back in 2014, when it issued the Counties' Phase I MS4 permits, the Department did not include trading in those permits because the trading program was still under its initial development. That choice was not arbitrary or capricious.

Finally, Carroll County challenged a somewhat ambiguous provision in its permit requiring the County to cooperate with other State agencies in the development of the "water resources element" of the County's comprehensive plan under Maryland Code, Land Use Article §3-101 et seq. The Court held that the challenged permit provision did not – and could not – transfer the responsibilities of those agencies to the County.

(The Counties' permits are very similar to other counties' Phase I MS4 permits which this Court held to be valid in *Maryland Department of Environment v. Anacostia Riverkeeper*, 447 Md. 88 (2016). However, the arguments in that case are distinguishable from the ones raised in this litigation.)

In re: Adoption/Guardianship of C.E., No. 77, September Term 2017, filed June 6, 2019. Opinion by Getty, J.

https://mdcourts.gov/data/opinions/coa/2019/77a17.pdf

FAMILY LAW—TERMINATION OF PARENTAL RIGHTS—FAMILY LAW ARTICLE § 5-323—UNFITNESS

FAMILY LAW—TERMINATION OF PARENTAL RIGHTS—FAMILY LAW ARTICLE § 5-323—EXCEPTIONAL CIRCUMSTANCES

FAMILY LAW—TERMINATION OF PARENTAL RIGHTS—SUBSEQUENT ACTION

Facts:

The child ("C.E.") was born May 2014 to C.D. ("Mother") and H.E. ("Father"). Immediately following C.E.'s birth, Baltimore City Department of Social Services ("the Department") responded to a "risk of harm" report and request for a safety assessment of C.E. from the hospital. The Department discovered that Mother's other five children had previously been removed from her care, and that Mother had a pervasive history of mental illness.

The Department determined that C.E. would not be safe in the parent's care and filed a petition for shelter care. The petition was granted and the Department placed C.E. with Mr. and Ms. B., cousins of Mother. C.E. continued to reside with Mr. and Ms. B. while the Department attempted to achieve reunification. Following a grant of a motion for waiver of the Department's obligation to continue to make reasonable efforts to reunify the parents with C.E., the Department sought to terminate the parental rights of the parents.

At the termination of parental rights hearing, a variety of expert witnesses testified as to the Mother's and the Father's fitness as parents. Expert witnesses concluded that Father would not be able to "provide proper care in a consistent, protective, and nurturing way" and lacked appropriate housing for C.E. Mother appeared to suffer from a variety of mental illnesses, making her incapable of providing for C.E.'s health and welfare. Father testified that he planned to live with Mother if C.E. were returned to him and would exclusively rely on Mother to care for C.E. while he was at work. Father refused to believe that Mother had any mental illnesses and would not separate C.E. from Mother.

The juvenile court found that there was clear and convincing evidence that Mother was unfit to parent C.E., but there was only a preponderance of evidence that Father was unfit. The juvenile court also found by clear and convincing evidence that there was not any likelihood of reunification of C.E. with Mother and/or Father in the foreseeable future, or ever. The juvenile court declined to terminate either Mother's or Father's parental rights and ordered C.E. into the guardianship and custody of Mr. and Ms. B. Although adoption is the "gold standard," the

juvenile court determined that the custody and guardianship plan provided an adequate amount of stability and permanence for C.E. The juvenile court relied heavily on the perceived bond between C.E. and Father as a reason to maintain the parental relationship.

Held: Vacated and remanded.

The questions before the Court of Appeals in this case involved the findings of fact and legal conclusions as to the Father only, findings of fact and legal conclusions related to the Mother's conduct was not before the Court of Appeals. As to the Father, the Court of Appeals first considered whether it was an abuse of discretion for the juvenile court to decline to terminate Father's parental rights. A juvenile court has authority to terminate parental rights pursuant to § 5-323 of the Family Law Article of the Maryland Code upon a finding of clear and convincing evidence that (1) the parent is unfit to remain in the parental relationship with the child or (2) exceptional circumstances exist that would make continuation of the parental relationship detrimental to the child's best interests. FL § 5-323(d) also contains statutory factors that the juvenile court must consider. Both the unfitness prong and the exceptional circumstances prong require a separate inquiry.

As to the unfitness prong, the Court of Appeals determined the juvenile court's decision to keep the father's parental rights intact was in error. Almost every factor delineated under FL § 5-323(d) was found against Father apart from the finding that there was "attachment" between Father and C.E. Here, the juvenile court overemphasized the bond between the Father and the child and failed to properly consider permanency and the ability of the Father to successfully parent C.E. in a stable environment. Therefore, the juvenile court abused its discretion in declining to terminate Father's parental rights under the unfitness prong.

As to the exceptional circumstances prong, the Court of Appeals determined that Father's continued relationship with Mother was an exceptional circumstance that would have also warranted termination of his parental rights. Father refused to sever his relationship with Mother, continued to live with Mother, and would have relied on Mother solely for providing childcare to C.E. while Father was at work. Further, Father refused to acknowledge Mother's mental health conditions. Thus, Father failed to establish a safe and stable environment for C.E. and to provide a home in which C.E. could reside. The juvenile court abused its discretion in declining to find exceptional circumstances to terminate the Father's parental rights.

The Court of Appeals also considered whether the juvenile court erred in addressing the change in C.E.'s permanency plan in his CINA case in the same order denying the Department's petition to terminate parental rights. Pursuant to FL § 5-324(a), a separate order should have issued. While not every instance of procedural non-compliance constitutes reversible error, in this instance, it was not possible to conclude that the juvenile court conducted a separate analysis with respect to the termination of parental rights and change in permanency plan.

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D.L. v. Sheppard Pratt Health System Inc., et al., No. 38, September Term 2018, filed August 13, 2019. Opinion by Getty, J.

https://mdcourts.gov/data/opinions/coa/2019/38a18.pdf

ACTION – GROUNDS AND CONDITIONS PRECEDENT – MOOT, HYPOTHETICAL OR ABSTRACT QUESTIONS

Facts:

Petitioner, D.L., a fourteen-year-old girl, was involuntarily admitted to a mental health facility owned and operated by Respondent, Sheppard Pratt Health Systems, Inc. ("Sheppard Pratt") in 2015. The impetus for D.L.'s involuntary admission stemmed from an incident in which a police officer encountered her displaying fresh self-inflicted superficial cut wounds along her left arm. In response, an Administrative Law Judge ("ALJ") ordered D.L. to be involuntarily admitted at a facility owned and operated by Sheppard Pratt in Ellicott City. D.L. was released from the facility soon after and filed a petition for judicial review of the ALJ's involuntary admission decision in the Circuit Court for Howard County. Before the Circuit Court, Sheppard Pratt moved to dismiss the case as moot, because D.L. had already been released. The circuit court found Sheppard Pratt's arguments persuasive and dismissed the petition as moot without holding a hearing. D.L. then filed a notice of appeal in the circuit court and appealed its decision to the Court of Special Appeals. On appeal, the parties filed a joint motion to remand the case to the circuit court to conduct a hearing. The motion was granted and on remand, after holding a hearing, the circuit court again found that Sheppard Pratt's motion to dismiss on mootness grounds should be granted and that no exceptions to the mootness doctrine applied. D.L. then filed a second notice of appeal, appealing the circuit court's decision to the Court of Special Appeals for the second time. The intermediate appellate court, in an unreported decision, held that the case was moot and affirmed the circuit court's dismissal. D.L. then petitioned this Court for certiorari, which we granted, and the primary issue in dispute was whether collateral consequences stemming from her involuntary admission precluded dismissal as moot.

Held: Reversed.

The Court of Appeals held that D.L.'s petition for judicial review of her involuntary admission was not moot simply based on her release. In particular, the Court determined that D.L. was subject to possible collateral consequences as a result of the involuntary admission order. The Court determined that the commitment generated several collateral consequences in multiple spheres including: (i) restrictions to her driver's license privileges; (ii) restrictions to her future employment; (iii) impact in any future child custody or child in need of assistance proceedings; (iv) impact in future involuntary admission proceedings; (v) the social stigmatization of mental illness; and (vi) submission of her information to the Federal Bureau of Investigation's National

Instant Criminal Background Check System. The Court also considered whether, as Sheppard Pratt contended, many of these collateral consequences were mitigated by D.L.'s prior stay at a Residential Treatment Center ("RTC"). The Court held that there was insufficient evidence in the record to indicate that her prior stay at an RTC was an involuntary admission that would already implicate these collateral consequences. Therefore, the Court of Appeals reversed the judgment of the Court of Special Appeals.

Wireless One, Inc. v. Mayor and City Council of Baltimore, et al., No. 70, September Term 2018, filed August 23, 2019. Opinion by Watts, J.

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

http://www.mdcourts.gov/data/opinions/coa/2019/70a18.pdf

REAL PROPERTY – MD. CODE ANN., REAL PROP. (1974, 2015 REPL. VOL.) ("RP") § 12-205(a) – MOVING AND RELOCATION EXPENSES – RP § 12-201(e) – "DISPLACED PERSON"

Facts:

In 1847, the Cross Street Market ("the Market") was established in Baltimore City. At all times since 1847, the Mayor and Council of Baltimore City ("the City"), Respondent, has owned and operated the Market. In 1994, the City established the Baltimore Public Markets Corporation ("the Markets Corporation"), Respondent, to assist with the regulation, control, and maintenance of the Market and other public markets in Baltimore City. In 2004, Wireless One, Inc. ("Wireless One"), Petitioner, began leasing a stall in the Market from the City. Wireless One's business consisted of leasing cell phones and related equipment, such as chargers. As of 2016, Wireless One's lease was a month-to-month lease.

On November 9, 2016, through the Markets Corporation, the City entered into a management agreement with CSM Ventures, LLC ("CSM"), a subsidiary of Caves Valley Partners ("Caves"), to operate and redevelop the Market. The management agreement authorized CSM to lease portions of the Market and terminate existing tenancies. Under the management agreement, the Markets Corporation was required to pay CSM $2 million to redevelop and operate the Market.

In late 2016, Wireless One was advised that it would not fit into the plans for the redeveloped Market, and that it should pursue other options. On December 21, 2016, on behalf of CSM and Caves, a representative sent an e-mail message to Wireless One and other Market tenants concerning the redevelopment of the Market. According to an affidavit from Arsh Mirmiran, a partner at Caves, on or around January 24, 2017, a Wireless One representative requested to terminate Wireless One's month-to-month lease and to vacate the stall at the Market by February 1, 2017, with the agreement that Wireless One would not be billed for February 2017 rent. Mirmiran averred that management agreed with Wireless One's request. On February 8, 2017, Wireless One vacated the Market. At that time, Wireless One removed all of its inventory, but left the physical stall, including counters and storage shelves, which were affixed to the stall and unable to be removed.

On June 2, 2017, in the Circuit Court for Baltimore City, Wireless One filed a complaint against Respondents, alleging that it was a "displaced person," as defined by Md. Code Ann., Real Prop. (1974, 2015 Repl. Vol.) ("RP") § 12-201(e)(1), that Respondents were displacing agencies as

defined by RP § 12-201(f), and that it was entitled to moving and relocation expenses under RP § 12-205(a). Wireless One also alleged that there had been an unconstitutional taking of its property without compensation, in violation of the United States and Maryland Constitutions. On July 11, 2017, Respondents filed a motion to dismiss, or, in the alternative, for summary judgment, arguing, among other things, that Wireless One was not a "displaced person" because Wireless One terminated its lease voluntarily and because of the exemption in RP § 12-201(e)(2)(iii), and that there was no taking.

On September 11, 2017, the circuit court conducted a hearing on the motion and heard argument from the parties. On the same day, the circuit court issued an order granting the motion and dismissing the complaint. In the order, the circuit court explained that it agreed with Respondents' argument that the exemption in RP § 12-201(e)(2)(iii) applied. The circuit court also ruled that "no taking ha[d] occurred" because Wireless One was "not within the class of persons entitled to relief under [RP] § 12-20[5(a)]." On September 20, 2017, Wireless One filed a motion to alter or amend, which the circuit court denied.

Wireless One appealed. On December 21, 2018, in a reported opinion, the Court of Special Appeals affirmed the circuit court's judgment. *See Wireless One, Inc. v. Mayor and City Council of Baltimore City*, 239 Md. App. 687, 689, 198 A.3d 892, 893 (2018). On December 27, 2018, Wireless One petitioned for a writ of certiorari, which the Court of Appeals granted on February 4, 2019. *See Wireless One v. Mayor and City Council of Baltimore*, 462 Md. 556, 201 A.3d 1228 (2019). On May 2, 2019, the Court of Appeals heard oral argument in the case. At oral argument, questions arose concerning the statutory construction and legislative history of RP §§ 12-201 and 12-205. On May 3, 2019, the Court issued an order authorizing the Attorney General to file an amicus brief "concerning the appropriate construction of [RP] § 12-201 et seq." On June 12, 2019, the Attorney General filed an amicus brief. On July 2, 2019, Respondents filed a reply to the amicus brief.

Held: Affirmed.

The Court of Appeals held that Wireless One was not a "displaced person," as that term is defined in RP § 12-201(e)(1)(i), because it voluntarily terminated its lease and abandoned its stall at the Market before action by Respondents or CSM to terminate the lease and before any redevelopment occurred. Wireless One left its stall at the Market on its own accord before any action by Respondents or CSM to terminate the lease, other than the advisement that it would not fit into the redevelopment plans for the Market and that it should pursue other options. Thus, Wireless One did not qualify as a "displaced person" under the plain language of RP § 12-201(e)(1)(i), and it was not entitled to moving and relocation expenses under RP § 12-205(a).

In addition to concluding that Wireless One was not a "displaced person" under the plain language of RP § 12-201(e)(1)(i), the Court of Appeals held that Wireless One was not a "displaced person" because it "lease[d] from the displacing agency after the displacing agency [took] title to the real property[.]" RP § 12-201(e)(2)(iii). Applying the plain and unambiguous

language of RP § 12-201(e)(2)(iii)—that a person who leases from a displacing agency after the displacing agency takes title to the real property is not a displaced person—inescapably led to the conclusion that Wireless One was not a displaced person.

The Court of Appeals concluded that it was undisputed that the Market was established by the City in 1847, and that it has been owned and operated by the City since its establishment. It was not until 2004, well after the City took title to the Market, that Wireless One entered into its lease. Put simply, it was undisputed that Wireless One acquired its lease after the City acquired title to the Market. Nothing in the management agreement between Respondents and CSM transferred title to the Market; rather, the management agreement simply authorized CSM to operate, manage, and redevelop the Market. As such, it was readily apparent that Wireless One leased its stall in the Market from the City after the City had taken title to the Market, and, therefore, the plain language of RP § 12-201(e)(2)(iii) applies, and Wireless One was not a "displaced person."

Although unnecessary to resort to a review of the legislative history, the Court of Appeals observed that its holding concerning the plain language of RP § 12-201(e)(2)(iii) was fully supported by the legislative history, and the legislative history did not compel a contrary interpretation. As such, the Court held that Wireless One was not wrongfully denied moving and relocation expenses, and there was no unconstitutional taking.

Joseph Stracke, et al. v. Estate of Kerry Butler, Jr., et al., No. 64, September Term 2018, filed August 16, 2019. Opinion by Hotten, J.

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

https://mdcourts.gov/data/opinions/coa/2019/64a18.pdf

SURVIVAL AND WRONGFUL DEATH ACTION – GROSS NEGLIGENCE – SUFFICIENT EVIDENCE

STATUTORY INTERPRETATION – THE FIRE AND RESCUE COMPANY ACT – IMMUNITY FOR MUNICIPAL DEPARTMENTS

Facts:

The Estate of Kerry Butler, Jr., and additional parties ("Respondents"), filed a wrongful death and survival action, alleging that Baltimore City Fire Department medics, Joseph Stracke and Stephanie Cisneros ("Petitioners"), were grossly negligent in their treatment of Mr. Butler. Around 1:00 a.m. on March 2, 2011, Mr. Butler's wife, Ms. Crystal Butler, called 9-1-1, reporting that Mr. Butler was experiencing chest pain and difficulty breathing and speaking. Respondents were dispatched to the Butlers' residence, arriving just before 1:20 a.m., after having some difficulty locating the Butlers' home due to the unlit street and inconsistencies between the reported address and accurate address. Stracke approached the residence where Ms. Butler was standing outside, and Mr. Butler was seated just inside the doorway. At the time, Mr. Butler was 28 years old, five feet and seven inches tall, approximately 245 pounds, and had no medical history of chest pain or heart conditions.

As he approached the house, Stracke asked "what seems to be the problem[,]" to which Ms. Butler responded that Mr. Butler believed he was having a heart attack. When Stracke asked Mr. Butler what was wrong, Mr. Butler responded that "[his] right side hurt." Stracke visually assed Mr. Butler and determined that Mr. Butler needed to be brought to the ambulance for further evaluation. Mr. Butler then walked 30-40 feet from his home to the ambulance, unaided by a stretcher or Stracke. Cisneros performed a visual assessment of Mr. Butler, observing that he did not appear to be in need of any assistance as he approached the ambulance and entered it without difficulty.

Inside the ambulance, Petitioners took and recorded Mr. Butler's blood pressure, heart rate, and blood oxygen level, felt his pulse, and listened to his lungs, observing that all vitals were baseline and stable. Petitioners then transported Mr. Butler to the nearest hospital, less than a mile away. Approximately seven minutes had elapsed between Petitioners' initial contact with Mr. Butler and their departure for the hospital.

After arriving at the hospital minutes later, Mr. Butler exited the ambulance and sat in a wheelchair retrieved by Stracke as they waited for hospital personnel to triage Mr. Butler. After waiting for approximately ten minutes, Mr. Butler became unconscious and began to slide out of his chair, but was caught by Stracke before his head struck the floor. Mr. Butler was taken to a code room by hospital staff to receive treatment, while Petitioners returned to service to prepare for the next dispatch call. Despite the hospital staff's treatment, Mr. Butler could not be resuscitated and ultimately died.

Respondents brought suit, alleging gross negligence by Petitioners. A jury concluded that Petitioners were grossly negligent, and awarded Respondents $3,707,000. However, the trial court granted Petitioners' motion for judgment notwithstanding the verdict ("JNOV"), concluding that there was insufficient evidence to support a finding of gross negligence. On appeal, a divided Court of Special Appeals reversed, concluding that there was sufficient evidence of gross negligence. The Court also reaffirmed the Court of Appeals opinion in *Mayor & City of Baltimore v. Chase*, 360 Md. 121, 756 A.2d 987 (2000), holding that Md. Code, Cts. & Jud. Proc. § 5-604(a) granted immunity in simple negligence cases to municipalities and their employees.

Held: Reversed.

The Court of Appeals held that there was insufficient evidence that Petitioners' conduct amounted to gross negligence. The Court defined gross negligence as "an intentional failure to perform a manifest duty in reckless disregard of the consequences[,]" and represents an utter indifference to the life and property of another. *Barbre v. Pope*, 402 Md. 157, 187, 935 A.2d 699, 717 (2007). Viewing the evidence in the light most favorable to Respondents, *see Cooper v. Rodriguez*, 443 Md. 680, 706, 118 A.3d 829, 844 (2015), Petitioners assessed Mr. Butler – a seemingly healthy, 28-year-old man in all regards – took his vitals, and promptly transported him to the nearest hospital within seven minutes of first arriving on the scene. "[A] well-intended error in medical judgment – even if it costs the patient's life – [does not equate to a] wanton and reckless disregard for the life of that patient." *McCoy v. Hatmaker*, 135 Md. App. 693, 713, 763 A.2d 1233, 1244 (2000). The Court concluded that there was not legally sufficient evidence that Petitioners made a deliberate choice not to give their patient a chance to survive.

Concluding that Petitioners were not grossly negligent, the Court went on to hold that Petitioners' motion for JNOV should have been granted because Md. Code, Cts. & Jud. Proc. § 5-604(a) granted Petitioners immunity from simple negligence claims. The Court reaffirmed its opinion in *Mayor & City of Baltimore v. Chase*, 360 Md. 121, 756 A.2d 987 (2000), explaining that § 5-604(a) unambiguously confers immunity against simple negligence claims upon municipal fire and rescue companies and their employees, as well as to volunteer and private rescue companies. Because Petitioners were not grossly negligent, they were entitled to immunity under § 5-604(a).

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Baltimore County, Maryland v. Michael Quinlan, No. 50, September Term 2018, filed August 26, 2019. Opinion by Adkins, J.

Getty, J., dissents.

https://www.courts.state.md.us/data/opinions/coa/2019/50a18.pdf

MARYLAND WORKERS' COMPENSATION ACT – OCCUPATIONAL DISEASE – LE § 9-502(D) – PARAMEDIC/FIREFIGHTERS – DEGENERATIVE MENISCAL TEARS

Facts:

Paramedic Michael Quinlan filed a claim with the Workers' Compensation Commission (the "Commission") against his employer, Baltimore County (the "County,") asserting he developed meniscal tears in his right knee due to his job duties. After a hearing, the Commission disallowed the claim, concluding that Quinlan "did not sustain an occupational disease" in his right knee arising out of the course of his employment.

Quinlan sought review in the Circuit Court for Baltimore County. Prior to trial, the County moved for summary judgment arguing Quinlan failed to present evidence that his knee injury was an occupational disease or that it was related to the nature of his employment as a paramedic. The motion was denied.

At trial, Quinlan testified that he's been a Baltimore County paramedic for the last 24 years. He estimated that during a typical 48-hour shift, over the course of four days, he responds to 26-30 calls. Quinlan's activities during these calls include: climbing in and out of emergency vehicles, carrying up to 50 pounds of gear, crouching to address and service patients, lifting patients onto stretchers and moving stretchers, and taking patients up and down stairs.

The jury returned a verdict for Quinlan, and found that he had "sustain[ed] an occupational disease of right knee degenerative tears . . .." The County appealed to the Court of Special Appeals, who affirmed the Circuit Court in a reported opinion and held, "Quinlan met the statutory requirements of LE § 9-502(d)(1) by establishing at trial that the degenerative menisci tears were an occupational disease . . .." *Baltimore Cty. v. Quinlan*, 238 Md. App. 486, 509 (2018).

Held: Affirmed.

The Court of Appeals held that the Circuit Court did not err in denying the County's motion for summary judgment. There was sufficient evidence for the jury to reasonably conclude that Quinlan's degenerative knee tears were "due to the nature of an employment in which hazards of

the occupational disease exist," satisfying the threshold for employer liability set out in § 9-502 of the Labor and Employment Article.

The Court held, as a matter of law, degenerative meniscal tears should not be excluded from the universe of occupational diseases. The record contained evidence that the nature of a paramedic's job places one at greater risk for degenerative knee conditions, Quinlan's job required that he engage in the activities that account for this increased risk, and that he engaged in these activities repetitively over 24 years of employment. Moreover, there is evidence that the employment actually caused the degenerative tears. Therefore, the jury was within its power to find for Quinlan.

Davona Grant, et al. v. County Council of Prince George's County Sitting as the District Council, et. al., No. 75, September Term 2018, filed August 20, 2018. Opinion by Getty, J.

https://mdcourts.gov/data/opinions/coa/2019/75a18.pdf

ZONING AND PLANNING – SOURCE AND SCOPE OF POWER

MUNICIPAL CORPORATIONS – RULES OF PROCEDURE AND CONDUCT OF BUSINESS – OPEN MEETINGS ACT

Facts:

Wal-Mart Real Estate Business Trust ("Wal-Mart") applied to the Maryland-National Capital Park and Planning Commission ("MNCPPC") for a special exception, variance, and alternative compliance regarding an existing store located in the Woodyard Crossing Shopping Center in Clinton, Maryland. The MNCPPC development review division issued a report ("Staff Report") which recommended that Wal-Mart's special exception and variance application be denied. The Prince George's County Planning Board declined to hear the case, adopted the Staff Report's recommendation, and assigned the case to the Zoning Hearing Examiner ("ZHE") to conduct a hearing. The ZHE recommended that Wal-Mart's special exception and variance application be denied. Thereafter, Wal-Mart filed exceptions to the ZHE's decision and requested that the Prince George's County Council sitting as the District Council ("District Council") hear the case. In response, several citizen protestants including Petitioner, Davona Grant ("Grant"), filed a lengthy opposition to Wal-Mart's exceptions. The District Council also elected, by unanimous vote, to hear the matter and make the final decision on Wal-Mart's application.

The District Council held a hearing on July 18, 2016 and, at the end of the proceedings, approved a motion to have its staff attorney prepare an order reversing the ZHE's decision. At a hearing the following day, the District Council's staff attorney presented it with a proposed fifty-one-page order approving Wal-Mart's application and the District Council moved to adopt the order which carried by a seven to two vote. The proposed order contained findings of fact distinct from those issued by the ZHE. Grant then filed a petition for judicial review of the District Council's decision in the Circuit Court for Prince George's County. The circuit court affirmed the decision of the District Council. Thereafter, Grant appealed the circuit court's decision to the Court of Special Appeals.

Before the intermediate appellate court, Grant argued that the District Council exercises only appellate jurisdiction over special exception and variance applications and therefore the District Council's review was limited to the ZHE's findings of fact. In addition, Grant argued that the District Council violated the Maryland Open Meetings Act based on its conduct between the July 18 and 19 hearings. Grant also contended that the record lacked sufficient evidence that Wal-Mart's application should be approved.

The Court of Special Appeals determined that Grant presented insufficient evidence that a violation of the Open Meetings Act occurred and that the District Council applied the wrong standard in its variance analysis and remanded the case to the District Council. In response, Grant filed a petition of certiorari with this Court which we granted. On appeal, the Court was tasked with determining whether: (i) the District Council improperly delegated preparation of its order and findings of fact to its staff attorney; (ii) the District Council employed an "evasive device" intended to circumvent the requirements of the Open Meetings Act; and (iii) the District Council exercises original or appellate jurisdiction over special exception and variance applications.

Held: Affirmed.

The Court of Appeals held that: (i) the District Council did not improperly delegate preparation of its draft order and findings of fact to its staff attorney; (ii) Grant presented insufficient evidence that a violation of the Open Meetings Act occurred; and (iii) the District Council exercises original jurisdiction over special exception and variance applications. As to the first issue, the Court determined that the Regional District Act ("RDA") grants unto the District Council wide-ranging authority to enact zoning laws and nothing within the RDA, the Prince George's County Code ("PGCC"), or administrative law generally prohibit this practice. As to the second issue, the Court held that Grant presented insufficient evidence that District Council violated the act to overcome the statutory presumption, under the Open Meetings Act, that the District Council complied with the Act.

As to the jurisdictional issue, the Court reiterated that the RDA bestows upon the District Council wide-ranging authority to establish zoning laws, the creation of administrative offices to hear such cases, and to make laws codifying the accompanying procedure. In response to Grant's arguments that the procedural aspects of the District Council's review indicate that the District Council's jurisdiction is only appellate, the Court of Appeals determined that simply because a lower court, master, or administrative agency is assigned to hold hearings, receive evidence, hear oral argument, and make findings of fact and conclusions of law, it does not follow that the lower court, master, or administrative entity maintains original jurisdiction over the proceedings. Therefore, the Court of Appeals affirmed the judgment of the Court of Special Appeals.

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COURT OF SPECIAL APPEALS

Richard Brendoff v. State of Maryland, No. 578, September Term 2018, filed August 1, 2019. Opinion by Leahy, J.

https://mdcourts.gov/data/opinions/cosa/2019/0578s18.pdf

CORRECTIONAL SERVICES – JUSTICE REINVESTMENT ACT – TECHNICAL VIOLATIONS OF PROBATION

Facts:

Appellant, Richard Brendoff, pleaded guilty to theft, second-degree burglary, and attempted second-degree burglary in three separate cases in the Circuit Court for Anne Arundel County. While serving his sentences, the circuit court granted Brendoff's request for drug and alcohol treatment pursuant to Maryland Code (1982, 2015 Repl. Vol., 2017 Supp.), Health General Article ("HG"), § 8-507 and committed him to the Department of Health ("the Department") for residential drug treatment at a facility to be determined by the Department. In addition to the HG § 8-507 order, the court placed Brendoff on supervised probation and, as conditions of his probation, and ordered him to complete drug treatment generally, the specific residential treatment program, and any after care. Brendoff left his inpatient residential drug treatment facility prior to being discharged and was charged with violating the conditions of his probation relating to drug treatment. While the violation of probation ("VOP") hearing was pending, Brendoff contacted his probation agent and entered a different out-patient treatment center. Unfortunately, he incurred additional VOP charges after missing six required treatment sessions at the new treatment center. At Brendoff's VOP hearing, the circuit court, construing new provisions of the Correctional Services Articles that were promulgated under the Justice Reinvestment Act, found that he had committed non-technical violations of the conditions of his probation based on the allegation that he absconded from the treatment facilities. The court revoked Brendoff's probation and ordered him to serve 10 years of his previously suspended sentences. We granted Brendoff leave to appeal the circuit court's determination that he committed a non-technical violation of his probation by "absconding."

Held: Vacated and remanded

The Court of Special Appeals held that when a prisoner is placed on supervised probation upon admission into a drug and alcohol treatment facility pursuant to an order issued under HG § 8-507, the Division of Parole and Probation ("DPP"), which includes the assigned probation agent, is the probationer's "supervising authority" for purposes of ascertaining whether the probationer has absconded within the meaning of Maryland Code (1999, 2017 Repl. Vol.), Correctional Services Article ("CS"), 6-101(b). Consequently, the circuit court erred in this case by considering the treatment facilities as the supervising authorities when it found that he committed a non-technical violation of his probation by walking away from Jude House and missing six required appointments at New Life. Accordingly, the Court of Special Appeals remanded the case to the circuit court to determine whether Brendoff absconded in violation of his probation by "willfully evading [the] supervision" of his probation agent, within the meaning of CS § 6-101(b)(1)-(2).

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Jermaine Dancer Kimble v. State of Maryland, No. 2049, September Term 2017, filed August 1, 2019. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2019/2049s17.pdf

COMPETENCY TO STAND TRIAL – DISMISSAL OF CHARGES – RUNNING OF TIME PERIOD

Facts:

Jermaine Kimble was charged on November 9, 2012 with sexual abuse of a minor and related offenses. His trial was postponed several times, and on September 2, 2014, the Circuit Court for Baltimore County found him incompetent to stand trial ("IST") and dangerous, and committed him to the custody of the Department of Health.

At an annual review hearing on April 3, 2015, the court found that Mr. Kimble remained IST but no longer was dangerous, and released him subject to continued treatment. Several months later, the court held another status hearing, and found that Mr. Kimble was still IST and "fully compliant" with his treatment plan.

At an annual review hearing on April 1, 2016, the court considered the Department's most recent evaluation and found that Mr. Kimble remained IST. In the course of scheduling the next status hearing, the parties and the court agreed that it should be set close to the "dismissal date," which all assumed was five years from the date Mr. Kimble was charged. The court scheduled another annual review for December 1, 2017, and observed that would also be Mr. Kimble's "dismissal date."

On November 13, 2017, Mr. Kimble filed a motion to dismiss. He argued that the five-year time limit set forth in Maryland Code, § 3-107(a) of the Criminal Procedure Article required the court to dismiss his charges. The State opposed the motion, arguing that the time had not yet expired because the period began to run on the date Mr. Kimble was found IST, not the date he was charged. The court agreed, and denied Mr. Kimble's motion.

Held: Affirmed.

The purely legal question before the Court of Special Appeals was whether the circuit court correctly interpreted CP § 3-107(a) to mean that the five-year time limit began to run from when Mr. Kimble was found incompetent rather than, as he argued, the date on which charges were filed. Because the plain language of CP § 3-107(a) is subject to "two or more reasonable alternative interpretations," *Deville v. State*, 383 Md. 217, 223 (2004), the Court found it ambiguous. The Court examined the language of the statute and reviewed earlier versions of the

statute, case law, and the legislative history, and resolved the ambiguity by finding that the time limits began to run on the date the defendant is found incompetent to stand trial.

Wayne Rothe v. State of Maryland, Case No. 2454, September Term 2018, filed August 2, 2019. Opinion by Moylan, J.

https://mdcourts.gov/data/opinions/cosa/2019/2454s18.pdf

KUCHARCZYK V. STATE AND THE LEGAL SUFFICIENCY OF EVIDENCE – *KUCHARCZYK*'S ATTACK ON LEGAL SUFFICIENCY – *REQUIESCAT IN PACE*

Facts:

At approximately 2:30 p.m. on March 8, 2018, the victim, Michael Dowling, left his home to pick up his daughter from school. On his way, he encountered the appellant, Wayne Rothe, whom Dowling had permitted to park his "pop-up camper" in Dowling's driveway. During the course of a conversation between the two men, Rothe asked Dowling where he was going. Dowling replied that he was picking up his daughter from school. When Dowling returned with his daughter circa 3:30 p.m., he found that his garage door had been kicked in, and that the tools he had stored in the garage were missing.

At approximately 3:00 p.m., Detective James Frauenhoffer received a telephone call from someone at the "Real Scrap" scrapyard, informing him that the appellant was at that location. Aware that there was an outstanding warrant for Rothe's arrest, Detective Frauenhoffer responded to the scene. Rothe fled when he saw Detective Frauenhoffer approaching. Ultimately, however, he was apprehended by other officers. At the scrapyard Detective Frauenhoffer discovered the property that had been taken from Dowling's garage.

Rothe was charged with second-degree burglary, fourth-degree burglary, malicious destruction of property, and theft. At the end of the State's case, Rothe moved for a judgment of acquittal, arguing that the State's case rested entirely on Dowling's credibility. The court denied the motion, and Rothe was convicted on all counts.

On appeal, Rothe contends that the evidence was legally insufficient to sustain his convictions. Citing *Kucharczyk v. State*, 235 Md. 334, 201 A.2d 683 (1964), he claims that certain ostensible inconsistencies in Dowling's testimony rendered that testimony inherently incredible. The purported inconsistencies include Dowling's having testified that he had never given Rothe permission to enter the garage, while having told the police that the camper in which Rothe resided derived electricity from an outlet in the garage.

Held: Affirmed.

The Court of Special Appeals held that because Dowling's testimony was not inherently incredible, it was legally sufficient to sustain the convictions.

In *Kucharczyk v. State*, the Court of Appeals held that the evidence adduced at trial was legally insufficient to support the appellant's convictions, given that the testimony of the State's sole witness was inherently incredible. In that case, the only incriminating evidence consisted of the testimony of the alleged victim, a sixteen-year-old with an I.Q. of 56, whom a defense psychologist testified was incompetent to testify. That witness's incriminating testimony was belied by his having testified on no fewer than three occasions that the *corpus delicti* of the crime had never occurred. The alleged victim's testimony was, moreover, replete with other inconsistencies. The facts giving rise to a finding of inherent incredibility in *Kucharczyk* were exceptional and have not since been replicated.

From the Court's exceedingly narrow holding in *Kucharczyk*, the defense bar has devised the so-called "*Kucharczyk* Doctrine," according to which inconsistencies in a witness's testimony may serve to exclude that testimony from evidence, thereby diminishing the legal sufficiency of the State's case. This so-called "doctrine" conflates damaged credibility with inherent incredibility. The assessment of damaged credibility, as a matter of fact, falls firmly within the purview of the fact finder. By contrast, inherently incredible testimony may, in an extraordinary case such as *Kucharczyk*, present an issue of legal sufficiency, the review of which is a proper appellate function.

That Dowling's testimony may have contained some inconsistencies did not render that testimony inherently incredible.

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Patrick Joseph Sweeney v. State of Maryland, No. 1032, September Term 2018, filed August 1, 2019. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2019/1032s18.pdf

CRIMINAL LAW – JURY INSTRUCTIONS – ACCOMPLICE LIABILITY

CRIMINAL LAW – JURY INSTRUCTIONS – SUPPLEMENTAL INSTRUCTIONS

Facts:

Patrick Joseph Sweeney was convicted in the Circuit Court for Montgomery County of second-degree theft and burglary. He was found guilty of breaking into a church pastor's garden shed and taking a John Deere riding mower, a collection of small tools, and about 25 pairs of sneakers that had been donated to the church. The night of the burglary, Mr. Sweeney's truck was tracked by GPS leaving the Days Inn where he was living, driving to the scene of the crime and stopping there for a time, and then driving to Washington D.C. before returning to the Days Inn early in the morning. When police executed a search warrant on his home and truck sometime later, they found a pair of sneakers that the pastor recognized as some of those stolen from his shed. They also found a collection of tools in his truck which were admitted into evidence at trial as 'burglary tools' over Mr. Sweeney's objection.

The State presented its evidence on a first-degree principal theory of liability, portraying Mr. Sweeney as the only individual involved in these crimes. After the jury had been instructed and deliberations had begun, the judge received a note from the jury. The jury inquired whether, if two individuals participated in the crime of burglary, but only one entered the shed that was burglarized, both individuals would be guilty of that crime. The trial judge, over Mr. Sweeney's objection, responded to the note by giving a supplemental instruction on accomplice liability. Shortly thereafter, the jury returned a guilty verdict. Mr. Sweeney appealed his convictions arguing that he was unfairly prejudiced by the supplemental accomplice liability instruction, and that the circuit court erred by admitting a collection of tools characterized as 'burglary tools' into evidence when there were undisputedly no tools involved in this burglary. He also argued that his motion to suppress the GPS data was improperly denied.

Held: Reversed.

The Court of Special Appeals agreed with Mr. Sweeney that the circuit court should not have given a supplemental instruction on accomplice liability for two reasons. The Court found first that the supplemental instruction was not generated by the evidence at trial because the State did not present any evidence of another participant in the crime. And because a defendant cannot be an accomplice if there was no principal, an accomplice instruction was not appropriate in Mr.

Sweeney's case. The Court also found that the accomplice liability instruction unfairly prejudiced Mr. Sweeney because it presented a new theory of criminal liability that he had no opportunity to respond to. The Court found that the circuit court should have instructed the jury to refer to the instructions already given, and that if a supplemental instruction introduces a new theory of culpability, the defendant must be given the opportunity to respond in a supplemental argument.

The Court of Special Appeals also found that the circuit court erred by admitting the 'burglary tools' into evidence. The tools found in Mr. Sweeney's truck were not used to commit this crime. And to admit them on the theory that they demonstrate that Mr. Sweeney is a well-prepared burglar, the Court reasoned, constitutes impermissible evidence of criminal propensity under the Maryland Rules of Evidence. The Court finally found that the warrant for the GPS surveillance of Mr. Sweeney's truck was supported by probable cause and that the circuit court properly denied Mr. Sweeney's motion to suppress the resulting evidence.

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Shawna Lynn Faith v. State of Maryland, No. 1040, September Term 2018, filed August 2, 2019. Opinion by Berger, J.

https://mdcourts.gov/data/opinions/cosa/2019/1040s18.pdf

CRIMINAL LAW – CONSTITUTIONAL LAW – FOURTH AMENDMENT – REASONABLENESS OF INTIMATE ROADSIDE SEARCH

Facts:

Based upon evidence recovered during a warrantless roadside search following a traffic stop, appellant Shawna Lynn Faith was convicted of possession of cocaine with intent to distribute. Prior to trial, Faith moved to suppress the cocaine recovered during the search. The circuit court denied Faith's motion, and Faith was subsequently convicted pursuant to an agreed statement of facts.

The circumstances surrounding the search were largely uncontested. Faith's vehicle was stopped on westbound I-70 in Frederick County after an officer observed the vehicle following too closely behind another vehicle. Frederick County Sherriff's Deputy Douglass Storee initiated the stop. Faith was driving the vehicle, a passenger was sitting in the front seat, and Faith's three-year-old son was in the backseat. Deputy Storee noticed track marks on Faith's arms and inquired as to where Faith was coming from. Faith said that they were returning home to Cumberland after taking "someone else's child down to Baltimore." Deputy Storee considered this explanation to be odd. Deputy Storee also observed that the two women in the vehicle appeared to be squinting, which he found significant because sometimes people under the influence of illegal substances are sensitive to light.

Deputy Storee requested a K-9 unit. After the K-9 unit arrived, Faith and the passengers were asked to vacate the vehicle before the scan. Faith and the passengers were patted down for weapons and then walked back to Deputy Storee's vehicle. The canine search resulted in an alert at the door of Faith's car. Deputy Storee called for an officer to "conduct a female search" and subsequently searched the vehicle. Drug paraphernalia and crack cocaine were recovered from the vehicle.

During the search of the vehicle, Sergeant Amanda Ensor arrived. Sergeant Ensor proceeded to search Faith. At the time, it was still daylight outside, and moderate to heavy traffic passed on the highway. Faith's companion and son stood at the front of Deputy Storee's vehicle, and Sergeant Ensor took Faith back to the rear of that vehicle, a car-length away. Faith was searched while standing between Deputy Storee's vehicle and the K-9 vehicle while facing into oncoming traffic with her back to the male officers and vehicle passengers. The male officers testified that the faced away from Faith because "obviously there's a privacy issue." Faith's companion, who was holding Faith's son, stood next to Deputy Storee.

Sergeant Ensor detailed the procedure of her search, which she testified was consistent with her routine practice for roadside searches involving suspected CDS. Sergeant Ensor told Faith that she was going to search her and informed Faith that if she was "hiding something on [her] person or in [her] vagina . . . [Sergeant Ensor would] find it." Sergeant Ensor asked Faith to unbutton her shorts and pull her shorts and underwear away from her body. Sergeant Ensor explained that this allowed her to look from above and see the "front portion" of Faith's vagina. When Faith complied, Sergeant Ensor observed a "condom hanging out like down in her underwear." Sergeant Ensor characterized the condom as "very obvious." At that point, Sergeant Ensor offered to transport Faith to the Law Enforcement Center to retrieve the condom. Faith walked back to the passenger seat of her vehicle. While sitting on the passenger seat, Faith pulled the condom out through the side of her shorts and put it in a bag for Sergeant Ensor.

The condom contained eighteen individual bags weighing the same amount and an additional bigger bag containing what appeared to be crack cocaine. Faith was subsequently placed under arrest.

Held: Reversed.

The issue before the Court of Special Appeals was whether the roadside search of Faith complied with the Fourth Amendment. The Court of Special Appeals reviewed federal and Maryland caselaw on warrantless searches and specifically considered the framework set forth by the United States Court of Appeals for the Fourth Circuit in *Bell v. Wolfish*, 441 U.S. 520 (1979), governing sexually invasive searches. In *Bell*, the Fourth Circuit explained that the following factors must be considered when balancing the invasion of personal rights intrinsic in a sexually invasive search against the need for a particular search: (1) the scope of the particular intrusion; (2) the manner in which the search was conducted; (3) the justification for initiating the search; and (4) the place in which the search was performed. 441 U.S. at 559. The Court further observed, citing *State v. Hardin*, 196 Md. App. 384, 397 (2010), that even when police have sufficient grounds for a sexually invasive search, the modality of the search must also be considered.

The Court of Special Appeals applied the analytical framework of *Bell* to the circumstances of Faith's search. The Court considered the manner and location of the challenged search, in light of its scope and justification, while balancing the need for the roadside search against the invasion of personal rights that the search entailed. The Court observed that the scope of the search included a visual inspection of Faith's genital area. The Court determined that it was more appropriate to use the term "sexually invasive search" to apply to all intrusive searches, rather than the "strip search" term that had been employed in other cases. The Court characterized the search in Faith's case as a "look in" search, which involved "a visual inspection of [Faith's] external genital area, with no removal of clothing, no touching, and no visual inspection of internal body cavities." The Court explained that look-in searches are "less invasive than strip searches requiring removal of clothing and body cavity searches involving inspection of internal genital and anal cavities" but "cannot be treated as reasonable per se

because any sexually invasive search that allows a government agent to view a person's private areas is still intrusive and demeaning."

With respect to the justification for initiating the search, the Court of Special Appeals explained that when the K-9 dog alerted to the presence of narcotics in the vehicle, the police officer had probable cause to undertake a warrantless arrest of Faith, the driver of the vehicle. *See Partlow v. State*, 199 Md. App. 624, 644 (2011). The Court further emphasized that police were permitted to search Faith's person to remove any weapons or recover evidence that could be concealed or destroyed. *Belote v. State*, 411 Md. 104, 113 (2009). The Court further acknowledged that a sexually invasive search may be conducted incident to arrest if the police have reasonable articulable suspicion that the arrestee is concealing drugs on his or her body -- which the police had in this case, and Faith did not contest on appeal. The Court specifically addressed whether the lack of exigent circumstances for conducting the invasive search in a public manner and location -- rather than, for example, conducting the search at the police station -- rendered the search unreasonable.

The Court of Special Appeals emphasized that although police attempted to shield Faith from public view and avoid exposing Faith's private parts to onlookers, Faith's companion and young child, as well as passing motorists, could observe that the search was occurring. The Court emphasized that the State had identified no exigency to justify the roadside search. Ultimately, the Court of Special Appeals held that the non-exigent visual inspection of the genital area of a person suspected of concealing CDS, in daylight, while she stood between two police cruisers with emergency lights flashing, along the shoulder of an interstate highway, as moderate to heavy traffic passed and her companion and young child watched, violated Faith's Fourth Amendment right to be free from unreasonable searches. Accordingly, the Court held that the circuit court erred by denying Faith's motion to suppress the drug evidence obtained as a result of the unconstitutional search and reversed Faith's conviction.

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Wendell Griffin v. State of Maryland, No. 484, September Term 2018, filed August 29, 2019. Opinion by Beachley, J.

https://mdcourts.gov/data/opinions/cosa/2019/0484s18.pdf

CORAM NOBIS – SIGNIFICANT COLLATERAL CONSEQUENCES

CORAM NOBIS – WAIVER

Facts:

Appellant was convicted of first-degree murder and a related weapons charge in 1982. In 2012, appellant filed a petition for post-conviction relief as well as a petition for writ of actual innocence, alleging that the State committed numerous *Brady v. Maryland*, 373 U.S. 83 (1963) violations in securing his convictions. At the hearing on these petitions, appellant and the State reached an agreement whereby appellant would receive a time-served sentence in exchange for dismissing his post-conviction and actual innocence claims. Consequently, the court never ruled on appellant's two petitions.

In 2013, appellant filed a § 1983 action in the United States District Court for the District of Maryland against the Baltimore Police Department and three of its detectives. The District Court dismissed appellant's claim, and the Fourth Circuit affirmed, holding that under *Heck v. Humphrey*, 512 U.S. 477 (1994), appellant could not pursue his § 1983 claim until he invalidated his State conviction.

Appellant then attempted to vacate his convictions by filing a petition for *coram nobis* relief based on the alleged *Brady* violations. The circuit court denied appellant's petition, and appellant appealed.

Held: Affirmed.

In order to successfully petition a court for *coram nobis* relief, a petitioner must demonstrate that he or she is suffering significant collateral consequences. Additionally, a petitioner must show that he or she did not previously waive the grounds that the petition relies upon.

Here, appellant's inability to pursue a federal civil claim for unliquidated damages does not constitute a significant collateral consequence under *coram nobis* law. Additionally, appellant waived the grounds underlying his *coram nobis* petition because they were withdrawn in 2012 when he agreed to a modification of sentence in exchange for his dismissal of those claims.

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In Re: K. Y.-B., No. 3150, September Term 2018, filed August 30, 3019. Opinion by Arthur, J.

https://mdcourts.gov/data/opinions/cosa/2019/3150s18.pdf

JUVENILES – SHELTER CARE FOR ALLEGED CHILD IN NEED OF ASSISTANCE – CONSENT TO IMMUNIZATIONS

Facts:

On January 2, 2019, Mother gave birth to the Child. Before the Child was discharged from the hospital, the Baltimore City Department of Social Services petitioned to have the Circuit Court for Baltimore City, sitting as juvenile court, declare the Child to be a child in need of assistance (CINA). The Child was placed in shelter care.

After a hearing on January 7, 2019, a family magistrate recommended that the court grant a limited guardianship to the Department. The magistrate recommended that the Department be granted authority to consent to medical care for the Child, but not the authority to consent to immunizations contrary to Mother's religious beliefs. The juvenile court adopted the recommendations in an order for shelter care.

Mother moved for immediate review of the shelter care order. The Department moved for immediate review as well, objecting to the prohibition on authorizing vaccinations.

After a hearing on January 16, 2019, the juvenile court ordered a continuation of shelter care. The court also granted the Department the authority to allow the child to receive vaccinations, concluding that "the State's interest in public health and the secular welfare of the [Child] outweigh[ed] Mother's right to religious freedom." Mother appealed. The court stayed the provision authorizing vaccinations pending Mother's appeal.

Subsequently, the CINA adjudicatory hearing began but did not conclude. The court extended the duration of shelter care. When the hearing recommenced, the court ordered a continuation of shelter care at the request of Mother's attorney. The court then extended the duration of shelter care a third time. Mother noted a second appeal (which is pending as a separate case). At the time this appeal was decided, the CINA adjudicatory hearing had not yet concluded.

Held: Dismissed in part; affirmed in all other respects.

The Child, through counsel, moved to dismiss the appeal as moot. Although the Court of Special Appeals did not agree that the appeal was moot, the Court held that Mother waived her right to contest the shelter care order by consenting to continued shelter care at a later hearing. Consequently, the Court dismissed the appeal insofar as it concerned the order for shelter care.

The Court concluded that Mother had not waived her repeated objections to granting the Department the authority to consent to vaccinations for the Child. The Court denied the motion to dismiss insofar as it concerned the grant of authority to consent to vaccinations.

Mother contended that Md. Code (1982, 2015 Repl. Vol.), § 18-4A-03 of the Health-General Article ("HG") prohibited the Department from consenting to vaccinations over her objections. That statute authorizes certain persons to consent to the immunization of a minor child "if a parent is not reasonably available." HG § 18-4A-03(a). It further provides that the person must defer to the unavailable parent's expressed opposition to immunization in some circumstances. In this case, Mother did not satisfy the statutory definition of a parent who "is not reasonably available[.]" HG § 18-4A-03(d). Mother's location was known, and she was actively litigating the case and voicing her opposition to immunization. HG § 18-4A-03 does not apply where, as here, a parent appears in person at a juvenile court proceeding and asserts an objection to immunization.

The Court of Special accepted the premise that Mother had a *bona fide* religious objection to vaccinations of the Child. The Court concluded that the juvenile court did not err or abuse its discretion in determining that the interests of the child outweighed Mother's religious beliefs.

In deciding the conditions under which a child should be placed in shelter care, it is appropriate for the juvenile court to evaluate whether a parent's religious beliefs pose a serious danger to the child's life or health or impair or endanger the child's welfare. In this case, the juvenile court did not err in concluding that Mother's religious beliefs must yield to the Child's health and welfare. Nor did the court abuse its discretion in granting the Department the authority to consent to routine immunizations.

Here, the Child was only two weeks old and in the care and custody of the Department pending a CINA adjudication. The court could properly consider well-known facts that infants of the Child's age are acutely at risk of contracting infectious diseases and other serious illnesses unless they receive the vaccinations that are recommended by authorities in pediatric medicine. In light of those serious risks of harm, as well as the effectiveness of preventive immunizations, the court did not abuse its discretion in granting the Department the authority to consent to routine immunizations, despite Mother's religious objection to vaccinations.

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David A., et al. v. Karen S., No. 2481, September Term 2018, filed July 31, 2019. Opinion by Fader, C.J.

https://mdcourts.gov/data/opinions/cosa/2019/2481s18.pdf

FAMILY LAW – ATTORNEY'S FEES AND COSTS – DE FACTO PARENT

FAMILY LAW – ATTORNEY'S FEES AND COSTS – ASSESSMENT OF COUNSEL FEES

FAMILY LAW – ATTORNEY'S FEES AND COSTS – ASSESSMENT OF FEES

Facts:

The father ("Father") of five-year-old A.W. ("Child") filed a complaint for custody, naming Child's mother and maternal grandmother ("Ms. Karen S.") as defendants. Child's paternal grandparents ("the A.s") moved to intervene. The A.s denied that Father was an unfit parent, but asked for legal and physical custody of Child, "in the event that [the father] is found by this Court to be unfit for custody." The A.s also alleged that Ms. Karen S. was unfit to have custody or visitation with Child.

Following a trial, the circuit court found that Child's mother and Father both were unfit to have custody of Child, that exceptional circumstances existed to award custody to a non-parent, and that Ms. Karen S. was Child's *de facto* parent. The court also found much of the A.s' testimony inconsistent and incredible. The court awarded Ms. Karen S. sole legal custody and primary physical custody of Child. The court awarded the A.s limited visitation.

After reviewing the statutory factors under § 12-103 of the Family Law Article, the court determined that Ms. Karen S. was entitled to an award of attorney's fees. The court found that (1) Father and Child's mother did not have the ability to pay fees, (2) the A.s held substantial financial assets, (3) Ms. Karen S. was in financial need due to the costs of defending the case, (4) Ms. Karen S. had substantial justification for defending the action, and (5) the A.s did not have substantial justification for intervening in the action. The court awarded attorney's fees and costs in favor of Ms. Karen S. and against the A.s in the full amount sought by Ms. Karen S. The A.s appealed.

Held: Affirmed.

The Court first analyzed whether the circuit court was authorized to award attorney's fees to Ms. Karen S. The Court rejected the A.s' contention that fees under § 12-103(a) may be awarded only to a biological parent and explained that a *de facto* parent's status in a dispute over custody or visitation is equal to that of a biological parent, adoptive parent, or other *de facto* parent because the court must consider only the best interest of the child, not any differences in the

status of the parents. Thus, a *de facto* parent is eligible for an award of attorney's fees and costs incurred in a child custody, visitation, or child support proceeding under § 12-103(a) on the same basis as a biological or adoptive parent.

The Court then addressed the A.s' argument that § 12-103(a) does not authorize an award of attorney's fees against them because the statutory language "child of the parties" permits an award to be made only against a parent of the child, not a grandparent. The Court determined that the phrase "child of the parties" was ambiguous as to whether it applied to non-biological parent-child relationships; however, after considering the legislative history and the broad purpose of the statute, the most consistent and logical interpretation is that § 12-103(a) permits an award against non-parent intervenors on the same basis as parents.

The Court further found that the circuit court did not abuse discretion in finding that the A.s lacked substantial justification for intervening in the case, when they consistently took positions during the course of the litigation that they backed away from at trial and the court found their explanations and testimony largely incredible.

Finally, the Court addressed the A.s' two arguments as to the amount of the award assessed against them. First, the Court rejected their contention that they should be responsible for only a portion of Ms. Karen S.'s attorney's fees and costs. The Court observed that the circuit court had properly assessed the relevant factors identified in § 12-103(b) of the Family Law Article, which are (1) the financial status of each party; (2) the needs of each party; and (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding. Second, the Court found meritless the A.s' argument that they should receive a credit from the attorney's fees award for their past expenses for caring for Child.

In re: R.S., No. 3205, September Term 2018, filed August 28, 2019. Opinion by Friedman, J.

https://www.courts.state.md.us/data/opinions/cosa/2019/3205s18.pdf

INFANTS – INTER-JURISDICTIONAL PLACEMENT – INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN – STATUTORY INTERPRETATION

ADMINISTRATIVE LAW AND PROCEDURE – CONSISTENCY WITH STATUTE, STATUTORY SCHEME, OR LEGISLATIVE INTENT – INVALIDATION

INFANTS – INTER-JURISDICTIONAL PLACEMENT – INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN – CONSTITUTIONALITY

Facts:

The Worcester County Department of Social Services (WCDSS) removed appellant, two-year-old R.S., from the care of her mother, placed the child in shelter care, and filed a petition with the juvenile court alleging R.S. was a child in need of assistance (CINA) due to mother's neglect. Mother identified T.S., a resident of Delaware, as R.S.'s father (hereinafter, T.S. or father). T.S. appeared at the adjudicatory hearing. He had only just learned that he might be R.S.'s father, so the court ordered a paternity test. The court then sustained the petition allegations concerning mother's neglect of R.S. At a continued disposition hearing, the juvenile court found T.S. to be R.S.'s biological father.

At subsequent disposition hearings, R.S. asked to be placed in the care of her father under Md. Code, Cts. & Jud. Proc. (CJ) § 3-819(e) because the petition allegations had only been sustained as to mother and father was "able and willing" to care for the child. But over R.S.'s objection and at WCDSS's urging, the court concluded that the Interstate Compact on the Placement of Children (ICPC) applied to R.S.'s possible placement with father because he lived in Delaware. As a result, the court needed approval from the "appropriate public authorities" in Delaware before sending R.S. to live with father. Md. Code, Fam. L. (FL) § 5-604(d). A social worker in Delaware, however, concluded that father was an inappropriate placement option for R.S., so the court and WCDSS began treating R.S.'s paternal grandparents as R.S.'s only viable placement option.

Nonetheless, at a final CINA review hearing, the juvenile court granted father and the paternal grandparents joint legal and physical custody of R.S. over the child's objection that her father, as a fit parent, was entitled to sole custody. R.S. noticed an appeal from the joint custody order, arguing that it was tainted by the juvenile court's and WCDSS's improper reliance on the ICPC to deny father sole custody of her earlier in the CINA proceeding.

Held: Vacated and remanded for further proceedings.

The Court of Special Appeals held that the ICPC does not apply to the placement of a child with an out-of-state biological parent. By its plain language, the ICPC only applies when a state sends a child to another state for "placement in foster care or as preliminary to a possible adoption." FL § 5-604(a). A child's placement with a biological parent is not a foster care or preadoptive placement. Thus, by its plain terms, the ICPC does not apply to the out-of-state placement of a child with a parent.

The Court of Special Appeals further held invalid a regulation promulgated by the Association of Administrators of the Interstate Compact on the Placement of Children purporting to expand the application of the ICPC to placements with biological parents. Maryland courts will not "give effect to agency regulations that are inconsistent with or conflict with the statute the regulations are intended to implement." *McClanahan v. Wash. Cnty. Dep't of Soc. Servs.*, 445 Md. 691, 708 (2015) (cleaned up). The regulation conflicted with the plain language of the ICPC showing that it only applies to foster care and preadoptive placements, neither of which include placements with biological parents.

The Court of Special Appeals also concluded that its interpretation of the ICPC was reinforced by Maryland's consistent recognition that "a parent's interest in raising a child is a fundamental right" under federal and state law. *In re Billy W.*, 386 Md. 675, 683-84 (2005). Interpreting the ICPC to apply to parents could result in a parent being deprived of custody of a child without any judicial finding that the parent is unfit. This is so because the ICPC requires the sending agency—here, the Maryland juvenile court—to obtain approval from the "appropriate public authorities" in the receiving state before sending a child over state lines. FL § 5-604(d). But the ICPC provides no avenue for the juvenile court to reject the assessment of the out-of-state authorities—in this case, a single social worker in Delaware—and it also does not provide the parent an adequate opportunity to appeal a negative assessment. This problematic outcome occurred in R.S.'s case because father was denied custody of R.S. without the court ever making a finding that father was unable, unwilling, or otherwise unfit to care for R.S.

Finally, the Court concluded that the need to investigate out-of-state parents or to address the lack of relationship between a child and an out-of-state parent were not compelling reasons to depart from the ICPC's plain language. Instead, the Court of Special Appeals underscored that in CINA proceedings, a social services department must allege facts and the juvenile court must make a supported finding that a parent is unfit before depriving an out-of-state parent of custody of a child.

75-80 Properties, LLC, et al. v. Rale, Inc. et al., No. 1689, September Term 2017, filed August 29, 2019. Opinion by Arthur, J.

https://mdcourts.gov/data/opinions/cosa/2019/1689s17.pdf

LAND USE – EX PARTE COMMUNICATIONS WITH QUASI-JUDICIAL DECISIONMAKERS

Facts:

In 2012, developers applied for a zoning map amendment for more than 400 acres of land in Frederick County. The application requested that land zoned for agricultural purposes be rezoned to permit a planned unit development (PUD) for residential development. The developers also applied for an agreement, under which the PUD zoning would remain in place notwithstanding any subsequent changes to laws or regulations regarding development, and a letter of understanding, which would define the public facilities that the developers would be required to construct.

The Frederick County Planning Commission recommended the approval of the PUD. The Board of County Commissioners approved the PUD, subject to certain conditions. The developers accepted the conditions and the Planning Commission recommended approval of a revised plan.

In April of 2014, the Board of County Commissioners held four public meetings concerning the applications. Members of the public voiced considerable opposition to the proposed development, much of it focused on traffic safety and the adequacy of local roadways.

Shortly before the Board's final hearing, Commissioner Paul C. Smith attended a public meeting of the Frederick Area Committee for Transportation (FACT), an organization that advocates for transportation improvements in Frederick County. At the meeting, Commissioner Smith argued that nearby residents would benefit from the developers' proposed improvements to highways.

Commissioner Smith's comments later reappeared, without attribution, in a letter purportedly from FACT to the Board of County Commissioners. The Board received the letter shortly before the final public hearing on the applications. Toward the end of the hearing, the Board President read the letter into the record. Commissioner Smith did not disclose that the letter reiterated arguments he made at the FACT meeting a week earlier. The Board of County Commissioners then voted to approve the PUD and related agreements.

RALE, Inc., an organization that had opposed the developers' applications, petitioned for judicial review of the decision to approve the PUD. RALE asked the court to remand the case back to the newly-constituted Frederick County Council (the governing body that replaced the Board of County Commissioners when the County became a charter county). RALE argued that Commissioner Smith had engaged in an undisclosed ex parte communication concerning the

application, and that Frederick County ethics laws required the court to remand the case for reconsideration. RALE also sought to subpoena Commissioner Smith concerning the creation of the letter. The court remanded the case to the governing body and quashed a subpoena of Commissioner Smith.

On remand, the Council received additional evidence regarding the possible significance of the FACT letter. Commissioner Smith declined to cooperate, invoking his privilege against self-incrimination. The Council voted to send the entire matter back to the Planning Commission to begin anew. The developers refused, arguing that they had vested rights in the prior approvals.

The Council adopted a resolution, finding "extreme irregularity surrounding the FACT letter." The Council asked the circuit court to take appropriate action to allow the Council to rehear the developer's applications. The court found that Commissioner Smith had engaged in an undisclosed ex parte communication, and that the ex parte communication was a substantial factor in the approval decisions. The circuit court vacated the approval of the PUD and related agreements and remanded the case to the Council.

The developers took a timely appeal. Commissioner Smith also noted an appeal.

Held: Affirmed.

Under a special statute that governs certain land use decisions in Frederick County, a member of the County's governing body "who communicates ex parte with an individual concerning a pending application during the pendency of the application" must disclose the communication. Md. Code (2014), 5-859(b) of the General Provisions Article ("GP"). During an action for judicial review of such a decision, "[i]f the court finds that a violation of this part occurred, the court shall remand the case to the governing body for reconsideration." GP § 5-862(a)(2).

The developers challenged the circuit court's finding that Commissioner Smith engaged in an ex parte communication under GP § 5-859(b). The Court of Special Appeals noted that Commissioner Smith not only attended a public meeting, but he commented on a pending application at the meeting, his comments were reproduced in FACT's letter to the Commission, he did not disclose that his comments had engendered the FACT letter, and the letter was read into evidence at the end of testimony. His communications were ex parte because they concerned a pending quasi-judicial proceeding in which he was one of the decisionmakers, and his communications were not part of the record of the proceeding.

The Court rejected the developers' arguments that the statute applied only to communications with an "applicant." By its terms, GP § 5-859(b) requires disclosure of ex parte communications "with an individual concerning a pending application."

The Court concluded that GP § 5-859(b) did not violate First Amendment protections of freedom of speech, insofar as it required disclosure of ex parte communications. Restrictions on ex parte communications by quasi-judicial decisionmakers serve an important public purpose of fostering

public confidence in the fairness and integrity of the decisional process by ensuring that all interested persons have equal access to the information on which the decision is based.

The Court rejected Commissioner Smith's argument that GP § 5-859, as construed by the circuit court, was unconstitutionally vague.

The Court concluded that an adequate factual basis supported the circuit court's order vacating the PUD and related agreements. Based on all of the circumstances, it was not unreasonable to infer that Commissioner Smith had procured evidence in a proceeding that was pending before him as a quasi-judicial decisionmaker. The court was not required to credit testimony that the FACT letter had no effect on the Board's decision.

The Court explained that the court did not need to make any finding of fraud or extreme circumstances outside the administrative record to justify the initial remand. GP § 5-862(a)(2) expressly required the court to remand the case for reconsideration if it finds a violation of the Frederick County ethics law. Any finding of extreme circumstances was pertinent only to the earlier decision to permit a deposition of Commissioner Smith.

The Court concluded that an adequate factual basis existed for the Council's conclusions on remand. Faced with considerable evidence that the FACT letter was intended to (and probably did) have some effect on the Board's approval of the PUD, it was not illogical for the Council to seek to ensure an untainted process.

The Court concluded that the Council did not exceed the scope of the remand order by considering other evidence related to the traffic and road improvements. The remand order had imposed no restrictions on how the Council would reconsider its decision.

Finally, the Court rejected the argument that the Council used the remand as a pretext for a mere change of mind for an earlier decision.

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Harford County, Maryland v. Maryland Reclamation Associates, Inc., No. 788, September Term 2018, filed August 1, 2019. Opinion by Berger, J.

https://mdcourts.gov/data/opinions/cosa/2019/0788s18.pdf

INVERSE CONDEMNATION – EXHAUSTION OF ADMINISTRATIVE REMEDIES – STATUTE OF LIMITATIONS – FINALITY

Facts:

In 1990, Maryland Reclamation Associates, Inc. ("MRA") purchased sixty-two acres for the purpose of constructing and operating a rubble landfill. After acquiring the land, Harford County enacted Bill 91-10, which effectively prohibited MRA from operating a rubble landfill on the property. MRA disputed Bill 91-10 in various administrative and judicial forums. Ultimately, both the Harford County Hearing Examiner and Harford County Board of Appeals concluded that Bill 91-10 was valid and applied to MRA. As a result, MRA sought variances to operate a rubble landfill notwithstanding the regulation. On June 5, 2007, the Harford County Board of Appeals voted 7-0 to deny MRA's requested variances.

Thereafter, MRA challenged the validity of Bill 91-10 and the denials of the variances in the Circuit Court for Harford County. In 2008, the circuit court affirmed the Board's decisions. Thereafter, the Court of Appeals granted certiorari. On March 11, 2010, the Court of Appeals issued *Maryland Reclamation Associates, Inc. v. Harford County*, 414 Md. 1 (2010) ("*MRA IV*"). In *MRA IV*, the Court of Appeals held that Bill 91-10 applied to MRA and that the Board of Appeals did not err in denying MRA's requested variances.

Following the decision of the Court of Appeals in *MRA IV*, on February 19, 2013, MRA filed an inverse condemnation action in the Circuit Court for Harford County. MRA alleged that Harford County's zoning laws interfered with MRA's investment backed business expectations to operate a rubble landfill, and that such interference constituted a regulatory taking under Article III, Section 40 of the Maryland Constitution, and Articles 19 and 24 of the Maryland Declaration of Rights.

In response, Harford County filed dispositive motions, arguing that MRA's takings claim was time-barred because its cause of action accrued in June 2007, when MRA's requests for variances were denied by the Board of Appeals. The circuit court denied the County's motions, ruling that MRA's claim accrued in March 2010, when the Court of Appeals issued *MRA IV*. The case proceeded to trial in April 2018. After deliberating, the jury found in favor of MRA on its inverse condemnation claim and awarded damages in the amount of $45,420,076. This award accounted for $30,845,553 representing just compensation, plus $14,574,523 in interest. Harford County then appealed the jury's award.

Held: Reversed.

Harford County first argued on appeal that the case should not have proceeded to trial because MRA failed to exhaust its administrative remedies. The County contended that MRA was required to raise its inverse condemnation claim in an administrative proceeding before it could seek just compensation in the circuit court. The Court of Special Appeals disagreed. The Court recognized that administrative agencies have the first opportunity to consider certain constitutional issues when "those issues would be pertinent in the particular proceeding before the" agency. *Maryland Reclamation Associates, Inc. v. Harford County*, 342 Md. 476, 491-92 (1996). Nevertheless, the Court held that MRA was not obligated to raise its inverse condemnation claim in an administrative forum. Rather, the Court concluded that MRA exhausted its administrative remedies when it sought a ruling that Bill 91-10 was invalid and when it requested variances to operate a rubble landfill notwithstanding Bill 91-10.

The Court then addressed Harford County's statute of limitations argument. The County argued that it became clear on June 5, 2007 -- when the Board of Appeals denied MRA's requested variances -- that MRA could not operate a rubble landfill on the property. The County, therefore, asserted that the statute of limitations on MRA's inverse condemnation claim began to run on that date. MRA responded by arguing that the taking did not accrue until 2010, when the Court of Appeals issued *MRA IV*. The Court of Special Appeals held that MRA's claim accrued in 2007, when the Board of Appeals issued its final decision. The Court disagreed with MRA, observing that the Court of Appeals addressed a similar issue in *Arroyo v. Board of Education of Howard County*, 381 Md. 646 (2004) (holding that a claim against an administrative agency accrued when the agency rendered its final decision, and not at the time when judicial review of that final decision was completed). The Court recognized that although MRA appealed the Board's final decision to the circuit court and Court of Appeals, MRA's appeal did not delay the accrual of its claim.

MRA attempted to avoid the effect of *Arroyo* by arguing that its takings claim did not become "permanent or stabilized" until the Court of Appeals issued *MRA IV*. MRA relied on *Litz v. Maryland Department of Environment*, 434 Md. 623 (2013), in which the Court of Appeals held that an alleged taking that resulted from continuous pollution did not accrue for limitations purposes until the physical taking stabilized. The Court of Special Appeals expressed reservations that the stabilization doctrine applies to regulatory takings, stating that federal courts have limited the doctrine to cases of flooding and similar physical events. Nevertheless, the Court concluded that to the extent the stabilization doctrine applies in regulatory takings actions, the alleged taking of MRA's property stabilized when the Board of Appeals denied MRA's requested variances. The Court held that it was "abundantly clear [on that date] that the County would not permit MRA to operate a rubble landfill." Accordingly, the Court held that MRA's takings claim was time-barred and, therefore, reversed MRA's $45,420,076 verdict.

The Court further observed that its holding will not lead to instances where a claim does not become justiciable until after the statute of limitations has run. The Court reasoned that MRA

could have filed its claim within the limitations period and the circuit court, if necessary, could have then stayed the case to await the pending *MRA IV* decision.

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Jonathan Blood, et al. v. Stoneridge at Fountain Green Homeowners Association, Inc., No. 476, September Term 2018, filed August 29. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2019/0476s18.pdf

REAL PROPERTY – CONSTRUCTION AND OPERATION – COVENANTS AS TO USE OF REAL PROPERTY

Facts:

Jonathan and Megan Blood ("the Bloods") bought a home in a Bel Air development known as Stoneridge at Fountain Green in April 2015. The Bloods do not dispute that, as homeowners in the development, they were subject to the Declaration of Covenants, Conditions, and Restrictions (the "Declaration") imposed by the Stoneridge at Fountain Green Homeowners Association, Inc. (the "Association").

In June 2015, the Bloods purchased a solar collection system for their roof, including fifteen solar panels to be installed on the front roof of their house and thirty-three solar panels on the back roof. In violation of the Declaration, the Bloods had the panels installed before seeking pre-approval from the Association. The Bloods filed a tardy application with the Association's architectural committee in August 2015, when the installation was nearly complete. The Association denied their application.

In May 2016, the Association notified the Bloods that they lacked the requisite approval for their solar panels and directed the Bloods remove the solar panels from the front roof of their home. In response, the Bloods appealed to the Association's Board of Directors. The Board of Directors denied the appeal on July 25, 2016. The Bloods still did not remove the solar panels from their front roof, so on December 14, 2016, the Association filed a two-count complaint in the Circuit Court of Harford County seeking an injunction and a declaratory judgment.

The Bloods argued at trial that even though they did not apply to the Association for approval before beginning construction, requiring them to remove fifteen solar panels from their front roof would be an "unreasonable limitation" under § 2-119(b)(2) of the Real Property Article ("RP") because removing the front solar panels would "[s]ignificantly increase[] the cost of the solar collector system" and it would "[s]ignificantly decrease[] the efficiency of the solar collector system." The trial court disagreed and ruled in favor of the Association. The Bloods appealed.

Held: Affirmed.

The Court of Special Appeals affirmed the circuit court's decision to enforce the Association's covenant prohibiting front roof solar panels. Enforcement the covenant was not an "unreasonable limitation" under RP § 2-119(b)(2) because the Bloods had failed to seek and obtain the required

approval from the Association before installing the system on their front and back roofs and the Association only required removal of front roof panels and allowed solar panels on back roof to remain in place.

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Clyde Jackson Crowe and Veronica Crowe v. CSX Transportation, Inc., No. 922, September Term 2018, filed August 28, 2019. Opinion by Eyler, J.

https://mdcourts.gov/data/opinions/cosa/2019/0922s18.pdf

WORKERS' COMPENSATION – OCCUPATIONAL DISEASES

Facts:

Clyde Jackson Crowe and his spouse, Veronica Crowe, filed suit in the Circuit Court for Baltimore City against CSX Transportation, Inc. (CSX), seeking damages under the Federal Employer's Liability Act. (FELA), 45 U.S.C. §§ 51-60. The Crowes alleged that Mr. Crowe was exposed to asbestos fibers, in the 1960s, while employed by CSX. In 2016, Mr. Crowe was diagnosed with mesothelioma, allegedly caused by that exposure.

The circuit court granted summary judgment in favor of CSX on the ground that Mr. Crowe's claim was covered by the Longshore and Harbor Workers' Compensation Act, (LHWCA), 33 U.S.C. §§ 901-950, which constituted the exclusive remedy.

In 1972, Congress amended the LHWCA to expand coverage to land based port workers who are "engaged in maritime employment." Prior to 1972, Mr. Crowe, who worked at a port facility but on land, was not covered by the LHWCA.

The Crowes contended that the 1972 amendment could not lawfully be retroactively applied to him or, in the alternative, that he was not "engaged in maritime employment" within the meaning of the amendment.

Held:

Mr. Crowe was engaged in maritime employment within the meaning of the 1972 amendment. The amendment applies because the intent of Congress was to extend coverage to additional workers and to convert conduct-based fault liability under the FELA to non-fault compensation under the LHWCA. The LHWCA provides the exclusive remedy.

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ATTORNEY DISCIPLINE

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By an Order of the Court of Appeals dated June 25, 2019, the following attorney has been indefinitely suspended by consent, effective August 1, 2019:

ANTHONY IGNATIUS BUTLER, JR.

*

By an Opinion and Order of the Court of Appeals dated July 17, 2019, the following attorney has been suspended for sixty (60) days, effective August 16, 2019:

RAJ SANJEET SINGH

*

By an Order of the Court of Appeals of Maryland dated August 21, 2019, the following attorney has been suspended:

STEVEN COCHARIO ANTHONY

*

By an Order of the Court of Appeals dated August 21, 2019, the resignation from the further practice of law in this State of

TIMOTHY LEE CREED

has been accepted.

*

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JUDICIAL APPOINTMENTS

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On July 10, 2019, the Governor announced the appointment of **Guido James Porcarelli** to the District Court for Baltimore City. Judge Porcarelli was sworn in on August 2, 2019 and fills the vacancy created by the retirement of the Hon. Steven D. Wyman.

*

On July 10, 2019, the Governor announced the appointment of **Michael Wisit Siri** to the District Court for Baltimore County. Judge Siri was sworn in on August 2, 2019 and fills the vacancy created by the enactment of Chapter 749 of the 2019 General Assembly Legislative Session.

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On July 10, 2019, the Governor announced the appointment of **Bruce Edelman Friedman** to the District Court for Baltimore County. Judge Friedman was sworn in on August 8, 2019 and fills the vacancy created by the enactment of Chapter 749 of the 2019 General Assembly Legislative Session.

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UNREPORTED OPINIONS

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

https://mdcourts.gov/appellate/unreportedopinions

	Case No.	*Decided*
5501 Pulaski, LLC v. CBK Realty	0724 *	August 14, 2019
A.		
A Healing Leaf v. Md. Medical Cannabis Comm'n	1209 **	August 16, 2019
Alexander, Damon v. State	2576 **	August 30, 2019
Anderson, Kedar v. State	0721 *	August 7, 2019
A-Pinn Contracting v. Miller Pipeline	1538 **	August 8, 2019
Attman Properties v. Anne Arundel Cnty.	1795 **	August 12, 2019
B.		
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