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COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Claire L. K. K. Ogilvie, Misc. Docket AG No. 4, September Term 2016, filed March 23, 2018. Opinion by Greene, J.

https://mdcourts.gov/data/opinions/coa/2018/4a16ag.pdf

ATTORNEY DISCIPLINE – CONVICTION FOR A SERIOUS CRIME – DISBARMENT

Facts:

On January 23, 2015, Respondent entered an Alford plea to the charges of felony breaking and entering, felony malicious wounding, and felony abduction in the Circuit Court for the City of Charlottesville, Virginia. She was sentenced to fifty years of incarceration, with forty-six years suspended and supervised probation for an indefinite period of time, with additional conditions of probation. On May 18, 2016, the Court indefinitely suspended Respondent from the practice of law. On August 14, 2017, Respondent was released from a federal corrections facility. On March 1, 2018, this Court held Oral Argument, at which Respondent failed to appear.

Held: Respondent disbarred.

The Court concluded that Respondent violated the Maryland Lawyers' Rules of Professional Conduct 19-308.4(a), (b) and (d), as a result of her criminal convictions for breaking and entering, malicious wounding, and abduction. The Court reasoned that the felonious nature of Respondent's conduct, her conviction and sentence, her failure to report her charges and conviction to Bar Counsel, as well as the absence of extenuating circumstances warranted disbarment.

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Attorney Grievance Commission of Maryland v. Gregory Allen Slate, Misc. Docket AG No. 5, September Term 2017, filed March 2, 2018. Opinion by Watts, J.

https://www.mdcourts.gov/data/opinions/coa/2018/5a17ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

On behalf of the Attorney Grievance Commission, Petitioner, Bar Counsel filed in the Court of Appeals a "Petition for Disciplinary or Remedial Action" against Gregory Allen Slate, Respondent, charging him with violating Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 8.1 (Bar Admission and Disciplinary Matters), 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation), 8.4(d) (Conduct That Is Prejudicial to the Administration of Justice), and 8.4(a) (Violating the MLRPC).

A hearing judge found the following facts. Before attending law school, Slate initiated a case against ABC News Inc. and other defendants ("the ABC Case"). The defendants moved to dismiss for bad-faith conduct of litigation. The United States District Court for the District of Columbia granted the motion to dismiss, and, in a Memorandum Opinion, found that Slate: had fabricated a document and presented it to the Court in bad faith; had given testimony at a deposition that was at least intentionally misleading, if not perjurious; and had repeatedly attempted to abuse the discovery process. Slate filed multiple motions, including a motion for reconsideration. The Court denied the motions, and, in another Memorandum Opinion, found that Slate's motions demonstrated a continued pattern of omissions and obfuscations. Slate appealed, and the United States Court of Appeals for the District of Columbia Circuit affirmed.

After the United States District Court for the District of Columbia issued the Memorandum Opinions ("the Opinions"), Slate applied for admission to the Bar of Maryland. At the time, Question 11(a) of the Character Questionnaire required an applicant to provide a complete list of all judicial proceedings to which the applicant had been a party. Slate disclosed that he had been a party to multiple civil cases, including the ABC Case. Slate disclosed the ABC Case's name, the filing date, the court's name and address, the date of trial, and the date of disposition. Next to "Disposition[,]" Slate wrote: "Dismissed pending appeal in the United States Court of Appeals for District of Columbia Circuit[.]"

Question 18 of the Character Questionnaire, which was known as "the catchall question," asked an applicant whether there were "any circumstances or unfavorable incidents [that] may have [had] a bearing upon [his or her] character or [his or her] fitness to practice law, not called for by the questionnaire or disclosed in [his or her] answers[.]" Question 18 required the applicant to "give details, including any assertions or implication of dishonesty, misconduct, [or] misrepresentation[.]" Slate responded "No" to Question 18.

Slate signed Question 20, which required an applicant to "acknowledge [his or her] duty to respond fully and candidly to each question or required disclosure[,]" and to "declare and affirm under the penalties of perjury, that the matters and facts set forth in the [bar] application [were] true and accurate." Slate did not attach the Opinions to his bar application or disclose the existence of the Opinions in his bar application. Nor did Slate ever supplement his bar application with the Opinions.

The State Board of Law Examiners ("the SBLE") received Slate's bar application. After passing the bar examination, Slate signed an Affirmation by General Bar Applicant, in which he falsely affirmed under oath that all of the facts in his bar application remained correct. Slate's bar application was sent to the Character Committee for the Fourth Appellate Judicial Circuit ("the Character Committee"). As part of the character and fitness investigation, a member of the Character Committee interviewed Slate. During the character interview, Slate did not disclose the Opinions or the findings therein. The character interviewer conditionally recommended Slate's admission to the Bar of Maryland, but recommended that the Character Committee's co-chairs review his bar application and conduct a follow-up meeting regarding his litigation history. The Character Committee's co-chairs conducted an informal meeting with Slate. At the meeting, Slate discussed the disposition of the ABC Case in general, without disclosing the substance of the findings in the Opinions. The Character Committee's co-chairs recommended that Slate be admitted to the Bar of Maryland without a hearing. The SBLE cleared Slate for admission without a hearing. The Court of Appeals admitted Slate to the Bar of Maryland.

The hearing judge found that Slate had multiple opportunities to disclose the Opinions and the findings therein before, during, and after the completion of his bar application. The hearing judge found that, throughout the bar application process, Slate knowingly omitted the Opinions and the findings therein. The hearing judge found that Slate "used benign terms to describe" the ABC Case's disposition and the findings in the Opinions. The hearing judge found that Slate "concealed" the Opinions "in an attempt to deceive" the Character Committee and the SBLE so that he would get admitted to the Bar of Maryland.

A Maryland lawyer assisted another lawyer who represented someone whom Slate had sued as a pro se plaintiff. The Maryland lawyer visited a website about Slate that included the Opinions. The Maryland lawyer filed a complaint against Slate with Bar Counsel, who requested from Slate a response to the complaint. In his response, Slate falsely stated that he had complied with MLRPC 8.1 (Bar Admission) by "disclos[ing] everything necessary and more to the Character Committee during the review process."

The hearing judge concluded that Slate had violated MLRPC 8.1(a), 8.1(b), 8.4(c), 8.4(d), and 8.4(a).

Held: Disbarred.

The Court of Appeals overruled Slate's exceptions to the hearing judge's findings of fact, determining that most of the exceptions pertained to factual allegations that were immaterial to the attorney discipline proceeding. The Court concluded that Slate violated MLRPC 8.1(a) by responding "No" to Question 18, the catchall question, when he should have disclosed the Opinions and the findings therein. Slate also violated MLRPC 8.1(a) by mispresenting to Bar Counsel that he had provided all required information during the bar application process. Slate violated MLRPC 8.1(b) by failing to supplement his bar application with, or tell the character interviewer or the Character Committee's co-chairs about, the Opinions and the findings therein. Slate violated MLRPC 8.4(c) by concealing the Opinions and the findings therein throughout the bar application process. Slate also violated MLRPC 8.4(c) by making a false statement to Bar Counsel. Slate violated MLRPC 8.4(d) through his knowing concealment of required information during the bar application process, and through his misrepresentation to Bar Counsel.

The Court noted five aggravating factors. First, Slate had a dishonest or selfish motive, as he concealed material information to get admitted to the Bar of Maryland. Second, Slate had engaged in a pattern of dishonesty. Third, Slate committed multiple violations of the MLRPC. Fourth, Slate refused to acknowledge his misconduct's wrongful nature. Fifth, Slate's pattern of dishonesty demonstrated that he was likely to repeat his misconduct. The Court noted only two mitigating factors: the absence of prior attorney discipline, and inexperience in the practice of law.

The Court agreed with Bar Counsel that the appropriate sanction for Slate's misconduct was disbarment. The Court noted that Slate had deliberately concealed the Opinions and the findings therein by: responding "No" to the catchall question in his bar application; falsely stating under oath that the representations in his bar application remained accurate; withholding the required information during the character interview and the meeting with the Character Committee's co-chairs; and failing to supplement his bar application. Additionally, Slate had misrepresented to Bar Counsel that he had provided all required information. The Court explained that there was little doubt that, had Slate's dishonesty come to light during the bar application process, the Court would have determined that he lacked the character and fitness necessary for admission to the Bar of Maryland. The Court observed that the hearing judge's opinion was devoid of any facts that could have possibly constituted compelling extenuating circumstances, which would have precluded disbarment.

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Attorney Grievance Commission of Maryland v. Anna G. Aita, Misc. Docket AG No. 90, September Term 2016, filed March 27, 2018. Opinion by Hotten, J.

https://mdcourts.gov/data/opinions/coa/2018/90a16ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

The Attorney Grievance Commission ("Petitioner"), through Bar Counsel, filed a Petition for Disciplinary or Remedial Action with the Court of Appeals against Anna G. Aita ("Respondent"). Petitioner alleged that Respondent violated Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 1.5 (Fees), 1.15 (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 3.3(a)(1) (Candor Toward the Tribunal), and 8.4(a), (c), and (d) (Misconduct). Petitioner further averred violations of former Maryland Rules 16-604 (Trust Account–Required Deposits) and 16-606.1 (Attorney Trust Account Record-Keeping). These violations stemmed from Respondent's representation of two former clients in immigration matters, Isaac Escalante and Ingris Ardon. The Court transferred the matter to Judge Glenn L. Klavans of the Circuit Court for Anne Arundel County ("the hearing judge") to conduct an evidentiary hearing, and render findings of fact and conclusions of law. The hearing judge found the following facts:

Respondent became a member of the Bar of Maryland on June 19, 2002. She began a solo law practice in May of 2003, and described her areas of concentration as immigration, criminal, traffic, family, and civil litigation. Respondent began representation of Isaac Escalante, a Guatemalan native, in April of 2012 after Escalante was arrested for traffic violations. Escalante was taken into Department of Homeland Security ("DHS"), Immigration and Customs Enforcement custody and place in removal proceedings. Respondent agreed to represent Escalante in both his criminal and immigration matters. The total fee for the representation was $2,500, which Escalante paid in increments. The funds were not held in an attorney trust account, and had not been previously earned at the time of payment. Escalante was satisfied with Respondent's representation in his criminal case.

In Escalante's immigration case, Respondent filed an Application for Cancellation of Removal with the immigration court. While Escalante was detained, Respondent went to his family's home to review documents that may be useful in supporting Escalante's application for Cancellation of Removal. Respondent made copies of the family's original documents, but never returned the originals. Respondent did not file any of the collected documents. A Master Calendar hearing was scheduled in Escalante's case for November 26, 2013 at 1:00 p.m. at the immigration court in Baltimore, Maryland. Five minutes after the hearing began, Respondent notified Escalante by text message that a different attorney, Charles Yates, would be substituting for Respondent in immigration court. Escalante replied at 2:10 p.m. Escalante texted Respondent asking when his court date was taking place, to which Respondent replied "[t]oday at 1:00

p[.]m." Escalante replied, "I didn't know." Escalante did not appear in court that day. Yates contacted Respondent, but she did not respond. The immigration judge ordered Escalante removed from the United States of America *in absentia*.

On January 20, 2014, Escalante again attempted to contact Respondent by text and asked if he could reopen his immigration case. Respondent replied, "[y]ou can. I am going to need 295 dollars." On February 18, 2014, Respondent filed a Motion to Reopen Escalante's case. Escalante paid the $110 filing fee. In the Motion to Reopen, Respondent falsely represented to the immigration court that Escalante failed to appear for his hearing on November 26, 2013, because he had car trouble. On February 19, 2014, the immigration judge granted the Motion to Reopen and set another hearing for March 11, 2014. Respondent never informed Escalante that his case was reopened and scheduled for another hearing. On March 11, 2014, both Escalante and Respondent failed to appear, and Escalante was ordered removed *in absentia* for a second time. After learning of Escalante's arrest, his domestic partner notified Respondent who collected a $200 fee to file a second Motion to Reopen on Escalante's behalf. Respondent never filed the motion, and later refunded $295 representing application and filing fees paid on Escalante's behalf.

Escalante subsequently retained Rene Swafford ("Swafford"), Esquire. Swafford attempted several times to contact Respondent, but Respondent did not reply. In September of 2015, Swafford requested a copy of Escalante's client file from Respondent, but received no response. In December of 2015, Bar Counsel requested that Respondent provide Escalante's file to Swafford. In January of 2016, Respondent complied.

In July of 2013 Ingris Ardon, a Guatemalan native and mother to three United States citizen children, retained Respondent to represent her at an individual calendar hearing. Respondent charged Ardon a flat fee of $3,000 for the representation, with $1,000 due at signing, and the balance due over a period of four months in installments of $500 each. Ardon paid Respondent a total of $2,500. The funds were not deposited into a trust account, and were not previously earned at the times of payment. Respondent instructed Ardon to bring documents to her office to demonstrate her eligibility for Suspension of Deportation. Ardon provided Respondent with 585 pages of documents. Respondent never filed any applications, pleadings, or supporting documentation on Ardon's behalf.

On October 29, 2013, Ardon and her three children appeared in immigration court for the scheduled individual hearing. Respondent sent Ardon a text message saying she would not be attending court because of a family emergency, and that Yates would appear in her place. When Yates arrived, he told Ardon and her family "I know nothing about your case." It appeared that the hearing had been rescheduled due to a government shutdown. However, Respondent was unaware of the rescheduling, and made no effort to ascertain its status.

On December 18, 2013, Respondent sent Ardon a letter releasing her as a client because of Ardon's failure to make payments pursuant to the retainer agreement. The letter also indicates that Respondent was going to withdraw from Ardon's case, but Respondent never entered her appearance with the court. On December 20, 2013, Respondent sent Ardon a letter informing her

that Respondent would apply a $185 filing fee towards Ardon's balance. Ardon requested a refund of all of her money, but Respondent failed to refund funds specifically paid to her in trust for the payment of filing fees.

The hearing judge concluded by clear and convincing evidence that Respondent violated MLRPC 1.1, 1.3, 1.4(a) and (b), 1.5, 1.15(a), (c), and (d), 1.16(d), 3.3(a)(1), and 8.4(a) and (c), and violated former Maryland Rules 16-604 and 16-606.1. The hearing judge concluded that Respondent did not violate MLRPC 8.4(d) because there was no evidence produced that Respondent's conduct had wider consequences likely to impair public confidence in the profession.

Respondent excepted to a finding that she violated the charged provisions of the MLRPC. Petitioner excepted to a conclusion that Respondent did not violate Rule 8.4(d).

Held: Disbarred.

The Court of Appeals found that that Respondent violated MLRPC 1.1, 1.3, 1.4(a) and (b), 1.5, 1.15(a), (c), and (d), 1.16(d), 3.3(a)(1), and 8.4(a), (c), and (d), and violated former Maryland Rules 16-604 and 16-606.1.

The Court sustained Petitioner's exception to the hearing judge's conclusion that Respondent did not violate Rule 8.4(d). The Court ruled that Respondent's conduct did have wider implications beyond her two clients, and was prejudicial to the administration of justice. The public must be able to trust that when utilizing a lawyer's service, the lawyer will appear on their behalf when required and pursue the appropriate remedies. *See Attorney Grievance Comm'n of Maryland v. Walker-Turner*, 428 Md. 214, 232, 51 A.3d 553, 564 (2012). Respondent continually failed to attend her clients' hearings and file for the appropriate relief. Respondent's conduct was prejudicial to the administration of justice, thus violating MLRPC 8.4(d).

The appropriate sanction for Respondent's conduct was disbarment. The Court of Appeals considered the vulnerable nature of an immigration client's status. In noting that Respondent's clients were both citizens of other countries, who did have a strong grasp of the English language. As such, Respondent's clients comprise members of a vulnerable group who often rely wholly on their lawyer's assurances and expertise. Respondent's conduct merits disbarment.

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April Ademiluyi v. Maryland State Board of Elections; Administrator State Board of Elections, Linda Lamone; State Governor, Lawrence Hogan; Judge Ingrid Turner, No. 35, September Term 2017, filed March 26, 2018. Opinion by Watts, J.

http://www.mdcourts.gov/data/opinions/coa/2018/35a17.pdf

ELECTION LAW – MD. CODE ANN., ELEC. LAW (2002, 2010 REPL. VOL.) § 12-202 – CHALLENGE TO JUDICIAL CANDIDATE'S ELIGIBILITY – STATUTE OF LIMITATIONS – DOCTRINE OF LACHES – UNREASONABLE DELAY – PREJUDICE

Facts:

In 2016, April Ademiluyi ("Appellant") was a candidate for judge of the Circuit Court for Prince George's County in the primary and general elections. In the general election, the candidates included three incumbent judges of the Circuit Court for Prince George's County, as well as two lawyers, Appellant and the now-Honorable Ingrid M. Turner ("Judge Turner"). On November 8, 2016, in the general election, Judge Turner and the three incumbent judges received sufficient votes to win the election; Appellant finished last. After the election results were certified, Governor Lawrence J. Hogan issued commissions to the successful candidates, including Judge Turner, who subsequently took the oath that is prescribed by the Constitution of Maryland, and assumed the office of judge of the Circuit Court for Prince George's County.

Previously, on April 14, 2016, before both the 2016 primary election on April 26, 2016, and the general election, Appellant filed with the Commission on Judicial Disabilities ("the Commission") a complaint against Judge Turner, alleging that Judge Turner had committed various ethical violations during the election campaign by engaging in prohibited political activities, including endorsing numerous politicians. While the ethics complaint was pending before the Commission, on April 21, 2016, a few days before the 2016 primary election, The Washington Post published an article that contained information about Judge Turner's background, including that she was a military lawyer and former member of the Prince George's County Council, and that, for twenty years, she "served as legal counsel to admirals, administrative units[,] and sailors[, b]ut [that] she ha[d] little experience in local courts." Over a year later, after the 2016 primary and general elections, the Commission responded to Appellant's ethics complaint against Judge Turner, who had assumed office. Specifically, in a letter dated April 26, 2017, the Commission stated that the ethics complaint against Judge Turner had been "reviewed and discussed by the Judicial Inquiry Board" and the Commission, and that the Commission was dismissing the ethics complaint because it concluded that the evidence failed to show that Judge Turner committed sanctionable conduct.

On May 9, 2017, almost two weeks after the date of the Commission's letter, and more than six months after the 2016 general election, Appellant, filed a petition in the Circuit Court for Anne Arundel County ("the circuit court") seeking to have the candidacy of Judge Turner decertified, and alleging that Judge Turner was constitutionally unqualified for judicial office because she

allegedly had never practiced law in Maryland. Appellant named as defendants the Maryland State Board of Elections, State Administrator of Elections Linda Lamone, Governor Hogan, and Judge Turner (together, "Appellees"). In the petition, Appellant sought a writ of mandamus ordering the Governor to rescind the commission that he had issued to Judge Turner, and an order decertifying both Judge Turner's candidacy and the election results. In the petition, Appellant also contended that there was no prejudice or unreasonable delay in the timing of the filing of the petition. On May 22, 2017, Appellant filed an amended petition, raising the same allegations and seeking the same relief.

Before any response from Appellees, on July 9, 2017, Appellant filed a motion for summary judgment and a memorandum of law, contending that Judge Turner was constitutionally unqualified to be a judge in Maryland because she allegedly had not practiced law in Maryland, and arguing that she (Appellant) was entitled to the position of judge of the Circuit Court for Prince George's County. In an "Affidavit in Support of Motion for Summary Judgment," Appellant averred, in relevant part:

> [] I had no knowledge of [Judge] Turner's legal practice history until [T]he Washington Post['s] article[] dated April 21, 2016 had been published[,] and [the Commission] was invest[igat]ing [Judge] Turner.
>
> * * *
>
> [] On April 29, 2017, I received notice from the [Commission] that my complaint against [Judge] Turner went through the full process[,] but the [Commission] decided not to take action.
>
> [] After receiving notice of disposition from [the Commission], I immediately verified [Judge] Turner's online official Maryland biographies and commenced this suit[.]

(Record citations omitted).

On July 21, 2017, Appellees filed a motion to dismiss, or, in the alternative, a cross-motion for summary judgment, arguing, in relevant part, that the election claims were untimely under Md. Code Ann., Elec. Law (2002, 2010 Repl. Vol.) ("EL") §12-202(b) and barred by the doctrine of laches. On September 8, 2017, the circuit court conducted a hearing, and granted the motion to dismiss. The circuit court ruled, in pertinent part, that the petition was untimely filed under EL § 12-202(b), and that the doctrine of laches barred the election claims. On the same day, Appellant filed a notice of appeal directly to the Court of Appeals pursuant to EL § 12-203. On September 12, 2017, consistent with its oral ruling, the circuit court issued an order granting the motion to dismiss.

Held: Affirmed.

The Court of Appeals held that that the circuit court correctly granted the motion to dismiss and concluded that Appellant's petition was untimely under EL § 12-202(b) because Appellant did not file the petition in the circuit court until May 9, 2017, more than six months after the 2016 general election, and more than one year after Appellant admittedly became aware of the facts that served as the basis for the election claims; and, the petition was filed at least several months after the election results were certified. The Court further concluded that there was no basis on which to toll the statute of limitations. The Court held that, independent of the statutory limitations period set forth in EL § 12-202(b), the petition was barred by the doctrine of laches because, in filing the petition in the circuit court more than six months after the 2016 general election, Appellant unreasonably delayed in asserting her rights, and that delay prejudiced Appellees. Because the Court held that the circuit court correctly granted the motion to dismiss, it did not address the three other questions presented on brief by Appellant that concerned the merits of the election claims.

The Court of Appeals determined, as an initial matter, that it was evident that the election claims—concerning Judge Turner's alleged ineligibility, *i.e.*, lack of qualifications, for office of judge of the Circuit Court for Prince George's County—constituted a challenge to the qualifications, *i.e.*, eligibility, of a candidate seeking election and, thus, fell within the purview of EL § 12-202(a). In other words, EL § 12-202 applied and Appellant was required to file the petition in the circuit court within the statutory limitations period specified in EL § 12-202(b)—namely, "within the earlier of: (1) 10 days after the act or omission or the date the act or omission became known to [Appellant]; or (2) 7 days after the election results [were] certified[.]" (Paragraph breaks omitted).

The Court of Appeals determined that a review of the record led to the conclusion that Appellant became aware of Judge Turner's alleged ineligibility, or lack of qualifications, to be a judge when or shortly after The Washington Post published its article about the contested judicial election, setting forth information about Judge Turner's legal practice background. The record demonstrated that, on April 21, 2016, prior to the 2016 primary election, The Washington Post published an article containing information about Judge Turner, including the circumstances that Judge Turner had been a military lawyer and a member of the Prince George's County Council, and that Judge Turner apparently had "little experience in local courts." The Court concluded that, in the circuit court, Appellant was clear that she saw The Washington Post's article when it was published, and, as a result, became aware of Judge Turner's legal practice background. The Court concluded that, in addition to the record demonstrating that Appellant gained knowledge of Judge Turner's legal background when or shortly after The Washington Post's article was published, the issue of whether Judge Turner had been admitted to the Bar of Maryland or had practiced law in Maryland, *i.e.*, Judge Turner's legal practice background, was something that would have been easily ascertainable by Appellant through minimal investigation; *i.e.*, these were facts that would have been readily discernible in today's digital age. The Court noted that Appellant had the ability to access information about Judge Turner's professional background through minimal investigation, and there was no need to delay filing the petition in the circuit court.

The Court of Appeals determined that the record supported the conclusion that Appellant became aware of Judge Turner's alleged ineligibility, or lack of qualifications, to be a judge when or shortly after The Washington Post published its article on April 21, 2016, and Appellant had the ability to uncover information about Judge Turner's legal background regardless of the publication of The Washington Post's article. The date on which Appellant actually became aware of the alleged act or omission underlying the election claims—on or shortly after April 21, 2016—was far earlier than the date on which the election results were certified, which occurred after November 8, 2016. Under EL § 12-202(b)(1), Appellant was required to file the petition in the circuit court within ten days after the act or omission became known to her, which she failed to do; instead, Appellant waited until May 9, 2017, to file the petition in the circuit court. Even were the Court to consider EL § 12-202(b)(2), instead of EL § 12-202(b)(1), as providing the relevant statutory limitations period, undisputedly, Appellant filed the petition in the circuit court on May 9, 2017, more than six months after the 2016 general election, and long after the 2016 general election results had been certified. The Court concluded that, under either deadline set forth in EL § 12-202(b), Appellant's filing of the petition more than six months after the 2016 general election was untimely, and, accordingly, EL § 12-202(b) barred the election claims.

The Court of Appeals rejected the contention that EL § 12-202(b) was tolled either due to wrongdoing on Judge Turner's part, or because Appellant filed the ethics complaint with the Commission, and failed to discern any basis on which to toll the statute of limitations. The Court concluded that Appellant's bare allegations that Judge Turner committed fraud on the taxpayers to secure her position as a judge and that Judge Turner had unclean hands were insufficient to establish that Judge Turner engaged in wrongful conduct that prevented Appellant from asserting the election claims. Rather, as the record demonstrated, on or shortly after April 21, 2016, Appellant became aware of Judge Turner's candidacy and eligibility for office, *i.e.*, of the basis for the election claims, and Appellant was neither tricked nor induced into delaying filing the petition in the circuit court until May 9, 2017, over a year later. Instead, according to Appellant herself, she elected to await the outcome of the ethics complaint with the Commission before filing the petition in the circuit court. The Court was unable to identify any wrongful conduct on Judge Turner's part that resulted in Appellant's delay in filing the petition in the circuit court. The Court also concluded that the filing of the ethics complaint with the Commission did not support tolling of EL § 12-202(b)'s statutory limitations period, and did not excuse Appellant's failure to timely challenge Judge Turner's eligibility for office under EL § 12-202.

The Court of Appeals held that, independent of the holding that the election claims were barred by EL § 12-202(b) due to the untimely filing of the petition in the circuit court, the doctrine of laches barred the election claims. In filing the petition in the circuit court more than six months after the 2016 general election, there was an unreasonable delay in Appellant's assertion of the election claims, and that delay resulted in prejudice to Appellees. Appellant's filing of the petition in the circuit court on May 9, 2017, more than six months after the 2016 general election, and over a year after Appellant became aware of the facts that formed the basis for the election claims, constituted a clear-cut example of unreasonable delay for purposes of the doctrine of laches. In short, waiting until more than six months after the election to challenge a candidate's eligibility for judicial office was unreasonable, and provided no opportunity

whatsoever for either the circuit court or the Court of Appeals to assess the election claims before the 2016 general election.

The Court of Appeals concluded that, under the circumstances of the case, at a minimum, the unreasonable delay in Appellant's filing of the petition prejudiced Judge Turner and the State Board of Elections. The untimely filing of the petition obviously prejudiced Judge Turner, who relied on the certification of her candidacy and the certification of the general election results, "only to have the results belatedly challenged on a ground that was ripe prior to Election Day." *Ross v. State Bd. of Elections*, 387 Md. 649, 672, 876 A.2d 692, 706 (2005). The State Board of Elections "likewise was prejudiced because it too relied on the correctness of the ballots and expended considerable efforts in overseeing the election when [Judge Turner]'s candidacy could have been protested judicially prior to the election[.]" *Id.* at 672-73, 876 A.2d at 706. Thus, the Court determined that, apart from EL § 12-202(b)'s statutory limitations period, the petition was barred by the doctrine of laches because, in filing the petition in the circuit court more than six months after the 2016 general election, Appellant engaged in unreasonable delay, and that delay resulted in prejudice to Appellees.

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In the Matter of the Albert G. Aaron Living Trust, No. 21, September Term 2017, filed March 26, 2018. Opinion by Barbera, C.J.

https://mdcourts.gov/data/opinions/coa/2018/21a17.pdf

TRUSTS – TRUST CONSTRUCTION

Facts:

Albert G. Aaron created a living trust, into which he transferred most of his assets. He restated the trust once and amended it eleven times over roughly four years. At the time he created the trust, Mr. Aaron was married to Eileen Aaron but had been separated from her for several years. Eileen died, and Mr. Aaron married Myrna Kaplan, his long-time girlfriend.

After Eileen's death and his remarriage to Myrna, Mr. Aaron created the Eleventh Amendment to the trust. Mr. Aaron had been battling esophageal cancer, and he died approximately two weeks after making that amendment.

In the original trust document, Mr. Aaron provided for the creation of a charitable foundation. However, he qualified that "if my wife survives me," the foundation would not be created. Elsewhere, he defined "my wife" to mean "Eileen Aaron" wherever it appeared in the trust. If his wife survived him and the foundation was not created, the money designated for the foundation would be distributed to other beneficiaries.

After Mr. Aaron's death, the Trustees sought to restate the trust, merging the eleven amendments into the original trust to create a single, unified document. The Trustees proposed deleting the language "if my wife survives me," reasoning that the provision was unnecessary because Eileen, the wife to whom he was referring, had already died. Because Mr. Aaron remarried, amended the trust, and was survived by his second wife, Myrna, certain beneficiaries of the trust disputed that the phrase "my wife" meant Eileen.

Held: Affirmed.

The Court of Appeals held that Mr. Aaron intended for the charitable foundation to come into being. Mr. Aaron never changed the definition of "my wife" in the original trust agreement, and he never referred to Myrna as "my wife" without some other qualifier, such as "my current wife." Additionally, before he died, Mr. Aaron modified the composition of the advisory board for the foundation, something he would not have done if he did not intend for it to exist. Given Mr. Aaron's poor health and the fact that, in the Eleventh Amendment, he drastically increased the amount of money Myrna was to receive, the Court held that Mr. Aaron intended to create the charitable foundation and the provision containing the language "if my wife survives me" should be deleted from the trust.

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In the Matter of the Honorable Pamela J. White, Miscellaneous No. 5, September Term, 2016, filed March 27, 2018. Opinion by Adkins, J.

https://mdcourts.gov/data/opinions/coa/2018/5a16m.pdf

JUDGES – REMOVAL OR DISCIPLINE – REPRIMAND – PROCEEDINGS AND REVIEW – MANDAMUS – FAIRNESS OF PROCEEDINGS

Facts:

The Maryland Commission on Judicial Disabilities ("Commission") issued a public reprimand to Judge Pamela J. White for violating Maryland Code of Judicial Conduct ("MCJC") Rule 1.2 (Promoting Confidence in the Judiciary), Rule 2.2 (Impartiality and Fairness), Rule 2.3 (Bias, Prejudice, and Harassment), and Rule 2.11 (Disqualification). The Court previously held that Judge White had no right to appeal the Commission's issuance of a public reprimand. *Matter of White*, 451 Md. 630, 649–50 (2017) (per curiam) [hereinafter "*White I*"]. Although the Court had no appellate jurisdiction to review a judge's exceptions to the Commission's determination to issue a public reprimand after public charges and a contested hearing, the common law writ of mandamus provided an avenue for a judge to challenge the fundamental fairness of the proceedings before the Commission. *Id.*

Judge White challenged several aspects of the proceedings before the Commission. She alleged that the Commission committed procedural missteps before and after issuing public charges against her. Judge White insisted that the Commission's material deviations from the requirements of the Maryland Constitution and the Rules were serious failures that deprived her of procedural due process and thus rendered the proceedings fundamentally unfair.

Held: Petition for writ of mandamus denied.

The Court reiterated its previous holding that "the Commission has a duty to provide procedural due process, as set forth in the State Constitution and Maryland Rules, to an accused judge . . . ." *Id.* at 651. An accused judge is entitled to these elements of procedural due process—notice, an opportunity to respond, [and] a fair hearing—regardless of the outcome—i.e., whether the Commission ultimately decides to dismiss the charges, reprimand the judge, or recommend that we censure, discipline, or remove the judge." *Id.* at 648. The Court addressed Judge White's claims about procedural defects that allegedly occurred before and after the Commission issued public charges.

Proceedings Preliminary To Charges

Judge White contended that Investigative Counsel failed to promptly notify her of the complaints. She asserted that this delayed notification prejudiced her ability to dispute the

allegations before the Inquiry Board, and to raise objections to Investigative Counsel's failure to comply with time standards. Maryland Rule 18-404(e)(4) requires Investigative Counsel to notify the judge of the existence of a complaint before completing a preliminary investigation. Investigative Counsel may delay such notice "for good cause shown." Although Investigative Counsel did not explain why delayed notice or whether she had good cause to do so, the Court concluded that this delay did not prejudice Judge White. Maryland's due process requirements do not require notification of a preliminary investigation before a determination of probable cause.

Next, Judge White objected to several instances of so-called *ex parte* communications between Investigative Counsel and the Inquiry Board or Commission. The Inquiry Board discussed the case with Investigative Counsel at its meetings in 2015. Investigative Counsel was also present at the meetings where the Commission discussed Judge White's case. The Court relied on *In re Diener*, 268 Md. 659, 677 (1973) for the proposition that the Commission's role "as investigator, prosecutor, judge and jury," does not offend due process requirements. The Rules and the Constitution also plainly contemplate ongoing communication between Investigative Counsel and the Commission.

Judge White argued that the Commission did not promptly transmit a copy of the Inquiry Board's report to her before finding probable cause, as required by Maryland Rule 18-404(j)(4). Rather than doing this, the Commission withheld the report, but found probable cause to charge Judge White. The Commission did not send a copy of the report until Judge White requested it. The Commission also agreed to reconsider its probable cause determination after giving Judge White an opportunity to file objections. Judge White filed extensive objections, which the Commission reviewed, before again finding probable cause.

When the Commission sent the Inquiry Board's report to Judge White, it declined to send Investigative Counsel's May 19, 2015 memorandum, which was an attachment thereto. The Commission argued that this was Investigative Counsel's work product and was, therefore, protected from disclosure. The Court concluded that the Commission's failure to send the Inquiry Board's Report violated the Maryland Rules. The Court also rejected the Commission's claim that Investigative Counsel's memorandum was protected work product, because it did not contain any of Investigative Counsel's "strategies, theories, and mental impressions." Although the Commission should have disclosed the report and memo, it remedied this failure by revisiting the probable cause determination.

Proceedings After Charges Filed

After the Commission filed charges against Judge White, she filed several discovery requests seeking information from Investigative Counsel. Investigative Counsel moved to strike these discovery requests arguing that Investigative Counsel was not a "party" to judicial discipline proceedings. The Commission Chair agreed that Investigative Counsel should not be considered a "party" for purposes of applying the civil discovery rules in a judicial discipline proceeding and struck Judge White's discovery requests. The Court rejected this conclusion and held that discovery could not be refused on the grounds that Investigative Counsel is not a party. Despite

this error, Judge White still had an opportunity to review and copy the entirety of the Commission record, which provided her with sufficient information to prepare for her evidentiary hearing.

At the evidentiary hearing, the Commission limited the testimony of several of Judge White's witnesses to ten minutes. Other witnesses were limited to testifying about only certain matters. Judge White testified without limitation. Despite these limitations, her witnesses testified extensively regarding Judge White's good character and her role as supervisor of the Circuit Court's alternative dispute resolution program. Investigative Counsel's case consisted solely of the recordings and transcripts of the hearings and the complaints. Allowing Judge White to present several character witnesses, and unfettered testimony of her own, complied with the basic principles of fairness and did not violate her due process rights. *Maryland State Police v. Zeigler*, 330 Md. 540, 557 (1993).

Finally, Judge White argued that the Commission sanctioned her for conduct beyond the scope of the charges when it determined there were violations of MCJC Rule 1.2 relating to one of the hearings. The charges alleged that she violated MCJC Rule 1.2, and closed by stating that "Judge White's behavior provides evidence that Judge White engaged in conduct that was prejudicial to the proper administration of justice in Maryland Courts . . . ." Judges facing disciplinary proceedings are entitled to notice of the charges against them. *Cf. Attorney Grievance Comm'n v. Seiden*, 373 Md. 409, 416–21 (2003). Here, Judge White was charged with violating MCJC Rule 1.2, and her conduct at the hearing was identified as a basis for the charges. The Commission's sanction did not exceed the charges.

The Commission made several mistakes in Judge White's case. But, after careful scrutiny of these mistakes and the entire record, the Court concluded that Judge White received the fundamental due process protections under the Maryland Constitution and Rules, namely "notice, an opportunity to respond, [and] a fair hearing . . . ." *White I*, 451 Md. at 648.

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Shontel Hunter v. Broadway Overlook, No. 61, September Term 2017, filed March 26, 2018. Opinion by Greene, J.

https://mdcourts.gov/data/opinions/coa/2018/61a17.pdf

REAL PROPERTY ARTICLE – SECTION 8-402.1 – NOTICE REQUIREMENT

Facts:

On February 28, 2017, Respondent Broadway Overlook, Landlord, issued a "Notice to Vacate Property" to the Petitioner Shontel Hunter, Tenant. The letter provided Ms. Hunter notice that she had fourteen (14) days to vacate the property. The notice did not state the reason for eviction. Two days after it provided Ms. Hunter notice to vacate the property, Respondent filed a breach of lease complaint against Ms. Hunter in the District Court of Maryland sitting in Baltimore City. The District Court held a trial on April 14, 2017. At the start of trial, Ms. Hunter moved to dismiss the action on the basis that the Respondent had filed its Complaint prematurely. The Tenant also argued that the "Notice to Vacate" did not specify why she needed to vacate, which, she argued, was a violation of her lease agreement. The District Court denied Ms. Hunter's motion. After receiving evidence, the District Court ruled in favor of the Landlord.

Ms. Hunter appealed to the Circuit Court for Baltimore City. Sitting as an appellate court, the Circuit Court affirmed the judgment of the District Court. The Circuit Court concluded that Real Prop. § 8-402.1(a)(1)(i)(2)(b) requires a landlord to *only* provide notice to the tenant that he or she must vacate in 14 days, not to "exhaust the 14 day period of notice before filing the action." The Circuit Court also held that because the Landlord's Complaint explained the grounds for the relief sought, there was sufficient evidence to affirm the District Court.

With permission of the Court of Appeals, the parties submitted on brief.

Held: Reversed.

The Court of Appeals held that § 8-402.1(a)(1)(i) of the Real Property Article of the Maryland Code provides that before a landlord may file a breach of lease action, the tenant must breach the lease, the notice requirement must expire, and the tenant must refuse to comply with the notice to vacate. The Landlord may not file a breach of lease action prior to the expiration of the fourteen day notice period. Additionally, the Court of Appeals held that the Respondent's "Notice to Vacate" failed to comply with the terms of the lease and was not subsequently cured by the Landlord's Complaint for breach of lease.

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June Diane Duffy, as Personal Representative of the Estate of James F. Piper v. CBS Corporation, f/k/a Viacom, Inc., f/k/a Westinghouse Electric Corp., No. 41, September Term 2017, filed March 28, 2018. Opinion by Greene, J.

https://mdcourts.gov/data/opinions/coa/2018/41a17.pdf

NEGLIGENCE – STATUTE OF REPOSE – CAUSE OF ACTION ARISES – EXPOSURE APPROACH TEST

NEGLIGENCE – STATUTE OF REPOSE – CAUSE OF ACTION ARISES – PROSPECTIVE APPLICATION

Facts:

Mr. James F. Piper worked as a steamfitter during the construction of a steam turbine generator at his place of employment, Morgantown Generating Station. CBS Corp., formerly known as Westinghouse, contracted with his employer to manufacture and install the turbine generator. During the installation of the turbine, Mr. Piper was unknowingly exposed to asbestos contained in the turbine's insulating material. The last possible day of his exposure to asbestos was June 28, 1970.

Two days later, on July 1, 1970, a statute of response, enacted as Article 57, § 20 in the Maryland Code, went into effect. The statute of repose provided a twenty-year temporal limitation to the discovery rule's applicability to causes of action for injuries arising from improvements to real property.

On December 26, 2013, Mr. Piper was diagnosed with mesothelioma. He filed suit against thirty-three defendants, including Westinghouse, in the Circuit Court for Baltimore City. At the close of discovery, Westinghouse filed a motion for summary judgment on the grounds that the statute of repose, now codified at Section 5-108 of the Courts and Judicial Proceedings Article, barred Mr. Piper's causes of action. Specifically, Westinghouse argued that Mr. Piper did not have an injury at the time of his exposure to asbestos and, by bringing his claims more than forty year after his exposure, his causes of action were barred by the temporal limitation provided by Section 5-108. Mr. Piper, on the other hand, argued that his injury arose at the time of his exposure to asbestos and he relied on *John Crane Inc. v. Scribner*, 369 Md. 369, 800 A.2d 700 (2002), for the proposition that an asbestos-exposure related claim arises at the time of exposure to asbestos.

The Circuit Court for Baltimore City granted Westinghouse's motion for summary judgment. Mr. Piper appealed to the Court of Special Appeals, which affirmed the Circuit Court. While the case was pending in the intermediate appellate court, Mr. Piper died and the Petitioner June Duffy was appointed as Personal Representative of Mr. Piper's Estate. Ultimately, Ms. Duffy was substituted in place of Mr. Piper as a party to the litigation.

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Held: Reversed.

The Court of Appeals held that an injury related to asbestos exposure that underlies a cause of action for personal injury or wrongful death arises at the time of exposure. The Court applied the "exposure approach," as previously adopted by the Court in *John Crane Inc. v. Scribner*, 369 Md. 369, 383, 800 A.2d 727, 735 (2002). The Court held that the "exposure approach" was applicable to determine if a party's injuries or cause of action arose prior to the enactment of the Courts and Judicial Proceedings Article § 5-108, originally enacted as Article 57, § 20.

Article 57, § 20 went into effect on July 1, 1970. Mr. Piper's last date of exposure to asbestos was on June 28, 1970. The Court of Appeals held, therefore, that the Estate's causes of action were not barred by the statute of repose because the decedent's injuries or causes of action arose from his unknowing exposure to asbestos, between May 3, 1970 and June 28, 1970, a period of time before the statute of repose was enacted. Accordingly, as a matter of law, the statute of repose does not apply if the injury or the "last exposure undisputedly was before" the effective date of the Courts and Judicial Proceedings Article, § 5-108, formerly Article 57, § 20.

Additionally, the Court of Appeals departed from the reasoning of the Court of Special Appeals, which held that Mr. Piper's injury was his diagnosis of mesothelioma. As such, that court held that Section 5-108 barred Mr. Piper's causes of action, because his injury did not accrue within twenty years after Westinghouse placed the turbine into operation. Consistent with this reasoning, the Court of Special Appeals also held that the terms "arise" and "accrue" had the same meaning based on the use of "arising" in Section 2 of Article 57, § 20 and the use of "accrue" in the purpose paragraph of Article 57, § 20. The Court of Appeals held that these terms have different meanings, particularly in light of the nature of asbestos-related cases where a cause of action accrues at a date much later than when the underlying injury arises. Consistent with prior case law, including *Scribner*, the Court of Appeals held that the discovery rule applied in the context of asbestos-related cases. Because Mr. Piper brought suit within three years of discovering that his underlying injury of exposure to asbestos had developed into a cognizable cause of action, his suit is not barred by the statute of limitations.

COURT OF SPECIAL APPEALS

Phlonda Peay v. Reginald Barnett, No. 1726, September Term 2016, filed March 29, 2018. Opinion by Zarnoch, J.

https://mdcourts.gov/data/opinions/cosa/2018/1726s16.pdf

PERSONAL JURISDICTION – SERVICE OF PROCESS – "MISTAKE" UNDER MARYLAND RULE 2-535(b) – WAIVER

Facts:

In 2006, appellee Reginald Barnett, an inmate at the Maryland Correctional Adjustment Center ("Super Max") was seriously injured after several officers entered his cell and shackled him. Barnett was taken to the hospital in Super Max, transported to an outside hospital to have his wounds sutured, and ultimately, transferred to a different prison. On February 19, 2008, Barnett filed a complaint in the Circuit Court for Baltimore City against several officers whom Barnett alleged to have been involved. The defendants included appellant Phlonda Peay, who was a captain at Super Max at the time of Barnett's injuries. Barnett alleged that Peay, along with three others, approved and supervised the other officers' conduct.

The complaint stated that Peay and the five other officers had the mailing address of the Department of Public Safety and Correctional Services (DPSCS) in Baltimore City. Between May and June of 2008, at least four notices were mailed to Peay and the other five officers via DPSCS. A private process server went to Peay's Owings Mills apartment on December 25, 2008 to serve her with the complaint. Peay's sister, Donna Dingle, answered the door. The process server filed an affidavit on December 31, 2008 stating that Peay's "sister and co-resident" was served with the papers at Peay's Owings Mills home in Baltimore County. Peay did not file an answer to the complaint. Thereafter, the docket indicates that the court's notices were sent often to her home address.

On June 2, 2009, Barnett filed a request for an order of default against the five remaining defendants, including Peay. On July 1, 2009, the circuit court entered a default order against each of the defendants and notice of the default order was mailed to Peay. On August 7, 2009, the circuit court directed the Clerk of the Court to enter judgment against the five remaining defendants. All five defendants were held jointly and severally liable for a total of $500,000 and copies of the judgment were mailed. Six years later, after Barnett was able to start collecting on the judgment through a writ of garnishment on Peay's wages, Peay filed a motion to set aside the judgment, arguing that she was not properly served because her sister did not "reside" at her

home. Although the circuit court concluded that service was improper, it denied the motion, finding that Peay did not exercise "diligence and good faith" as required by cases applying Md. Rule 2-535(b).

Held: Reversed and Remanded

The issue on appeal is whether the circuit court correctly denied Peay's motion to vacate the default judgment against her despite the court's acknowledgment of a defect in service of process. In this case, Peay likely had actual notice of the proceedings and did not diligently challenge the judgment for more than six years. Logic would suggest an obvious yes. However, relevant caselaw suggests the answer is not that simple. The U.S. Supreme Court has said that "[a] defendant is always free to ignore judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, 706 (1982). And the Court of Appeals of Maryland, relying on the proposition that there can be no valid proceeding against a defendant in the absence of proper service, has allowed a challenge four years after entry of a default judgment and six years after actual knowledge of the litigation by the defaulting party. *See Little v. Miller*, 220 Md. 309 (1959).

A "mistake" under Md. Rule 2-535(b) refers only to a "jurisdictional mistake," which includes lack of personal jurisdiction arising out of a defect in service of process. The equitable considerations of "diligence and good faith," do not apply to "jurisdictional mistakes" under Md. Rule 2-535(b) that would render a default judgment void. Once the circuit court determines that the issuing court exceeded either its *in personam* jurisdiction or its subject matter jurisdiction, the court must find the prior judgment invalid.

Further complicating this issue is a trend in the caselaw – particularly in federal courts – making it easier to find that a defaulting defendant has waived personal jurisdiction by his or her conduct. *See Ins. Corp. of Ireland, supra*, 456 U.S. at 703-05. In reliance upon this authority, the Court of Special Appeals concluded that the circuit court, rather than focusing on post-judgment diligence, should have considered whether Peay has waived personal jurisdiction. Thus, we reverse and remand this case for further proceedings.

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Edward Dorsey Ellis Rollins, III v. State of Maryland, No. 10, September Term 2017, filed March 29, 2018. Opinion by Berger, J.

https://mdcourts.gov/data/opinions/cosa/2018/0010s17.pdf

CRIMINAL LAW – JURY INSTRUCTIONS – DISORDERLY CONDUCT – INDECENT EXPOSURE

Facts:

Edward Dorsey Ellis Rollins, III ("Rollins"), appellant, was convicted of one count of indecent exposure and disorderly conduct based upon events that occurred on June 22, 2016 when Rollins repeatedly exposed himself in front of an open door in an Ocean City hotel room. Four women observed the exposure from the enclosed balcony of their condominium unit in a building adjacent to the hotel in which Rollins was staying.

At trial, Rollins asked the court to instruct the jury, with respect to indecent exposure, that the exposure must have been shocking or offensive to the viewer. The circuit court declined to propound the requested instruction.

Rollins further requested that the court specifically instruct the jury that the statutory definition of "public place" provided for the offense of disorderly conduct should not be applied to the "public" element of indecent exposure. The circuit court declined to propound the requested instruction.

With respect to the instruction on disorderly conduct, Rollins requested that the circuit court avoid including the specifically identified examples of "public places" set forth in the disorderly conduct statute. See Md. Code (2002, 2012 Repl. Vol.), § 10-201 of the Criminal Law Article ("CL"). Rollins and the State agreed on most of the language of the disorderly conduct instruction, but Rollins proposed that the circuit court define "public place" as "a place to which the public or a portion of the public has access and a right to resort for business, dwelling, entertainment or other lawful purpose" and avoid listing any examples. The circuit court propounded the State's requested instruction, including the examples.

Held: Affirmed.

The Court of Special Appeals held that the circuit court did not err or abuse its discretion with respect to the jury instructions it propounded.

First, with respect to the indecent exposure instruction, the Court outlined the well-established elements of indecent exposure: (1) a public exposure; (2) made willfully and intentionally, as opposed to inadvertently or accidentally; (3) which was observed, or was likely to have been

observed, by one or more persons, as opposed to performed in secret, or hidden from the view of others. Rollins had argued that the case of *Wisneski v. State*, 398 Md. 578 (2007), established the additional element that a viewer be "shocked or offended" by the defendant's conduct. The Court observed that, in *Wisneski*, the discussion about viewers who were shocked was within the context of explaining how, based on the facts and circumstances in that case, an exposure that occurred in a private home could satisfy the public element of indecent exposure. The Court emphasized that it had previously cited to *Wisneski* for the elements of indecent exposure, without articulating any requirement that a viewer be shocked or offended. Furthermore, the Court noted that neither the Court of Appeals nor the Court of Special Appeals had ever articulated an additional element of indecent exposure requiring that a viewer be shocked or offended. For these reasons, the Court determined that the circuit court properly declined to propound the requested instruction.

The Court further held that the circuit court did not abuse its discretion by declining to propound the clarifying instruction requested by Rollins about the differing definitions of "public place" for the disorderly conduct and indecent exposure charges. The Court emphasized the broad discretion of the circuit court in this context and determined that the circuit court clearly differentiated between the two separate offenses and the separate elements for each offense while instructing the jury

Last, the Court addressed Rollins's assertion that the circuit court erred by including the enumerated examples of a "public place or conveyance" set forth in CL § 10-201. The Court held that the circuit court's instruction, including the legislatively enumerated examples of "public places," was a correct statement of the law.

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Todd Michael Scriber v. State of Maryland, No. 2699, September Term 2016, filed March 29, 2018. Opinion by Graeff, J.

https://mdcourts.gov/data/opinions/cosa/2018/2699s16.pdf

SEXUAL ABUSE OF A MINOR – SUFFICIENCY OF THE EVIDENCE – EXPLOITATION

Facts:

Appellant, a science teacher at a Montgomery County high school, administered a makeup exam to N.S., one of his students. As part of the accommodations for her learning disability, N.S. took a written examination and then had the questions administered orally.

After completing the written examination, N.S. went to the front of the classroom, where appellant was seated in a roller chair, to go over the exam orally. N.S. was wearing a skirt, and she stood approximately 18 inches from appellant. Toward the end of the exam, appellant turned to face N.S. and leaned forward with his hands on his knees and his phone in his hand. The phone was facing downward and the camera was facing upward. Appellant then put the phone almost underneath N.S.' skirt and started clicking the volume button of the phone, which takes pictures when the phone is positioned in the manner described.

At that point, N.S. stepped back and crossed her legs while she finished the oral review of the examination. After completing the examination, N.S. left appellant's classroom and met two of her friends, who were waiting outside of the classroom. N.S. told these two friends about the pictures appellant was taking during the examination. N.S. also told her father and mother.

N.S. filed a complaint with Child Protective Services ("CPS") for Montgomery County. The complaint was forwarded to the Montgomery County Police, which investigated the incident. Upon finding pictures on appellant's phone of the buttocks of adolescent females in the classroom, the police seized appellant's phone to perform a data extraction.

From appellant's phone, the police extracted photographs and thumbnail images of three of appellant's minor-students, which were taken in the classroom. These images included pictures of the buttocks of M.S. No picture of N.S. was discovered.

Appellant was charged with four counts of sexual abuse of a minor in violation of Md. Code (2012 Repl. Vol) § 3-602(b)(1) of the Criminal Law Article ("CR"). Appellant was found guilty on two counts pertaining to his actions toward M.S. and N.S.

Held: Affirmed.

Md. Code (2012 Repl. Vol) § 3-602(b)(1) of the Criminal Law Article ("CR") provides, in pertinent part: "A parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not cause sexual abuse to the minor." Sexual abuse is defined as "an act that involves sexual molestation or exploitation of a minor, whether physical injuries are sustained or not." *Id*. at (a)(4)(i).

In the context of this case, where appellant was a teacher taking multiple photos of a student during school, and the content of the photos, depicting primarily the buttocks of a student bending over what appears to be a table, taken with evidence of photos appellant took depicting only a "young woman's legs and buttocks," a rational trier of fact could conclude that appellant's actions in taking these photos were for his own benefit and constituted exploitation of a sexual nature.

Appellant's action, in placing his phone underneath his student's skirt and taking a picture, was sufficient for a rational trier of fact to find that appellant engaged in an act that involved sexual exploitation at the time he had responsibility for the student's supervision.

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Kevin Sewell v. State of Maryland, No. 2188, September Term 2016, filed March 5, 2018. Opinion by Raker, J.

https://www.courts.state.md.us/data/opinions/cosa/2018/2188s16.pdf

EVIDENCE – PRIVILEGED COMMUNICATIONS – SPOUSAL COMMUNICATIONS PRIVILEGE

Facts:

Kevin Sewell appealed his convictions of first degree murder, child abuse in the first degree, and neglect of a minor. Sewell claimed (1) that the judge should not have admitted text messages between Sewell and his wife, and (2) that the State should not have been allowed to present most of its opening statement from the perspective of the deceased victim.

Before the Court of Special Appeals, Sewell argued that the judge erred by admitting his text messages with his wife when the State had presented no evidence to rebut the presumption of confidentiality in communications between spouses. The State argued that text messages are too insecure to provide a reasonable expectation of confidentiality without additional facts that Sewell did not present.

Sewell also claimed that the State's opening statement from the perspective of the victim constituted a forbidden "golden rule" argument.

Held: Reversed.

The Court of Special Appeals held that the trial court erred in admitting confidential marital communications in the form of text messages in violation of the marital communications privilege. Text messages between spouses are presumed confidential.

Maryland Code Ann. Courts & Judicial Proceedings § 9-105 (2002; 2012 Repl. Vol, 2015 Supp.) makes a spouse "not competent to disclose any confidential communication between the spouses occurring during their marriage." Either spouse can claim the privilege. Marital communications are presumed to be confidential, but if that presumption is rebutted, the claimant then bears the burden of establishing confidentiality. That presumption must be rebutted, however, in order to require the claimant to prove that the communication was confidential. Sending text messages between cell phones does not by itself rebut the presumption of confidentiality.

Sewell's claim regarding the State's opening statement was not preserved.

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The Court held that text messages between spouses are presumed to be confidential communications for the purpose of applying the spousal communications privilege.

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Martez Johnson v. State of Maryland, No. 223, September Term 2017, filed March 2, 2018. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2018/0223s17.pdf

CRIMINAL PROCEDURE ARTICLE SECTION 6-218 – CRIMINAL LAW ARTICLE SECTION 9-405

Facts:

After a jury trial in the Circuit Court for Baltimore City, Martaz Johnson (formerly a Maryland Transportation Authority police officer) was convicted of two counts of second-degree assault and misconduct in office. The circuit court sentenced Mr. Johnson to two concurrent terms of ten years in prison for the former charge and a concurrent five years for the latter, with all but eighteen months suspended. He was incarcerated on August 11, 2015, and appealed his convictions. On November 16, 2015, Mr. Johnson filed a petition asking the court to release him on an appeal bond. The circuit court granted his request but ordered him to be placed in home detention under certain conditions. On December 14, 2015, Mr. Johnson was released on an appeal bond of $25,000 and placed in home detention, subject to the court's conditions. Shortly after this court affirmed his convictions, Mr. Johnson filed a motion to amend the trial court's appeal bond order asking the court to release him from home detention and credit him for the time he served in home detention. After a hearing, the circuit court denied the motion on the ground that a violation of the bond conditions exposed him only to forfeiture of the bond, not to criminal liability of escape, and therefore he was not in "custody" as required by § 6-218 of the Criminal Procedure Article ("CP"), which defines a defendant's right to sentence credits, and not entitled to credit for his time served. Mr. Johnson appealed, challenging the circuit court's denial of his motion to amend the court's appeal bond order.

Held: Reversed and remanded.

The Court of Special Appeals held that the circuit court erred in denying Mr. Johnson's motion to amend the court's appeal bond order and reversed and remanded the case for further proceedings. The Court relied on a synthesis of CP § 6-218 and § 9-405 of the Criminal Law Article ("CR"), which defines the offense escape, and on the nature of Mr. Johnson's confinement in home detention. The Court also analyzed three operative cases—*Maus v. State*, 311 Md. 85 (1987), *Balderston v. State*, 93 Md. App. 364 (1992), and *Dedo v. State*, 343 Md. 2 (1996)—and determined that Mr. Johnson was in "custody" for the purpose of CP § 6-218 and is entitled to credit for his time served while awaiting appeal. Further, the Court determined Mr. Johnson could be charged with escape pursuant to CL § 9-405 based on the nature and extent of his confinement, not on the fact that he was released after being convicted. The Court concluded

that Mr. Johnson's confinement in home detention while released on appeal bond qualified as "custody."

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Oscar Orlando Martinez v. Silvia Trujillo Sanchez, No. 61, September Term 2017, filed March 1, 2018. Opinion by Eyler, Deborah S., J.

https://mdcourts.gov/data/opinions/cosa/2018/0061s17.pdf

SPECIAL IMMIGRANT JUVENILE STATUS – 8 U.S.C. § 1101(a)(27)(J) – STATE COURT PREDICATE ORDER – FIRST-LEVEL FACTUAL FINDINGS.

Facts:

Father filed petition for custody of Daughter and for declaration that she is eligible for Special Immigrant Juvenile ("SIJ") status. Mother was served but did not participate in proceedings. Daughter was born in El Salvador in 2000 and was abandoned by Mother when she was three. Father later moved to the United States for employment and to escape gang activity. Daughter crossed into the United States in Texas in 2015 and was taken into custody by border patrol and released to Father. She has been living with Father and Stepmother in Hyattsville and attending school. At close of evidentiary hearing, court granted custody to Father and granted Daughter SIJ status. Father submitted order that included first-level factual findings. Court crossed out proposed factual findings but signed order containing conclusions that Daughter had been abandoned by Mother and that it was not in Daughter's best interest to return to El Salvador.

Father noted appeal, contending that the court's order was deficient in that, notwithstanding that it stated conclusions necessary for a finding of eligibility for SIJ status, it did not set forth specific first-level factual findings to support those conclusions, and therefore could be rejected by the USCIS when Daughter applies for SIJ status.

Held: Vacated and remanded.

The state court's role in a SIJ matter is to make factual findings in a predicate order that the juvenile then submits to the USCIS in petitioning the federal government for SIJ status. The USCIS may reject a petition if the predicate order is a mere template that gives conclusions but does not make factual findings on which the conclusions are based. All indications in this case are that the trial court credited the testimony by Father and Daughter, but failed to include specific factual findings in its predicate order on the mistaken belief that that was not necessary. Case remanded for the court to issue an adequate predicate order and, if it deems necessary, hold an additional hearing.

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Erik Belfiore v. Merchant Link, LLC, No. 2043, September Term 2016, filed March 1, 2018, Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2018/2043s16.pdf

EMPLOYMENT DISCRIMINATION – DISCRIMINATION BASED ON RACE – MONTGOMERY COUNTY CODE § 27-19(a)(1)(A) (DISCRIMINATORY COMPENSATION) – MONTGOMERY COUNTY CODE § 27-19(c)(1) (RETALIATION) – BURDEN OF PROOF

Facts:

Erik Belfiore served in various executive positions at Merchant Link, LLC ("Merchant Link") over a period of six years, and rose ultimately to the position of Chief Operating Officer. In 2011, he sought a pay increase, and the company was considering it. Before a final decision was made, though, he was terminated after he tried, the company contends, to sabotage an important company project. He challenged his termination in the Montgomery County Office of Human Rights ("OHR"), alleging that he had been fired and, before that, denied the pay increase, on the basis of race. After a six-day evidentiary hearing, a hearing examiner found that Merchant Link had established non-discriminatory reasons to justify his pay and termination, and that Mr. Belfiore failed to establish intentional discrimination or retaliation based on race. The Circuit Court for Montgomery County affirmed the OHR's decision.

Held: Affirmed.

The Case Review Board of the OHR did not err in affirming the hearing examiner's report and recommendation finding that Mr. Belfiore failed to produce evidence to establish his claims for discriminatory compensation under Montgomery County Code § 27-19(a)(1)(A) and retaliation under Montgomery County Code § 27-19(c)(1).

This is the first employment case decided by the Court of Special Appeals that interprets Montgomery County's nondiscrimination laws in a proceeding that originated in the county's administrative process. And in interpreting the county's laws, it is appropriate to apply federal decisions construing comparable federal discrimination laws. Specifically, section 27-1(b) of the Montgomery County Code expressly notes that "[t]he prohibitions in this article are substantially similar, but not necessarily identical, to prohibitions in federal and state law." And Maryland courts interpreting state and county laws prohibiting discrimination have generally found federal decisions construing comparable federal laws persuasive, if not absolutely determinative. *E.g.*, *Taylor v. Giant of Md., LLC*, 423 Md. 628, 652 (2012); *Chappell v. Southern Md. Hosp., Inc.*, 320 Md. 483, 494 (1990); *Edgewood*, 212 Md. App. at 200, n.8.

As for the merits of the claims (specifically, discrimination in compensation and retaliation), the parties agreed that there was no evidence of direct discrimination, and that therefore the three-step burden-shifting analysis first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) applies. *See Dobkin v. Univ. of Baltimore Sch. of Law*, 210 Md. App. 580, 592–93 (2013). At the first step, the employee must establish a *prima facie* case of discrimination or retaliation. *McDonnell Douglas*, 411 U.S. at 253; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). At Step 2, the employer can rebut the *prima facie* case by presenting evidence of "some legitimate, nondiscriminatory reason" for the alleged disparate treatment or retaliation. *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 254. At Step 3, the plaintiff employee must prove that the proffered reasons were pretextual or unworthy of credence and that discrimination or retaliation was the real reason. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515 (1993); *Burdine*, 450 U.S. at 253.

The hearing examiner did not err in finding that Mr. Belfiore succeeded in establishing a *prima facie* case as to both claims under the first step, but that he did not ultimately succeed in proving his claims. Under the second step, Merchant Link produced sufficient evidence of legitimate, nondiscriminatory reasons for the difference in pay and Mr. Belfiore's firing. Under the third step, however, Mr. Belfiore failed to produce evidence sufficient to establish that those reasons were pretextual, and were in fact caused by racial discrimination.

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Comptroller of the Treasury v. Jason Pharmaceuticals, Inc., No. 1952, September Term 2016, filed March 1, 2018. Opinion by Zarnoch, J.

https://mdcourts.gov/data/opinions/cosa/2018/1952s16.pdf

TAX – INTEREST ON TAX REFUND CLAIM – ERROR "ATTRIBUTABLE TO THE STATE"

Facts:

Jason Pharmaceuticals, Inc. ("JPI") is a Maryland corporation and a subsidiary of Medifast that sells and distributes weight-management products. It prints paper materials to sell to customers at Medifast's weight-loss centers. JPI operates a printing shop on Maryland's Eastern Shore, where it leases four large printing machines from Xerox Corporation ("Xerox"). JPI paid sales tax with each lease payment to Xerox from November 2007 through January 2013. On May 10, 2012, JPI filed a refund claim with the Comptroller's Office for $332,365 in sales tax overpayments for the preceding four years. Even after JPI filed its first refund claim, it continued to pay sales tax while the company conducted an internal review of whether it met the exemption criteria. On September 4, 2012, JPI filed a second refund claim for the period of March through August 2012.

Between July 2012 and May 2013, an auditor with the Comptroller's Office reviewed JPI's records and samples of printed materials. In January 2013, after JPI completed its own internal review, JPI finally stopped paying sales tax. On May 15, 2013, however, the Refund Supervisor at the Comptroller's Office issued a denial letter for both refund claims, subject to JPI's option to request an informal hearing. The hearing officer reversed the Comptroller's Office's decision, finding that JPI's use of the printers met the criteria for the exemption and that JPI was entitled to a refund. Soon after, JPI received refund checks totaling more than $337,000. In the final determination letter, the hearing officer concluded that, although JPI was entitled to the refunds, it was not entitled to recover interest on the refunds from the State.

JPI appealed the Comptroller's final determination on the issue of interest to the Maryland Tax Court. The Tax Court ordered the Comptroller to pay interest on the refunds. The Comptroller filed a petition for judicial review with the Circuit Court for Anne Arundel County, which upheld the Tax Court's decision.

Held: Reversed and remanded

The issue on appeal is whether there was substantial evidence in the record before the Tax Court to support its conclusion that JPI was entitled to interest on its refund of sales tax. Whether JPI's use of the printers met the criteria for exemption involved measuring what proportion of its

printed materials were for sale. There is no dispute that JPI's use of the printers met the exemption and that it was entitled to a refund of the sales tax. A significant exception to a State agency's obligation to pay interest, however, is that "[a] tax collector may not pay interest on a refund if the claim for refund is: . . . based on . . . an error or mistake of the claimant not attributable to the State or a unit of the State government . . . ." TGA § 13-603(b)(2)(i).

A foundational question for the Tax Court in this case was what was the relevant law, regulation, or policy expressed by the State that led to or caused JPI's erroneous payment. Only after the law or policy that led to the error is identified does it become relevant whether the taxpayer used "reasonable judgment under the circumstances." *See Comptroller v. SAIC*, 405 Md. 185, 201 (2008). For a taxpayer who mistakenly pays a tax to be entitled to interest in addition to a refund, there must be some reason to attribute fault to the State for the taxpayer's error.

The Court of Special Appeals noted that although an auditor would have denied the refund, the final determination of the Comptroller was that JPI was entitled to the refund. In addition, the Court concluded that substantial evidence did not support the Tax Court's determination that JPI was "led by the laws, regulations, or policies expressed by the State to the mistaken conclusion that tax [was] owed." *See SAIC*, 405 Md. at 192. As a result the appellate court reversed and remanded for a ruling upholding the Comptroller.

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Richard Beavers Construction, Inc., et al. v. Dexter Wagstaff, No. 1977, September Term 2016, filed March 1, 2018. Opinion by Arthur, J.

https://mdcourts.gov/data/opinions/cosa/2018/1977s16.pdf

WORKERS' COMPENSATION – AVERAGE WEEKLY WAGE

Facts:

In the middle of February 2013, Dexter Wagstaff began working as a lift operator for Richard Beavers Construction, Inc. (RBCI). RBCI agreed to pay him at a rate of $18.95 per hour. RBCI hired him for the purpose of working "full time," meaning "40 hours a week."

Although Mr. Wagstaff needed to be available to work eight hours a day for five days a week, RBCI instructed him not to report to the construction site when it was raining or snowing. He would not earn pay when he could not work because of poor weather. Over the next six weeks, frequent rain and occasional snow prevented him from working full, 40-hour weeks. During that period, he worked for an average of only 16.75 hours per week, for which he received average gross earnings of $317.41 per week.

On April 1, 2013, Mr. Wagstaff suffered an accidental injury at the construction site, when he fell through a roof and landed face-first on a warehouse floor, 18 feet below. He suffered extensive traumatic injuries which required surgery and long-term therapy.

Mr. Wagstaff submitted a claim to the Workers' Compensation Commission. He reported gross weekly wages of $758.00, the amount that he would earn from working 40 hours at the rate of $18.95 per hour.

RBCI submitted records of his actual earnings during the six weeks before the accident. Based on that submission, the Commission initially determined that his average weekly wage was $317.38. Using the statutory formula for temporary total disability, the Commission ordered RBCI and its insurer to pay $212.00 per week to Mr. Wagstaff.

Eventually, the Commission held a hearing on the issue of average weekly wage. RBCI and its insurer asserted that the correct average weekly wage was $317.44, as shown in the wage records; Mr. Wagstaff asserted that his average weekly wage should be $758.00, based on a 40-hour work week at the rate of $18.95 per hour.

At the hearing, Mr. Wagstaff testified that he had been hired to work "full time," meaning "40 hours a week." He explained that inclement weather was the sole reason that he did not actually work 40-hour weeks after being hired. The owner of RBCI, who also testified at the hearing, did not dispute that RBCI had hired Mr. Wagstaff for the purpose of working "on a full-time basis."

After the hearing, the Commission found Mr. Wagstaff's average weekly wage to be $758.00 and, accordingly, ordered an adjustment to his compensation. Under the statutory formula, therefore, he was entitled to receive $505.33 per week while temporarily totally disabled.

RBCI and its insurer petitioned for judicial review in the Circuit Court for Talbot County.

RBCI and its insurer then moved for summary judgment, based on deposition testimony from Mr. Wagstaff and on the record of the proceedings in the Commission. They contended that, as a matter of law, Mr. Wagstaff's average weekly wage needed to be calculated using the actual hours worked. On that basis, they asserted that the "correct" average weekly wage was $317.44. The circuit court denied their motion.

Before trial, all parties submitted a joint motion in which they agreed that there were no factual disputes. They presented additional written and oral arguments on the same legal issue that was the subject of the summary judgment motion.

On November 2, 2016, the circuit court issued an order confirming the Commission's decision and upholding the finding that Mr. Wagstaff's average weekly wage is $758.00.

RBCI and its insurer noted a timely appeal from the circuit court's judgment.

Held: Affirmed.

On appeal, RBCI and its insurer raised the single issue of whether the Workers' Compensation Commission erred when it determined that Mr. Wagstaff's average weekly wage was $758.00. RBCI and its insurer contended that the Commission was required as a matter of law to calculate his average weekly wage by adding up his gross earnings from the six weeks before the accident and then dividing that total by six.

The Court of Special Appeals concluded that the Commission's decision was not premised on an error of law. The Commission was not required to calculate the employee's average weekly wage based on the actual earnings before the accident where: the employee was injured only a short time after being hired to work 40 hours per week; the employee worked substantially less than 40 hours per week before the accident; the circumstances called into question whether the actual hours worked in that time period were representative of his normal working hours; and the parties presented only two options for determining the average weekly wage.

First, RBCI and its insurer argued that a "plain reading" of the Workers' Compensation Act required the Commission to calculate average weekly wage solely based on actual earnings. Section 9-02(a)(1) of the Labor and Employment Article states that "the average weekly wage of a covered employee shall be computed by determining the average of the weekly wages of the covered employee ... when the covered employee is working full time; and ... at the time of ... the accidental injury[.]" RBCI and its insurer argued that this provision clearly meant that average

weekly wage must be based on the "actual weeks worked" prior to the accident. The Court did not see such a limitation expressed in the statutory language.

The Court reasoned that the meaning of the key phrase, "when the covered employee is working full time," is unclear for an employee who is hired for the purpose of working full time but who is not actually working those full-time hours before the accident. Consistent with the purpose of compensating employees for lost earning capacity, "average weekly wage is based on what the employee would earn from the employer where working under a specific contract of hire existing between the employer and employee." *Crowner v. Balt. United Butchers Ass'n*, 226 Md. 606, 610 (1961). What an employee "would earn" under the contract existing at the time of the injury is not necessarily identical to what the employee had "earned" immediately prior to the injury.

RBCI and its insurer insisted that Mr. Wagstaff received an impermissible "windfall" through his injury— i.e., that he would earn more by being injured than if he had continued working. The Court was unconvinced by that argument, because it depended on the dubious premise that the six-week earning history truly represented his normal working hours. If the six-week sample significantly understated his normal hours, then using it to determine his benefits would result in an unwarranted windfall for the employer and insurer. In many situations involving newly-hired employees, an inflexible requirement tying an injured employee's compensation to pre-accident earnings would subvert the statutory purpose of compensating employees for lost earning capacity.

RBCI and its insurer also purported to rely on COMAR 14.09.03.06, the regulation that establishes the procedure for determining average weekly wage. Section (B) of the regulation states that, "[a]s soon as practicable" after the employee files a claim, "the employer/insurer shall file a wage statement containing" information about the "average wage earned by the claimant during the 14 weeks before the accident." RBCI and its insurer argued that this provision required the Commission to calculate average weekly wage based on actual wages from the 14 weeks prior to an accident. In fact, the regulation states only that the employer or insurer "shall file a wage statement" containing certain information; it does not purport to require the Commission to use any particular method of calculation.

The subsequent section, COMAR 14.09.03.06(C), obligates all parties to "produce evidence from which the Commission can determine an accurate average weekly wage at the first hearing[,]" and states that the Commission shall determine average weekly wage at that hearing. This regulation permits parties to contest whether the 14-week wage statement accurately represents what the employee would earn from the employer under the contract in existence at the time of the injury. In cases where the Commission holds a hearing, the regulation does not restrict the Commission from using a different time period if the Commission deems it appropriate to do so. Where the Commission holds a hearing, it may decide the most appropriate basis for its calculation according to the unique facts of each case.

The Court of Special Appeals rejected the assertion that the Commission made a "hypothetical" or "speculative" determination when it selected the 40-hour week as the basis for its calculation. Mr. Wagstaff had testified that RBCI hired him to work on a full-time basis, meaning 40 hours

per week, at the rate of $18.95 per hour. His testimony sufficiently supported the conclusion that $758.00 per week was a reasonable approximation of what he would normally earn in his position.

It was also undisputed that he had actually earned about $317.44 per week because he worked only 16.75 hours per week during the six weeks after he was hired. Yet the Commission had reason to conclude that this six-week history did not accurately reflect what he would expect to earn in his position. The Commission could reasonably conclude that the weather during that period (rain or snow on about three out of every five work days) was abnormal. Given that the parties had presented the Commission with only two options ($314.44 or $758.00), it was not unreasonable to conclude that $758.00 was the better approximation of what he would have earned if not for the injury.

RBCI and its insurer also sought support *Stevenson v. Hill*, 171 Md. 572 (1937). In that case, the Court of Appeals reasoned that variations in working hours that are an ordinary incident of employment, such as seasonal reductions in hours, should be a factor in the computation of average weekly wage. The record in *Stevenson v. Hill*, however, included the employee's 53-week earning history and information about the employer's days of operation in a full year before the accident, which the parties had agreed were no shorter than those of others in the region. Thus, the claimant could not reasonably dispute that the 53-week earnings history was a representative sample. In this case, by contrast, RBCI and its insurer relied exclusively on a wage statement covering the six-week period before the accident. They did not provide information about the total hours that lift operators for RBCI, or similarly-situated employees at RBCI or comparable firms, normally work throughout the year. An employee's six-week earnings history, without more, is not conclusive proof of what that employee would expect to earn from the employer in a normal week.

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ATTORNEY DISCIPLINE

By an Opinion and Order of the Court of Appeals dated March 2, 2018, the following attorney has been disbarred:

GREGORY ALLEN SLATE

*

By an Order of the Court of Appeals dated January 3, 2018, the following attorney has been disbarred by consent, effective March 5, 2018:

STACY ENID LEBOW SIEGEL

*

By a Per Curiam Order of the Court of Appeals dated March 6, 2018, the following attorney has been disbarred:

CLAIRE L.K.K. OGILVIE

*

By a Per Curiam Order of the Court of Appeals dated March 6, 2018, the following attorney has been disbarred:

STEPHEN HOWARD SACKS

*

By an Order of the Court of Appeals dated March 13, 2018, the following attorney has been disbarred by consent:

MARTIN BERNARD BROWN

*

By an Order of the Court of Appeals dated March 14, 2018, the following attorney has been indefinitely suspended by consent:

GRACE BADOLATO KILCHENSTEIN

*

*

By an Opinion and Order of the Court of Appeals dated February 15, 2018, the following attorney has been suspended for thirty days, effective March 19, 2018:

VERNON CHARLES DONNELLY

*

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

ELIZABETH MARGARET FISCHER

*

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

MIKE MEIER

*

By an Order of the Court of Appeals dated March 23, 2018, the following attorney has been suspended:

JASON MARK SIMS

*

By an Opinion and Order of the Court of Appeals dated March 27, 2018, the following attorney has been disbarred:

ANNA G. AITA

*

By an Order of the Court of Appeals dated March 27, 2018, the following attorney has been placed on inactive status by consent:

ANN O. JARRELL

*

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RULES ORDERS AND REPORTS

A Rules Order pertaining to amendments to the One Hundred Ninety-Third Report and supplement of the Standing Committee on Rules of Practice and Procedure was filed on March 6, 2018.

https://www.courts.state.md.us/sites/default/files/rules/order/ro193amendment.pdf

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UNREPORTED OPINIONS

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

https://mdcourts.gov/appellate/unreportedopinions

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