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http://www.mdcourts.gov/opinions/cosa/2016/1522s15.pdf

ART. 2B § 16-101(b)(1)(i) – ALCOHOLIC BEVERAGE LICENSE – JUDICIAL REVIEW – STANDING – AGGRIEVED PARTY – ECONOMIC INJURY

Facts:

Article 2B § 16-101(b)(1) addresses who is authorized to appeal "a decision of a local licensing board to the circuit court of the county." In addition to other requirements, the statute provides that a "licensee . . . that appeals a decision of a local licensing board . . . must be aggrieved by the decision of the board[.]"

Hiteshbhai Patel, appellant, holds a Class A beer and wine license for the use of Omkara, Inc., t/a Big Willey's, a convenience store in Crisfield, Maryland. He sought judicial review of a decision of the Board of License Commissioners for Somerset County, appellee, to issue the same type of license to Azaz Azam and another person for the use of Somers Cove Market, Inc., a nearby convenience store in Crisfield. Mr. Patel argued that both convenience stores drew patrons from the same geographic area, and that prior to the issuance of the license to Somers Cove, there were five such licenses in Crisfield, a small municipality. He asserted that the issuance of an additional license would adversely affect his business, causing him to suffer economic damages different from that of the general public.

The circuit court dismissed Mr. Patel's petition for judicial review, finding that Mr. Patel did not have standing to challenge the Board's issuance of the license to Somers Cove because he presented no evidence of a specific economic injury, as is the requirement in zoning cases.

Held: Vacated and remanded for further proceedings.

To establish that he or she is aggrieved by the issuance of an alcoholic beverage license to a nearby competitor, an existing licensee need not show specific, actual harm from the issuance of the license. Rather, the existing licensee need only demonstrate the likelihood of harm due to increased competition. Because Mr. Patel satisfied this requirement, the circuit court erred in dismissing the petition for judicial review.

Steven Burnett v. Cereta Spencer, No. 470, September Term 2015, filed September 28, 2016. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2016/0470s15.pdf

MARYLAND RULES – RULE 2-651 – ATTACHMENT OF CORPORATE INTERESTS TO SATISFY A JUDGMENT

Facts:

Cereta Spencer and Steven Burnett were divorced in the Circuit Court for Baltimore County in 2010. The court granted Spencer a monetary award of $3.7 million. On July 3, 2012, the clerk docketed two money judgments in favor of Spencer and against Burnett, in the amounts of $912,500.00 and $1,612,500.00. The judgments appeared to represent unpaid portions of the monetary award.

On November 3, 2014, Spencer obtained writs of garnishment of wages against Burnett's employer, CAEI Inc., and on Burnett's bank. Three days later, on November 6, 2014, Spencer filed a motion for ancillary relief under Md. Rule 2-651, which was directed to CAEI, a Subchapter S corporation in which Burnett was the majority owner.

On December 9, 2014, the circuit court granted the motion for ancillary relief. Its orders "charged" Burnett's "equity interests" in CAEI "with the payment of all amounts due" on the two judgments against him. In addition, the orders "enjoined" Burnett and CAEI from "transferring any assets by way of dividend, loan or otherwise" to Burnett. The orders required that "any distributions payable or any other money that is or becomes due to" Burnett "by reason of his corporate stock shares in CAEI" "be directed" to Spencer.

Burnett and CAEI moved for reconsideration. Burnett and Spencer eventually reached an agreement on February 9, 2015, which was embodied in a consent order that was signed by the court on March 16, 2015, and docketed on March 25, 2015. Under the consent order, Burnett could join in CAEI's motion for reconsideration, which was to be heard on February 10, 2015, but he withdrew his objections to service and his motion for reconsideration of the court's original charging orders of December 9, 2014. The consent order gave Burnett until February 26, 2015 to elect his exemptions, if any, from Spencer's action to collect on her judgment.

On February 10, 2015, the day after Burnett and Spencer reached the agreement that became the consent order, the circuit court conducted a hearing on CAEI's motion for reconsideration. In an order signed by the court on February 19, 2015, and docketed on March 9, 2015, the court amended its December 9, 2014, order in two respects: (1) it permitted CAEI to reimburse Burnett for legitimate business expenses incurred on CAEI's behalf; and (2) it permitted CAEI to make and forgive loans to Burnett, provided that the company gave advance notice to Spencer's attorneys.

In accordance with the agreement that became the consent order between Burnett and CAEI, Burnett claimed several exemptions on February 26, 2015. At the same time, Burnett filed what he called "a motion to release property from levy" under Md. Rule 2-643(c). In that motion, Burnett asked the court to release the "levy" on his corporate interest. He contended that a charging order could only reach partnership, and not corporate interests.

In an order dated April 21, 2015, the circuit court denied Burnett's motion to release property from levy, which was docketed on April 27, 2015. On May 21, 2015, Burnett appealed. Spencer moved to dismiss the appeal.

Held: Affirmed.

The Court of Special Appeals held that: (1) Burnett's appeal was properly before the Court; (2) Md. Rule 2-651 authorizes the circuit court to attach certain aspects of a judgment debtor's interest in a corporation; and (3) the corporation was required to pay the judgment creditor, not the judgment debtor, when the corporation issued any payment or dividend to the judgment creditor.

First, in support of her motion to dismiss, Spencer argued that Burnett had no right to appeal because he "consented to the validity" of the charging order when he entered into the consent order on February 9, 2015. Second, Spencer argued that Burnett's appeal was untimely because, she says, he was required to note his appeal within 30 days of March 25, 2015, the date when the clerk docketed the consent order. However, her premise for this motion was incorrect because Burnett appealed from the denial of his "motion to release property from levy," and not the consent order.

Under Maryland Code (1974, 2013 Repl. Vol.), § 12-303(1) of the Courts and Judicial Proceedings Article ("CJP"), Burnett had the right to appeal from the order denying that motion, because it was an order "with reference to the receipt or charging of the income, interest, or dividends" of the "property with which the action is concerned," or "the refusal to modify, dissolve, or discharge such an order." The court did not deny that motion until April 21, 2015, and the clerk did not enter it on the docket until April 27, 2015. Burnett's appeal was timely because he noted his appeal on May 21, 2015, less than 30 days after the clerk docketed the appealable interlocutory order.

Second, the Court rejected Burnett's contention that Md. Rule 2-651 could not be used to fashion a charging order against an interest in a corporation. Burnett argued that no statute expressly authorizes a court to impose a charging order against a shareholder's interest in a corporation. He incorrectly contended that a court could not order a form of relief under Rule 2-651 unless the relief had some corresponding statutory basis.

The Court reasoned that Burnett's argument ignored Md. Rule 2-631, which concerns the "[e]nforcement procedures available" for judgment-creditors. It states that "[j]udgments may be

enforced only as authorized by these rules or by statute." (Emphasis added.) Because the rule employs the disjunctive term "*or*," a person may enforce a judgment by a method that is authorized by the rules alone: the method need not also be expressly authorized by statute.

Furthermore, Burnett's corporate interest was subject to attachment under CJP § 3-305, which states that "[a]n attachment may be issued against any property or credit, matured or unmatured, which belong to a debtor." Burnett's corporate interest was subject to enforcement of the judgment because the distributions are "property or credit, matured or unmatured." The circuit court did not exceed its power when it entered an order enjoining the transfer, conveyance, or other disposition of property that was subject to enforcement of the judgment under Md. Rule 2-651.

Finally, the Court rejected Burnett's contention that the trial court erred in allegedly "exempting" Spencer from the burden of proving which portion of the corporate distributions were "subject to the enforcement of the judgement[.]" Burnett argued that the charging order left him without any source of funds to pay the tax liability he incurred as a result of the distributions. He also asserted that some portion of the distributions belonged to CAEI and not to him, and Spencer did not meet her alleged burden of quantifying the proportion of the distributions that allegedly belonged only to him. The Court found that Burnett failed to preserve his arguments because he did not present them in the circuit court.

However, even if Burnett had preserved the arguments, the Court reasoned that they would be unmeritorious because the declaration of a dividend creates a debtor-creditor relationship between a corporation and its shareholders. If a corporation decides to distribute $100 to its shareholders, it owes $100 to each shareholder – not $100 minus the shareholder's individual tax liability on account of the distribution. Accordingly, the charging order allowed Spencer to attach the debt that the corporation owed to its shareholder, Burnett.

Karen Streaker v. Kristina Boushehri, et al., No. 1391, September Term 2015, filed September 28, 2016. Opinion by Nazarian, J.

http://mdcourts.gov/opinions/cosa/2016/1391s15.pdf

MARYLAND COURTS & JUDICIAL PROCEDURE CODE SECTION 3-2A – 04 (B)(4) – TWENTY PERCENT RULE

A party in a medical malpractice action has the burden to prove that his or her medical expert does not devote more than twenty percent of his or her professional activities to activities that directly involve testimony in personal injury claims.

Facts:

Karen Streaker filed a medical malpractice claim against Kristina Boushehri, a Certified Nurse Midwife, and Capital Women's Care, LLC ("CWC"), her practice, for injuries and damages she allegedly suffered while under their care. As required by Maryland's Health Care Malpractice Claims Act, Ms. Streaker designated a medical expert, Lawrnece S. Borow, M.D., to certify that Ms. Boushehri and CWC had departed from the relevant standards of care and that those departures proximately caused Ms. Streaker's personal injuries and damages. Ms. Streaker filed a Certificate of Qualified Expert from Dr. Borow, in which he attested that he did not devote more than twenty percent of his professional time to activities that directly involve testimony in personal injury claims. In response, the defendants served discovery, including discovery relating to Dr. Borow's professional activities. Dr. Borow produced some materials, but declined to produce others.

The defendants eventually filed a motion to compel financial records and the court granted it a week before trial and the day before Dr. Borow's scheduled *de bene esse* deposition. The defense also subpoenaed Dr. Borow's office calendar and a list of his prior testimony, but Dr. Borow moved (in Pennsylvania, where he lives) to quash it, and the *de bene esse* deposition went on without those materials. Dr. Borrow testified during the direct examination portion of the deposition that he spent approximately fifteen percent of his professional time on work that directly involves testimony in personal injury actions. On cross, the defense challenged his calculation, contending that Dr. Borow had misalloted time spent preparing for depositions as work not directly related to testimony. The defense also argued that Dr. Borow's records were incomplete and that he had failed to reveal or itemize work he had performed as an expert witness.

The defense filed a motion to exclude Dr. Borow's testimony because he did not meet the Twenty Percent Rule. Both the defense and Ms. Streaker presented the court with calculations of the time Dr. Borow devoted to activities directly involved in personal injury claims. At the close of the hearing, the trial court granted the motion, noting that the record regarding Dr. Borow's professional activities was muddled and incomplete, that he found some of the doctor's

testimony "curious," and that ultimately the defendant's version or analysis was a much more accurate account of the testimony concerning Dr. Borow's activities than Ms. Streaker's version. After excluding Ms. Streaker's only medical expert witness, the court granted the defendant's motion for summary judgment. Ms. Streaker appealed, contending that the trial court erred in calculating the Twenty Percent Rule by including initial case reviews when calculating the time Dr. Borow spent in activities directly involved in testimony in personal injury claims, and in granting the defense's motion for summary judgment. Ms. Streaker also asserted that the defense had the burden to prove that Dr. Borow did not meet the Twenty Percent Rule.

Held: Affirmed.

The Court of Special Appeals held that a party in a medical malpractice action has the burden to prove that his or her medical expert does not devote more than twenty percent of his or her professional activities to activities that directly involve testimony in personal injury claims.

The Court also held that the trial court did not err in finding that the plaintiff's medical expert did not meet the Twenty Percent Rule when presented with a muddled record regarding the doctor's professional activities and the doctor's testimony lacked credibility. The Court explained that it did not specifically address whether initial case reviews should be included in the category of activities that directly involve testimony in personal injury claims, but that the trial court did not abuse it's discretion in finding the Dr. failed to satisfy the Twenty Percent Rule based on the record before it, which included initial case reviews.

Finally, the Court explained that the trial court correctly granted the defendant's motion for summary judgment after finding that the plaintiff's only medical expert did not meet the Twenty Percent Rule, which left the plaintiff without a medical expert to testify as to the standard of care.

State of Maryland v. Larry Dixon, No. 2781, September Term 2015, filed September 30, 2016. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2016/2781s15.pdf

MENTAL HEALTH – COMPETENCY TO STAND TRIAL – PRE-TRIAL CONFINEMENT

Facts:

Dixon was accused of the July 3, 2015 murder of Keith Glascoe. On that day, when the police arrived at a Baltimore City residence in response to a 911 call, Dixon admitted that he shot Glascoe. Dixon was arrested and charged with first and second degree murder and first degree assault.

Dixon was incarcerated in general population housing at the detention center while awaiting his trial. While in detention, Dixon was assessed by a mental health clinician. Dixon reported that he was experiencing depression, anxiety, and interrupted sleep and that he had stopped taking his prescribed psychiatric medication. Dixon's family told Dixon's attorney that Dixon routinely minimized his mental health issues and was paranoid about the police, correctional officers, and his court proceedings. Dixon's wife reported that, prior to his arrest, Dixon had become increasingly paranoid and was experiencing auditory hallucinations.

The circuit court ordered the State Department of Mental Health and Hygiene ("the Department") to examine Dixon to assess his criminal responsibility and competency to stand trial. A psychologist employed by the Department performed an initial evaluation of Dixon pursuant to the court's order. In a letter dated January 8, 2016, the Department psychologist requested an additional sixty days to allow the Department to conduct a more extensive evaluation of Dixon's competency and criminal responsibility. The Department psychologist stated that she had "made arrangements with the Pretrial Evaluation Unit of the Clifton T. Perkins Hospital Center for Mr. Dixon's further evaluation."

The circuit court found good cause to extend the time for the Department to conduct its examination of Dixon's competency to stand trial. The court issued two orders on January 13, 2016. The first order, extended the period for Dixon's competency examination and, finding that because of the apparent severity of his mental disorder, Dixon would be endangered by continued confinement in the correctional facility, ordered the immediate transportation of Dixon to Perkins where he was to be "admitted as an inpatient and remain hospitalized until further order of [the] Court." The second order extended the period for Dixon's criminal responsibility examination and also required Dixon's immediate transportation to Perkins. In an order signed the next day, the court clarified that Dison was to be transported to Perkins on "Tuesday, January 19, 2016 at 10:00 for admission and treatment[,]" and that Dixon was to remain at Perkins "until further order of this Court." In a report dated April 8, 2016, the Department concluded that Dixon was not competent to stand trial.

On February 12, 2016, the Department filed an appeal challenging the January 13 and January 14, 2016 orders of the Circuit Court for Baltimore City. In their timely appeal, the Department questions whether the circuit court's orders violated the plain language of Maryland Code (2001, 2008 Repl. Vol., 2015 Supp.) §§3-105 and 3-111 of the Criminal Procedure Article. Dixon filed a motion to dismiss the Department's appeal, asserting that because the Department has already completed his competency evaluation, the question presented by the Department was moot.

Held: Affirmed.

The Court of Special Appeals first determined that the issue presented in the instant "capable of repletion yet evading review[,]" and, therefore, was not moot. *State v. Parker*, 334 Md. 576, 586 (1994). Consequently, the Court denied the appellant's motion to dismiss the appeal.

The Court opined that the plain language of Criminal Procedure §§3-105 and 3-111 grants the circuit court considerable discretion to dictate the conditions of a defendant's confinement while awaiting and undergoing psychiatric evaluations. Specifically, where a court determines that a defendant, "because of the apparent severity of the mental disorder . . . would be endangered by confinement in a correctional facility," the court may order that the Department "confine the defendant, pending examination, in a medical facility that the Health Department designates as appropriate[.]" C.P. §3 105(c)(2)(i)(1). C.P. §3-111(b)(2).

Discerning no error in the circuit court's determination that Dixon needed to be confined in a psychiatric facility for his own safety pending his psychiatric evaluations, the Court of Special Appeals held that the circuit court did not err or abuse its discretion by ordering that Dixon be confined to Perkins, which was the facility expressly identified by the Department's psychologist as the appropriate venue for Dixon's evaluations, and which is the only secure medical facility in the State that the Department has designated to receive patients who have been accused of felonies.

Jeffrey Michael Shiflett v. State of Maryland, No. 2198, September Term 2014, filed September 28, 2016. Opinion by Nazarian, J.

http://mdcourts.gov/opinions/cosa/2016/2198s14.pdf

SIXTH AMENDMENT – CRIMINAL DEFENDANT'S RIGHT TO BE PRESENT AT TRIAL – MARYLAND RULE 4-231 – PRESENCE OF DEFENDANT – MARYLAND RULE 4-231 (c)(1)-(2) – WAIVER OF RIGHT TO BE PRESENT

Trial court did not abuse its discretion when it conditioned the defendant's reentry to the courtroom upon agreement to wear a stun cuff after the court found that the defendant posed a threat to courtroom security.

Facts:

Jeffery Shiflett was charged with first-degree murder, first-degree assault, first-degree burglary, third-degree burglary, carrying a weapon openly with intent to injure, and two counts of second-degree assault in the Circuit Court for Baltimore County. At trial, Mr. Shiflett conceded that he had killed the victim, but disputed that it was premediated. To contest that Mr. Shiflett was guilty of first-degree murder, the defense attempted to introduce evidence of Mr. Shiflett's untreated mental illnesses. When that failed, the defense attempted to use evidence of Mr. Shiflett's psychiatric disorders to demonstrate that he was not competent to stand trial. After a mid-trial competency hearing, Mr. Shiflett was deemed competent, and evidence of his psychiatric disorders was ultimately not admitted into evidence.

Before and throughout the trial, Mr. Shiflett behaved in a disruptive and threatening manner. He consistently used angry, vulgar, and violent language with the court, and repeatedly threated the judge and the prosecutor. Mr. Shiflett was permitted to be in the courtroom unrestrained during jury selection, but after he tried to force his way into the judge's chambers, the court ordered him to wear a stun cuff, a device worn around the ankle that administers an electric shock, if he wanted to remain in the courtroom during the trial. Mr. Shiflett refused to wear the stun cuff, and the trial continued while he remained in the courthouse lock-up with a video and audio hook-up that allowed him to see and hear the proceedings.

At the conclusion of the jury trial, Mr. Shiflett was found guilty of first-degree premeditated murder, first-degree felony murder, and the remaining counts, except for one count of second-degree assault. At the sentencing hearing, Mr. Shiflett moved for jury sentencing, but the court denied his motion and sentenced him to life in prison without the possibility of parole. Mr. Shiflett appealed, contending that the trial court abused its discretion by ordering him to wear a stun cuff, and then proceeding with trial in his absence when he refused to wear it.

Held: Affirmed.

The Court of Special Appeals held that the trial court did not abuse its discretion when it conditioned the defendant's reentry to the courtroom upon agreement to wear a stun cuff after the court found that the defendant posed a threat to courtroom security.

The Court noted that although the Sixth Amendment guarantees a defendant the right to be present during every stage of trial, a defendant who engages in conduct that justifies exclusion from the courtroom waives that right. The Court discussed *Illinois v. Allen*, in which the Supreme Court held that a trial judge confronted with a disruptive defendant can "(1) bind and gag the defendant, thereby [keeping the defendant in the courtroom]; (2) cite [the defendant] for contempt; or (3) take him out of the courtroom until he promises to conduct himself properly." 397 U.S. at 344. The Court of Special Appeals acknowledged that trial in absentia is appropriate only in the extraordinary case, after the careful discretion by the trial court.

The Court explained that Mr. Shiflett's violent and erratic behavior justified the trial court's removal of him and setting conditions for his return. The Court held that requiring Mr. Shiflett to wear a stun cuff was a reasonable condition, and that the trial court did not abuse its discretion when it conditioned reentry to the courtroom upon him wearing it.

Norvel B. Thompson v. State of Maryland, No. 168, September Term 2015, filed August 31, 2016. Opinion by Wright, J.

http://www.mdcourts.gov/opinions/cosa/2016/0168s15.pdf

CRIMINAL LAW – EXAMINATION OF JURORS – VOIR DIRE

Facts:

Appellant Norvel Thompson was charged and convicted of second-degree assault, reckless endangerment, and possession of a shotgun by a prohibited person. During the jury *voir dire* process for the appellant's trial, his counsel requested that the circuit court ask the potential jurors whether any of them had "strong feelings" towards the possession of firearms. The circuit court refused to ask the question, explaining that it was inherent in other questions that he asked during jury selection. The circuit court also denied appellant's motion to dismiss based on alleged *Hicks* violation, when the trial was delayed so that a competency evaluation could be performed on appellant. Appellant challenged, among other things, these two decisions of the circuit court.

Held: Reversed.

The circuit court abused its discretion in failing to ask one of the requested *voir dire* questions, and the appellant's conviction is vacated and remanded. The circuit court did not err, however, in denying appellant's motion to dismiss based on a *Hicks* violation.

In conducting *voir dire*, the court must ask a question specifically requested by a party if that question goes towards a juror's bias or partiality towards the charged crime; a "catchall" question asking the jurors for "anything else" that may cause them not to render an impartial verdict is insufficient and not equivalent to asking the specific question requested.

State of Maryland v. Donta Newton a/k/a Jason Jones, No. 1751, September Term 2015, filed September 30, 2016. Opinion by Graeff, J.

http://www.mdcourts.gov/opinions/cosa/2016/1751s15.pdf

INEFFECTIVE ASSISTANCE OF COUNSEL – "VALID" TRIAL STRATEGY OR TACTIC – ACQUIESCING TO ALTERNATE JUROR'S PRESENCE DURING DELIBERATION

Facts:

Appellee was indicted for, inter alia, attempted murder. Appellee's first trial resulted in a mistrial due to problems with juror absences and scheduling conflicts that prevented a verdict by 12 jurors. During the interim between the first and second trial, defense counsel questioned members of the first jury and discovered that they "were 10 to 2 for acquittal and moving in that direction."

At the end of the second trial, after losing one juror, the judge recommended, and both parties agreed, to allow the remaining alternate juror to go into the jury room while the other twelve jurors were deliberating, with instructions not to participate in the deliberations. Appellee was convicted by the original 12 jurors.

During post-conviction proceedings, defense counsel stated that he agreed to the alternate's presence during deliberations because he thought there was a "significant chance" of an acquittal, he wanted to ensure that the second trial did not result in another mistrial, and he "saw no harm and only good coming from" this decision. The issue presented here is whether trial counsel's decision to allow an alternate juror to go into the jury room during deliberation constituted ineffective assistance of counsel or whether it was a *valid* tactical decision under the *Strickland* test.

Held: Reversed.

Pursuant to *Stokes v. State*, 379 Md. 618 (2004), there is no question that it is error to send an alternate juror into the jury room during deliberations, even with instructions not to participate in deliberations. And if that occurs and the defense objects, prejudice will be presumed on direct appeal. *Stokes* did not hold, however, that a defendant cannot, for tactical reasons, agree to a procedure where an alternate juror sits in the jury room during deliberations.

In *Ramirez v. State*, 178 Md. App. 257 (2009), we held that a defendant waived his complaint regarding prejudice due to the presence of an alternate juror by failing to raise this claim in the circuit court. Thus, it is clear that permitting an alternate to be present in the jury room during deliberation does not automatically entitle a defendant to a new trial.

Counsel's acquiescence to the alternate juror remaining in the jury room during deliberations clearly was a matter of strategy, albeit one not sanctioned by law. And it was a strategy that could have worked to the benefit of appellee. A strategic decision made under these circumstances is not deficient conduct under the *Strickland* standard. To adopt a rule that a decision based on a misunderstanding of the law is *per se* ineffective assistance of counsel, even if it is a well-reasoned tactical decision under the facts of the case, would put a defendant in a "heads I win; tails you lose" situation, where an accused could take a position at trial that has the potential to be beneficial, and it if did not work out, he could get a new trial on the ground that it was not a valid tactical decision. We decline to adopt such a rule. Counsel here made a tactical decision that he reasonably believed would be beneficial to his client. In light of the high deference that this Court must give to counsel's decision making under *Strickland*, and given the strong presumption that counsel's conduct "falls within the wide range of reasonable professional assistance," we hold that counsel's conduct was not deficient. Appellee did not receive ineffective assistance of counsel.

Robert Amos Patterson v. State of Maryland, No. 2126, September Term 2014, filed September 27, 2016. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2016/2126s14.pdf

CRIMINAL LAW – PETITION FOR WRIT OF ACTUAL INNOCENCE – EXPERT TESTIMONY

Facts:

On July 9, 1992, Rudolph Holland was fatally shot at 49 Clay Street, near Annapolis, Maryland. Several witnesses testified that they saw two black men, one with dark skin, and the other with lighter skin, either in the area of the shooting or running from the scene. Some witnesses were able to identify Robert Amos Patterson as the man with the lighter skin by a photo array or in court. Others were either unable positively to identify him, or identified someone other than him as the man with the lighter skin.

At trial, Officer William Hyatt testified that on July 17, 1992, he responded to a neighborhood in Washington, D.C., after receiving a report that suspects in another shooting were in the area. Upon arrival, he observed three suspects, one of whom was later identified as Mr. Patterson. According to Officer Hyatt, Mr. Patterson and the other men fled, and Mr. Patterson discarded his gun after removing its bullets. Mr. Patterson was apprehended and placed under arrest for possession of a handgun. About four months later, Mr. Patterson was arrested by the Annapolis City Police Department for the Clay Street murder.

Another State's witness, Special Agent Joseph Williamson, a firearm examiner with the Federal Bureau of Investigation, testified that the bullet recovered from the murder victim of the Annapolis shooting, as well as several other bullets recovered from the crime scene, were fired from the .38 caliber handgun that Officer Hyatt had recovered from Mr. Patterson, "to the exclusion of any other firearm in the world." The agent formed his opinion using comparative microscopic testing, which matches markings (*i.e.* "toolmarks") impressed upon the fragments and cartridge casings of recovered bullets with toolmarks of a sample bullet fired from the same gun. The State repeated the agent's emphatic conclusion during closing argument and in rebuttal.

In his defense, Mr. Patterson, as well as several other witnesses, testified that Mr. Patterson was at a barbecue in Forestville, Maryland, the day of the Annapolis shooting. Mr. Patterson also denied ever possessing or discarding a gun on the day of his arrest.

Mr. Patterson was convicted of first-degree murder, use of a handgun in the commission of a crime of violence, and use of a handgun in the commission of a felony. The circuit court sentenced Mr. Patterson to life imprisonment for the first-degree murder conviction, and a consecutive term of 20 years' imprisonment for one of the handgun convictions.

rior to the instant appeal, Mr. Patterson pursued several post-conviction remedies. In 1993, Mr. Patterson filed a motion for new trial based on newly-discovered evidence – an affidavit of an attorney who investigated his case before trial, which contradicted testimony of an arresting officer. The circuit court denied his motion, which was affirmed by the Court of Special Appeals in an unreported opinion. Mr. Patterson's post-conviction petition was also unsuccessful. In 2013, Mr. Patterson, acting through counsel, filed a petition for writ of actual innocence, alleging that his trial had been tainted by Special Agent Williamson's testimony regarding comparative bullet-lead analysis ("CBLA"), a firearms identification technique that has been deemed unreliable and inadmissible under *Frye-Reed* by the Maryland courts. The circuit court dismissed his petition without a hearing after the trial transcripts revealed that the agent never used CBLA testing to connect Mr. Patterson to the crime.

In the instant appeal, Mr. Patterson, acting through the same counsel, filed a second petition for writ of actual innocence, citing recent scientific studies, scholarly articles, and court decisions, which allegedly scrutinized the use of firearms identification in reaching such subjective conclusions. The circuit court denied his petition, concluding that this newly-discovered evidence would not have substantially affected the jury's verdict.

Mr. Patterson appealed.

Held: Affirmed.

The Court of Special Appeals held that the circuit court did not abuse its discretion in denying Mr. Patterson's petition.

In *Fleming v. State*, 194 Md. App. 76 (2010), this Court determined that testimony regarding comparative microscopic testing was admissible because it is still generally accepted under *Frye-Reed*. Thus, even if recent criticisms of comparative microscopic testing constitute newly-discovered evidence that would have precluded the agent from testifying that the fatal bullets were fired from Mr. Patterson's handgun "to the exclusion of any other firearm in the world," this Court agreed with the circuit court's finding that Special Agent Williamson could have expressed a similar conclusion to a reasonable degree of certainty within his field of expertise.

Additionally, it was not an abuse of discretion for the circuit court to conclude that the agent's testimony did not overcome other compelling evidence of Mr. Patterson's guilt, particularly, in light of the Court of Appeals' recent decision in *McGhie v. State*, ____ Md. ___, 2016 WL 4470907 (Aug. 24, 2016), which held that the circuit court did not abuse its discretion in denying a petition for a writ of actual innocence, even though the State's ballistics expert lied about his credentials.

State of Maryland v. Kelsey Samples, No. 1090, September Term 2015, filed September 1, 2016. Opinion by Graeff, J.

http://www.mdcourts.gov/opinions/cosa/2016/1090s15.pdf

PRELIMINARY HEARING – CRIMINAL INFORMATION – MISDEMEANOR – CP § 4-102(2) – MARYLAND RULE 4-201(c)(2)(A)

Facts:

Appellee was charged by way of a statement of charges in the District Court of Maryland with four misdemeanors, three involving firearms and one involving drugs. Subsequently, a criminal information was filed in the circuit court, charging appellee with: Count 1, wearing, carrying, and transporting a handgun in a vehicle; Count 2, possession of a regulated firearm by a minor; Count 3, wearing, carrying, and transporting a handgun on her person; and Count 4, possession of a controlled dangerous substance.

At a hearing in the circuit court, appellee moved for dismissal of the charges. She argued that the State improperly filed a criminal information on misdemeanor charges without a preliminary hearing in violation of Maryland Code (2008 Repl. Vol.) § 4-102(2) of the Criminal Procedure Article ("CP") and Maryland Rule 4-201(c)(2)(A).

The State argued that a defendant is entitled to a preliminary hearing only if he or she is charged with a felony not within the jurisdiction of the District Court, and there is no right to a preliminary hearing where a criminal information is filed with respect to a crime that is a misdemeanor. It asserted that, because appellee was charged only with misdemeanors, she was not entitled to a preliminary hearing.

The circuit court ruled that misdemeanors could be charged by criminal information in circuit court only when the defendant had a preliminary hearing at which probable cause was found to hold the defendant. Because appellant had not received a preliminary hearing, the circuit court ruled that the information was improperly filed, and it dismissed the case.

Held: Reversed.

Pursuant to the Maryland Rules and the Criminal Procedure Article of the Maryland Code, a defendant charged with a misdemeanor is not entitled to a preliminary hearing. Accordingly, the State properly filed an information against appellee when the charges were misdemeanors, even though appellee had not received a preliminary hearing.

Darrell Bellard v. State of Maryland, No. 1281, September Term 2014, filed August 31, 2016. Opinion by Nazarian, J.

http://mdcourts.gov/opinions/cosa/2016/1281s14.pdf

CRIMINAL LAW ARTICLE – FIRST-DEGREE MURDER – SECTION 2-304 – SENTENCING PROCEDURE IMPRISONMENT FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE

Legislation repealing the death penalty in Maryland did not create a right to jury sentencing in cases where the State seeks a sentence of life without the possibility of parole.

Facts:

Darrell Bellard was charged with four counts of first-degree murder and other related offenses in the circuit court for Prince George's County in September 2010. The State timely filed a Notice of Intent to Seek Death Penalty, and Mr. Bellard filed a motion to strike the Notice. While the trial was pending, the General Assembly passed Senate Bill 276 (2013 Md. Law ch. 156), which repealed the death penalty prospectively as of October 1, 2013. The State then withdrew its original Notice and instead filed Notice of Intent to Seek Imprisonment for Life Without the Possibility of Parole, pursuant to CR § 2-203. Mr. Bellard responded by filing Notice of Election to be Tried by Jury and, if Convicted of First Degree Murder, to be Sentenced by Jury. Both parties subsequently filed motions to strike the other party's notices.

The circuit court granted the State's motion, and denied Mr. Bellard's motion. Mr. Bellard was tried by a jury and found guilty of four counts of first-degree murder and other related offenses, and sentenced by the trial court to life imprisonment without the possibility of parole. Mr. Bellard appealed, contending that the trial court erred by failing to strike the State's Notice of Intent to Seek Imprisonment for Life Without the Possibility of Parole because the sentencing procedure statute for first-degree murder, as amended by legislation repealing Maryland's death penalty, entitled him to elect to be sentenced by a jury, rather than the court.

Held: Affirmed.

The Court of Special Appeals held that CR § 2-304 does not entitle criminal defendants to jury sentencing in life without parole cases.

The Court noted that the unique permanence of capital punishment compels procedure safeguards that other punishment do not, and even though a sentence of life in prison without the possibility of parole is permanent, a criminal defendant is not entitled to the same procedural safeguards as those previously reserved for cases where the State sought the death penalty.

The Court acknowledged that the legislation repealing the death penalty inadvertently created some ambiguity in the statute governing sentencing procedures in life without parole cases, but rejected Mr. Bellard's argument that the current version of CR § 2-304 provides the right to jury sentencing is such cases. In so doing, the Court examined the legislative history of Senate Bill 276, which repealed the death penalty, and concluded that the purpose of the legislation was to repeal the death penalty, *not* to alter the sentencing procedures or create new rights for defendants where the State seeks life without parole.

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Candace Grueff v. Michael Vito, et al., No. 1878, September Term 2014, filed August 31, 2016. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2016/1878s14.pdf

IRREVOCABLE TRUSTS – POWER TO AMEND – INTENT OF SETTLOR
REVOCABLE TRUSTS – MARYLAND COMMON LAW – DUTY OF TRUSTEE

Facts:

Settlor of irrevocable trust for immediate and equal benefit of his four children included in trust instrument a broad power to amend upon an affirmative vote of 75% of the beneficiaries.

Held:

Power to amend must be interpreted to effectuate the Settlor's intent. Amendment to trust by 3 of 4 beneficiaries to divest the remaining beneficiary of her interest in the trust, and redistribute it to themselves was contrary to the Settlor's intention in creating the trust and therefore was ineffective.

Under Maryland common law, the trustee of a revocable trust for the lifetime benefit of the Settlor does not owe a duty of care to the contingent remainder beneficiaries of the trust while the Settlor is alive.

Charles Huntley v. Lydia Huntley, No. 755, September Term 2015, filed September 1, 2016. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2016/0755s15.pdf

FAMILY LAW – RETIREMENT BENEFITS – MONETARY AWARD – PLEADING REQUIREMENTS

Facts:

Appellee, Lydia Huntley ("Lydia"), filed a complaint for absolute divorce in the Circuit Court for Baltimore County after twenty-eight years of marriage to appellant, Charles Huntley ("Charles"). Lydia requested, among other things, a monetary award, alimony, a portion of the marital share of Charles's retirement benefits, and attorney's fees. Charles filed an answer in which he denied Lydia's entitlement to a monetary award and asked the court to deny Lydia an award of alimony. Charles did not request any affirmative relief aside from the grant of a divorce.

At trial, Charles requested a portion of the marital share of Lydia's retirement benefits, which were already in payout status. The trial court denied Charles's request on the ground that Charles had not included such request in his pleadings. The court awarded Lydia one-half of the marital portion of Charles's retirement benefits on an "if, as, and when" basis and a monetary award, but denied Lydia's request for alimony. The court did, however, grant Lydia an award of $3,500 in attorney's fees.

Held: Affirmed.

The Court of Special Appeals held that the trial court did not err by refusing to grant Charles a portion of the marital share of Lydia's retirement benefits, because Charles failed to include a request for such relief in his answer or in any counter-complaint. The Court noted that the only relief that Charles requested in his answer was that the trial court "grant him a Divorce, and deny [Lydia] alimony." Because the authority of the trial court to act in any case is limited by the issues framed in the parties' pleadings, the trial court did not err by failing to grant Charles a portion of the marital share of Lydia's retirement benefits.

The Court also rejected Charles's contention that, because Lydia included her retirement benefits on the Rule 9-207 form, she was not prejudiced by his failure to request an equitable division of such benefits. Lydia's admissions on a Rule 9-207 form relating to her retirement benefits do not constitute a request by Charles that the court divide such benefits. Furthermore, Lydia's own request for a portion of the marital share of Charles's retirement benefits did not put herself on notice that Charles would request a portion of the marital share of Lydia's retirement benefits.

Finally, the Court stated that, given that Lydia's retirement benefits were already in payout status, if Lydia had known that Charles was requesting an award of a portion of her retirement benefits, she may well have objected to a distribution of Charles's retirement benefits on an "if, as, and when" basis, and instead requested that the trial court grant her a monetary award based on the value of marital property that included the present value of Charles's retirement benefits. Charles's failure to include in his pleadings a request for an equitable division of the marital portion of Lydia's retirement benefits foreclosed Lydia's option to make such request.

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In re: Adoption/Guardianship of L.B. And I.L., No. 2816, September Term 2015, filed September 1, 2016. Opinion by Graeff, J.

http://www.mdcourts.gov/opinions/cosa/2016/2816s15.pdf

TERMINATION OF PARENTAL RIGHTS – STANDING TO CHALLENGE GUARDIANSHIP

Facts:

On February 3, 2016, the Circuit Court for Harford County granted the Harford County Department of Social Services' petitions for guardianship of L.B. and I.L., terminating the parental rights of the children's mother and granting guardianship to the Department. On February 9, 2016, the court issued a written order, reiterating its findings that the mother was an unfit parent and that extraordinary circumstances existed such that it was in the child's best interest that the mother's parental rights be terminated. On appeal, the mother challenged both the termination of her parental rights and the court's decision to grant guardianship to the Department and not to family members.

Held: Affirmed.

It is clear that, once an order terminating parental rights becomes final, the parent has no standing to challenge future matters regarding the child. In the situation where a parent challenges the termination of parental rights on appeal, however, we hold that the parent retains standing to raise on appeal "any portion of the process terminating her rights," including the child's placement with the Department. Once the termination of parental rights is affirmed on appeal, however, the order becomes final, and the parent no longer has standing to challenge decisions relating to the child, including the circuit court's order regarding placement of the child. Accordingly, because we affirmed the order terminating the mother's parental rights, she no longer has standing to contest the court's decision regarding guardianship.

Select Portfolio Servicing, Inc. v. Saddlebrook West Utility Company, LLC, et al., No. 1911, September Term 2013, filed August 31, 2016. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2016/1911s13.pdf

WATER AND SEWER CHARGES IMPOSED BY DECLARATION RECORDED IN LAND RECORDS – COVENANT RUNNING WITH THE LAND – PRIVATE AGREEMENT CONSTITUTING A LIEN INSTRUMENT AGAINST REAL PROPERTY – RULE AGAINST PERPETUITIES – MARYLAND CONTRACT LIEN ACT – FORECLOSURE BASED ON POWER OF SALE IN LIEN INSTRUMENT

Facts:

Developer purchased raw land in Prince George's County on which to build residential subdivision. Statute applicable within Washington Suburban Sanitary District required developers of residential subdivisions within the sanitary district to pay for the installation and construction of water and sewer facilities. Developer recorded in the Prince George's County Land Records a Declaration stating its intention to build the water and sewer facilities for the subdivision and by which each lot owner promised, upon purchase of his or her lot, to pay an annual Water and Sewer Charge for 23 years, and granted the developer's wholly owned company ("Utility") a lien to secure payment of the annual Water and Sewer Charge with a power of sale or assent to decree upon default. The first purchaser of a particular lot ("the Property") defaulted on Water and Sewer Charge and then sold the Property to another owner without the payments in default being cleared. That owner then refinanced her loan, and the refinance lender performed a two-party title search that did not reveal the Declaration. The refinance loan later was sold to subsequent lenders. The second owner of the Property also failed to pay the annual Water and Sewer Charges for the Property. When the holder of the Utility brought an action to foreclose on the lien created by the Declaration, the holder of the refinance DOT intervened. The foreclosure action was dismissed and the holder of the refinance DOT brought a declaratory judgment action seeking a declaration of the rights of the parties, in particular the lien priority between the holder of the refinance DOT and Utility as the holder of the lien created in the Declaration to secure payment of the annual Water and Sewer Charges. The circuit court ruled that the Declaration created a lien that had priority over the refinance DOT.

Held: Affirmed.

The Declaration created a covenant that ran with the land because it touched and concerned the land and satisfied the requirement of vertical privity. The Declaration also was an instrument that created a lien by contract and therefore was a lien instrument. The lien could be foreclosed upon

default by exercising the power of sale or assent to decree. The Declaration did not violate the rule against perpetuities and was not void for that reason. The lien was created by contract, within the meaning of section 14-202 of the Maryland Contract Lien Act, but could be enforced outside that act, under the Maryland foreclosure of lien instrument rules. Because the Declaration was recorded in the land records before the refinance DOT was recorded, and at that time refinance DOTs did not have statutory first lien priority, the lien created by the Declaration had priority over the refinance DOT.

Jayson Amster v. Rushern L. Baker, County Executive of Prince George's County, et al., No. 1801, September Term 2013, filed August 30, 2016. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2016/1801s13.pdf

MARYLAND PUBLIC INFORMATION ACT – CONFIDENTIAL COMMERCIAL INFORMATION EXEMPTION – PUBLICLY AVAILABLE INFORMATION – SEVERABILITY – IN CAMERA REVIEW

Facts:

Calvert Tract, appellee, executed a commercial lease with Whole Foods as the anchor store for a proposed mixed use development project. Calvert Tract provided a redacted copy of the lease to Prince George's County, appellee, "as part of the ongoing discussions of the development of the property." County officials as well as Calvert Tract acknowledged the lease's existence in communications with the public.

Jayson Amster, appellant, filed a Maryland Public Information Act ("MPIA") request with Prince George's County, seeking disclosure of the lease between Whole Foods and Calvert Tract. The County denied the request, informing appellant that the lease was not subject to disclosure under the confidential commercial information exemption to the MPIA. See Md. Code (2014), § 4-335(2) of the General Provisions Article ("GP").

Appellant filed a complaint in the Circuit Court for Prince George's County against the County, seeking disclosure of the Whole Foods lease. Subsequently, the court granted Calvert Tract's motion to intervene as a defendant. Appellees filed motions for summary judgment, which the trial court granted on the grounds that the entire lease was exempt from disclosure under the confidential commercial information exemption found in GP § 4-335(2).

Held: Affirmed.

After noting that no Maryland appellate opinion has analyzed the MPIA's confidential commercial information exemption as applied to a private document that was voluntarily submitted to the government, the Court of Special Appeals adopted the test established by the U.S. Court of Appeals for the District of Columbia Circuit in *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992). The D.C. Circuit established a three-part test for a private document to be exempt from disclosure: (1) the document must contain confidential commercial or financial information that was (2) voluntarily provided to the government and (3) not customarily released to the public by the private party. Applying the *Critical Mass* test, the Court held that, because the Whole Foods lease contained financial or

commercial information provided to the County on a voluntary basis, which Calvert Tract did not customarily release to the public, the lease was confidential commercial information exempt from disclosure under GP § 4-335(2).

The Court also held that, although the existence of the Whole Foods lease was a matter of public record, the confidential commercial information exemption still applied to bar the lease's disclosure. The only information that was made public was the existence of the lease, as well as the existence of a trigger date, the grading date, and the opening date. The mere fact that such information was made public did not mean that the contents of the lease should no longer be covered by the confidential commercial information exemption, because there were substantial differences in the level of detail between what was disclosed and the information requested. The information that was disclosed was in general, summarized terms, and constituted a small portion of the lease; such information was not the detailed, technical, or specific information that appellant was requesting. More importantly, Calvert Tract, not the County, disclosed the information, and disclosure by a private party does not constitute official disclosure that waives the exemption.

Finally, the Court held that the trial court did not err by declining to conduct an *in camera* review to determine which parts, if any, of the lease were severable and thus subject to disclosure. *In camera* review was not appropriate for the lease, because the purpose of the confidential commercial information exemption, as applied to private records voluntarily submitted to the government, is "to encourage individuals to provide certain kinds of confidential information to the Government." Severing portions of the Whole Foods lease and publicly disclosing the same would create a chilling effect on commercial developers' willingness to voluntarily provide their leases to the County. Therefore, to protect the government's interest in receiving such information on a cooperative basis, the Court held that, once a trial court determines that the confidential commercial information exemption applies to a document under the *Critical Mass* test, that document is exempt from disclosure in its entirety.

Robert Roman v. Sage Title Group, LLC, No. 40, September Term 2014, filed September 27, 2016. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2016/0040s14.pdf

CONVERSION – MONEY – EVIDENCE SUFFICIENT FOR CLAIM OF CONVERSION OF MONEY

NEGLIGENCE – EXPERT TESTIMONY ON STANDARD OF CARE – EXPERT TESTIMONY REQUIRED WHERE NEGLIGENCE NOT OBVIOUS TO AVERAGE JUROR

Facts:

Robert Roman, appellant, and Kevin Sniffen, branch manager of appellee, Sage Title Group LLC ("Sage Title") agreed that Roman would place his money into Sage Title's escrow account for the purpose of assisting Sage Title's client, Brian McCloskey, a builder, obtain a construction loan for two of his properties. The money placed in the escrow account for McCloskey's properties would still belong to Roman and would be returned to him when the loan was obtained. Roman gave Sniffen three checks totalling $2,420,000, which were deposited in Sage Title's escrow account. Later, Sniffen disbursed all of the funds pursuant to McCloskey's instructions and without Roman's permission. None of Roman's funds were ever returned to him.

Roman sued Sage Title for negligence and conversion. At the close of Roman's case in chief, the trial court granted judgment in favor of Sage Title on the negligence claim because of a lack of expert testimony to establish Sage Title's standard of care. At the end of the case, the court submitted the conversion claim to the jury, which returned a verdict in favor of Roman for $2,420,000. Subsequently, the trial court granted Sage Title's motion for judgment notwithstanding the verdict ("JNOV"), because, as a matter of law, Sage Title could not be liable for conversion of money.

Held: Affirmed in part and reversed in part.

On the conversion claim, the Court of Special Appeals reversed the trial court's grant of Sage Title's motion for JNOV. The Court noted that the general rule in Maryland is that money is not subject to a claim for conversion. The Court of Appeals, however, recognized an exception to that rule where a plaintiff can prove that "the defendant converted specific segregated or identifiable funds." *Allied Investment Corp. v. Jansen*, 354 Md. 547, 564 (1999).

In the instant case, the Court of Special Appeals held that the $2,420,000 deposited into Sage Title's escrow account was sufficiently specific, segregated, and identifiable to support a claim

for conversion. Roman identified the specific funds at issue through the three checks and the corresponding notations on Sage Title's escrow reports. The funds were segregated because, by agreement, the funds were to be placed in Sage Title's escrow account, belong to Roman, be accessible only by Roman, and be returned to Roman. Although funds other than Roman's were placed in the escrow account, Sage Title accounted separately for each property by generating "single ledger balance reports" showing the transactions for each property. Finally, the funds were sufficiently identifiable, because all of Roman's monies were not returned to him, nor were they disbursed with Roman's permission.

On the negligence claim, the Court of Special Appeals upheld the trial court's grant of judgment in favor of Sage Title. The Court noted that a number of Maryland cases have held that expert testimony on the applicable standard of care is not necessary where "the alleged negligence, if proven, would be so obviously shown that the trier of fact could recognize it without expert testimony." *Schultz v. Bank of America*, 413 Md. 15, 28-29 (2010). In the instant case, however, the Court concluded that expert testimony was needed, because most lay people are not familiar with the operation of escrow accounts, nor with any standard of care a title company owes to individuals (like Roman) who are *not* clients, but who deposit funds in escrow with the title company for the company's clients. Therefore, without expert testimony on Sage Title's standard of care, Roman did not present a *prima facie* claim of negligence.

Stanley Rochkind v. Starlena Stevenson, No. 418, September Term 2015, filed September 1, 2016. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2016/0418s15.pdf

LEAD PAINT PREMISES LIABILITY/NEGLIGENCE – CONSUMER PROTECTION ACT/UNFAIR TRADE PRACTICES – SOURCE OF LEAD CAUSATION – DIRECT EVIDENCE OF LEAD PAINT AT PREMISES – MEDICAL CAUSATION – LEAD PAINT EXPOSURE AS SUBSTANTIAL FACTOR CAUSATION FOR ATTENTION DEFICIT HYPERACTIVITY DISORDER (ADHD) – LEAD PAINT EXPOSURE AS SUBSTANTIAL FACTOR CAUSATION FOR LOSS OF IQ – COLLATERAL SOURCE RULE – RECOVERY OF FEES FOR PREVAILING PARTY IN CONSUMER PROTECTION ACT CLAIM.

Facts:

Toddler was diagnosed with elevated blood lead levels while living at the subject house in Baltimore City in the early 1990s. Years later, after reaching adulthood, she sued the owner of the house for negligence and unfair trade practices. The subject house was tested for the presence of lead paint, which was found on 22 interior surfaces. The child was seen ingesting paint at the subject house.

By age 5, the child was struggling to pay attention in school. A psychological evaluation at that time showed that she had a low average to borderline IQ and ADHD. She was placed in special education classes. At age 13, the child attempted suicide. Psychological evaluations the following year revealed that her IQ was in the extremely low range. The child graduated from high school and qualified for the State Division of Occupational Rehabilitation Services (DORS) program for job training and coaching. She held two jobs, unsuccessfully, and has since been unemployed.

The case was tried by a jury, which returned a verdict for the plaintiff for unfair trade practices, based on a finding that deteriorated lead paint was inside the subject house at the outset of the tenancy, and for negligence. The jury awarded the plaintiff $539,000 in non-economic damages and $829,000 in economic damages. A partial new trial on damages was awarded because a plaintiff's expert expressed an opinion at trial that had not been revealed prior to trial. On retrial on damages, the jury awarded the plaintiff $700,000 in non-economic damages and $753,000 in economic damages. Upon application of the cap on non-economic damages, the award was reduced to $1,103,000.

The plaintiff's attorneys sought an award of fees under the Maryland Consumer Protection Act, as prevailing parties, which was denied.

On appeal, the defendant argued, *inter alia*, that the existence of lead paint at other places the plaintiff had lived or had exposure to had to be ruled out for source of lead causation to be

established; that, on general medical causation, the court abused its discretion by not holding a *Frye-Reed* hearing before deciding whether the plaintiff's expert pediatrician could testify that exposure to lead paint was a substantial factor causing ADHD; that, on specific medical causation, the evidence did not support that expert's opinion that the plaintiff's ADHD was caused by her exposure to lead paint; that the court abused its discretion by not holding a *Frye-Reed* hearing before permitting another of the child's experts to testify that she had suffered a decrease in IQ due to her exposure to lead paint, and the amount of the decrease; and that the court erred by precluding the defense from showing that the cost of a job coach, which the plaintiff was including in her damages for future lost earnings, could be provided by the DORS program at no cost. In a cross-appeal, the plaintiff argued that the court erred by denying her attorneys' fees request.

Held: Affirmed.

When there is *direct evidence* of the presence of lead paint at a particular property, that the lead paint was deteriorated (chipping, flaking, etc.), and that the plaintiff suffered from elevated blood lead levels at a time relevant to that property, a qualified expert witness can express the source of lead opinion that the deteriorated lead paint at that property was a substantial factor in causing the plaintiff's injuries without eliminating all other possible sources of lead paint exposure. The cases in which the presence of lead paint inside a property is established circumstantially do not apply when there is direct evidence of the presence of lead paint inside the property.

The trial court did not abuse its discretion by allowing the plaintiff's expert witness to testify that ingestion of lead paint by a young child can be a substantial factor in causing ADHD, and was a substantial factor in causing the plaintiff's ADHD, without first holding a *Frye-Reed* hearing. Materials submitted by the plaintiff, in particular a 2013 publication by the EPA entitled "*Integrated Science Assessment for Lead*," which classifies numerous health conditions by degree of causal connection (or not) to lead exposure, conclude that epidemiologic studies show a causal connection between lead paint exposure and attention, impulsivity, and hyperactivity in children. The general reliability of these studies did not need to be determined in a *Frye-Reed* hearing, even though the defendant produced studies to the contrary. The medical causation issue concerning ADHD was for the jury to decide. Likewise, the court did not abuse its discretion by not holding a *Frye-Reed* hearing on the issue whether ingestion of lead paint by a young child can be a substantial factor in causing a reduction in IQ, and how much of a reduction.

The trial court did not err by ruling that the collateral source rule precluded any reference to the DORS program offering job coaching services for free, when one of the plaintiff's experts opined that in order to hold any job, she would need job coaching at the cost of $38 per hour.

The trial court did not err or abuse its discretion in denying the request for attorneys' fees made by the plaintiff's lawyer under the Consumer Protection Act. The CPA violation was for an unfair trade practice, based on the jury's finding that there was deteriorated lead paint at the subject house from the inception of the lease. The bulk of the claims against the defendant were

for negligence, however, and the request for fees did not distinguish fees that were connected to the CPA claim and those that were connected to the negligence claim.

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ATTORNEY DISCIPLINE

*

By a Per Curiam Order of the Court of Appeals dated September 6, 2016, the following attorney has been disbarred:

STEVEN LEE SHOCKETT

*

By an Order of the Court of Appeals dated September 8, 2016 the following attorney has been disbarred:

STEPHEN JOHN SAUNDERS

*

By a Per Curiam Order of the Court of Appeals dated September 9, 2016, the following attorney has been disbarred:

SHAKAIRA SIMONE MOLLOCK

*

By an Order of the Court of Appeals dated September 16, 2016 the following attorney has been disbarred by consent:

REID DONALAN HENDERSON

*

By an Order of the Court of Appeals dated September 16, 2016, the following attorney has been disbarred by consent:

WOO-JIN KIM

*

*

By an Order of the Court of Appeals dated September 22, 2016, the following attorney has been indefinitely suspended by consent:

ROBERT PAUL PRATZ

*

By an Order of the Court of Appeals of Maryland dated September 22, 2016, the following non-admitted attorney is excluded from exercising the privilege of practicing law in this State for sixty (60) days:

JING TAN

*

This is to certify that the name of

ABRAHAM ALLAN GERTNER

has been replaced upon the register of attorneys in this state as of September 27, 2016.

*

By an Order of the Court of Appeals dated September 27, 2016 the following attorney has been indefinitely suspended by consent:

SANFORD BRUCE JAFFE

*

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JUDICIAL APPOINTMENTS

*

On July 8, 2016, the Governor announced the appointment of **WILLIAM WARDELL DAVIS** to the Circuit Court for Cecil County. Judge Davis was sworn in on September 9, 2016 and fills the vacancy created by the retirement of the Hon. V. Michael Whelan.

*

On September 12, 2016, the Governor announced the appointment of **LISA ANN PHELPS** to the District Court of Maryland – Baltimore County. Judge Phelps was sworn in on September 26, 2016 and fills the vacancy created by the retirement of the Hon. Alexandra N. Williams.

*

On September 8, 2016 the Governor announced the appointment of **KATIE MURPHY O'HARA** to the District Court of Maryland – Baltimore City. Judge O'Hara was sworn in on September 28, 2016 and fills the vacancy created by the retirement of the Hon. Jamey H. Hueston.

*

On September 8, 2016, the Governor announced the appointment of **MICHAEL STEPHEN STUDDARD** to the District Court of Maryland – Baltimore City. Judge Studdard was sworn in on September 28, 2016 and fills the vacancy created by the retirement of the Hon. Nathan Braverman.

*

On September 8, 2016, the Governor announced the appointment of **NICOLE RENE EGERTON TAYLOR** to the District Court of Maryland – Baltimore City. Judge Taylor was sworn in on September 30, 2016 and fills the vacancy created by the retirement of the Hon. Miriam B. Hutchins.

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UNREPORTED OPINIONS

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