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COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Michael R. Carithers, No. AG 18, September Term, 2010, filed July 18, 2011, Opinion by Greene, J.

<http://mdcourts.gov/opinions/coa/2011/18a10aq.pdf>

ATTORNEY DISCIPLINE - APPROPRIATE SANCTIONS

Facts: Michael R. Carithers, Respondent, earned his J.D. at the University of Michigan Law School and is admitted to practice law in the District of Columbia, Michigan, and Maryland. He was admitted to practice law in Maryland on September 26, 2006. Between 1991 and 2005, he was affiliated as an associate or "of counsel" with several different firms, employed by the Office of the General Counsel at Ford Motor Company in Dearborn, Michigan, and held a position with the City Solicitor's Office in Baltimore, Maryland. In his position as "of counsel" for several firms, Respondent would do work assigned by the firms while maintaining his own clients independently and not entering them into the firms' databases.

In August of 2005, Respondent was hired at the Baltimore-based firm of Brown & Sheehan, LLP ("B&S"). Michael Alan Brown and David Sheehan were the only two equity partners at the firm of Brown & Sheehan. There was no written contract regarding Respondent's employment at B&S but he was hired as a full-time employee at a salary of \$90,000 plus benefits. It was agreed that, given Respondent's experience, he would be given the designation "of counsel." There was no agreement between Respondent and Mr. Brown or Mr. Sheehan that he could maintain a side practice. Respondent signed an acknowledgment form, indicating that he had received the B&S personnel handbook on December 13, 2007. Respondent worked at B&S until June of 2008.

Respondent admits that he had a side practice while employed at B&S. Respondent opened a number of cases on his own without entering them into the B&S client database, received payments using the B&S billing statements, B&S retainer agreements, letterhead, B&S resources and sometimes met with these clients during the hours that he was at B&S. Respondent deposited checks received from clients in his side practice directly into his personal account. He did not maintain a trust account for his side practice or separate malpractice insurance. Further, he did not initially report any of the income received from his side

practice from 2005 through 2008 to the Internal Revenue Service. He eventually filed amended tax returns regarding income received from his side practice.

On June 23, 2008, Mr. Brown and Mr. Sheehan discovered that Respondent had personally negotiated checks from clients and deposited the checks into Respondent's personal account and that he had maintained a side practice separate from B&S. On the same day, they terminated his employment.

The Attorney Grievance Commission, acting pursuant to Maryland Rule 16-751(a), filed a "Petition for Disciplinary or Remedial Action" against Respondent, charging several violations of the Maryland Rules of Professional Conduct ("MRPC") including 1.15(a) (Safekeeping Property) and 8.4(a)-(d) (Misconduct), stemming from the deposit of unearned fees into his personal account. In accordance with Maryland Rule 16-752(a), the matter was referred to a judge of the Circuit Court for Baltimore City to conduct an evidentiary hearing.

The hearing judge held an evidentiary hearing on January 5 and 6, 2010, and, pursuant to Rule 16-757(c), found by clear and convincing evidence that Respondent's acts and omissions constituted violation of Rules 8.4(a)-(d) and 1.15(a) of the MRPC. The hearing judge also found that Respondent violated the Maryland Business Occupations and Professions Art. Sec. 10-304(a).

Held: Michael R. Carithers committed criminal acts by intentionally and deceptively misappropriating fees from former B&S clients that represented B&S legal fees. In addition, Respondent failed to set up and maintain a separate client trust account and willfully deposited unearned fees into his personal account, for his personal use, prior to earning the fees. Absent compelling extenuating circumstances, intentional misappropriation of client funds or another's funds is deceitful and dishonest conduct, which justifies disbarment.

Attorney Grievance Commission v. Gregory Raymond Keiner, Misc. Docket AG No. 24, September Term, 2010, Filed August 19, 2011, Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2011/24a10ag.pdf>

ATTORNEY DISCIPLINE - SANCTIONS - DISBARMENT

Facts: The Attorney Grievance Commission, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent Gregory Raymond Keiner. The Petition charged Respondent with violating Maryland Lawyers' Rules of Professional Conduct ("MRPC") 1.4 (Communication) and 8.4 (Misconduct). The misconduct was in connection with Respondent's actions while working as an associate at The Law Offices of Evan K. Thalenberg, PA, primarily practicing lead paint litigation. Pursuant to Maryland Rules 17-773 and 16-752(a), the Court referred the Petition to the Honorable Timothy J. McCrone of the Circuit Court for Howard County, to conduct an evidentiary hearing and make findings of fact and conclusions of law.

Before the hearing on the Petition, Judge McCrone held a hearing to address several discovery and evidentiary matters. Respondent had filed Interrogatories and Requests for Admission, seeking, inter alia, information in connection with Bar Counsel's refusal to enter into a conditional diversion agreement with Respondent. Respondent had also indicated that at the hearing on the Petition he sought to enter into evidence a Report of the Peer Review Panel concerning Respondent and letter communications between Bar Counsel and Respondent regarding a possible conditional diversion agreement. In response, Bar Counsel had filed a Motion for Protective Order.

At that hearing, Judge McCrone granted Bar Counsel's motion for protective order, finding that all information related to a potential conditional diversion agreement was not relevant to any claim or defense at issue at the hearing on the Petition. Judge McCrone further ruled that, because the Peer Review process is a confidential mediation that is irrelevant to the issues before the court at the hearing on the Petition, Respondent would not be permitted to have the Peer Review Report entered into evidence.

Following the hearing on the Petition, Judge McCrone issued written findings of fact and conclusions of law. Judge McCrone found that Respondent had engaged in intentional dishonest conduct by wrongfully deleting and altering his law firm's clients' electronic files to make viable cases appear closed for lack of merit. Judge McCrone further found (and Respondent

conceded) that Respondent had done so in order to conceal the cases from the firm, with the intent of pursuing the cases on his own once he started his own practice of law. Respondent also wrongfully used the firm's resources in an effort to identify and solicit new clients for his potential law practice. Although Respondent presented evidence of mental health disability and alcohol dependency, the hearing judge found that the disability did not cause Respondent's misconduct or prevent him from adhering to the requirements of MRPC and the law. Instead, Judge McCrone found that Respondent's conduct was solely motivated by the desire for personal gain. Based on his factual findings, Judge McCrone concluded that Respondent violated MRPC 1.4(a) and (b) and 8.4(a)-(d).

Bar Counsel filed no exceptions to Judge McCrone's findings of fact or conclusions of law. Respondent took no exception to Judge McCrone's conclusion that Respondent violated MRPC 1.4 and 8.4. Respondent, however, excepted to certain of the hearing judge's factual findings. In several of those exceptions, Respondent refers to the very letter communications and Peer Review Report that Judge McCrone ruled inadmissible. Bar Counsel responded with a motion to strike all argument and reference related to both the Peer Review Report and a conditional diversion agreement.

Held: Respondent violated Rules 1.4(a) and (b), and 8.4(a)-(d), did not present sufficient mitigation, and the appropriate sanction is disbarment.

The Court sustained certain aspects of Respondent's exceptions related to the hearing judge's misidentification of Respondent's treating mental health experts and failure to identify explicitly certain factual findings as mitigation. The Court overruled Respondent's exceptions to the hearing judge's omission in the factual findings of the reports of Respondent's mental health experts and of Respondent's counseling with respect to his alcohol dependency, explaining that a hearing judge need not recount all of the evidence presented at the hearing and that it was apparent that the hearing judge considered all of the evidence before him in making his factual findings.

The Court granted Bar Counsel's motion to strike from Respondent's exceptions all references and argument related to a conditional diversion agreement and the Peer Review Report. With regard to the conditional diversion agreement, the Court explained that, under Maryland Rule 16-743, the peer review process is entirely confidential. Moreover, the Court explained that the recommendation of the Peer Review Panel suggests to the

Attorney Grievance Commission, but not to the Court, what the majority of the panel members consider to be the appropriate course of a given attorney discipline proceeding. Once the Attorney Grievance Commission files a Petition, the Peer Review Panel Report has no further relevance. In regard to the conditional diversion agreement, the Court noted that, under Maryland Rule 16-736, the process is completely voluntary and between Bar Counsel and an attorney. The Court explained that a conditional diversion agreement, however, is not available to the Court as a potential disposition of formal charges that have been filed, heard, and proved. The Court therefore held that Judge McCrone did not err in ruling inadmissible the Peer Review Report and the letter communications between Bar Counsel and Respondent's counsel concerning a conditional diversion agreement.

The Court then determined the appropriate sanction for Respondent's misconduct. The Court began by noting that Respondent's conduct was intentional, dishonest, and solely motivated by the desire for personal gain. As such, absent compelling extenuating circumstances, disbarment was the appropriate sanction. The Court next focused on the mitigation established by Respondent to determine whether it constituted the requisite compelling extenuating circumstances. Because Respondent's mental health issues and alcohol dependency were not the root cause for Respondent's misconduct, that mitigation was not in and of itself sufficient to mitigate the sanction to less than disbarment. The Court then moved on to the remaining mitigating factors. After reviewing its relevant attorney discipline precedent, the Court determined that, on balance, given Respondent's misconduct, the mitigation did not constitute the compelling extenuating circumstances necessary to permit a sanction less than disbarment.

Attorney Grievance Commission of Maryland v. Jagjot S. Khandpur, No. AG 3, September Term, 2010, filed July 18, 2011, opinion by Greene, J.

<http://mdcourts.gov/opinions/coa/2011/3a10ag.pdf>

ATTORNEY DISCIPLINE - APPROPRIATE SANCTIONS

Facts: Respondent, Jagjot S. Khandpur, was admitted to practice law in Maryland on June 11, 2001, and maintained a solo law practice in Montgomery County, Maryland. He was born, educated, and attended law school in India. In 1993, he was awarded an LLM by Howard University in Washington, D.C., and admitted to the District of Columbia Bar. He was staff counsel at an information technology company until he entered private practice in 1997. Since then he has been a sole practitioner without support staff.

In June 2006 a friend of Respondent's, Mohan Thapa, referred Bhuwani Shanker Subedi to Respondent to handle Subedi's application for asylum. In early August, Respondent met with Thapa and Subedi, explained that the asylum application would need to be filed within one year of Subedi's arrival in the United States, and agreed to represent Subedi in preparing the written application and representing him at an asylum interview. Respondent sent Subedi a letter agreeing to a fixed fee of \$1,500, to be paid in two equal installments. If the matter ended up in immigration court, an additional fee would be negotiated.

Subedi made an initial \$750 payment in cash "on a date uncertain," and this payment was never deposited in Respondent's IOLTA at Bank of America. Thapa provided the second \$750 payment by check, which was deposited directly into Respondent's personal account on or about February 4, 2007. Although it was due by February 14, 2007 - one year after Subedi's arrival in the United States - Respondent did not file his client's application for asylum until on or about March 27, 2007. Respondent argued that the delay was due to the client's failure to provide essential information, but no documentation or records were produced to support this claim. Immigration authorities returned the application as incomplete on June 4. Respondent resubmitted an amended application but it was denied and the INS commenced deportation proceedings. Subedi retained new counsel and filed a grievance against Respondent.

After an initial meeting with Bar Counsel in September of 2008, on February 24, 2009, Respondent and Bar Counsel entered

into a Conditional Diversion Agreement (CDA) under Maryland Rule 16-736, which was contingent on Respondent producing certain specific financial records to substantiate his story. Respondent provided copies of monthly bank account statements for his IOLTA but no other documentation. After Bar Counsel advised Respondent that he had violated the CDA by failing to produce the required records, Respondent promised to provide more records by May 26, 2009. On June 1, Respondent provided some additional records, but none of the records produced explained what happened to the fees paid by Subedi or Thapa. As a result, on November 18, 2009, Bar Counsel revoked the CDA

Pursuant to Maryland Rule 16-715, the Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Jaggot S. Khandpur, charging him with professional misconduct arising out of his representation of Bhuwani S. Subedi in his application for asylum. Bar Counsel charged Respondent with violating Rules 1.3 (Diligence), 1.4 (Communication), 1.15 (Safekeeping Property), 3.4(c) (Fairness to Opposing Party and Counsel), 8.1 (Bar Admission and Disciplinary Matters), and 8.4(c) and (d) (Misconduct) of the Maryland Rules of Professional Conduct ("MRPC").

The matter was referred to a judge of the Circuit Court for Montgomery County, who held an evidentiary hearing on September 20, 2010. The hearing judge found clear and convincing evidence that Respondent had violated Rule 1.3 by failing to file Subedi's asylum application on time; Rule 1.15 by failing to keep proper records for his IOLTA, failing to fully account for either the original \$750 cash payment or the subsequent \$750 check, and failing to deposit advance fee payments in trust until they were earned; and Rule 8.4(d) by falsely stating to Petitioner's investigator and in the CDA that he had deposited the prepaid funds into his IOLTA, and by failing to produce complete records, in a timely manner, after a legitimate demand by Bar Counsel, to show the receipt and distribution of trust funds.

The hearing judge concluded that there was not clear and convincing evidence that Respondent had violated Rule 8.1 or Rule 8.4(c) because Respondent's false statements were "misinformed, not devious," and his delayed production of documents was "either through laziness or ineptitude," but not "deceitful." Bar Counsel announced at the hearing that it would not pursue its allegation that Respondent had violated Rule 1.4. The hearing judge did not address the allegation that Rule 3.4(c) had been violated, and neither party filed an exception to this omission.

Held: Jagjot S. Khandpur failed to represent his client with reasonable diligence, failed to keep proper records for his Attorney Trust Account and properly hold client payments in trust until earned, and frustrated Bar Counsel's investigation by carelessly making false statements and knowingly failing to produce documents demanded by Bar Counsel. But because there was no finding of intentional misappropriation and Respondent's misconduct did not result in financial loss to his clients, the appropriate sanction is indefinite suspension from the practice of law, effective thirty days from July 18, 2011. Respondent may apply for re-admission 60 days after the effective date of his suspension.

Consolidated Waste Industries, Inc. v. Standard Equipment Company, No. 143, September Term 2011, filed 15 August 2011. Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2011/143a10.pdf>

CONTRACTS AND TORTS - EVIDENCE OF SUBSEQUENT REPAIRS - JURY INSTRUCTIONS - ABUSE OF DISCRETION - MARYLAND RULE 5-403 - EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME - MARYLAND RULE 2-522(c) AND SPECIAL VERDICTS - THE TRIAL COURT'S DECISION TO EXCLUDE EVIDENCE WAS NOT AN ABUSE OF DISCRETION, WHERE THE PROBATIVE VALUE OF THE EXCLUDED EVIDENCE IS (1) LIMITED BY OTHER EVIDENCE PROVIDING THE SAME INFORMATION AND (2) OUTWEIGHED BY THE DANGER OF A JURY REACHING AN ERRONEOUS CONCLUSION. THE TRIAL COURT'S DECISION TO USE A PROPOSED VERDICT SHEET IS NOT AN ABUSE OF DISCRETION, WHERE THE ELEMENTS OF AND DEFENSES TO NEGLIGENCE ARE SEPARATED ON THE VERDICT SHEET.

Facts: On 7 June 2005, Appellant, Consolidated Waste Industries, Inc. ("Consolidated Waste") purchased a John Deere 744J Loader ("Waste Hauler") from, Appellee, Standard Equipment Company ("Standard Equipment"). The Waste Hauler was used at Consolidated Waste's garbage transfer facility approximately thirteen hours a day, five and a half days a week. On 16 February 2007, after approximately twenty months and 5635 hours of running time, the Waste Hauler's hydraulic system began to experience problems. Consolidated Waste sent the Waste Hauler to Standard Equipment to perform the repairs. After two attempts at the repair, Standard Equipment returned the Waste Hauler in an operational condition. The total invoice for the first set of repairs was \$20,434.14.

On 6 December 2007, after approximately seven months and an additional 2153 hours of running time, the Waste Hauler again experienced hydraulic system problems. Consolidated Waste sent the Waste Hauler to Standard Equipment to perform the repairs for a second time. Again, Standard Equipment took two tries before returning the Waste Hauler in an operational condition. On 9 April 2008, Standard Equipment returned the Waste Hauler after four months. The total invoice for the second set of repairs was \$33,623.73.

On 8 December 2008, Consolidated Waste filed in the Circuit Court for Prince George's County a three count complaint, alleging breach of contract, negligence, and unjust enrichment as a the result of Standard Equipment's failure to perform the second set of repairs in a workmanlike and timely manner.

Consolidated Waste later dismissed the count alleging unjust enrichment. The complaint asked for a judgment in the amount of the second set of repairs, \$33,623.73. On 29 June 2009, the case was transferred to the Circuit Court for Charles County following an unopposed motion by Standard Equipment.

On 31 December 2009, approximately twenty months and 4404 hours of running time after the disputed repairs, the Waste Hauler experienced hydraulic system problems for a third time. Consolidated Waste sent the Waste Hauler to a different company for repairs, Carter Machinery. Carter Machinery performed a complete hydraulic system clean-out in two months (from 31 December 2009 to 23 February 2010), for a cost exceeding \$40,000.

On 5 May 2010, Standard Equipment filed a "Motion in Limine to Exclude Expert Testimony of G. B. Critzer ('Critzler')"; a "Motion in Limine to Exclude Evidence of Repairs not in Controversy "; and a "Motion in Limine to Exclude Evidence of Subsequent Repairs." On 6 May 2010, the trial court denied the motions to exclude Critzer's testimony and to exclude evidence of repairs not in controversy. The trial court granted the motion excluding evidence of subsequent repairs.

Trial took place in the Circuit Court on the 6th and 7th of May 2010. Critzer testified as an expert witness for Consolidated Waste. Critzer's testimony included his opinion of the proper industry standard to correct metal contamination in a hydraulic system and the role he had played in supervising such repairs in the past. Even after examining the invoices of the prior repairs by Standard Equipment, however, Critzer would not comment on the details or competency of the repairs performed.

The trial court elected to use Standard Equipment's verdict sheet over Consolidated Waste's objections regarding Questions 4, 5, and 6. Question 4 of the verdict sheet asked whether Consolidated Waste proved that Standard Equipment was negligent, while Question 5 asked whether Consolidated Waste proved the negligence caused damages. Question 6 asked if Consolidated Waste was negligent contributorily and was preceded with an instruction that it was to be skipped if either Question 4 or Question 5 was answered in the negative. Consolidated Waste contended (1) that Question 5 asking if Standard Equipment's negligence caused damages to Consolidated Waste was redundant and confusing potentially to the jury because the causation and damages elements of negligence were already addressed in Question 4, and (2) that addressing contributory negligence in Question 6 was not appropriate, as it forced the jury to evaluate the issue of contributory negligence when determining the elements of

negligence. The jury answered Questions 4 and 5 in the negative and left Question 6 unanswered accordingly.

The jury returned a verdict in favor of Standard Equipment on both the breach of contract and negligence claim. On 10 June 2010, Consolidated Waste noted timely an appeal with the Court of Special Appeals. On appeal, Consolidated Waste claimed that the trial court abused its discretion by granting the "Motion in Limine to Exclude Evidence of Subsequent Repairs" and submitting to the jury the verdict sheet requested by Standard Equipment. On 18 March 2011, before the Court of Special Appeals could decide the appeal, the Court of Appeals issued a writ of certiorari to consider Consolidated Waste' claims.

Held: Affirmed. The Court of Appeals held that the Circuit Court for Charles County did not abuse its discretion when it granted: (1) a motion in limine to exclude evidence of subsequent repairs, and (2) the use of Standard Equipment's verdict sheet.

The Court ruled that the Circuit Court was within the confines of Maryland Rule 5-403 which states, "[a]llthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" In so holding, the Court explained that a reasonable person could determine that the probative value of the subsequent repairs failed to outweigh the potential prejudice, given that any probative value was (1) limited by alternative evidence offering the same information and (2) outweighed by the danger of the jury concluding erroneously that the mere existence of third set of repairs proved a breach of contract and/or negligence.

The Court ruled also that the Circuit Court did not abuse its discretion in regards to the verdict sheet. Separating the elements of negligence and causation in Question 4 and 5 was not only reasonable but ordinary. Moreover, including the defense of contributory negligence in Question 6 was reasonable and not confusing because it was supported by the facts and only reachable after the jury found negligence.

Hovnanian Land Investment Group, LLC, et al, v. Annapolis Towne Centre at Parole, LLC, No. 71, September Term, 2010, filed on July 20, 2011. Opinion written by Adkins, J.

<http://mdcourts.gov/opinions/coa/2011/71a10.pdf>

CONTRACTS – WAIVER – EFFECT OF NON-WAIVER CLAUSES

CONTRACTS – WAIVER – CONDITIONS PRECEDENT – WAIVER IMPLIED BY CONDUCT

Facts: Respondent, the owner of a large, mixed-use development near Annapolis, Maryland, agreed to sell a portion of the property to Petitioner, a developer, for the construction of a residential tower. The contract required certain conditions to be met by Respondent prior to the closing, and also contained a clause saying that any waiver or modification of the contract had to be in writing. One of the conditions precedent required the Respondent to establish a funding scheme for maintenance of the common areas as part of the condominium declaration.

The Respondent drafted the condominium declaration with input from all of the parties. With regard to the common area, the declaration contained a provision stating that the specific maintenance fee requirements would be detailed with each tenant in supplemental agreements. Petitioner asked for clarification, but otherwise the planning and negotiation for the development continued.

After two years of negotiation by the parties, Petitioner terminated the agreement and refused to go to closing, alleging that Respondent failed to meet a condition precedent regarding the establishment of a maintenance fee system for the development's common areas.

Held: Court of Special Appeals reversed. Although the intermediate appellate court was correct in determining, as a matter of law, that the existence of a "non-waiver" clause was not dispositive for the waiver inquiry, the determination is a factual one which requires resolution of inferences and disputes. In this inquiry, the court looks at the party's actions both *before* and *after* the alleged breach. A party can waive a condition precedent by agreeing, in advance, to a course of action which would not otherwise comply with a contractual requirement. A party may also waive a condition precedent *after* a breach by failing to assert its remedies for that breach. A party's inaction or silence is relevant, especially when that party is silent in response to a breach. Given the extent of

this factual inquiry, the circuit court should not have granted summary judgment.

Similarly, we cannot agree with the circuit court that the declaration satisfied the condition precedent as a matter of law. When the meaning of the condition precedent is highly contested, with each party presenting evidence of its intention and scope, then the matter cannot be resolved at the summary judgment stage.

* * *

Roger Mandel Greenberg v. State of Maryland, No. 144, September Term 2010, Filed August 17, 2011. Opinion by Battaglia, J.

<http://mdcourts.gov/opinions/coa/2011/144a10.pdf>

CRIMINAL LAW - EVIDENCE - PRIVILEGE - ATTORNEY-CLIENT -
INVOCATION - PRELIMINARY INQUIRY

Facts: Roger Greenberg, Appellant, was tried by a jury in the Circuit Court for Montgomery County on five counts relating to the care and custody of Evelyn Zucker, an elderly woman to whom Greenberg had been married. After the marriage, on November 26, 2008, but prior to Greenberg's indictment, in July of 2009, Robert M. McCarthy was appointed as guardian for Ms. Zucker. Thereafter, Mr. McCarthy initiated proceedings seeking to annul Greenberg's marriage to Ms. Zucker, void a deed prepared by Mr. Hessel that conveyed a tenancy by the entireties interest in Ms. Zucker's home to Greenberg, invalidate a will (prepared for Ms. Zucker and drafted by Mr. Hessel), which would benefit Greenberg, and to remove Greenberg as Ms. Zucker's healthcare agent. During the annulment hearing, Mr. McCarthy called Greenberg and Mr. Hessel as witnesses.

During the subsequent criminal proceeding against Greenberg, the State sought to call Mr. Hessel as a witness in its case-in-chief. Greenberg's attorney moved to exclude Mr. Hessel's testimony on the basis of attorney-client privilege, asserting that Mr. Hessel "was at one point in 2008 representing both . . . Ms. Zucker and Mr. Greenberg" and that there was "certainly the issue of attorney-client privilege." The trial judge denied the motion, reasoning that Greenberg had categorically waived the attorney-client privilege at the annulment hearing. Later during trial, when the State called Mr. Hessel to the witness stand, Greenberg objected, claiming that there had been an attorney-client relationship between Mr. Hessel and Greenberg, and that the "things that they discussed" or "talked about" with each other were privileged. Thereafter, the trial judge overruled Greenberg's objection, but granted a continuing objection to Greenberg as to Mr. Hessel's testimony.

Greenberg appealed the Circuit Court's privilege determination, arguing that the trial judge erroneously failed to inquire into the "surrounding facts and circumstances" of Mr. Hessel's representation of Greenberg, the "complete circumstances related to [Greenberg's] possible waiver of privilege," and "the scope of the prosecution's proposed use of the evidence at trial." The Court of Appeals granted certiorari on bypass.

Held: The Court of Appeals vacated and remanded for a new trial. The Court drew upon its opinion in *Newman v. State*, 384 Md. 285, 863 A.2d 321 (2004) for the proposition that "the party seeking the protection of the [attorney-client] privilege bears the burden of establishing its existence," and that, "[o]nce the privilege is invoked, the trial court should 'make a preliminary inquiry and hear testimony relative thereto out of the presence of the jury, looking at the surrounding facts and circumstances.'" Looking to other jurisdictions, the Court determined that, in both state and federal contexts, most courts appear to consider the attorney-client privilege invoked upon a showing that an attorney and a client communicated in a professional capacity. Examining the record, the Court determined that Greenberg had sufficiently invoked the attorney-client privilege to trigger further proceedings on the issue.

Once invoked, the Court instructed, the trial court must perform a preliminary inquiry pursuant to Maryland Rule 5-104. The Court explained that, while an evidentiary hearing is not required, the trial judge must make findings to "satisfy not only the existence, but the non-existence and waiver of the attorney-client privilege." The Court determined that, even though the judge had reviewed "the transcript of Greenberg's testimony at the annulment hearing prior to the time that he determined waiver," the judge erred by failing to "determine the nature and scope of privileged communication," to "explore with specificity what testimony the State sought to solicit from Mr. Hessel," and to "utilize those details to determine the extent of any waiver." Thus, the Court concluded that the record was too sparse to support the trial judge's findings regarding the existence and waiver of the privilege.

Moreover, the Court declined the State's invitation to apply the crime-fraud exception to the attorney-client privilege, as the "trial judge's premature determination" precluded its ability to do so. Lastly, because the State exploited Mr. Hessel's testimony during trial, and in opening and closing arguments, the Court determined that the State's use of the evidence could "in no way be viewed as harmless."

Deltavia Cure v. State of Maryland, No. 135, September Term 2010, filed 16 August 2011. Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2011/135a10.pdf>

CRIMINAL LAW - EVIDENCE - IMPEACHMENT BY PRIOR CONVICTION - MARYLAND RULE 5-609 - WAIVER BY DEFENDANT FOR APPELLATE REVIEW OF OBJECTION TO JUDGE'S *IN LIMINE* RULING ALLOWING USE OF PRIOR CONVICTION FOR IMPEACHMENT BY DISCLOSING THE CONVICTION ON DIRECT EXAMINATION DURING DEFENSE CASE-IN-CHIEF

WHEN A DEFENDANT ELECTS TO TESTIFY IN HIS OR HER DEFENSE AND IN DOING SO, REVEALS A PRIOR CONVICTION ON DIRECT EXAMINATION TO PREEMPTIVELY "DRAW THE STING OUT", KNOWING THAT THE TRIAL JUDGE RULED *IN LIMINE* THAT THE STATE WILL BE ALLOWED TO IMPEACH HIM OR HER WITH THAT PRIOR CONVICTION IN CROSS-EXAMINATION, THE DEFENDANT DOES NOT WAIVE NECESSARILY HIS OR HER RIGHT TO APPELLATE REVIEW OF THE MERITS OF THE TRIAL JUDGE'S PRIOR *IN LIMINE* DETERMINATION REGARDING THE USE OF THE CONVICTION FOR IMPEACHMENT PURPOSES.

CRIMINAL LAW - EVIDENCE - IMPEACHMENT BY PRIOR CONVICTION FOR ARSON - MARYLAND RULE 5-609 - ABUSE OF DISCRETION

WHEN AN APPELLATE COURT REVIEWS A TRIAL COURT'S *IN LIMINE* RULING THAT A PRIOR CONVICTION WILL BE ADMISSIBLE FOR IMPEACHMENT PURPOSES UNDER RULE 5-609, IT IS NOT AN ABUSE OF DISCRETION TO ALLOW USE OF A CONVICTION FOR AN INFAMOUS CRIME (ARSON) IF, APPLYING THE FIVE PRONGS FROM *JACKSON V. STATE*, 340 MD. 705, 668 A.2D 8 (1995), THE TRIAL COURT DETERMINES THAT THE PROBATIVE VALUE OF THAT PRIOR CONVICTION FOR AN INFAMOUS CRIME OUTWEIGHS THE PREJUDICIAL IMPACT IT MAY HAVE ON THE FACT-FINDER.

Facts: In a prior case, on 7 March 2001, Deltavia Cure ("Cure") was convicted of first-degree arson. On 14 March 2008, Baltimore City Police arrested and charged Cure with two counts of possession with intent to distribute a controlled dangerous substance, two counts of conspiracy to distribute a controlled dangerous substance, and two counts of conspiracy to possess with intent to distribute a controlled dangerous substance. On 12 January 2009, at the start of Cure's trial on the drug charges in the Circuit Court for Baltimore City, the trial judge ruled that Cure's prior conviction for arson would be available to the prosecution for use as impeachment evidence should Cure elect to testify. In an attempt to "draw the sting out" of the arson conviction, Cure revealed the existence of the prior arson conviction upon direct examination in his case-in-chief. Upon cross-examination, the prosecution did not inquire directly regarding the arson conviction. The jury returned a guilty verdict

as to each count against Cure.

Cure appealed to the intermediate appellate court, arguing that the trial judge abused his discretion by admitting Cure's prior conviction for arson for impeachment purposes. The Court of Special Appeals affirmed the decision of the trial court in a reported opinion, *Cure v. State*, 195 Md. App. 557, 7 A.3d 145 (2010). Relying upon *Brown v. State*, 373 Md. 234, 817 A.2d 241 (2003), the intermediate appellate court held that, by testifying affirmatively upon direct examination regarding the prior conviction, Cure waived his right to appellate review of the trial judge's ruling *in limine*. The Court of Special Appeals addressed the merits of the impeachment value of arson nonetheless, reasoning that there was no abuse of discretion in allowing impeachment by prior conviction because common law arson is an "infamous crime," a classification which makes it germane to a witness's credibility.

Cure filed a timely petition for Writ of Certiorari, which we granted, *Cure v. State*, 418 Md. 190, 13 A.3d 798 (2011), to consider the following questions:

(1) When the trial court ruled prior to jury selection that the State could impeach Mr. Cure with his prior conviction for first-degree arson, did Mr. Cure waive his right to complain on appeal about the Court's ruling by testifying about the conviction during his direct examination?

(2) Did the trial court abuse its discretion when it ruled that the State could impeach Mr. Cure with his prior conviction for first-degree arson?

Held: Affirmed. The Court first discussed *Ohler v. United States*, 529 U.S. 753, 120 S. Ct. 1851, 146 L. Ed 2d 826 (2000), in which the Supreme Court held, in a 5-4 decision, that by introducing a prior conviction in direct examination, a defendant waives his right to appellate review of the trial court's *in limine* ruling of admissibility of the conviction for impeachment purposes. The dissent, authored by Justice Souter, countered that "allowing the defendant to introduce the convictions on direct examination thus tends to promote fairness of trial without depriving the Government of anything to which it is entitled."

This Court previously spoke to the issue in *Brown*, where the Court was fractured in how to decide the case. Following *Ohler*, the plurality opinion written by Judge Raker (and joined by two

other Judges), held that by "drawing the sting out" of a conviction, a defendant waives the right to appellate review of the trial court's *in limine* ruling. The dissent, authored by Judge Wilner (also joined by two Judges), agreed with Justice Souter's dissent in *Ohler*. Judge Harrell, in his concurring opinion, agreed with Judge Wilner that the issue was not waived (like the dissent), but would have held that the impeachment in *Brown* was proper. His vote was therefore the fourth vote needed to affirm Brown's conviction.

Resolving any ambiguity created by this fractured decision in *Brown* on the issue of waiver, the Court in *Cure* adopted the reasoning of Justice Souter's dissent in *Ohler* and Judge Wilner's dissent in *Brown*. The Court held that, in the limited setting outlined by Judge Wilner in *Brown*, i.e., when a defendant reveals the existence of a prior conviction on direct examination in the defense case-in-chief, knowing that the trial judge has made a final ruling *in limine* that the conviction will be available to the prosecution for impeachment purposes, the defendant does not waive his opportunity for appellate review of the trial judge's *in limine* ruling.

The Court then addressed the merits of *Cure*'s contention that an arson conviction, having little relevance to a defendant's credibility, fails the balancing test provided in Rule 5-609. The Court first noted that arson, because it is classified as an "infamous crime", falls within the eligible universe of impeachable offenses. The Court then discussed the slight expansion in scope between common law arson and statutory first-degree arson, noting that first-degree arson has remained the same substantially since 1929. Finally, the Court noted, that because the language of Rule 5-609 recognizes a connection between "infamous crimes" and credibility, an arson conviction necessarily has impeachment value. In weighing the probative value of the conviction against the possibility for a prejudicial impact, the court discussed five considerations outlined in *Jackson v. State*, 340 Md. 705, 717, 668 A.2d 8, 14 (1995), namely: (1) the impeachment value of the conviction; (2) the point in time of the conviction and the defendant's subsequent history; (3) the similarity between the conviction and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the defendant's credibility. Applying this framework to the facts of *Cure*'s case, the Court held that it was not an abuse of discretion for the trial court to permit impeachment with the prior arson conviction.

Amaro Annier Atkins v. State of Maryland, No. 110, September Term 2010, filed August 18, 2011. Opinion by Greene, J.

<http://mdcourts.gov/opinions/coa/2011/110a10.pdf>

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - INSTRUCTIONS ON LACK OF INVESTIGATIVE AND/OR SCIENTIFIC EVIDENCE

Facts: On November 24, 2007, Petitioner was involved in an altercation with the three alleged victims in this case. The victims claimed that Atkins attacked them with a knife, while Atkins claimed that he swung his pocketknife in self defense. Three days later, police executed a search warrant for Atkins's home. During the search police removed from Atkins's bedroom a non-foldable black knife, approximately 12 inches in length overall with a 6 inch blade. Police, however, did not perform any scientific or forensic testing on the knife, and there was no testimonial evidence from witnesses linking the particular knife found in Atkins's home to the crime.

At trial, the State argued that the knife found in Atkins's home was the knife used to inflict the injuries on the victims. The trial judge allowed the State to present the knife as evidence of the crime over defense counsel's objection. At the close of evidence, the State requested, and the trial judge gave, in relevant part, the following instruction over defense counsel's objection:

You should consider all of the evidence or lack of evidence in deciding whether the defendant is guilty. However, I instruct you that there is no legal requirement that the State utilize any specific investigative technique or scientific test to prove its case.

The jury found Atkins guilty on three counts of assault. Atkins appealed to the Court of Special Appeals, arguing that the trial judge had abused his discretion in giving the jury instruction because it improperly commented on the evidence. In an unreported opinion, the Court of Special Appeals affirmed the convictions and upheld the instruction given by the trial judge.

Held: Reversed and Remanded.

The instruction given was not proper under the facts of the case because it unfairly prejudiced the defendant and constituted commentary on a question of fact that invaded the province of the

jury. The investigative techniques instruction as worded effectively undermined the defense theory of self defense, and relieved the State of its burden to prove guilt beyond a reasonable doubt. Basically, the instruction directed the jury to ignore the fact that the State had not presented evidence connecting the knife to the crime, implying that the lack of such evidence is not necessary or relevant to the determination of guilt, and to disregard any argument by defense to the contrary. In addition, the Court emphasized, however, that its holding was based on the particular facts of this case and it was not holding that an investigative techniques instruction would never be proper.

Mark E. Furda v. State of Maryland, No. 100, September Term, 2010
Filed on August 17, 2011. Opinion written by Adkins, J.

<http://mdcourts.gov/opinions/coa/2011/100a10.pdf>

CRIMINAL LAW – PERJURY AND FALSE INFORMATION – FIREARM APPLICATION
– COMPOUND QUESTION – FUNDAMENTAL AMBIGUITY

CRIMINAL LAW – PERJURY AND FALSE INFORMATION – FIREARM APPLICATION
– EFFECT OF APPELLATE REVERSAL OF EARLIER COURT ORDER THAT WAS
BASIS FOR CONVICTIONS

Facts: After responding to a domestic altercation between Mark Furda and his wife, Montgomery County police seized Furda's extensive collection of weapons and transported him to the hospital for a mental health evaluation. Furda was later transferred to a behavioral health facility. Upon release, Furda requested the return of his firearms, which a judge denied on the grounds that Furda had been committed to a mental institution and was, therefore, prohibited from possessing a firearm. Although Furda asked the judge to reconsider, he did not wait for the judge's response before traveling to a gun store to acquire a new gun. When filling out the application to purchase a firearm, Furda certified, under penalty of perjury, that he had not been committed to a mental institution. His application was denied, and he was subsequently convicted of perjury and false information in a firearm application. In two separate appeals, Furda appealed both his convictions and the judge's earlier finding that Furda had been committed to a mental institution. While the Court of Special Appeals reversed the judge's denial of Furda's motion for the return of his weapons, it affirmed Furda's convictions.

Held: The Court of Appeals affirmed both convictions, holding that the question on the firearm application—"Have you ever been adjudicated mentally defective or have you been committed to a mental institution?"—was sufficiently unambiguous to serve as the predicate for a conviction of perjury and false information, and that Furda knowingly and willfully answered that question falsely. While a fundamentally ambiguous question on a firearm application cannot serve as the basis for a conviction of perjury or false information, a question is not fundamentally ambiguous merely because it is compound in nature or the words it uses have different meanings in different situations. Rather, a question is fundamentally ambiguous when it is entirely unreasonable to expect that the defendant understood the question posed to him.

Additionally, when examining whether a defendant intentionally lied on the application, a court should consider the context of the

question and the defendant's answers, as well as other extrinsic evidence relevant to the defendant's understanding of the questions posed in the application. The crime of intentionally giving a false statement under oath requires a court to focus on the defendant's intent and the facts as they existed at the time he filled out the firearm application. At the time Furda completed the application, the judge's order finding him to be a person prohibited from possessing firearms had not been modified or overturned. It is well settled that a court's decision is binding on the parties until it is overturned. Thus, up and until a defendant successfully defeats a court order on appeal, that court's finding remains valid. Here, considering that Furda had not yet defeated his court order on appeal, the order was still valid and he was required to disclose it on his firearm application.

Andre Devon Arthur v. State of Maryland, No. 90, September Term, 2010. Opinion filed on July 13, 2011 Adkins, J.

<http://mdcourts.gov/opinions/coa/2011/90a10.pdf>

CRIMINAL PROCEDURE - PRESERVATION OF SUFFICIENCY OF EVIDENCE CLAIM
- REQUIREMENTS FOR MOVING FOR JUDGMENT OF ACQUITTAL

CRIMINAL PROCEDURE - MARYLAND PATTERN JURY INSTRUCTIONS

Facts: Andre Arthur was convicted in circuit court for failure to obey a lawful order and resisting arrest. On July 4, 2007, Corporal Eric Stanley Heard was driving when he heard an item hit his patrol vehicle. Believing it was a newspaper that Arthur had thrown at the vehicle, Stanley stopped the vehicle and approached Arthur. According to Stanley, Arthur then began shouting obscenities at him, to which Stanley responded by telling Arthur to "settle down." When Arthur refused, Stanley attempted to arrest Arthur. Arthur physically struggled, resisting arrest, until two officers helped Stanley place Arthur on the ground and arrest him. At trial, Arthur argued that he had a right to resist the arrest because Stanley was attempting to regulate his speech in violation of the First Amendment of the United States Constitution. Arthur requested a jury instruction on the right to resist an unlawful arrest, but the court refused for two reasons-- it believed that Arthur had not generated the instruction, and the instruction was not in the Maryland Criminal Pattern Jury Instruction for resisting a warrantless arrest. Consequently, the court gave only the pattern instructions. On appeal, the Court of Special Appeals affirmed both convictions, holding that the trial court did not err in using the pattern jury instruction because the "reasonable grounds" language in that instruction adequately conveyed that the arrest must be lawful.

Held: The Court of Appeals reversed and ordered a new trial on both charges, holding that the trial court abused its discretion in failing to provide a jury instruction on the right to resist an unlawful arrest. The Court held that the pattern instruction was ambiguous because the jury could interpret "reasonable grounds" as "reasonable articulable suspicion," thus confusing the standard for an arrest with the standard for a *Terry* stop. This may have prejudiced Arthur because it may have led the jury to believe that he was required to succumb to arrest even if Stanley did not have probable cause to arrest. Moreover, the "NOTES ON USE" commentary to the Pattern Instruction directed courts to draft fact-specific resisting arrest instructions in cases where probable cause was at issue. The Court refused to address Arthur's sufficiency of the evidence claim because it was not preserved.

Tyrone Lawson v. Bowie State University, No.119, September Term, 2010. Opinion filed on August 16, 2011 by Adkins, J.

<http://mdcourts.gov/opinions/coa/2011/119a10.pdf>

PERSONNEL AND PENSION - STATUTORY INTERPRETATION - § 5-305 OF THE STATE PERSONNEL AND PENSIONS ARTICLE - WHISTLEBLOWER PROTECTION - REASONABLE BELIEF REQUIREMENT

Facts: Tyrone Lawson, an employee of the Bowie State University Police Department, drafted a letter disclosing potential abuses by his fellow officers and, feeling unable to report these violations to the chief of police, he presented the letter to the school's vice president. The vice president notified the chief of police of the contents of the letter. The chief subsequently fired Lawson for insubordination, among other things.

Following his termination, Lawson sought relief through the administrative channels, arguing that he was entitled to whistleblower protection because the letter constituted a "protected disclosure" as contemplated by statute. An administrative law judge considered the matter, and concluded that the employee's letter was not a "protected disclosure" because it was drafted as part of his personal "crusade" to improve the police department, rather than for the purpose of notifying a higher authority of a potential violation. The Circuit Court for Prince George's County affirmed the ALJ's decision.

Held: Court of Appeals reversed. When evaluating whether a disclosure is protected under the Maryland Whistleblower Protection Act, the correct test is an objective test which examines the disclosure itself. The statute requires only that the employee have a reasonable belief that he is reporting a violation, not that the employee possess a purely altruistic motive for the disclosure. The ALJ erred by relying on the employee's personal motivation for making the disclosure and concluding that it did not meet the statutory requirements.

Zvi Guttman, Trustee, et. al. v. Wells Fargo Bank, et. al., Misc. No. 20, September Term 2010, filed 16 August 2011. Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2011/20a10m.pdf>

REAL PROPERTY - CURATIVE STATUTE - STATUTORY INTERPRETATION - PLAIN LANGUAGE - LEGISLATIVE HISTORY - DEFECTS IN AFFIDAVIT OF CONSIDERATION - FROM THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF MARYLAND CODE (1974, 2010 REPL. VOL.), REAL PROPERTY ARTICLE, § 4-109, THE GENERAL ASSEMBLY EXPRESSED A CLEAR INTENT THAT THE DEFECTS PRESENT IN THE INSTANT CASE - WHICH INVOLVE MISSING OR IMPROPER AFFIDAVITS OF CONSIDERATION - BE CURED.

Facts: The United States Bankruptcy Court certified, and this Court accepted to review, four questions pertaining to § 4-109 of the Real Property Article of the Md. Code. In pertinent part, the statute reads:

(b) Defective grants recorded on or after January 1, 1973. - If an instrument is recorded on or after January 1, 1973, whether or not the instrument is executed on or after that date, any failure to comply with the formal requisites listed in this section has no effect unless it is challenged in a judicial proceeding commenced within six months after it is recorded.

(c) Failures in formal requisites of an instrument. - For the purposes of this section, the failures in the formal requisites of an instrument are:

- (1) A defective acknowledgment;
- (2) A failure to attach any clerk's certificate;
- (3) An omission of a notary seal or other seal;
- (4) A lack of or improper acknowledgment or affidavit of consideration, agency, or disbursement; or
- (5) An omission of an attestation.

In each of the four adversary proceedings - consolidated to facilitate a coordinated disposition of the common issues of Maryland law - the trustees seek to avoid a transfer of a lien via a deed of trust. The trustees assert that, as a consequence

of a defective or missing affidavit of consideration, the deeds of trust are void as to subsequent bonafide purchasers.

The creditors filed a motion to dismiss in all of the adversary proceedings, disputing the trustees' cause of action. According to the creditors, the lack of an affidavit of consideration or missing information in the affidavit of consideration is cured pursuant to § 4-109(c)(4). Therefore, each of the recorded instruments are rendered valid and enforceable as to subsequent bonafide purchasers.

Held: In each of the four certified questions, the defects identified there are cured by § 4-109 and the instruments are thereby valid and enforceable as to third parties. In this case, the language of the statute is plain and unambiguous. The statute cures explicitly the sort of defects the trustees identify and challenge: "A lack of or improper . . . affidavit of consideration." § 4-109(c)(4).

Further, a court may look beyond the plain meaning of the statute's words to avoid an absurd result and/ or to confirm the plain reading of the statute. In the present case, the Court considered extrinsic evidence of legislative intent and confirmed its reading of § 4-109. In the 1970s, the General Assembly restructured the State's real property law and established § 4-109 - a provision that cures prospectively instruments which would otherwise be void for failure to comply with certain "formal requisites." In enacting § 4-109, the General Assembly balanced the value of accurate and reliable land records with the importance of promoting confidence in the validity of instruments and the free flow of commerce, unhindered by "formalities."

Douglas Wietzke, et ux., v. The Chesapeake Conference Association, et al., No. 122, September Term 2010, Filed August 17, 2011. Opinion by Battaglia, J.

<http://mdcourts.gov/opinions/coa/2011/122a10.pdf>

REAL PROPERTY - PRIVATE NUISANCE - JURY INSTRUCTIONS

TORT LAW - VIOLATION OF COUNTY ORDINANCE - PRIMA FACIE EVIDENCE OF NEGLIGENCE

Facts: Douglas and Vanessa Wietzke, Petitioners, filed a four-count complaint against the Chesapeake Conference Association of Seventh-Day Adventists ("the Church"), and various others, Respondents, in the Circuit Court for Montgomery County alleging nuisance, trespass, and negligence in connection with the construction of a new parking lot by the Church, which, the Wietzkes claimed, was ultimately the cause of the "repeated and continu[ed] flooding" of their home in Silver Spring, Maryland.

At the ensuing jury trial, the Wietzke's adduced evidence that the Church had been issued two Notices of Violation from Montgomery County arising from their construction of the new parking lot and the construction of a stormwater pond on their property. The director of the Church's construction project testified that one of the Notices, which was issued pursuant to Section 19-16(a) of the Montgomery County Code, was issued after water containing sediment was deposited onto the Wietzkes' property. Nevertheless, after the close of the Wietzkes' case, the Montgomery County Circuit Court granted the Church's motion for judgment as to the Wietzkes' negligence claim, reasoning that the ordinances violated by the Church were not intended to protect a class of persons encompassing the Wietzkes, and that there was no proof "that the specific alleged violation was the cause" of the flooding.

After the close of the Church's case, but before the jury was instructed, the trial judge, over the Wietzkes' objections, denied several of the Wietzkes' requested jury instructions relating to the nuisance count: one requested, but denied, jury instruction would have directed the jury that interference with the comfortable enjoyment of the affected property was the only consideration; another rejected instruction would have admonished the jury that Montgomery County's approval of the Church's construction project was not a defense to the Wietzkes' claim for private nuisance; yet another rejected instruction would have advised the jury that the existence of other contributing sources to a nuisance was not a defense to an offending landowner's own

contribution to the same nuisance. Thereafter, the jury found in favor of the Church on nuisance and trespass, and judgment was entered.

The Wietzkes noted an appeal, arguing that the trial judge erroneously instructed the jury to consider the reasonableness of the Church's conduct in using its land when determining nuisance liability, that the trial judge erred in rejecting the Wietzkes' requested jury instructions regarding County approval and contributing sources, and that the trial judge erroneously granted the Church's motion for judgment as to the negligence count. The Court of Special Appeals affirmed.

Held: The Court of Appeals affirmed in part and reversed in part. The Court first reviewed the propriety of the trial judge's nuisance instructions under the abuse of discretion standard. Regarding the first nuisance instruction, which directed the jury to consider the reasonableness of the Church's conduct in using its land, the Court explained that, historically, the nuisance inquiry required "a determination of whether the offending landowner's use of its own property was 'reasonable, usual, and proper.'" While some early nineteenth century nuisance cases "flirted with discussing only the unreasonableness of the interference caused to the affected landowner's use and enjoyment as a basis for relief," the Court instructed that it had never "expressly adopted a view consistent with that doctrine nor deflected one that balanced reasonable use versus unreasonable interference." Thereafter, the Court pointed out that the contemporary trend was to characterize private nuisance as an exercise in "balanc[ing] the conflicting rights of landowners," especially in surface water cases. Applying these principles to the Wietzkes' case, the Court concluded that the trial judge "properly instructed the jury that they should consider the reasonableness of the offending landowner's use of its property."

As to the Wietzkes' second and third requested instructions, which would have advised the jury that neither the County's approval of the Church's construction project, nor the fact that other properties were contributing to the same nuisance, were defenses to a nuisance action, the Court instructed that, "[e]ven if a requested jury instruction is a correct exposition of the law, a trial judge should incorporate it only where it is generated by the evidence before the jury, and not already fairly covered by the instructions given." First, the Court determined that neither the Church's theory of its case, nor the evidence adduced at trial, generated the Wietzkes' requested instructions. Further, the Court reasoned, the trial judge's instructions, that

"[a] person who creates or continues a nuisance is responsible for the injury or damage caused to others by the nuisance . . . [and the Church is] liable if they created a change in that water flow which created a nuisance to the Wietzkes," already fairly covered the necessary territory.

Lastly, however, the Court reversed the trial judge's grant of the Church's motion for judgment as to the Wietzkes' negligence claim. Drawing upon Judge John C. Eldridge's opinion in *Brooks v. Lewin Realty III, Inc.*, 378 Md. 70, 835 A.2d 616 (2003), the Court instructed that *prima facie* evidence of negligence may be submitted to the jury where a plaintiff shows "the violation of a statute or ordinance [is] designed to protect a specific class of persons which includes the plaintiff," and that "the violation proximately caused the injury complained of."

The Court examined the Church's violation of Section 19-16(a) of the Montgomery County Code, and highlighted that, based on the ordinance's legislative record, the purpose of the ordinance was to prevent liquid containing sediment from being deposited upon the "premises of another." Moreover, the Court observed that a Notice of Violation was issued, at least in part, because "[t]here was sediment water and deposition on the property below" and that "[t]here was flooding of the house." While the County's Notice did not specifically list the Wietzkes' property, the Church's construction project manager testified that the private property referred to was the Wietzkes', according to the opinion.

COURT OF SPECIAL APPEALS

State of Maryland v. Vincent Greco, No. 2343, September Term, 2009. Opinion filed on July 7, 2011 by Raker, J.

<http://mdcourts.gov/opinions/cosa/2011/2343s09.pdf>

CRIMINAL PROCEDURE - IMPERFECT SELF DEFENSE - ADMISSIBILITY OF PSYCHIATRIC TESTIMONY

CRIMINAL PROCEDURE - STATED RATIONALES - LACK OF CONSTITUTIONAL REQUIREMENTS

CRIMINAL PROCEDURE - POST-CONVICTION RELIEF - APPLICATION OF § 7-106(c)(2)

CRIMINAL PROCEDURE - WAIVER OF ARGUMENT ON APPEAL - RULE 8-131

Facts: The central issue in this case was whether the circuit court erred in granting appellee post-conviction relief under § 7-106(c)(2) of the Criminal Procedure Article.

In 1982, appellee was charged, tried before a jury, and convicted of the first degree murder, felony murder, and first degree rape of a 78 year-old women. At trial, appellee admitted to killing the victim, but asserted the sex was consensual and the killing was in self-defense. In support of his self-defense claim, appellee attempted to introduce expert psychiatric testimony regarding his mental status and how it altered his perception of the threat the victim posed to him at the time of her death. The trial court allowed some, but not all, of this evidence to be admitted.

In 2008, appellee made a claim for post-conviction relief that requested a new trial where more of the expert psychiatric testimony would be admitted. In 2009, the circuit court granted appellee post-conviction relief, reasoning that § 7-106(c) allowed a new trial for the first degree murder conviction based on the theory that *Hoey v. State*, 311 Md. 473, 536 A.2d 622 (1988), and *Simmons v. State*, 313 Md. 33, 542 A.2d 1258 (1988), together overruled the rule from *Johnson v. State*, 292 Md. 405, 439 A.2d 542 (1982), that had been applied in appellee's trial to exclude some of the expert testimony.

The State appealed this decision to the Court of Special Appeals, and, before this Court, argued that the circuit court

incorrectly applied § 7-106(c)(2) because the opinions in question did not create a new legal standard required by the state or federal constitution that was intended to be applied retrospectively, as is necessary to grant post-conviction relief under that section. Appellee argued that the opinions did create a new, constitutionally required legal standard that was intended to be applied retrospectively.

Held: The Court of Special Appeals reversed the circuit court's grant of post-conviction relief under § 7-106(c)(2).

The Court explained that § 7-106(c)(2) requires, among other things, that the standard in question must be not previously recognized and mandated by either the state or federal constitution. The standard at issue was that Maryland law allows a defendant to present testimony regarding his mental impairment in support of a claim of imperfect self-defense.

The Court broke this standard down into three parts: (1) the requirement that the State prove all elements of a crime and the right of a defendant to put on a defense against each element; (2) the recognition of imperfect self-defense based on an honest but unreasonable belief; and (3) the recognition that psychological evidence of a defendant's mental impairment may be relevant to such a defense and may be admissible. Each part of the standard was then examined in detail to determine if any part was both not previously recognized and constitutionally mandated.

The right to present a defense to every element (1) was found to be constitutionally mandated, but previously recognized long prior to appellee's 1982 trial.

The imperfect self-defense based on an honest but unreasonable belief (2) was found to have been recognized by the Court of Special Appeals as early as 1975, and when the Court of Appeals officially recognized it in 1984, it did so using common law reasoning and made no indication of any constitutional mandate.

The potential relevance and admissibility of psychological evidence to prove imperfect self-defense (3) was found to be neither new nor constitutionally mandated. A detailed examination of the *Johnson*, *Hoey*, and *Simmons* opinions revealed that, contrary to appellee's assertions, *Johnson* did not prohibit the admission of psychological evidence relevant to a valid defense, but only of evidence offered in support of the invalid diminished-capacity defense. *Hoey* and *Simmons* clarified this aspect of *Johnson* rather than overruling it, even if isolated

snippets of their language suggested otherwise. Several cases from the period between 1982 and 1988 confirmed that psychological evidence relevant to a valid defense was admissible throughout. The relevant holdings in *Hoey* and *Simmons* were also not constitutionally mandated as the opinions made no indication of any such reasoning but based the holdings on other grounds.

Only one part of the standard at issue was imposed by a constitution, and none of them were not recognized previously. Because both of these conditions are required by the language of § 7-106(c)(2)(i), no part of the standard is eligible for retrospective application to a criminal trial under § 7-106(c)(2). The Court held that the circuit court that granted appellee a new trial under the statute did so in error, and reversed.

Jarmal Johnson v. State of Maryland, No. 3117, September Term, 2007. Opinion filed on June 30, 2011 by Raker, J.

<http://mdcourts.gov/opinions/cosa/2011/3117s07.pdf>

CRIMINAL LAW - LESSER INCLUDED OFFENSES - ASSAULT WITH INTENT TO MURDER

CRIMINAL PROCEDURE - FAILURE TO CHARGE IN INDICTMENT - EXERCISE OF JURISDICTION

CRIMINAL PROCEDURE - CONSTRUCTIVE AMENDMENT OF INDICTMENT - TIME FOR APPEAL

Facts: The issue in this case was whether, on collateral attack, appellant's conviction for assault with intent to murder should be vacated because his indictment did not contain that charge.

In 1992, appellant was indicted with the charges of attempted murder in the first degree, assault, the use of a firearm in the commission of a felony, and the wearing, carrying, or transporting of a weapon. At trial, the jury convicted him of assault with intent to murder, assault, the use of a firearm in the commission of a felony, and the wearing, carrying, or transporting of a weapon. He was acquitted of attempted first degree murder. He appealed his convictions and they were affirmed by the Court of Special Appeals in 1993.

In 2008, appellant filed a motion to correct an illegal sentence, arguing for the first time that his assault with intent to murder conviction must be vacated because he was not charged with that crime. The circuit court denied appellant's motion and he appealed to the Court of Special Appeals.

Although appellant was not charged in his indictment with the crime of assault with intent to murder, the record of the trial indicates that all participants behaved as though it was. The judge gave jury instructions on the elements of this crime, the prosecutors argued it, and the jury convicted him of it, all without any objection from appellant or his counsel. On direct appeal from his conviction, appellant also made no mention argument regarding the absence of assault with intent to murder from his indictment.

On appeal from the denial of his motion to correct an illegal sentence, appellant argued that he was never indicted for the crime of assault with intent to murder and that assault with

intent to murder is not a lesser included offense of attempted murder. In his view, the circuit court did not have jurisdiction to try him for an uncharged offense, rendering his conviction void and his sentence illegal. He asserted that his appeal was timely because lack of jurisdiction may be raised at any time.

Held: The Court of Special Appeals dismissed the appeal as untimely filed.

The Court agreed with appellant that assault with intent to murder is not a lesser included offense of attempted murder because it contains elements that attempted murder lacks, and the indictment therefore did fail to contain the charge at issue. The Court disagreed, however, that this failure divested the circuit court of subject matter jurisdiction to try such a charge. Rather, the circuit court simply made an error in the exercise of the subject matter jurisdiction that it did possess.

Circuit courts in Maryland are courts of original jurisdiction that can hear all cases not specifically reserved for another forum. There is no doubt that the circuit court had subject matter jurisdiction to try a criminal case with a charge of assault with intent to murder, but it erred in exercising that jurisdiction. Rather than allowing the jury to convict only on the charges contained in the indictment, the circuit court allowed the parties, through their behavior, to constructively amend the indictment by expanding the grounds upon which the jury could convict. This was error, but it was not error that deprived the court of its subject matter jurisdiction. The remedy for this error in the exercise of jurisdiction was a direct and timely appeal, but appellant did not raise this objection on direct appeal.

State of Maryland v. Roxie Brown, No. 858, September Term, 2010.
Opinion filed on July 8, 2011 by Raker, J.

<http://mdcourts.gov/opinions/cosa/2011/858s10.pdf>

CRIMINAL PROCEDURE - SIGNING OF CRIMINAL INFORMATION - ASSISTANT
STATE'S ATTORNEYS

Facts: The issue in this case was whether assistant state's attorneys (ASAs) are authorized to sign criminal informations under Maryland Rule 4-202(b), even in counties where they are not explicitly authorized to do so in §§ 15-402 through 15-424 of the Criminal Procedure Article.

Appellee was charged in Anne Arundel County district court with three counts of felony assault, three counts of misdemeanor assault, and one count of reckless endangerment. Noting problems with the original charges, an ASA signed and filed a new criminal information alleging three counts of reckless endangerment. Appellee prayed a jury trial in both cases, and they were transferred to the circuit court for trial.

On the scheduled trial date, the State entered a *nolle prosequi* to all of the counts in the original case and to one of three counts in the criminal information signed by the ASA. Appellee entered a not guilty plea and moved, orally, to dismiss the criminal information, alleging that the signature on the information did not comply with Maryland Rule 4-202(b) because it was not signed by the State's Attorney but instead it was signed by an ASA. The trial court granted the motion and the State noted this timely appeal.

Held: The Court of Special Appeals reversed the circuit court's dismissal and remanded the case for further proceedings.

The Court explained that Maryland Rule 4-202(b) requires that "[a]n indictment or information shall be signed by the State's Attorney of a county or by any other person authorized by law to do so," and that Maryland Rule 4-102(k) defines "State's Attorney" as "a person authorized to prosecute an offense." Thus, the Rules allow a "person authorized to prosecute an offense" to sign an information.

To determine if ASAs were so authorized, the Court examined the constitutional creation and statutory authorization of the office of State's Attorney, and noted that the Court of Appeals has held that the State's Attorney is "vested with the broadest official discretion" to institute and prosecute criminal cases.

State v. Romulus, 315 Md. 526, 537, 555 A.2d 494, 499 (1989).

An integral and necessary part of this broad official discretion is the ability to delegate the power and duties of the office of the State's Attorney to persons beyond the individual occupying that constitutional position.

The Court held here that the explicit authorization for State's Attorneys to delegate tasks in certain counties in §§ 15-402 through 15-424 does not mean that the State's Attorneys in other counties, such as Anne Arundel, are unauthorized to delegate such tasks. Rather, the State's Attorney's authority to delegate responsibilities related to prosecution to ASAs is part of a State's Attorney's broad official discretion.

The Court held that the ASA who signed appellee's information was a person authorized to prosecute an offense in Anne Arundel, and therefore was authorized to sign a criminal information. The circuit court's grant of appellee's motion to dismiss was therefore reversed.

ATTORNEY DISCIPLINE

The following name has been placed upon the register of attorneys in the Court of Appeals effective July 28, 2011:

NORMAN CHRISTOPHER RAY

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By an Order of the Court of Appeals of Maryland dated July 19, 2011, the following attorney has been indefinitely suspended by consent from the further practice of law in this State:

MICHAEL LOUIS SUBIN

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By an Order of the Court of Appeals of Maryland dated August 3, 2011, the following attorney has been disbarred by consent from the further practice of law in this State:

GLENN EDWARD CULPEPPER

*

By an Order of the Court of Appeals of Maryland dated August 3, 2011, the following attorney has been disbarred by consent from the further practice of law in this State:

EGAN PATRICK O'BRIEN

*

The following name has been replaced upon the register of attorneys in the Court of Appeals effective August 8, 2011:

JEFFREY S. MARCALUS

*

By an Opinion and Order of the Court of Appeals of Maryland dated July 18, 2011 the following attorney has been indefinitely suspended effective August 17, 2011:

JAGJOT SINGH KHANDPUR

*

By an Opinion and Order of the Court of Appeals of Maryland dated August 19, 2011, the following attorney has been disbarred from the further practice of law in this State:

GREGORY RAYMOND KEINER

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By an Order of the Court of Appeals of Maryland dated July 28, 2011, the following attorney has been disbarred by consent effective August 29, 2011 from the further practice of law in this State:

LESTER ANTHONY DOUGLAS ADAMS

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