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Table of Contents

COURT OF APPEALS

Attorney Discipline
Indefinite Suspension
Attorney Grievance v. Harmon....3

"Robo-Signing"
Attorney Grievance v. Dore....5

Suspension
Attorney Grievance v. Gray....8

Tax Evasion
Attorney Grievance v. Hoang....10

Unauthorized Practice of Law
Attorney Grievance v. Gerace....12

Civil Procedure
Certificate of Qualified Expert
Heavenly Days Crematorium v. Harris, Smariga & Associates....14

Criminal Law
Closing Argument
Whack v. State....16

District Court Testimony
Oku v. State....18

Post-Conviction Proceedings: Laches
Lopez v. State....19

Insurance Law
Executive Compensation
Maryland Insurance Commissioner v. Kaplan....21

Real Property
Bona Fide Purchaser
Fishman v. Murphy 23

Boundary Dispute
Webb v. Nowak 25

Torts
Duty to Warn Third Parties
Georgia Pacific v. Farrar 27

Substantial Contributing Factor
Dixon v. Ford Motor Company 28

Witness Accreditation
Little v. Schneider 29

Transportation
Employment Qualification Standards
Zei v. Maryland Transit Administration 31

COURT OF SPECIAL APPEALS

Criminal Law
Combined DNA Index System ("CODIS")
Diggs & Allen v. State 33

Reckless Endangerment
Moulden v. State 36

Requirement to Make Restitution
Stachowski v. State 38

Labor & Employment
Employment Contracts
Spacesaver Systems v. Adam 40

Torts
Contracts
Premium of America v. Sanchez 42

Zoning and Planning
Master Plan Consistency
Pringle v. Montgomery Co. Planning Board 45

ATTORNEY DISCIPLINE 47

JUDICIAL APPOINTMENTS 49

COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Anthony Maurice Harmon, Misc. Docket AG No. 44, September Term 2010, filed August 19, 2013. Per Curiam.

http://www.mdcourts.gov/opinions/coa/2013/44a10ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – INDEFINITE SUSPENSION

Facts:

The Attorney Grievance Commission ("Petitioner") filed a Petition for Disciplinary or Remedial Action against Anthony Maurice Harmon ("Respondent") for his alleged misconduct and violation of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC"). Respondent was alleged to have failed to maintain adequate records regarding his attorney trust account, commingled personal and client funds, received cash disbursements from his attorney trust account, and failed to respond to communications from Bar Counsel.

The Petition was referred to the Honorable Toni E. Clarke of the Circuit Court for Prince George's County. Respondent was served personally with the Petition and Petitioner's Requests for Admission of Facts and Genuineness of Documents on November 22, 2010. He did not respond. The hearing judge entered an Order of Default against Harmon on March 9, 2011 and scheduled a hearing for April 12, 2011. Maryland Rule 2–613(d) provided Respondent with thirty days to move to vacate the Order of Default or otherwise respond to the Notice of Order of Default. Respondent did not take any action during this time.

Respondent appeared at the April 12 hearing with an Opposition to the Motion to Default and an Answer to the Petition. Finding that Respondent did not substantiate satisfactorily any averment meeting the standard for vacating the Order of Default under Maryland Rule 2–613(d), the hearing judge denied Respondent's motion. The factual averments made in the Petition and Requests for Admission were, therefore, deemed admitted. Respondent was, however, permitted to participate in the hearing.

The hearing judge concluded that Respondent violated MLRPC 1.15 and 8.1, as well as Maryland Rule 16–606.1, 16–607, and 16–609 as a result of misconduct relating to his attorney trust account and his failure to respond to Bar Counsel's requests for information. The hearing judge did not include, in her Findings of Fact and Conclusions of Law, any findings concerning mitigation.

Bar Counsel recommended, as a sanction, an indefinite suspension with the right to apply for reinstatement in no less than six months. Respondent filed an Opposition to Petitioner's Recommendation for Sanctions with the Court of Appeals one day prior to oral argument in that Court.

Held:

The Court of Appeals determined that Respondent violated MLRPC 1.15, 8.1(b), and Maryland Rules 16–606.1, 16–607, and 16–609. Regarding Respondent's attorney trust account, the Court concluded that Respondent failed to maintain adequate records for his attorney trust account transactions, commingled personal and client funds, and made cash disbursements from his attorney trust account. The Court further noted that, because Respondent failed repeatedly to respond to Bar Counsel's communications and did not provide Bar Counsel with information it requested from him, Harmon violated also MLRPC 8.1(b).

The Court determined that an indefinite suspension with the right to apply for reinstatement in no less than six months was the appropriate sanction. Harmon offered at oral argument a motion in mitigation, including letters from an accountant and a therapist, in which he argued that public reprimand was appropriate. Although the Court recognized that Harmon may have been confronting substantial personal difficulties at the time Bar Counsel conducted its investigation, it also noted that Respondent's Opposition was untimely, did not include a Certificate of Service, was not provided to opposing counsel until the morning of oral argument before the Court of Appeals, and relied on evidence in mitigation not raised before, and not considered by, the hearing judge. It therefore did not consider the Opposition, and ordered an indefinite suspension with the right to apply for reinstatement in no less than six months. Finally, because Respondent admitted to suffering from clinical depression before the Court of Appeals, the Court noted that any petition for reinstatement must address Respondent's then-existing mental condition in considering his overall fitness to resume the practice of law.

Attorney Grievance Commission of Maryland v. Thomas Patrick Dore, Misc. Docket AG No. 35, September Term 2012, filed August 20, 2013. Opinion by Adkins, J.

Bell, C.J., dissents.

http://www.mdcourts.gov/opinions/coa/2013/35a12ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS
Attorney's conduct in having non-lawyer employees "robo-sign" and notarize "his" signature on foreclosure affidavits filed in court violated Rules 3.3(a)(1), 5.3(a)(1), and 8.4(d). A 90-day suspension is an appropriate sanction, when the attorney has a long professional record with no prior disciplinary complaints and where he takes extensive post-misconduct efforts to remedy the consequences of his actions.

Facts:

Respondent Thomas Patrick Dore delegated to his nonlawyer employees the task of signing affidavits in foreclosure cases. Unbeknownst to Dore, his employees also notarized some of these signatures. This practice came to the attention of a circuit court judge, who issued a private admonition to Dore.

Dore promptly hired an attorney, investigated and stopped his firm's affidavit-signing practices, and reported his conduct to the Attorney Grievance Commission ("AGC"). AGC charged Dore with violating four provisions of the Maryland Lawyers' Rules of Professional Conduct: Rule 3.3 (candor toward the tribunal); Rule 5.3 (responsibilities regarding nonlawyer assistants); Rule 8.4(c) (dishonesty, fraud, misrepresentation); and Rule 8.4(d) (misconduct prejudicial to the administration of justice).

The hearing proceeded on a stipulated statement of facts and conclusions of law. The hearing judge found that Dore violated Rules 3.3(a)(1), 5.3(a)(1) and 8.4(d), but not Rule 8.4(c). Neither Bar Counsel nor Dore filed any exceptions.

Held:

The Court of Appeals found that Dore violated Rules 3.3(a)(1), 5.3(a)(1) and 8.4(d) and ordered a 90-day suspension.

Rule 3.3(a)(1) prohibits a lawyer from knowingly "mak[ing] a false statement of material fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Dore violated this rule, when he gave a blanket authorization to his employees to sign his name in all foreclosure cases to "affirm under the penalties of perjury"

the truthfulness of information in the affidavits, regardless of any knowledge on his part about the particular case.

These same practices, where Dore's nonlawyer employees signed and notarized Dore's signature, without his knowledge of the notarization, served as the basis for Dore's violation of Rule 5.3(a). If Dore had exercised a reasonable degree of supervision over his employees and the firm's forms, he would have discovered that the affidavit-signing practice spread to employees to whom he gave no authorization and that his signatures were also unlawfully notarized. Dore's failure to do that clearly violated Rule 5.3(a).

Rule 8.4(d) provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." An attorney's conduct rises to this level if it is so egregious that it has a negative impact on the profession as a whole, leaving a bad mark on all of us. *See Attorney Grievance Comm'n v. Marcalus*, 414 Md. 501, 522, 996 A.2d 350, 362 (2010). The prejudice to the administration of justice may also be measured by the practical implications the attorney's conduct has on the day-to-day operation of our court system. *See Attorney Grievance Comm'n v. Ficker*, 319 Md. 305, 315, 572 A.2d 501, 505–06 (1990).

Dore's conduct was prejudicial to the administration of justice both because it severely undermined the public's trust in the legal profession, and because it wasted judicial resources. The trial court found that Dore improperly instructed his employees to sign his name on affidavits in foreclosure actions, failed to realize that those affidavits were unlawfully notarized, and allowed those false affidavits to be filed in court. The hearing court found that Dore's conduct was the type of conduct that "inevitably leads the public to distrust the legal profession and casts a negative light on the court system." Furthermore, because Dore's "extensive foreclosure practice brought him into every jurisdiction in the State," "Circuit Courts in five counties and Baltimore City were required to hold hearings to determine the validity of [Dore's] filings, forcing delays in the foreclosure proceedings and their ultimate disposition. The need for those hearings . . . negatively impacted the efficacy of the courts."

On a larger scale, Dore's affidavit-signing practices were an example of "robo-signing," the notorious " assembly-line signing and notarizing of affidavits for foreclosure cases, mortgage assignments, note allonges and related documents, all filed in courts and deed recorders in counties across the United States." (Citation omitted.)

The robo-signing practices clearly had an unsettling effect on the economy and homeowners, no matter who engaged in them. But these practices are even more disturbing when a member of the legal profession is involved. *See Attorney Grievance Comm'n v. Vanderlinde*, 364 Md. 376, 415, 773 A.2d 463, 486 (2001). As the preamble to our rules of professional conduct makes clear, "as a member of the legal profession," a lawyer is not only "a representative of clients," but he is also "an officer of the legal system and a public citizen having special responsibility for the quality of justice."

It is not surprising that, after the discovery of these egregious affidavit signing practices, courts could no longer take for granted the validity of affidavits filed by attorneys. The revelations

have "shaken the confidence that the courts have traditionally given to those kinds of affidavits." (Citation omitted.) In urging this Court to adopt a new rule and amend the existing rules to prevent this type of conduct from ever taking place again, Judge Wilner, the Chair of the Rules Committee, emphasized that "apart from prejudice to the homeowners," those practices "constitute[] an assault on the integrity of the judicial process itself." (Citation omitted.)

As the hearing judge pointed out, Dore's "actions contributed to the need for a change in the Rules governing foreclosure actions." It was this very type of irregularity that "motivated Governor O'Malley and members of the Maryland Congressional delegation to seek a halt of foreclosure actions in Maryland." This type of conduct also necessitated this Court's adoption, on an emergency basis, of Rule 14-207.1 and an amendment to Rules 14-207 and 1-311.

That Maryland Rules had to be amended further evidences the magnitude of the negative impact that misconduct such as Dore's has had on the legal profession. Dore's bogus affidavit practice contributed to the loss of the courts' trust in affidavits filed by attorneys, compromised the integrity of the foreclosure process, and resulted in a substantial expenditure of resources of courts of all levels. This is not to mention the negative effect Dore's conduct had on the particular cases handled by his firm. That the homeowners and mortgage companies in the individual cases were adversely affected goes without saying. The negative impact on the legal profession was great. Thus, the Court found Dore in violation of Rule 8.4(d).

In fashioning the appropriate sanction, the Court considered the American Bar Association's *Standards for Imposing Lawyer Sanctions*, which focus on "the nature of the ethical duty violated," "the lawyer's mental state," "the extent of the actual or potential injury caused by the lawyer's misconduct," and "any aggravating or mitigating circumstances." (Citation omitted). Taking into account the many mitigating circumstances in the case, the Court ordered a 90-day suspension.

Attorney Grievance Commission of Maryland v. Melissa Donnelle Gray, Misc. Docket AG No. 22, September Term 2012, filed August 15, 2013. Opinion by Cathell, J.

http://www.mdcourts.gov/opinions/coa/2013/22a12ag.pdf

ATTORNEY MISCONDUCT – SANCTIONS – 60-DAY SUSPENSION

Facts:

Bar Counsel received complaints in respect to Respondent and commenced an investigation. That investigation revealed that Respondent in respect to one client, on 27 July, 2009 had agreed to prepare a Qualified Domestic Relations Order (QDRO) that would make her client an alternate payee of David Ford's retirement benefits and transfer to her client one-half of those benefits. Despite repeated requests from opposing counsel and by her client, Respondent did not complete the task until January 13, 2012. In respect to this particular issue Respondent also failed to cooperate with Bar Counsel.

In a matter involving a different client, money from a home sale was placed in a joint escrow account in both the names of Respondent an another attorney. After the resolution of the sale, a court ordered that the Bank release certain sums to Respondent's client and to the client of the other attorney. For over four years opposing counsel repeatedly informed Respondent that her client's money should be distributed to her client.

Additionally, her client directed Respondent to file an appeal of the court order. While the appeal was filed, no transcript was prepared and the appeal was ultimately dismissed. Respondent took the position that because the client had not forwarded money for the preparation of the transcript she had no choice but to let the appeal be dismissed. The client alleged that she knew nothing of the events that resulted in the dismissal of her appeal and, in fact, was not informed that the appeal had been dismissed.

The client's money at issue was ultimately attempted to be withdrawn via two checks allegedly issued to the client. Apparently the checks were never presented to the bank for payment and the sum involved may have escheated to the state. The client took the position that she had not been informed about the checks or the money.

Respondent took no exception to the hearing court's findings of fact or conclusions of law. Bar Counsel took exception to the hearing court's conclusion that the rules relating to the handling of escrow money did not apply in this case because there were two attorneys from different firms named as the escrow agents/trustees of the account.

Return to ToC

Held:

The Court granted Bar Counsel's exception and held that generally the particular rules applied no matter how many attorney's names might be on such accounts. The Court also found that Respondent had violated Rules 1.3, 1.4, 1.15 and Rule 8.4(b). Respondent had been previously reprimanded.

Respondent was suspended from the practice of law for 60 days.

Attorney Grievance Commission of Maryland v. John Thanh Hoang, Misc. Docket AG No. 16, September Term 2009, filed August 19, 2013. Per Curiam.

http://www.mdcourts.gov/opinions/coa/2013/16a09ag.pdf

ATTORNEY DISCIPLINE – FRAUD – MISREPRESENTATION – TAX EVASION – SANCTION – DISBARMENT

Facts:

John Thang Hoang (an attorney admitted to practice in Maryland on June 25, 1986) was a registered partner in Tax-Smart Technology Services ("Tax-Smart"), a Florida partnership offering tax strategies and tax preparation services from its office in Alexandria, Virginia. While he was a certified public account and partner of Tax-Smart, Respondent designed a long-term, elaborate, and duplicitous scheme having the effect of defrauding the U.S. Government by preparing for his clients more than 500 federal income tax returns that claimed false gross receipts for illusory businesses, enabling his clients to show business losses through deductions of significantly above-market-value amounts for websites purchased through Tax-Smart. Respondent claimed his compensation by taking a percentage of the refunds generated by his preparation of the fraudulent tax returns.

In November 2005, the Internal Revenue Service ("IRS") notified Hoang that it intended to investigate the sale of the tax deduction strategy employed by Tax-Smart, as well as the associated Schedule C deductions. Tax-Smart and Hoang continued to sell the "product," and many of Tax-Smart customers' 2006 returns prepared by Hoang show he continued to take deductions for his clients using this strategy. Hoang scheduled (and then canceled) appointments with the IRS concerning the audits of six customers, failed to provide requested documents to the IRS, and refused to contact his audited customers. The IRS calculated that the tax deduction scheme cost the federal government approximately $11,600 per tax return, or $6,100,000 in 2003 alone.

On May 8, 2008, the U.S. Government filed in the U.S. District Court for the Eastern District of Virginia a complaint for permanent injunction and other relief against Hoang and Tax-Smart Technology Services, seeking under 26 U.S.C. §§ 7402, 7407, and 7408 to enjoin the fraudulent tax deduction scheme. On May 12, the parties entered into an agreement in which Hoang, on behalf of himself and Tax-Smart, consented to the entry of a Stipulated Judgment of Permanent Injunction. Hoang agreed not to offer tax services that promote non-compliance with federal tax laws, participate in making false representations that customers may take tax deductions without regard to whether the customer is engaged in a bona fide business activity, or claim a tax deduction for software depreciation without regard to the true value of the software or whether the software is used in a legitimate business venture. Hoang agreed also not to prepare, file, or assist in preparing or filing any federal income tax returns for any person other than himself. In the course of the Government's investigation, it was discovered further that, as of May 12, 2008,

Hoang had not filed his personal federal income tax returns for any tax years since 2000, which violated 28 U.S.C. §§ 6700, 6701, 6694, and 7203.

In February 2009, the Maryland Attorney Grievance Commission, acting through Bar Counsel, filed charges against Hoang under the Maryland Lawyers Rules of Professional Conduct (MLRPC), charging him with violations of Rules 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer); 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); and 8.4(d) (engaging in conduct that is prejudicial to the administration of justice). The matter was assigned to a judge of the Circuit Court for Montgomery County for an evidentiary hearing and to make findings of fact and conclusions of law regarding the matters asserted in the Petition. On June 22, 2009, personal service of a copy of the Petition for Disciplinary Action, Writ of Summons, and Order was made properly upon Hoang at his last known address by an investigator for the Attorney Grievance Commission. Hoang did not file an answer to the Petition.

Bar Counsel sought, and the hearing judge granted, an order of default. A hearing was held on September 4, 2009, on Bar Counsel's *ex parte* proof. Respondent failed to appear or participate in the hearing. The hearing judge expressly concluded that Hoang violated MLRPC 8.4(b), (c), and (d) by a standard of clear and convincing evidence. No exceptions were filed to the hearing judge's Findings of Fact and Conclusions of Law. Bar Counsel recommended disbarment as the appropriate sanction. Hoang did not participate before the Court of Appeals.

Held:

The Court of Appeals held that, because a lawyer's intentional false and fraudulent preparation of tax returns, whether on his, her, or on behalf of others, is conduct "infested with fraud, deceit, and dishonesty," even if it involves an act that is unrelated to practicing law directly, Hoang's gross criminal misconduct violated MLRPC 8.4(b). Likewise, Hoang's fraudulent tax deduction scheme was a plain violation of MLRPC 8.4(c), which prohibits lawyers from engaging in acts involving deceit, fraud, or misrepresentation.

A lawyer's willful failure to file his or her personal income tax returns violates the prohibition of Rule 8.4(d) of engaging in conduct prejudicial to the administration of justice. Hence, the Court held that Hoang's misconduct violated Rule 8.4(d) by failing to file personal federal tax returns for the years 2000 until May 12, 2008. Because a lawyer's repeated failure to file income tax returns is considered a dishonest act that reflects adversely on a lawyer's honesty, trustworthiness and fitness to practice law, Hoang's repeated failure to file his personal federal income tax returns is a violation of MLRPC 8.4(c) as well.

In light of Respondent's pattern of planned and deliberate fraudulent misconduct in devising and receiving compensation from a lengthy and elaborate tax deduction scheme for his clients, his failure to file tax returns for a period of eight years, and because Respondent did not provide any evidence of mitigating circumstances, disbarment was the appropriate sanction.

Attorney Grievance Commission of Maryland v. Michael Francis Gerace, Misc. Docket AG No. 28, September Term 2012, filed August 19, 2013. Opinion by Barbera, C.J.

http://www.mdcourts.gov/opinions/coa/2013/28a12ag.pdf

ATTORNEY MISCONDUCT – SANCTIONS – DISBARMENT

Facts:

The Attorney Grievance Commission ("Commission"), acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent Michael Francis Gerace. The petition alleged that Respondent committed professional misconduct in connection with his representation of a client and his unauthorized practice of law following an order of decertification from the Court of Appeals.

The matter was referred to the Honorable Michele D. Jaklitsch of the Circuit Court for Anne Arundel County to make findings of fact and conclusions of law. With respect to a complaint filed with the Commission by Colin Schafer, Esq., Judge Jaklitsch found that Respondent agreed, in writing, to represent the Schafer family in a landlord-tenant dispute in April 2010 for a fixed fee of $500. After the representation commenced, Respondent attempted to change the fee arrangement to an hourly rate, claiming that it was within his discretion to do so. In November 2010, the Schafers terminated Respondent as counsel, but Respondent refused to file a motion to withdraw, return the case file to Mr. Schafer, and refund the unearned fees. Respondent also failed to respond to his client's multiple attempts to contact him.

With respect to the unauthorized practice of law, Judge Jaklitsch found that Respondent was decertified from the practice of law on April 7, 2010, pursuant to an order of the Court of Appeals, for failure to pay his annual client protection fund assessment. In November 2011, while trying to obtain a response to Mr. Schafer's complaint, the Commission's investigator learned that Respondent was working at a law firm. Judge Jaklitsch found that Respondent knowingly engaged in the unauthorized practice of law by holding himself out to the Schafers and his colleagues as a licensed attorney.

Based on her factual findings, Judge Jaklitsch concluded that Respondent violated Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.1 (competence); 1.3 (diligence); 1.5(b) (fees); 1.16(d) (termination of representation); 5.5(a) and (b) (unauthorized practice of law); 8.1(b) (bar admission and disciplinary matters); and 8.4(a), (b), (c), and (d) (misconduct).

Neither the Commission nor Respondent filed exceptions to Judge Jaklitsch's findings of fact or conclusions of law. The Court of Appeals entered a Per Curiam Order disbarring Respondent on June 25, 2013.

Held:

The appropriate sanction for Respondent's violations is disbarment.

Because neither party filed exceptions to Judge Jaklitsch's findings of fact, the Court accepted her factual findings for the purpose of determining the appropriate sanction. The Court then reviewed Judge Jaklitsch's conclusions of law and agreed, based on an independent review of the record, that Respondent violated MLRPC 1.1, 1.3, 1.5(b), 1.16(d), 5.5(a) and (b), 8.1(b), and 8.4(a), (b), (c), and (d).

Based on Respondent's professional misconduct in connection with his representation of the Schafers, his intentional dishonesty with respect to his status as an attorney, and his disregard for the disciplinary process, the Court concluded that disbarment was the appropriate sanction.

Heavenly Days Crematorium, LLC v. Harris, Smariga and Associates, Inc., No. 128, September Term 2011, filed August 15, 2013. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2013/128a11.pdf

PROFESSIONAL MALPRACTICE – ENGINEERS – CERTIFICATE OF QUALIFIED EXPERT

PROFESSIONAL MALPRACTICE – ENGINEERS – MOTION TO WAIVE OR MODIFY EXPERT CERTIFICATE REQUIREMENT

PROFESSIONAL MALPRACTICE – ENGINEERS – TIME FOR FILING MOTION TO WAIVE OR MODIFY EXPERT CERTIFICATE REQUIREMENT

Facts:

Heavenly Days Crematorium, LLC ("Heavenly Days") filed a lawsuit against engineering firm Harris, Smariga and Associates, Inc. ("HSA") alleging that HSA committed "professional negligence" and breach of contract in assisting Heavenly Days in designing and obtaining government approval of a new pet crematorium. The allegations in the complaint centered on the work of an employee who was not a licensed engineer. The complaint accused her of numerous mistakes in her interactions with the county permitting department, as well as various communication failures.

After more than 90 days passed from the filing of that complaint, HSA filed a motion to dismiss, noting that Heavenly Days had not, as required by Maryland Code, Courts and Judicial Proceedings, §3-2C-02, filed a timely certificate of a qualified expert stating that HSA's work had failed to meet the applicable standard of care for professional engineers. In opposition, Heavenly Days argued that the employee against whom the allegations in the complaint were levied was not a "licensed professional" and that the claims were not based upon professional actions that gave rise to a heightened standard of care; therefore, Heavenly Days argued, the §3-2C-02 certificate requirement did not apply. In the alternative, it asked the court to waive or modify the requirement by extending the time in which the certificate could be filed.

The circuit court agreed with HSA that, regardless of whether the claim was based on the actions of a "licensed professional," the complaint alleged negligence in the provision of professional services and triggered the statutory certificate requirement. The court did not find "good cause" to waive or modify the requirement and thus dismissed the complaint without prejudice. Because the statute of limitations had run, however, the decision effectively barred Heavenly Days from refiling its claims. On appeal, the Court of Special Appeals affirmed the dismissal.

Held: Reversed.

The Court held that, where a complaint does not allege negligent acts or omissions by a licensed professional, it may not be dismissed for failure to file a §3-2C-02 certificate, though summary judgment may later be appropriate if the alleged wrongful acts are attributable to a licensed professional. Further, where expert testimony is unnecessary to assist the factfinder in determining whether the alleged acts or omissions met the applicable standard of care, the trial court may exercise its discretion under the statute to waive or modify the certificate requirement, provided that a request for such waiver or modification is made within the 90-day time period during which the certificate is to be filed. Because Heavenly Days' complaint did not specifically attribute negligent acts or omissions to a licensed professional, the Court reversed the dismissal and remanded for further proceedings.

Tommy Whack, Jr. v. State of Maryland, No. 86, September Term 2012, filed August 21, 2013. Opinion by Barbera, C.J.

http://www.mdcourts.gov/opinions/coa/2013/86a12.pdf

CRIMINAL LAW – CLOSING ARGUMENT – IMPROPER PROSECUTORIAL COMMENT

Facts:

Petitioner Tommy Whack, Jr., was convicted of second-degree murder in the Circuit Court for Prince George's County after being accused of shooting a man sitting in a pick-up truck in Landover, Maryland. During the trial, the State presented evidence from a DNA analyst who compared known DNA profiles of Petitioner and the victim with samples of DNA obtained from the truck where the shooting occurred. The DNA analyst stated that Petitioner could not be excluded as a person whose DNA might have been among a mixture of several DNA profiles found on the passenger door armrest in the truck. She further testified that one out of every 172 randomly selected African Americans could have contributed to this mixture of DNA profiles. Additionally, the analyst testified that the victim's DNA matched a DNA profile found on the truck's passenger headrest, putting the odds of the DNA coming from another African American at one in 212 trillion.

During the defense's closing argument, defense counsel suggested an alternative suspect and questioned the strength of the DNA evidence against Petitioner. In rebuttal closing argument, the State maintained that Petitioner's DNA was found on the truck and suggested that the one in 172 figure given by the DNA analyst was "no less strong" than one in 212 trillion. The Circuit Court denied Petitioner's motion for a mistrial made in response to these comments. Petitioner appealed his conviction, arguing that the prosecutor's misleading statements concerning the DNA evidence deprived him of a fair trial. The Court of Special Appeals affirmed the conviction in an unreported opinion.

Held: Reversed and remanded for a new trial.

The Court of Appeals concluded that the State made inaccurate statements during its rebuttal closing argument. The Court noted that the State wrongly asserted that Petitioner's DNA was found in the truck when the DNA analyst who testified at trial could only state that Petitioner's DNA might be present. The Court further faulted the State for drawing a false equivalency between the figure of one in 172 and one in 212 trillion. The Court dismissed the State's argument that the invited response doctrine was triggered in the case, concluding that the defense's comments during closing argument did not excuse the State's inaccurate response in rebuttal. The Court noted that the State's case was largely circumstantial and that the DNA evidence provided the only link between Petitioner and the crime scene. Although the trial court

did give general cautionary instructions to the jurors that they should rely on their own recollection of the testimony and evidence, the Court concluded these instructions were not enough to cure the prejudice to Petitioner.

Robert Oku v. State of Maryland, No. 59, September Term 2012, filed August 16, 2013. Opinion by Barbera, C.J.

http://mdcourts.gov/opinions/coa/2013/59a12.pdf

CRIMINAL PROCEDURE – EVIDENCE – DEFENDANT'S DISTRICT COURT TESTIMONY

Facts:

Petitioner Robert Oku was convicted of reckless endangerment and second-degree assault in the District Court of Maryland in Montgomery County after testifying that he had twice punched a man in an apartment building elevator on July 21, 2011. Petitioner obtained *de novo* review of his convictions in the Circuit Court for Montgomery County. At that bench trial, he moved to prevent the introduction into evidence of his District Court testimony; Petitioner argued that the State's use of the testimony during its case-in-chief would contravene the purpose of the *de novo* system of review for certain District Court judgments and violate his Fifth Amendment right against compelled self-incrimination. The Circuit Court disagreed and ruled that the testimony was admissible. Following the court's ruling, the parties stipulated to the substance of Petitioner's District Court testimony. Based on this stipulation and the victim's in-court identification, the court convicted Petitioner of second-degree assault.

Held: Affirmed.

The Court of Appeals first examined the history and purpose of the *de novo* system, which affords criminal defendants convicted in the District Court a new trial, with the burden again on the State to prove guilt beyond a reasonable doubt. Petitioner encouraged the Court to treat his District Court testimony as never having been given. The Court rejected the contention, clarifying that *de novo* appeals are original insofar as the case is decided as if no judgment were rendered. The parties are not restricted to the evidence they offered in District Court, and the Circuit Court makes new findings of fact, applying the rules of evidence. The Court determined that the *de novo* nature of Petitioner's Circuit Court trial did not require exclusion of his District Court testimony and held, accordingly, that the trial court was legally correct in allowing its admission.

The Court then addressed Petitioner's Fifth Amendment argument, observing that a defendant who chooses to testify has waived his right against compelled self-incrimination with respect to that testimony. Petitioner argued that the subsequent use of this testimony in a *de novo* proceeding would render it involuntary. The Court disagreed, reasoning that testimony not compelled when given did not transform into compelled testimony by its later introduction at the Circuit Court trial.

Jose F. Lopez v. State of Maryland, No. 61, September Term 2012, filed August 20, 2013. Opinion by McDonald, J.

Harrell and Battaglia, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2013/61a12.pdf

POST-CONVICTION PROCEEDINGS – LIMITATIONS AND LACHES.

Facts:

On February 24, 1986, Jose F. Lopez was convicted of attempted first degree rape, attempted robbery with a dangerous and deadly weapon, and burglary. On March 3, 1986, Mr. Lopez pled guilty to two counts of first degree rape, one count of second degree rape, three counts of burglary, and one count of assault with intent to rape. The offenses arose out of a series of burglaries and rapes during 1985 and 1986, and involved five different victims. Mr. Lopez was sentenced to consecutive life sentences for two of the offenses and concurrent sentences on the other charges.

On October 3, 2005, Mr. Lopez, unrepresented by counsel, filed a post-conviction petition covering both cases. In his petition and subsequent amended petition, Mr. Lopez alleged, among other things, ineffective assistance of counsel. The State responded by arguing that Mr. Lopez's claims were without merit and that, in any event, he had waived the right to raise them. In late 2007, Mr. Lopez came to be represented by the Office of the Public Defender, which filed a supplement to his petition. On November 25, 2008, the State filed an answer that expanded upon its prior arguments and, for the first time, argued that Mr. Lopez's petition should be denied on the ground of laches.

The Circuit Court held that laches was available to the State as a defense to a post-conviction petition, and it denied the petition on that basis. The Court of Special Appeals agreed that laches was applicable in post-conviction proceedings, but nonetheless found that the record in this case was insufficiently developed for a finding that laches barred the petition in this case. The Court of Special Appeals vacated the judgment and remanded the matter to the Circuit Court for reconsideration. The Court of Appeals granted certiorari to review the judgment of the Court of Special Appeals.

Held: Reversed.

The Court of Appeals reviewed the legislative history of the Maryland Post-Conviction Procedure Act. Because Mr. Lopez was sentenced prior to October 1, 1995 – the effective date

of the 10-year limitations period in the Post-Conviction Procedure Act – his action was not subject to that limitations period.

Prior to the 1995 amendment, the Post-Conviction Procedure Act permitted the filing of a post-conviction petition "at any time." In *Creighton v. State*, 87 Md. App. 736, 591 A.2d 561 (1991), the Court of Special Appeals construed this language to mean that laches did not apply. When the General Assembly added the 10-year limitations period in reaction to that case in 1995, it explicitly provided that the amendment was not to have "any effect" on cases in which sentences were imposed prior to October 1, 1995.

The Court held that neither the 10-year period of limitations provided by the Post-Conviction Procedure Act nor the doctrine of laches applies to petitions relating to sentences imposed before October 1, 1995.

Maryland Insurance Commissioner v. Leon Kaplan, No. 12, September Term 2012, filed August 16, 2013. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2013/12a12.pdf

NONPROFIT HEALTH SERVICE PLANS – EXECUTIVE COMPENSATION – POST-TERMINATION BENEFITS – EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (ERISA)

NONPROFIT HEALTH SERVICE PLANS – EXECUTIVE COMPENSATION – POST-TERMINATION BENEFITS – ANNUAL INCENTIVE PLAN

NONPROFIT HEALTH SERVICE PLANS – EXECUTIVE COMPENSATION – POST-TERMINATION BENEFITS – SUPPLEMENTAL EXECUTIVE RETIREMENT PLAN

Facts:

Leon Kaplan was terminated without cause from his position as an executive vice president at CareFirst, a nonprofit health service plan. He claimed various post-employment benefits. Two of the many monetary payments provided under his employment agreement were based on an annual incentive plan ("AIP") and a supplemental executive retirement plan ("SERP"). The AIP provided management employees extra compensation after each year of work based on whether the company met certain financial goals that year; however, under Kaplan's employment agreement, his post-termination benefit would equal a full-year target amount regardless of whether he had worked the entire year or whether the company's performance objectives were met. The SERP ordinarily offered additional retirement benefits to senior executives who had vested in the plan by working a certain number of years. On the date of his termination, Mr. Kaplan would not have worked the requisite number of years for the SERP benefits to vest, but his employment agreement provided "service credits" that made up the difference.

CareFirst declined to pay the post-termination AIP and SERP benefits (other than a prorated amount of the AIP payment) on the basis that the compensation was not "for work actually performed" and was therefore illegal under Maryland Code, Insurance Article §14-139(c), as that provision had been interpreted by the Maryland Insurance Commissioner. The Commissioner issued an order affirming the company's decision. On appeal, the circuit court agreed with the Commissioner's conclusion as to the effect of the Maryland statute. It held, however, that the denial of the SERP benefit was preempted by the federal Employment Retirement Income Security Act ("ERISA") and reversed that portion of the order. The Commissioner appealed and the Court of Appeals issued a writ of certiorari before a decision was reached in the Court of Special Appeals.

Held:

Maryland Code, Insurance Code, §14-139 applies to post-termination benefits in an executive's employment contract and is not preempted by ERISA where, in accordance with federal jurisprudence on ERISA preemption, the law did not affect the interpretation of the eligibility standards of the plan or its administration. The Court further held that the AIP termination payout provided for in Mr. Kaplan's employment agreement was not "for work actually performed" because he had worked only part of the year and the company had failed to reach the financial target necessary to trigger a payment. Lastly, the Court determined that payment of the SERP benefit would also not be "for work actually performed" because Mr. Kaplan would not have been vested in the SERP but for service credits granted to him in his employment agreement for time he did not actually work for the company.

Jeremy K. Fishman, et al, v. Sheila Murphy, Personal Representative of the Estate of Dorothy Mae Urban, Misc. Docket No. 93, September Term 2012, filed August 15, 2013. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/coa/2013/93a12.pdf

REAL PROPERTY – BONA FIDE PURCHASER – VOIDABLE DEED – LIS PENDENS – EQUITABLE SUBROGATION.

PETITIONERS, SUBSTITUTE TRUSTEES FOR A LENDER, WERE NOT BONA FIDE PURCHASERS OF AFFECTED REAL PROPERTY BECAUSE PETITIONERS' LENDER HAD CONSTRUCTIVE NOTICE THROUGH LIS PENDENS OF PENDING LITIGATION FILED BY A THIRD PARTY BEFORE THE LOAN CLOSED, BUT WERE ENTITLED NONETHELESS TO BE SUBROGATED EQUITABLY AS PRIORITY LIEN HOLDER BECAUSE A PORTION OF THE PROCEEDS FROM THE LOAN WERE USED BY BORROWER TO BENEFIT RESPONDENT'S INTEREST IN THE PROPERTY.

Facts:

On 3 January 2008, Sheila Murphy, the personal representative of the Estate of Dorothy Mae Urban, filed suit against Robert Street, Urban's son, in the Circuit Court for Anne Arundel County, alleging a deed for 229 Dale Street, Pasadena, Maryland("Pasadena property"), executed on 30 May 2007, from Urban to Street was null and void because Street induced the conveyance through fraud or undue influence. Before a hearing was held to consider these allegations, Street executed a note and deed of trust on 18 February 2008, secured by the subject property, to 1st Chesapeake Home Mortgage LLC ("1st Chesapeake") for $91,350. Of the loan proceeds, $59,086.72 was applied to pay-off an existing mortgage on the property, which encumbrance was created by Urban on 6 December 2004. On 15 March 2010, a hearing was held before Judge Jaklitsch to determine whether the Urban-to-Street deed was null and void. The Circuit Court found that a confidential relationship existed between Street and Urban and that the deed was procured through undue influence on the part of Street. As a result, on 23 March 2010, Judge Jaklitsch ordered a constructive trust be created and the Pasadena property conveyed thereby to the Estate. She did not declare expressly, however, the Urban-to-Street deed void ab initio.

On 28 October 2010, Midfirst Bank, which had been assigned the Street note and deed of trust by 1st Chesapeake, granted substitute trustee power to Jeremy K. Fishman, Samuel D. Williamowsky, and Erica T. Davis Ruth, ("Petitioners"). Street defaulted under the note and deed of trust on 1 May 2010. On 1 December 2010, Petitioners filed to foreclose on the Pasadena property in the Circuit Court for Anne Arundel County. The Estate, pursuant to Maryand Rule 14-211, filed a Motion to Stay and Dismiss the foreclosure. The Motion set forth two arguments as to why Petitioners could not foreclose on the Pasadena property. First, it contended that the creation of the constructive trust voided presumptively the Urban-to-Street

deed and thus the deed offers no protection to a subsequent purchaser. In the alternative, the Motion argued that Petitioners had constructive prior notice, through lis pendens, of the Estate's claim on the Pasadena property and, therefore, were foreclosed from priority as a bona fide purchaser. On 16 May 2011, a hearing on the Estate's Motion was held before Judge Caroom of the Circuit Court. Judge Caroom denied the Estate's Motion, determining that creation of a constructive trust does not void presumptively a deed and whether Petitioners received actual notice as to the pending litigation was a "disputed material fact."

The Estate appealed permissibly Judge Caroom's interlocutory ruling to the Court of Special Appeals. That court determined, in a reported opinion (207 Md. App. 269, 52 A.3d 130 (2012)), that Petitioners were not bona fide purchasers because Petitioners had constructive notice, through lis pendens, of the Estate's claim to the property. In addition, the court concluded that equitable subrogation was unavailable to Petitioners for the portion of the loan used to pay-off the existing encumbrance created by Urban. The Court of Special Appeals reversed the Circuit Court's judgment, remanding the case to the Circuit Court to grant the Estate's Motion to Stay and Dismiss. The Court of Appeals granted the petition for a writ of certiorari filed by Petitioners.

Held: Reversed.

The Court of Appeals reversed the judgment of the Court of Special Appeals. The Court began its analysis by reviewing whether the Petitioners were bona fide purchasers. It determined that establishment of a constructive trust implies a voidable deed only, unless the court declares void the affected deed. A voidable deed may not deny to a later transferee the status of a bona fide purchaser. Petitioners, however, were not bona fide purchasers here because, under the doctrine of lis pendens, constructive notice of the Estate's earlier suit against Street provided sufficient notice to foreclose the protections of a bona fide purchaser being enjoyed by Petitioners' principal. Nevertheless, the Court held that equitable subrogation should be applied because the Estate should not be enriched unjustly by Petitioners paying-off the Urban mortgage. The Court concluded that equitable subrogation entitled Petitioners to the rights and privileges of Urban's mortgage lender and, as a result, Petitioners were owed $59,086.72 , the amount which encumbered the land at the time of the Urban-to-Street conveyance.

John L. Webb, Sr., et ux. v. G. Philip Nowak, et ux., No. 83, September Term 2012, filed August 20, 2013. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/coa/2013/83a12.pdf

REAL PROPERTY – BOUNDARY DISPUTE – CLEARLY ERRONEOUS STANDARD – DEED INTERPRETATION PRINCIPLES

Facts:

Petitioners, John and Ruth Webb (the "Webbs"), believed that they held title to a 0.26-acre tract of land (the "Disputed Land") in Sharpsburg, Maryland. The Webbs contend that the Disputed Land is a part of three contiguous parcels acquired by the Webbs in 2000. The Disputed Land abuts and shares its western boundary with property owned by Respondents G. Philip and Barbara Nowak (the "Nowaks"), who claim also title to the Disputed Land.

The Webbs filed suit in the Circuit Court for Washington County against the Nowaks after the Nowaks removed merchantable timber from the Disputed Land. The Webbs sought compensatory and punitive damages, as well as damages under a common law theory for trespass. The Nowaks filed a counter-complaint seeking, among other relief, a declaratory judgment that they hold fee simple title to the Disputed Land and therefore owe nothing to the Nowaks for the removal of the timber.

The parties' disagreement stems from conflicting interpretations of a 1928 recorded deed from the heirs of Samuel Miller to Alice Wolf (the "Wolf deed"), a predecessor owner in the relevant chain of title. The Wolf deed describes a fence as constituting the western boundary line of the property conveyed to Wolf. During the first half of 2007, the Nowaks commissioned Frederic M. Frederick, a local surveyor, to prepare a survey of their land (the "Frederick Survey"). The Frederick Survey located the western boundary line of the Webbs' property along the remnants of an existing fence line (the "Existing Fence"), approximately 300 feet west from a stake at the west side of the "County road" and running from the stake in a northwesterly direction. Frederick and the Respondents assert that the Existing Fence is the same fence described in the Wolf deed. A 2000 survey prepared for the Webbs (the "Zenith Survey"), by contrast, placed the contentious boundary line 77 to 140 feet beyond the Existing Fence. The Zenith Survey harmonizes with the Webbs' belief that the fence described in the Wolf deed ceased to exist at some point after 1928 and before 2000, and, thus should be treated as a physical monument lost to antiquity, leaving the distance call in the Wolf deed as controlling. Thus, according to the Webbs, the western boundary line of their property extends beyond the Existing Fence described in the Frederick Survey. The Webbs contend that the Existing Fence did not exist in 1928.

The Circuit Court for Washington County entered judgment in favor of the Nowaks, finding, by clear and convincing evidence, that the western boundary of the Webbs' property was, in fact, the Existing Fence referred to in the Frederick Survey. The Court of Special Appeals affirmed in

an unreported opinion. The Court of Appeals issued a writ of *certiorari* to determine whether the intermediate appellate court erred in its determination as to the location of the disputed boundary. The Court of Appeals also agreed to determine whether the Court of Special Appeals applied the incorrect standard of review ("clearly erroneous") in determining the boundary. The Webbs believed the case presented purely a question of law and should be reviewed without deference to the trial court. They believe further that the status of the fence in the Wolf deed as a monument should be terminated because it is lost; and that, as a result, the distance call in the deed should control.

Held: Affirmed.

Based on the evidence found credible and persuasive by the trial judge, the Respondents are the rightful owners of the Disputed Land. The "clearly erroneous" standard of review applied by the intermediate appellate court was the correct standard of review on appeal of the trial judge' resolution of this boundary dispute. Petitioners failed to prove that the trial court erred in its determination on the relevant question of fact.

As a result of the trial court's factual determination that the Existing Fence was, in fact, the fence described in the 1928 deed, established principles of deed interpretation did not require reversal of the lower courts' decisions. Specifically, the preference for course and distance calls as controlling when a monument is lost is irrelevant based on the trial court's conclusion that the fence the Petitioners' claim was lost never existed in the first place.

Georgia Pacific, LLC, f/k/a Georgia-Pacific Corporation v. Jocelyn A. Farrar, No. 102, September Term 2012, filed July 8, 2013. Opinion by Wilner. J.

http://www.mdcourts.gov/opinions/coa/2013/102a12.pdf

TORTS – ASBESTOS – DUTY TO WARN THIRD PARTIES

Facts:

Plaintiff contracted mesothelioma, allegedly from exposure to asbestos fibers brought into the home, in 1968-69, on the clothes of her grandfather, who was exposed to asbestos dust in the course of his employment. Plaintiff was responsible for shaking out and laundering the clothes and sweeping the dust from the floor.

Plaintiff sued Georgia Pacific, whose product was the alleged source of the asbestos dust on her grandfather's clothes during the 1968-69 period. Grandfather did not handle the Georgia Pacific product directly but worked in the vicinity of others who did use the product and was exposed to the dust from their use of it.

The issue was whether Georgia Pacific had a duty to warn the granddaughter of the danger from contact with the dust on the grandfather's clothes. The circuit court and the Court of Special Appeals held that such a duty existed.

Held: Reversed.

The Court of Appeals reversed, holding that, given the somewhat skimpy state of knowledge regarding the danger to household members from asbestos dust brought into the home prior to the adoption of OSHA regulations in 1972, the inability to give warnings directly to household members like the plaintiff, and the inability of any warnings given at that time to have any practical effect, there was no duty by a manufacturer to warn household members who had no relationship with the manufacturer, were not in contact with the product itself, and were never on the work site where the product was used of the danger from contact with the clothing.

Bernard Dixon, etc., et al. v. Ford Motor Company, No. 82, September Term 2012, filed July 25, 2013. Opinion by Wilner, J.

Bell, C.J., and Battaglia, J., dissent.

http://www.mdcourts.gov/opinions/coa/2013/82a12.pdf

TORTS – ASBESTOS – SUBSTANTIAL CONTRIBUTING FACTOR

Facts:

Wife/mother died of mesothelioma allegedly caused by exposure to asbestos-laden dust brought home by husband from working on Ford brake products. She was also exposed to asbestos-laden dust from joint compound used by wife and husband in home improvement projects. Her husband and daughter brought a wrongful death action against Ford Motor Company. The jury returned a verdict for the plaintiffs, but the trial court (1) reduced the non-economic damage part of wrongful death verdict pursuant to a statutory cap, and (2) struck the jury's finding that the joint compound was not also a contributing factor. The Court of Special Appeals reversed the judgment against Ford on the ground that the trial court abused its discretion in permitting the plaintiffs' expert witness to testify.

Held: Judgment of Court of Special Appeals Reversed.

The Court of Appeals held that:

1) the trial court did not err in allowing expert testimony, based in part on evidence of multiple and cumulative exposures by wife, over 13-year period, to asbestos fibers from the Ford brake products, that any of those exposures constituted a substantial contributing factor in causing the mesothelioma;
2) the trial court erred in overturning jury verdict that joint compound used in home improvement project was not a substantial contributing factor in causing the mesothelioma;
3) cap on non-economic damages in wrongful death action involving two or more claimants of 150% of cap on individual award of non-economic damages does not violate equal protection, due process, right to jury trial, or Article 19 of the Maryland Declaration Of Rights;
4) the trial court did not err in denying motion for new trial.

Victoria Little v. Roger Schneider, No. 88, September Term 2012, filed August 22, 2013. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2013/88a12.pdf

EVIDENCE – OPENING THE DOOR – WITNESS ACCREDITATION – PHYSICIAN'S BOARD CERTIFICATION STATUS:

EVIDENCE - ADMISSIBLE TESTIMONY OF FACT WITNESS:

Facts:

Victoria Little underwent an aortobifemoral bypass surgery, performed by Dr. Schneider and Dr. Gonze, to remove a buildup of plaque in her aorta. Drs. Schneider and Gonze attempted to complete the surgery with a 16 x 8 mm graft, but the suture used to connect the tissue to the graft would not hold, causing Little to lose a large amount of blood. Unable to complete the aortobifemoral bypass, Drs. Schneider and Gonze converted the surgery into an axillobifemoral bypass. During surgery Little lost 5100 ccs of blood—almost her entire volume of blood. As a result, there were severe surgical complications: Little became permanently paralyzed from the waist down and suffered temporary damage to her kidneys, liver, heart, lungs, and spinal cord.

At trial, the jury found that Drs. Schneider and Gonze were negligent in the performance of the surgery. Schneider appealed, challenging two evidentiary rulings by the trial court: (1) allowing Little to question Dr. Schneider about his lack of board certification and (2) excluding from evidence a chest CAT scan which allegedly showed Little's aorta. The Court of Special Appeals reversed on both issues.

Held: Reversed

Under our opinion in Dorsey v. Nold, 362 Md. 241, 765 A.2d 79 (2001), a defendant physician's board certification status is generally not admissible as irrelevant. However, a defendant physician may open the door to the admission of such evidence if he puts his qualifications and credentials at issue. When a defendant physician testifies as a fact witness, the proper scope of his witness accreditation is more limited than that of an expert because the jury does not need to receive the same amount of detail as to his qualifications or credentials in order to decide whether he is credible. In this case, Dr. Schneider exceeded the reasonable limits of proper witness accreditation by testifying extensively as to his accomplishments and good deeds. Thus, the trial judge did not abuse his discretion in allowing Little to ask Dr. Schneider, on re-direct, about his lack of board certification in order to counter Schneider's effort to cloak himself as the paragon of vascular surgeons.

Schneider also complains that the trial judge improperly excluded a chest CAT scan, which allegedly could be used to determine the actual size of Little's abdominal aorta. The size of Little's aorta was the central fact of consequence in this case, and thus, if the CAT scan could aid in determining the size of Little's aorta, it may be relevant. Yet, Dr. Schneider still had to have a witness who could identify and interpret the CAT scan. None of Schneider's experts used the CAT scan in forming their opinions, and thus, it was undisputed that they would not be permitted to testify about the CAT scan. Schneider, however, argued that as a fact witness, he should have been permitted to testify using the scan. Yet, it is well established that fact witnesses must have personal knowledge of the matters to which they testify. In this regard, the trial judge clearly found that Dr. Schneider lacked the necessary personal knowledge. Indeed, the trial judge could find no indication at all that Schneider even knew that the CAT scan existed when he was treating Little. Clearly, then, it was within the trial judge's discretion to prohibit Dr. Schneider from testifying about this CAT scan because such testimony would have gone outside the realm of Schneider's personal knowledge regarding what he did and what he observed in the treatment of Little.

Anthony Zei v. Maryland Transit Administration, No. 62, September Term 2012, filed May 20, 2013. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2013/62a12.pdf

http://www.mdcourts.gov/opinions/coa/2013/62a12mr.pdf

DISABILITY LAW – EMPLOYMENT QUALIFICATION STANDARDS – TRANSPORTATION LAW – FEDERAL MOTOR CARRIER SAFETY REGULATIONS

Facts:

The Maryland Transit Administration ("MTA") employed Anthony Zei as a bus driver. On December 3, 2004, Zei was found to suffer dilated cardiomyopathy, a cardiovascular disease. This condition disqualified Zei from employment as a bus driver based upon the Medical Guidelines of the Federal Motor Carrier Safety Administration. As a result, the MTA discharged Zei from its employment on September 1, 2005.

In December 2005, Zei filed suit alleging that the MTA violated his rights under the Rehabilitation Act. A jury found the MTA guilty of discrimination and awarded Zei $200,000. However, the Court of Special Appeals reversed, holding that Zei's failure to satisfy the federally-created qualification standard for drivers of commercial motor vehicles rendered him unqualified for the MTA bus driver position as a matter of law.

Held: Affirmed.

The Court determined that the MTA properly imposed the federally-created qualification standard. The qualification standard precludes individuals suffering from particular cardiovascular diseases from serving as bus drivers. In order to reach this conclusion, the Court considered how the federally-created qualification standard interacts with the Americans with Disabilities Act ("ADA"). The ADA allows employers to use qualification standards only if they "are shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation . . . ." 42 U.S.C. § 12113(a).

First, the Court found that the qualification standard is job-related and of business necessity. The legislative history of the ADA and the cardiovascular disease standard demonstrate that Congress viewed the qualification standard as job-related and of business necessity because it did not abolish the requirements when it enacted the ADA. Instead, Congress required the Secretary of Transportation to identify and eliminate any unnecessary regulatory burden. After a thorough review of the cardiovascular disease qualification standard, the Federal Highway Administration ("FHA") decided that the regulation was necessary.

Second, the MTA's voluntary adoption of the federally-created qualification standard does not affect the holding. Federalism concerns dictated that the federal government provide some discretion to state governments over whether to impose the federally-created standard, but the FHA strongly urged the state governments to follow the regulations. Congress also created the Motor Carrier Safety Assistance Program to provide a financial incentive to state governments to adopt the federally-created qualification standard. Maryland opted into the program and adopted compatible state regulations. Thus, Maryland may adopt the federally-created qualification standard because there is a clear federal policy that encourages state participation.

Third, Zei's performance could not be accomplished by reasonable accommodation. Zei argued that a modification of policies would serve as a reasonable accommodation. However, the Court relied on *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995), in explaining that a modification of policies would be "ineffectual in remedying the basic disparities between the medical condition and the legitimate physical criteria for employment as a bus driver." 50 F.3d at 282 n.2. The Court agreed with *Myers*, and it concluded that a modification in policies would be an unreasonable accommodation.

COURT OF SPECIAL APPEALS

Howard Bay Diggs v. State of Maryland and *Traimne Martinez Allen v. State of Maryland*, Consolidated Cases, Nos. 929 & 932, September Term, 2010, filed August 28, 2013. Opinion by Kehoe, J.

http://www.mdcourts.gov/opinions/cosa/2013/0929s10.pdf

DNA EVIDENCE – DNA SAMPLES – PUBLIC SAFETY ARTICLE ("PS") § 2-501(I) – DNA PROFILES – DNA RECORDS – COMBINED DNA INDEX SYSTEM ("CODIS") – CODIS MATCHES – CODIS HITS – ADMISSIBILITY OF CODIS MATCHES – PS § 2-510 – EXPERT TESTIMONY

DNA EVIDENCE – EXPERT TESTIMONY – STATISTICAL DATA

Facts:

Defendants were charged with multiple offenses arising from a home invasion. Police recovered DNA samples from various items at the crime scene. These samples were analyzed, a DNA profile was created, and a corresponding DNA record was uploaded to state databases. CODIS matched certain of the crime scene DNA records to the DNA records of two other individuals. No additional testing was completed to verify the CODIS matches. The DNA samples recovered from the crime scene were also compared directly to DNA samples taken from the defendants. This comparison indicated that items at the crime scene contained DNA from one of the defendants.

At trial, the State did not present DNA evidence. In their defense, the defendants called a DNA expert to testify about the CODIS matches to the other individuals. The trial judge granted the State's motion to preclude evidence of the CODIS matches pursuant to PS § 2-510, in addition to various other grounds. The trial court did, however, permit the expert witness to testify that the defendants' DNA profiles did not match the DNA profiles recovered from certain items at the crime scene.

During cross-examination, the State elicited from the expert that certain of the DNA samples recovered from the crime scene matched DNA samples taken directly from one of the defendants. The expert did not provide statistical data in support of her conclusion, but stated that she was able to opine, to a reasonable degree of scientific certainty, that the samples came from the same person. On re-direct, defendants did not ask the expert to explain the factual bases of her opinion or how she arrived at her conclusion.

On appeal, the defendants contended that the trial court erred in prohibiting the admission of evidence of the CODIS matches. In support of this position, they argued that the trial court misapplied PS § 2-510 to the facts at bar, and that the trial court's ruling violated their right to present a defense, among other contentions. Defendants also challenged the admissibility of the expert's testimony as to the matching DNA samples where the expert offered no population genetics statistical data in support of her conclusions.

Held: Affirmed.

The Court explained that PS § 2-501(i) recognizes two general classifications of DNA samples. The first consists of DNA obtained directly from an individual arrested on, or convicted of, certain types of crimes, usually via cheek swab. The second consists of DNA recovered from a crime scene. DNA samples are submitted to certified crime laboratories to be analyzed. Information derived from this analysis is used to create a DNA profile, which, in turn, is included in a DNA record. DNA records are uploaded to databases maintained by state authorities.

DNA records are, in relevant part, maintained in the databases in two distinct collections: the Convict and Arrestee Collection (DNA samples taken from known convicts or arrestees), and the Unsolved Crimes Collection (DNA samples recovered from crime scenes). See Maryland v. King, __ U.S. __, 133 S. Ct. 1958 (2013). The Combined DNA Index System—CODIS—is a computer program through which law enforcement authorities can compare and contrast the DNA records stored in the state databases—i.e., compare and contrast the DNA records of crime scene evidence against the DNA records of convicted or arrested individuals. See King, 133 S. Ct. at 1984. The CODIS comparison may result in a "match" or a "hit" or both, each of which are narrowly defined terms of art. A CODIS "match" occurs when the comparison indicates that there is a significant level of consistency between the numerical data contained in the DNA records to justify additional testing and analysis of a known DNA sample from the individual associated with the DNA record. A "hit" occurs when a confirmed match aids in the investigation of an unsolved case.

Public Safety Article § 2-510 provides that: "A match obtained between an evidence sample and a data base entry may be used only as probable cause and is not admissible at trial unless confirmed by additional testing." Based on the plain meaning of § 2-510, the Court held that evidence of a CODIS match is not admissible at trial—any trial, not just the trial of the individual associated with the DNA record—unless additional testing confirms the match. The Court also concluded that PS § 2-510's requirement that a CODIS match be confirmed by additional testing of the DNA samples before evidence of the CODIS match is admissible at trial was a reasonable restriction on appellants' rights, see Kelly v. State, 392 Md. 511 (2006), and that an expert witness cannot testify as to the names of those associated with matching DNA records unless additional testing has been completed to confirm the CODIS matches.

Lastly, the Court held that DNA evidence was admissible without population genetics statistical data where the expert was able to opine, to a reasonable degree of scientific certainty, that two DNA samples came from the same person. See Young v. State, 388 Md. 99 (2004).

Brian Lee Moulden v. State of Maryland, No. 750, September Term 2011, filed June 26, 2013. Opinion by Kenney, J.

http://www.mdcourts.gov/opinions/cosa/2013/0750s11.pdf

CRIMINAL LAW – SENTENCING & PUNISHMENT

CRIMINAL LAW – RECKLESS ENDANGERMENT

Facts:

Appellant moved to suppress evidence seized as the result of an allegedly illegal search. At the motions hearing, Detective John Murphy testified that he was watching a live video feed of Marcs Court in Annapolis, which was across the street from where a robbery had occurred the day before. He observed two men riding bicycles; one of the men matched the description of the man suspected of committing several recent robberies in Annapolis. He radioed for Officer Michael Prout to "go down and identify the subjects[.]"

When Officer Prout arrived at the scene, he observed two men riding bicycles towards a nearby apartment building, their backs turned to him. As he approached in his marked police cruiser, one of the men abandoned his bicycle and ran into Apartment F of the nearby 9 Marcs Court apartment building. When the other man, who just stood there, told the officer that that man went by the nickname "B" – the nickname of the suspect in the previous robberies – "alarm bells went off" and he radioed for backup.

Additional officers arrived, including Detective Richard Truitt and Officer Jennifer Card. They testified that, at Apartment F, Sherry Brown emerged and indicated she was the "leaseholder" of Apartment F, and confirmed that "B" was inside the apartment. She verbally consented to a search, and later signed a consent form. Eventually, "B" – later identified as appellant – "came out on his own accord" and was arrested. Recovered during the search of Apartment F were credit and identification cards belonging to Vincente Ramirez – the victim of the previous day's robbery – and a wallet belonging to appellant identifying Apartment F as his address.

After the testimony, the circuit court found that there was probable cause to support appellant's warrantless arrest, and that appellant did not have standing to challenge the search.

At sentencing on appellant's convictions in several consolidated cases, the court accepted appellant's plea agreement that "any sentence both active and suspended imposed in K-10-2230 and 2231 will be run concurrent to each other." (Emphasis added). During sentencing, however, the court indicated that, should appellant violate his probation, the suspended portions of the sentences would run consecutive to each other.

During appellant's trial on the robbery of Mr. Ramirez, Mr. Ramirez testified that he had been confronted by appellant with a gun which, when a scuffle ensued, he realized was a "fake" plastic gun. At the end of trial, appellant's counsel made a motion for judgment on the reckless endangerment charge, because, with a fake gun, there was not a substantial risk of death or serious physical injury to Mr. Ramirez. That motion was denied, and the jury convicted appellant of reckless endangerment.

Held:

Regarding the motion to suppress, there was probable cause to support appellant's warrantless arrest. It is reasonable to infer that, in abandoning his bicycle and running away, appellant was aware of Officer Prout's approach in the police cruiser, and that appellant's flight indicated a consciousness of guilt. Appellant matched the physical description of the suspect in the robberies, and also went the same nickname – "B" – as that suspect. Even assuming that appellant was the co-tenant of Apartment F, Ms. Brown, as the other co-tenant, had authority to consent to a search of the apartment.

Regarding the plea agreement, there is no dispute that, under its terms, any sentences imposed in cases K-10-2230 and K-10-2231 were to run concurrent to each other. While the circuit court did not actually impose a consecutive sentence, were it to be imposed – as indicated it would be in the event of a violation of probation – that sentence would be in violation of the plea agreement.

Regarding reckless endangerment, the evidence was not sufficient to support that conviction where the State failed to counter Mr. Ramirez's testimony that the gun was "fake" with any evidence from which a juror might rationally infer that the gun was real and capable of firing a projectile, or if used as a club, would present a substantial risk of death or serious personal injury.

Kenneth Martin Stachowski, Jr. v. State of Maryland, No. 2051, September Term 2006, filed August 27, 2013. Opinion by Kehoe, J.

http://www.mdcourts.gov/opinions/cosa/2013/2051s06.pdf

RESTITUTION – CONDITION OF PROBATION – COURT'S AUTHORITY TO IMPOSE CONDITIONS BOUNDED BY STATUTORY LIMITATIONS

RESTITUTION – CONDITION OF PROBATION – ILLEGAL SENTENCE

RESTITUTION – VICTIMS – UNRELATED

Facts:

Between 2003 and 2005, Stachowski committed a variety of criminal offenses in Somerset and Wicomico counties in Maryland as well as in Delaware.

In 2003 and 2004, Stachowski entered into separate written home improvement contracts with three Somerset County residents, Darlene Wright, Ruth Daniels, and Emma Daniels. He failed to perform the agreed-upon work and the aggrieved individuals filed complaints with the Maryland Home Improvement Commission. As a result, Stachowski was charged in three separate proceedings in the District Court of Maryland, sitting in Somerset County, with failing to perform home improvement contracts in violation of § 8-605 of the Business Regulations Article ("BR") and with acting as a contractor without a license in violation of BR § 8-601 (the "home improvement cases"). In each of the home improvement cases, Stachowski pleaded guilty to one charge and the State nolle prossed the other. Thereafter, in the Ruth Daniels and Darlene Wright cases, Stachowski received a six-month suspended sentence, a $1,000 suspended fine, three years supervised probation, and was ordered to pay restitution as a condition of that probation. In the remaining case, Stachowski received a 30 day suspended sentence, a $1,000 suspended fine, three years supervised probation, and was ordered to pay restitution as a condition of probation. Stachowski did not make the required restitution payments and, eventually, the State filed petitions to revoke his probations. After a hearing, the district court found Stachowski to be in violation of probation in all three home improvement cases and ordered Stachowski to serve the previously suspended sentences in each case and to pay fines of $1,000 in each case, to be served off at a rate of $10 per day of confinement. The sentences were to run consecutively to one another. Stachowski timely appealed the disposition of the three violation of probation cases to the circuit court.

In June, 2005, Stachowski passed a bad check to a company called Somerset Well Drilling and was charged in the Somerset County district court with obtaining property or services by bad check in violation of § 8-103 of the Criminal Law Article ("CL"). Upon Stachowski's request for a jury trial, the case was transferred to the circuit court. Prior to the scheduled trial date in the circuit court, Stachowski's wife made full restitution to Somerset Well Drilling.

On October 11, 2006, the violation of probation cases and the bad check case were called for trial in the circuit court. At the beginning of the proceeding, the State represented that the parties had reached an agreement as to the disposition of all four cases. As part of this agreement, Stachowski pleaded guilty to the bad check offense. After the prosecuting attorney recounted the factual basis for the guilty plea, the circuit court found Stachowski guilty of violating§ 8-103 of the Criminal Law Article. As to his violation of probation appeals, Stachowski conceded that he had not made the required restitution payments but testified that he was struggling to support his family. The circuit court found by a preponderance of the evidence that Stachowski was in violation of his probation because he had failed to make the required restitution payments ordered by the district court. The court then sentenced Stachowski to eighteen months with all but five months suspended, supervised probation for five years in the bad check case, and imposed consecutive sentences for Stachowski's suspended sentences in the home improvement cases. The court also ordered Stachowski "to make restitution to those three victims [of the home improvement cases] . . . ." as a condition of probation in the bad check case. Stachowski appealed.

Held: Reversed in part.

The Court concluded that while a court has the discretion to impose a requirement for restitution as a part of a sentence or as a condition of probation, that discretion is limited by § 11-603 of the Criminal Procedure Article. A court's broad authority to impose conditions of probation is bounded by statutory limitations upon its authority. See, e.g., Bailey v. State, 355 Md. 287, 299 (1999). This principle is fully applicable when courts impose an obligation to make restitution as a condition of probation. See, e.g., Silver v. State, 420 Md. at 427; Chaney v. State, 379 Md. 460, 470 (2007). Thus, reasoned the Court, a court order requiring a defendant to pay restitution as a term of probation under § 6-221 of the Criminal Procedure Article must be consistent with the "explicit statutory requirements allowing restitution under limited circumstances" found in § 11-603. As a result, when a sentencing court exceeds the limits of its statutory authority in ordering restitution as a condition of probation, an appellate court will invalidate the order as an illegal sentence. Walczak v. State, 302 Md. 422, 427, 433 (1985); see also, Carter v. State, 193 Md. App. 193, 209 (2010) .

Turning to the present appeal, the Court concluded that the circuit court was without authority to require defendant to pay restitution to the victims in the home improvement cases as a condition of probation for the sentence on the bad check charge. Furthermore, in response to an argument by the State, legislative history does not support the conclusion that § 11-619 of the Criminal Procedure Article was intended to, or had the effect of, authorizing sentencing courts to require as a condition of probation that defendants pay probation to victims of crimes that are unrelated to the conviction for which probation is granted.

Spacesaver Systems, Inc. v. Carla Adam, No. 1797, September Term 2011, filed June 27, 2013. Opinon by Kenney, J.

http://www.mdcourts.gov/opinions/cosa/2013/1797s11.pdf

LABOR & EMPLOYMENT – EMPLOYMENT CONTRACTS

Facts:

Carla Adam, like her sister Amy Hamilton and her half-brother Daivd Craig, was a trustee, part owner, board member, and executive employee of Spacesaver Systems, Inc. Spacesaver was formed by their parents, Jack and Alice Schmidt, in 1953. In 2006, each of the Schmidts' three children signed an identical Executive Employment Agreement, which stated that the employee could be terminated by the company "for cause."

After she was terminated by Spacesaver, Adam filed a breach of contract suit against Spacesaver alleging that she was terminated without cause. Both parties filed motions for summary judgment; the motions court, finding that the Agreement was not unambiguous, denied the motions. The court stated that "a contract such as this which is silent as to the term [or duration] of the employment relationship is presumed to establish an at-will relationship, terminable for any reason or no reason at all," which conflicted with the for-cause language of the Employment Agreement.

After a trial, the trial court, reasoning that Adam had a "lifetime contract" with Spacesaver and could only be terminated for cause, found that Spacesaver had breached the Employment Agreement. The court awarded Adam $255,868.20 in damages from the date of her termination through the date of trial – $198,000 from wages ($10,000 per month in salary x 16.5 months) and $57,868.20 in commissions.

Held:

The Employment Agreement, although lacking a typical durational term of employment – which would suggest an at-will contract – was a continuous for-cause contract that remained in effect until Adam was removed for-cause, or was no longer competent to discharge the duties of the office or efficient in the performance of them. It was not, however, a lifetime contract, which is a rare type of contract that should be specific and definite, with little or no room for misunderstanding. Thus, it must contain the terms as to work and salary.

The trial court did not err in awarding damages. Although her salary was not set in the Employment Agreement, an email from Spacesaver's corporate attorney to Adam and Hamilton specifically put her salary at $120,000 per year ($10,000 per month). And the court properly

incorporated commissions into the damages award where the complaint specifically asked for damages based on wages and commissions.

Premium of America, LLC v. William Sanchez, et al., No. 43, September Term 2011, filed August 29, 2013. Opinion by Kehoe, J.

http://www.mdcourts.gov/opinions/cosa/2013/0043s11.pdf

NEGLIGENCE – LIMITATION ON SCOPE OF DUTY

NEGLIGENCE – DUTY – INTIMATE NEXUS – ALTERNATIVE METHODS TO ESTABLISH TORT DUTY

NEGLIGENCE – DUTY – "INTIMATE NEXUS OR ITS EQUIVALENT" – PRIVITY

NEGLIGENCE – PRIVITY – CONTRACT ON BEHALF OF UNDISCLOSED PRINCIPALS

AGENCY – CONTRACTS ON BEHALF OF MULTIPLE UNDISCLOSED PRINCIPLES

NEGLIGENCE – DUTY – "INTIMATE NEXUS OR ITS EQUIVALENT" – RESTATEMENT (SECOND) OF TORTS § 552

MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Facts:

This case arises out of the actions of several affiliated companies, including Beneficial Assurance, Ltd. and Premium Escrow Services, Inc. (collectively, "Beneficial").

Beneficial was an agent for investors who were seeking to purchase viatical policies, life insurance policies of persons suffering from HIV/AIDS. While the specifics varied from case to case, Beneficial sought out potential investors and identified each investor's financial goals and the amounts he or she was willing to invest. Beneficial entered into written agreements with each investor by which the investor authorized Beneficial to purchase viatical policies on his or her behalf. These contracts included a disclaimer as to the reliability of estimates of viators' life expectancies. The investor placed funds into an escrow account administered by Beneficial to cover the purchase price of the policy and the life insurance premiums that would come due between the date of purchase and the date of the insured's death. The funds reserved for premium payments were usually calculated based on the viator's life expectancy—as determined by a third-party physician—plus one year.

Viatical policies were often sold at auction and, as part of the auction process, Beneficial obtained the viator's medical records. Beneficial submitted the medical records to a third-party physician who would review the information and provide a life expectancy estimation for the viator. Based in part upon the life expectancy evaluation, Beneficial would match a viatical policy to one or more investors and would bid on it. If Beneficial was successful, at closing, the

viator assigned the beneficial interest in the policy to an escrow agent, which, while purportedly independent, was actually under Beneficial's control. The escrow agent held the policy for the investor and disbursed funds as needed to pay policy premiums.

After closing, Beneficial sent a package of closing documents to the purchasers whose funds were used in the settlement. The package usually included information about the insurance policy, the financial rating of the insurer, an assignment, documentation as to the transfer of the beneficial interest in the policy to the escrow agent, and a copy of the report from the physician who had reviewed the viator's medical records and provided an estimate of the viator's life expectancy to Beneficial.

For various reasons, Beneficial went into bankruptcy in 2002. As part of the bankruptcy proceedings, the bankruptcy court confirmed a reorganization plan under which Premium of America, LLC ("Premium") was established as a limited liability company. The members of Premium were the investors who purchased viatical policies through Beneficial. The members assigned their interests in the policies to Premium as well as any claims that a member might have against any third party retained by Beneficial in connection with the marketing, sale, and administration of the viatical policies.

Premium filed claims for negligence, negligent misrepresentation, and gross negligence in the Circuit Court for Baltimore County against appellee, William C. Sanchez, M.D., a District of Columbia physician who provided life expectancy estimates for persons suffering from HIV/AIDS in this time period. Premium asserted that Sanchez significantly underestimated the life expectancies of these persons because he did not take into account advances in HIV/AIDS treatment and that his failure to do so was the result of his negligence or gross negligence. Sanchez filed a motion for summary judgment arguing, among other grounds, that Premium's claims failed as a matter of law because there was no nexus, privity, or any other relationship between him and any investor that established a duty on his part to them. After holding a hearing, the circuit court granted the motion because it concluded that Sanchez did not owe a duty to Premium's members and therefore was not liable to them for any errors in his evaluations.

Premium filed a motion to alter or amend the judgment or, in the alternative, a motion for leave to file an amended complaint to add a breach of contract claim against Sanchez. The circuit court denied both motions. Premium appealed.

Held: Affirmed.

The Court first stated that where a failure of duty causes economic loss, "'courts have generally required an intimate nexus between the parties as a condition to the imposition of tort liability. This intimate nexus is satisfied by contractual privity or its equivalent.'" Walpert v. Katz, 361 Md. 645, 658 (2000) (quoting Jacques v. First Nat'l Bank of Md., 307 Md. 527, 534-35 (1986)).

The Court then considered several arguments that the intimate nexus requirement was satisfied in this case.

First, the Court, applying §§ 6.03 and 6.05 of the Restatement (Third) of Agency and the comments thereto, concluded that "privity or its equivalent" did not exist between a numerically undetermined and undisclosed class of principals and a third party to a contract. The Court explained that from Sanchez's perspective, Beneficial had neither express nor implied authority to act on behalf of potential investors. This was because Beneficial did not disclose the true nature of its business to him. Had it done so, Sanchez might well have declined to make the evaluations at all or, alternatively, to charge more for them. The Court emphasized that comment (c) to § 6.05 of the Restatement (Third) of Agency provided that Sanchez, as a party to a contract, had the right to set the price for his services and to set other conditions as well. Building on this, the Court concluded that one such condition could quite reasonably have been to limit the number and nature of the persons to whom his opinion was disseminated.

Second, the Court concluded that, even assuming arguendo that Premium's undisclosed members (the potential investors) and Sanchez were in privity, that privity would be insufficient to establish the sort of "intimate nexus" required to establish a tort duty on Sanchez's part where (1) Sanchez believed that his evaluations were going to be used by Beneficial to decide whether to purchase viatical policies; (2) Sanchez had no knowledge that any entity other than Beneficial would rely on the evaluations; and (3) there was no evidence whatsoever of any conduct by Sanchez linking him to the investors or suggesting any understanding on his part that anyone other than Beneficial would rely on his assessments. The Court concluded that such circumstances in no way satisfied the "intimate nexus" requirement and, as such, would fail to limit what would otherwise be "liability in an indeterminate amount for an indeterminate time to an indeterminate class." Walpert v. Katz, 361 Md. 645, 671 (2000) (internal quotation marks omitted).

Third, the Court evaluated whether Sanchez had a tort duty to Premium's members under Restatement (Second) of Torts § 552. The Court of Appeals, in 100 Investment LP v. Columbia Town Center, 430 Md. 197, 230-31 (2013), concluded that Restatement (Second) of Torts § 552 and the privity theories of contract are alternative methods to establish tort duty. For liability to attach under Restatement (Second) Torts § 552, the plaintiff must be a member of a limited class, namely either (1) one to whom the defendant intended to supply the information directly or (2) one to whom the defendant knew the recipient, in turn, intended to supply the information and who suffered a loss after relying on the information for the same purpose as did the original recipient. See Walpert v. Katz, 361 Md. 645, 676-77 (2000). The Court determined that Restatement (Second) Torts § 552 was not a basis for concluding that Sanchez had a tort duty to Premium's members (the potential investors).

Fourth, and finally, the Court concluded that while motions for leave to file amended complaints are typically granted, a court does not abuse its discretion in denying such a request where a claim is flawed and the flaw cannot be repaired by an amendment.

Gregory Pringle v. Montgomery Co. Planning Board M-NCPPC, No. 2334, September Term 2011, filed June 27, 2013. Opinion by Kenney, J.

http://www.mdcourts.gov/opinions/cosa/2013/2334s11.pdf

ZONING AND PLANNING – MASTER PLAN CONSISTENCY

Facts:

The Germantown Employment Area Sector Plan's recommendations for the "Seneca Meadows/Milestone District" state: (1) "Concentrate a limited amount of street level retail near the transit station. Big box retailers, if proposed, should have active storefronts with multiple entrances and small retail uses facing Seneca Meadows Parkway and Observation Drive"; and (2) "Street level retail must conform to the plan's urban design guidance." (Emphasis added). The Seneca Meadows/Milestone District was then rezoned to a TMX-2 zone; the Montgomery County Zoning Ordinance states that development under a TMX-2 zone "must be consistent with the recommendations of the applicable master or sector plan." (Emphasis added).

Minkoff Development Corporation applied to the Montgomery County Planning Board for the approval of a Site Plan and a Preliminary Plan Amendment. which relate to a development project known as "The Shops at Seneca Meadows." Gregory Pringle submitted comments to the Planning Board that the Site Plan and Preliminary Plan Amendment were not "in conformance" with the Sector Plan. The Planning Board issued, on December 22, 2010, Resolution 10-157 approving the Site Plan and Resolution 10-156 approving the Preliminary Plan Amendment. The resolutions state that the Site Plan is "consistent" with – and "substantially conforms" to – the Sector Plan. As to the Sector Plan's language that "[b]ig box retailers, if proposed, should have active storefronts with multiple entrances and small retail uses facing Seneca Meadows Parkway and Observation Drive," the resolutions indicate that locating other "small retail uses" on Seneca Meadows Parkway and Observation Drive at the location of the proposed Wegman's grocery store was "not feasible" and would "not likely translate into viable retail" because of topographical drainage and grading concerns at that location. Moreover, "in order to accommodate the topographical limitations of the site, these buildings have been fronted on an interior street."

Mr. Pringle petitioned for judicial review in the Circuit Court for Montgomery County. After a hearing, and reasoning that the Planning Board "had before it substantial evidence to conclude that the respective applications before it for preliminary plans and site plan approval were consistent with the recommendations contained in the [Sector Plan] and that the . . . [Planning] Board made specific findings of fact," the court affirmed the Planning Board's approval of the resolutions.

Held:

Although the Sector Plan is "binding" on the Seneca Meadows development in the sense that the proposed development "must be consistent" with the Sector Plan recommendations, the recommendation in the Sector Plan stating that "[b]ig box retailers, if proposed, should have active storefronts with multiple entrances and small retail uses facing Seneca Meadows Parkway and Observation Drive," is clearly aspirational rather than mandatory. (Emphasis added). Cases, including one case in Maryland, have interpreted the word "should" as indicating a mere recommendation.

There was substantial evidence in the record to support the Planning Board's findings of fact regarding the characteristics of the site itself and its ultimate conclusion of consistency with the Sector Plan. Specifically, in its Site Plan approval, the Planning Board found that the natural drain location of the site (at the corner of Seneca Meadows Parkway and Observation Drive where the Sector Plan has called for retail frontage) and the grades of that intersection made "locating the retail uses on Seneca Meadows Parkway and Observation Drive . . . not feasible," and that, due to those "constraints," "an internal network of streets relatively near the proposed transit station is [still] consistent with the Sector Plan."

Return to ToC

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals dated August 9, 2013, the following attorney has been reprimanded by consent:

NEAL MARCELLAS JANEY, SR.

*

By an Order of the Court of Appeals dated June 11, 2013, the following attorney has been disbarred by consent, effective August 12, 2013:

GRANT MATTHEW MURCHISON

*

By an Order of the Court of Appeals dated August 14, 2013, the following attorney has been indefinitely suspended by consent:

MICHAEL CLIFFORD HICKEY, JR.

*

This is to certify that

ERNEST STEVEN NICHOLS

has been replaced upon the register of attorneys in this state as of August 14, 2013.

*

By a Per Curiam Opinion and Order of the Court of Appeals dated August 19, 2013, the following attorney has been disbarred:

JOHN THANH HOANG

*

By a Per Curiam Opinion and Order of the Court of Appeals dated August 19, 2013, the following attorney has been indefinitely suspended:

ANTHONY MAURICE HARMON

*

By an Opinion and Order of the Court of Appeals dated August 22, 2013, the following attorney has been suspended for six months:

GARLAND HOWE STILLWELL

*

Return to ToC

JUDICIAL APPOINTMENTS

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On July 3, 2013, the Governor announced the appointment of **STACY ADELE MAYER** to the District Court of Maryland – Baltimore County. Judge Mayer was sworn in on August 5, 2013 and fills the vacancy created by the retirement of the Honorable Bruce S. Lamdin.

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On July 3, 2013, the Governor announced the appointment of **JOAN ELIZABETH RYON** to the Circuit Court for Montgomery County. Judge Ryon was sworn in on August 8, 2013 and fills the vacancy created by the retirement of the Honorable Louise G. Scrivener.

*

On July 3, 2013, the Governor announced the appointment of **GREGORY CRONIN POWELL** to the District Court of Maryland – Prince George's County. Judge Powell was sworn in on August 12, 2013 and fills a vacancy created by the enactment of Chapter 34 of the 2013 General Assembly Legislative Session.

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