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Attorney Grievance Commission of Maryland v. Wendy Barrow Culberson, AG No. 3, September Term 2022, filed March 27, 2023. Opinion by Booth, J.

https://www.courts.state.md.us/data/opinions/coa/2023/3a22ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

The Attorney Grievance Commission of Maryland ("Commission"), acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action ("Petition") against Wendy Barrow Culberson, a member of the Maryland Bar, arising out of her representation of Gabrielle Buck. The Commission alleged that Ms. Culberson violated the Maryland Attorneys' Rules of Professional Conduct ("MARPC") 19.301.4 (Communication), 19.301.5(a) (Fees), 19.301.7 (Conflict of Interest—General Rule), 19.301.15(a) (Safekeeping Property), 19.308.1(a) (Bar Admissions and Disciplinary Matters), and 19.308.4(a)–(d) (Misconduct), and Maryland Rule 19-407(a)(2)–(4) (Attorney Trust Account Record-Keeping).

Preceding the evidentiary hearing in this case, Ms. Culberson failed to respond to discovery requests. The hearing judge then granted Bar Counsel's motion for sanctions and entered an order striking Ms. Culberson's answer to the Petition and prohibiting Ms. Culberson from calling witnesses, presenting records, or testifying on anything other than mitigation at the evidentiary hearing, which was held on October 19, 2022. Ms. Culberson did not appear. The hearing judge admitted all of Bar Counsel's exhibits without objection and heard testimony from Bar Counsel's forensic investigator concerning his review of Gabrielle Buck's bank records and the various withdrawals and transactions undertaken by Ms. Culberson in connection with her client's bank accounts over a span of several years.

The hearing judge found that, in February 2014, Ms. Culberson executed an agreement with her client, Ms. Buck, in which Ms. Culberson agreed to help manage Ms. Buck's business and farm interests for a monthly $3,500 flat-fee retainer. Other legal services would be billed at Ms. Culberson's standard hourly rate. In March 2016, Ms. Buck executed a power of attorney naming Ms. Culberson as her agent and giving her access to her bank accounts. Between April 2016 and July 2019, Ms. Culberson made hundreds of cash withdrawals and was later unable to account for $597,797 in withdrawn funds. During the representation, Ms. Culberson failed to provide Ms. Buck with any time records or billing invoices to substantiate legal services provided or fees incurred, and never provided an accounting of the funds she withdrew. When questioned, Ms. Culberson did not advise Ms. Buck that she retained the majority of the cash

withdrawals for her own personal use and benefit. Financial statements and invoices subsequently provided by Ms. Culberson to Ms. Buck and to Bar Counsel included hourly charges for non-legal services that should have been provided as part of the $3,500 monthly retainer fee.

During Bar Counsel's subsequent investigation, Ms. Culberson knowingly and intentionally misrepresented that Ms. Buck agreed to increase her monthly retainer fee from $3,500 to $5,000 and told her not to submit periodic invoices. The financial documents provided by Ms. Culberson to Bar Counsel contained numerous errors and intentional misrepresentations, and were created after the fact by Ms. Culberson in an attempt to conceal her misappropriation of funds. Ms. Culberson also admitted that she failed to maintain any client matter records or client ledgers.

The hearing judge concluded that Ms. Culberson committed all of the violations alleged by the Commission. The hearing judge found that Bar Counsel had proven eight aggravating factors: (1) a dishonest or selfish motive; (2) a pattern of misconduct; (3) bad faith obstruction of the disciplinary proceeding; (4) submission of false evidence and false statements during the disciplinary process; (5) refusal to acknowledge the wrongful nature of her conduct; (6) substantial experience in the practice of law; (7) indifference to making restitution; and (8) illegal conduct. The hearing judge found one mitigating factor, the absence of a prior disciplinary record, and rejected other mitigating factors asserted by Ms. Culberson, which were unsupported by record evidence.

Held: Disbarred.

The Supreme Court of Maryland determined that the hearing judge's findings of fact were substantiated by clear and convincing evidence and were not clearly erroneous and agreed with the hearing judge's conclusions of law. In overruling Ms. Culberson's exceptions, the Court concluded that the hearing judge did not abuse her discretion when she imposed sanctions on Ms. Culberson because Ms. Culberson was unwilling to comply with her discovery obligations. It also concluded that testimony from Ms. Culberson's client, Ms. Buck, was not required to prove the alleged misconduct because Ms. Culberson's own statements and written correspondence established her misconduct. And, the hearing judge did not err by adopting Bar Counsel's proposed findings of fact and conclusions of law because they were supported by the record, as the hearing judge properly concluded in her own independent review. Considering the facts of the case in light of the established aggravating and mitigating factors, the Court concluded that disbarment was the appropriate sanction. The facts of Ms. Culberson's case, including her representation that she had no intention of practicing the law in the future, did not justify a departure from the well-established rule that when an attorney engages in knowing and intentional misappropriation of funds, disbarment is warranted.

Attorney Grievance Commission of Maryland v. Keith Anthony Parris, AG No. 22, September Term 2021, filed February 1, 2023. Opinion by Eaves, J.

https://mdcourts.gov/data/opinions/coa/2023/22a21ag.pdff

ATTORNEY DISCIPLINE – SANCTION – DISBARMENT

Facts:

The Attorney Grievance Commission of Maryland (the "Commission"), acting through Bar Counsel, filed a Petition for Disciplinary and Remedial Action with this Court against Keith Anthony Parris ("Parris"). The Commission alleged that Parris violated Maryland Attorney's Rules of Professional Conduct ("MARPC") 19-301.1 (Competence), 19-301.3 (Diligence), 19-301.4 (Communication), 19-301.5 (Fees), 19-303.2 (Expediting Litigation), 19-303.3 (Candor Toward the Tribunal), 19-303.4 (Fairness to Opposing Party and Attorney), 19-308.1 (Bar Admissions and Disciplinary Matters), and 19-308.4 (Misconduct).

The Commission's allegations against Parris resulted from his failure to file opposition motions on behalf of his client; failure to respond to discovery requests; failure to comply with court orders compelling him to complete discovery; failure to communicate with his client; repeated failure to respond to his client's requests for information; misrepresentation of the status of the case to his client; knowing and intentional misrepresentations to the trial court; collection of unreasonable fees from his client for services he did not perform; and failure to respond to Bar Counsel's requests for information.

A hearing judge filed Findings of Fact and Conclusions of Law with this Court and found by clear and convincing evidence that Parris violated all the above-cited Rules. The hearing judge found as a mitigating factor Parris's absence of a disciplinary record. As aggravating factors, the hearing judge found that Parris exhibited (1) dishonest or selfish motive; (2) a pattern of misconduct; (3) multiple offenses; (4) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; (5) refusal to acknowledge the wrongful nature of the conduct; (6) substantial experience in the practice of law; and (7) indifference to making restitution. Neither party filed any exceptions to the Findings of Fact and Conclusions of Law.

Held:

The Court held that disbarment was the appropriate sanction.

Based on an independent review of the record, the Court accepted the hearing judge's findings of fact as established, and it concluded that clear and convincing evidence supported the hearing judge's conclusions of law in all respects. Thus, the Court held that Parris violated MARPC 19-

301.1 (Competence), 19-301.3 (Diligence), 19-301.4 (Communication), 19-301.5 (Fees), 19-303.2 (Expediting Litigation), 19-303.3 (Candor Toward the Tribunal), 19-303.4 (Fairness to Opposing Party and Attorney), 19-308.1 (Bar Admissions and Disciplinary Matters), and 19-308.4 (Misconduct).

In determining the appropriate sanction, the Court agreed with the hearing judge that clear and convincing evidence supported each of the above-cited aggravating factors. The Court discussed that the purpose of a sanction is to protect the public from future harm and its perception of the legal profession and to deter future misconduct. The Court concluded that disbarment was the appropriate sanction for Parris's flagrant and persistent violations of the professional conduct Rules.

Attorney Grievance Commission of Maryland v. Richard Louis Sloane, AG No. 37, September Term 2021, filed March 2, 2023. Opinion by Hotten, J.

Fader, C.J., Booth and Gould, JJ., concur and dissent.

https://www.courts.state.md.us/data/opinions/coa/2023/37a21ag.pdf

ATTORNEY DISCIPLINE — SANCTION — INDEFINITE SUSPENSION

Facts:

The Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary and Remedial Action with the Supreme Court of Maryland, alleging that Richard Louis Sloane ("Respondent") violated Maryland Attorneys' Rules of Professional Conduct ("MARPC") 19-303.1 (Meritorious Claims and Contentions); 19-303.2 (Expediting Litigation); 19-303.3(a)(1) (Candor Toward the Tribunal); 19-303.4(c) and (d) (Fairness to the Opposing Party and Attorney); 19-304.4(a) (Respect for Rights of Third Persons); and 19-308.4(a), (c), and (d) (Misconduct). These allegations stemmed from Respondent's obstructive and hostile conduct during his representation of a client in a divorce and custody case.

The hearing judge found that Respondent obstructed two depositions by making speaking objections, even after the circuit court's intervention during the second deposition. Throughout discovery, Respondent made frivolous objections to standard discovery requests and filed discovery motions that contained frivolous arguments and false assertions. He falsely claimed that he attempted to resolve discovery disputes in good-faith. He misrepresented the case's history both in his motions and during hearings. Respondent did not cease his misconduct, despite various judges admonishing him. Respondent's conduct hindered and delayed the litigation of his client's case without any substantive purpose. As a result, the circuit court ordered his client to pay attorney's fees in the aggregate amount of $20,350.

The hearing judge found two mitigating factors attributable to Respondent, including the absence of a prior disciplinary history and that, as evidenced by the testimony of his character witnesses, Respondent maintained a good character and reputation among his friends and clients. The hearing judge also found six aggravating factors attributable to Respondent, including a dishonest or selfish motive, a pattern of misconduct, multiple offenses, refusal to acknowledge the wrongful nature of the conduct, substantial experience in the practice of law, and indifference to making restitution. The hearing judge concluded that Respondent violated each MARPC as alleged by Petitioner.

Held: Indefinite suspension with the right to apply for reinstatement after six months.

Based on an independent review of the record, the Court affirmed the hearing judge's legal conclusions that Respondent violated MARPC 19-303.1 (Meritorious Claims and Contentions); 19-303.2 (Expediting Litigation); 19-303.3(a)(1) (Candor Toward the Tribunal); 19-303.4(c) and (d) (Fairness to the Opposing Party and Attorney); 19-304.4(a) (Respect for Rights of Third Persons); and 19-308.4(a), (c), and (d) (Misconduct).

The Court overruled all but one of Respondent's exceptions. The Court sustained Respondent's exception to the hearing judge's finding regarding the aggravating factor of indifference to making restitution. There was no evidence that Respondent's client sought restitution because he neither filed a complaint against Respondent nor testified at the evidentiary hearing. Additionally, Respondent's client's own misconduct contributed to the fee awards against him.

The Court held that Respondent's conduct was similar in kind, if not quantity, to the attorney in *Attorney Grievance Commission v. Mixter*, 441 Md. 416, 109 A.3d 1 (2015). In that case, this Court disbarred an attorney who filed frivolous motions, obstructed proceedings, and made misrepresentations to the circuit court in twenty-two cases spanning over seven years. *Id.* at 439, 509–27, 109 A.3d at 15, 57–68. Here, Respondent misrepresented the case's history to the circuit court during various hearings. He filed several discovery motions that misrepresented the circuit court's rulings in an effort to extract attorney's fees from the opposing party. He also asserted meritless arguments regarding discovery after the circuit court previously resolved those issues.

This Court upheld the hearing judge's findings of two mitigating factors and five aggravating factors. Over the course of Respondent's career, spanning nearly two decades, he has never been the subject of attorney discipline. Indeed, his "misrepresentations were limited to one case and one client[.]" *Att'y Grievance Comm'n v. Shapiro*, 441 Md. 367, 403, 108 A.3d 394, 415 (2015). However, Respondent's misrepresentations were egregious, aggravated by his unwillingness to appreciate the wrongful nature of his conduct. Ultimately, the Court determined that Respondent's conduct warranted indefinite suspension with the right to apply for reinstatement after six months.

Attorney Grievance Commission of Maryland v. Kevin Mbeh Tabe, AG No. 6, September Term 2022, filed February 27, 2023. Opinion by Watts, J.

https://www.mdcourts.gov/data/opinions/coa/2023/6a22ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – 90-DAY SUSPENSION

Facts:

Kevin Mbeh Tabe, Respondent, a member of the Bar of Maryland, was admitted to the Bar in 2009. Mr. Tabe provided legal services to two clients regarding immigration matters from an office in Dallas, Texas, while maintaining a Maryland attorney trust account. Mr. Tabe was retained to represent Fon Halley Fon, a citizen of Cameroon who had entered the United States seeking asylum. Mr. Fon was detained at an immigration detention center in Louisiana and faced removal proceedings. Mr. Tabe failed to appear at a master calendar hearing for Mr. Fon, despite Mr. Fon's understanding that Mr. Tabe, as his attorney, would attend. After the hearing date, Mr. Fon asked to meet with Mr. Tabe, but no meeting occurred. The immigration court rescheduled the hearing and Mr. Tabe appeared at the rescheduled hearing, where the court ordered that Mr. Fon's asylum application be submitted by a designated date. Mr. Tabe had Mr. Fon complete asylum application materials and timely submitted the application. However, the application included several important errors, and Mr. Tabe failed to promptly file a corrected application.

At some point prior to Mr. Fon's individual asylum hearing, Mr. Tabe lost Mr. Fon's Cameroonian National Identification Card, his only form of photographic identification, which contributed to the rejection of his asylum application by the immigration court. Mr. Tabe was retained to represent Mr. Fon in an appeal to the Board of Immigration Appeals ("BIA"), and Mr. Tabe filed a brief with the BIA on Mr. Fon's behalf. But, the BIA affirmed the immigration court's decision and dismissed Mr. Fon's appeal. Mr. Tabe never deposited any of the funds paid by Mr. Fon's family for the initial representation or the appeal into an attorney trust account. Mr. Fon filed a complaint against Mr. Tabe with Bar Counsel.

Mr. Tabe was retained by Christian Nkwizi, a citizen of Cameroon who had entered the United States seeking asylum. Mr. Nkwizi was detained at an immigration detention center in Georgia, and he also faced removal proceedings. Mr. Tabe failed to deposit the funds paid on Mr. Nkwizi's behalf for representation in a trust account. Mr. Tabe filed an asylum application for Mr. Nkwizi. The court scheduled an individual hearing for Mr. Nkwizi, but Mr. Nkwizi was released from detention before the hearing and moved to Massachusetts. Mr. Tabe filed a motion to change venue to Massachusetts, which he assured Mr. Nkwizi would be granted, meaning that all his future hearings would be in Massachusetts rather than Georgia.

However, the court denied the motion, emailing notice to Mr. Tabe, who neither read it nor shared it with Mr. Nkwizi. Neither Mr. Tabe nor Mr. Nkwizi attended Mr. Nkwizi's individual

hearing—the former because he assumed the change of venue was granted, the latter in reliance on Mr. Tabe's representations. Due to his failure to appear, the court deemed Mr. Nkwizi's application abandoned and ordered him removed from the country. Mr. Tabe told Mr. Nkwizi that he would resolve the issue and filed a motion to rescind the court's order and reopen the proceedings. Mr. Tabe did not include a required affidavit, which was part of the basis for the court's denial of the motion. Mr. Nkwizi filed a complaint against Mr. Tabe with Bar Counsel.

On behalf of the Attorney Grievance Commission, Petitioner, Bar Counsel filed a "Petition for Disciplinary or Remedial Action" against Mr. Tabe, charging him with violating Maryland Attorneys' Rules of Professional Conduct ("MARPC") 1.1 (Competence), 1.15(a) (Safekeeping Property), 8.4(d) (Conduct that is Prejudicial to the Administration of Justice), and 8.4(a) (Violating the MARPC); Maryland Rule 19-404 (Trust Account – Required Deposits); and Federal Immigration Rules of Professional Conduct for Practitioners, 8 C.F.R. § 1003.102(a)(1), (l), (n), (o), (q), and (r). The Supreme Court of Maryland appointed a hearing judge to hear the attorney discipline proceeding.

On November 4, 2022, the hearing judge issued an opinion including findings of fact and conclusions of law, concluding that Mr. Tabe had violated MARPC 1.1, 1.15, and 8.4(a) and (d); Maryland Rule 19-404; and 8 C.F.R. § 1003.102(a)(1), (l), (n), (o), (q), and (r). The hearing judge found seven aggravating factors: (1) prior disciplinary history; (2) a pattern of misconduct; (3) multiple offenses; (4) vulnerability of the victims; (5) substantial experience in the practice of law; (6) indifference to making restitution; and (7) likelihood of repetition of misconduct. The hearing judge also found four mitigating factors: (1) full and free disclosure to the disciplinary board and a cooperative attitude toward the proceedings; (2) remorse; (3) the absence of a dishonest or selfish motive; and (4) personal or emotional problems.

On February 3, 2023, the Supreme Court of Maryland heard oral argument.

Held: Suspended from the practice of law in Maryland for 90 days with the condition of the engagement of an attorney monitor for a one-year period upon reinstatement to the practice of law in Maryland. The attorney monitor's responsibilities shall include, but not be limited to, oversight of workload volume and stress management issues.

The Supreme Court of Maryland overruled Mr. Tabe's exceptions to the hearing judge's findings that he "failed to adequately explain the asylum process to Mr. Fon or prepare Mr. Fon for his upcoming individual hearing" and that he only met with Mr. Fon once and that he failed to provide services of value to Mr. Nkwizi and, therefore, charged an unreasonable fee. The Court also overruled Mr. Tabe's exceptions to the hearing judge's finding of the aggravating factors of a pattern of misconduct, likelihood of future violations, and vulnerability of the victims.

The Supreme Court of Maryland sustained Bar Counsel's exception to the hearing judge's conclusion that Mr. Tabe violated MARPC 1.1 by failing to competently represent the clients in immigration proceedings. Bar Counsel contended that under MARPC 8.5(b), the hearing judge

should have concluded that the violation of MARPC 1.1 resulted from Mr. Tabe's "failure to properly maintain client funds in an attorney trust account[,]" and that his alleged failure to provide competent representation, i.e., misconduct involving the substance of the representation, was governed by the Federal Immigration Rules of Professional Conduct for Practitioners ("FIRPCP").

The Supreme Court of Maryland explained that, under the plain language of MARPC 8.5(b), in Maryland, in connection with a matter pending before a tribunal, the rules of the tribunal where an attorney's alleged misconduct occurred must be applied in an attorney disciplinary proceeding, and, as stated in Comment 4 of the Rule, an attorney shall be subject only to the rules of professional conduct of that tribunal. In this case, Bar Counsel filed charges alleging violations of the MARPC and the FIRPCP. The hearing judge found violations of both MARPC 1.1 and 8 C.F.R. § 1003.102(o) based on the same conduct—the failure to provide competent representation. The Court concluded that, under the plain language of MARPC 8.5(b) and its case law, Mr. Tabe could not be subject to both sets of rules for the same conduct. Given that the misconduct in the case arose from matters pending before the federal immigration tribunal, the charges in the case should have been pursued under the federal immigration rules, unless the immigration rules did not contain a counterpart applicable to the alleged misconduct.

The Supreme Court of Maryland stated that, although in its exception, Bar Counsel stated that it charged violations of the MARPC only in relation to Mr. Tabe's attorney trust account misconduct, the petition for disciplinary or remedial action made no distinction as to what misconduct was alleged to be in violation of the MARPC versus the FIRPCP. In accordance with its case law, the Court recommended that in the future where misconduct implicating MARPC 8.5(b) is concerned, Bar Counsel identify in the petition for disciplinary or remedial action the discrete act or acts of alleged misconduct and the set of professional rules that it contends to have been violated by the particular act or acts of alleged misconduct at issue. In this case, except for the violations of MARPC 1.1 (Competence), 1.15(a) (Safekeeping Property), 8.4(d) (Conduct that is Prejudicial to the Administration of Justice), and 8.4(a) (Violating the MARPC), and Maryland Rule 19-404 (Trust Account – Required Deposits) that pertained to trust account violations, the FIRPCP applied to the conduct at issue involving the two immigration cases.

The Supreme Court of Maryland concluded that, although not for the reasons stated, the hearing judge's conclusion that Mr. Tabe violated MARPC 1.1 was correct given the finding that Mr. Tabe did not deposit the fees from Mr. Fon and Mr. Nkwizi into his client trust account.

The Supreme Court of Maryland also concluded, as the hearing judge had, that Mr. Tabe violated MARPC 1.1, 1.15(a), and 8.4(d) and (a), Maryland Rule 19-404, and 8 C.F.R. § 1003.102(a)(1), (l), (n), (o), (q), and (r) by, among other things, failing to competently and diligently represent his clients, resulting in adverse rulings for them, losing a client's only photographic identification card, and failing to place client funds into an attorney trust account. The Court noted the same seven aggravating factors and four mitigating factors as the hearing judge and determined that the appropriate sanction for Mr. Tabe's misconduct was a 90-day suspension

from the practice of law in Maryland, with the condition of the engagement of an attorney monitor for a one-year period upon reinstatement to the practice of law in Maryland.

Attorney Grievance Commission of Maryland v. Ali Mansouri Kalarestaghi, AG No. 48, September Term 2021, filed March 14, 2023. Opinion by Hotten, J.

Fader, C.J., Booth, and Gould, JJ., concur and dissent.

https://mdcourts.gov/data/opinions/coa/2023/48a21ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – SUSPENSION

Facts:

The Attorney Grievance Commission of Maryland, acting through Bar Counsel ("Petitioner"), filed with this Court a Petition for Disciplinary or Remedial Action against Ali Mansouri Kalarestaghi ("Respondent"). Petitioner charged Respondent with violating Maryland Attorneys' Rules of Professional Conduct ("MARPC") 19-301.4(a)(1) and (b) (Communication) (1.4); 19-301.7 (Conflict of Interest – General Rule) (1.7); 19-301.8(a) (Conflict of Interest; Current Clients; Specific Rules) (1.8); 19-301.9(a) (Duties to Former Clients) (1.9); 19-301.16(a) (Declining or Terminating Representation) (1.16); and 19-308.4(a), (c), and (d) (Misconduct) (8.4). These violations stemmed from Respondent's concurrent representation of two clients with adverse interests.

As reflected in the findings of fact, the hearing judge found that Respondent placed the parties in direct conflict during representation; failed to recognize and advise the clients of the conflict of interest; failed to attempt to obtain the clients' informed consent, confirmed in writing, to continue with the representation; entered into a business transaction with a client without advising the client, in writing, of the desirability of seeking advice of independent counsel and without giving the client a reasonable opportunity to do so; represented a client against a former client without obtaining written, informed consent from the former client; and engaged in conduct that is prejudicial to the administration of justice.

The hearing judge found two aggravating factors attributable to Respondent, including a dishonest or selfish motive and substantial experience in the practice of law. The hearing judge also found that Respondent established four mitigating factors by a preponderance of the evidence, including full and free disclosure to disciplinary board or cooperative attitude toward proceedings, the absence of a prior disciplinary record, a good reputation in the legal community, and the imposition of other penalties or sanctions. Ultimately, the hearing judge concluded that Respondent violated the applicable MARPC as alleged by Petitioner.

Held: Sixty-day suspension, stayed in favor of a six-month probationary period, subject to the conditions that Respondent adhere to the MARPC and complete a continuing legal education course on conflicts of interest or general ethics.

Based on an independent review of the record, the Court affirmed the hearing judge's legal conclusions, except for the 19-308.4(c) violation, and overruled all of Respondent's exceptions. The Court, therefore, concluded that Respondent violated MARPC 19-301.4(a)(1) and (b) (Communication) (1.4), 19-301.7 (Conflict of Interest – General Rule) (1.7), 19-301.8(a) (Conflict of Interest; Current Clients; Specific Rules) (1.8), 19-301.9(a) (Duties to Former Clients) (1.9), 19-301.16(a)(1) (Declining or Terminating Representation) (1.16), and 19-308.4(a) and (d) (Misconduct) (8.4).

The Court determined that the nature and circumstances of Respondent's misconduct closely resembled that of other attorneys who have been suspended where the attorney does not act with dishonest or deceitful intent, does not cause the client actual harm, lacks a prior disciplinary record, and was cooperative with Bar Counsel throughout the investigation. This Court upheld the hearing judge's findings of four mitigating factors and two aggravating factors. In the aggregate, the Court concluded that Respondent's conduct warranted a sixty-day suspension, but with the execution of that disposition stayed for a six-month period of probation, subject to the conditions that Respondent adhere to the MARPC and complete a continuing legal education course on conflicts of interest or general ethics.

State of Maryland v. Keith Krikstan, No. 18, September Term 2022, filed February 27, 2023. Opinion by Watts, J.

Hotten, Eaves, and Battaglia, JJ. dissent.

https://www.mdcourts.gov/data/opinions/coa/2023/18a22.pdf

CHILD ABUSE – SEXUAL ABUSE OF A MINOR – ACT THAT INVOLVES SEXUAL EXPLOITATION – SUFFICIENCY OF THE EVIDENCE

Facts:

In this case, 30-year-old Keith Krikstan, Respondent, a substitute teacher, was charged with sexual abuse of a minor. Krikstan, who worked on-and-off as a substitute teacher at A.G.'s middle school, engaged in a sexually exploitative relationship with the 12-year-old student through cell phone text messages, an electronic messaging application, and video chats outside of class. Krikstan first met A.G. when he was teaching as a substitute in her seventh-grade science class. Krikstan began texting A.G., quickly becoming what she considered "more than" a friend. Krikstan professed his love for A.G., doing so over 100 times. Krikstan asked to see A.G.'s "butt," either clothed or bare. A.G. sent photos of her buttocks, sometimes bare, to Krikstan 10 to 15 times. According to A.G., Krikstan showed her part of his penis on several occasions when they video chatted. In other conversations, Krikstan discussed his desire to have sex with A.G.

After a few weeks of these communications, A.G. told Krikstan that she was interested in a 21-year-old man named Joey. Krikstan became upset, told A.G., among other things, that he had "loved" her but was "done[,]" and wished her a "great life with Joey." A.G. testified that Krikstan "was mad at" her and that he sent her a message through Snapchat telling her the things above. After this, Krikstan returned to A.G.'s school as a substitute teacher and discussed with her his negative feelings about her having expressed an attraction to the 21-year-old man. Specifically, Krikstan substitute taught A.G.'s math class. Once there, Krikstan gave A.G. a late pass to stay after math class. After class, while A.G. was still in the classroom, Krikstan conveyed to her that he was mad and upset with her because of her feelings for the other adult man.

After this conversation at school, Krikstan resumed sexually exploiting A.G. regularly, by telephone and electronically outside of school hours, telling her that he loved her and wanted to have sex with her. These electronic communications were often intensely romantic and graphically sexual. One exchange involved Krikstan instructing A.G. how to masturbate using a pillow, which she did, and afterward Krikstan messaged the 12-year-old that he had visualized her "riding a cock." None of the explicitly romantic or sexual exchanges occurred at school.

Approximately two months after Krikstan substitute taught A.G.'s math class, Krikstan again elected to substitute teach one of A.G.'s classes after another conflict about A.G's feelings for the other man and emotional conversations with A.G. That day, another student reported to a school official the nature of the relationship between Krikstan and A.G., and Krikstan was later arrested. Krikstan was convicted of sexual abuse of a minor.

The Appellate Court of Maryland reversed his conviction for sexual abuse of a minor, theorizing that he had not "said or implied anything sexual" in his conversation with the minor in school. *Keith Krikstan v. State*, No. 2279, Sept. Term, 2019, 2022 WL 1284081, at *1, *6 (Md. App. Ct. Apr. 29, 2022). In a concurring opinion, the Honorable Christopher B. Kehoe explained that, from his perspective based on the legislative history of the criminal child abuse statute, a "historical accident" had led to the conclusion that "Krikstan's otherwise fully-warranted conviction for sexual abuse of a minor must be reversed[.]" *Id*. at *8 (Kehoe, J., concurring). The State petitioned for a writ of certiorari, which the Supreme Court of Maryland granted. *See State v. Krikstan*, 481 Md. 2, 281 A.3d 718 (2022).

Held: Reversed.

Reversed and case remanded to the Appellate Court of Maryland with instruction to affirm the judgment of the Circuit Court for Charles County.

The Supreme Court of Maryland held that the evidence was sufficient to support Krikstan's conviction of sexual abuse of a minor under Md. Code Ann., Crim. Law (2002, 2021 Repl. Vol.) ("CR") § 3-602. For conviction under the statute, the person must have care, custody, or responsibility for supervision of the minor at the time the person engages in "an act that involves" sexual exploitation of the minor. CR § 3-602(a)(4)(i). The Court concluded that to support a conviction under CR § 3-602, where a person has sexually exploited a minor through electronic communications at a time that the person did not have care, custody, or responsibility for the supervision of the minor, there must be a showing that the person engaged in an act that related to, affected, or was a part of the out-of-school sexual exploitation of the minor when the person had care, custody, or responsibility for supervision of the minor. The occurrence of sexual exploitation outside of the perpetrator's time of responsibility for supervision of the minor may be used to establish child sexual abuse under CR § 3-602, but there must be a showing that the perpetrator engaged in an act relating to, affecting, or that was a part of the sexual exploitation while the perpetrator was responsible for the care, custody, or supervision of the minor. That the act at issue relates to, affects, or is a part of sexual exploitation of the minor need not be shown through direct evidence; rather, the showing may be accomplished though evidence that permits a rational trier of fact to find that the act is related to the sexual exploitation of the minor. In addition, the act taken while the person is responsible for the care, custody, or supervision of the minor need not be of a sexual or criminal nature. It is enough that the act relates to, affects, or is a part of the sexual exploitation of the minor.

The Supreme Court of Maryland stated that its holding flowed directly from *Degren v. State*, 352 Md. 400, 419, 722 A.2d 887, 896 (1999), a case in which the Court affirmed a conviction for child sexual abuse under Md. Code (1957, 1996 Repl. Vol.), Art. 27, § 35C (a predecessor to CR § 3-602), and in doing so considered the meaning of the phrase "involves sexual molestation or exploitation" and explained that the word "involves" "connotes a broad sense of inclusion, such as an act *relating* to sexual molestation or exploitation." (Citing Merriam-Webster's Collegiate Dictionary 617 (10th ed.) ("defining 'involve' as 'to engage as a participant' or 'to have an effect on' and 'involved' as 'being affected or implicated'")) (emphasis in original). The Court stated that is conclusion was also consistent with its holding in *Walker v. State*, 432 Md. 587, 622-23, 69 A.3d 1066, 1087-88 (2013), in which it discussed that sexual exploitation is not limited to incidents involving physical contact and can include a wide range of behavior. In *Walker*, *id.* at 622, 69 A.3d at 1087, the Court explained that:

> Our review of Maryland case law leads us to several conclusions about [CR] § 3-602. The statute . . . can encompass a wide range of behavior that need not, in itself, be criminal. Child sexual abuse can be committed as part of a single act or a series of actions and it is not necessary that the defendant physically touch the child in order to commit the crime. The context in which the abuse occurs matters and failing to act to prevent abuse can be criminal. Finally, exploitation requires that the defendant "took advantage of or unjustly or improperly used the child for his or her *own* benefit."

(Quoting *Degren*, 352 Md. at 426, 722 A.2d at 900) (emphasis in original).

The Supreme Court of Maryland concluded that the evidence demonstrated that Krikstan's in-school conduct fell squarely within the meaning of the language of the statute providing that sexual abuse means an act that involves either sexual molestation or exploitation of a minor, regardless of whether physical injuries occur or not. In the classroom after math class, Krikstan discussed with A.G. his anger and demonstrated jealousy over her attraction to another adult man. At the time of the in-school interaction, A.G. had already informed Krikstan of her attraction to the other man in the context of a sexually exploitative relationship conducted through electronic communications, and Krikstan had already expressed his anger about the other adult man while communicating with A.G. during the existing out-of-school sexually exploitative relationship. And, after the in-school display of anger, Krikstan continued the out-of-school sexual exploitation, which included emotionally charged electronic communications about whether A.G. loved Krikstan or the other man.

The Supreme Court of Maryland concluded that a rational juror could easily have found that Krikstan's reiteration in the classroom of his angry, jealous reaction to A.G.'s feelings for another man related to, affected, or was a part of the ongoing sexual exploitation of A.G. outside of school. By returning to the classroom as her substitute teacher and discussing his anger with A.G. at school, Krikstan continued his sexual exploitation of the minor by conveying the same anger and jealousy that he had demonstrated earlier in an exploitative electronic communication, when he said he had "loved" her but was "done" with her.

The Supreme Court of Maryland concluded that "[a] rational trier of fact could easily have found that Krikstan's in-school expression of anger about A.G.'s attraction to another man was one or more of the following: (1) a demonstration of romantic feelings for A.G., (2) a demonstration of his jealousy of A.G.'s attraction to the other man, (3) an act taken for his own benefit to undermine or stop A.G.'s attraction to another man, or (4) an act taken to further his continued out-of-school sexual exploitation of A.G." The Supreme Court of Maryland determined that "any one of these alternatives provide[d] the basis for the finding that Krikstan's expression of anger in school was an act that related to, affected, or was a part of his already sexually exploitative relationship with A.G."

The Supreme Court of Maryland determined that, under the language of the child abuse statute and relevant case law, it was not necessary for Krikstan specifically to say or imply anything sexual during the classroom conversation. The legislative history of the statute indicates an intent by the General Assembly that the statute be interpreted broadly to include a wide range of conduct and to protect children. With these principles and the evidence presented at trial in mind, it was clear that the evidence was sufficient for a rational juror to have found that Krikstan's in-school acts met the definition of conduct involving sexual exploitation of a minor.

The Supreme Court of Maryland, upon concluding that the evidence was more than sufficient to support Krikstan's conviction, reversed the judgment of the Appellate Court of Maryland.

In re Petition for Emergency Remedy by the Maryland State Board of Elections, No. 21, September Term 2022, filed March 29, 2023. Opinion by Fader, C.J.

Biran, J., concurs.

https://mdcourts.gov/data/opinions/coa/2023/21a22.pdf

CONSTITUTIONAL LAW – SEPARATION OF POWERS – JUDICIAL FUNCTION

STATUTORY INTERPRETATION – DEFINITION OF EMERGENCY CIRCUMSTANCES IN ELECTION LAW ARTICLE § 8-103(b)(1)

Facts:

When emergency circumstances, not constituting a declared state of emergency, interfere with the electoral process, Election Law § 8 103(b)(1) permits the Maryland State Board of Elections or a local board of elections to petition a circuit court to take any action the court considers necessary to provide a remedy that is in the public interest and protects the integrity of the electoral process. Pursuant to that authority, the State Board filed a petition in September 2022 in the Circuit Court for Montgomery County to permit early canvassing and tabulation of absentee ballots for the 2022 general election. The State Board requested that the court: (1) temporarily suspend a statutory prohibition against beginning the canvassing process until after election day; (2) permit local boards to begin canvassing absentee ballots on October 1, 2022; and (3) permit local boards to tabulate absentee ballots as they canvass them, but not to release results until after the polls close on election day.

In its petition, the State Board argued that emergency circumstances existed sufficient to invoke Election Law § 8-103(b)(1) because the combined experiences of the 2022 primary election and the 2020 primary and general elections, along with historical trend data, led the State Board to believe that local boards would not be able to timely process the expected volume of absentee ballots. Absent relief from the court, the State Board contended that the delay in processing absentee ballots would result in missed deadlines for determining election results and decreased public confidence in the integrity of the electoral process.

After the State Board filed its petition, Daniel Cox, a gubernatorial candidate in the 2022 election, intervened. Candidate Cox stipulated to the State Board's factual allegations but opposed the petition on two bases: (1) § 8-103(b)(1) violates separation of powers guarantees by delegating a nonjudicial function to the courts; and (2) the problems forecasted by the State Board did not constitute "emergency circumstances" because they were foreseeable. The circuit court agreed with the State Board, granted the petition, and permitted canvassing of absentee ballots to begin on October 1. After expediting review, the Supreme Court of Maryland affirmed in a per curiam opinion issued on October 7, 2022. This opinion explains the basis for that ruling.

Held: Affirmed.

The Court first considered whether § 8 103(b)(1) violates the separation of powers guaranteed by Article 8 of the Maryland Declaration of Rights. A task expressly delegated to the Judiciary by the General Assembly complies with Article 8 only if it constitutes a judicial function. Our caselaw reflects that we consider two factors in determining whether a task constitutes a judicial function: (1) whether the task is of a nature that has traditionally been performed by courts; and (2) whether sufficient guidance limits the court's discretion so that the court is not called upon to make a decision based on policy, expediency, or politics. Applying those factors, the Court determined that the task assigned by § 8 103(b)(1) is a judicial function. The Court reasoned that the statute contemplates a decidedly judicial proceeding, initiated by a petition, in which the court is to determine whether statutorily identified factors are established by evidentiary proof of adjudicatory facts and, if so, to fashion an appropriate remedy. Moreover, as reflected in statute and caselaw, court intervention to protect the integrity of the electoral process is a classic judicial function. The Court also determined that § 8 103(b)(1) provides sufficient guidance to constrain the court's discretion by allowing a court to impose a remedy only if it finds the existence of emergency circumstances that interfere with an election, and requiring that its remedy addressing those emergency circumstances both be in the public interest and protect the integrity of the electoral process. Therefore, the Court held that § 8 103(b)(1) does not violate Article 8 on its face. The Court also held that the circuit court's application of § 8 103(b)(1) was not unconstitutional as applied.

The Court next considered whether "emergency circumstances" existed that justified the circuit court's intervention. The Court first determined, based on dictionary definitions and context provided by the Maryland Code, and consistent with legislative history, that "emergency circumstances" for purposes of § 8-103(b)(1) include any unexpected or unforeseen conditions that require immediate attention to prevent harm, but that do not rise to the level of urgency or threatened harm required for a declared state of emergency. Here, the urgency of the situation was essentially undisputed, and the Court concluded that the circuit court did not err in finding that the full extent of the anticipated increased volume of absentee ballots, as well as the effect of that volume on the timing of reporting election results, was not foreseeable until after the 2022 primary election. Accordingly, the Court held that the circuit court correctly rejected Candidate Cox's challenge to the court's authority to impose a remedy pursuant to § 8 103(b)(1).

Montgomery Park, LLC v. Maryland Department of General Services, Nos. 12 & 13, September Term 2022, filed February 24, 2023. Opinion by Eaves, J.

https://mdcourts.gov/data/opinions/coa/2023/12a22.pdf

STATE FINANCE AND PROCUREMENT – MARYLAND STATE BOARD OF CONTRACT APPEALS – LEGAL STANDARD OF REVIEW FOR CANCELLATION OF INTENDED PROCUREMENT AWARDS

STATE FINANCE AND PROCUREMENT – BID PROTEST – STANDING

Facts:

In this case, the Procurement Officer for the Department of General Services ("DGS"), on behalf of the Maryland Insurance Administration ("MIA"), issued a Request for Proposals ("RFP") for office space. Although Montgomery Park, LLC ("Montgomery Park") was initially named the intended awardee, DGS, through its Procurement Officer, later cancelled the RFP before the award was presented to the Board of Public Works for approval. After cancelling the RFP for new office space, the Procurement Officer negotiated a renewal of MIA's existing lease at 200 St. Paul Place in Baltimore City.

In response to DGS's actions, Montgomery Park filed two separate bid protests—one relating to the Procurement Officer's decision to cancel the RFP, and a second one relating to the renewal of the existing lease between MIA and St. Paul Place ("St. Paul Plaza"). The Procurement Officer denied both bid protests. The Procurement Officer determined that the cancellation of the RFP complied with the applicable provisions of the State Finance and Procurement Article of the Maryland Code and the Code of Maryland Regulations ("COMAR"). With respect to the second bid protest, the Procurement Officer determined that Montgomery Park did not have standing to challenge the lease renewal, but even if it did, the lease renewal was negotiated pursuant to the provisions of State law that permit the renewal of an existing lease without soliciting other offers.

Thereafter, Montgomery Park appealed the Procurement Officer's decision to the Maryland State Board of Contract Appeals ("Board"), which overturned the Procurement Officer's decisions. The Board determined that the Procurement Officer's cancellation of the RFP and subsequent lease renewal violated Maryland procurement law. In a separate opinion, the Board concluded that Montgomery Park had standing to challenge the Procurement Officer's renewal of MIA's existing lease.

DGS appealed the Board's two decisions to the Circuit Court for Baltimore City, which reversed the Board. Montgomery Park appealed the circuit court's decision to the Appellate Court of Maryland. The Appellate Court affirmed the circuit court's rulings in a reported opinion.

Montgomery Park petitioned the Supreme Court of Maryland for a writ of certiorari, which the Court granted. *Montgomery Park, LLC v. Maryland Dep't of Gen. Servs*., 479 Md. 64 (2022). Montgomery Park contended that: (1) the Board erred when it determined that the Procurement Officer's decision to cancel the RFP for an office lease in connection with the relocation of MIA's headquarters was arbitrary and capricious; and (2), the Board erred when it determined that the Montgomery Park, as the intended awardee of the RFP, had standing to challenge the renewal of MIA's existing lease after the RFP was cancelled.

Held: Affirmed.

Regarding the Boards' first opinion, the Supreme Court of Maryland held that the Board was correct in determining that when the Board undertakes a review of a procurement officer's decision to cancel an RFP, the standard of review is whether the procurement officer's decision is arbitrary or capricious. The Supreme Court of Maryland, however, disagreed with the Board's conclusion that the Court's discussion of the standard of review in *Hanna v. Board of Education of Wicomico County*, 200 Md. 49 (1952), is inconsistent with the arbitrary or capricious standard of review. The Supreme Court of Maryland held that the Hanna standard of review demonstrates the kind of conduct that represents arbitrary or capricious decision making.

Applying the arbitrary or capricious standard of review to the merits, the Supreme Court of Maryland overruled the Board's decision. The Court noted that the Board improperly substituted its judgment for the judgment of the Procurement Officer and MIA Commissioner. Upon an examination of the record, the Court noted that the Procurement Officer did exercise her discretion in determining that the MIA Commissioner's four reasons for wanting to cancel the RFP were legitimate. Thus, the Procurement Officer's decision to cancel the RFP was not arbitrary or capricious.

As to the Board's second opinion, the Supreme Court of Maryland held that Montgomery Park lacked standing to challenge the decision of the Procurement Officer to renew the lease between MIA and St. Paul Plaza. First, the Supreme Court of Maryland, adopting the reasoning of the Appellate Court of Maryland, recognized that the "logical and temporal connection" between the first and second bid protest does not give Montgomery Park a legal interest in the lease renewal. *See Montgomery Park, LLC v. Maryland Dep't of Gen. Servs*., 254 Md. App. 73, 107 (2022). Second, the Supreme Court of Maryland opined that once the Procurement Officer canceled the RFP, Montgomery Park no longer had standing pursuant to COMAR 21.05.05D. Thus, Montgomery Park had no legal interest in the current lease between MIA and St. Paul Plaza, nor did Montgomery Park have standing pursuant to COMAR.

For all those reasons, the Supreme Court of Maryland, held that (1) the standard of review that the Maryland State Board of Contract Appeals must apply to a procurement officer's decision to cancel an RFP is an arbitrary and capricious one; (2) the Procurement Officer's decision to

cancel the RFP was not arbitrary or capricious; and (3) Montgomery Park lacked standing to protest the lease renewal between MIA and St. Paul Plaza.

Jennifer Rowe v. Maryland Commission on Civil Rights, No. 17, September Term 2022, filed March 29, 2023. Opinion by Biran, J.

Fader, C.J., and Watts and Booth, JJ., dissent.

https://mdcourts.gov/data/opinions/coa/2023/17a22.pdf

APPELLATE JURISDICTION – STATUTORY INTERPRETATION – HUMAN RELATIONS – CIVIL RIGHTS

Facts:

Jennifer Rowe had for two years been a member of a Krav Maga martial arts gym in Baltimore City. Ms. Rowe – who suffers from anxiety, depression, and post-traumatic stress disorder – commented on a post in the gym's private Facebook group, referring to mental and emotional disabilities. The gym's staff determined that Ms. Rowe's comment violated the group's posting policies, and they deleted the comment. After more communication over the next five months, the gym terminated her membership and banned her from the premises because, according to the gym, Ms. Rowe had violated her membership agreement by engaging in "disruptive, slanderous, [and] harassing" behavior.

Title 20 of the Maryland Code's State Government Article prohibits discriminatory acts in places of public accommodation. Subtitle 10 allows a person claiming to be aggrieved by alleged discrimination to file a complaint with the Maryland Commission on Civil Rights, which then investigates the matter and issues written findings on whether or not there is probable cause to believe discrimination has occurred. If the Commission finds probable cause, it will attempt conciliation and, if those attempts are unsuccessful, an administrative law judge will conduct a hearing appealable under the "contested cases" provisions of Maryland's Administrative Procedure Act. If the Commission finds no probable cause, however, the complainant may request that the Commission reconsider its finding. Md. Code, State Gov't Article (SG) § 20-1005(d)(1) (2021 Repl. Vol.). If the Commission affirms its earlier finding, then the complainant may seek judicial review in the circuit court. SG § 1005(d)(2).

Ms. Rowe filed a Maryland Commission on Civil Rights complaint alleging that the gym engaged in disability discrimination by deleting her Facebook comment and by terminating her membership. The Commission investigated the complaint and found that there was no probable cause to believe the gym had discriminated against Ms. Rowe based on her disability. The Commission explained that the gym had a legitimate, non-discriminatory business reason for terminating her membership. Ms. Rowe filed a request that the Commission reconsider its no-probable-cause finding, and the Commission denied this request, affirming its earlier finding. Ms. Rowe petitioned for judicial review in the Circuit Court for Baltimore City, and the circuit court affirmed the Commission's denial.

Ms. Rowe then noted an appeal to the Appellate Court of Maryland. During oral argument, the Appellate Court panel raised *sua sponte* the issue of jurisdiction. The right to take an appeal from an administrative agency decision is limited except where it is expressly granted by some statute. Md. Code, Cts. & Jud. Proc. § 12-302(a) (2020 Repl. Vol.). The Appellate Court panel asked whether there exists a statute authorizing an appeal to the Appellate Court from the judgment of the circuit court on a petition for judicial review of a Commission no-probable-cause finding. After receiving supplemental briefing from the parties on the jurisdictional issue, the Appellate Court issued an unreported opinion dismissing the appeal for lack of jurisdiction. *In the Matter of Rowe*, No. 0354, Sept. Term, 2021, 2022 WL 1224729 (April 25, 2022). Ms. Rowe filed a petition for a writ of *certiorari*, and the Supreme Court of Maryland granted the petition. *Rowe v. MCCR*, 481 Md. 1 (2022).

Held: Affirmed.

The Supreme Court of Maryland held that the Appellate Court did not have jurisdiction to conduct a second level of judicial review. The Human Relations statute provides that "a denial of a request for reconsideration of a finding of no probable cause by the Commission is a final order appealable to the circuit court as provided in § 10-222 of [the State Government Article]." SG § 20-1005(d)(2). Notably, the statute does not refer to SG § 10-223 (which governs subsequent appeals to the Appellate Court), to the Appellate Court, or to the relevant APA "Contested Cases" subtitle as a whole.

The Court discussed two relevant APA sections. Section 10-222 of the APA provides a right of circuit court judicial review to "a party who is aggrieved by the final decision in a contested case" and outlines the procedures for review in such cases. Section 10-223 provides that "[a] party who is aggrieved by a final judgment of a circuit court under this subtitle may appeal to the Court of Special Appeals in the manner that law provides for appeal of civil cases." Ms. Rowe argued that SG § 20-1005(d)(2)'s reference to SG § 10-222 was an express incorporation of that provision, meaning that any circuit court review occurred "under" the APA contested cases subtitle as conceived of by § 10-223; this would grant her a second level of review before the Appellate Court.

The Supreme Court of Maryland held that the plain language of SG § 20-1005(d)(2) is unambiguous, explicitly providing for judicial review in "the circuit court" (in accordance with SG § 10-222) but not in the Appellate Court. It expressly references SG § 10-222 and nothing else. Discrimination complaints prior to a probable cause finding are not "contested cases" under the APA, and the Commission's work before a probable cause determination is more investigative than quasi-judicial. SG § 20-1005(d)(2)'s reference to SG § 10-222 therefore means that the circuit court must conduct its review, to the extent applicable, as it conducts its review in a SG § 10-222 contested case, but the application of SG § 10-222's procedures is not to be confused with the conversion into an APA "contested case." Rowe's case arises under the Human Relations statute, not the APA's "contested cases" subtitle.

The Court collected examples of other statutes in the Human Relations title and throughout the Code in which the General Assembly expressly granted Appellate Court review by referring directly to SG § 10-223; to Title 10, Subtitle 2 of the State Government Article; to the Administrative Procedure Act overall; or to the Appellate Court itself. These varying approaches reveal that the General Assembly has elsewhere provided express grants of appellate review but did not do so here. The pertinent legislative history confirmed this reading of the statute and reinforced the General Assembly's desire to make sure that when the Commission found no probable cause, complainants were not left without any judicial review at all, but not necessarily to provide two or three levels of judicial review.

APPELLATE COURT OF MARYLAND

Patriot Construction, LLC v. VK Electrical Services, LLC, No. 942, September Term 2021, filed March 2, 2023. Opinion by Friedman, J.

https://mdcourts.gov/data/opinions/cosa/2023/0942s21.pdf

LIMITATIONS OF ACTIONS – COMPUTATION OF LIMITATIONS PERIOD – ACCRUAL OF RIGHT OF ACTION OR DEFENSE – CONTRACTS – CONSTRUCTION AND OPERATION – CONDITIONS PRECEDENT TO PAYMENT

When a contact contains a pay-when-paid clause as a condition precedent to payment, a breach of contract action for failure to pay does not accrue until the condition is met.

Facts:

In July 2016, VK Electrical Services ("VKES") completed work under a subcontract for Patriot Construction, LLC. The subcontract included a "pay-when-paid" clause, which provided that Patriot's receipt of payment under the main contract was a condition precedent to Patriot's payment obligations to its subcontractors. Patriot received full payment under the main contract in October 2019, but refused to pay VKES for invoices totaling approximately $65,000.

VKES brought suit in the Circuit Court for Anne Arundel County against Patriot, alleging breach of contract. Patriot moved to dismiss the claim based on the statute of limitations, arguing that because more than three years had passed since VKES had completed its work, the time for filing suit had expired. Following a bench trial, the circuit court found that the statute of limitations had not expired and that Patriot was in breach of contract. The court awarded VKES damages in the amount of the unpaid invoices.

Held: Affirmed

The Appellate Court of Maryland held that in a breach of contract action, the statute of the limitations begins to run at the time of the breach. Under the pay-when-paid clause contained in the subcontract, the breach did not occur until Patriot received its payment under the main contract but refused to pay VKES. Because Patriot received its payment in October 2019, VKES's lawsuit filed in June 2020 was well within the three-year statute of limitations.

Joseph Isaac Rohrbaugh v. State of Maryland, No. 2009, September Term 2021, filed March 31, 2023. Opinion by Sharer, J.

https://mdcourts.gov/data/opinions/cosa/2023/2009s21.pdf

JUVENILES – RIGHTS AND PRIVILEGES AS TO ADULT PROSECUTIONS – APPEAL AND REVIEW – DISCRETION OF LOWER COURT – JUVENILE TRANSFERS AND CERTIFICATIONS

JUVENILES – RIGHTS AND PRIVILEGES AS TO ADULT PROSECUTIONS – APPEAL AND REVIEW – DISCRETION OF LOWER COURT – JUVENILE TRANSFERS AND CERTIFICATIONS

Facts:

Joseph Rohrbaugh, then 16 years old, was charged as an adult in two separate cases in the circuit court. In the first case, he was charged with first-degree assault, second-degree assault, possession of a firearm, and related offenses after he allegedly discharged a firearm during a large fight between two groups of females. In a second case, he was charged with possession of a loaded firearm and related offenses after he was allegedly found in possession of a firearm. It was undisputed that the charged crimes in both cases were properly brought in the circuit court pursuant to § 3-8A-03 of the Courts and Judicial Proceedings ("CJP") Article of the Maryland Code. Although, ordinarily, the juvenile court has exclusive original jurisdiction over a person under the age of 18 who is alleged to have committed an act that would be a crime if committed by an adult, CJP § 3-8A-03 deprives the juvenile court of jurisdiction when the juvenile is at least 16 years old and is alleged to have committed certain enumerated crimes.

After being charged, Mr. Rohrbaugh filed a "reverse waiver" motion to have his cases transferred to the juvenile court pursuant to Maryland Code, § 4-202 of the Criminal Procedure ("CP") Article. Pursuant to that statute, the circuit court may transfer a case involving a child to the juvenile court if, among other things, "the court determines by a preponderance of the evidence that a transfer of its jurisdiction is in the interest of the child or society." CP § 4-202(b)(3). In making that determination, the court is required to consider: "(1) the age of the child; (2) the mental and physical condition of the child; (3) the amenability of the child to treatment in an institution, facility, or program available to delinquent children; (4) the nature of the alleged crime; and (5) the public safety." CP § 4-202(d).

In conjunction with that motion, Mr. Rohrbaugh also filed a motion asking the circuit court to place the burden of proof on the State. He argued that, because CP § 4-202 was vague as to who has the burden when a transfer motion has been filed, the State should be required "to prove by a preponderance of the evidence that Mr. Rohrbaugh is not amenable to treatment in the juvenile system." The State opposed both motions.

At the hearing on Mr. Rohrbaugh's motions the court first addressed the motion regarding the burden of proof. The court denied the motion, finding that the language of the statute and the relevant case law supported the State's position that Mr. Rohrbaugh, as the moving party, should carry the burden.

The court then received extensive testimony and evidence regarding Mr. Rohrbaugh's transfer motion. At the conclusion of that evidence, the court made express findings as to each of the five factors outlined in CP § 4-202. In the end, the court ruled that transferring the cases to the juvenile court would not be in the interest of Mr. Rohrbaugh or society. The court found that it was not likely that Mr. Rohrbaugh would benefit from available DJS programs better than he would from anything available in the adult system. The court also found that transferring the cases would not reduce the likelihood of recidivism or make him a more productive, law-abiding person. The court explained that, while it "was a very close case[,]" Mr. Rohrbaugh failed to carry his burden on the waiver motion.

Mr. Rohrbaugh thereafter waived his right to a jury trial and proceeded to a bench trial, where he pleaded not guilty pursuant to an agreed statement of facts. As part of that agreement, the State dismissed all charges except was possession of a regulated firearm by a person under the age of twenty-one. The State then read into the record the statement of facts, which established that, on September 28, 2021, Mr. Rohrbaugh was arrested and found in possession of a loaded firearm. The court subsequently found Mr. Rohrbaugh guilty of the sole charge and sentenced him to a term of five years' imprisonment, suspended all but time served, and a four-year period of probation.

On appeal, Mr. Rohrbaugh raised two issues: 1) whether the circuit court erred in placing the burden of persuasion on him when ruling on his transfer motion; and 2) whether the circuit court abused its discretion in denying his transfer motion.

Held: Judgment affirmed.

The Appellate Court of Maryland held that the circuit court did not err in placing the burden of persuasion on Mr. Rohrbaugh. The Court explained that the relevant caselaw made clear that the juvenile should carry the burden of persuasion when a reverse waiver is sought. The Court found that placing the burden on the juvenile was consistent with the plain language of CP § 4-202, which requires an affirmative showing that a transfer of the circuit court's jurisdiction is in the interest of the child or society. The Court also found that placing the burden on the juvenile was consistent with the general rule that the moving party should bear the burden of production and persuasion, particularly because, with a reverse waiver motion, the juvenile is the party attempting to change the status quo. Finally, the Court found that placing the burden on the juvenile did not adversely implicate the juvenile's due process rights, given that a person does not have a constitutional right to be treated as a juvenile and that, even so, the reverse waiver process is replete with due process protections.

The Court also held that the circuit court did not abuse its discretion in denying Mr. Rohrbaugh's reverse waiver motion. The Court found that the circuit court had conducted a thorough analysis of each of the statutory factors and had issued a well-reasoned decision based on those factors and the circumstances of the case. In so doing, the Court rejected Mr. Rohrbaugh's contentions that the circuit court had placed too much emphasis on his age, had improperly assumed him guilty of the charged crimes, and had erroneously found that there were programs in the adult system to treat youthful offenders. The Court emphasized that the circuit court had particularly considered Mr. Rohrbaugh's amenability to treatment, comporting with *Davis v. State*, 474 Md. 439 (2021).

Robert Eugene Hammond, IV v. State of Maryland, No. 44, September Term 2022, filed February 2, 2023. Opinion by Graeff, J.

https://mdcourts.gov/data/opinions/cosa/2023/0044s22.pdf

CRIMINAL LAW – PRESERVATION REQUIREMENT REGARDING WAIVER OF JURY TRIAL

Facts:

Appellant, Robert Eugene Hammond, was convicted in a bench trial of, among other things, assault.

The State presented evidence that appellant was armed at the time of the shooting and participated with his brothers in firing multiple gunshots at the residence. A six-year-old boy was shot by a bullet.

Held: Affirmed.

Maryland Rule 4-246(b) provides that a court may not accept a jury trial waiver until it "determines and announces on the record that the waiver is made knowingly and voluntarily." There is no dispute that the court failed to comply with that aspect of the rule. To challenge a failure to comply with Rule 4-246(b) on appeal, however, there must be an objection raised in the trial court. Because appellant failed to object to the court's failure to announce, we decline to exercise discretion to address the issue.

Unlike a claim that the procedure in Rule 4-246(b) was not followed, a claim of a constitutional violation of the right to a jury trial does not require an objection to preserve the claim. The record here was sufficient to support the court's conclusion that the waiver was knowing and voluntary.

Prior involvement in drug-related offenses does not, by itself, constitute a factual trigger requiring a specific inquiry into the voluntariness of appellant's waiver of the right to a jury trial. Based on the totality of the circumstances, including appellant's demeanor, the court was not obligated to ask more specific questions regarding the voluntariness of appellant's jury trial waiver.

Evidence that appellant fired gunshots at a residence was sufficient to convict him for second-degree assault of the "intent to frighten" modality because appellant created a zone of danger to all the residents in the home, and he intended to place everyone in the home in fear of imminent physical harm.

Eric Demond Hinton v. State of Maryland, No. 637, September Term 2020, filed March 29, 2023. Opinion by Woodward, J.

https://mdcourts.gov/data/opinions/cosa/2023/0637s20.pdf

EVIDENCE – *NOLO CONTENDERE* PLEAS – ADMISSIBILITY OF EVIDENCE FROM A *NOLO CONTENDERE* PLEA PROCEEDING AT A SUBSEQUENT VIOLATION OF PROBATION HEARING

Facts:

In 2012, Eric Demond Hinton, appellant, was convicted of various charges related to armed robbery, assault, and burglary after a jury trial in the Circuit Court for Montgomery County. The court sentenced appellant to a total of eighteen years of incarceration, with all but six years suspended, and a period of five years of supervised probation. In 2014, the court reconsidered its sentence and sentenced appellant to a total of seventeen years of incarceration, with all but five years suspended, and the same five years of supervised probation. Appellant was released from incarceration in 2015 and began his five years of supervised probation.

In 2018, while still serving his five-year term of probation, appellant was arrested in Prince George's County for illegal possession of a firearm and related charges. In 2019, appellant appeared before the Circuit Court for Prince George's County and advised the court of a plea agreement with the State in which he would plead *nolo contendere* to an amended charge of illegal possession of a regulated firearm in exchange for a sentence of three years of incarceration, with all time of incarceration suspended except for time served, and two years of supervised probation. At the plea hearing, the State proffered the evidence that it would have presented had the case gone to trial, and appellant's counsel agreed that the proffer would be the State's case.

Thereafter, appellant was arrested on a bench warrant issued by the Circuit Court for Montgomery County for violating the conditions of appellant's probation that required him to obey all laws and to receive permission before possessing a firearm. At the violation of probation hearing, the State moved two exhibits into evidence—a certified copy of the docket entries from the Prince George's County case, and a transcript of the hearing in which appellant entered a *nolo contendere* plea. The Circuit Court for Montgomery County found appellant in violation of probation and sentenced him to six years of incarceration, with credit of 492 days for time served. Appellant noted a timely appeal.

Held: Affirmed.

On appeal, the Appellate Court of Maryland first discussed the law governing violations of probation. According to the Court, a violation of probation hearing involves two stages: (1) a retrospective factual question of whether the probationer has violated a condition of probation; and (2) a discretionary determination by the sentencing authority of whether a violation of a condition warrants revocation of probation. The Court explained that in the first stage, the State has both the burden of production, which is to come forward with evidence to support a violation, and the burden of persuasion, and the burden of persuasion is satisfied by a trial judge finding the essential facts comprising a violation of a condition by a preponderance of the evidence. Thus, unlike in a criminal case, the probation court is not bound by the constraints of the reasonable doubt standard of proof. The Court stated further that, in probation revocation proceedings, the formal rules of evidence are not applied. Finally, according to the Court, appellate review of the second stage, whether revocation is warranted, is for abuse of discretion.

The Court next addressed a *nolo contendere* plea and its effect on a subsequent violation of probation proceeding. The Court explained that a defendant does not admit guilt or claim innocence by entering a *nolo contendere* plea, and as a result, no verdict of guilty may be found, nor does the acceptance of the plea of *nolo contendere* result in a conviction. The Court further stated that a plea of *nolo contendere* is not receivable in another proceeding as evidence of guilt, and thus the plea itself, and any admission or other statement made by a defendant in the course of a *nolo contendere* plea process, are not admissible in a violation of probation hearing. Other evidence from the *nolo contendere* plea proceeding, however, is admissible at the violation of probation hearing, including "reasonably reliable" hearsay. Lastly, the Court stated that at a probation revocation hearing, the improper admission into evidence of the *nolo contendere* plea or a statement made by the defendant in the course of a *nolo contendere* plea process is not reversible error if the trial court relies primarily on the evidence properly admitted at the probation revocation hearing.

Turning to the issues on appeal, the Court determined that, although the trial court erroneously admitted appellant's *nolo contendere* plea as part of the docket entries from the Prince George's County case, that court's express lack of reliance on such plea in the violation of probation hearing precluded a holding that the admission of the plea was reversible error. The Court also concluded that the admission at the violation of probation hearing of appellant's statement from the *nolo contendere* plea hearing was not reversible error because the trial court did not indicate in its ruling that it relied in any way on appellant's acceptance of the prosecutor's proffer of facts in the Prince George's County case. The Court ultimately held that the prosecutor's proffer of facts in support of appellant's *nolo contendere* plea at the plea hearing was sufficient evidence to support the probation court's finding that appellant had violated the terms of his probation to obey all laws and to obtain permission before possessing a firearm.

Finally, the Court addressed "a common view among at least some practitioners that the entry of a *nolo contendere* plea by a person on probation immunizes that person against a later violation of probation, and as a result, no part of a *nolo contendere* plea proceeding can be used against that person in a violation of probation hearing." The Court explained that "only the *nolo*

contendere plea itself and any statement by the defendant made during the *nolo contendere* plea process cannot be used against the defendant in a violation of probation hearing, or in any civil or criminal proceeding for that matter."

Young Lee, As Victim's Representative v. State of Maryland, et al., No. 1291, September Term 2022, filed March 28, 2023. Opinion by Graeff, J.

Berger, J., dissents.

https://mdcourts.gov/data/opinions/cosa/2023/1291s22.pdf

CRIMINAL PROCEDURE – VICTIMS' RIGHTS – VACATUR OF CONVICTIONS – NOLLE PROSEQUI – MOOTNESS

Facts:

In 2000, a jury convicted Adnan Syed of, among other things, the 1999 murder of Hae Min Lee. The court imposed an aggregate sentence of life plus 30 years. Mr. Syed filed multiple, ultimately unsuccessful, challenges to his convictions in the years that followed.

In September 2022, the State filed in the Circuit Court for Baltimore City a motion to vacate Mr. Syed's convictions pursuant to Md. Code Ann., Crim. Proc. Art. ("CP") § 8-301.1 (Supp. 2022). The victim's brother, Young Lee, who lives in California, conveyed to the court a desire to attend the vacatur hearing in person. After an in-person hearing, which Mr. Lee was required to attend remotely, the court granted the State's motion and vacated Mr. Syed's convictions. The State gave Mr. Lee notice only one business day before the hearing.

Mr. Lee appealed, claiming violations of his rights as the victim's representative. He subsequently filed, in the circuit court and this Court, a motion to stay further circuit court proceedings. Two days before a response to the motion filed in this Court was due, the State entered a nolle prosequi on all charges against Mr. Syed. This Court subsequently ordered that the appeal would proceed.

Held: Judgment vacated; case remanded for further proceedings.

The entry of the nol pros, entered shortly before a response to Mr. Lee's motion to stay was due, and before the 30-day deadline provided by Maryland Rule 4-333(i) for the State to either enter a nolle prosequi or take other appropriate action, was done with the purpose or "necessary effect" of preventing Mr. Lee from obtaining a ruling on appeal regarding whether his rights as the victim's representative were violated. Under the unique facts and circumstances of this case, exceptional circumstances existed to temper the authority of the State to enter a nol pros. The nol pros was void, it was a nullity, and it did not render the appeal moot.

CP § 8-301.1(d) provides victims with the right to prior notice of the hearing on a motion to vacate and the right to attend the hearing. These rights were violated in this case, where the State gave Mr. Lee notice only one business day before the hearing, which was insufficient time to

reasonably allow Mr. Lee to attend the hearing in person, and therefore, the court required Mr. Lee to attend the vacatur hearing remotely.

Although remote proceedings can be valuable in some contexts, where, as here, a crime victim or victim's representative conveys to the court a desire to attend a vacatur hearing in person, all other individuals involved in the case are permitted to attend in person, and there are no compelling reasons that require the victim to appear remotely, a court requiring the victim to attend the hearing remotely violates the victim's right to attend the proceeding. Allowing a victim entitled to attend a court proceeding to attend in person, when the victim makes that request and all other persons involved in the hearing appear in person, is consistent with the constitutional requirement that victims be treated with dignity and respect.

A victim does not have a statutory right to be heard at a vacatur hearing. The court, however, has discretion to permit a victim to address the court at a vacatur hearing regarding the impact of the court's decision on the victim and/or the victim's family.

Bessie Jean Peete v. Maryland Elizabeth Peete, No. 2098, September Term 2021, filed March 1, 2023. Opinion by Wells, C. J.

https://mdcourts.gov/data/opinions/cosa/2023/2098s21.pdf

FAMILY LAW – BIGAMY – STANDING TO ANNUL – LACHES

Facts:

Bessie and Author Peete were married in 1971 but separated in the spring of 1975. Roughly 15 years after they separated, on April 9, 1991, Author filed a complaint for absolute divorce in the Superior Court for the District of Columbia. Bessie did not file an answer, nor did she appear at the subsequent divorce hearing. The D.C. Superior Court granted Author an absolute divorce. On June 13, 1992, several months after Author obtained the judgment for divorce, he married Maryland in Prince George's County. The two remained married until Author's death on September 9, 2007. On November 18, 2011, roughly twenty years after the 1991 judgment of divorce and four years after Author's death, Bessie filed a motion in the Superior Court for the District of Columbia to vacate the judgment of divorce based on improper and ineffective service of process. After a hearing, the D.C. Superior Court determined that service had not been effective and vacated the judgment of divorce. Roughly nine years later, on December 7, 2020, Bessie filed a complaint in the Circuit Court for Prince George's County seeking to annul the marriage between Author and Maryland on grounds of bigamy. Following a hearing, a magistrate issued a report and recommendation concluding that Bessie did not have standing to annul the marriage between Author and Maryland. The circuit court overruled Bessie's exceptions and she appealed.

Held: Affirmed on different grounds.

STANDING

Bessie argued that the circuit court erred in finding that she had no standing to bring a suit seeking to annul Author and Maryland's marriage. The court looked to statutory authority, namely, Maryland Code, Family Law ("FL") Article § 2-202(b) which provides that "[o]nly a marriage between two individuals who are not otherwise prohibited from marrying is valid in this State," and FL § 2-202 which states that certain types of marriages are void, of which bigamy is not mentioned. Largely from this analysis, the circuit court concluded that marriages like Author and Maryland's, where at the time they were married there was no legal prohibition against it, they were not within prohibited degrees of consanguinity, they both consented, etc., their marriage was voidable and Bessie had no standing to invalidate Author and Maryland's marriage.

The Appellate Court of Maryland determined that although statutory law was somewhat unclear as to whether a bigamous marriage was void or voidable, appellate authority was clear: a bigamous marriage is void. In *Morris v. Goodwin*, 230 Md. App. 395, 404 (2016), *cert. dismissed*, 451 Md. 587 (2017), we looked to "'whether, with proper consent, the parties could have established a valid marriage. If not, the marriage is considered void.'" Additionally, we stated that "'[i]f, on the other hand, the parties could have lawfully married had one or the other party's consent to the marriage not been legally ineffective, the marriage is voidable rather than void.'" *Id*. (source citation omitted). We concluded that "bigamous and incestuous marriages are void marriages, because they are invalid regardless of the parties' consent." *Id*. (citation omitted). Here, once the D.C. Superior Court invalidated Author's divorce, he was still married to Bessie at the time he married Maryland. That marriage was bigamous, and Bessie had standing to seek to annul it.

LACHES

Although Bessie took issue with the circuit court considering the effect of arguably a 20-year delay in asserting her right to annul Author's bigamous marriage, the Appellate Court found no error in the court doing so. Only one decision from the Supreme Court of Maryland (at the time called the Court of Appeals) touches on the issue of equitable considerations in the context of bigamous marriages: *Townsend v. Morgan*, 192 Md. 168, 173 (1949). There, a husband's wife left him, and he believed himself to be free to marry again. He did. Husband then sought to obtain an annulment from the second wife on the grounds that he really was still married to the first wife. The second wife objected, citing the "maxim" of "unclean hands." The Court held that equitable considerations of unclean hands cannot apply to annul a bigamous marriage. But "the courts apply the maxim only where some unjust act of the complainant affects the equitable relations of the parties with respect to the matter presented for adjudication." *Id*. at 176.

Decisions from other jurisdictions are more helpful. In each case, the court applied the equitable doctrine of laches where a spouse waited years to invalidate a marriage and reap a financial windfall. *See, e.g., Self v. Self*, 893 S.W.2d 775 (Ark. 1995) (in a suit over entitlement to widow's benefits from the Veterans Administration – first wife's motion to set aside allegedly invalid divorce decree 24 years after it was entered was barred by laches). Here, the Court determined that laches should apply because Bessie waited over twenty years to seek to invalidate Author's marriage and did so not to vindicate her marriage to him but, by her own admission, to obtain a financial benefit from Author's estate. To not apply the equitable doctrine of laches in this instance, the Court reasoned, would work a grave injustice to Author's second wife, Maryland.

In the Matter of Abigail Sulerzyski, No. 302, September Term 2022, filed March 1, 2023. Opinion by Beachley, J.

https://mdcourts.gov/data/opinions/cosa/2023/0302s22.pdf

ADMINISTRATIVE AGENCIES – REGULATORY INTERPRETATION – MEDICAID

Facts:

Appellee Abigail Sulerzyski, a Medicaid participant with numerous complex medical needs who had been receiving 137 hours of private duty nursing services ("PDN") per week, requested an additional 31 hours of PDN from appellant, the Maryland Department of Health. With the additional hours, Ms. Sulerzyski would have been receiving "24/7 PDN." Ms. Sulerzyski is a participant in the Rare and Expensive Case Management program ("REM"), which, in COMAR 10.09.69.11A(4), requires that PDN services be "rendered in accordance with COMAR 10.09.53," the regulations governing nursing care for the Early and Periodic Screening, Diagnosis, and Treatment program ("EPSDT").

The Department denied Ms. Sulerzyski's request. Ms. Sulerzyski appealed this decision to the Office of Administrative Hearings. The Department filed a motion to dismiss for failure to state a claim. Ms. Sulerzyski attached supporting affidavits to her response to the motion to dismiss. The administrative law judge ("ALJ") converted the motion to dismiss to a motion for summary decision based on his consideration of the affidavits. The ALJ granted summary decision based on his interpretation of 10.09.53.04A(10), which requires participants receiving PDN services to have a caregiver who is able to care for the participant when a nurse is not available, and 10.09.53.05B, which the ALJ interpreted to mean that PDN is unavailable when the caregiver is not asleep, at work, or at school.

Ms. Sulerzyski sought judicial review in the Circuit Court for Anne Arundel County. The circuit court vacated the ALJ's decision, ruling that the ALJ improperly converted the motion to dismiss into a motion for summary decision. The Department appealed.

Held: Affirmed.

The Appellate Court of Maryland affirmed the judgment of the Circuit Court for Anne Arundel County and remanded the case to the Office of Administrative Hearings for further proceedings.

The Court concluded that the ALJ erred in granting summary judgment in favor of the Department. First, the Court determined that, while COMAR 10.09.53.04A(10) requires participants receiving PDN care to have an available caregiver when a nurse is not available, the ALJ erred in accepting the Department's argument that 10.09.53.05B restricts PDN care to times when the caregiver is unavailable due to his or her sleep, work, or school schedules. The Court

concluded that the ALJ's interpretation imposed conditions that were inconsistent with Maryland and federal caselaw that mandates the provision of services based on medical necessity. Second, the Court held that Ms. Sulerzyski's mother's affidavit produced sufficient evidence for summary decision purposes that Ms. Sulerzyski had a "caregiver" as contemplated by 10.09.53.04A(10).

Solon Phillips v. Alyssa Chang, et al., No. 482, September Term 2022, filed March 28, 2023. Opinion by Harrell, J.

https://mdcourts.gov/data/opinions/cosa/2023/0482s22.pdf

ATTORNEYS AND LEGAL SERVICES – POWER TO REGULATE AND CONTROL BAR ADMISSION PROCESS – JURISDICTION

Facts:

Solon Phillips, an unsuccessful applicant for admission to the Bar of Maryland, sued the members of the Character Committee for the Fourth Appellate Circuit who recommended denial of his application. The Committee members recommended denial for Phillips' failure to demonstrate the necessary good moral character needed for admission to the Bar (which recommendation the Supreme Court of Maryland adopted – *In Re Phillips*, 457 Md. 113 (2017)). Phillips' subsequent suit against the Committee members, filed in the Circuit Court for Prince George's County, asserted that they committed a tortious act in concluding to recommend denial of his application.

The Committee members responded by filing a motion to dismiss Phillips' complaint based on, among other grounds, lack of subject matter jurisdiction, citing in support *In Re Application of Kimmer*, 392 Md. 251 (2006). The circuit court granted the motion. Phillips noted this timely appeal.

Held: Affirmed.

Kimmer is dispositive of this appeal. *Kimmer* was an injunctive action against the State Board of Law Examiners for an alleged failure to grant a request for a reasonable accommodation under the Americans with Disabilities Act in taking the Maryland Bar Examination. The Supreme Court of Maryland in *Kimmer* elaborated on its view as to its exclusive authority to regulate the Bar admission process. Accordingly, the circuit court in *Kimmer* had no jurisdiction to entertain Kimmer's suit against the Board of Law Examiners.

Although *Kimmer* involved the Board of Law Examiners in its role and actions in the Bar admission process, there is no principled difference for jurisdiction purposes between the Committee's role and actions in the Bar admission process from that of the Board. Thus, the circuit court in Phillips' case was correct in recognizing its lack of jurisdiction in this matter.

Tenae Smith et al. v. Westminster Management, LLC, et al., No. 2508, September Term 2019, filed March 3, 2023. Opinion by Kehoe, J.

https://mdcourts.gov/data/opinions/cosa/2023/2508s19.pdf

LANDLORD-TENANT LAW – RESIDENTIAL LEASES – MD. CODE, REAL PROPERTY ARTICLE § § 8-208 AND 8-401 – THE PROPER MEANING OF "RENT" IN REAL PROP. § 8-208(D)(3) AND REAL PROP. § 8-401

LANDLORD-TENANT LAW – RESIDENTIAL LEASES – MD. CODE, REAL PROPERTY ARTICLE § 8-401(E)(IV)—THE PROPER MEANING OF "RENT" IN SUMMARY EJECTMENT PROCEEDINGS FOR RESIDENTIAL LEASES

LANDLORD-TENANT LAW – RESIDENTIAL LEASES – MD. CODE, REAL PROPERTY ARTICLE § 8-401(E)(2)(IV) – THE PROPER MEANING OF "COSTS OF THE SUIT" IN SUMMARY EJECTMENT PROCEEDINGS FOR RESIDENTIAL LEASES

Facts:

Tenae Smith and other current or former tenants of residential properties managed by Westminster Management, LLC filed a civil action against Westminster and an affiliate asserting that several of Westminster's business practices violated provisions of a variety of State laws.

All of the appellants signed written lease agreements with Westminster. The leases were for one year and were renewed annually. One of the appellants is Simone Ryer. Her lease with Westminster is typical. It states in relevant part (bold emphasis in original):

> THIS LEASE AGREEMENT, made on December 16, 2016, whereby [Westminster,] agent for Landlord, does hereby lease onto Tenant, the premises known as 36 Benoni Circle hereafter referred to as the Premises .... at a rental of **Twelve Thousand Eight Hundred Fifty Two Dollars and 00 Cents** ($12,852.00), payable in equal monthly installments of **One Thousand Seventy One Dollars 00 Cents** ($1071.00), in advance, without notice, deductions, set off, or demand, on the first day of each month.

In construing a residential lease agreement that contained very similar language, the Supreme Court of Maryland used the term "fixed monthly charge" to refer to the equal monthly installments of the annual rent. *Lockett v. Blue Ocean Bristol, LLC*, 446 Md. 397 420–21 (2016).

In addition to setting out the lease term, the annual rent, and the fixed monthly charge, the lease agreement between Ms. Ryer and Westminster contained a number of standard provisions that appear in all of the lease agreements between Westminster and appellants. The ones most relevant to this appeal are (formatting altered, emphasis added):

> 8. Definition of Rent: *All payments* from Tenant to Landlord required under the terms of this Lease, *including, but not limited to, [c]ourt costs, shall be deemed rent*.
>
> * * *
>
> 17. Repairs. Landlord shall be responsible for repairs to the Premises ... except that Tenant agrees to pay the costs of [all repairs caused by] Tenant, Tenant's family, employees, [and] invitees[.]
>
> * * *
>
> 30. Payment of Rent: Tenant shall pay the rent at the Landlord's office or at such other place as may be designated by the Landlord. Rent will be accepted by the Landlord Monday through Friday, 9:00 a.m. to 4:30 p.m....
>
> Should Landlord employ an Agent to institute proceedings for rent and /or repossession of the Premises for non-payment of any installment of rent, and should such rent be due and owing as of the filing of said proceedings, *Tenant shall pay to Landlord the reasonable costs incurred by Landlord in utilizing the services of said Agent*.
>
> * * *
>
> 31. Late Charge: Tenant will pay, *as additional rent, a charge of five (5 %) percent of the monthly rental as a late charge* in the event that Tenant shall fail to pay, both while occupying the Premises and after vacating same, an installment of the rent after 4:30 p.m. on the fourth day beyond the date on which it became due and payable. This shall not constitute a waiver of the Landlord's right to institute proceedings for rent, damages and /or repossession of the Premises for non-payment of any installment of rent.
>
> * * *
>
> 32. Application of Payments: All payments from Tenant to Landlord may, at Landlord's option, be applied in the following order to debts owed by Tenant to Landlord: late charges, agent's fees, attorney's fees, court costs, obligations other than rent (if any) due Landlord, other past due rent other than monthly rent, past due monthly rent, current monthly rent.
>
> * * *

Appellants assert that these lease provisions are inconsistent with Maryland law, have been and continue to be interpreted and applied by Westminster in ways that violate Maryland law, or both. As a result, according to appellants, Westminster has charged "excessive and illegal fees for the late payment of rent .... throughout its multi-family rental properties in Maryland" in

situations in which tenants fail to pay their rent in full on a timely basis. What follows is a summary of their contentions.

Westminster's tenants are required to pay their fixed monthly rent in advance, in full, and on or before the first day of the month. If a tenant fails to pay their rent in full by the fifth day of the month, Westminster charges a late fee of 5% of the month's rent. Appellants concede that Westminster has the right to charge a late fee, but they assert the 5% penalty is the maximum permitted by Md. Code, Real Prop. § 8-208(d)(3)(i). However, according to appellants, Westminster imposes additional fees at the sixth day of the month or shortly thereafter:

First, Westminster charges what it terms an "agent's fee" of either $10 or $12 and a "court fee" or "summons fee" of either $20 or $30 whenever its agent, eWrit Filings, LLC, files a summary ejectment action in the District Court pursuant to Md. Code, Real Prop. § 8-401 for repossession of the premises for failure to pay rent. Appellants assert that eWrit does not charge a fee to Westminster for filing such documents. If a tenant fails to pay their rent on or before the 5th, then on the next day, Westminster typically charges the tenant the 5% late fee, a $10 agent fee, and summons fee of $20 to $30, even though eWrit charges Westminster $10 for filing a summons. Appellants assert that by imposing these fees on tenants in addition to the 5% late fee, Westminster violated Real Prop. § 8-208(d)(3)(i).

Second, when Westminster seeks a warrant of restitution from the District Court for Baltimore City, it charges the tenant a filing fee of $80, even though the filing fee for summary ejectment actions throughout the State, including the City of Baltimore, was $50. Appellants assert that $50 was the only cost that eWrit charged Westminster for each such filing.

Third, appellants contend that RP § 8-208(d)(2) prohibits landlords from using any lease that "[h]as the tenant agree to waive or forego any right or remedy provided by applicable law." Appellants assert that Westminster's form lease purports to allow it to define all charges as "rent" and to allocate tenants' rent payments to non-rent charges. Appellants contend that these provisions violate Maryland law. This has the effect of waiving appellants' rights to be summarily evicted only for failure to pay rent under RP § 8-401 and not for failure to pay other non-rent charges.

Fourth, appellants assert that Westminster assessed these charges against them on numerous occasions and routinely refused to dismiss pending eviction proceedings until they had paid the past due rent, the 5% late charge, and all of the agent's fees, summons fees, filing fees, and other improper or illegal charges. Moreover, appellants assert that Westminster did not reimburse tenants for the agent's and summons fees even if their case was dismissed or resulted in a judgment for the tenant.

Based on these factual assertions, appellants contend that Westminster breached its contracts with appellants and violated the Maryland Consumer Protection Act (Md. Code, Com. Law §§ 13-101–501); the Maryland Consumer Debt Collection Act (Com. Law §§ 14-201–204); and various provisions of title 8 of the Real Property Article. In addition to damages, appellants assert that they are entitled to injunctive and declaratory relief.

Finally, appellants contend that they alleged an adequate factual basis to support their request for class action certification.

Westminster Management contests many of the appellants' factual allegations and asserts that the legal arguments presented by appellants are wrong.

The Circuit Court for Baltimore City denied appellants' motions for class-action certification and subsequently granted Westminster's motion for summary judgment on all counts.

Held: Reversed.

The Appellate Court of Maryland held that:

Md. Code Real Prop. § 8-208(d)(3) prohibits a residential lease from providing for a penalty for the late payment of rent "in excess of 5% of the rent due for the rental period for which the payment was delinquent." For the purposes of § 8-208, "rent" means "the periodic sum owed by the tenant for use or occupancy of the premises." *See Lockett v. Blue Ocean Bristol, LLC*, 446 Md. 397, 425 (2016).

Md. Code Real Prop. § 8-401(e)(2)(iv) provides that, in summary ejectment actions involving "a residential tenancy," the court may enter judgment "in favor of the landlord for the amount of rent and late fees determined to be due together with costs of the suit if the court finds that the residential tenant was personally served with a summons." For the purposes of § 8-401(e)(2)(iv), "rent" means "the periodic sum owed by the tenant for use or occupancy of the premises." *See Lockett v. Blue Ocean Bristol, LLC*, 446 Md. 397, 425 (2016).

Md. Code Real Prop. § 8-401(e)(2)(iv) provides that, in summary ejectment actions involving "a residential tenancy," the court may enter judgment "in favor of the landlord for the amount of rent and late fees determined to be due together with costs of the suit if the court finds that the residential tenant was personally served with a summons." For the purposes of § 8-401(e)(2)(iv), "costs of the suit" means fees charged and collected by the District Court clerk's office and fees charged and collected by the sheriffs' departments (when process is served by deputy sheriffs) or by the District Court (when process is served by District Court constables) as shown on the District Court of Maryland Cost Schedule.

The circuit court's denial of appellants' second motion for class action certification is reversed. On remand, appellants may file a new motion for class certification. If they do so, the circuit court shall treat it as an initial motion for class certification and shall hold a hearing on the motion if any party requests one. *See Chavis v. Blibaum & Associates, P. A.*, 476 Md. 534, 579 (2021)

Jose Ortiz Cerrato v. Toni Garner, et al., No. 301, September Term 2022, filed March 1, 2023. Opinion by Albright, J.

https://www.courts.state.md.us/data/opinions/cosa/2023/0301s22.pdf

MARYLAND SECURITY DEPOSIT ACT – DEFINITION OF A SECURITY DEPOSIT

MARYLAND SECURITY DEPOSIT ACT – LIABILITY FOR EXCESSIVE SECURITY DEPOSIT

Facts:

Under Section 8-203 of the Real Property Article ("RP"), a landlord in a residential lease cannot impose a "security deposit" that exceeds two months' rent per dwelling unit. A security deposit is the payment of money by the tenant to the landlord, including an advance payment of the last month's rent, to protect the landlord against future nonpayment of rent, breach of lease, or damages. If a landlord charges an amount as a security deposit that is too high, RP § 8-203(b)(1) allows the tenant to recover up to three times the excess, plus reasonable attorney's fees.

Two landlords listed a Maryland residential property for rent. A prospective tenant offered to lease the property for one year at a lower monthly price than advertised, and offered to pay the year's rent in advance. The landlords ultimately accepted the offer, and a lease agreement was executed that provided for a $2,500 security deposit and $2,500 rent per month. The landlords were then paid the security deposit and eleven months' rent in advance.

After this payment, and amid an ongoing dispute about the condition of the property, the tenant filed suit against the landlords in the Circuit Court for Anne Arundel County. The tenant alleged, among other things, that the landlords had accepted a total upfront payment of $30,000, and that $27,500 of this was a security deposit. As such, the tenant argued that the landlords had imposed or charged an improperly high security deposit under RP § 8-203. The Circuit Court granted summary judgment for the landlords on the issue of the security deposit, reasoning that the landlords did not impose or charge an excess security deposit because the tenant had offered to make rent payments in advance.

The tenant timely appealed to the Appellate Court.

Held: Affirmed

The Appellate Court concluded that the landlords did not impose or charge an excessive security deposit under RP § 8-203(b). The Appellate Court reasoned that RP § 8-203 is remedial in that it prevents a landlord from demanding an excessive upfront payment from a tenant to secure against risk, a payment that could disadvantage tenants. Looking to the statutory language, the

Appellate Court noted that "security deposit" is broadly defined to include payments made to protect the landlord against certain risks of loss. Thus, the Appellate Court concluded that the payment made to the landlords fell within the statutory definition of a security deposit.

Nevertheless, the Appellate Court concluded that the landlords did not impose or charge an excess security deposit within the meaning of RP § 8-203(b). The Appellate Court reasoned that (1) the landlords did not actively request, demand, or require the payment of an excess security deposit; (2) the tenant voluntarily offered to make advance payments of rent in exchange for a lower total amount of rent; and (3) the written lease agreement did not obligate the tenant to make his rent payments in advance.

Haissaun Mitchell et al. v. Rite Aid of Maryland, Inc. et al., No. 21, September Term 2022, filed March 2, 2023, Opinion by Leahy, J.

https://www.courts.state.md.us/data/opinions/cosa/2023/0021s22.pdf

TORT LAW – WORKERS' COMPENSATION IMMUNITY – EMPLOYER-EMPLOYEE RELATIONSHIP – CONTROL OF THE WORKER – SUMMARY JUDGMENT

TORT LAW – PREMISES LIABILITY – DUTY TO PROVIDE SECURITY MEASURES TO BUSINESS INVITEES – FORESEEABILITY

TORT LAW – PREMISES LIABILITY – PROXIMATE CAUSE – FORESEEABILITY

Facts:

A temporary worker, Snochia Moseley, entered a facility leased and operated by Rite Aid with her ID badge and opened fire on her co-workers, killing three and wounding three. The shooter was the direct employee of Abacus Corporation, a Rite Aid contractor, assigned to work at the facility. Three members of the Mitchell family, all direct employees of Capstone, a different Rite Aid contractor at the same facility, suffered physical and emotional harm from the attack. The Mitchells sued both Rite Aid and Abacus Corporation, on the theories that Rite Aid was negligent in its operation of the facility, and Abacus Corporation was negligent in employing the shooter.

Rite Aid moved for, and was granted, summary judgment on two independent grounds. First, the trial court found the Mitchells were Rite Aid employees and their claim was barred by workers' compensation immunity despite evidence that Capstone, rather than Rite Aid, had the power to control the Mitchells' conduct in the course of their employment. Specifically, the evidence showed that Capstone employees were required to wear distinctive vests, did not participate in morning meetings with Rite Aid employees, and were supervised by Capstone employees at all times. Moreover, the Mitchells produced evidence suggesting that Capstone's on-site supervisors primarily provided direction on the day-to-day work of Capstone employees, with high-level directives coming from Rite Aid management.

Second, the trial court found the shooting was unforeseeable because Rite Aid was not aware of any prior indicators of the shooter's violent tendencies. The shooter had only been a temporary employee assigned to work at the facility for a short period and had not engaged in any conduct which would have put Rite Aid on notice that she posed a threat of violence. The Mitchells failed to show that, given Rite Aid's security measures at the facility, the premises created the opportunity for Mosely to commit the crime.

Abacus Corporation also moved for, and was granted, summary judgment on the grounds that there was no evidence that it negligently hired, supervised, or retained Moseley because it

conducted a reasonable inquiry into Moseley's fitness as an employee. The Mitchells noted a timely appeal.

Held: Affirmed.

Affirmed on the alternative ground of foreseeability.

First, the Appellate Court concluded that the circuit court erred in part in granting summary judgment to Rite Aid on the ground of workers' compensation immunity. Guided by well-defined precedent in *Tyson Farms, Inc. v. Uninsured Employers' Fund*, 471 Md. 386 (2020), *Great Atl. & Pac. Tea Co., Inc. v. Imbraguglio*, 346 Md. 573 (1997), and *Whitehead v. Safway Steel Prods., Inc*., 304 Md. 67 (1985), the Court concluded that genuine disputes of material fact precluded a determination that Rite Aid was the Mitchells' employer on summary judgment. Specifically, the Court observed that the position that Rite Aid maintained ultimate control over its facility and directed Capstone's supervisors on the services to be provided to Rite Aid is not necessarily inconsistent with the proposition that the Mitchells remained employees of an independent contractor, if the Mitchells were free from Rite Aid's control except as to the final product of their work.

Second, the Appellate Court held that the circuit court correctly granted summary judgment on the alternative ground of foreseeability. To avoid summary judgment on a premises liability claim arising out of the criminal act of a third party, the plaintiff must show that such activity was foreseeable. *Troxel v. Iguana Cantina*, LLC, 201 Md. App. 476, 491, 497 (2011). The Mitchells did not establish that the shooter's attack was a reasonably foreseeable criminal act because (a) there was no history of violent criminal activity in the vicinity of facility, (b) there was no indication that the shooter, a temporary worker employed through a different staffing agency, posed a threat of violence, and (c) the events immediately preceding the shootings did not presage any imminent violent outburst. Thus, because Rite Aid lacked any notice, its duty as a possessor "to take *reasonable* measures . . . to eliminate the conditions contributing" to foreseeable criminal activity was never generated. *Id*. at 496-97 (emphasis in original). Moreover, the Mitchells' proffered security expert could not identify any causal link between the perceived breaches and the Mitchells' injuries. The Mitchells did not produce any evidence indicating that Rite Aid knew or should have known that Moseley posed a threat of violence, or demonstrate how, considering the baseline security measures already in place at the facility, that Rite Aid knew or should have known that the premises "created a situation which afforded an opportunity to the third person to commit such a tort or crime." *Id.* at 509-10.

Finally, the Appellate Court held that the circuit court correctly granted summary judgment to Abacus on the Mitchells' negligent hiring claim. The record reflected that Abacus conducted a reasonable inquiry into the shooter's fitness as an employee that simply failed to reveal certain red flags which tend to evade most standard background checks. Absent any admissible evidence of its negligence, the circuit court did not err in granting summary judgment in favor of Abacus.

ATTORNEY DISCIPLINE

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By an Opinion and Order of the Supreme Court of Maryland dated March 2, 2023, the following attorney has been indefinitely suspended:

RICHARD LOUIS SLOANE

*

By an Order of the Supreme Court of Maryland dated March 9, 2023, the following attorney has been placed on disability inactive status by consent:

PETER GEORGE ANGELOS

*

This is to certify that the name of

GODSON M. NNAKA

has been replaced on the register of attorneys permitted to practice law in this State as of March 13, 2023.

*

By an Order of the Supreme Court of Maryland dated March 24, 2023, the following attorney has been placed on disability inactive status by consent:

CHRISTINA JULIANNE BOSTICK

*

By an Order of the Supreme Court of Maryland dated March 24, 2023, the following attorney has been indefinitely suspended:

MATTHEW JAMES PLACHE

*

*

By an Order of the Supreme Court of Maryland dated March 24, 2023, the following attorney has been disbarred by consent:

GARY DON WRIGHT

*

By an Opinion and Order of the Supreme Court of Maryland dated March 27, 2023, the following attorney has been disbarred:

WENDY BARROW CULBERSON

*

By an Opinion and Order of the Supreme Court of Maryland dated February 27, 2023, the following attorney has been suspended for ninety days, effective March 29, 2023:

KEVIN MBEH TABE

*

By an Opinion and Order of the Supreme Court of Maryland dated February 28, 2023, the following attorney has been suspended for sixty days, effective March 30, 2023:

SHERWOOD R. WESCOTT

*

UNREPORTED OPINIONS

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

https://mdcourts.gov/appellate/unreportedopinions

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