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## Table of Contents

### COURT OF APPEALS

#### Attorney Discipline Disbarment

*Attorney Grievance Comm'n v. Silbiger* .....3

#### Indefinite Suspension

*Attorney Grievance Comm'n v. Collins* .....6

#### Commercial Law

##### Credit Grantor Closed End Credit Provisions

*Lyles v. Santander Consumer USA* .....11

#### Criminal Law

##### Alleged Legal or Factual Inconsistencies in Verdicts

*Williams v. State*.....13

#### Transportation

##### Evidentiary Test of Breath for Alcohol

*Dejarnette v. State*.....16

### COURT OF SPECIAL APPEALS

#### Criminal Law

##### Evidence – Other Sexually Assaultive Behavior

*Woodlin v. State* .....18

#### Family Law

##### Child Custody – Discovery Violations

*Kadish v. Kadish*.....20

Family Law (cont'd)	
Child in Need of Assistance – Custody	
<i>In re: X.R., X.R., K.D.</i> .....	23
Insurance Law	
Coverage for Economic Losses Resulting from Pandemic	
<i>GPL Enterprise v. Certain Underwriters at Lloyd's</i> .....	25
ATTORNEY DISCIPLINE .....	27
RULES ORDERS .....	28
UNREPORTED OPINIONS .....	29

# COURT OF APPEALS

*Attorney Grievance Commission of Maryland v. Clifford Baer Silbiger*, Misc. Docket AG No. 57, September Term 2020, Opinion by Booth, J.

Harrell, J., joins in judgment only.

<https://www.courts.state.md.us/data/opinions/coa/2022/57a20ag.pdf>

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

## **Facts:**

This attorney grievance matter involves charges filed by the Attorney Grievance Commission (“Commission”) against Clifford Baer Silbiger, in connection with activities in which he engaged relating to his trust account, including taking cash disbursements, comingling personal funds with client funds, paying personal expenses directly from his attorney trust account, and maintaining negative client-matter balances. In December 2020, the Commission, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Mr. Silbiger alleging that Mr. Silbiger’s conduct violated the Maryland Attorneys’ Rules of Professional Conduct (“MARPC”) 19-301.1 (Competence); 19.301.3 (Diligence); 19-301.4(a) and (b) (Communication); 19.301.15(a),(b), and (d) (Safekeeping Property); 19-308.1(b) (Bar Admission and Disciplinary Matters); 19-308.4 (a)-(d) (Misconduct); Maryland Rule 19-407(a)(2)-(d) (Attorney Trust Record-Keeping); Maryland Rule 19-408(a) (Comingling of Funds); Maryland Rule 19-410(a)-(c) (Prohibited Transactions); and Maryland Code, Business Occupations & Professions Article (“BOP”) § 10-306.

This Court transmitted the case to a hearing judge to conduct an evidentiary hearing and make findings of fact and conclusions of law. At the hearing, Mr. Silbiger, who was represented by counsel, admitted to the underlying facts upon which the charges were filed. Specifically, Mr. Silbiger admitted that in November 2018, he settled the claims of his client, Ms. Johnson and her minor children, related to a 2016 car accident. Initially, Mr. Silbiger properly disbursed a portion and withheld a portion of the settlement funds pending a lien resolution. However, between December 2018 and January 2019, without Ms. Johnson’s knowledge or permission, Mr. Silbiger knowingly and intentionally used a significant amount of Ms. Johnson’s settlement proceeds to pay expenses for his law practice, including payroll, health insurance benefits, and

monthly mortgage payments. In January 2019, upon resolution of the outstanding lien, Mr. Silbiger wrote Ms. Johnson a check for the remainder of her settlement funds. However, he did not deliver that check until he had deposited his own personal funds into his attorney trust account. Notwithstanding Mr. Silbiger's deposit of his personal funds into the trust account, the deposit was insufficient to cover the check withdrawal of a third-party who was owed a portion of the settlement which resulted in an overdraft in Mr. Silbiger's attorney trust account.

In February 2019, following the third-party withdrawal, Bar Counsel was notified that there had been an overdraft in Mr. Silbiger's attorney trust account. The same day Bar Counsel wrote to Mr. Silbiger requesting various documents to account for the overdraft. Mr. Silbiger responded a week and a half later that the overdraft was caused by mistakenly depositing funds into the wrong account, but he failed to provide Bar Counsel with the requested documentation. Months later, in April 2019, Bar Counsel again requested documentation for the February overdraft. Mr. Silbiger finally provided the requested documents in June 2019, which revealed that he had failed to maintain accurate records for the receipt, maintenance, and disbursement of client and third-party funds. When Bar Counsel sought additional documentation, Mr. Silbiger admitted to his misconduct in "borrowing" Ms. Johnson's settlement funds but argued that Ms. Johnson was not harmed and her funds were repaid in full.

Mr. Silbiger admitted that during the period in question he made cash disbursements from his attorney trust account, commingled personal funds with client funds, paid personal expenses directly from his attorney trust account, maintained negative client matter balances, and allowed his attorney trust account to fall below the required minimum needed to maintain in trust for his clients.

Following the evidentiary hearing, the hearing judge made findings of fact and conclusions of law that, by clear and convincing evidence, Mr. Silbiger had violated every rule named in the Petition, except MARPC 1.3. In addition, the hearing judge made findings of fact regarding relevant aggravating and mitigating factors. Specifically, the hearing judge found the presence of the following aggravating factors: (i) dishonest or selfish motive, (ii) pattern of misconduct, (iii) multiple violations of the MARPC, and (iv) substantial experience in the practice of law. The hearing judge found the following mitigating factors: (i) absence of a prior disciplinary record, (ii) timely good faith efforts to rectify the consequences of his misconduct, (iii) good reputation in the legal community, (iv) genuine remorse for his conduct, (v) full and free disclosure to the Commission or a cooperative attitude toward the attorney discipline proceeding, and (vi) unlikelihood of repetition of the misconduct. Neither the Commission nor Mr. Silbiger filed exceptions to any of the hearing judge's findings of fact or conclusions of law.

The only issue in dispute before the Court was the appropriate sanction to be imposed for the misconduct. The Commission recommended disbarment to the Court. Mr. Silbiger contended that no client or third party was harmed in connection with, or was even aware of, his misconduct. He asserted that his mitigating factors and his good-faith full repayment of the "borrowed" funds warranted a sanction less than disbarment.

**Held:** Disbarred.

The Court of Appeals accepted the hearing judge's findings of fact and agreed with the hearing judge's conclusions of law. Upon review of the established aggravating and mitigating factors in this case, the Court did not find that the circumstances surrounding Mr. Silbiger's misconduct justified a deviation from the sanction of disbarment that is ordinarily warranted when an attorney engages in knowing and intentional conduct that involves the misappropriation of funds.

The Court reflected on two recent opinions that examined the Court's sanctions jurisprudence involving intentional dishonesty: *Attorney Grievance Comm'n v. Bonner*, 477 Md. 576 (2022), and *Attorney Grievance Comm'n v. Collins*, 477 Md. 482 (2022). In these opinions, the Court made clear that in cases of theft or misappropriation of funds, the Court has not imposed a sanction less than disbarment since the pronouncement of the standard set forth in *Attorney Grievance Comm'n v. Vanderlinde*, 364 Md. 376 (2001), and the Court declined to do so in this present case. The Court considered the aggravating and mitigating factors and explained that upon independent and careful review of the individual facts in this case, it cannot minimize or excuse Mr. Silbiger's misconduct simply because his client was not harmed or may have never even known that the misconduct occurred. The Court concluded that the mitigating factors did not justify imposing a sanction less than disbarment.

*Attorney Grievance Commission of Maryland v. Natalie Thryphenia Collins*, Misc. Docket AG No. 6, September Term 2021, filed February 25, 2022. Opinion by Watts, J.

<https://www.mdcourts.gov/data/opinions/coa/2022/6a21ag.pdf>

## ATTORNEY DISCIPLINE – SANCTIONS – INDEFINITE SUSPENSION

### **Facts:**

Natalie Thryphenia Collins, Respondent, a member of the Bar of Maryland, was admitted to the Bar in 1991 and from October 2019 to mid-June 2020 worked at a law firm on Ingleside Avenue in Baltimore, Maryland. On June 8, 2020, in an unrelated disciplinary matter, this Court suspended Collins from the practice of law in Maryland for sixty days, effective July 8, 2020, and ordered that she pay court costs. On September 10, 2020, Collins filed in this Court a petition for reinstatement pursuant to Maryland Rule 19-751 stating that she had complied with her obligations under former Maryland Rule 19-742 (now Maryland Rule 19-741) and the requirements and conditions of her suspension, and that to the best of her “knowledge, information, and belief” no complaints were pending against her. Between June 8, 2020, the effective date of her suspension, and September 10, 2020, the date that she filed the petition for reinstatement, Collins had not provided any information to Bar Counsel under Maryland Rule 19-742. In addition, Collins had not paid court costs.

On March 20, 2020, C.J. Irving filed a complaint against Collins with Bar Counsel. Irving had been a party to a child custody case in which Collins represented the children’s other parent, C. Davis. Collins did not respond to requests from Bar Counsel for information during the investigation of the Irving complaint and represented in the petition for reinstatement that no complaints were pending against her.

On April 21, 2021, on behalf of the Attorney Grievance Commission, Petitioner, Bar Counsel filed a “Petition for Disciplinary or Remedial Action” against Collins, charging her with violating Maryland Attorneys’ Rules of Professional Conduct (“MARPC”) 3.3(a)(1) (Candor Toward the Tribunal), 4.1(a)(1) (False Statement to Third Person), 8.1(a) (False Statement of Material Fact), 8.1(b) (Failing to Respond to Lawful Demand for Information), 8.4(b) (Criminal Act), 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation), 8.4(d) (Conduct that is Prejudicial to the Administration of Justice), and 8.4(a) (Violating the MARPC). The charges stemmed from two grounds.

First, based on the Irving complaint, Bar Counsel asserted that Collins engaged in misconduct during a telephone call with Irving. According to the allegations in the petition, at some point after the January 22, 2020 award of custody, Collins telephoned Irving and “falsely identified” herself as calling from an elementary school about an issue with one of Irving’s children. Irving allegedly provided Collins with personal information, believing that she was speaking with a

school employee, before Collins “confessed to being ‘opposing counsel.’” Bar Counsel charged that Collins engaged in dishonest conduct because, in the telephone call with Irving, she allegedly initially identified herself as associated with Irving’s child’s school, but later acknowledged that she was Davis’s attorney. When the case was called for oral argument, in response to a question from this Court about the disposition of the Irving complaint, Senior Assistant Bar Counsel stated that the allegations in the petition concerning the Irving complaint were dismissed by Bar Counsel before the evidentiary hearing for “a number of reasons. In the petition, Bar Counsel asserted that Collins had failed to respond to correspondence sent to her requesting a response to the Irving complaint. Bar Counsel did not dismiss that aspect of the petition.

Next, in the petition, Bar Counsel alleged that, in a petition for reinstatement, signed under the penalties of perjury, Collins falsely represented that she had complied with the requirements of Maryland Rule 19-742, that she had satisfied the requirements and conditions of her suspension, and that, to the best of her “knowledge, information, and belief,” she did not have any complaints or disciplinary proceedings pending against her.

The Court appointed a hearing judge to hear the attorney discipline proceeding. On July 2, 2021, Collins filed an answer to the petition. Bar Counsel filed notices of service of discovery material, stating that Bar Counsel had served Collins with interrogatories, a request for admission of fact and genuineness of documents, a request for production of documents, and a notice of deposition. On July 30, 2021, Bar Counsel filed a motion for sanctions and a motion to shorten time based on Collins’s failure to respond to the request for production of documents and failure to appear at a properly noticed deposition. Collins did not respond to the motion. On August 18, 2021, the hearing judge granted in part and denied in part the motion for sanctions. The hearing judge precluded Collins from calling witnesses or presenting documents as evidence on her behalf at the disciplinary hearing and precluded Collins from testifying at the hearing except as to mitigation.

On August 23, 2021, the hearing judge conducted a hearing, at which Bar Counsel introduced thirty exhibits into evidence. Collins appeared at the hearing and testified as to mitigation. On September 14, 2021, the hearing judge issued an opinion including findings of fact and conclusions of law, concluding that Collins had violated MARPC 3.3(a)(1), 8.1(a), 8.1(b), 8.4(b), 8.4(c), 8.4(d), and 8.4(a). The hearing judge also found that Bar Counsel established the existence of numerous aggravating factors, and that Collins failed to establish the existence of any mitigating factors.

Oral argument in the Court of Appeals was scheduled on January 11, 2022, and Collins failed to appear.

**Held:** Indefinitely suspended.

The Court of Appeals concluded that Collins violated MARPC 3.3(a)(1), 8.1(a), 8.1(b), 8.4(b), 8.4(c), 8.4(d), and 8.4(a).

The Court concluded that the hearing judge did not clearly err in finding that Collins made knowing and intentional misrepresentations in the petition for reinstatement by stating that to the best of her knowledge no new disciplinary complaints were pending against her, and in her October 15, 2020 response to Bar Counsel's objection to her petition for reinstatement and October 22, 2020 letter to Bar Counsel, by stating in both that she did not know of the Irving complaint until receiving Bar Counsel's response to her petition for reinstatement, *i.e.*, on more than one occasion, Collins falsely denied having knowledge of the Irving complaint.

The Court determined that the hearing judge's finding that Collins made knowingly false statements of material fact to the Court in the petition for reinstatement concerning compliance with Maryland Rule 19-742 was supported by the record. The conclusion hinged on the hearing judge's finding of fact that Collins's statement regarding compliance with the Rule "was knowingly and intentionally false." Given the exhibits presented at the disciplinary hearing by Bar Counsel and Collins's testimony in mitigation, the Court concluded that the hearing judge's finding with respect to Collins's state of mind was not clearly erroneous. The Court stated that, generally, though, where an attorney expresses an opinion about a matter and the opinion is wrong or the attorney's logic is faulty, that is not a ground for a finding of dishonesty or a finding that the attorney has made a false statement.

The Court of Appeals declined to uphold the hearing judge's determination that Collins made a misrepresentation in the petition for reinstatement by stating that she had complied with the requirements and conditions of the June 8, 2020 suspension order as the evidence did not establish that payment of the costs was a condition or requirement of reinstatement.

The Court of Appeals concluded that clear and convincing evidence supported the hearing judge's determination that Collins falsely stated in the petition that to the best of her "knowledge, information, and belief" there were no disciplinary complaints pending against her, despite Bar Counsel's correspondence to her on numerous occasions concerning the Irving complaint. The hearing judge's conclusion that Collins violated MARPC 3.3(a)(1) and 8.4(c) by knowingly making a false statement in the petition for reinstatement that there were no pending disciplinary complaints against her was supported by clear and convincing evidence.

The Court of Appeals determined that the hearing judge's conclusion that Collins made false statements in the response to Bar Counsel's objection, in violation of MARPC 3.3(a)(1) and 8.4(c), and in the October 22, 2020 letter to Bar Counsel, in violation of MARPC 8.1(a) and 8.4(c), by stating that she had not received notice of the pending Irving complaint until she received Bar Counsel's objection to the petition for reinstatement was supported by clear and convincing evidence.

The Court of Appeals determined that the record supported the hearing judge's conclusion that Collins received requests for information on five occasions and knowingly failed to respond to Bar Counsel in violation of MARPC 8.1(b).

The Court of Appeals stated that clear and convincing evidence supported the hearing judge's conclusion that Collins violated MARPC 8.4(b) by committing a criminal act that reflects adversely on her honesty and trustworthiness. Although Collins was not charged with perjury, clear and convincing evidence demonstrated that Collins committed the criminal offense by affirming under the penalties of perjury that the content of the petition for reinstatement was true to the best of her knowledge, information, and belief. Arguably, Collins's affirmation under the penalties of perjury, *i.e.*, the false oath, may have been provided as a result of confusion or mistake and not willfully done. However, as Collins was precluded from testifying at the disciplinary hearing except as to mitigation, based on the exhibits admitted into evidence, the hearing judge's findings that Collins's "statements were false when made and she knew they were false when made[,]" were not clearly erroneous.

The Court of Appeals determined that clear and convincing evidence supported the hearing judge's conclusion that Collins violated MARPC 8.4(d). Collins's conduct, including knowingly making false statements of fact in connection with the petition for reinstatement and her failure to respond to Bar Counsel's lawful requests for information, would negatively impact the perception of the legal profession of a reasonable member of the public.

The Court of Appeals determined that clear and convincing evidence supported the hearing judge's conclusion that Collins violated MARPC 8.4(a), as she violated MARPC 3.3(a)(1), 8.1(a), 8.1(b), 8.4(b), 8.4(c), and 8.4(d).

The Court determined that Collins's misconduct was aggravated by prior attorney discipline, a dishonest or selfish motive, a pattern of misconduct, bad faith obstruction of the disciplinary process, substantial experience in the practice of law, and illegal conduct. The Court determined that there was no basis on which to determine that any mitigating factors were present, given that the hearing judge found that Collins failed to prove any mitigation by a preponderance of the evidence and Collins did not file any exception to the hearing judge's findings of fact.

In determining the appropriate sanction, the Court of Appeals reviewed *Attorney Grievance Comm'n v. Vanderlinde*, 364 Md. 376, 773 A.2d 463 (2001) and subsequent case law. The Court stated that, given the long line of cases in which it had not imposed the sanction of disbarment, it expressly recognized that the holding in *Vanderlinde* no longer exclusively sets the standard for imposition of the sanction in cases involving intentional dishonesty. As the cases readily demonstrated, in numerous attorney disciplinary cases involving intentional dishonesty under MARPC 8.4(c) and knowingly making false statements under MARPC 3.3(a)(1) and 8.1(a), the Court had not imposed a sanction of disbarment and had not found the existence of compelling extenuating circumstances to be the "root cause" of the misconduct at issue to warrant a lesser sanction or even considered the matter. In other words, the cases demonstrated that the Court had not in cases involving intentional dishonest conduct consistently applied the holding in *Vanderlinde* and required compelling extenuating circumstances to justify a sanction less than disbarment.

The Court of Appeals stated that what could be gleaned from the sanctions imposed in cases involving intentional dishonesty post-*Vanderlinde* in recent years, was that, increasingly, the

Court had not imposed the sanction of disbarment where the dishonest conduct at issue does not involve theft, fraud, harm to a client or third party, or the intentional misappropriation of funds. The Court had on multiple occasions imposed a sanction less than disbarment in cases involving intentional dishonest conduct where there was no theft or intentional misappropriation of funds by the attorney, the attorney had not benefitted or profited from the misconduct, and no client had been harmed. The Court stated that, going forward, it was clear that cases involving dishonesty and knowingly made false statements would be assessed on an individual basis to determine whether the misconduct at issue gave rise to deployment of the standard set forth in *Vanderlinde*, namely, whether compelling extenuating circumstances that are the “root cause” of the misconduct are required to warrant a sanction less than disbarment.

The Court of Appeals concluded that the appropriate sanction for Collins’ misconduct was an indefinite suspension. The Court explained that, although Collins made statements that were determined to be knowingly false and intentionally dishonest, it was not persuaded that disbarment was warranted. Collins was found, among other things, to have falsely advised this Court and Bar Counsel that she did not receive the Irving complaint, but Bar Counsel ultimately dismissed the allegations in the petition for disciplinary or remedial action pertaining to the complaint. The Irving complaint stemmed from litigation in which Collins had represented an opposing party in a child custody matter and consisted of the complainant’s version alone of a telephone conversation with Collins. Collins’s misrepresentations with respect to not having received the Irving complaint did not cause injury to a client or involve theft or misuse of funds.

The Court of Appeals stated that, although it was reasonable for the hearing judge to determine that Collins received Bar Counsel’s e-mails and letters concerning the Irving complaint, it was not one of the most egregious cases of an attorney being found to have knowingly made false statements to the Court or to Bar Counsel. The Court stated that, insofar as a sanction for a violation of MARPC 8.4(b) is concerned, in various instances, it had imposed a sanction less than disbarment.

The Court of Appeals concluded that, although Collins was found to have engaged in intentional dishonest conduct by making obvious and inexplicably false statements in a petition for reinstatement and by failing to acknowledge correspondence from Bar Counsel concerning a complaint that was ultimately dismissed, given the nature of the violations of the MARPC, the lack of harm to any client, and the circumstance that the case does not involve theft, misappropriation of client funds, or other pecuniary benefit to Collins, the appropriate sanction for Collins’s misconduct was an indefinite suspension. Considering the nature and circumstances of the false statements, as well as recent case law in which the Court had not consistently imposed the sanction of disbarment for misconduct involving intentional dishonesty, and that it now expressly recognized that the *Vanderlinde* standard is not implicated in all instances of intentional dishonesty, Collins’s misconduct did not warrant disbarment. Collins’s misconduct did not involve circumstances for which the Court has generally applied the *Vanderlinde* standard, for instance, theft, fraud, intentional misappropriation, or harm to a client. Indeed, Collins’s misconduct had resulted in harm only to herself. The Court indefinitely suspended Collins from the practice of law in Maryland.

*Jabari Morese Lyles v. Santander Consumer USA Inc.*, Misc. No. 3, September Term 2021, filed May 13, 2022. Opinion by Getty, C.J.

<https://mdcourts.gov/data/opinions/coa/2022/3a21m.pdf>

COMMERCIAL LAW – CREDIT GRANTOR CLOSED END CREDIT PROVISIONS – PENALTY FOR KNOWING VIOLATION – CALCULATION OF DAMAGES

**Facts:**

The United States District Court for the District of Maryland certified the following question of law to this Court—if a credit grantor is found to have knowingly violated Credit Grantor Closed End Credit Provisions (“CLEC”), Maryland Code Annotated, Commercial Law §§ 12-1001, *et seq.*, does [CL] § 12-1018(b) require the credit grantor to return three times: (1) all amounts collected by the credit grantor in excess of the principal amount financed; (2) only those amounts collected that the borrower contends violate CLEC; or (3) some other amount.

This certified question arises in the context of a class action lawsuit brought by Appellant Jabari Morese Lyles against Appellee Santander Consumer USA, Inc. (“Santander”) for alleged CLEC violations. Mr. Lyles entered into a Retail Installment Sales Contract (“RISC”), which was subsequently assigned to Santander, to finance the purchase of a motor vehicle. The RISC expressly invoked CLEC as the governing law. Mr. Lyles financed \$20,657.00 in the RISC with finance charges of \$15,596.44 throughout the duration of the RISC. As of the filing of the underlying class action, Santander collected at least \$27,029.67 on the RISC. In this amount, Santander charged and collected twelve convenience fees, each for \$10.95, totaling \$131.40. Mr. Lyles maintains that Santander knowingly violated CLEC in charging these twelve conveniences fees and asserts that he is entitled to relief under CL § 12-1018(a)(2) and CL § 12-1018(b).

CL § 12-1018(a)(2) and (b) state:

(a)(2) Except for a bona fide error of computation, if a credit grantor violates any provision of this subtitle the credit grantor may collect only the principal amount of the loan and may not collect any interest, costs, fees, or other charges with respect to the loan.

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(b) In addition, a credit grantor who knowingly violates any provision of this subtitle shall forfeit to the borrower 3 times the amount of interest, fees, and charges collected in excess of that authorized by this subtitle.

**Held:**

The Court of Appeals determined that CL § 12-1018(b) requires a credit grantor to return three times the amount of interest, fees, and charges collected that the borrower contends violate CLEC.

First, the Court provided an analysis of caselaw interpreting CL § 12-1018(a)(2). The federal courts consistently interpret CL § 12-1018(a)(2) as limiting a credit grantor's collection from a borrower to the principal amount of the loan. As such, regardless of whether a borrower has asserted a valid CLEC violation, if the borrower has not paid the credit grantor in excess of the principal loan amount, the borrower is unable to state a claim because he or she has not suffered any actual damages that are compensable under CLEC. In comparison, the Court of Special Appeals recently determined that CL § 12 1018(a)(2) places a limit on the amount of damages that a credit grantor has to pay to a borrower. Therefore, a borrower is permitted to bring a cause of action under CL § 12 1018(a)(2) where the borrower can show that he or she has suffered compensable damage under CLEC or where the borrower requests appropriate declaratory or injunctive relief. Although the federal courts and the Court of Special Appeals disagree as to when a borrower is permitted to bring a claim under CL § 12-1018(a)(2), these divergent interpretations uniformly recognize that CL § 12-1018(a)(2) confines the credit grantor's collection to the principal amount of the loan only.

With this understanding of CL § 12-1018(a)(2), the Court then engaged in a plain language analysis of CL § 12 1018(b). The Court noted that the provision begins with the words “[i]n addition,” which signals an additional penalty to the penalty set forth in subsection (a)(2). A credit grantor that violates CLEC is liable under CL § 12-1018(a), and a credit grantor that knowingly violates the subtitle is also liable under CL § 12-1018(b). Further, the Court explained that the language “in excess of that authorized by this subtitle” identifies that the amounts that a credit grantor charged in violation of CLEC are the amounts to be trebled for a knowing violation of the subtitle. The provision makes no reference to amounts collected in excess of the principal amount financed. Accordingly, the amount to be trebled under CL § 12-1018(b) are those amounts collected in violation of CLEC.

Finally, the Court traced the legislative history of CL § 12-1018(a)(2) and CL § 12 1018(b). The legislative history revealed that the language adopted in CL § 12 1018(a)(2) and CL § 12-1018(b) originated in CL § 12-413, the Maryland Secondary Mortgage Loan Law. CL § 12-1018(b) has remained unchanged since its original enactment in 1983, with the exception of the addition of the word “fees” to the statute. Nothing in the legislative history indicates that the General Assembly intended for CL § 12-1018(b) to be interpreted inconsistently with its plain meaning.

For these reasons, the Court held that CL § 12-1018(b) requires a credit grantor that knowingly violates CLEC to forfeit to the borrower three times the amounts of interest, fees, and charges collected in violation of the subtitle. Accordingly, assuming Santander knowingly collected the convenience fees alleged by Mr. Lyles in violation of CLEC, the appropriate calculation of damages under CL § 12-1018(b) is treble the amount of convenience fees collected.

*Nicholas Jabbar Williams v. State of Maryland*, No. 37, September Term 2021, filed March 25, 2022. Opinion by Watts, J.

McDonald and Booth, JJ., concur.

<https://www.mdcourts.gov/data/opinions/coa/2022/37a21.pdf>

ALLEGED LEGAL OR FACTUAL INCONSISTENCIES IN VERDICTS – NO-  
IMPEACHMENT RULE – MARYLAND RULE 5-606(b) – SUFFICIENCY OF THE  
EVIDENCE

**Facts:**

In the Circuit Court for Charles County, the State, Respondent, charged Nicholas Jabbar Williams, Petitioner, with first-degree premeditated murder of Cameron Marcel Townsend, use of a firearm in the commission of a crime of violence (murder), first-degree assault of Townsend, use of a firearm in the commission of a crime of violence (first-degree assault), possession of a regulated firearm while under the age of twenty-one, and wearing, carrying, or transporting a handgun in a vehicle. The jury found Williams guilty of second-degree murder and possession of a regulated firearm while under the age of twenty-one and not guilty of first-degree assault and use of firearm in the commission of a crime of violence (second-degree murder). (The jury also found Williams not guilty of first-degree murder and guilty of wearing, carrying, or transporting a firearm in a vehicle.) Williams’s counsel objected on the ground that the guilty verdict as to second-degree murder was legally inconsistent with the not-guilty verdict as to first-degree assault. Williams’s counsel requested that the circuit court have the jury “redeliberate” with respect to second-degree murder. The circuit court denied the request and accepted the jury’s verdicts.

Williams filed a motion for a new trial, contending that statements made by jurors after the jury had been dismissed indicated that the jury misinterpreted the jury instructions on second-degree murder and other matters. Williams attached to the motion an affidavit signed by one of the jurors in this case, containing allegations concerning the jury’s deliberations. The State moved to strike the statements in the motion for a new trial that were attributed to jurors. The circuit court granted the motion to strike, sealed the affidavit, and denied the motion for a new trial.

Williams appealed, and, without affirming or reversing, the Court of Special Appeals ordered a limited remand to the circuit court with instruction to determine whether a firearms examiner’s report was admissible under *Rochkind v. Stevenson*, 471 Md. 1, 236 A.3d 630 (2020). See *Williams v. State*, 251 Md. App. 523, 574, 546, 254 A.3d 556, 586, 570 (2021). Although the Court of Special Appeals did not affirm the convictions, the Court rejected Williams’s contentions as to the issues of legally inconsistent verdicts, the circuit court’s denial of the motion for a new trial, and the sufficiency of the evidence for second-degree murder and possession of a regulated firearm while under the age of twenty-one. See *id.* at 538, 572, 567,

254 A.3d at 565, 585, 582. Williams filed a petition for a writ of *certiorari*, which the Court of Appeals granted. See *Williams v. State*, 476 Md. 262, 261 A.3d 239 (2021).

**Held:** Affirmed.

The Court of Appeals concluded that the guilty verdict as to second-degree murder was not legally inconsistent with the not-guilty verdicts as to first-degree assault and use of a firearm in the commission of a crime of violence because the jury instructions on the offenses at issue were correct and neither of the offenses at issue of which Williams was acquitted is a lesser-included offense of second-degree murder. In reaching the conclusion, consistent with case law, the Court considered the instructions given to the jury on the offenses at issue and the elements of the offenses. This approach was compelled by the analysis endorsed by the majority of the Court in *State v. Stewart*, 464 Md. 296, 211 A.3d 371 (2019) (per curiam) and by *McNeal v. State*, 426 Md. 455, 44 A.3d 982 (2012), in which, when determining whether verdicts were legally inconsistent, the Court considered the jury instructions as to the offenses at issue and the elements of the offenses, not the facts of a particular case.

The Court of Appeals explained that it was undisputed that the jury instructions accurately conveyed the elements of all three of the relevant offenses. In determining whether there was a legal inconsistency, the next step was to compare the elements of the offenses and resolve the question of whether, under the required evidence test, the offense of first-degree assault, where the modality of the commission of the offense is the use of a firearm, or use of a firearm in the commission of a crime of violence is a lesser-included offense of second-degree murder. The answer was no. The offenses of first-degree assault (involving the use of a firearm) and use of a firearm in the commission of a crime of violence have an element—specifically, the use of a firearm—that second-degree murder lacks. The analysis demonstrated that the not-guilty verdicts were not as to a lesser-included offense of second-degree murder and that there was no legal inconsistency in the verdicts. The Court thus concluded that the verdicts in the case were not legally inconsistent and declined to depart from its holding in *McNeal* that factually inconsistent verdicts are permissible in criminal jury trials.

The Court of Appeals concluded that the circuit court correctly granted the motion to strike statements by jurors referenced in the motion for a new trial and that the circuit court did not abuse its discretion in denying the motion for a new trial. The information obtained from jurors after the verdict that Williams's counsel proffered on the last day of the trial and the averments in the affidavit accompanying the motion for a new trial purported to be statements by jurors about discussions that occurred during the jury's deliberations and the jurors' thought processes during deliberations. None of the information attributed to the jurors involved allegations of racial bias or discrimination or the existence of external influences on the jury. The information proffered by Williams's counsel on the last day of trial as well as the information in the affidavit accompanying the motion for new trial indicated that the jurors who William's counsel spoke with after the verdict revealed, at that time, that they were not convinced that Williams shot Townsend. This type of *post hoc* information from jurors was clearly barred from being received

by the circuit court under both the no-impeachment rule and the plain language of Maryland Rule 5-606(b)(1) and (2), which establish that it is improper in an inquiry into the validity of a jury's verdict to consider statements or testimony by a juror about the jury's deliberations obtained after a jury has reached a verdict.

The Court of Appeals concluded that, viewing the evidence in the light most favorable to the State, the evidence was sufficient to support the challenged convictions. Although any one piece of evidence alone may not have been sufficient, all of the evidence combined—including the circumstances that blood, a bullet, and a cartridge case were found in Williams's vehicle, that he was the last person seen with Townsend, that Williams lied about dropping off Townsend on the night of his murder, and that Williams engaged in unusual behavior the next day, including cleaning his bathroom with bleach—was sufficient for a rational trier of fact to find Williams guilty beyond a reasonable doubt of second-degree murder and possession of a regulated firearm while under the age of twenty-one.

*Alexander Dejarnette v. State of Maryland*, No. 41, September Term 2021, filed March 25, 2022. Opinion by Watts, J.

<https://www.mdcourts.gov/data/opinions/coa/2022/41a21.pdf>

EVIDENTIARY TEST OF BREATH FOR ALCOHOL – CODE OF MARYLAND REGULATIONS 10.35.02.08G – TWENTY-MINUTE OBSERVATION PERIOD – COMPLIANCE – ADMISSIBILITY

**Facts:**

The State, Respondent, charged Alexander Dejarnette, Petitioner, with four counts related to driving under the influence of alcohol—namely, negligent driving, driving under the influence of alcohol, driving under the influence of alcohol per se, and driving while impaired. Prior to trial in the Circuit Court for Somerset County, Dejarnette filed a motion in limine to exclude the results of a breath test, arguing that the twenty-minute observation period set forth in Code of Maryland Regulations (“COMAR”) 10.35.02.08G had not been complied with. At the end of a motions hearing, the circuit court denied the motion. A jury acquitted Dejarnette of negligent driving and driving under the influence of alcohol, but convicted him of driving under the influence of alcohol per se and driving while impaired by alcohol. The circuit court sentenced Dejarnette to one year of imprisonment, with all but ten days suspended, and one year of supervised probation, and ordered him to pay a \$250 fine and \$145 in court costs. Dejarnette appealed, contending that the circuit court erred in admitting the results of the breath test. The Court of Special Appeals held that the circuit court did not err and affirmed the circuit court’s judgment. *See Dejarnette v. State*, 251 Md. App. 467, 469, 254 A.3d 524, 525 (2021). Dejarnette filed a petition for a writ of *certiorari*, which the Court of Appeals granted. *See Dejarnette v. State*, 476 Md. 264, 261 A.3d 240 (2021).

**Held:** Affirmed.

The Court of Appeals held that the plain language of the relevant statutes is clear and that the statutes do not provide that noncompliance with the twenty-minute observation period set forth in COMAR 10.35.02.08G results in the inadmissibility of evidence of breath test results. The COMAR regulation itself does not contain an exclusionary provision for alleged noncompliance with the observation period. Nothing in COMAR 10.35.02.08G(1), (2), or (3), the provisions relating to the twenty-minute observation period, mentions the invalidity or inadmissibility of breath test results where the provisions are not complied with. In the absence of any exclusionary provision in the statutes or COMAR 10.35.02.08G pertaining to noncompliance with the twenty-minute observation period, the Court declined to read such an exclusionary provision into either the regulations or statutes.

The Court of Appeals held that the alleged compliance or noncompliance with the twenty-minute observation period goes to the weight to be given to breath test results, i.e., the weight of the evidence, not the admissibility. The Court was not convinced that case law from other jurisdictions relied on by Dejarnette compelled a contrary result where the Maryland statutes and regulation at issue are clear and unambiguous and no case requires suppression or non-admission of breath test results for alleged noncompliance with the twenty-minute observation period.

The Court of Appeals stated that COMAR 10.35.02.08G does not define “observed” or “observation” and neither term is qualified by a word such as “continuous,” “unbroken,” “constant,” or anything of the like. Indeed, neither term is qualified whatsoever. The regulation does not require that the person performing the observation watch the person and do nothing else. The regulation does not describe the manner in which the observation is to be performed, other than that the observation is meant to ensure that for the twenty minutes before administration of a breath test, an individual does not eat, drink, smoke, or have any foreign substance in the individual’s mouth or respiratory tract, and the individual’s mouth must be checked. Given this, the Court declined to read into the regulation something that is not there and hold that observation means that an officer must give the individual constant, fixed, or unbroken attention during the twenty-minute period.

The Court of Appeals concluded that, in the case, the record supported a finding that the officers complied with the twenty-minute observation period. In addition, the Court determined that the circuit court made findings on the record that the officers complied with the twenty-minute observation period set forth in COMAR 10.35.02.08G. The Court concluded that, in ruling on the motion *in limine*, the circuit court found that the officers complied with the twenty-minute observation period set forth in COMAR 10.35.02.08G, and the Court determined that the court’s factual findings were supported by the record.

# COURT OF SPECIAL APPEALS

*John Matthew Woodlin v. State of Maryland*, No. 107, September Term 2021, filed May 31, 2022. Opinion by Friedman, J.

<https://mdcourts.gov/data/opinions/cosa/2022/0107s21.pdf>

CRIMINAL LAW – EVIDENCE – OTHER SEXUALLY ASSAULTIVE BEHAVIOR –  
BALANCING PROBATIVE VALUE AND PREJUDICIAL EFFECT

## **Facts:**

John Woodlin was tried in the Circuit Court for Wicomico County for child sexual abuse and related sexual offenses arising from a 2019 incident involving his then eleven-year-old grandson, A.H. Before trial, the State filed a timely motion of intent to introduce evidence of a prior conviction for sexual assault under Section 10-923 of the Courts and Judicial Proceedings (“CJ”) Article, seeking to admit evidence that in 2010 Woodlin pleaded guilty to a third-degree sexual assault of an incapacitated, adult male. Over Woodlin’s objection, the circuit court ruled that the evidence would be admissible. At trial, the State offered, and the court admitted, the testimony of the police officer who investigated the 2010 offense, a certified copy of Woodlin’s 2010 conviction, and substantial portions of the transcript of Woodlin’s 2010 guilty plea proceedings. The jury ultimately convicted Woodlin of child sexual abuse and related offenses. Woodlin timely appealed to the Court of Special Appeals, presenting two primary arguments: first, that the allegations of the 2010 conviction are so dissimilar from those of the 2019 incident that they ought not be admissible under CJ § 10-923; and second, that the evidence that the State used to prove Woodlin’s 2010 conviction was too “salacious” to be admissible.

**Held:** Affirmed

As to Woodlin’s first argument—that his 2010 conviction was too dissimilar from the 2019 allegations to be admissible under CJ § 10-923—the Court of Special Appeals held that the circuit court did not abuse its discretion in admitting evidence of the prior sexual assault. The Court explained that when weighing the probative value of evidence of prior sexually assaultive behavior against the danger of unfair prejudice under CJ § 10-923(e)(4), courts must consider whether and how similar the two instances of sexually assaultive behavior actually are. The more

similar the prior sexually assaultive behavior is to the charged offense, the more probative of propensity it is, and the less unfairly prejudicial. Conversely, the more dissimilar the prior sexually assaultive behavior is to the charged offense, the less probative of propensity it is, and the more unfairly prejudicial. Here, there was evidence supporting both sides of the argument, and the circuit court's decision to put the evidence to the jury was not an abuse of discretion.

As to Woodlin's second argument—that once the 2010 conviction was determined to be generally admissible, the evidence that the State actually introduced was too “salacious” to be admissible—the Court of Special Appeals held that Woodlin waived this argument by failing at both the motions stage and at trial to object to the scope of the evidence offered or otherwise raise the issue of redaction to the judge. Moreover, even if Woodlin had preserved his objection, the Court of Special Appeals held that the circuit court did not abuse its discretion in admitting what Woodlin refers to as the “salacious” details of the prior sexually assaultive behavior. While the precise contours of how much evidence of prior sexually assaultive behavior should be admitted must be decided on a case-by-case basis by circuit courts, the Court explained that it is insufficient merely to admit the fact of the prior conviction. Instead, circuit courts must admit sufficient factual detail of the prior sexually assaultive behavior to allow the jurors to compare and contrast the current allegations with the prior sexually assaultive behavior to determine for themselves whether and to what extent the prior sexually assaultive behavior is probative—or not—as to whether the defendant committed the act for which they are on trial. Here, for the jurors to be able to determine how probative Woodlin's 2010 conviction was of the likelihood that he sexually abused A.H. in 2019, they had to know something about the similarity or dissimilarity between the offenses. Some degree of detail was, therefore, necessary to establish a factual basis on which the jury could compare and contrast the current allegations with the prior sexually assaultive behavior.

*Miranda S. Kadish v. Craig M. Kadish*, No. 275, September Term 2021, filed April 27, 2022. Opinion by Leahy, J.

<https://mdcourts.gov/data/opinions/cosa/2022/0275s21.pdf>

FAMILY LAW – CHILD CUSTODY – DISCOVERY VIOLATIONS – SANCTIONS

**Facts:**

Appellant Miranda S. Kadish (“Mother”) and appellee Craig M. Kadish (“Father”) married in 2014 and are the parents of S., who was born in 2015. As of March 1, 2018, Mother and Father had separated. After the separation, Mother relocated to the State of Nevada, and Father remained in Maryland. A judgment of absolute divorce was entered on July 8, 2019. The parties entered into an Agreement, which was incorporated, but not merged, into the judgment of divorce. The judgment granted the parties joint legal and shared physical custody of S. “subject and pursuant to the terms set forth in the Agreement.” Among other things, the Agreement broadly contemplated that S. would reside primarily with Mother during the school year and with Father during the summer and specified the travel arrangements for the pick-up and return of S. at the start and end of each access period.

On November 19, 2019, Father filed a petition for contempt. A few months after filing this petition, Father propounded interrogatories and a request for production of documents. Father also served Mother with a notice of deposition. Mother did not respond to any discovery requests and failed to appear for her deposition. On March 18, 2020, Father filed an amended and supplemental petition for contempt. Mother did not respond to the original contempt petition and failed to respond to the amended petition until June 19, 2020.

Father filed a motion for sanctions and/or to compel, along with the amended petition for contempt. Mother did not respond. The court granted Father’s motion, in part, and ordered Mother to respond to Father’s discovery requests and produce any responsive documents. After Mother failed to provide the requested discovery, Father filed a renewed motion for discovery sanctions. The court granted Father’s renewed motion and ordered that the matters sought in Father’s first discovery requests be taken as established but clarified that the order was not applicable to a pending petition for modification.

Contemporaneously with his amended petition for contempt and first motion for sanctions, Father filed a motion for modification and sought sole legal and primary physical custody of S.

On July 9, 2020, Father propounded requests for admissions. While Mother responded to Father’s requests, she objected on relevancy grounds to the vast majority of requests for admission relating to the period before the Judgment of Divorce; the validity of the Agreement; whether S. had autism; whether she and S. reside with her second child and the second child’s father; and whether this individual provides any financial support. Father also served a second

set of interrogatories and requests for production of documents, to which Mother did not respond.

Several months earlier, Mother had filed a “Petition for Contempt,” alleging Father had not paid child support as required by the court’s order. Then, in September 2020, Mother filed her own motion to modify custody and child support and sought sole physical custody of S.

On September 29, 2020, Father filed a consolidated motion for sanctions regarding Mother’s multiple failures to provide discovery relative to custody issues. Mother filed an opposition in which she requested seven additional days to serve her discovery responses. After seven days passed without response, the court entered an order granting Father’s motion for sanctions. In the order, the court deemed admitted all the requests for admissions to which Mother refused to respond on the basis of relevance and excluded testimony regarding discoverable evidence unless the evidence “has direct bearing on the best interests of the parties’ child.”

After Mother failed to appear for her deposition, Father filed a fourth motion for discovery sanctions, which the court granted on December 8, 2020. By this point, Mother had failed to answer two separate sets of interrogatories, had not appeared for her deposition (which had been noticed on three separate occasions), had not responded to two separate requests for production of documents, and had not produced a single document. The court ordered that it would “apply a rebuttable presumption in the trial of this case that the minor child’s best interests will be served by a modification of the Judgment herein to grant [Father] her primary physical custody and her sole legal custody.”

On the eve of trial, Mother moved to postpone the trial due to illness. The court denied Mother’s request but, over Father’s objection, permitted Mother to participate remotely. The court then proceeded with a two-day trial in which it addressed four motions: (1) Father’s amended and supplemental petition for contempt; (2) Mother’s petition for modification of custody; (3) Father’s petition for modification of custody and child support; and (4) Mother’s motion for contempt. At trial, Mother did not proffer anything on the issues of custody or child support, and, during her direct examination, Father’s objections to Mother’s testimony based on the court’s discovery sanctions were overruled. The court concluded that a material change in circumstance had occurred and, after considering the *Sanders-Taylor* factors, granted Father sole legal and physical custody, subject to Mother’s visitation rights. The court denied Mother’s petition for contempt for failure to pay child support and retroactively modified Father’s child support obligations. Mother noted a timely appeal.

**Held:** Affirmed.

The Court of Special Appeals reached three holdings. First, the Court concluded that the discovery sanctions imposed by the circuit court in this child custody case were consistent with the Maryland Rules and Maryland decisional law. The Court held that the circuit court did not err or abuse its discretion by its choice of sanctions because, rather than bar evidence that could

bear directly on S.'s best interests, the court safeguarded S.'s right to have her best interests fully considered. The circuit court contended with Mother's incessant discovery violations properly by fashioning sanctions that, among other things, restricted her ability to present evidence at trial that she failed to produce in discovery without barring any evidence necessary for the court to consider in making a custody determination in S.'s best interests. Indeed, the trial judge expressly preserved Mother's ability to present "evidence directly bearing on the best interests of the minor child" in her orders imposing sanctions. At trial, and over Father's objections, the court permitted Mother to present testimony and any other evidence that she had bearing on S.'s best interests.

Second, the Court held that the circuit court did not abuse its discretion in determining that a material change of circumstances had occurred and in granting Father sole legal and physical custody of S., subject to Mother's visitation rights.

Third, the Court held that Mother did not have a right to appeal as the party who unsuccessfully sought to have the other adjudged in contempt.

*In re: X.R., X.R., K.D.*, Nos. 1051, 1052, and 1054, September Term 2021, filed May 2, 2022. Opinion by Wells, C.J.

<https://mdcourts.gov/data/opinions/cosa/2022/1051s21.pdf>

## JUVENILE LAW – CHILDREN IN NEED OF ASSISTANCE – CUSTODY

### **Facts:**

Two of the Appellant’s (“Mother”) children, Child 1 and Child 3, while in her care, were sexually abused by their half-brother, also a minor. Another of Mother’s children, Child 2, witnessed the abuse of Child 1. The Circuit Court for Baltimore County, sitting as a juvenile court, found Child 1 and Child 2 to be children in need of assistance (“CINA”) and placed them with the Appellee (“the Department of Social Services” or “the Department”). While the court did not find Child 3 to be a CINA, it did remove Child 3 from Mother’s custody and awarded custody to Child 3’s father, who, the Department determined, was an appropriate person to entrust with Child 3’s care.

Mother appealed contesting the court’s CINA findings for Child 1 and Child 2 and their placement with the Department. She also argued the court erred in placing Child 3 with that child’s father.

### **Held:** Affirmed.

Mother asserted that the juvenile court’s findings, based on the Department’s evidence, failed to show that she was unable to care for Child 1 and Child 2. The Department countered that there was ample evidence in the record to show that Mother was unable to adequately care for Child 1 and Child 2 when she allowed their half-brother to return home to live with her and the children in violation of a safety plan to which Mother had consented.

The Court of Special Appeals agreed with the Department. The Court held that Mother’s past neglect could be used to forecast the likelihood that she would neglect the children in the future.

Mother then argued that even with a CINA finding, the juvenile court erred in placing the children with the Department at the dispositional phase of the CINA proceeding. Mother argued that at disposition, the court must use the “clear and convincing standard” rather than “a preponderance of the evidence” standard based on a line of cases stretching back to 1983 which hold that “a more stringent” standard is required before a court denies a parent custody. *See, e.g., In re Jertrude O.*, 56 Md. App. 83, 98 (1983), *cert. denied*, 298 Md. 309 (1984); *In re Joseph G.*, 94 Md. App. 343, 350 (1993) (holding that “a more stringent standard of proof is required to deny custody” than at the adjudication stage); *In re J.R.*, 246 Md. App. 707, 756 (2020)

(reiterating this Court’s holding in *In re Joseph G.* requiring a “more stringent” standard in order to deny custody). Mother reasoned that “a more stringent” standard must require clear and convincing evidence.

The Court of Special Appeals noted that despite what *Jertrude O.* and its progeny stated, the CINA statute does not require employment of “a more stringent” standard of proof at the dispositional phase of a CINA proceeding, let alone use of the “clear and convincing” standard. Looking to the holding in *In re Yve S.*, 373 Md. 551 (2003) for guidance, the Court of Special Appeals held that Family Law (“FL”) § 9-101 is the appropriate inquiry a juvenile court must undertake when determining the appropriate custody arrangement after a CINA finding. In reaching this holding, the Court rejected Mother’s contention that FL § 9-101 was inapplicable in CINA proceedings, holding that by its own terms, the statute applies “in any custody or visitation proceeding.” Further, the Court rejected Mother’s argument that consideration of FL § 9-101 at disposition would shift the burden from the Department to the parent. The Court held that this was not a cause for concern because the juvenile court would only consider FL § 9-101 after a CINA finding. Mother, and any similarly situated parent, appropriately bears the burden of demonstrating that the child at the center of a CINA finding would not be subject to future neglect or abuse if that child was returned to that parent. The Court’s reasoning was consistent with other jurisdictions with similar CINA statutes.

Finally, the Court affirmed the juvenile court’s award of Child 3’s custody to that child’s father. The Court of Special Appeals held that the juvenile court did not abuse its discretion in finding that Mother could not show that “there is no likelihood of further child abuse or neglect” under FL 9-101. The Court held that the juvenile court also was within its discretion in finding that Child 3’s father was an appropriate person to have custody.

*GPL Enterprise, LLC v. Certain Underwriters at Lloyd's, et al.*, No. 302, September Term 2021, filed May 24, 2022. Opinion by Arthur, J.

<https://www.courts.state.md.us/data/opinions/cosa/2022/0302s21.pdf>

## INSURANCE – COVERAGE FOR ECONOMIC LOSSES RESULTING FROM PANDEMIC

### **Facts:**

Appellant GPL Enterprise, LLC, operates a restaurant in Frederick County. On March 16, 2020, the Governor of Maryland issued an emergency order that closed all Maryland restaurants and bars in response to the COVID-19 pandemic. The Governor's order prohibited GPL from operating its restaurant at full capacity but allowed for carry-out business and delivery orders to continue. GPL incurred significant loss as a result of the Governor's order.

GPL had previously obtained a commercial property insurance policy from a syndicate of underwriters at Lloyd's, the insurance market in London. The policy provides coverage for "direct physical loss or damage to Covered Property," which includes GPL's restaurant. The policy includes business-interruption coverage, which insures against the loss of business income and incurrence of expenses due to a suspension of business operations "caused by direct physical loss of or damage to property" at the restaurant. The policy also includes coverage for the loss of business income and incurrence of expenses if a civil authority prohibits access to a restaurant as a result of damage to property other than the restaurant, such as an adjacent property.

GPL made a written demand for coverage under the policy, asserting that, as a result of the COVID-19 virus and the Governor's order, it had suffered direct physical harm, loss, or damage to its premises. Additionally, GPL asserted a claim for business interruption coverage due to having to suspend operations pursuant to the Governor's order. Finally, GPL asserted a claim for coverage on the premise that an act of civil authority had prohibited access to the restaurant. The underwriters denied the claim.

GPL filed a complaint in the Circuit Court for Frederick County, alleging breach of contract and requesting that the court declare the parties' rights under the policy. The underwriters moved to dismiss the complaint, arguing that the policy afforded no coverage because there was no "direct physical loss or damage to" the restaurant or other property. GPL subsequently amended its complaint to allege additional facts and moved for summary judgment. The underwriters moved for summary judgment, incorporating their motion to dismiss the initial complaint.

The circuit court granted the underwriters' motion to dismiss and denied GPL's motion for summary judgment. The court reasoned that GPL did not claim to have suffered physical damage to its property or loss of its property. The court embodied its ruling in a written order, but it did not declare the parties' rights. GPL appealed.

**Held:** Affirmed in part, vacated in part.

The Court of Special Appeals concluded that GPL's policy affords no coverage for purely economic losses that GPL suffered as a result of the COVID-19 virus and the Governor's order. The Court affirmed the dismissal of GPL's claim for breach of contract and the entry of summary judgment against GPL.

In this case, GPL did not sustain any actual physical damage to its restaurant, and there was no damage to any neighboring property. GPL sustained no physical damage that required any type of repair or remediation preventing GPL from conducting business in the restaurant. The Governor's order modifying the permissible business operations in response to the COVID-19 pandemic does not constitute direct physical loss or damage to the restaurant. The Governor's order does not constitute prohibited access to the restaurant due to any type of physical damage, whether it be to the restaurant itself or any neighboring structure. Further, the COVID-19 virus itself did not cause a direct physical loss of or damage to the restaurant. The absence of a virus exclusion in the policy did not imply the existence of coverage. Consequently, the requirements for business-interruption coverage were not satisfied.

The Court further concluded that the circuit court improperly disposed of GPL's claim for a declaratory judgment without declaring the parties' rights, as it was required to do. Therefore, the case was remanded to the circuit court to issue a declaratory judgment consistent with the opinion.

# ATTORNEY DISCIPLINE

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By an Order of the Court of Appeals dated May 9, 2022, the following attorney has been suspended for seven months with 30 days stayed, effective immediately, followed by one year of probation with terms:

RACHAEL ALEXANDRA SCHMID MOSHMAN

\*

By a Per Curiam Order of the Court of Appeals dated May 11, 2022, the following attorney has been indefinitely suspended:

AMBER LISA MAIDEN

\*

By an Opinion and Order of the Court of Appeals dated May 26, 2022, the following attorney has been disbarred:

CLIFFORD BAER SILBIGER

\*

# RULES ORDERS AND REPORTS

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A Rules Order pertaining to the 210<sup>th</sup> Report of the Standing Committee on Rules of Practice and Procedure was filed on May 11, 2022.

[https://mdcourts.gov/sites/default/files/rules/order/ro210\\_0.pdf](https://mdcourts.gov/sites/default/files/rules/order/ro210_0.pdf)

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# UNREPORTED OPINIONS

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

<https://mdcourts.gov/appellate/unreportedopinions>

	<i>Case No.</i>	<i>Decided</i>
6525 Belcrest Rd. v. Prince George's Cnty. Council	0726	May 4, 2022
A		
Adams, Antonio Anthony v. State	1055	May 26, 2022
Alexander & Cleaver PA v. Md. Assoc. for Justice	0949	May 9, 2022
Alexander, Christopher D. v. State	0935	May 23, 2022
Allen, Michael Maurice, Sr. v. State	2382 **	May 3, 2022
B		
Bennett, Paul V. v. Bennett	0655	May 31, 2022
Bennett, Paul V. v. Bennett	1520	May 31, 2022
Brockington, Timothy v. State	0786	May 4, 2022
Brown, Eric v. State	0043	May 19, 2022
Brown, Jaylin Jerome v. State	0715 *	May 23, 2022
Burke, Melissa Lynn v. State	1039	May 4, 2022
Burton, Joqua' D. v. West	0933	May 10, 2022
Butler, Calvin Rodney v. State	1343	May 16, 2022
C		
Carter, Charles H. v. GardaWorld Security Services	1112	May 4, 2022
Cothren, Thomas v. Solomon	0971	May 13, 2022
Coulibaly, Tiemoko v. Rosenberg	0969	May 25, 2022
Crowell, Dawn E. v. Ward	0490	May 12, 2022
Dicicco, Robert A. v. Coachford Properties	0981 *	May 18, 2022
D		
DuFour, Margaret Chu v. Nash	1507	May 31, 2022

E		
E.N. v. T.R.	1335	May 3, 2022
Ellis, Amber T. v. Ellis	1266	May 27, 2022
Estate of Dorsey, Tyrenka v. Kaplan Higher Education	1632 **	May 23, 2022
Etame, Jacques v. M&T Bank	0940	May 4, 2022
F		
F., Filadelfo Benitez v. State	1237	May 13, 2022
H		
Heidary, Massoud v. Montgomery Cnty.	0824	May 4, 2022
Helms, Jerry Adam, Jr. v. State	1159 *	May 31, 2022
Hodge, Debra v. Ward	0878 *	May 25, 2022
I		
In re: A.C.	1467	May 18, 2022
In re: J.C.	0676	May 3, 2022
In re: J.J.	1292	May 5, 2022
In re: J.W. & J.B.	1160	May 5, 2022
In re: J.W. & J.B.	1190	May 5, 2022
In re: L.R.	1157	May 31, 2022
In re: T.C.	0640	May 3, 2022
In re: Z.B. and Z.I.	1462	May 27, 2022
J		
J.B. v. L.B.	1309	May 6, 2022
Johnson, John Kevin v. State	1078	May 4, 2022
Johnson, Joshua M. v. State	0738	May 16, 2022
Jones, Deonta v. State	0571	May 25, 2022
Jones, Khiry Devon v. State	0594	May 20, 2022
K		
Kellner, Edith v. Charles	1176	May 25, 2022
Kirksey, John v. PHH Mortgage Corp.	0987	May 26, 2022
Kowalchik, Kimberly v. Price	0855	May 3, 2022
Kravitz, Bellamy v. Fombin	0823	May 25, 2022
M		
M.Y. v. L.G.	0946	May 10, 2022
Madison, Mazerline v. Hickory TSF	1401	May 25, 2022
Malley, Shawn Christopher v. State	0906	May 3, 2022

Marion E.F., Sr. v. State	0868	May 4, 2022
Matulewicz, Carl Michael v. Indian Acres Club	0841	May 12, 2022
Mayor & City Cncl. Of Balt. v. Guest	0457	May 23, 2022
McDonald & Eudy Printers v. LTS Home Improvements	0244	May 18, 2022
Monroe, Tiffany Madera v. Prince George's Cnty.	1082	May 24, 2022
N		
Norris, Edward J. v. Norris	0767 *	May 25, 2022
P		
Parker, Melissa v. Bennett	1313	May 17, 2022
Pearson, Jewelet v. Sharpe	1504 *	May 12, 2022
Petition of Ranson. Cliff	1099	May 18, 2022
Petition of Ranson. Cliff	1158	May 18, 2022
Q		
Quarles, Michelle v. Brown	0958 *	May 5, 2022
R		
Roberts, Aaron B. v. Dept. of Pub. Safety & Corr. Servs.	1047 *	May 3, 2022
Roberts, Aaron B. v. Dept. of Pub. Safety & Corr. Servs.	1050 *	May 3, 2022
Roundtable Wellness v. Medical Cannabis Comm'n.	0116	May 10, 2022
S		
S.O. v. H.M.	0546	May 3, 2022
Sagres Construction v. W.S.S.C.	0109	May 9, 2022
Seck, Aziz Nalla v. State	1305 **	May 11, 2022
Sewell, Starsha v. Howard	1148	May 4, 2022
Stanton, Jason B. v. Ferguson	1444 *	May 26, 2022
State Bd. Of Physicians v. Modjarrad	1295 *	May 6, 2022
Stock, Michael Steven v. Stock	0415	May 9, 2022
Stokes, Avery Leslie v. State	1038	May 4, 2022
T		
Taylor, Derrick S. v. State	1317	May 10, 2022
Thomas, Monique Keisha v. State	0850	May 16, 2022
W		
Walker, Kevron D. v. State	0433	May 4, 2022
William, Marquell C. v. State	0233	May 4, 2022
Williams, Robert v. Williams	1279	May 24, 2022

Woodley, Bryant v. State	0494	May 4, 2022
<b>Z</b>		
Zeman, Robert v. State	1049 *	May 10, 2022

September Term 2021  
\* September Term 2020  
\*\* September Term 2019