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Attorney Grievance Commission of Maryland v. Denise Leona Bellamy, Misc. Docket AG Nos. 6 & 13, September Term 2016, filed June 21, 2017. Opinion by Barbera, C.J.

http://www.mdcourts.gov/opinions/coa/2017/6a16ag.pdf

ATTORNEY GRIEVANCE COMMISSION — DISCIPLINE — DISBARMENT Respondent, Denise Leona Bellamy, violated Maryland Lawyers' Rules of Professional Conduct 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.3, 3.4, 8.1, and 8.4. These violations stemmed from Respondent's misconduct resulting in seven separate complaints against her. Respondent added to her misconduct by obstructing the disciplinary process through repeatedly failing to respond to Bar Counsel, and, in one instance, directly refusing to provide lawfully requested information. The sanction is disbarment.

Facts:

Respondent, Denise Leona Bellamy, was admitted to the Maryland Bar in 2005. She was previously suspended from the practice of law in Maryland, and, though reinstated in 2013, she was temporarily suspended for failure to pay her annual assessment to the Client Protection Fund of Maryland and remained suspended as of the filing date of the two Petitions for Disciplinary or Remedial Action brought by Bar Counsel here and consolidated for this proceeding.

Bar Counsel charged Respondent with violating the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") in seven separate matters. During her representation of Cindy Kamara, Respondent took a retainer fee and did not deposit it into a trust account or maintain records, and converted the money to her own use prior to earning it. She did little to no work on Ms. Kamara's case and failed to communicate with her client, ignoring repeated attempts to contact her. Respondent did the same in her representation of Eraina Dixon, and in addition, told Ms. Dixon that she had prepared an affidavit for her but never provided her with such a document.

Next, Respondent represented Yolanda Curtis as plaintiff in a suit for recovery of Ms. Curtis's home rental security deposit, providing her with a fee range without explaining the basis of her fee or executing a written agreement regarding the fee. Respondent failed to appear in court at a scheduled hearing, causing the court to enter judgment against Ms. Curtis. After granting Respondent's motion to reset the matter for trial, the court entered judgment for Ms. Curtis.

Respondent received a money judgment from the defendant and converted the money to her own use, never remitted the money to Ms. Curtis, and failed to file a notice of satisfaction with the court.

In 2013, Respondent was charged with driving under the influence, reckless driving, and driving on a suspended license. When Respondent appeared in court on those charges, she was asked by the trial judge whether she had any prior criminal convictions, she stated she did not, despite a previous DUI conviction on her record. The State's Attorney's Office for Prince George's County, upon discovering the falsehood, notified Bar Counsel of this matter.

Respondent represented Beverly Christina Bradley-Topping in the filing of a divorce action. Respondent received a retainer fee from Ms. Bradley-Topping and converted this fee to her own use before earning it, did not deposit it into a client trust fund, and did not maintain an accounting. Respondent filed a complaint for divorce on behalf of Ms. Bradley-Topping, and Ms. Bradley-Topping asked her to amend the grounds for divorce to "desertion". Respondent told Ms. Bradley-Topping that she would amend the complaint but never did so. Respondent failed repeatedly to communicate with Ms. Bradley-Topping and to meet with her, and on two occasions delayed until the day before to inform Ms. Bradley-Topping of key hearings. Respondent repeatedly violated the court's scheduling order, failing to engage in discovery. The court granted a motion to compel discovery, and when Respondent still failed to comply, the court entered sanctions against Ms. Bradley-Topping. After the court granted a limited divorce, Respondent drafted a Judgment of Limited Divorce Order and shared it with Ms. Bradley-Topping, who requested that grounds of "desertion" be included in the order and that the sanctions be struck from the document. Respondent filed the proposed order with no material changes.

Respondent represented Courtney Smith Lamar in connection with a complaint for divorce filed against Ms. Lamar. Respondent failed to deposit her retainer fee into an attorney trust account, did not maintain records of the fee, and converted the fee to her own use before earning it. When Ms. Lamar sought reconciliation with her husband, Respondent promised to send a letter to opposing counsel on the subject but never did so. Respondent performed little meaningful work in the action. Respondent failed to reply to her client's requests for information, failed to notify her about or respond to discovery requests, and failed to respond to four attempts by the court to contact Respondent to clear court dates.

During Respondent's representation of a client in divorce and custody proceedings brought by plaintiff Allwell Onwubuche, Respondent proffered to the court that Mr. Onwubuche had shoved the parties' child. Respondent stated that her client then called the police, and that she had a copy of the police report. Mr. Onwubuche's attorney requested a copy of the police report, but Respondent refused to produce it.

In regards to all of these matters, Bar Counsel asked Respondent for information multiple times, but she failed to respond, and at one point directly refused to provide the name of her bank to Bar Counsel's investigator. Respondent also failed to return unearned fees in the Kamara, Dixon,

Lamar, and Bradley-Topping matters, and failed to return client files to any of her clients after termination of her representation.

Respondent failed to respond to the charges filed against her by Bar Counsel, failed to appear at the hearings on these matters before the trial judge and this Court, and has not presented any evidence or arguments on her behalf at any point throughout these proceedings. The hearing judge adopted Bar Counsel's Proposed Findings of Fact and Conclusions of Law, finding that Respondent violated MLRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.3, 3.4, 8.1, and 8.4. Respondent filed no exceptions.

Held:

The Court of Appeals held, consistent with the hearing judge's conclusions, that Respondent failed to perform meaningful work for her clients, to abide by her clients' goals in their representation, to communicate with her clients, to follow the rules governing treatment of retainer fees, to charge reasonable fees for her services, to return client files after termination of representation, and to follow court orders regarding discovery. The Court also agreed that she had made false statements to a judge and to her clients. This series of misconduct violated MLRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.3, 3.4. Her apparent theft of Ms. Curtis's judgment and her dishonesty violated Rule 8.4, and her nonperformance in the courts and refusal to cooperate with Bar Counsel was prejudicial to the administration of justice, again in violation of Rule 8.4. Her complete failure to respond to Bar Counsel violated Rule 8.1. The Court parted company with the hearing judge's conclusions of law on only three issues. The Court did not find a violation of the contingent fee provisions of Rule 1.15 on this record, nor did the Court find the record sufficient to support a violation of Rule 3.4(c) through Respondent's failure to appear at the first hearing in the Curtis matter. The Court also disagreed that Respondent violated Rule 3.4(a) in the Onwubuche matter because she did not "unlawfully obstruct" Mr. Onwubuche's access to the police report—her failure to provide the report to opposing counsel was poor practice, but no discovery request had been made for the document.

The Court held that Respondent's numerous rule violations required a sanction of disbarment.

Attorney Grievance Commission of Maryland v. Mark Kotlarsky, Misc. Docket AG No. 30, September Term 2016, filed June 22, 2017. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/coa/2017/30a16ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

Respondent, Mark Kotlarsky, was admitted to the Bar of Maryland on December 15, 1992. On January 14, 2015, a check was presented to Citibank that was dishonored due to insufficient funds in Respondent's account. On January 26, 2015, Citibank informed Bar Counsel that Respondent had over-drafted one of his accounts. In response to Bar Counsel's inquiry regarding the over-drafted account, Respondent stated the account was an operating account, not an attorney trust account, and the overdraft was due to a stop payment order. Through its investigation of the over-drafted account, Bar Counsel discovered that Respondent disbursed $53,484 from his attorney trust account to "6 Beachside LLC." In response to Bar Counsel's inquiry, Respondent explained that the disbursement was for his law firm's pension plan. Upon further investigation, Bar Counsel discovered that Respondent had filed a Petition for Chapter 7 bankruptcy and that Respondent had failed to disclose assets his pension plan was entitled to in the petition. Specifically, Respondent failed to disclose his pension plan's status as an unsecured creditor in another bankruptcy case. Bar Counsel's investigation also revealed that Respondent had outstanding state and federal tax liens amounting to approximately $22,948.

By letter dated June 22, 2015, Bar Counsel requested that Respondent provide information and documentation regarding Respondent's tax liens and related tax liability. Respondent failed to respond to Bar Counsel's letter. On July 13 and August 4, 2015, Bar Counsel sent Respondent two additional letters requesting information, but Respondent failed to respond. On January 26, 2016, after receiving subpoenaed records from Citibank, Bar Counsel requested information regarding eight transactions pertaining to Respondent's attorney trust account and relating to client ledgers for six named individuals. Respondent again failed to respond to Bar Counsel's inquiry.

Held:

The Court of Appeals agreed with the hearing judge that Respondent violated MARPC §19-308.1(b) and MARPC §19-308.4(a), (c), and (d). The Court determined that disbarment was the appropriate sanction in light of Respondent's fraudulent misconduct in failing to disclose in his bankruptcy petition that his pension plan was an unsecured creditor in a different bankruptcy case.

The Court concluded that Respondent violated MARPC §19-308.1(b) when Respondent repeatedly failed to respond to Bar Counsel's requests for information in letters dated June 22, July 13, and August 4, 2015 and January 26, 2016. The Court noted that it has consistently held that repeated failures to respond to Bar Counsel's investigative requests can be a violation of MARPC §19-308.1(b). *See Attorney Grievance Comm'n v. Gray*, 436 Md. 513, 521-22, 83 A.3d 786, 791 (2014); *Attorney Grievance Comm'n v. Harmon*, 435 Md. 306, 315-16, 77 A.3d 1107, 1112-13 (2013); *Attorney Grievance Comm'n v. Bleecker*, 414 Md. 147, 174, 994 A.2d 928, 944 (2010).

The Court also concluded that Respondent violated MARPC §19-308.4(a), (c), and (d). The Court held that Respondent knowingly failed to disclose a potential claim his law firm's pension plan may have received in his petition for bankruptcy, thereby violating sub-section (c) and (d). The Court also noted that it has previously held that when an attorney violates several Rules of Professional Conduct, the attorney may also violate MARPC §19-308.4(a). The Court held that because Respondent violated MARPC §19-308.1(b) and MARPC §19-308.4(c) and (d), Respondent thereby also violated MARPC §19-308.4(a). The Court concluded that because Respondent's conduct in failing to disclose the potential claim in his bankruptcy petition was analogous to its decisions in *Attorney Grievance Comm'n v. Byrd*, 408 Md. 449, 970 A.2d 870 (2009) and *Attorney Grievance Comm'n v. Zodrow*, 419 Md. 286, 19 A.3d 381 (2011), that disbarment was the appropriate sanction.

Attorney Grievance Commission of Maryland v. Bonnie Elizabeth Plank, Misc. Docket AG No. 59, September Term 2015 & Misc. Docket AG No. 12, September Term 2016, filed June 22, 2017. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/coa/2017/59a15ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

Petitioner, the Attorney Grievance Commission, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, Bonnie Elizabeth Plank. The Court of Appeals ordered that the case be transmitted to the Circuit Court for Baltimore County to conduct an evidentiary hearing and render findings of fact and conclusions of law. Thereafter Petitioner filed an Amended Petition for Disciplinary or Remedial Action. The charges brought in Amended Petition I are based on conduct outlined in four separate complaints filed with the Commission. Petitioner then filed a separate Petition for Disciplinary or Remedial Action and a Motion to Consolidate Petitions for Disciplinary or Remedial Action, based on an additional complaint. The Court of Appeals consolidated the matters for purposes of a hearing.

Respondent failed to appear at the evidentiary hearing. Based on clear and convincing evidence, the hearing judge found the following facts:

On December 16, 2015, Respondent entered guilty pleas in Morgan County, West Virginia to charges of Driving Under the Influence of Controlled Substances (West Virginia Code § 17C-5-2) and Possession of Controlled Substance—Marijuana (West Virginia Code § 60A-4-401). Her pleas were accepted, and Respondent was convicted of both charges.

On March 27, 2014, Mr. Howard Vernon Jones hired Respondent to represent him in a Chapter 7 bankruptcy proceeding because his home was in foreclosure. At their initial meeting, Respondent requested a fee of $1,200. Although she had not yet provided any legal services, Respondent accepted a payment of $600 from Mr. Jones. Notwithstanding the fact that he had instructed her to file for bankruptcy under Chapter 7, Respondent filed for Chapter 13 bankruptcy on behalf of Mr. Jones. At a meeting with Respondent, Mr. Jones learned of the incorrect filing and again instructed Respondent to file for bankruptcy pursuant to Chapter 7. On or about June 26, 2014, Respondent filed a petition for Chapter 7 bankruptcy on behalf of Mr. Jones, but failed to address in any manner the incorrect Chapter 13 bankruptcy filing.

Mr. Jones appeared for a scheduled meeting/hearing in the Bankruptcy Court. Just prior to the meeting/hearing, Mr. Jones received a telephone call from Respondent. Respondent indicated that she was in the hospital in Baltimore. Although Respondent told Mr. Jones that she would contact him about rescheduling the meeting/hearing, she failed to do so. Mr. Jones ultimately

engaged new counsel, and learned that Respondent had failed to withdraw the incorrectly filed Chapter 13 bankruptcy petition.

On May 28, 2014, the Chapter 13 filing was dismissed. The bankruptcy court directed Respondent to file, by June 11, 2014, a response justifying her fee. Respondent failed to do so. The bankruptcy court issued an order directing Respondent to refund the fee to Mr. Jones. On August 19, 2014, Respondent filed a Motion for Reconsideration of the Dismissal of the Chapter 13 filing and Reduction of Fees; the Motion was denied. The Chapter 7 bankruptcy case was dismissed and Respondent was again ordered to refund any attorney's fees, but failed to do so.

On September 5, 2014, the Commission sent Respondent a letter, notifying her of the complaint filed by Mr. Jones and requesting a response within 15 days. Since there was no response, Petitioner sent a second letter, again requesting information from Respondent. The letter was returned as undeliverable. Petitioner sent a third letter to Respondent's last known address.

Respondent failed to respond to any of these letters, but contacted Petitioner and claimed that Mr. Jones was not her client and that the signatures on the complaint did not match those of her former client. The Commission's investigator, after meeting with Mr. Jones, confirmed that the complainant had engaged Respondent and was the correct Mr. Jones.

Respondent met with the investigator again on April 8, 2015, confirmed her representation of Mr. Jones and that she had filed on his behalf for bankruptcy under Chapter 7 and Chapter 13. Respondent indicated she received $1,200 in attorney's fees and used $306 of that amount to pay filing fees. Respondent further indicated that, because she did not have the necessary software for the court filings, she had to engage the assistance of another attorney and his paralegal. Respondent stated that she paid the paralegal $894, the balance of the fee received from Mr. Jones. Neither the attorney nor the paralegal ever received the $894 payment.

Respondent was engaged by Aung Kyaw Min Lal on or about December 16, 2014 in the defense of a debt collection case filed on or about September 19, 2014. The amount in controversy was $5,600. Prior to Respondent's involvement, in November 2014, the plaintiff moved the case from Baltimore County to Washington County, Maryland.

Respondent and Mr. Lal agreed that her fee for services rendered would be $500 if the case was resolved prior to a hearing and $1,500 if a hearing was necessary. Mr. Lal paid Respondent $1,500, but Respondent failed to place the funds in an attorney trust account and failed to withdraw properly the funds as earned.

In March, 2015, Mr. Lal authorized Respondent to offer $2,500 to settle the matter. Respondent, however, informed Mr. Lal that she required him to produce the $2,500 in advance of her transmitting the offer, and if she was able to negotiate and decrease the settlement amount, she would keep the balance of the $2,500 for her continuing involvement in the case. Respondent attempted to justify her actions by informing Mr. Lal that she had earned in excess of what he had paid her. Using false information and threats, Respondent pressured Mr. Lal to accept her conditions vis-à-vis the settlement offer.

Respondent continued to provide false information to Mr. Lal and accused him of committing fraud on the Court. She threatened to file a $50,000 breach of contract claim against Mr. Lal and report him to the board that oversees his professional license. Respondent further advised Mr. Lal that she was entitled to punitive and actual damages and that he would be responsible for paying them. Mr. Lal settled the case without her assistance.

Scott B. Wheat, Esquire represented Plaintiff CACH, LLC in the Lal collection case. In that case Ms. Plank failed to propound discovery in a timely manner and failed to obtain court approval to allow the late filing. When Mr. Wheat refused to respond to the untimely discovery requests, Respondent threatened to bring disciplinary action against him. During the course of the case, Respondent received forwarded emails from Respondent that involved communications between Mr. Lal and her—privileged and confidential information.

In August 2015, Respondent, while employed by a law firm in Texas, met with one of the firm's clients, Linda Ann Porter. The firm represented Ms. Porter as a plaintiff in a suit filed in the United States District Court for the Southern District of Texas. Some time in August 2015, Respondent encouraged Ms. Porter to discharge the firm and engage Respondent to represent her.

Upon engagement, Ms. Porter paid Respondent a fee of $1,500 and agreed to a contingency fee of 20% of any and all recoveries resulting from the suit. The agreement was outlined in a document titled Engagement Letter and Fee Agreement. Ms. Porter paid Respondent the $1,500, but failed to place the payment in an attorney trust account, and failed to obtain Ms. Porter's consent to deposit the money elsewhere. Respondent did not withdraw properly the fees as earned. At some point during this representation, Respondent falsely represented to Ms. Porter that her $1,500 check was refused by the bank. Ms. Porter issued another check for $1,500. After learning of the double payment, Ms. Porter demanded a refund from Respondent, but she refused.

Respondent, in fact, sought additional payment for her services. The requested payments were not contemplated by the Engagement Letter and Fee Arrangement. Ms. Porter declined to make additional payments to Respondent. Thereafter, Respondent abandoned the representation of Ms. Porter without notice and without sufficient time for another attorney to be engaged. Moreover, Respondent refused to return any of the unearned fees. In addition, Respondent, after being requested to do so, failed to supply Ms. Porter with documents pertaining to her representation. On or about September 1, 2015, Respondent filed a Motion for Withdrawal of Counsel on Behalf of Plaintiff, Linda Ann Porter without the authorization of Ms. Porter. In the Motion, Respondent falsely represented that Ms. Porter had failed to pay attorney's fees. To the contrary, Ms. Porter had paid all of fees called for in the Engagement Letter and Fee Arrangement. Respondent failed to respond to the Commission's multiple demands for a response to the complaint of Ms. Porter.

The hearing judge concluded that Respondent violated MLRPC 1.1 (competence); 1.3 (diligence); 1.4 (communication); 1.5(a) (fees); 1.6 (confidentiality of information); 1.15(a) and (c) (safekeeping property); 1.16(d) (declining or terminating representation); 3.3(a) (candor toward the tribunal); 5.5(a) (unauthorized practice of law; multijurisdictional practice of law);

7.1(a) (communications concerning a lawyer's services); 8.1 (bar admission and disciplinary matters); and 8.4(b), (c), and (d) (misconduct).

Held:

Neither Respondent nor Petitioner filed exceptions to the hearing judge's findings of fact or conclusions of law. Upon *de novo* review, the Court of Appeals agreed with the hearing judge that Respondent violated MLRPC 1.1; 1.3; 1.4; 1.5(a); 1.6; 1.15(a) and (c); 1.16(d); 3.3(a); 5.5(a); 7.1(a); 8.1(b); and 8.4(b), (c), and (d). The Court determined that Respondent engaged in wide-ranging misconduct involving deceit and criminal convictions. Respondent obstructed Bar Counsel's investigation and failed to participate in these proceedings. Disbarment is the appropriate sanction to protect the public.

Deer Automotive Group, LLC t/a Liberty Ford v. Barbara Brown, et al., No. 62, September Term 2016, filed June 27, 2017. Opinion by Greene, J.

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

http://www.courts.state.md.us/opinions/coa/2017/62a16.pdf

APPEALS – PETITION TO COMPEL ARBITRATION – FINAL JUDGMENT RULE

Facts:

Barbara Brown and Herbert E. Spencer, Jr., ("Brown and Spencer") are individuals who each purchased vehicles from Deer Automotive Group, LLC t/a Liberty Ford ("Liberty Ford"), a Maryland limited liability company, which operates a new and used automobile dealership. On March 13, 2015, Brown and Spencer filed a class action lawsuit (the "Class Action") against Liberty Ford, challenging Liberty Ford's practice of providing customers with an alleged free lifetime Limited Warranty for their vehicles. The warranty was conditioned on the consumer's continued use of and payment for other services provided by Liberty Ford, which, Brown and Spencer maintain, is a "tying arrangement" that violates federal law.

Instead of filing a motion to compel arbitration in the Class Action suit, Liberty Ford commenced an independent action in the same court on April 27, 2015 (the "Arbitration Action") seeking to compel arbitration in the pending Class Action case and to stay the Class Action. The Circuit Court ruled that Brown and Spencer's claims in the Class Action were not subject to binding arbitration, then, subsequently, denied Liberty Ford's petition to compel arbitration. Liberty Ford appealed. In the Court of Special Appeals, Brown and Spencer filed a motion to dismiss the appeal arguing that the judgment of the Circuit Court denying the petition to compel arbitration was not an appealable final judgment. The Court of Special Appeals denied the motion, and Brown and Spencer petitioned this Court for review.

Held: Judgment of the Court of Special Appeals is vacated.

The Court of Appeals held that where there is a pending case involving a claim that is allegedly subject to arbitration, an order denying a petition to compel arbitration that is filed in a separate, independent action is not a final, appealable order.

The Court explained that when an order puts the parties out of court, with no recourse to prosecute or defend its rights with respect to the claim that may be subject to arbitration, an order denying a petition to compel arbitration is a final, appealable order. Here, however, there was a pending action involving a claim allegedly subject to arbitration, thus the order denying a petition to compel arbitration filed in a separate, independent action was not a final judgment because the party was mandated to stay in court to litigate the underlying claim. The Court

reasoned that to allow a party to circumvent the final judgment rule by filing a separate cause of action to compel arbitration of a claim that is the subject of litigation in a pending lawsuit between the same parties, where the party seeking arbitration could have filed the petition in the existing action, would undermine the final judgment rule. Moreover, the Court clarified that when the Court expressed the view in *dicta* that orders denying petitions to compel arbitration filed as independent actions are final orders in *Am. Bank Holdings, Inc. v. Kavanagh*, 436 Md. 457, 82 A.3d 867 (2013), this was limited to instances where there is not an already pending matter between the same parties regarding the same substantive dispute.

Accordingly, because the order denying Liberty Ford's petition to compel was not a final judgment, the Court of Special Appeals did not have appellate jurisdiction and should have dismissed the appeal.

Daniel Rohrer v. Humane Society of Washington County, No. 32, September Term 2016, filed June 27, 2017. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2017/32a16.pdf

ANIMALS – ABUSE OR NEGLECT OF ANIMALS – SEIZURE OF ANIMAL FROM OWNER.

ANIMALS – ABUSE OR NEGLECT OF ANIMALS – TIMELINESS OF EVIDENCE JUSTIFYING SEIZURE OF ANIMAL FROM OWNER.

ANIMALS – ABUSE OR NEGLECT OF ANIMALS – SEIZURE OF ANIMAL – PETITION FOR RETURN OF ANIMAL.

Facts:

In late 2014, an officer of the Humane Society of Washington County investigated an anonymous allegation of animal neglect at a farm in Boonsboro, Maryland. Based on that investigation, the officer obtained a criminal search warrant and seized and removed nearly 100 animals from the farm. A few weeks later, the farm's owner – Daniel Rohrer – was charged with more than 300 counts of animal cruelty.

While the animals were in State custody – actually at foster farms supervised by the Humane Society – the Humane Society decided that the seized animals should not be returned to Mr. Rohrer, regardless of the outcome of the pending criminal charges. In early 2015, it posted a notice at Mr. Rohrer's property, indicating that it had seized the animals under authority granted to it by Maryland Code, Criminal Law Article ("CR"), §10-615. Mr. Rohrer, in accordance with that statute, filed a petition for return of the animals in the District Court.

In the District Court, Mr. Rohrer argued that his animals had been well cared for and that, in any event, the Humane Society's notice was untimely because it was posted nearly two months after the animals were actually removed from his farm and while they were in State custody. The District Court, taking note of the pending criminal charges, denied the Petition "at this particular stage." Mr. Rohrer appealed this decision to the Circuit Court.

While the appeal of the petition for return was pending, the District Court held a trial on the animal cruelty charges. Nearly all of the charged counts were dismissed or resulted in judgments of acquittal. Mr. Rohrer was found guilty on five counts, for which the District Court imposed unsupervised probation before judgment for three years. The probation order released the animals from the warrant, but stated that their disposition would be decided in a civil proceeding.

A few months later, the Circuit Court conducted an on-the-record appeal of the District Court's denial of the petition for return and affirmed the District Court's decision.

The Court of Appeals then granted Mr. Rohrer's petition for a writ of certiorari. Mr. Rohrer again challenged the Humane Society's actions, seeking to clarify the procedures set out in CR §10-615 as well as the legal status of animals seized under that statute. He argued that the Humane Society could not seize his animals while they were in State custody pursuant to a valid search warrant, and that, in any event, the Humane Society could not rely on conditions observed in late 2014 to justify a constructive seizure that took place two months later, in early 2015. He also argued that the District Court's denial of his Petition for Return did not affect his ownership rights in the animals.

Held:

The Court of Appeals held that CR §10-615 does not allow a humane society to seize animals while they are in State custody pursuant to a valid search warrant. The Court also held, however, that a humane society may notify the animals' owner that it intends to take possession of those animals upon their release from State custody under the authority of the statute. Here, the animals were seized in late 2014 pursuant to a valid search warrant. When the Humane Society posted a notice at Mr. Rohrer's farm in early 2015, it could not physically seize the animals at that time. It could, however, notify Mr. Rohrer of its intent to take possession of them if and when they were released from the warrant.

The Court also held that CR §10-615 allows a humane society to rely on previously-observed conditions to justify its seizure of an animal – *i.e.*, that the physical act of taking possession of an animal need not be contemporaneous with the conditions relied upon by the humane society to justify its possession. The Court noted, however, that the lapse of time between observed conditions and a seizure is a relevant consideration when a District Court adjudicates a petition for return. The Court also noted that a District Court should ordinarily also consider whether the standard for a humane society's possession of a seized animal is satisfied at the time of the hearing, as well as at the time of the seizure. Here, the Humane Society could decide, in early 2015, to seize Mr. Rohrer's animals based on the conditions it observed in late 2014. When adjudicating Mr. Rohrer's Petition for Return, however, the District Court could take into account the fact that such evidence was two months old. And although the District Court made a finding that the Humane Society's seizure of Mr. Rohrer's animals was justified at the time of the seizure, it correctly did not assess whether the standard was met at the time of the hearing, since it was unclear if and when the animals would be released from the warrant.

Finally, the Court held that, while CR §10-615 allows a humane society to take possession of an animal when "necessary to protect the animal from cruelty" or when "necessary for the health of the animal," it does not confer ownership of the animals on the humane society. The District Court's denial of Mr. Rohrer's petition for return, then, did not transfer ownership of his animals to the Humane Society; instead, it authorized the Humane Society to continue possessing Mr. Rohrer's animals, at least as long as such possession remained necessary to protect the animals from cruelty or necessary for the health of the animals.

Stephanie L. Smith v. State of Maryland, No. 80, September Term 2016, filed June 22, 2017. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2017/80a16.pdf

BINDING AGREEMENTS – PLEA AGREEMENTS – PARTIES' CONSENT – ILLEGAL SENTENCE:

Facts:

The defendant, Stephanie L. Smith ("Ms. Smith"), entered into a plea agreement with the State of Maryland. The terms of the plea agreement included that Ms. Smith would enter a plea of guilty to the crime of theft and that she would serve jail time between 30 to 90 days. At the guilty plea proceeding, the sentencing judge accepted the terms of the agreement, binding himself to the agreement. However, the judge imposed a sentence below the terms of the plea agreement by sentencing Ms. Smith to probation before judgment, not finding her guilty of theft, and ordering home detention for 60 days, rather than actual jail time. Furthermore, this was done without the consent of the State.

Held: Affirmed.

We hold that the sentence in this case was not consistent with the terms of the binding plea agreement and was without the consent of the State; thus, it was an illegal sentence. *Bonilla v. State*, 443 Md. 1, 15, 115 A.3d 98, 106 (2015) (holding "that when a sentencing court violates Rule 4–243(c)(3) by imposing a sentence below a binding plea agreement without the State's consent, the sentence is inherently illegal and subject to correction under Rule 4–345(a)").

Moreover, our case law provides that when a defendant challenges the interpretation of a binding plea agreement the plea agreement should be construed according to what a reasonable lay person in the defendant's position would have understood it to mean. We determine, the terms of this agreement were unambiguous, and thus a reasonable lay person in the Ms. Smith's position would have understood the terms of the agreement to mean that there would be a finding of guilt and actual incarceration. Furthermore, when the State makes a challenge to the interpretation of a plea agreement, we focus on whether both parties to the agreement received fairness and equity in the respective benefits of their bargain. In the case at bar, the State did not receive what it bargained for when the judge imposed a sentence below the terms of the plea agreement. Thus, under the standards for interpreting the plea agreement, the sentence imposed was below the mandatory minimum sentence agreed upon by the parties and the State did not consent to the deviation of the terms.

Accordingly, we shall affirm the judgment of the Court of Special Appeals. *State v. Smith*, 230 Md. App. 214, 146 A.3d 1189 (2016).

James Patrick Beaman v. State of Maryland, No. 67, September Term 2016, filed June 21, 2017. Opinion by Greene, J.

http://www.courts.state.md.us/opinions/coa/2017/67a16.pdf

CRIMINAL JUSTICE – POST-CONVICTION DNA TESTING

Facts:

Appellant was convicted in the Circuit Court for Prince George's County for, among other crimes, four counts of first-degree murder. The State's theory of the case was that Appellant and his accomplice, Ervin Holton, shot the four victims in retaliation for a dispute over turf for selling drugs. On the day of the murders, police responded to an apartment for shots fired and found four men—Terrance Stephenson, Edmond Stephenson, Robert Morton, and Abraham Williams—murdered as a result of gunshot wounds. Police discovered a broken window in one of the bedrooms, through which it appeared someone had jumped. Police found the bodies of three of the men inside the apartment and the body of Edmond Stephenson outside, on the side of the apartment building. Investigators recovered blood evidence from the outside ground-level patio directly below the broken window. The State's theory regarding the murder of the fourth victim, Edmond Stephenson, was that he jumped through the bedroom window to escape after sustaining a non-fatal gunshot wound. The State believed that Edmond Stephenson landed on the patio, was chased by the shooters, and was ultimately caught and fatally shot near the side of the apartment building.

At trial, an eyewitness who lived in the same apartment complex, Doria Rogers, testified that loud noises "like people was fighting or something" awoke her on the morning of the murders. She testified that she got up and ran to the balcony and saw "two boys running past[,]" one was light-skinned and carrying a gun and the other was dark-skinned. Ms. Rogers described the men as being "together." Ms. Rogers testified that the light-skinned man was in front and the dark-skinned man was behind him. Ms. Rogers testified that she watched until the men disappeared from her sight. Once she returned inside the apartment, she heard gunshots. Before trial, the police showed Ms. Rogers a photo array and she identified the Appellant as the dark-skinned man she had seen running past her apartment.

Subsequent to his convictions, Appellant filed a *pro se* petition seeking DNA testing of the blood-evidence found on the first-floor patio. Appellant argued that the testing would prove that the blood on the patio belonged to the victim, Edmond Stephenson, which in turn, he argued, would tend to establish that Ms. Rogers misidentified Appellant as the dark-skinned man and that she actually witnessed Edmond Stephenson running from the light-skinned man. The Circuit Court denied Appellant's petition, ruling that "it is not reasonable to believe that simply testing blood found at the crime scene would prove [Mr. Beaman's] innocence, especially since the State never presented an argument that the blood belonged to [Mr. Beaman]. . . Since there is not a substantial probability that testing DNA would have changed the verdict, the request is

denied." Appellant appealed the denial of his petition, arguing that the circuit court judge applied the incorrect standard of law.

Held: Affirmed.

The Court of Appeals held that the circuit court judge applied the incorrect standard of law in ruling that there is not a "substantial possibility" that the testing would have "changed the verdict."

Under § 8-201 of the Criminal Procedure Article, persons convicted of crimes of violence are entitled to post-conviction DNA testing upon a showing that "a reasonable probability exists that the DNA testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing and the requested DNA test employs a method of testing generally accepted within the relevant scientific community." The Court noted that by applying a standard of "substantial possibility," the circuit court judge employed the more rigorous standard used to determine whether a petitioner is entitled *to a new trial* under § 8-201(c). To receive DNA testing, a petitioner need only show a "reasonable probability" or "fair likelihood" that DNA testing has the scientific potential to produce exculpatory or mitigating evidence.

Moreover, the Court explained that exculpatory evidence under the post-conviction DNA statute is evidence that tends to establish the innocence of the petitioner. The statute does not require a petitioner to show that the outcome of his or her case necessarily would have been different, had the jury been presented with the evidence the petitioner seeks to obtain through the requested DNA testing. Therefore, the circuit court judge also applied the incorrect standard of law when he invoked language suggesting that the DNA evidence would have needed to "change the verdict."

In applying the correct standard of law, the Court concluded that there was no reasonable probability that DNA testing of the blood evidence had the scientific potential to produce exculpatory or mitigating evidence. The Court reasoned that testing blood, found at a location where a victim landed after being shot and jumping out of a fourth-story window, to show that the blood belonged to the victim does not logically suggest that an eyewitness misidentified Appellant. Thus, the Court concluded that although the circuit court judge confounded the applicable standards in its ruling, there is no reason to remand this case for further proceedings because of the obvious futility of Appellant's assertions. Accordingly, the Court affirmed the order of the Circuit Court which denied Appellant's petition for post-conviction DNA testing.

United Food & Commercial Workers International Union, et al. v. Wal-Mart Stores, Inc., et al., No. 42, September Term 2016, filed June 22, 2017. Opinion by Getty, J.

http://www.courts.state.md.us/opinions/coa/2017/42a16.pdf

LABOR & EMPLOYMENT – NATIONAL LABOR RELATIONS ACT – PREEMPTION

LABOR & EMPLOYMENT – ANTI-INJUNCTION ACT – LABOR DISPUTE CASE

Facts:

Between 2011 and 2013, United Food and Commercial Workers International Union ("UFCW"), a labor union that represents grocery, retail, meatpacking, and food-processing workers, held demonstrations at seven Walmart stores throughout Maryland, protesting Walmart's employment conditions. In response, Walmart sued UFCW in state court for trespass and nuisance, and sought an injunction against UFCW. UFCW filed a motion to dismiss, arguing that Walmart's claims were preempted by the National Labor Relations Act ("NLRA"). The circuit court held that Walmart's claims were not preempted, and denied UFCW's motion to dismiss. Walmart filed a motion for a preliminary injunction, in which it argued that this case does not involve a labor dispute within the meaning of Maryland's Anti-Injunction Act ("AIA"). The circuit court agreed with Walmart that the AIA does not apply, and granted the preliminary injunction. After the parties filed cross-motions for summary judgment, the circuit court granted summary judgment in favor of Walmart, and issued a permanent injunction against UFCW. On appeal, the Court of Special Appeals affirmed the judgment of the circuit court.

Held: Affirmed.

Walmart's state law claims for trespass and nuisance against a labor union that held disruptive, nonviolent demonstrations on employer's private property were not preempted by the NLRA. Although UFCW's conduct was arguably prohibited by the NLRA, the local interest exception to NLRA preemption applied. First, protecting the private property rights of citizens is a significant state interest that is deeply rooted in local feeling and responsibility. Second, the state law claims presented to the circuit court are not identical to the claims presented to the National Labor Relations Board ("NLRB"), so exercising state court jurisdiction over the state law claims entails little risk of interference with the regulatory jurisdiction of the NLRB. Therefore, the circuit court properly denied UFCW's motion to dismiss the state law claims for lack of jurisdiction.

Furthermore, Walmart's lawsuit for trespass and nuisance against UFCW did not "involve or grow out of a labor dispute," because UFCW does not represent, or seek to represent, Walmart's

employees. Therefore, Walmart was not required to satisfy heightened criteria of Maryland's Anti-Injunction Act in order to receive an injunction against UFCW.

Elvaton Towne Condominium Regime II, Inc., et al. v. William Kevin Rose, et ux., No. 33, September Term 2016, filed June 23, 2017. Opinion by Barbera, C.J.

http://www.mdcourts.gov/opinions/coa/2017/33a16.pdf

CONDOMINIUMS – GENERAL COMMON ELEMENTS – TAKINGS – While the Maryland Condominium Act does not preclude "suspension-of-privileges" methods as a means of enforcing collection of delinquent fees, such means must have been agreed to by the unit owners and incorporated into the Declaration. Where this means of collection is established by a rule, enacted by only a majority of the condominium association's governing council or board of directors rather than by a supermajority of the unit owners through an amendment to the Declaration, it is invalid as an interference in property rights beyond the power of the condominium association to impose.

DECLARATORY JUDGMENT – IDENTICAL ISSUES PENDING IN ANOTHER TRIBUNAL – Maryland courts will not ordinarily grant declaratory judgment where a proceeding involving identical issues is already pending in another tribunal. In such a case, it is neither useful nor proper to issue declaratory relief, unless very unusual and compelling circumstances exist to do so.

Facts:

Petitioner/Cross-Respondents Elvaton Towne Condominiums, its condominium association, and its management firm (collectively, "Elvaton") alleged that Respondents/Cross-Petitioners William and Dawn Rose ("the Roses"), owners of a unit in the condominium, were delinquent in paying their condominium assessments. Elvaton's governing Board of Directors passed "suspension-of-privileges" rules (the "Rule") that prohibited unit owners allegedly in arrears from using the community pool or from parking overnight in the parking lot.

Elvaton obtained a lien against the Roses' unit and brought a debt collection case against them in District Court. The Roses then sued Elvaton in circuit court, asking for a declaratory judgment that the Rule was invalid as an unauthorized taking of their property, and seeking to adjudicate the validity of the debt in circuit court. The Roses motioned for, and the court granted, a stay in the related District Court proceedings.

The circuit court first ruled that the Roses could not argue the validity of the debt in that court, because this issue was already pending before the District Court. After a trial on the merits, the circuit court granted declaratory judgment on the validity of the Rule. The court explained that Elvaton did not have the authority to restrict the Roses' use of the parking lots and the pool as a means of collecting on the debt, because Elvaton was not authorized by the condominium's

governing documents to do so. *Elvaton Towne Condo. Regime II, Inc. v. Rose*, No. 1033, Sept. Term 2014, slip op. (Md. Ct. Spec. App. filed Apr. 21, 2016). Both Elvaton and the Roses appealed their respective adverse judgments, and the Court of Special Appeals affirmed both judgments of the circuit court. Both parties sought, and we granted, further review in this Court.

Held:

Elvaton first argued that the Rule was not a taking of property because its effect was temporary, unlike the permanent taking of a property interest in general common elements that this Court found in *Ridgely v. Smyrnioudis*, 343 Md. 357 (1996). The Court disagreed, explaining that temporary takings are actionable, as demonstrated in other contexts such as inverse condemnation law. Moreover, the Court agreed with the Court of Special Appeals in this case that "[t]here is no temporary-infringement exception from complying with the collection procedures in . . . the Act. If there were, a condominium association could collect disputed debts by 'temporarily' blocking a hallway or lobby to prevent a unit owner's accessing the unit." *Elvaton*, slip op. at 24 (quoting Brief of Consumer Protection Division of the Office of the Attorney General of Maryland as Amicus supporting the Roses on the suspension-of-privileges issue).

Elvaton also argued that the condominium's existing Declaration and By-Laws provided the necessary authority for the Rule. Elvaton pointed out, for instance, that the Declaration states that all unit owners are subject to the provisions of the By-Laws and rules that Elvaton's Board of Directors passes, and that the By-Laws provide authority for Elvaton to implement use restrictions of general common elements (explicitly including parking), to establish and provide for the collection of fees from unit owners, and to prohibit violation of the association's rules.

The Court held that, while Elvaton's existing Declaration and By-Laws did grant it broad powers to impose reasonable rules and enforce payment of delinquent fees, no provisions authorized a suspension-of-privileges rule, and thus the Rule was invalid as beyond the condominium association's authority. The Real Property article of the Maryland Code § 11-108(a) states that the "common elements may be used only for the purposes for which they were intended and, *except as provided in the declaration*, the common elements shall be subject to mutual rights of support, access, use, and enjoyment by all unit owners." (emphasis added). No provision of the Declaration here allowed such a restriction of access to the common elements. The Court also noted that, based in the language of § 11-108(a) and the legislative history of that provision, a rule restricting access to a general common element must be provided for in the declaration; a bylaw alone would be insufficient.

Last, the Court agreed with the circuit court that, because the validity of the Roses' alleged debt was already pending before the District Court, the circuit court was well within its discretion not to address that issue in the absence of unusual and compelling circumstances, and no such circumstances were present here.

Eastern Shore Title Company v. Steven J. Ochse, et. al., No. 16, September Term 2016, filed May 31, 2017. Opinion by Getty, J.

http://www.courts.state.md.us/opinions/coa/2017/16a16.pdf

TORTS – NEGLIGENCE – DAMAGES – COLLATERAL LITIGATION DOCTRINE

Facts:

In 1998, the Henrys subdivided their thirty-five-acre parcel of land in Dorchester County. In 2001, the Ochses purchased a five-acre residential lot from the Henrys through a Contract of Sale. The lot contained physical remains of a gravel roadbed, which was documented on the Henrys' subdivision plat as a "driveway." The Contract of Sale was in the standardized form of a Maryland Residential Contract of Sale, and provided that "[t]itle to the Property . . . shall be good and merchantable, free of liens and encumbrances except as specified herein." The Contract of Sale also contained a standard form fee-shifting provision, which provided that "[i]n any action or proceeding between the [Ochses] and the [Henrys] based in whole or in part" on the Contract, "the prevailing party in such action or proceeding shall be entitled to receive reasonable attorney's fees from the other party." The Ochses' deed included a "driveway provision," indicating that their fee simple interest in the property was "SUBJECT, HOWEVER, to the rights of others legally entitled to the use of a 'Driveway', for purpose of ingress, egress and regress, over" the property.

Eastern Shore Title Company ("ESTC"), as an agent of Chicago Title Insurance Company ("Chicago Title"), performed the title search for the Ochses. Chicago Title guaranteed in their title insurance policy that the Ochses' property was exactly as depicted in the 1998 subdivision plat.

In 2005, the Ochses hired a contractor to undertake significant renovations and landscaping to their property. In response to an inquiry from the contractor, Ms. Ochse reviewed the property deed to determine whether the gravel roadbed could be removed and contacted ESTC for clarification. ESTC conducted a second title search of the Ochses' property, which failed to uncover any deed with respect to the roadbed. ESTC theorized that the "driveway" was really a right-of-way for the benefit of the Henry property, and offered to prepare a release for the Henrys' signatures to quitclaim any and all rights in the "driveway." When presented with the draft release, the Henrys refused to sign it or to relinquish their claims to any right-of-way over the Ochses' property.

The Ochses then informed Chicago Title of the presence of an "undisclosed right-of-way" on their property that ESTC had "failed to pick up on" during the title search, and requested that Chicago Title initiate a claim on their behalf against ESTC. Chicago Title denied the claim, referring to a portion of the Ochses' policy that excepted from coverage "easements . . . and other limitations" shown on the 1998 subdivision plat.

In 2007, the Ochses filed suit against the Henrys in the Circuit Court for Dorchester County seeking reformation of their deed and other relief. During the course of the litigation, the Henrys' attorney mailed a letter to the Ochses' counsel revealing the existence of a 1919 deed, which conveyed to Dorchester County in fee simple determinable a thirty-foot-wide strip of land "for the purpose of making a new county road." The 1919 deed also contained a reversionary clause, which stated that "if the [county road] is abandoned by . . . Dorchester County, or their successors in interest, the lands hereby conveyed shall revert back to the said grantors, their heirs and assigns." This thirty-foot-wide strip of land, or "county road," had been mistakenly designated as the "driveway" on the Henrys' subdivision plat of the Ochses' property.

In response to this letter, the Ochses filed an amended complaint, adding Dorchester County as an interested party defendant. Dorchester County responded to the complaint by asserting its fee simple interest in the county road. After multiple hearings and a two-day bench trial, the circuit court granted Dorchester County's motion for summary judgment, denied relief to the Ochses, and awarded attorney's fees to the Henrys, which were to be paid to by the Ochses pursuant to the fee-shifting provision in the Contract of Sale. While that decision was on appeal to the Court of Special Appeals, Dorchester County conveyed its interest in the thirty-foot-wide strip of land to the Ochses through a quitclaim deed. Dorchester County was then dismissed from the litigation. The Court of Special Appeals then reversed the circuit court's decision as to the Ochses' claims and the attorney's fees award, and remanded to the circuit court. On remand, the circuit court granted attorney's fees to the Ochses, which were to be paid by the Henrys pursuant to the fee-shifting provision in the Contract of Sale. The circuit court determined that, because the Ochses prevailed on some issues but did not prevail on others, a "proportionate award" was appropriate.

In 2010, while the Henry litigation was still ongoing, the Ochses filed a complaint in the Circuit Court for Talbot County against ESTC and Chicago Title for breach of contract and negligence. Following a four-day bench trial, the trial court concluded that Chicago Title was liable for breach of contract, and ESTC was liable for negligence and breach of contract. Regarding damages, the trial court awarded the Ochses the attorney's fees from both the instant litigation and the prior litigation against the Henrys.

In 2013, ESTC and Chicago Title filed a motion to alter or amend the judgment, requesting that the damages be reduced by any recovery made by the Ochses in the Henry litigation. ESTC and Chicago Title attached to their motion documentation that the Henrys had satisfied their judgment to the Ochses from the Henry litigation on June 13, 2013. The trial court granted the motion and reduced the judgment against both Chicago Title and ESTC by the amount paid by the Henrys in the Henry litigation.

The Ochses and ESTC appealed to the Court of Special Appeals, which remanded the case to the trial court to determine whether ESTC's negligence proximately caused the Ochses to file suit against the Henrys. The Ochses and ESTC then petitioned the Court of Appeals for a writ of certiorari, and the Court of Appeals granted the petition and the cross-petition.

Held: Reversed and remanded with instructions to reinstate the judgment of the Circuit Court for Talbot County.

Maryland follows the "American Rule," which provides that the costs and expenses of litigation, other than the usual and ordinary court costs, are not recoverable in an action for damages. However, the American Rule is not an absolute bar and, in Maryland, the collateral litigation doctrine is an exception to the American Rule. The collateral litigation doctrine permits the recovery of attorney's fees incurred by the plaintiff where the wrongful acts of a defendant involved the plaintiff in litigation with others and made it necessary to incur expenses to protect his or her interest, and such costs and expenses should be treated as legal consequences of the original act. If a plaintiff incurred litigation expenses, then the plaintiff may recover collateral litigation expenses as damages by demonstrating that such expenses were the natural and proximate consequence of the injury complained of, were incurred necessarily and in good faith, and were a reasonable amount. However, a plaintiff may only recover collateral litigation expenses as damages in a negligence cause of action if the plaintiff actually incurred the attorney's fees. Thus, if the plaintiff recovered the collateral litigation expenses pursuant to a contractual fee-shifting provision, then the plaintiff cannot also recover those same attorney's fees under a collateral litigation doctrine theory of damages. In this case, the Ochses did not incur the attorney's fees because the Henrys satisfied the attorney's fees pursuant to the fee-shifting provision in the Contract of Sale.

Furthermore, to calculate damages in a negligence action based on the collateral litigation doctrine, the trial court is permitted to take judicial notice of the attorney's fees and litigation costs incurred as a result of the original litigation, and use those fees and costs as a measure of damages in the collateral litigation lawsuit. Therefore, the trial court did not abuse its discretion by taking judicial notice of the attorney's fees awarded in the Henry litigation, and by reducing its damages award to the Ochses by the amount previously satisfied by the Henrys.

Clarksville Residents Against Mortuary Defense Fund, Inc., et al. v. Donaldson Properties, et al., No. 70, September Term 2016, filed June 22, 2017. Opinion by Hotten, J.

Watts, J., concurs.

http://www.mdcourts.gov/opinions/coa/2017/70a16.pdf

STATUTES – GENERAL AND SPECIFIC STATUTES

ZONING AND PLANNING – GROUNDS FOR GRANT OR DENIAL IN GENERAL

Facts:

In December 2009, Donaldson Properties, *et al*., filed a conditional use application with the Howard County Board of Appeals, seeking to construct a funeral home in the Rural Residential-Density Exchange Option zone ("RR-DEO") in Howard County. Funeral homes are an approved conditional use in the RR-DEO zone. The proposed conditional use was initially denied by a Board Hearing Examiner, but upon revisions to the proposed plan made by Donaldson, the Board granted Donaldson's application on *de novo* review. Clarksville Residents Against Mortuary Defense Fund, Inc., an organization composed of community members who were opposed to Donaldson's proposed funeral home, filed a petition for judicial review in the Circuit Court for Howard County challenging the process by which the Board approved Donaldson's conditional use application. In relevant part, the community members challenged: (1) the Board's refusal to address the considerations set forth in Howard County Zoning Regulation ("HCZR") §130.C; (2) the Board's conclusion that the proposed conditional use plan satisfied the *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981), "adverse effects" test when it failed to analyze the "ordinary or inherent adverse effects" of a funeral home; (3) the Board's conclusion that the *Schultz* "adverse effects" test was satisfied, despite the surrounding Asian community's deep-seated cultural aversion to the death industry; and (4) the Board's conclusion that the *Schultz* "adverse effects" test was satisfied when it approved the plan, despite the community members' argument that the plan contemplated removing fifty feet of natural forest along a Tier II stream. The circuit court held a hearing and subsequently issued an order affirming the Board's decision. The community members appealed to the Court of Special Appeals, which, in an unreported opinion, affirmed the judgment of the circuit court.

Held: Affirmed.

The Court of Appeals held that the Board did not err in failing to address the more general considerations contained in HCZR §130.C. The Court determined that HCZR §131 contains specific requirements the Board must consider when approving a conditional use; whereas,

HCZR §130.C contains broader considerations that are not tailored to conditional uses and are intended to apply across the entire regulatory scheme. The Court concluded that because "a specific statutory provision governs over a general one" and because HCZR §131 was a more specific statutory provision than §130.C, the Board did not err in failing to address the considerations contained in §130.C. *See Lumberman's Mut. Cas. Co. v. Ins. Comm'r*, 302 Md. 248, 268, 487 A.2d 271, 281 (1985).

The Court held that the Board did err in concluding that the *Schultz* test was satisfied despite the Board's failure to first consider what the "ordinary or inherent adverse effects" of a funeral home were. The Court noted the *Schultz* test reflects that a conditional use must be denied if "it is determined from the facts and circumstances that the grant of the requested [conditional use] would result in an adverse effect … unique and different from the adverse effect that would otherwise result from the development" of the conditional use. *Schultz*, 291 Md. at 15, 432 A.2d at 1327. The Court concluded in *Schultz* that the appropriate standard for determining whether a conditional use would have an "adverse effect" is when "there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated" with the conditional use "irrespective of its location[.]" *Id*. at 22-23, 432 A.2d at 1331 (citations omitted). The Court determined that if a conditional use applicant demonstrates compliance with the prescribed standards and requirements outlined in the relevant statute or regulation, there is a presumption that the use is in the interest of the general welfare, which may only be overcome by probative evidence of unique adverse effects. The Court held that because the Howard County Council – in their capacity as a legislative body – undertook an assessment of the inherent adverse effects of a funeral home and determined that a funeral home use was sufficiently compatible with the permitted uses in the RR-DEO zone, subject to the requirements contained in HCZR §131, it was not necessary for the Board to first specify what adverse effects were inherent in a funeral home before approving Donaldson's conditional use application. The Court also differentiated the present case from the Court of Special Appeals' decision in *Mills v. Godlove*, 200 Md. App. 213, 26 A.3d 1034 (2011), by concluding that in the present case, the Board presented sufficient factual findings to support its conclusion that the proposed funeral home would not present any adverse impact above and beyond those inherently associated with a funeral home irrespective of its location.

The Court held the Board did not err in concluding that the *Schultz* "adverse effects" test was satisfied, despite evidence presented before the Board indicating some community members had a deep-seated cultural aversion to the death industry based on their Asian heritage. The Court noted that a reviewing court ordinarily gives an administrative agency's interpretation and application of the statute which the agency administers considerable weight. *See Bd. of Quality Assurance v. Banks*, 354 Md. 59, 69, 729 A.2d 376, 281 (1999). HCZR §131.B.2.a. requires the Board to evaluate the proposed conditional use plan according to the *Schultz* "adverse effects" test and specifically consider the "impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions[.]" The Court concluded the Board did not err in determining HCZR §131.B.2.a only required it to consider the enumerated

considerations contained in the regulation because the plain language of the regulation supports that finding and the Court defers to the Board's interpretation of its own regulation. *See Banks*, 354 Md. at 69, 729 A.2d at 381. The Court further held that because the *Schultz* "adverse effects" test existed within Howard County's regulatory scheme governing conditional uses, the community members were required to demonstrate a substantial nexus between their assertion of a "cultural aversion to the death industry" and the enumerated considerations contained in HCZR §131.B.2.a. The Court held that because the community members failed to present substantial evidence connecting their "cultural sensitivities" to any of the enumerated conditions contained in HCZR §131.B.2.a, the Board did not err in failing to consider their asserted sensitivities.

The Court held the Board did not err in concluding that the *Schultz* "adverse effects" test was satisfied when it approved Donaldson's conditional use, despite the community members' assertion that the proposed use planned to remove natural forest along a Tier II stream. The Court concluded the community members' claim was without merit because evidence before the Board indicated the proposed plan included a 100-foot stream buffer to protect the Tier II stream and no evidence was presented indicating Donaldson planned to remove any trees from the stream buffer.

National Waste Managers, Inc. Chesapeake Terrace v. Forks of the Patuxent Improvement Association, Inc. et al., No. 90, September Term 2016, filed June 21, 2017. Opinion by Wilner, J.

http://www.mdcourts.gov/opinions/coa/2017/90a16.pdf

ZONING AND PLANNING – TIME TO OBTAIN PERMITS – SPECIAL EXCEPTIONS AND VARIANCES – EXTENSIONS OF TIME

Facts:

In 1993, the Anne Arundel county board of appeals granted petitioner special exceptions and variances to construct a landfill and sand and gravel operation; due to delays in obtaining a necessary waste disposal permit from the State Department of the Environment, three extensions of time to obtain that permit and a county building permit to construct the landfill were granted through 2011. In 2011, however, by an even split (2-2), the Board effectively denied a further 2-year extension. The Circuit Court and the Court of Special Appeals reversed that denial and remanded the case to the board for further proceedings but disagreed on the standard the board was to apply.

Held:

The Court of Appeals held:

(1) the even split on the board constituted a denial of the requested extension;
(2) the issue was whether the decision of the denying members was supported by substantial evidence and free of legal error;
(3) the findings of the denying members as to petitioner's diligence in pursuing the MDE and county permits were unsupported by substantial evidence and were therefore arbitrary and capricious;
(4) their findings regarding whether the requested extension was the minimum necessary to afford relief was legally erroneous; and
(5) their findings regarding the impact of the extension on the surrounding neighborhood and adjacent property were based on an erroneous standard.

The rulings of the lower courts were vacated with instructions to remand to the board of appeals for further proceedings in conformance with the Court of Appeals opinion.

COURT OF SPECIAL APPEALS

Patricia Lamalfa v. Janis Hearn, et al., No. 87, September Term 2016, filed June 28, 2017. Opinion by Eyler, Deborah S. J.

http://www.mdcourts.gov/opinions/cosa/2017/0087s16.pdf

EVIDENCE – ADMISSION OF DOCUMENT RELIED UPON BY EXPERT WITNESS IN FORMING OPINION – RULE 5-703(b).

Facts:

Defense medical expert in automobile tort case relied upon medical records prepared by treating hospital, doctors, and chiropractor in forming his opinion that certain injuries the plaintiff was claiming damages for were not caused by the accident. At trial, the court admitted the documents into evidence, under Rule 5-703(b), as "facts or data" relied upon by a testifying expert witness. Plaintiff did not request a limiting instruction. Jury returned a verdict for plaintiff in the amount of her medical bills and $650 for pain and suffering. She appealed, arguing that the trial court erred in admitting the medical records into evidence under Rule 5-703(b), instead of just disclosing them to the jury without admitting them, and sought a new trial on damages.

Held: Affirmed.

Rule 5-703(b) provides that "[i]f determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data reasonably relied upon by an expert [witness] . . . may, in the discretion of the court, be disclosed to the jury even if those facts are not admissible in evidence." It further provides that, "[u]pon request, the court shall instruct the jury to use those facts and data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference."

When facts and data relied upon by a testifying expert witness are contained in a written document, the Court of Appeals has not drawn a distinction between admitting the document in evidence and disclosing the document to the jurors. *See Brown v. Daniel Realty Co*., 409 Md. 565, 601 (2009). For jurors to be able to use the facts and data in such a document to evaluate

the expert's opinion, they must be able to read the document, and that cannot be done by a cursory disclosure. The concern that the plaintiff in this case had, that the jurors would use the medical records substantively because, having been admitted, they would be in the jury room during deliberations, should have been addressed by requesting a limiting instruction, as the rule allows. The court did not err in admitting the medical records into evidence.

111 Scherr Lane, LLC, et al. v. Triangle General Contracting, Inc., et al., No. 855, September Term 2016, filed June 29, 2017. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2017/0855s16.pdf

CIVIL PROCEDURE – REPLEVIN AND DETINUE – RULES 12-601 AND 12-602 – RECOVERY FOR DETINUE PERMITTED FOR VALUE OF PERSONAL PROPERTY OF PLAINTIFF ORIGINALLY HELD UNJUSTLY BY DEFENDANT AND THEN KNOWINGLY AND WRONGFULLY DESTROYED BY DEFENDANT PRIOR TO PLAINTIFF'S FILING ACTION FOR REPLEVIN.

Facts:

Business ("TECO") owned real property on which it stored trailers and other items of personal property and on which it permitted an unrelated business ("Triangle") to store trailers and other items of personal property, for a monthly rental. Real property was sold at foreclosure to the LLC owned by Gills. Soon after title passed, Gills gave TECO ten days to remove its personal property. TECO attempted to do so, and removed many items, but was thwarted by weather. Knowing much of TECO's personal property still was on the real property, Gills barred TECO from entering. Triangle first learned of the change in title of the real property after the ten-day period and immediately contacted Gills about retrieving its personal property. Gills would not allow it to do so.

About a month later Gills took most of the trailers and other personal property to a scrap yard where it was scrapped and he received payment. TECO and Triangle did not know that he had done so when, about two months later, they each filed actions for replevin in District Court. Their cases were consolidated and after two hearings the court issued writs of replevin. Some of the items of personal property were recovered but others were not on the real property anymore and were not recovered. The suits were converted to actions for detinue and transferred to the circuit court because the amounts in controversy exceeded the monetary jurisdiction of the District Court. Separate trials were held on the detinue claims. The circuit court found in favor of TECO and Triangle in both. It rejected Gills and the LLC's argument that TECO and Triangle had abandoned their personal property after the ten-day period Gills had given to retrieve it. It also rejected the argument that the plaintiffs were barred from recovering in detinue for the value of personal property that was not still present on the real property and in Gills and the LLC's possession when the actions in replevin were filed. It credited Triangle's expert on valuation, applying a market value, not replacement value, measure of damages to items Triangle had stored on the real property to use in its construction business. Gills and the LLC appealed.

Held: Affirmed.

Rule 12-601 governs actions for replevin and Rule 12-602 governs actions for detinue. Both rules provide that the actions shall be brought against the person who has possession of the property at the time the complaint is filed, and if it is later discovered that another person has possession of the property, that person shall be joined as a defendant. If the plaintiff obtains a writ of replevin but upon execution some of the property is not recovered, the action can be converted to one for detinue, for recovery of damages for the property not recovered. In this case, the personal property of the plaintiffs had been in the possession of the defendants and the plaintiffs attempted to retrieve it. When the defendants prohibited the plaintiffs from entering on the real property and retrieving their personal property, the defendants knew that the plaintiffs still wanted their property back. The circuit court correctly found on the facts adduced that neither TECO nor Triangle had relinquished their interest in the personal property and therefore that they had not abandoned the property. With this knowledge, the defendants destroyed many of the items of personal property by taking them to a scrap yard (for which the defendants were paid). Neither TECO nor Triangle knew when they filed their replevin actions that the defendants had destroyed much of the personal property.

At common law, it was recognized as an exception to the requirement that an action for replevin/detinue be brought against the person having possession of the personal property at the time the complaint was filed that the person had unjustly held the property and then culpably destroyed it before the complaint was filed. That exception applies here. The circuit court did not err in allowing the plaintiffs to pursue their claims for detinue even though the defendants were not in possession of the personal property when the claims were filed. Also, under the circumstances, where Triangle was in need of the tools and materials it kept on the real property for its construction business, the court did not abuse its discretion in applying a market value measure of damages.

Michael Johnson, Jr. v. Mayor & City Council of Baltimore, et al., No. 1245, September Term 2015, filed June 1, 2017. Opinion by Reed, J.

http://www.mdcourts.gov/opinions/cosa/2017/1245s15.pdf

WRIT OF EXECUTION – PROPERTY SUBJECT TO EXECUTION – PUBLIC PROPERTY AND INSTITUTIONS

Facts:

Michael Johnson, Jr. was awarded compensatory and punitive damages in an action he filed against three Baltimore City Police officers who assaulted him and then left him stranded in the rain in Howard County. Following a previous appeal to this Court, in which we largely affirmed the judgments of the circuit court, but revised the compensatory damages award and remanded for further proceedings, Mr. Johnson filed a Request for Writ of Execution and Levy Upon Personal Property and a Request for Garnishment of Property in the amount of this Court's revised judgment, naming the Mayor and City Council of Baltimore the judgment debtors.

On June 26, 2015, the writs were issued by the clerk of the circuit court. The Writ of Execution directed the Sherriff of Baltimore City to levy upon the City's property to satisfy a monetary judgment, and the Writ of Garnishment of Property directed M&T Bank to hold $281,000.00 from the City's account subject to further proceedings in the circuit court. On July 8, 2015, the City filed a motion to quash the writs and release the property from levy. Following a hearing, the motions court quashed both writs. This appeal—the second to the Court of Special Appeals in this case—followed.

Held: Affirmed.

1) The circuit court, in quashing the writs, correctly found that the City is not the judgment debtor under the Local Government Tort Claims Act ("LGTCA") because the Baltimore City Police Department is an agency of the State, not the City of Baltimore.

2) The Court of Appeals' holding in *Darling v. City of Baltimore*, 51 Md. 1, 14 (1879), which was that "an execution on judgment against a municipal corporation cannot lie," is reaffirmed.

3) Even if the City were the judgment debtor, and even if municipal property could be obtained by execution, the writs still would have been properly quashed because Mr. Johnson's actions to collect on the judgment came before the further proceedings this Court ordered on remand.

June Diane Duffy as Personal Representative of the Estate of James F. Piper v. CBS Corporation, No. 453, September Term 2015 & No. 40, September Term 2016, filed May 31, 2017. Opinion by Woodward, C.J.

http://www.mdcourts.gov/opinions/cosa/2017/0453s15.pdf

STATUTE OF REPOSE – STATUTORY INTERPRETATION – RETROACTIVITY – WHEN ACTION ACCRUES

STATUTE OF REPOSE – STATUTORY INTERPRETATION –MANUFACTURER'S EXEMPTION

Facts:

CBS Corporation ("CBS"), appellee, is a Delaware corporation that is the successor by merger to a Pennsylvania corporation bearing the same name, which was formerly known as Westinghouse Electric Corporation ("Westinghouse"). In early 1970, Westinghouse entered into two separate contracts with the Potomac Electric Power Company ("Pepco") to sell and install a turbine generator for Pepco's Morgantown Generating Station ("Morgantown") in Woodzell, Maryland. The specifications for the installation contract called for the use of insulation containing asbestos.

James F. Piper, appellant, worked as a steamfitter at Morgantown. Although he did not work directly on the installation of the turbine generator, he worked near the workers installing the turbine generator's insulation. The last day that the workers installed such insulation was June 28, 1970, and the turbine generator was operational by July of 1970. The last date of Piper's exposure to asbestos dust generated by the installation of the generator's insulation was June 28, 1970.

On December 26, 2013, Piper was diagnosed with mesothelioma. Piper sued CBS for damages caused by inhalation of asbestos fibers during his career as a steamfitter in Morgantown. CBS filed a motion for summary judgment asserting that the statute of repose barred Piper's cause of action. After a hearing, the trial court agreed with CBS and granted its motion for summary judgment.

Held: Affirmed.

The statute of repose, Maryland Code (1974, 2013 Repl. Vol.), § 5-108 of the Courts and Judicial Proceedings Article ("CJP"), provides in relevant part, that "no cause of action accrues . . . when . . . personal injury . . . resulting from the defective and unsafe condition of an improvement to real property occurs more than 20 years after the date the entire improvement

becomes available for its intended use." CJP § 5-108(a). The statute also states that "[a] cause of action for an injury described in this section accrues when the injury or damage occurs." CJP § 5-108(e). The Court of Special Appeals noted that Piper's cause of action was for damages in a personal injury case "resulting from the defective or unsafe condition of an improvement of real property." CJP § 5-108(a). The Court then determined that Piper's injury, mesothelioma, was discovered, and thus "occurred," in 2013, forty-three years after the turbine generator "first bec[a]me[] available for its intended use" in July of 1970. CJP § 5-108(a). Therefore, because Piper's cause of action did not accrue within 20 years of the turbine generator's operational status, Section 5-108(a) precluded the prosecution of Piper's cause of action against CBS.

Nevertheless, Piper claimed that his cause of action survived because Section 2 of the original statute of repose, Chapter 666 of the Acts of 1970, stated that the statute did not "apply to any cause of action arising on or before June 30, 1970." The Court held that the term "arising" in Section 2 meant "accruing" in the context of the history, language, and purpose of the statute. Because Piper's cause of action did not accrue until December 26, 2013, Section 2 did not preclude the bar of the statute of repose.

Finally, Piper asserted that his cause of action was not barred by the statute of repose because Westinghouse was a manufacturer of a product containing asbestos and the statute specifically exempted manufacturers. See CJP § 5-108(d)(2)(ii). The Court observed that the manufacturer's exemption was not enacted until 1991. Because Piper's cause of action did not accrue prior to July of 1990, it was barred by the statute of repose prior to the enactment of the manufacturer's exemption. The Court determined that under the Maryland Constitution, CBS had a vested right not to be sued on a cause of action that was otherwise time barred. *See Dua v. Comcast Cable*, 370 Md. 604, 627, 633 (2012). Accordingly, the 1991 amendment creating the manufacturer's exemption did not revive Piper's claim against CBS.

John R. Fone v. State of Maryland, No. 962, September Term 2016, filed June 6, 2017. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2017/0962s16.pdf

SEARCH AND SEIZURE OF EVIDENCE OF CHILD PORNOGRAPHY ON COMPUTER – WARRANT – STALENESS OF PROBABLE CAUSE

Facts:

On January 2, 2015, Google reported to the National Center for Missing and Exploited Children ("NCMEC") that an image of child pornography had been attached to a specific gmail account associated with a particular IP address for a computer. The NCMEC reported that information to the Montgomery County Police, which investigated the IP address and the internet service provider account associated with it and found that the appellant was the person listed on the account. The records of the account confirmed this and that the address for the account was a townhouse in Gaithersburg.

On March 18, 2015, the police applied for, obtained, and executed a search warrant for child pornography in the appellant's townhouse. The warrant application did not furnish the date on which the image of child pornography had been attached to the gmail account discovered by Google.

The appellant was home when the warrant was executed. The police interviewed him and searched his laptop computer. They located ten images of child pornography on that computer. The police later determined that the appellant had sent the ten images to an unknown recipient by a Yahoo! Messenger instant messaging program on his laptop computer on August 24, 2014, between 3:41 p.m. and 3:47 p.m.

The appellant was charged with ten counts of possession and ten counts of distribution of child pornography. He moved to suppress the evidence found in his laptop computer, arguing, in part, that the warrant was not supported by probable cause because the information on which it was based was stale. The motion was denied. The State *nol prossed* the possession counts, and the appellant was tried and convicted of the ten distribution counts.

Held: Affirmed.

The issuing judge had a substantial basis to believe that the probable cause supporting the warrant was not stale. Child pornography is not likely to dissipate, is not perishable or consumable, and even if deleted can be retrieved from a computer's hard drive by law enforcement specialists. Those who possess child pornography usually collect it and value keeping their collections. In addition, federal law requires that internet service providers,

including Google, report suspected child pornography to the NCMEC "as soon as reasonably possible." Staleness usually is not a concern with computer-stored child pornography for these reasons. The issuing judge would have reason to believe, based on the federal law, that the image in question had been attached to the appellant's email on his laptop computer within a relatively short time before Google discovered it on January 2, 2015.

Return to ToC

Bashunn Phillips v. State of Maryland, No. 713, September Term 2016, filed June 28, 2017. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2017/0713s16.pdf

CRIMINAL PROCEDURE – MOTION *IN LIMINE* – APPEAL TO IN BANC PANEL

Facts:

On July 18, 2014, a grand jury indicted Bashunn Phillips for the first-degree murder of Shar-Ron Mason and other related crimes. The State notified Phillips that it intended to offer at trial a radio frequency signal propagation map purporting to establish the approximate location of Phillips's phone on the morning of the murder. Phillips filed a motion *in limine* seeking to exclude the map and related testimony, arguing that the evidence was inadmissible under *Frye-Reed*. The Circuit Court for Anne Arundel County held a four-day evidentiary hearing on Phillips's motion and then granted it.

Displeased with this interlocutory ruling, the State filed a request for in banc review of the trial court's order pursuant to the Maryland Constitution, Article IV, section 22, and Maryland Rules 4-352 and 2-551. Phillips filed a motion to dismiss, arguing that the in banc panel was without jurisdiction to hear the appeal because Maryland's appellate courts have repeatedly recognized that Article IV, section 22, of the Maryland Constitution permits in banc review only when a direct appeal is allowed. Phillips urged that the State had no statutory right to appeal the court's order. The in banc panel denied Phillips's motion to dismiss, stating that it would reconsider the motion after oral argument. After briefing and oral argument, the in banc panel entered an order, concluding that it had jurisdiction to hear the State's appeal and that the trial court abused its discretion in its evidentiary ruling.

Phillips noted an appeal to this Court. In response, the State filed a motion to dismiss, arguing that Phillips lacked the statutory authority to appeal an evidentiary ruling before a trial has been conducted.

Held: Motion Denied; Judgment Reversed.

The Court of Special Appeals began by addressing the State's motion to dismiss, relying on *Buck v. Folkers*, 269 Md. 185 (1973), and *Estep v. Estep*, 285 Md. 416 (1979), (which the Court noted were dispositive of the issue). The Court held that a decision of an in banc panel is a final judgment (even if the in banc panel lacked jurisdiction to decide the issue) that may be appealed to the Court of Special Appeals. Accordingly, the proper time to appeal such a judgment is immediately after the decision of the in banc panel. A party who waits for remand to the trial

court loses the ability to appeal the issues decided by the in banc panel. The Court thus denied the State's motion to dismiss.

The Court then turned to the question of whether the in banc panel had jurisdiction to hear the State's appeal of the trial court's evidentiary ruling in the first instance. The Court observed that the purpose of Article IV, section 22, was to authorize an in banc appeal as a substitute for appeal to a traditional Maryland appellate court. The jurisdiction of the in banc panel, the Court explained, is determined by the Maryland Constitution, Maryland Code, and Maryland Rules. Relying on *Dean v. State*, 302 Md. 493 (1985), and *Board of License Commissioners for Montgomery County v. Haberlin*, 320 Md. 399 (1990), the Court instructed that a litigant may not appeal to an in banc panel in the circuit court if the litigant cannot also note an appeal to the Court of Special Appeals successfully. The Court then surveyed the relevant Maryland Code provisions, including Maryland Code (1973, 2013 Repl. Vol., 2016 Supp.), Courts and Judicial Proceedings Article ("CJP"), §§ 12-301 to 12-303 and determined that the trial court's evidentiary ruling was neither a final judgment nor an appealable interlocutory order. The Court then determined that, because the State had no right to appeal from the trial court order granting Phillips's motion in limine, the in banc panel was without jurisdiction. Accordingly, the Court vacated the in banc panel's June 3, 2016 order and remanded with instructions to remand the case back to the trial court so that criminal proceedings could resume.

Michael William Hall v. State of Maryland, No. 1690, September Term 2015, *Tywan Jamad Cummings v. State of Maryland,* No. 1701, September Term 2015 & *Daquawn Lubin v. State of Maryland*, No. 2071, September Term 2015, filed June 28, 2017. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2017/1690s15.pdf

CRIMINAL PROCEDURE – OBJECTIONS TO EVIDENCE – MARYLAND RULE 4-323 – PRESERVATION

Facts:

Messrs. Hall, Cummings, and Lubin were charged with robbery, use of a firearm in a crime of violence, and related offenses and tried as co-defendants in the circuit court for Prince George's County. During a motion *in limine*, defense counsel sought to introduce the complaining witness's prior manslaughter conviction for impeachment purposes. The trial court denied the request, reasoning that manslaughter was not an impeachable offense, and then prohibited the defense from cross-examining the witness on the matter during the trial.

The defendants appealed, arguing that the court erred in ruling that manslaughter was not an impeachable offense and in prohibiting the defense from cross-examining the State's witness regarding the conviction, which the defense argued provided a motive to testify falsely. The State conceded that the court erred in the way it characterized the conviction, but countered that the issue was not preserved for appellate review because the defense did not seek to introduce the conviction again during trial.

Held: Reversed and remanded for further proceedings.

The Court of Special Appeals held that the defendants did not have to renew the offer of evidence at trial to preserve the issue for appellate review. The Court reasoned that a defendant need not object again to the admission of evidence when the trial court excludes the evidence in response to a motion *in limine* and that ruling was intended to be the final ruling on the matter.

The Court also held that the trial court committed reversible error when it concluded that manslaughter was not an impeachable offense. The Court explained that the error prevented the trial court from assessing the relative probativity and prejudice of the conviction and precluded it from exercising discretion as to whether the manslaughter conviction should be admitted to impeach the State's witness.

Rene Mitchell v. Keith Yacko, et al., No. 200, September Term 2016, filed May 31, 2017. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2017/0200s16.pdf

REAL PROPERTY – FORECLOSURE – FORGERY AS DEFENSE

Facts:

In June 2005, Rene Mitchell decided to purchase a residential property in Bowie, and, on June 8, 2005, she signed a sales contract. Ms. Mitchell and her lender, Fremont, had agreed to a conventional fixed rate loan, as documented by the terms of the sales contract. At the closing on July 11, 2005, however, Ms. Mitchell noticed that the promissory note contained an adjustable interest rate and the deed of trust contained an adjustable rate rider.

Ms. Mitchell then informed her realtor and the settlement agents of the error, requested that the closing be terminated, and refused to sign any further documents. She also requested the return of all documents that she had signed up to that point. Although the settlement agents agreed to terminate the closing, they told Ms. Mitchell that they had to keep the documents and shred them. Consequently, Ms. Mitchell requested that they stamp a "VOID" mark on each page of each document that she signed. The settlement agent complied, and Ms. Mitchell wrote a notation, in her own hand, on the adjustable rate note, indicating that those documents were void.

Ms. Mitchell wrote a letter to Fremont, notifying it of its error and requesting cancellation. Fremont responded by letter, agreeing to cancel the loan "transaction" and indicating there was a "new transaction" that was adjusted to provide the "proper loan requirements." On the same day, Fremont sent two further letters: the first informed Ms. Mitchell that the loan was cancelled and the second informed her that the loan would henceforth have a fixed rate mortgage.

No new loan documents were executed. On July 15, 2005, Fremont returned the cancelled documents—the deed of trust and note, bearing the "VOID" marks and Ms. Mitchell's handwritten note—to Ms. Mitchell. The first pages of the deed and note sent to Ms. Mitchell contain stamps reading "CANCELLED AND SATISFIED IN FULL without recourse" followed by a signature line dated July 15, 2005.

Ms. Mitchell moved into the Property and made consistent payments for almost eight years. On January 1, 2013, Ms. Mitchell first failed to make a payment on the loan and continued to miss installment payments each month thereafter. The Substitute Trustees, acting for the successors in interest of Fremont, filed an order to docket foreclosure in the Circuit Court for Prince George's County on August 24, 2015.

As required by Maryland Rule 14-207, the order to docket foreclosure contained copies of a note and deed of trust as exhibits revealing that 10 years earlier a deed of trust was filed in the land

records for Prince George's County on July 14, 2005, three days after the terminated closing. These documents, however, did not contain the "void" or "cancelled" marks. As further required by Maryland Rule 14-207, the order to docket contains an affidavit, executed by the servicing agent, stating that the note is a "true and accurate copy." Another affidavit affirms "[t]hat [] attached hereto is a true and accurate copy of the Deed of Trust that is the lien instrument subject to this foreclosure action."

On September 25, 2015, Ms. Mitchell filed, under Maryland Rule 14-211, a motion to stay the sale and dismiss the action, arguing that the order to docket did not provide a copy of a valid and enforceable note or deed of trust because the note and deed of trust were voided. On February 11, 2016, the circuit court, without a hearing, entered an order denying Ms. Mitchell's motion to stay the sale and dismiss the action.

Held: Reversed.

The Court of Special Appeals began by analyzing Maryland Rule 14-207, which addresses the pleadings and exhibits that must be filed to commence a foreclosure. The Court drew on the decision of the Court of Appeals in *Wells Fargo Home Mortgage, Inc. v. Neal*, 398 Md. 705 (2007), a foreclosure case, to observe the ancient equity doctrine that one may not request equitable relief with unclean hands. The Court stated that, in order to seek relief through foreclosure, the matter "must not be marred by any fraudulent, illegal, or inequitable conduct." *Id*. at 730.

The Court of Special Appeals then turned to Maryland Rule 14-211, which governs motions to stay foreclosure sales and dismiss foreclosure actions. The Court instructed that Rule 14-211(b) states that the circuit court may deny such a motion without a hearing if the motion (1) was not timely filed and there is no good cause for this lack of compliance; (2) does not substantially comply with the Rule's requirements; or (3) does not state a valid defense on its face. Drawing on *Buckingham v. Fisher*, 223 Md. App. 82 (2015), the Court explained that forgery is a valid defense under Rule 14-211.

The Court then held that a party cannot institute a foreclosure action upon forged documents. Turning to the case at hand, the Court held that Ms. Mitchell's Rule 14-211 motion sufficiently pleaded a defense because it pleaded the elements of forgery. As such, it was error for the circuit court to deny Ms. Mitchell's motion without a hearing. The judgment was vacated and the case remanded to the circuit court for further proceedings to determine whether the note or deed of trust filed in the land records and attached to the order to docket were forged.

Manekin Construction, Inc. v. Maryland Department of General Services, No. 600, September Term 2016, filed June 28, 2017. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2017/0600s16.pdf

SUMMARY DECISION – "BASIS OF A CLAIM" – EVIDENTIARY HEARINGS BEFORE THE BOARD OF CONTRACT APPEALS.

Facts:

This appeal arises from the circuit court's order affirming the decision of the Maryland Board of Contract Appeals (the "Board") to grant summary decision in favor of the Department of General Services of Maryland ("DGS"), appellee. On June 9, 2010, appellant Manekin Construction, LLC ("Manekin") was awarded a contract with DGS to construct a two-story barrack and a one-story garage for the Maryland State Police in Hagerstown, Maryland. The contract price totaled more than eight million dollars and was subject to mutually agreed upon Proposed Change Orders ("PCOs").

Construction of the barrack and garage took place from June 21, 2010 until the project was substantially complete on or around July 26, 2012. Approximately every two weeks throughout the construction process, Manekin and DGS officials held meetings ("Progress Meetings") to discuss Manekin's progress and other issues. During performance of the construction, Manekin encountered certain difficulties that it attributed to delays caused by DGS (among other reasons) and submitted numerous PCOs, thereby requesting additional compensation.

On November 2, 2011, Manekin notified DGS of the "cumulative impact and ripple effect of" certain factors. On December 7, 2011, Manekin submitted PCO No. 68, requesting compensation for the "additional time, and associated general conditions costs resulting from changes" discussed in the November 2, 2011 letter. A letter attached to PCO No. 68 detailed the changes requested, including the five "impact factors" that affected the cost of the project. Manekin and DGS discussed PCO No. 68 at three Progress Meetings, during which the issue was designated as "void" in the minutes for Progress Meetings and in the "PCO Log."

After the project was complete, Manekin submitted a "Request for Equitable Settlement" on March 18, 2013. After DGS's procurement officer denied Manekin's claim, Manekin appealed to the Board. On September 17, 2016, during a hearing on the merits of the claim, the Board stopped the proceedings and granted DGS's Third Motion for Summary Decision. The Circuit Court for Howard County affirmed the Board's decision. This appeal followed.

Held:

The Board of Appeals erred in its decision to stop the proceedings, make findings of fact, and grant summary decision in favor of DGS.

The primary issue we decide on appeal is whether the Board erred when it stopped the evidentiary hearing and granted summary decision in favor of DGS. More specifically, we must decide whether the Board improperly made findings of fact on disputed issues, including whether and when Manekin knew or should have known that DGS disputed or rejected Manekin's request for compensation detailed in PCO No. 68.

Pursuant to COMAR 21.10.04.02, "a contractor shall file a written notice of a claim relating to a contract with the appropriate procurement officer within 30 days after the basis for the claim is known or should have been known, whichever is earlier." Accordingly, one of the disputed issues in the proceedings before the Board was when Manekin "[knew] or should have known" of the "basis of a claim." DGS argued that Manekin should have known that DGS disputed the amount claimed in PCO No. 68 when DGS marked the PCO "void" on the PCO Log. Manekin has maintained that it did not know that DGS disputed its claim for additional compensation until the procurement officer denied Manekin's "Request for Equitable Settlement," thereby indicating to Manekin that it would have to file a claim in order to be compensated.

Prior to the evidentiary hearing, DGS filed multiple motions for summary decision, and the Board delayed its issuance of a ruling on DGS's Third Motion for Summary Decision. Only one witness, the President of Manekin and project manager, testified at the evidentiary hearing. Near the conclusion of that witness's testimony, however, the Board stopped the proceeding and granted DGS's Third Motion for Summary Decision.

The Board's two-step process in deciding a motion for summary decision begins with its determination of whether there is any dispute of "material fact." COMAR 21.10.05.06D(2)(a). Only "[a]fter resolving all inferences in favor of the party against whom the motion is asserted" and finding that "there is no genuine issue of material fact" should the Board determine whether the moving "party is entitled to prevail as a matter of law." COMAR 21.10.05.06D(2).

A contractor's knowledge of a basis for "request[ing] payment that is not in dispute when submitted," however, does not constitute having knowledge of the basis of a "claim." COMAR 21.07.02.05-1C. Manekin's submission of a PCO, therefore, is not dispositive evidence of having knowledge of the basis for a claim. The thirty-day limitations period under COMAR 21.07.02.05-1D begins once the contractor knows or should know of a dispute or denial of its request.

Notably, the Board indicated that it relied on certain factual conclusions, including that Manekin knew or should have known of the basis of a claim when DGS marked PCO No. 68 as "void," and even more so after certain Progress Meetings, during which DGS had requested "fragnets"--i.e. detailed explanations for a particular delay. Specifically, the Board relied on its conclusion that Manekin had committed to providing the fragnets for PCO No. 68 by March 1, 2012, based on a vague notation contained in the minutes from Progress Meeting 39 held on February 2, 2012.

In this case, not only did the Board misapply the relevant statute, but the Board also failed to separate its consideration of DGS's motion for summary decision from its authority as the finder of fact at the conclusion of the evidentiary proceedings. We hold that the Board erred in its decision to grant summary decision in favor of DGS.

Estate of Harold L. Adams, et al. v. Continental Insurance Company, et al., No. 1065, September Term 2014, filed June 1, 2017. Opinion by Beachley, J.

http://www.mdcourts.gov/opinions/cosa/2017/1065s14.pdf

LIMITATION OF ACTIONS – TORTS – MISREPRESENTATION

LIMITATION OF ACTIONS – QUESTIONS FOR JURY

Facts:

Thousands of plaintiffs filed personal injury claims against MCIC Inc., an asbestos installation company, for asbestos-related injuries. The claims were consolidated for trial in 1990, and a jury found MCIC Inc. liable in 1992. Settlement negotiations ensued, with plaintiffs seeking all available insurance coverage pursuant to MCIC Inc.'s insurance policies. MCIC Inc. produced insurance schedules indicating its available insurance for these claims, and classified the available coverage as "products coverage." Plaintiffs, believing this "products coverage" to be the only available and applicable coverage for their claims, requested to view the actual insurance policies prior to settlement. When the insurance companies could only produce piecemeal policies—which were standard Comprehensive General Liability ("CGL") policies—plaintiffs requested affidavits from the insurance companies certifying that MCIC Inc.'s total coverage pursuant to the policies was approximately $13 million, and that, to the best of the insurance companies' knowledge, no other applicable or available coverage existed. In 1994, relying on the piecemeal policies and affidavits, the parties entered into a settlement agreement for approximately $13 million.

In 1997, the Court of Special Appeals published the reported opinion *Commercial Union Ins. Co. v. Porter Hayden Co*., 116 Md. App. 605 (1997), *cert. denied*, 348 Md. 205 (1997). There, the Court recognized a new theory of recovery for asbestos-related injuries pursuant to a standard CGL policy's "operations coverage." Notably, standard CGL policies do not provide aggregate limits for claims covered by "operations coverage."

Plaintiffs took no significant action until 2002, when plaintiffs represented by the Law Offices of Peter Angelos ("LOPA") filed a Motion to Enforce Settlement Agreement under seal, arguing that, following the *Porter Hayden* decision, MCIC Inc. and the insurance companies owed them more money pursuant to "operations coverage." The remaining plaintiffs successfully intervened in this action in 2004. During discovery of the motion to enforce, MCIC Inc. produced documents referred to as the "Chapper Documents." According to all plaintiffs, the "Chapper Documents" prove that MCIC Inc. knew, well before it settled its claims in this case, that "operations coverage" likely applied to the plaintiffs.

The trial court dismissed the Motion to Enforce Settlement Agreement as untimely, and the Court of Special Appeals affirmed that decision in an unreported opinion. During this time, in

2005, plaintiffs represented by LOPA filed a new complaint alleging, in pertinent part, claims for: negligent misrepresentation, fraudulent misrepresentation, and fraudulent concealment. The remaining plaintiffs moved to intervene in 2007. All plaintiffs alleged that the Chapper Documents proved that MCIC Inc. and the insurance companies knew that they were liable for operations coverage, but intentionally concealed this fact from plaintiffs during settlement negotiations. The trial court dismissed these claims as untimely, finding that the plaintiffs were on inquiry notice of their causes of action shortly after the Court of Special Appeals published *Porter Hayden*. Plaintiffs appealed the dismissal of their claims.

Held: Affirmed.

A plaintiff is on inquiry notice of its cause of action when it is able to or should recognize the harm or wrong that occurred. A plaintiff need not necessarily know the mental state of the defendant in order to recognize the alleged harm or wrong. Here, the plaintiffs should have recognized that, after *Porter Hayden*, the representations and statements in the affidavits were wrong, and consequently, that MCIC Inc. and the insurance companies owed them significantly more money than the approximately $13 million settlement amount.

Negligent misrepresentation and fraudulent misrepresentation differ only in the degree of culpability based on the defendant's mental state. Accordingly, the plaintiffs here were on inquiry notice of both torts where the claims stemmed from the exact same misrepresentations. Because the plaintiffs should have recognized after *Porter Hayden* that the statements regarding available coverage were false, and because the plaintiffs should have recognized that this meant they had suffered pecuniary harm, the plaintiffs were on inquiry notice of their causes of action long before they filed their claims.

City of College Park, et al. v. Precision Small Engines, et al., No. 774, September Term 2016, filed June 6, 2017. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2017/0774s16.pdf

CONCURRENT JURISDICTION OF MUNICIPAL CORPORATION TO ENFORCE ZONING LAWS UNDER LAND USE ARTICLE SECTION 22-119(a) – MEMORANDUM OF UNDER STANDING – CONTRACT INTERPRETATION.

Facts:

Under section 22-119(a) of the Land Use Article ("LU"), a municipality within Prince George's County ("County") has concurrent jurisdiction to enforce violations of the County's zoning laws, adopted by the District Council, within the municipality; and the municipality may exercise that enforcement power if it enters into a written agreement with the County that complies with the requirements of LU section 22-119(b). Apart from any zoning authority of the County, a municipality has the authority, under section 5-211(a) of the Local Government Article ("LG"), to enact its own building and safety code, which it has done.

The City and the County entered into a memorandum of understanding ("MOU") pursuant to LU section 22-119(b) by which the City assumed the exercise of the County's zoning enforcement powers for violations within the City. The MOU states that the City's assumption of those zoning enforcement powers "shall not be deemed to diminish any City power or authority under [certain provisions of the Regional District Act] **or any other law**." (Emphasis added.) The MOU also stated that "[t]he City is not authorized to issue building, grading, Use and Occupancy, or other permits **now issued by the County** . . . ." (Emphasis added.)

Precision Small Engines, the tenant of a non-residential property in the City, and the owner and other tenants of that property brought a declaratory judgment action against the County and the City seeking a determination that the MOU prohibited the City from bringing violation actions against them for failure to obtain use and occupancy permits that are required under the City's building and safety codes. The circuit court ruled in favor of Precision Small Engines and the other plaintiffs, declaring that, under the MOU, the City could not require them to obtain City use and occupancy permits. The County and the City had taken the opposite position and appealed.

Held: Reversed.

The language of the MOU makes clear that the City is assuming the enforcement powers of the County with regard to the County's zoning laws, but that the City is not being delegated any other County powers, such as the power to issue **County** use and occupancy permits. The MOU

also makes clear that the City's assumption of the County's enforcement powers with respect to the County's zoning laws shall not diminish any City power or authority under "any other law"; and "any other law" includes the City's own building and safety laws. It is irrelevant that some of the inspections performed pursuant to the County's zoning laws and pursuant to the City's building and safety laws are similar or overlapping. The City maintains its power to adopt and enforce its own building and safety laws.

ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated April 10, 2017, the following attorney has been indefinitely suspended by consent, effective June 1, 2017:

L. MICHAEL SHAECH

*

This is to certify that the name of

LARRY JASON FELDMAN

has been replaced upon the register of attorneys in this Court as of June 5, 2017.

*

By an Order of the Court of Appeals dated June 16, 2017, the following attorney has been disbarred by consent:

PATRICK M. MORAN

*

By an Order of the Court of Appeals dated June 19, 2017, the following attorney has been indefinitely suspended by consent:

JESSE RAYMOND RUHL

*

By an Order of the Court of Appeals dated May 18, 2017, the following attorney has been disbarred by consent, effective June 19, 2017:

KELLY GARNER KILROY

*

*

By an Order of the Court of Appeals dated June 19, 2017, the following attorney has been disbarred by consent:

JAMES P. WU

*

This is to certify that the name of

ROBERT L. KLINE, III

has been replaced upon the register of attorneys in this Court as of June 20, 2017.

*

By an Order of the Court of Appeals dated June 16, 2017, the following attorney has been indefinitely suspended by consent, effective June 28, 2017:

RAYMOND JEROME VANZEGO, JR.

*

By an Order of the Court of Appeals dated June 5, 2017, the following attorney has been disbarred by consent, effective June 30, 2017:

RODNEY M. JONES

*

By an Order of the Court of Appeals dated June 30, 2017, the following attorney has been suspended:

PAMELA BRUCE STUART

*

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RULES ORDERS AND REPORTS

A Rules Order pertaining to the One Hundred Ninety-Third Report and supplement of the Standing Committee on Rules of Practice and Procedure was filed on June 20, 2017.

http://www.mdcourts.gov/rules/rodocs/ro193.pdf

UNREPORTED OPINIONS

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

http://www.mdcourts.gov/appellate/unreportedopinions/index.html

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