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COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Tiffany T. Alston, AG No. 13, September Term 2011, filed September 25, 2012. Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2012/13a11ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – INDEFINITE SUSPENSION

Facts:

Petitioner, the Attorney Grievance Commission (Commission), acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against attorney Tiffany T. Alston, Respondent. Petitioner alleged violations of the Maryland Lawyers' Rules of Professional Conduct (MLRPC) based on two separate matters: Respondent's conduct in connection with her representation of a client, and Respondent's failure to comply with trust account requirements pursuant to Maryland Rule 16-606.1. The Court of Appeals assigned the matter for a hearing to the Honorable Alfred W. Northrop of the Circuit Court for Prince George's County.

Respondent did not file an answer to the petition for disciplinary action, prompting Bar Counsel to file a Request for an Order of Default, pursuant to Maryland Rule 16-754(c) and 2-613(b). The Order of Default was granted, and Respondent was notified that she had 30 days within which to move to vacate the order. Respondent did not file a motion to vacate within the time allotted. Instead, Respondent brought with her to court on the date of the hearing a Motion to Reconsider and Request to Vacate the Order of Default, *Nunc Pro Tunc*. Respondent was not present in the courtroom when the case was called, and Judge Northrop proceeded with ex parte proof from Bar Counsel of the charged MLRPC violations, denying Respondent's motion to vacate. When Respondent arrived in the courtroom after the hearing had concluded, 42 minutes after the scheduled start time, Judge Northrop denied Respondent's request to re-open the hearing.

Based on the evidence presented at that hearing, the judge found the following facts. Respondent voluntarily entered into a Conditional Diversion Agreement (CDA) with Bar Counsel, and therein acknowledged several violations of the MLRPC. Respondent acknowledged that she failed to act with reasonable diligence in representing a client, failed to keep the client reasonably informed, and, after being discharged by the client, failed to respond promptly to requests made by the client and her new counsel for the client's file and an accounting of the client's retainer fee payments. Respondent also acknowledged her failure to comply with the trust account requirements of Maryland Rule 16-606.1, and acknowledged that she knowingly failed to respond to lawful demands for information from a disciplinary authority. Additionally, Judge Northrop found that Respondent failed to satisfy the provision in the CDA in

which Respondent agreed to have her law practice monitored by failing to provide the law practice monitor with access to information.

Based on these findings of fact, Judge Northrop concluded that Respondent had violated MLRPC 1.3 (diligence), 1.4(a)(2) (communication), and 1.16(d) (declining or terminating representation) in connection with her representation of a client, based on Respondent's signed acknowledgment in the CDA. With respect to trust account irregularities, Respondent violated MLRPC 1.15(a) (safekeeping property) and 8.1(b) (bar admission and disciplinary matters), also based on her signed acknowledgment in the CDA. Additionally, Judge Northrop found that Respondent violated MLRPC 8.4(a) (misconduct) by violating the previously mentioned rules, and she violated MLRPC 8.4(d) (misconduct) by failing to provide the law practice monitor with information needed to fulfill his reporting obligations. Judge Northrop found no mitigating factors, based on Respondent's repeated instances of uncooperative behavior and tardiness.

Respondent filed several exceptions alleging procedural errors committed by the Commission and Judge Northrop. First, Respondent, a member of the Maryland General Assembly's House of Delegates, contended that she was improperly denied a legislative continuance, pursuant to Maryland Code § 6-402, Courts and Judicial Proceedings Article, and Maryland Rule 2-508(d). Respondent argued that, as a result of this denial, the Commission violated her substantive and procedural due process rights and deprived her of a full opportunity to be heard on the facts underlying the alleged violation of the CDA. Second, Respondent argued that, because the hearing before Judge Northrop was held beyond the 120-day period after service of this Court's order designating the hearing judge pursuant to Maryland Rule 16-757(a), the court lacked jurisdiction to hear the case and make findings of fact and conclusions of law. Third, Respondent alleged that Judge Northrop abused his discretion when he refused to vacate the Order of Default.

Held:

Respondent's exceptions were denied. Assuming, without deciding, that Respondent would have been eligible for a legislative continuance in connection with an Attorney Grievance matter, she failed to present any record of a timely request for such a continuance. The first instance in which she claimed this entitlement came after the time to respond to Bar Counsel's petition to revoke the CDA had already passed. The Commission was under no obligation to grant Respondent's post hoc request for such a continuance. Rather, the Commission owed Respondent consideration of her request and, having considered the request, did not abuse its discretion in denying it.

Respondent's exception regarding the jurisdiction of the hearing judge was moot, as the Court of Appeals already addressed that issue. The Court had granted the Commission's motion to extend the time period within which to hold the hearing, curing any jurisdictional or procedural defect based on non-compliance with Maryland Rule 16-757(a).

The Court concluded that Judge Northrop did not abuse his discretion in denying Respondent's Motion to Vacate the Order of Default, which was unsigned, not properly docketed, not properly filed, and submitted on the day of the hearing. Trial courts have broad discretion to grant or deny a motion to vacate an order of default. Here, Respondent's motion was untimely and Respondent failed to appear when the matter was called. Therefore, Respondent's final exception was denied.

The Court determined that Respondent violated MLRPC 1.3, 1.4(a)(2), 1.15(a), 1.16(d), 8.1(b), and 8.4(a) and (d) in the same manner described in the hearing judge's findings of fact and conclusions of law. The Court concluded that the appropriate sanction for such violations is indefinite suspension.

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Luat D. Duckett, M.D., et. al. v. Raenora Riley, No. 61, September Term 2007, filed August 29, 2012. Opinion by Bell, C.J.

http://mdcourts.gov/opinions/coa/2012/61a07.pdf

CIVIL PROCEDURE – TRIALS – JURY TRIALS – RIGHT TO JURY TRIALS

Facts:

Respondent Raenora Riley filed a medical negligence action against petitioner Luat D. Duckett, M.D. in the Circuit Court for Prince George's County on November 12, 2003. The complaint did not contain a prayer for a jury trial. Additionally and contemporaneously, Ms. Riley filed a civil non-domestic case information sheet (case information sheet), a pre-printed form. On that form was a section for jury demand, with boxes, where trial preference for a jury could be indicated by checking "yes" or "no." Ms. Riley placed an "x" in the "yes" box indicating she was demanding a jury trial. The case information sheet, either the original form or a photocopy, was not served on Dr. Duckett.

Upon discovering the jury trial request through the clerk's sentencing order, the respondent moved to amend the scheduling orders to indicate a bench trial. Petitioner opposed. After a hearing, the judge denied the petitioner's motion to amend the scheduling order, concluding the request was proper. When the case was called for trial before a different judge, the petitioner renewed his objection to the insufficiency of the jury demand. The trial judge agreed, reversing the pre-trial ruling. A bench trial commenced, resulting in a judgment for the petitioner.

The Court of Special Appeals, in an unreported opinion, reversed the trial judge. The Court of Appeals subsequently granted a timely filed petition for writ of certiorari to review the case.

Held:

(1) A case information sheet is not a "pleading," for purposes of demanding a jury trial under Maryland Rule 2-325(a).
(2) A case information sheet does not qualify as a "paper," for the purposes of Maryland Rule 2-325(a) because Maryland Rule 2-112(a) and Maryland Rule 2-111(a) contain references to both the case information sheet and a "paper," and because the case information sheet's sole purpose was case management, as stated in Maryland Rule 15-202(b)(3).

Konnyack A. Thomas v. State of Maryland, No. 130, September Term 2011, filed October 26, 2012. Opinion by Battaglia, J.

Bell, CJ., dissents.
Adkins, J., concurs and dissents.

http://mdcourts.gov/opinions/coa/2012/130a11.pdf

CRIMINAL LAW – FIFTH AMENDMENT – *MIRANDA* WARNINGS – CUSTODIAL INTERROGATION

Facts:

Montgomery County police called Konnyack A. Thomas, Petitioner, to ask him to come to the police station to discuss an issue with one of his children. Thomas agreed, and, while driving to the police station, telephonically spoke with his wife, who informed him that the police wanted to talk about allegations his daughter had made about inappropriate sexual contact that Thomas had with the girl.

Upon arriving at the police station, Thomas was met by two detectives who were not in uniform and carried neither weapons nor handcuffs. The detectives led Thomas back into an interrogation room, informed him that he was not under arrest, and informed him that the door to the interrogation room would remain unlocked. Thomas was never restrained and was left alone for a period of time so that he could write a letter to his daughter, but was not read *Miranda* warnings. During the course of the interview, Thomas confessed to having sex with his daughter on multiple occasions, and, after the interview ended, Thomas was arrested.

At the suppression hearing, the circuit court judge suppressed the confessions that Thomas made, reasoning that he was "in custody" at the time he made the confessions, such that, absent *Miranda* warnings, anything he said was inadmissible. The State appealed, and the Court of Special Appeals reversed, holding that Thomas was not "in custody" and, therefore, that *Miranda* warnings were not necessary.

Held: Affirmed.

The Court of Appeals affirmed the Court of Special Appeals. The Court examined the totality of the circumstances surrounding Thomas's interrogation, including the events before, during, and after the questioning, and held that a reasonable person in Thomas's position would have felt free to end the encounter and leave. The Court's holding was based on Thomas's voluntary decision to come to the police station, even after speaking with his wife in the car; the absence of weapons, uniforms, or handcuffs; the lack of any restraint on Thomas's freedom of movement; and that Thomas was left alone for a period of time.

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Nathaniel Paul McMillan v. State of Maryland, No. 132, September Term 2008, filed August 24, 2012. Opinion by Bell, C.J.

http://mdcourts.gov/opinions/coa/2012/132a08.pdf

CRIMINAL LAW – DEFENSES – DURESS – FELONY MURDER

CRIMINAL LAW – DEFENSES – DURESS – FELONY MURDER – JURY INSTRUCTIONS

Facts:

Nathaniel Paul McMillan, the petitioner, was charged with first-degree premeditated murder, first-degree felony murder, and second-degree murder. He was tried by a jury in the Circuit Court for Prince George's County. Arguing that his participation in the crimes with which he was charged was coerced, he requested that the jury be instructed on the defense of "duress." The trial court refused. He was subsequently convicted of first-degree felony murder.

The petitioner appealed to the intermediate appellate court which, although it rejected the State's argument that the defense of "duress" is not applicable to felony murder, affirmed the judgment of the Circuit Court. The petitioner subsequently filed, in the Court of Appeals, a Petition for Writ of Certiorari, which the Court granted, along with a cross-petition filed by the State.

Held:

(1) Duress is available as a defense to felony murder if it is available as a defense to the underlying felony; (2) A defendant need not prove an attempt to thwart the crime in order to establish duress. The Court of Appeals agreed with the intermediate appellate court, which explained that if duress is available as a defense to the underlying felony, it is also available as a defense to felony murder arising from that felony. The Court reasoned that, barring a statute imperative, it would be unwarranted for a defendant to have a complete defense to the felony that forms the basis of the murder charge, yet still be convicted of the murder because he is unable to present that defense at trial.

The Court of Appeals also reinforced the standard that a defendant need only show "some" evidence of each element of a defense in order to be entitled to it. The Court specifically determined that evidence of affirmative obstructionist actions, such as calling the police, is not an element of duress that a defendant must prove in order to be entitled to the defense.

Warren Jerome Yates v. State of Maryland, No. 8, September Term 2012, filed October 23, 2012. Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2012/8a12.pdf

APPELLATE PROCEDURE – REVERSIBLE ERROR – CUMULATIVE EVIDENCE

CRIMINAL LAW – FELONY MURDER – CONTINUOUS TRANSACTION

APPELLATE PROCEDURE – STANDARD OF REVIEW – PLAIN ERROR

Facts:

Seeking to buy several pounds of marijuana, Donald Kohler contacted two men who put him in touch with Petitioner, Warren Jerome Yates. Petitioner, Kohler, and their associates met at a home in Middle River, Maryland, to exchange the drugs for money. After Kohler handed Petitioner a bag containing fake currency, Kohler fled the house and Petitioner chased after him carrying a handgun. Petitioner fired at Kohler, but instead shot and killed Shirley Worcester, a woman unconnected to the drug deal who happened to be standing outside her home at the time the shots were fired. After the shooting, Petitioner told two men who were present for the drug deal that he was not sure if his shots hit Kohler or not.

Petitioner and Kohler stood trial together before a jury in Baltimore County Circuit Court. During the trial, and over Petitioner's objection, a detective who interviewed one of the men present for the drug deal said that the man told the detective that Petitioner said, "I popped that nigga" after the shooting. Petitioner was convicted of second-degree felony murder, distribution of marijuana, and other related offenses.

Petitioner appealed, arguing that the detective's testimony was inadmissible hearsay; that Petitioner could not be convicted of felony murder because the underlying felony, distribution of marijuana, was complete at the time the killing occurred; and that the trial court incorrectly instructed the jury on the elements of felony murder by not telling jurors that the killing must take place "during the commission or attempted commission" of the underlying felony. The Court of Special Appeals rejected all of Petitioner's arguments and affirmed his convictions.

Held: Affirmed.

The Court of Appeals held that Petitioner was not entitled to a new trial based on the trial court's decision to admit the detective's hearsay. Assuming the hearsay was admitted in error, the Court noted that it was cumulative of other evidence, to which Petitioner did not object, offered at trial. The Court observed that two witnesses besides the detective testified that Petitioner admitted to

firing his gun at Kohler, and the substance of those statements and the detective's hearsay statement were similar enough that it did not ultimately affect the jury's verdict.

The Court affirmed Petitioner's conviction for second-degree felony murder, holding that a person can be convicted of felony murder even if the elements of the felony are completed at the time of the killing. The Court held that a killing constitutes felony murder when the homicide and felony are part of a continuous transaction and are closely related in time, place, and causal relation. The Court noted that the underlying felony of distribution of marijuana and Worcester's killing occurred very close in time and location, and the shooting stemmed directly from the drug deal that preceded it. As a result, the two events were part of a continuous transaction and the Court of Special Appeals did not err in affirming Petitioner's second-degree felony murder conviction.

The Court also held that the Court of Special Appeals did not abuse its discretion in declining to review the jury instructions for plain error. Plain error is reserved for errors that are compelling, extraordinary, exceptional, or fundamental to assuring the defendant a fair trial. The Court of Special Appeals did not abuse its discretion by giving great weight to the fact that the trial court used a pattern jury instruction, and consequently declining to conduct a plain error review of the instructions.

George J. Carroll v. State of Maryland, No. 126, September Term 2011, filed September 27, 2012. Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2012/126a11.pdf

JURY INSTRUCTIONS – REASONABLE DOUBT

MERGER – CONSPIRACY TO COMMIT ARMED ROBBERY – ATTEMPTED ARMED ROBBERY

Facts:

Petitioner, George J. Carroll, and two other men, Nicholas Cann and Zachary Lee, approached a group of teenagers at a Frederick County, Md. campsite on the night of April 24, 2010. Petitioner, Cann, and Lee, who carried machetes and a baseball bat, invited the teenagers to visit their campsite later. After a brief conversation, Petitioner, Cann, and Lee departed. Approximately 15 to 20 minutes later, the teenagers were forced from their tent by the men, who still wielded machetes and the bat. Petitioner, Cann, and Lee demanded money and valuables from the teenagers, along with their identification cards, and threatened them with the weapons. The three men eventually agreed that one of the teenagers should drive to an ATM to retrieve more cash. Cann rode in the front seat of the vehicle as one of the teens drove, and the rest of the teenagers sat in the backseat. The driver was able to alert police to the situation by flashing his high beams at oncoming traffic, and Cann was arrested at the vehicle. Police later apprehended Petitioner and Lee near the campsite.

At trial, Petitioner requested that, in addition to Maryland Criminal Pattern Jury Instruction (MPJI-Cr) 2:02 on reasonable doubt and the presumption of innocence, an instruction be given to the jury stating, "The State has the burden to prove each element of a charge beyond a reasonable doubt." Similarly, Petitioner requested that the instruction for each charged offense include the statement, "In order for a person to be convicted, the State must prove beyond a reasonable doubt each of these . . . elements." The trial court denied these requests, and, for all but the conspiracy charge, read MPJI-Cr 2:02 in conjunction with the pattern instruction for each substantive offense charged.

Petitioner was tried by a jury and convicted of four counts each of attempted armed robbery, conspiracy to commit armed robbery, second-degree assault, and reckless endangerment. At sentencing, Petitioner argued that the four conspiracy convictions should merge into one, and that the remaining conspiracy conviction should then merge with the attempted armed robberies. The trial court merged second-degree assault and reckless endangerment, but did not merge the four conspiracy convictions or the attempted armed robbery convictions. The Court of Special Appeals merged the four conspiracy convictions into one, as the facts of the case reflected only one conspiracy. The Court of Special Appeals, however, declined to merge conspiracy with attempted armed robbery, and rejected Petitioner's challenge to the jury instructions.

Held: Affirmed.

With respect to the jury instructions, Petitioner argued that the trial court's failure to give the requested instructions amounted to a denial of due process and a violation of Maryland Rule 4-325(c). Although the Court of Appeals agreed with Petitioner that under *In re Winship*, 397 U.S. 358 (1970), the Constitution "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," the Court did not agree that a more explicit statement of the State's burden is required in the jury instructions. Notably, the Court strongly endorsed the use of MPJI-Cr 2:02 in *Ruffin v. State*, 394 Md. 355, 906 A.2d 360 (2006), thus implying satisfaction with the constitutional sufficiency of the pattern instruction. The instructions given, reviewed as a whole, adequately conveyed to the jury the appropriate standard of proof. Because the State's burden of proof was fairly covered in the instructions actually given, there was no violation of Rule 4-325(c). Notwithstanding the holding, the Court suggested that the Maryland State Bar Association Committee on Maryland Pattern Jury Instructions should consider amending MPJI-Cr 2:02 to include explicit language instructing that the State has the burden to prove beyond a reasonable doubt each element of each charged offense.

Regarding merger, Petitioner acknowledged that his convictions for attempted armed robbery and conspiracy to commit armed robbery did not merge under the required evidence test or the rule of lenity. Instead, Petitioner sought to merge the convictions under principles of fundamental fairness as stated in *Monoker v. State*, 321 Md. 214, 582 A.2d 525 (1990). He argued that both offenses were inchoate and that the fleeting nature of the conspiracy made it part and parcel of the attempted armed robberies. The Court noted that fundamental fairness requires merger of separate convictions only in rare instances. The conspiracy to commit armed robbery and attempted armed robbery are distinct offenses, and each targets different conduct. Conspiracy addresses the planning of a crime, and attempt targets the steps taken towards consummating the plan. The jury could have found the conspiracy formed at several different points in time prior to the robberies, and the two crimes were not part and parcel of one another, or one continuous event. As a result, the Court held that in this case the two convictions did not merge under principles of fundamental fairness.

Kenneth Thomas v. State of Maryland, No. 127, September Term 2011, filed October 19, 2012. Opinion by Greene, J.

Battaglia, J., joins in judgment only.

http://mdcourts.gov/opinions/coa/2012/127a11.pdf

EVIDENCE – HEARSAY – PRIOR CONSISTENT STATEMENTS

EVIDENCE – IMPEACHMENT – PRIOR CONSISTENT STATEMENTS

Facts:

While on surveillance of a shopping center parking lot, a police officer observed two cars enter the lot. The officer observed the driver of one car ("Declarant") approach and reach into the passenger side of the other individual's ("Petitioner's") car. From this interaction, the officer surmised that Declarant and Petitioner engaged in a drug transaction. Once the cars left the lot, three officers stopped Declarant and conducted a search of his car and his person. An officer found a rock of crack-cocaine inside Declarant's shoe, at which point, Declarant admitted that he "bought [the crack cocaine] from a guy named Kenny [at the shopping center]." The police also stopped Petitioner in his car and found that Petitioner's currency denomination matched the denomination previously described by Declarant to the other officers.

In the Circuit Court for Montgomery County, Declarant testified about the drug deal. The State asserted that it made no promises to Declarant in exchange for his testimony, that Declarant received a probation before judgment on the drug possession charge, and that two weeks prior to trial, Declarant was charged with unauthorized use of a motor vehicle. The defense argued that Declarant was the one selling the drugs to Petitioner, and that Declarant lied to the police when they stopped him to make himself look better. In response, the State called several of the officers to testify that Declarant had told them that "Kenny" was the one who sold him the drugs. Defense counsel objected to this testimony as hearsay, but was overruled by the trial judge.

The jury convicted Petitioner of distribution of a controlled dangerous substance. On appeal, the Court of Special Appeals affirmed that judgment. The intermediate appellate court reasoned that under Maryland Rule 5-802.1(b), a witness's prior consistent statements are admissible even if the witness had multiple motives to fabricate, so long as the witness made the statements before any one of the motives to fabricate. Alternatively, the court held that the witness's prior consistent statements were admissible as rehabilitative evidence under Maryland Rule 5-616(c).

Held: Reversed.

Under Maryland Rule 5-802.1(b), if the prior consistent statements were made at a time prior to the existence of any fact which would motivate bias, interest or corruption on the part of the witness, then the prior consistent statements are admissible to rebut the alleged bias or interest. Conversely, statements made when the declarant had an alleged motive to falsify are not relevant to rebut a charge of fabrication. Here, Declarant's statements to the police officers were made before he was charged with unauthorized use; however, Declarant made the statements after he was stopped by police and under investigation for his alleged participation in a drug transaction. Thus, his prior consistent statements were inadmissible because his motive to lie, as alleged by Petitioner, had already arisen.

Under Maryland Rule 5-616(c)(2), a witness's prior consistent statements are admissible to rehabilitate the witness's credibility if the statements, under the circumstances in which they were given, detract from the impeachment or logically rebut the impeachment. In the instant case, defense counsel attempted to impeach Declarant by arguing that he lied on multiple occasions. The State rebutted the impeachment with the arresting police officers' repetition of Declarant's prior consistent statements. The mere fact that Declarant gave police the same information he testified to at trial, or what he stated to each officer, does not detract from, or rebut logically the impeachment undertaken. Requiring the police officers to repeat what Declarant said does not make Declarant's testimony any more believable, nor does it undermine the argument presented by the defense, that Declarant lied about his participation in the drug transaction.

John Doe, et al. v. Maryland State Board of Elections, et al., No. 131, September Term 2011, filed September 25, 2012. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2012/131a11.pdf

CONSTITUTIONAL LAW – ELECTION LAW – REFERENDUM AND THE APPROPRIATION EXCEPTION

Facts:

The Maryland Dream Act, ("the Act"), was enacted by the General Assembly during its 2011 session. The Act defines new eligibility requirements that exempt certain students from paying out-of-state tuition rates at higher education institutions in Maryland. Following its enactment, MDPetitions.com, ("Appellee-Intervenor"), petitioned to refer the Act to Maryland's 2012 General Election ballot. Pursuant to Article XVI of the Maryland Constitution, Maryland residents may "approve or reject at the polls, any Act, or part of any Act of the General Assembly," by petitioning to place the enacted Bill on the general election ballot. Md. Const. art. XVI, § 1(a). The Maryland State Board of Elections ("Appellee" or " the Board") certified the petition for referendum.

In response to the Board's certification, John Doe *et al.*, ("Appellants"), representing a group of individuals supporting the Act, challenged its referability. Appellants filed a Complaint, and later an Amended Complaint, in the Circuit Court for Anne Arundel County, seeking to remove the Act from consideration on the November 2012 ballot. Appellants maintained that the Act is an "appropriation for maintaining the State Government" within the meaning of Section 2 of Article XVI, of the Maryland Constitution and is, therefore, not subject to referendum. The Board filed, in the Circuit Court proceedings, its response, followed by the response of the Appellee-Intervenor. After consideration of the various motions filed for summary judgment, the trial judge entered summary judgment in favor of Appellees and against Appellants. The court reasoned that the Act, standing alone, failed to meet the standards adopted by this Court for determining that the law makes an appropriation. Similarly, the court rejected Appellants' arguments that the Act should be read *in pari materia* with the Cade Funding Formula, a formula used for calculating the minimum amount of funding for community colleges in the State, and future budget bills to find that the Act is an appropriation and thereby exempted from referendum. Following the judgment of the Circuit Court, Appellants noted an appeal to the Court of Special Appeals. Prior to any proceedings in that court, we granted Appellants' petition for writ of certiorari to address whether the Act is an appropriation. In a per curiam Order, we affirmed the trial court's decision.

Held: Affirmed.

The Maryland Dream Act is not an appropriation for purposes of maintaining the State Government. The primary object of the bill is not to appropriate money by assigning public monies to a particular use. Rather, the Act is a general law defining eligibility requirements for classes of individuals. Any impact the Act has on state spending is an incidental result of the changed eligibility requirements. Furthermore, the Act is not an appropriation *in pari materia* with the Cade Funding Formula and future budget bills. The Act's objective and purpose is to expand eligibility requirements for certain students. By contrast, the Cade Funding Formula calculates funding for higher education institutions in Maryland, and budget bills set the budget for the State. The Act was neither enacted with, nor referenced any of the other bills. Finally, even if construed *in pari materia* with the other bills, the Act does not make an appropriation. Only by tracing a long and complicated path, is there even a possible effect on future appropriations. The Act is too dependent on unknown variables to be an appropriation assigning public monies for a specified purpose.

Dennis Whitley III, et al. v. Maryland State Board of Elections, et al., No. 133, September Term 2011, filed October 23, 2012. Opinion by Harrell, J.

Battaglia, Adkins, and Barbera, JJ., dissent.

http://mdcourts.gov/opinions/coa/2012/133a11.pdf

STATUTORY CONSTRUCTION – ELECTION LAW – REFERENDUM – COMPUTER GENERATED PETITIONS NOT PROHIBITED

CONSTITUTIONAL LAW – ELECTION LAW – REFERENDUM – NO NEED FOR SEPARATE CIRCULATOR (INDEPENDENT OF SIGNATORY) FOR COMPUTER GENERATED PETITION

Facts:

Following the passage of Maryland's new congressional redistricting plan (SB 1 – 2011 Special Session), Intervenor, MDPetitions.com, sought to petition SB 1 to referendum on the general election ballot in November 2012. Intervenor employed a website-based initiative that allowed a user of the website to generate electronically a petition signature page by entering his or her identifying information in specified fields on the website. The voter then could print the signature page, affix his or her signature, complete the required petition circulator's affidavit attesting to the genuine nature of his or her signature, and submit the page to the petition sponsor in support of referring SB 1 to the ballot.

The State Board of Elections certified the petition for referendum after a determination that it contained a sufficient number of signatures. Dennis Whitley, et al. (Petitioners) filed suit in the Circuit Court for Anne Arundel County, objecting to the State Board's validation of two classes of signatures submitted by Intervenor. Specifically, Petitioners objected to (1) signatures obtained through the use of MDPetitions.com; and (2) self-circulated petitions, in which an individual signs as both signer and circulator. The invalidity of either category of signatures would result in the failure of the petition to qualify for referendum.

The Circuit Court for Anne Arundel County entered summary judgment in favor of the State Board and Intervenor. The Court of Appeals granted *certiorari* to consider (1) whether petition signatures obtained through the use of a third-party website violate the statutory requirement that an individual "include" or "provide" his or her identifying information under § 6-203 of the Election Law Article and COMAR 33.06.03.06; and (2) whether an individual may "self-circulate" a petition by signing both as the voter and as the circulator, consistent with the affidavit requirements of the Md. Const. art. XVI, § 4 and § 6-204 of the Election Law Article. In a per curiam Order entered on 17 August 2012 after oral argument, the Court of Appeals affirmed the decision of the Circuit Court, opinion to follow. This is that opinion.

Held: Affirmed.

The Court of Appeals concluded that the language of Election Law Article § 6-203 and COMAR 33.06.03.06(B) did not include a personal completion requirement precluding the use of computer software to generate electronically petition signature pages. Rather, whether an individual prints or types personally the information on the signature page, uses a computer program, or has someone else write the information on his or her behalf affects neither the State Board of Elections' ability to validate and verify the information required, nor impacts demonstrably the likelihood of voter fraud. Had the Legislature intended to impose a requirement that the signer of the petition print or type personally his or her information directly onto a signature page, it would have done so presumably.

Additionally, Petitioners contended that both the Article XVI, § 4 of the Maryland Constitution and § 6-204 of the Election Law Article prohibit self-circulated petitions. Specifically, Petitioners argued that the use in the laws of the words "procure," "presence," and "obtain" imply that more than one person was intended to be present at the time the signatures are affixed to the signature page and that, accordingly, an independent witness is required to sign the circulator's affidavit. The Court of Appeals, considering the text of the constitutional and statutory provisions in light of the objective of preventing voter fraud, determined that there is no prohibition against self-circulated petitions. The Court determined that the terms "procure," "observe," and "obtain" do not require that the signer and circulator be distinct individuals. Moreover, because an individual is necessarily and metaphysically in his or her own presence, he or she thus may attest to his or her own signature being affixed to a petition signature page "in his presence," without violating the requirements of Article XVI, Section 4 or the Election Law Article.

Barbara Hastings, et al. v. PNC Bank, NA, No. 109, September Term 2011, filed September 27, 2012. Opinion by Barbera, J.

Bell, C.J., Greene and Adkins, J.J., dissent.

http://mdcourts.gov/opinions/coa/2012/109a11.pdf

ESTATES AND TRUSTS – TRUSTEES – REQUESTS FOR WAIVERS OF LIABILITY AND INDEMNIFICATION AGREEMENTS

TAX – INHERITANCE TAX – EXEMPTION FROM INCOME ON PROBATE ASSETS – APPLICABILITY TO TRUST ASSETS

Facts:

Petitioners Barbara Hastings, R. Cort Kirkwood, and Ann K. Robinson were the remainder beneficiaries of a testamentary trust established through the estate of Marion Bevard. Inheritance tax was owed prior to the distribution of the trust's assets because the personal representative of the trust did not prepay the tax at the time the trust was created. PNC Bank, as trustee, calculated the fair market value of the trust to be $261,306.72, with approximately $42,000 of that amount constituting income earned on the principal contributed from the estate. PNC used those figures in calculating the taxes owed and the commission due to it as trustee. Once the tax was paid, PNC sent a letter to each of the Petitioners that included an accounting of the trust and a "Waiver, Receipt, Release and Indemnification Agreement" that sought to have Petitioners release PNC from liability and indemnify it for any losses, claims, or other issues that might arise from the administration of the trust. PNC stated that it sought the release as an alternative to petitioning a court for a final accounting.

Petitioners objected to PNC's distribution plan, arguing that the release and indemnity agreement was far too favorable to PNC, and demanded an immediate distribution of the trust assets. In response, PNC released a partial distribution, but not before Petitioners filed a three-count complaint seeking declaratory judgment in the Circuit Court for Baltimore County. Petitioners claimed that Maryland law did not allow PNC to demand that Petitioners sign a release agreement in order to receive their distribution, that the demand was unlawful, and that PNC's calculation of the distribution commission and inheritance tax was incorrect because it was based on the value of the trust with interest income added, rather than on the original contribution.

The parties filed cross-motions for summary judgment. The circuit court found in PNC's favor, holding that PNC correctly calculated the tax owed, and that the release was lawful because it only requested, not demanded, that Petitioners sign the release agreement. Petitioners appealed to the Court of Special Appeals, which affirmed the circuit court in an unreported opinion.

Held: Affirmed.

The Court of Appeals noted that nothing in the testator's will, or in Maryland statutory law, precluded PNC from seeking the release and indemnity agreement. Instead, the Court considered whether the Maryland common law, specifically a trustee's duty of loyalty, barred PNC from requesting the agreement. Trustees may not use the property of a beneficiary for their own purposes, or put themselves in a position where self-interest conflicts with trustee obligations. Trustees may engage, however, in otherwise-prohibited conduct if the beneficiaries provide valid, informed consent. The Court reasoned therefore that trustees must be able to solicit consent to conduct that would otherwise be a breach of the duty of loyalty. The Court held that the release agreement was not so broad and one-sided as to put PNC's interests ahead of those of Petitioners. PNC was legally entitled to a certain degree of protection and indemnity, and the release agreement did not radically depart from the kind of protection PNC would have been able to obtain through judicial proceedings to terminate the trust, even if PNC might have received a greater degree of protection through the release agreement. Petitioners retained the ability to accept the agreement, reject it, or negotiate for different terms, the Court observed.

Additionally, the Court held that PNC correctly calculated the value of the trust assets for tax purposes when it included the amount of interest that accrued on the initial contribution from the estate. Section 7-202 of the Tax-General Article imposes a 10 percent inheritance tax on property "that passes from a decedent and has a taxable situs in the State." This includes property held in trust, and applies in cases in which a devisee holds a subsequent interest, as Petitioners did here. Under state law, the tax on a subsequent interest can be prepaid or paid once the subsequent interest vests into a present, possessory interest, with the subsequent interest valued at the time of the payment. The Court held that Petitioners' characterization of the assets as "probate assets" was incorrect, as income earned by a trust during the life tenancy of a beneficiary is not income accrued on probate assets. The assets were only probate assets during the administration of the original estate, and the assets were no longer probate assets once the assets were contributed to the trust. The Court held that 7-210(c)(1)(iii) provides for the determination of inheritance tax when a personal representative defers payment, with the taxable amount based on the value of the interest when it vests in possession.

Joseph D. Miller v. Amanda Lee Mathias, No. 146, September Term 2008, filed August 27, 2012. Opinion by Bell, C.J.

http://mdcourts.gov/opinions/coa/2012/146a08.pdf

CIVIL PROCEDURE – STANDARDS OF REVIEW – ABUSE OF DISCRETION

CIVIL PROCEDURE – JUDGEMENTS – RELIEF FROM JUDGMENT – MOTIONS TO ALTER & AMEND

CIVIL PROCEDURE – APPEALS – STANDARDS OF REVIEW – PLAIN ERROR – GENERAL OVERVIEW

CIVIL PROCEDURE – SUMMARY JUDGMENT – SUPPORTING MATERIAL – GENERAL OVERVIEW

CIVIL PROCEDURE – VENUE – FORUM NON CONVENIENS

GOVERNMENTS – LEGISLATION – INTERPRETATION

FAMILY LAW – CHILD CUSTODY – ENFORCEMENT – UNIFORM CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT

Facts:

The parties are the mother and father of a minor child whose legal and physical custody they agreed to share. Both parties resided in Maryland when the agreement was signed, and it was known and contemplated that the appellee would be moving to Virginia with her new husband. Presently, the appellant lives in Takoma Park, Maryland, while the appellee lives in Fairfax County, Virginia. The appellee filed a Motion to Relinquish Jurisdiction to the Commonwealth of Virginia in the Circuit Court in Maryland and a Motion to Modify Custody in a Virginia court. The appellant responded with motions to dismiss on jurisdictional grounds in both cases.

The Circuit Court denied appellee's Motion to Relinquish without a hearing while the Virginia court denied appellant's Motion to Dismiss. The appellee filed a Motion to Alter or Amend, or Alternatively to Revise Judgment, which the Circuit Court granted and subsequently relinquished jurisdiction to Virginia. The appellant filed an Opposition to the Motion to Amend, but it was denied.

The appellant appealed to the Court of Appeals citing three issues: (1) whether the Circuit Court erred in granting the Motion to Alter or Amend, or Alternatively to Revise Judgment, without first holding an in-person hearing pursuant to Maryland Rule 2–311(e), (2) whether the forum non conveniens provisions of Maryland Code § 9.5–207 of the Family Law Article apply to a

child custody case in which the court has acquired "continuing, exclusive jurisdiction" pursuant to § 9.5–202 of the same article; and (3) if the forum non conveniens provisions are applicable, whether the Circuit Court abused its discretion in applying them.

Held:

(1) The trial court was not required to conduct a hearing on the appellee's Motion to Alter or Amend, or Alternatively to Revise Judgment, before granting relief; (2) The trial court's consideration of the forum non conveniens doctrine to resolve the appellee's motion to modify custody was consistent with the Uniform Child Custody Jurisdiction and Enforcement Act, despite the Circuit Court's exclusive, continuing jurisdiction over the child custody matter; and (3) the trial court's application of the forum non conveniens doctrine to resolve the appellee's motion to modify custody was not an abuse of discretion.

The Court of Appeals rejected the appellant's claim that the Circuit Court abused its discretion when it granted the appellee's motion to alter or amend without a hearing. The Court reasoned that the appellee's motion was filed under Rule 2-535, which governs the trial court's revisory power, and does not require a hearing. The Court therefore concluded that the trial court was not required to conduct a hearing on the appellee's motion before granting relief.

The Court also noted that the trial court was not precluded from applying a forum non conveniens analysis simply because it had continuing, exclusive jurisdiction. On the contrary, it was required to do so by § 9.5–207(a) of the Family Law Article. In reviewing the trial court's forum non conveniens analysis, the Court concluded that the trial court's properly considered the factors set forth in § 9.5–207(a).

O'Brien Atkinson, IV v. Anne Arundel County, Maryland, No. 111, September Term 2011, filed September 28, 2012. Opinion by Rodowsky, Lawrence F. (Retired, Specially Assigned).

Battaglia, J., dissents.

http://mdcourts.gov/opinions/coa/2012/111a11.pdf

LOCAL GOVERNANCE – CHARTER COUNTIES – CHARTER AMENDMENTS – CHARTER MATERIAL – COLLECTIVE BARGAINING – BINDING ARBITRATION – DECLARATORY JUDGMENT.

Facts:

In 2002, the voters of Anne Arundel County amended the County Charter to direct the County Council to adopt an ordinance providing for binding arbitration to resolve labor disputes with the County's law enforcement personnel and uniformed firefighters. The amendment provided that an arbitrator's binding decision would take into account the financial condition of the County and would be implemented as part of the next year's budget process. In 2003, the County Council adopted such an ordinance.

In 2011, the County Council amended the 2003 ordinance such that the County Council would "not be required to appropriate funds or enact legislation necessary to implement" an arbitrator's final written award. The 2011 ordinance included an uncodified "section 3," which provided that if any part of the 2011 ordinance were held invalid, the 2003 ordinance providing for binding arbitration "would be deemed repealed by operation of law." In that case, the pre-2003 law would be reinstated and the impasse resolution procedure ultimately would consist of submitting a fact finder's recommendation to the County Council which could "take the action it determines to be in the public interest."

Certain members of the affected bargaining units brought suit in the Circuit Court for Anne Arundel County seeking a declaratory judgment that the 2011 ordinance violates the 2002 Charter Amendment. The County argued that, properly construed to avoid constitutional issues, the 2002 Charter Amendment required the County Executive to propose funding in the budget to comply with a binding award, but that the County Council may reduce or eliminate that proposed appropriation. The County also filed a counterclaim, in the event the 2011 ordinance were found invalid, seeking a declaratory judgment that the 2002 Charter Amendment violates the Maryland Constitution, Article XI-A (the Home Rule Amendment), § 3, because the Charter amendment is not "charter material," under *Cheeks v. Cedlair Corp.*, 287 Md. 595, 415 A.2d 255 (1980), and its progeny. Alternatively, the County sought a declaration that the 2003 and 2011 ordinances dealing with binding arbitration destruct under uncodified section 3 of the 2011 ordinance.

The Circuit Court declared that the 2002 Charter Amendment violates the Maryland Constitution.

The Court of Appeals granted Petitioners' application for certiorari and the County's conditional cross-petition for certiorari prior to consideration of the case by the Court of Special Appeals.

Held: Reversed and remanded.

Binding arbitration of labor disputes with public safety employees is "charter material." The 2002 Charter Amendment represented a policy decision by the County's voters that certain labor disputes should be subject to binding arbitration. The County Council cannot reject the voters' policy decision by ordinance. Therefore, the 2011 ordinance allowing the County Council to not appropriate funds for a final arbitration award is invalid.

As implementation of the voters' policy decision was left to the County Council, the 2002 Charter Amendment does not unconstitutionally preclude the exercise of the County Council's law-making discretion. The 2002 Charter Amendment is valid.

The uncodified section 3 of the 2011 ordinance, providing that the 2003 ordinance would be repealed by operation of law if any part of the 2011 ordinance were deemed invalid, would reinstate the pre-2003 dispute resolution procedure, which did not allow for binding arbitration. As such, section 3 of the 2011 ordinance contravenes the 2002 Charter Amendment and is invalid.

Demetrius Nickens v. Mount Vernon Realty Group, LLC, et al., No. 7, September Term 2012, filed October 19, 2012. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2012/7a12.pdf

REAL PROPERTY – FORECLOSURE – FORCIBLE ENTRY – SELF-HELP – CONVERSION – ABANDONMENT

MARYLAND CONTINUES TO RECOGNIZE THE COMMON LAW DOCTRINE OF PEACEABLE SELF-HELP AS A MEANS FOR A FORECLOSURE PURCHASER TO GAIN RE-POSSESSION OF REAL PROPERTY FROM AN ILLEGAL OCCUPANT OF THE PROPERTY; HOWEVER, THE PURCHASER AND ITS AGENTS MUST ACT REASONABLY IN EXERCISING THAT RIGHT, INCLUDING AS TO THE DISPOSITION OF THE OCCUPANT'S PERSONALTY FOUND IN THE DWELLING ON THE REAL PROPERTY.

Facts:

Petitioner, Demetrius Nickens, resided originally at a Baltimore City property with his parents, the mortgagors of the property, and paid them rent in an amount equivalent to their then monthly mortgage payments. The amount of the monthly mortgage payment increased in September 2007, and Petitioner's parents were unable to meet the increased mortgage payment amount, and moved elsewhere. Petitioner contrived to live in the home, but stopped making any payments to his parents. Foreclosure proceedings were instituted against Petitioner's parents. Petitioner continued to live at the property after it was sold at a foreclosure sale to Deutsche Bank National Trust ("Deutsche Bank," the mortgagee), which received a judgment of possession on 14 May 2009. Thereafter, the law firm of Buonassissi, Henning, & Lash, P.C. ("BHL"), as agent for the American Servicing Company ("ASC"), the mortgage servicer, retained the property management services of Mount Vernon Realty Group, LLC ("MVRG"), owned by James E. Parks, III, and which employs Parks' mother, Irene Parks. After the award of the judgment of possession, the Parkses and MVRG notified Petitioner that, unless he vacated the house, they intended to enter the home and remove his belongings. On 6 September 2009, having learned apparently from a letter to them from Petitioner that he would be out of town on that day, the Parkses and MVRG entered the unoccupied home, changed the locks, placed a "no trespassing" sign on the front door, and disposed of Petitioner's personal possessions before he returned.

Petitioner sued BHL, ASC, the Parkses, and MVRG (known collectively as "Respondents") in the Circuit Court for Baltimore City. He asserted in his amended complaint, among other counts, that Respondents committed a wrongful eviction as to the real property and committed conversion as to his personal belongings. Respondents filed motions to dismiss, which the Court granted, with prejudice. Petitioner appealed the trial court's judgment to the Court of Special Appeals, re-characterizing his wrongful eviction claim to an unlawful forcible entry one. In an

unreported opinion, the intermediate appellate court affirmed the Circuit Court. That court concluded, first, that Respondents did not commit a forcible entry because they exercised lawfully the common law right of peaceable self help, and, second, that Respondents did not commit conversion because they did not interfere with Petitioner's right to his belongings, as the personal property had been abandoned. Petitioner petitioned the Court of Appeals for a writ of certiorari, which was granted. *Nickens v. Mount Vernon Realty Group, LLC,* 425 Md. 396, 41 A.3d 570 (2012).

Held:

Affirmed in part; reversed in part and remanded for further proceedings. The Court concluded, first, that Respondents, as agents of a foreclosure purchaser, exercised reasonably the long-recognized common law right of peaceable self help when MVRG and the Parkses entered the residential property and changed the locks for the purpose of repossessing the property. When a foreclosure purchaser and its agents employ the right to peaceable self-help, Maryland applies a standard of reasonableness based on the attendant circumstances to determine if the self-help was lawful. Respondents' exercise of self-help was reasonable and, hence, lawful because their intention was to avoid confrontation and the potential for retaliatory violence. Furthermore, the 2008 enactment of Balt. City Code Art. 13, § 8B-2, a statutory process that includes a notice requirement and that requests a Sheriff in Baltimore City to execute the writ of possession, was not the exclusive means for Respondents to repossess the realty. The Court interpreted the ordinance and the common law remedy of peaceable self-help as coexistent and concurrent in Baltimore City from 2008 to the present day. A titleholder and its agents may choose either the process of Section 8B-2 or employ peaceable self-help by reasonable means. The ordinance did not abrogate pervasively and comprehensively the common law right to peaceable self-help either by its express language or by recourse to its legislative history.

Second, the Court determined that it was premature for the Circuit Court and the Court of Special Appeals to enter judgment for Respondents on Petitioner's well-pleaded conversion claim. There was no reasonable basis from which to conclude that Petitioner abandoned his personalty or to indicate how Respondents acted in disposing of Petitioner's belongings. When a foreclosure purchaser and its agents dispose of personalty within a foreclosed property, disposition of the personalty found therein is also held to a standard of reasonableness. Those actors may be liable for the disposition of the personalty that is not accomplished in a reasonable way. This rule is consistent with the peaceable purpose of the self-help remedy. Although Respondents had the legal right to use self-help, it remains to be determined whether they exercised this right reasonably as to Petitioner's personalty.

USA Cartage Leasing, LLC, v. Todd A. Baer, et al., No. 129, September Term 2011, filed October 24, 2012. Opinion by McDonald, J.

http://mdcourts.gov/opinions/coa/2012/129a11.pdf

REAL PROPERTY – EASEMENTS – GENERAL EXPRESS EASEMENTS – RECORDING STATUTE

Maryland Code, Real Property Article, §4-101(a)(1)

Facts:

In 1984, Edwin and Rebecca Glesner subdivided a lot into two lots. They transferred one lot, and the transferring deed included a general right-of-way across the other lot to access a major road. That lot eventually came into the possession of Respondent, Todd. A. Baer. The other lot, originally retained by the Glesners, ultimately came into possession of Petitioner, USA Cartage Leasing, LLC. Baer then sought to enforce the right-of-way over Cartage's lot by filing suit to have the right-of-way declared valid and located.

The Circuit Court for Washington County found that Baer was entitled to the right-of-way, and it located the right-of-way. The Court of Special Appeals reversed and remanded to the circuit court to further consider the defense of adverse-possession but affirmed in all other respects. In its instructions to the circuit court on remand, the Court of Special Appeals adopted the principles and procedures set forth in Restatement 3d of Property: Servitudes, §4.8(1), (2) for locating a general easement. Cartage petitioned for a writ of certiorari, which was granted to consider the effectiveness of a grant of a general easement under the Maryland Recording Statute and the proper means of locating it, if effective.

Held: Affirmed

The Court held that, in the grant of an easement, the recording statute's requirement that a conveyance contain "a description of the property sufficient to identify it with reasonable certainty" refers to the description of the servient estate. As has been long recognized under Maryland case law, an easement described with lesser specificity is a general easement and may be located by other means.

The Court further held that when a general easement has been granted in a deed, but the precise location of the easement is not defined in the deed or established by custom or usage, the principles and procedures set forth in Restatement 3d of Property: Servitudes, §4.8(1), (2) may be used to locate the easement. The owner of the servient estate has the right within a reasonable time to propose a location reasonably suited to the purpose of the easement. If the owners of the servient and dominant estates cannot agree on the location of the easement, a court may exercise

its equitable powers to locate the easement in the same manner as it would locate an implied easement of necessity. The court should look first to the set of locations that fit the terms of the easement and are reasonably convenient to the owner of the dominant estate. It should then select from that set the location that is least onerous to the owner of the servient estate.

S & S Oil, Inc. v. Elaine W. Jackson, No. 122, September Term 2011, filed September 25, 2012. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2012/122a11.pdf

TORT LAW – ASSUMPTION OF THE RISK VERDICTS

Facts:

In June 2007, Elaine W. Jackson ("Respondent") entered a store attached to a gas station owned and operated by S & S Oil, Inc. ("Petitioner"). At that time, Petitioner was renovating the flooring near the soda machine. While searching for a soda for her granddaughter, Respondent stepped onto uneven ground, injuring her back and right knee. As a result of those injuries, Respondent required surgery.

In 2008, Respondent filed a lawsuit against Petitioner in the Circuit Court for Prince George's County. At the end of the trial, the trial judge instructed the jury to reach a verdict by answering questions on a verdict sheet. The version of the verdict sheet originally considered by the trial judge had one question asking both whether Respondent was contributorily negligent and whether Respondent assumed the risk of her injuries. When Petitioner asked that the compound question be split into two questions, the trial judge denied the request and instead altered the question so that it only asked about contributory negligence. When Petitioner objected to this alteration, the trial judge told Petitioner that "[A]ssumption of risk is a form of negligence."

The jury returned a verdict in favor of Respondent, answering on the verdict sheet that Petitioner's negligence caused Respondent's injuries and that Respondent was not contributorily negligent. The court entered judgment in favor of Respondent. Following unsuccessful post-trial motions, Petitioner appealed the trial court's judgment to the Court of Special Appeals arguing that it was a reversible error to refuse to ask a question on the verdict sheet specifically addressing assumption of the risk. The intermediate appellate court affirmed, reasoning that, under the facts of the case, "[i]f the jury determined that [Respondent] assumed the risk of her injury, it would necessarily find that she was contributorily negligent," and, therefore, it was proper to ask only about contributory negligence on the verdict sheet. This Court granted certiorari.

Held: Reversed and Remanded.

Under the facts of this case, contributory negligence did not subsume assumption of the risk. In this case, a reasonable jury could have determined both that Respondent assumed the risks associated with walking on uneven flooring and that the risk was reasonable, and therefore not contributorily negligent. Thus, a finding that Respondent was not contributorily negligent did

not preclude a finding of assumption of the risk and the trial court should have presented the defenses separately on the verdict sheet.

By failing to ask a question on the verdict sheet specifically addressing assumption of the risk, the trial judge committed reversible error. A trial judge commits error if he or she fails to present a defense to the jury that the defendant has a right to present. That error is reversible if the error prejudices the defendant's case.

Because a reasonable jury could have concluded that Respondent either knew of and appreciated or must have known of and appreciated the risks associated with walking on the uneven ground, and voluntarily assumed those risks, Petitioner had a right to have the defense of assumption of the risk presented to the jury. The trial judge's decision to refuse to place a question on the verdict sheet about assumption of the risk, however, would cause a reasonable juror to fail to consider the defense. Because a jury finding that Respondent assumed the risk of her injuries would have completely barred Respondent's recovery, Petitioner was prejudiced when the trial judge precluded the jury from considering the defense.

COURT OF SPECIAL APPEALS

Garrett Maurice Moreland v. State of Maryland, No. 1360, September Term 2010, filed September 26, 2012. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2012/1360s10.pdf

EVIDENCE – IMAGE CAPTURED ON SURVEILLANCE VIDEO DURING BANK ROBBERY – ADMISSIBILITY OF LAY WITNESS TESTIMONY OF LIFE-LONG FRIEND OF THE ACCUSED IDENTIFYING HIM AS THE PERSON HOLDING A GUN ON THE BANK SURVEILLANCE VIDEO OF THE ROBBERY – CIRCUMSTANCES IN WHICH SUCH LAY WITNESS IDENTIFICATION TESTIMONY DOES OR DOES NOT INVADE THE PROVINCE OF THE JURY.

Facts:

Following a jury trial in the Circuit Court for Anne Arundel County, Garrett Moreland, the appellant, was convicted of three counts of armed robbery and numerous related offenses. The evidence at trial established that at 11:00 a.m. the appellant and another man entered a bank branch in Edgewater. The appellant was wearing dark sunglasses and a ski hat. A bank employee was suspicious of the two men, and quickly pushed the silent alarm button. The appellant brandished a gun and paced the bank lobby floor while the second man forced his way behind the teller line, entering through a door with a broken lock. The second man emptied all of the cash from the teller's drawers. The appellant and the second man then exited the bank branch. A total of more than $15,000 had been stolen.

The state introduced into evidence a video recording of the robbery from the bank's surveillance cameras and still photographs made from it. It also offered eyewitness testimony from the bank's branch manager, a customer, and three bank tellers. Each identified the appellant as the man who had remained in the lobby, brandishing the gun during the robbery.

Over defense counsel's objection, the State also called as a lay witness the appellant's "cousin," an unrelated childhood friend of the appellant, who was then employed as a police officer, although he had not been involved in the subject investigation. The fact of the "cousin's" employment was not made known to the jury. The "cousin" testified that he had not seen the appellant for four or more years before trial. In that time, the appellant's appearance had changed in that he had lost between 20 and 25 pounds, no longer appeared healthy, and was now paralyzed, a new affliction. The "cousin" identified the appellant as the man in the surveillance video brandishing the gun.

The appellant appealed from his conviction, arguing, as he had at trial, it was a question for the jury to decide whether the appellant was one of the persons depicted in the surveillance video and still photographs and that it was improper to permit a lay witness to opine on that issue. He maintained that the jurors were capable of watching the video, observing the appellant as he sat in the courtroom, and deciding for themselves whether the appellant was one of the men shown in the video and photographs.

Held: Affirmed.

The trial court did not err in admitting the identification testimony of the "cousin." A lay witness who did not witness the events may not testify about the identity of a person shown in a surveillance video or photograph made from the video if the witness is no more capable of identifying the person in the video and photographs than the jurors are. However, when the lay witness is more likely to correctly identify the person in the video or photograph than are the jurors, given that he or she is substantially familiar with the person due to a family relationship or other extensive contacts with the person, the lay witness properly may identify the person in the video or photographs as the defendant. Such testimony does not invade the province of the jury, as the lay witness is more knowledgeable than the jurors about the defendant. The evidence is admissible, and is for the jurors to decide its weight.

In this case, the "cousin" had known the appellant for decades, had had extensive and frequent contacts with him, and was knowledgeable about physical traits of the appellant that had changed between the time of the robbery and the time of trial. The "cousin's" lay testimony identifying the appellant from the video and photographs did not invade the province of the jury and was properly admitted into evidence.

Robert Edward Quansah v. State of Maryland, No. 2433, September Term 2010, filed September 26, 2012. Opinion by Davis, Arrie, (Retired, Specially Assigned).

http://mdcourts.gov/opinions/cosa/2012/2433s10.pdf

MERGER OF SENTENCES – SECOND-DEGREE ASSAULT – VIOLATION OF AN INTERIM PEACE ORDER – RULE OF LENITY – REQUIRED EVIDENCE TEST

Facts:

The prosecuting witness (the victim) owned and resided at a six-bedroom house and rented rooms to several individuals, including appellant. About three weeks after appellant moved into her residence, the victim and appellant "went out a couple of times," but appellant soon became verbally and emotionally abusive, calling her derogatory names and demanding sexual relations, causing the victim to end the romantic relationship. Thereafter, appellant threatened "more than five times" that, if she attempted to evict him, he would burn the house down. Three weeks after the victim instructed appellant to move out of her house, she obtained a peace order prohibiting appellant from contacting her or entering her property. That evening, she smelled a strong odor of gasoline and discovered that the exterior wall and two windows outside her bedroom had been blackened by fire. As she called 911 on her cell phone, she went to the front of the house and saw appellant parked across the street in his taxi. When appellant saw the victim, he exited his vehicle, "grabbed [her] from the back" as she attempted to escape into her house and struck her repeatedly with a black steel object, landing blows on her head, knee, and toe and causing her to fall on the grass. As appellant struck the victim, he stated, "I told you I was going to kill you." Before briefly losing consciousness, the victim heard a "gunshot, pop-pop like two or three times" and then saw appellant enter his taxi. Appellant was apprehended and tried and convicted of second–degree assault and violation of a peace order.

Held:

Although appellant's sentences do not merge under the required evidence test because each offense requires proof of distinct elements, nevertheless merger may be necessary if the Legislature did not intend to authorize multiple punishments based on a single act of assault or there is uncertainty as to whether the Legislature intended to do so. When "we are uncertain as to what the Legislature intended, we turn to the . . . 'Rule of Lenity' by which we give the defendant the benefit of the doubt." *Moore v. State*, 198 Md. App. 655, 682-94 (2011) Because the Court, in the case *sub judice*, is uncertain as to whether the Legislature intended to authorize multiple punishments for a second-degree assault and a violation of a protective order based on the same assaultive behavior, we hold that appellant's ninety-day sentence for violating the peace order must be merged into his ten-year sentence for second-degree assault. *Abeokuto v. State*, 391 Md. 289, 356 (2006) ("the offense carrying the lesser maximum penalty ordinarily merges into the offense carrying the greater maximum penalty").

Lincoln Miller v. State of Maryland, No. 1907, September Term 2009, filed September 26, 2012. Opinion by Moylan, Charles (Retired, Specially Assigned).

http://mdcourts.gov/opinions/cosa/2012/1907s09.pdf

VOLUNTARINESS OF A GUILTY PLEA – NOTIFICATION OF IMMIGRATION CONSEQUENCES – SIXTH AMENDMENT – EFFECTIVE ASSISTANCE OF COUNSEL – RETROACTIVITY – CORAM NOBIS REVIEW

Facts:

On June 1, 1999, the appellant, Lincoln Miller, pled guilty in the Circuit Court for Prince George's County to possession of cocaine with the intent to distribute. The appellant was a native of Belize and had been a lawful permanent resident of the United States since 1981. The appellant was not advised that a guilty plea could have adverse immigration consequences, nor was he advised that by tendering a guilty plea he was giving up his right to a direct appeal. The appellant was sentenced to five years in prison without parole; he finished serving that sentence in 2004. The appellant visited his native Belize in 2008 and was detained upon his re-entry to the United States. Deportation proceedings were then instituted against him based upon his 1999 conviction.

On June 18, 2009, the appellant filed a Petition for a Writ of Error Coram Nobis in the Circuit Court for Prince George's County, arguing that his guilty plea had not been tendered knowingly, voluntarily, and intelligently, in light of the facts that he was not advised that he could face adverse immigration consequences or that he was giving up his right to a direct appeal. His immigration proceedings were stayed pending the resolution of the coram nobis proceedings. After a hearing, Judge Maureen Lamasney denied the appellant's petition in an opinion and order filed on October 5, 2009. Judge Lamasney found that adverse immigration consequences were a "collateral" consequence of a guilty plea, and that a guilty plea could not be invalidated for lack of voluntariness on the ground that a petitioner was not advised of a collateral consequence.

The appellant appealed to the Court of Special Appeals, arguing that he should obtain, retroactively, the benefit of the Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) (holding that an attorney's failure to advise a criminal defendant prior to entering a guilty plea that the plea may have adverse immigration consequences satisfies the performance prong of the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), test for a claim of ineffective assistance of counsel in violation of the Sixth Amendment). The Court affirmed in a reported opinion, *Miller v. State*, 196 Md. App. 658, 11 A.3d 340 (2010), holding that, under the framework established by Justice O'Connor's plurality opinion in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), *Padilla* announced a new rule and could not, therefore, retroactively apply to the appellant's conviction, which was on collateral review at the time *Padilla* was decided.

The Court of Appeals granted *certiorari*, 423 Md. 453, 31 A.3d 921 (2011), and vacated and remanded to the Court of Special Appeals, 423 Md. 474, 32 A.3d 1 (2011), for reconsideration in light of *Denisyuk v. State*, 422 Md. 462, 478-79, 30 A.3d 914 (2011) (holding that, because *Padilla* was merely an application of the *Strickland* standard to a new set of facts, it was compelled by existing precedent and should be retroactively applied, and stating that *Padilla* should be "applie[d] retroactively to all cases arising out of convictions based on guilty pleas that occurred after April 1, 1997," the effective date of the federal Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

Held: Affirmed on reconsideration.

The only ground for relief the appellant asserted in his coram nobis petition was that his guilty plea was rendered involuntary because he was not advised of the potential for adverse immigration consequences and was not advised that he was giving up his right to a direct appeal. The appellant did not mention the Sixth Amendment in his coram nobis petition or at the hearing held on the petition. Ineffective assistance of counsel and the voluntariness of a guilty plea are separate and distinct issues. The failure of a defense attorney to satisfy the performance prong of *Strickland* does not *ipso facto* render a guilty plea involuntary. Neither *Denisyuk* nor *Padilla*, which deal solely with the Sixth Amendment right to effective assistance of counsel, have any bearing on the voluntariness of a guilty plea, and are thus inapplicable to this case.

Even if, *arguendo*, some other part of the *Padilla* decision besides its Sixth Amendment holding were relevant to the appellant's coram nobis proceedings, such as its rejection of the distinction between direct and collateral consequences of a guilty plea, it would not necessarily be retroactively applicable to the appellant's 1999 conviction. Despite *dicta* in *Denisyuk* to the contrary, it is clear that Maryland has always followed the Supreme Court's retroactivity jurisprudence. Furthermore, the *Strickland* performance prong measures the performance of counsel against a national standard and does not vary from state to state. The question of whether a rule is new or is compelled by existing precedent depends upon the state of the law as of the time the appellant's conviction became final; in this case, September 1, 1999. As of 1999, the overwhelming consensus of federal, out-of-state, and Maryland courts that had considered the issue was that "Due Process does not require that a defendant be advised of the indirect or collateral consequences of a guilty plea, even if the consequences are foreseeable." *See Yoswick v. State*, 347 Md. 228, 240, 700 A.2d 251 (1997). The disagreement among the Justices in the *Padilla* decision itself is further evidence that *Padilla* announced a new rule.

As such, there was no "existing precedent" as of September 1, 1999 that would have compelled or dictated 1) a legal ruling that the failure to advise a criminal defendant about deportation consequences would constitute the ineffective assistance of counsel according to the Sixth Amendment; 2) a legal ruling that such a Sixth Amendment violation would *ipso facto* render an otherwise acceptable guilty plea involuntary even in a case where a Sixth Amendment claim had not been raised; or 3) a legal ruling that judges conducting collateral review of criminal convictions may not rely on the distinction between the direct and collateral consequences of a

conviction because the Supreme Court would, eleven years later, deem the distinction "ill-suited" for that purpose.

Ember Louise Buckley v. The Brethren Mutual Insurance Company, No. 1855, September Term 2010, filed September 26, 2012. Opinion by Kehoe, J.

Eyler, Deborah S., J., dissents.

http://mdcourts.gov/opinions/cosa/2012/1855s10.pdf

UNINSURED/UNDERINSURED MOTORIST COVERAGE – INSURANCE ARTICLE § 19-511

STATUTORY CONSTRUCTION – CONSTRUCTION OF STATUTE BY ADMINISTRATIVE AGENCY

Facts:

Ember Louise Buckley was a passenger in a motor vehicle owned and operated by Harvey Betts. The vehicle was insured by GEICO with policy limits of $100,000. Ms. Buckley's medical expenses alone exceeded that amount. GEICO offered to settle Buckley's claim for the policy limits. As required by Insurance Article § 19-511, Buckley notified her insurer, Brethren Mutual, of the offer and Brethren's adjuster responded by stating that Brethren would release its subrogation rights against Betts. The adjuster's letter was silent as to whether Brethren consented to, or refused to consent to, the settlement. Buckely accepted GEICO's offer and executed GEICO's standard release which, in addition to releasing Betts and GEICO, generally released "all other persons, firms or corporations" from liability resulting from the accident.

Brethren subsequently declined Buckley's UM claim on the basis that Buckley had assumed the risk of injury by Betts. Buckley sued. Initially, Brethren took the position that it had consented to the settlement but, after the Court of Special Appeals' opinion in *Kristings v. State Farm*, 189 Md. App. 367 (2009) was filed, Brethren asserted that it had not consented. Brethren subsequently filed a motion for summary judgment on the basis that Buckley's execution of the release of Betts and GEICO had the effect of releasing it from its obligations to Buckley under the UM provisions of its policy. The circuit court granted the motion.

Held: Vacated and remanded.

The judgment of the circuit court is vacated and the case remanded for further proceedings. The GEICO release did not have the effect of releasing Brethren's liability under the UM provision for to so hold would frustrate Insurance Article § 19-511's purpose of facilitating settlements between injured parties and underinsured tortfeasors. The case is remanded to the circuit court for further proceedings on Buckley's UM claim. As part of those proceedings, the circuit court must decide whether Brethren is irrevocably bound by its assertions to the court that it consented to the settlement. Moreover, there may be other arguments relating to the consent issue that are

not before the appellate court and the parties should be able to assert these grounds to the circuit court on remand.

Michael, LLC v. 8204 Associates Limited Liability Company, No. 601, September Term 2011, filed September 26, 2012. Opinion by Rodowsky, Lawrence F. (Retired, Specially Assigned).

http://mdcourts.gov/opinions/cosa/2012/0601s11.pdf

REAL PROPERTY – EASEMENT – DECLARATORY JUDGMENT – JUSTICIABILITY – STANDING – RIPENESS

Facts:

Michael, LLC, the plaintiff-appellant, had entered an agreement with Montgomery County to convert a County-owned surface parking lot ("Lot 3") into an underground parking garage. The County agreed to convey Lot 3 to Michael in consideration of Michael's constructing the underground garage and conveying the garage back to the County as a unit in a condominium. Michael then planned to construct private buildings on Lot 3 developed for mixed uses.

Lot 3 was subject to an easement held by 8204 Associates, LLC, the defendant-appellee, the owner of an adjacent property, 8204 Fenton Street. The easement consisted of a pedestrian bridge connecting the second floor of a commercial building located on 8204 Fenton Street with the surface parking lot on Lot 3. Michael's proposed construction of the underground parking garage on Lot 3 would eliminate the pedestrian bridge. Several alternative modes of access were proposed (construction of an interior or exterior elevator or construction of an exterior stairway) but Michael and 8204 Associates were unable to reach an agreement. The parties' agreement was a condition precedent to approval of the project by the County Planning Board and to settlement between Michael and the County on Lot 3.

Michael filed an action for a declaratory judgment in the Circuit Court for Montgomery County naming 8204 Associates and the County as defendants. Michael asked the court to decide whether the construction of an exterior stairway would comport with the terms of the easement. The court granted 8204 Associates' motion to dismiss for lack of a justiciable controversy.

Held: Reversed.

Michael has standing to bring the action for declaratory judgment. The correct rule as to standing is stated in 1 W. Anderson, *Actions for Declaratory Judgments*, § 159 at 300 (2d ed. 1951):

> "With respect to the right to maintain an action for declaratory relief 'interested' parties must, of course mean parties having a legal, protectible interest. ... If the plaintiff can show that his rights are in direct issue or jeopardy, and at the same

> time show that the facts are complete and that this interest is not merely academic, hypothetical, or colorable, but actual, a 'legal interest' as related to a justiciable controversy may be shown, and he has a right to maintain his action."

Although Michael is not yet an owner of Lot 3 and, therefore, is not technically a party to the disputed easement, Michael's contractual rights in Lot 3 provide a sufficient legal, protectible interest. Indeed, if 8204 Associates brought a declaratory judgment action against the County, as servient owner, seeking to have the easement construed to prevent any interference with the current use of the pedestrian bridge, Michael, as holder of the development rights under its agreement with the County, would have to be joined as a necessary party.

The action is also ripe for a decision. Although several conditions precedent to settlement between Michael and the County on Lot 3 remain unfulfilled, the terms of the easement are fixed and so is 8204 Associates' position that replacing the pedestrian bridge with an exterior stairway would violate the terms of the easement. Michael need not wait until it is sued by 8204 Associates in order for Michael to obtain a judicial determination of whether the exterior stairway violates the easement.

Adeline Sturdivant et al. v. Maryland Department of Health and Mental Hygiene, No. 309, September Term 2011, filed August 31, 2012. Opinion by Kehoe, J.

http://mdcourts.gov/opinions/cosa/2012/0309s11.pdf

STATUTORY LAW – STATE PERSONNEL AND PENSIONS ARTICLE

State Personnel and Pensions Article ("SPP") (1994, 2009 Repl. Vol.): (1) Do laid-off State employees have a statutory right to reinstatement? (2) Did the process actually used by Spring Grove Hospital to fill vacancies satisfy the statutory requirements for recruiting employees?

Facts:

In 2009, the Maryland Department of Health and Mental Hygiene ("DHMH") closed the Rosewood Center, a facility that provided treatment services to developmentally disabled individuals, and transferred a number of its staff members to Spring Grove Hospital, a State psychiatric hospital. The consolidation of the two facilities resulted in redundant staffing levels. DHMH subsequently laid off approximately 50 Direct Care Assistants ("DCAs"), who are responsible for assisting patients with daily activities, such as escorting patients to and from appointments. Pursuant to SPP § 11-205, DHMH laid off the least senior DCA's, including the 17 appellants. However, at the same time, Spring Grove had vacant DCA positions. Enclosed with each layoff notice was an employment application which the laid-off DCAs were orally requested to fill out and return. Most of the laid-off DCAs filed an employment application.

Spring Grove's Nurse Recruiter organized an interview panel to evaluate the qualifications and personnel files of the DCAs who applied for the open positions, a process which included asking a series of scripted questions and then scoring the DCA's answers. Seniority was not a factor in deciding whom to rehire. Laid-off DCAs who were junior in seniority to appellants were offered employment as DCAs and began working in their new positions in October, 2009.

Appellants filed a grievance asserting that (i) they had a statutory right to reinstatement according to seniority pursuant to SPP § 11-208 and (ii) the hiring process actually used by Spring Grove was a pretext to disguise the fact that it was reinstating laid-off employees without regard to their seniority. Dispute resolution efforts within DHMH and the Department of Budget and Management were unsuccessful and the grievance was referred to the office of Administrative Hearings for an adjudicatory hearing before an administrative law judge ("ALJ"). The ALJ denied the grievance, concluding that Spring Grove's hiring process was valid because it was a recruitment, pursuant to Title 7, and not a reinstatement of laid-off employees, pursuant to Title 11. Appellants then petitioned for judicial review in the Circuit Court for Baltimore City which affirmed the administrative decision.

Held:

1. SPP §7-203 provides that an agency can fill vacancies by recruitment or appointment from an existing list of eligible candidates. If the list of eligible candidates includes laid-off employees, and laid-off employees are rehired, SPP § 11-208 requires that they must be rehired on the basis of seniority. If the agency makes the effort to recruit in accordance with Title 7, it can hire the candidates it deems to be the best suited for the position. There is no statutory preference for either method—an agency may fill a vacancy through a Title 7 recruitment or a Title 11 reinstatement, or conceivably, a combination of both. There is nothing in the State Personnel and Pensions Article that prevents an agency from directing its recruiting efforts at previously laid-off employees, as occurred in this case. If this is done, the list of applicants that qualify for future employment may include candidates who are eligible for reinstatement pursuant to Title 11 as well as candidates who are eligible for appointment after participating in the Title 7 recruitment process. A laid-off employee has no absolute right to reinstatement if the agency subsequently fills vacancies in the same position.

2. The Court then held that, where an agency chooses to fill a vacant position by recruitment, the agency must comply with the statutory requirements for recruitment set out in SPP Title 7. Title 7's requirements are manifold but the most important in the Court's view pertain to public notice, thus assuring that all interested individuals have an opportunity to apply, and transparency, so that applicants and would-be applicants will know what criteria will be used in making hiring decisions. The Court concluded that "[t]he degree to which Spring Grove complied with these statutory mandates is problematic." Because the ALJ made findings of fact regarding some but not all of the compliance issues, the Court remanded the case to the administrative law judge for further proceedings with instructions that the ALJ should grant the grievance if the ALJ concludes that Spring Grove failed to comply with relevant statutory requirements for recruitment.

Georgia-Pacific, LLC f/k/a Georgia-Pacific Corporation v. Jocelyn Ann Farrar, No. 751, September Term 2010, filed September 26, 2012. Opinion by Kehoe, J.

http://mdcourts.gov/opinions/cosa/2012/0751s10.pdf

TORTS – ASBESTOS LIABILITY – MANUFACTURER'S DUTY TO WARN – SUFFICIENCY OF EVIDENCE – CHARGE TO JURY

(1) Did the court err in denying an asbestos manufacturer's motion for judgment on the grounds that the manufacturer had no duty to warn a household resident of the risk of exposure to asbestos fibers carried home by another member of the household who was exposed to, but did not directly work with, the manufacturer's product? (2) Did the court err by denying manufacturer's motion for judgment because there was not sufficient evidence to prove manufacturer's product was a substantial cause of plaintiff's mesothelioma? (3) Did the circuit court abuse its discretion by issuing a modified *Allen* charge in response to an ambiguous verdict as to one element of damages?

Facts:

When in high school, Ms. Farrar periodically lived in the same household as her grandfather, who worked as an insulator and was exposed to products containing asbestos in construction projects for almost fifty years, from 1925 into the 1970s. In 1968, when she was living in his household, Ms. Farrar's grandfather worked on the construction of the Forrestal Building in Washington, D.C. Evidence established that the grandfather was regularly exposed to dust from asbestos-containing products, including one manufactured by Georgia-Pacific. The evidence further indicated that the dust, which included asbestos fibers, would settle on the grandfather's clothing, hair, skin, and shoes and that he did not shower or change his clothes upon leaving the work site.

While living with her grandparents, Ms. Farrar did the laundry at least once a week during the period her grandfather worked on the Forrestal Building. She testified to shaking her grandfather's work clothes thoroughly because the dust from his clothing might clog the drain in the washing machine. After shaking out her grandfather's work clothing, she remembers breathing in the dust that was removed from the clothing. She also remembers having to sweep up dust on the ground that resulted from shaking out her grandfather's work clothes. Ms. Farrar described the dust as whitish-grayish, loose and fluffy.

Ms. Farrar filed a complaint in the Circuit Court for Baltimore City setting out claims for, *inter alia*, negligence, breach of warranty and strict liability, against numerous defendants. The complaint alleged that her mesothelioma was caused by the conduct of various defendants. On October 15, 2009, a jury trial commenced on claims against Georgia-Pacific and three absent cross-claim defendants. Georgia-Pacific argued that, as a matter of law, it did not owe a duty to warn household residents of workplace bystanders about asbestos exposure. It moved for

judgment on the issue but this motion was denied by the trial court. Medical testimony established that Ms. Farrar had developed mesothelioma and all exposures to asbestos—not just exposures to Georgia-Pacific asbestos products—would have, in a cumulative fashion, contributed to the development of her disease.

The jury returned a verdict finding that Ms. Farrar's exposure to Georgia-Pacific's product was a substantial factor in causing her injuries. The jury awarded $95,575 for past medical expenses; $75,000 for future medical expenses; $1,600,000 for future economic losses; and a verdict of "undetermined" for past and future non-economic losses. The court and counsel then engaged in a discussion about the meaning of "undetermined" and how best to move forward to obtain a complete verdict. The court decided to give the jury a modified *Allen* charge and dismissed the jury for further deliberations. After further deliberations, the jury replaced "undetermined" with an award of $18,500,000 for past and future non-economic losses. Of the total award of $20,272,575, Georgia-Pacific's proportionate share was $5,013768.75.

Georgia-Pacific moved for judgment notwithstanding verdict ("JNOV"), or, in the alternative, for new trial or remittitur. With Ms. Farrar's consent, the trial court granted JNOV in part on May 4, 2010, reducing the verdict by $75,000 to $20,197,575 ($4,995,018.75 against Georgia-Pacific), but otherwise denied JNOV. After one other minor revision to the amount, a judgment was entered and Georgia-Pacific noted its appeal.

Held:

1. The trial court did not err in denying Georgia-Pacific's motions for judgment and its motion for judgment notwithstanding the verdict.

A. With regard to the question of duty, the parties did not dispute that Georgia-Pacific manufactured an unsafe product or that Georgia-Pacific owed a duty to warn certain individuals of the harmful impact of its asbestos product. The only question was whether Ms. Farrar fell within the class of people to whom the duty was owed. The trial court correctly decided that she did. The requirement in *Gourdine v. Crews*, 405 Md. 722 (2008), and other cases for a direct connection between the defendant's conduct and the plaintiff's injury was satisfied by Ms. Farrar's inhalation of asbestos fibers which originated from the manufacturer's product because Ms. Farrar had physical contact with the harmful product which contributed to her disease and injury. Moreover, the extension of an asbestos manufacturer's duty to such a plaintiff did not create an indeterminate class of people.

B. Ms. Farrar presented sufficient evidence to meet the "frequency, proximity and regularity" test which the Court of Appeals established in *Eagle-Picher Industries, Inc. v. Balbos*, 326 Md. 179, 210-11 (1992), and reiterated in *Georgia-Pacific Corp. v. Pransky*, 369 Md. 360, 365-66 (2002). Ms. Farrar's testimony as to the frequency , proximity, and regularity of her exposure to Georgina-Pacific's product, together with expert testimony as to the cumulative effects of multiple exposures to asbestos was a sufficient basis for the jury to determine whether her

exposure to Georgia-Pacific's product was a substantial factor in causing her injuries. *See John Crane, Inc. v. Linkus*, 190 Md. App. 217, 238 (2010).

3. When the jury returned a verdict sheet indicating that its verdict as to past and future non-economic losses was "undetermined," the trial court did not abuse its discretion by following the "safer course," *see Lattisaw v. State*, 329 Md. 339, 347 (1993), and instructing the jury that its verdict must be unanimous and giving a modified *Allen* instruction (Maryland Pattern Jury Instructions Civil 1:15) in lieu of other instructions or questioning the jury as to the meaning of "undetermined."

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals dated October 5, 2012, the following attorney has been indefinitely suspended by consent:

JOHN KIRBY BURKHARDT

*

By an Order of the Court of Appeals dated October 9, 2012, the following attorney has been disbarred by consent:

ALLISON ELIZABETH NOVELLI

*

By an Order of the Court of Appeals dated September 11, 2012, the following attorney has been suspended for 90 days by consent, effective October 11, 2012:

DENISE LEONA BELLAMY

*

By an Order of the Court of Appeals dated September 12, 2012, the following attorney has been disbarred by consent, effective October 12, 2012:

WAYNE THOMAS PREM

*

By an Order of the Court of Appeals dated October 16, 2012, the following attorney has been placed on inactive status by consent:

TERRI LYNN JUANA SNEIDER

*

By an Order of the Court of Appeals dated October 17, 2012, the following attorney has been indefinitely suspended by consent:

CARREN SUSAN OLER

*

By an Order of the Court of Appeals dated October 18, 2012, the following attorney has been disbarred by consent:

MICHAEL KENNETH DECKER

*

By an Order of the Court of Appeals dated August 23, 2012, the following attorney has been indefinitely suspended by consent, effective October 22, 2012:

GEORGE GUILD STROTT, JR.

*

This is to certify that

JOHN WAYNE WALKER-TURNER, SR.

has been replaced on the register of attorneys in this state as of October 23, 2012.

*

By an Order of the Court of Appeals dated October 25, 2012, the following attorney has been disbarred by consent:

CLAYTON HENRY SCHRAMM

*

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RULES ORDERS AND REPORTS

A Rules Order pertaining to Categories 3, 6, 7, 8, 10 and 11 of the One Hundred Seventy Fourth Report of the Standing Committee on Rules of Practice and Procedure was filed on October 4, 2012:

http://mdcourts.gov/rules/rodocs/ro174categories36781011.pdf