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http://mdcourts.gov/opinions/coa/2017/38a16ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

On June 22, 2016, the Attorney Grievance Commission ("the Commission" or "Petitioner"), through Bar Counsel, filed a Petition for Disciplinary or Remedial Action ("Petition") against Respondent, Maurice Marnea Moody. The Petition alleged violations of Maryland Lawyers' Rules of Professional Conduct ("MLRPC") and the Maryland Rules governing attorney trust accounts. Specifically, Bar Counsel alleged that Respondent violated MLRPC: 1.15 (Safekeeping Property), 8.1 (Bar Admission and Disciplinary Matters), 8.4 (Professional Misconduct), Maryland Rules 16-606.1 (Attorney Account Record-Keeping), 16-607 (Commingling Funds), and 16-609 (Prohibited Transactions). The conduct stemmed from the representation of several clients during which Respondent demonstrated dishonest behavior, including making impermissible withdraws from his attorney trust account, creating inaccurate entries in client and account ledgers, and submitting false and conflicting records to Bar Counsel. This Court transferred the case to Judge Mickey J. Norman ("the hearing judge") of the Circuit Court for Baltimore County on September 29, 2016, to conduct an evidentiary hearing and render findings of fact and conclusions of law. Respondent did not timely respond to Bar Counsel and failed to appear for the evidentiary hearing. Thereafter, the hearing judge made the following findings of fact by clear and convincing evidence.

On June 5, 1996, Respondent was admitted to the Maryland Bar. Thereafter, on June 29, 2004, this Court ordered, by consent, that Respondent receive a 90-day suspension for violations of the then-named MLRPC 1.1, 1.3, 1.4, 1.16(d), 8.1(b), and 8.4(d). The facts demonstrated that Respondent failed to attend a hearing during a child support case, failed to file a post-conviction petition, failed to obtain service of process in a divorce case, and failed to timely file a claim for uninsured motorist benefits. On January 11, 2005, Respondent was reinstated after serving the suspension. Subsequently in December 2014, Respondent received a Commission reprimand due to his failure to maintain adequate records regarding his attorney trust account, resulting in an

overdraft from that account. Respondent also commingled client and third-party funds, resulting in a violation of MLRPC 1.15(a). Specifically Respondent failed to properly withdraw earned fees from his attorney trust account. As a result of this violation, Respondent was required to meet with a Commission Investigator, and review the accounting rules and a DVD explaining Escrow Management.

The Commission received a notice from M&T Bank on January 20, 2015, referring to a January 14, 2015 overdraft of Respondent's trust account. The notice revealed that a check in the amount of $104.00 was presented for payment, but the account did not contain sufficient funds to cover the check, which resulted in an overdraft in the amount of $26.79. The hearing judge noted that this was the second violation involving this M&T account. Thereafter, Bar Counsel instituted an investigation into Respondent's attorney trust account. On January 27, 2015, Bar Counsel sent letters to Respondent, both by regular and certified mail, seeking an explanation for the overdraft, and requesting that Respondent produce copies of his trust account records from November 2014 until January 2015. Respondent replied to Bar Counsel's letter on or about February 5, 2017, but failed to produce the records. On April 22, 2015, Bar Counsel sent a letter to Respondent, again requesting copies of his trust account bank records. On May 6, 2015, Bar Counsel received a copy of Respondent's ledger titled "Check Register for Attorney Trust Account" ("Check Register"). Additionally, Bar Counsel received copies of Respondent's client ledgers, checks, deposit slips, and bank statements for the period between November 2014 and January 2015. The hearing judge noted that Respondent sent a total of three check registers, all which contained inconsistent entries when compared to client ledger cards and physical copies of the actual checks.

In light of the aforementioned, the hearing judge noted several discrepancies reflecting attorney misconduct. Specifically, the Check Registers reflected that Respondent wrote several checks on behalf of clients for medical services, however copies of the checks indicated that they were in fact made out to Respondent. The Check Registers also indicated that Respondent made checks payable to Will Mcines, MD, for medical services, however further investigation demonstrated that Will Mcines was not a physician, medical professional, or medical provider, but instead, was Respondent's landlord from whom Respondent rented office space. In addition, the Check Registers indicated that Respondent withdrew improper fees when compared to client ledger cards for the respective clients. On several occasions, Respondent withdrew amounts that conflicted with the total amount that was listed on the corresponding client ledger card. Finally, the hearing judge noted that the above discrepancies also resulted in the improper disbursement of settlements to clients.

Based on the findings of fact, the hearing judge concluded that Respondent violated MLRPC: 1.15, 8.1, 8.4, and Maryland Rules 16-606.1, 16-607, and 16-609. Neither party filed exceptions. On September 12, 2017, after oral argument, the Court of Appeals issued a per curiam order immediately disbarring Respondent.

Held:

The Court of Appeals concluded that Respondent did in fact violate MLRPC: 1.15, 8.1, 8.4, and Maryland Rules 16-606.1, 16-607, and 16-609. The Court also noted that several aggravating factors were present in this case. Specifically, the Court determined that Respondent had prior instances of attorney discipline, engaged in a pattern of misconduct, engaged in multiple violations of the Rules of Professional Conduct, intentionally failed to comply with the Maryland Rules and Court orders, submitted deceptive evidence, refused to acknowledge his misconduct, had substantial experience in the law, and was likely to repeat this misconduct if given the opportunity to do so. As such, the proper sanction for Respondent's prolonged misconduct was disbarment.

Attorney Grievance Commission of Maryland v. Benjamin Jeremy Woolery, Misc Docket AG No. 15, September Term 2016, filed December 15, 2017. Opinion by McDonald, J.

http://mdcourts.gov/opinions/coa/2017/15a16ag.pdf

ATTORNEY DISCIPLINE – FAILURE TO ACT WITH COMPETENCE AND DILIGENCE – CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE

Facts:

On June 24, 2016, on behalf of the Attorney Grievance Commission ("the Commission"), Bar Counsel filed in the Court of Appeals a "Petition for Disciplinary or Remedial Action" against Benjamin Woolery, the Respondent. The Commission charged Mr. Woolery with violating the then-named Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.1 (Competence); 1.3 (Diligence); 1.7 (Conflict of Interest); 3.3 (Candor toward the Tribunal); and 8.4(a)-(d) (Misconduct).

A hearing judge found the following facts. Roy L. Chambers, a Maryland resident, passed away on July 3, 2006. He was survived by five adult children. Shortly after Mr. Chambers' death, the Register of Wills for Prince George's County opened an estate for Mr. Chambers. Under Mr. Chambers' will, his five surviving children were to inherit equal shares of his residuary estate.

Mr. Woolery served two stints as the personal representative for the estate. His first term ran from December 13, 2007 to April 28, 2008, and his second term ran from March 18, 2010 to late 2016 at his final accounting. By the time Mr. Woolery's second term began in 2010, the estate had only one asset: a parcel of real property – the Webster Lane property – that was 1.95 acres of land improved by a house, a garage with a residential apartment, and a large shed. As personal representative of the estate, Mr. Woolery was responsible for selling the Webster Lane property and dividing the profits among the beneficiaries.

Two of the beneficiaries, Thomas Chambers and Mary Nicodemus, were opposed to selling the property. Thomas Chambers and Ms. Nicodemus wanted the property conveyed only to them. They made various efforts to block the sale of the Webster Lane property and procure the property for themselves. Moreover, by 2010, Thomas Chambers had taken control of the property and had begun renting one or more of the buildings on the property to various tenants, further preventing Mr. Woolery from disposing of it.

On April 25, 2014, Mr. Woolery, along with a locksmith, visited the Webster Lane property, intending to secure its possession by changing the locks on the property. In order to pay for the locksmiths' services, Mr. Woolery hoped to sell some of the surveying equipment that had belonged to the decedent and that he believed might still be on the property. To that end, Mr. Woolery invited an acquaintance, Andrew Duley, a surveyor who Mr. Woolery thought might be

interested in purchasing that equipment. Mr. Duley invited another surveyor, Stephen Wilson, to accompany him.

While at the Webster Lane property that day, Mr. Woolery found a tractor with an attached backhoe ("the tractor") stored inside a large shed. Mr. Woolery did not know who owned the tractor, nor did he know how much it was worth. Assuming that the tractor belonged to the estate, Mr. Woolery sold it to Mr. Wilson for $500 cash. Unbeknownst to Mr. Woolery at the time, the tractor actually belonged to Thomas Chambers, who had purchased it for $15,200 in 2004.

Shortly after the sale, Thomas Chambers contacted Mr. Woolery with proof that Thomas Chambers owned the tractor. Upon learning this information, Mr. Woolery took no action to recover the tractor or to contact Mr. Wilson. Rather, Mr. Woolery told Thomas Chambers that he could file a claim in the Orphans' Court against the estate. Mr. Woolery believed that any loss Thomas Chambers suffered from the tractor's sale was offset by the rent money he had collected with respect to the Webster Lane property which, in Mr. Woolery's view, rightfully belonged to the estate.

Thomas Chambers subsequently sued Mr. Woolery individually in the District Court of Maryland for Prince George's County to recover the value of the tractor. The District Court entered judgment in favor of Thomas Chambers in the amount of $9,700, and, at Mr. Woolery's request, entered that judgment against the estate rather than against Mr. Woolery in his personal capacity.

Held: Reprimand.

The Court of Appeals held that Mr. Woolery violated MLRPC 1.1, 1.3, and 8.4(a) and (d). Consistent with the hearing judge's findings of fact and conclusions of law, the Court determined that Mr. Woolery made a mistake when he hastily decided to sell Thomas Chambers' tractor on behalf of the estate without determining its ownership and value. Mr. Woolery compounded that mistake when he failed to even attempt to recover the tractor after he learned that the estate did not own it. This misconduct was a violation of MLRPC 1.1, 1.3, and 8.4(a) and (d).

The Court concluded that the appropriate sanction for Mr. Woolery's misconduct was a reprimand. While Mr. Woolery's decision to sell the tractor hastily may have been an excusable mistake, his refusal to correct that mistake was done out of personal animus toward Thomas Chambers to the detriment of the estate. Mr. Woolery's misconduct was aggravated by two factors: Mr. Woolery's refusal to acknowledge the wrongful nature of his conduct; and Mr. Woolery's substantial experience (more than 25 years) in the practice of law. Because this was the first disciplinary action against Mr. Woolery and his good reputation in the legal profession, the Court concluded that a reprimand was the appropriate sanction to protect the public and deter future misconduct.

In the Matter of the Application of Mark Andrew Overall for Admission to the Bar of Maryland, Misc. Docket No. 16, September Term 2017, filed December 18, 2017. Opinion by Adkins, J.

http://mdcourts.gov/opinions/coa/2017/16a17m.pdf

DENIAL OF BAR ADMISSION—DUTY OF FULL DISCLOSURE—CANDOR AND TRUTHFULNESS

Facts:

Mark Overall graduated from law school in 2010 and was admitted to the Bar of Alabama that same year. In October 2012, the Alabama Bar issued a private reprimand to Overall after he failed to comply with local scheduling conflict resolution rules. Between October 2012 and May 2013, a number of complaints were filed against Overall alleging that he (1) failed to appear on behalf of clients, or was tardy; (2) was underprepared for court, leading to a mistrial; (3) had been found in contempt of court after being warned about his conduct; (4) improperly altered a subpoena when he was not authorized to issue subpoenas; (5) improperly filed civil complaints to avoid paying the fee for a jury demand; (6) had not informed a client about a court hearing; and (7) failed to file a written response to a Motion for Summary Judgment. Thereafter, Overall entered a conditional guilty plea to multiple violations of the Alabama Rules of Professional Conduct ("ARPC") and his license to practice law in Alabama was suspended for ninety-one days. As a condition of the plea, this suspension was held in abeyance for a two-year probationary period.

After the initial suspension, Overall was found in contempt of court for failing to appear on time for a hearing. He failed to pay the $50.00 fine, and improperly attempted to reschedule his show cause hearing. At the show cause hearing, he was held in criminal contempt and charged with resisting arrest. He was convicted of resisting arrest in Houston County District Court. His conviction was upheld after a *de novo* jury trial in the Houston County Circuit Court.

The Alabama Bar received additional complaints relating to his criminal contempt conviction and filed a Petition to Revoke Probation. Overall consented to the revocation of his probation and agreed to serve the 91-day suspension. His reinstatement was denied in March 2014 and October 2015.

Overall filed an application with the State Board of Law Examiners ("Board") for admission to the Bar of Maryland on May 13, 2015. The application asks candidates to disclose, among other things, criminal convictions and any disciplinary history with the Bar in Maryland or another jurisdiction. Overall disclosed the criminal contempt conviction in the District Court. Instead, he characterized his District Court conviction as "pending reversal due to lack of jurisdiction." Overall had, however, already been convicted in Circuit Court when he submitted his application. He also mischaracterized his suspension in Alabama as "administrative" when, in

fact, he was suspended for misconduct. Finally, Overall failed to disclose that a Maryland woman had filed a peace order against him. During his character investigation, Overall did not provide the Character Committee with documents it had requested.

The Character Committee for the Sixth Appellate Circuit ("Committee") unanimously recommended that Overall's application be denied because: (1) he demonstrated a lack of candor; (2) his law license had been suspended and not reinstated in Alabama; and (3) because he did not accept personal responsibility for his actions. The Board unanimously agreed that Overall's application should be denied because of his lack of candor in the application process, and the circumstances of his suspension in Alabama. Both the Committee and the Board concluded that Overall failed to demonstrate that he possessed the necessary moral character and fitness to practice law in Maryland.

Held: Denied.

The Court of Appeals held that Overall had not met the burden of establishing that he possessed the requisite moral character and fitness for admission to the Bar of Maryland. The Court relied on *In re Application of Strzempek*, 407 Md. 102 (2008) and *In re Application of Stern*, 403 Md. 615 (2008), to demonstrate that candidates who failed to fully disclose relevant information during the character review process displayed a lack of candor. The Court also explained, through a discussion of *In re Application of Allan S.*, 282 Md. 683 (1978), that full disclosure may be a saving grace for a candidate with a checkered past.

The Court concluded that, unlike the applicant in *Allan S.*, Overall displayed a consistent lack of candor by failing to fully disclose information related to the suspension of his law license in Alabama and the peace order that had been filed against him. Overall also failed to comply with the Character Committee's request for additional documentation. The Court viewed this conduct as equally troubling as the conduct of the applicants in *Strzempek* and *Stern*. For these reasons, the Court denied his admission.

The Bank of New York Mellon, Trustee et al. v. Heinz Otto Georg et al., No. 20, September Term, 2017, filed December 18, 2017. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2017/20a17.pdf

PRINCIPLE OF JUDICIAL ESTOPPEL – STANDING – PRIVITY – DOCTRINE OF RES JUDICATA – DOCTRINE OF COLLATERAL ESTOPPEL – FINAL JUDGMENT

Facts:

This case involves a refinance mortgage loan for real property located in Cockeysville, Maryland ("the Property") owned by Heinz Otto Georg ("Heinz") and his wife Susan M. Georg ("Susan"), Respondents. In 2002, Respondents first acquired title to the Property, which was unimproved, as tenants by the entirety. Subsequently, Respondents executed a deed of trust with an original construction loan amount of $807,000, and later executed a second deed of trust for an additional $100,000 home equity line of credit. Thereafter, Respondents sought to refinance the construction loan and the home equity line of credit, both of which were secured by deeds of trust on the Property.

To that end, on October 26, 2006, Heinz executed a note in the principal amount of $1,130,119 to First Horizon Home Loan Corporation ("First Horizon"), a lender, for the purpose of refinancing the construction loan and the home equity line of credit loan ("the Note"). The Note was secured by a deed of trust, signed that same day by Heinz, in favor of First Horizon ("the refinance Deed of Trust"). Closing instructions for the refinance mortgage loan—*i.e.*, the Note and the refinance Deed of Trust—identified the sole borrower as Heinz, and both the Note and the refinance Deed of Trust in favor of First Horizon also identified Heinz as the sole borrower. Only Heinz signed the Note and refinance Deed of Trust; indeed, neither document provided for Susan's signature. In connection with recording the refinance Deed of Trust in favor of First Horizon, however, both Heinz and Susan executed notarized affidavits affirming that, as of October 26, 2006, the unpaid principal balance of the construction loan secured by the first deed of trust was $807,000, and that the unpaid principal balance of the home equity line of credit loan secured by the second deed of trust was $100,000.

First Horizon apparently intended that the refinance mortgage loan would be used to release the two deeds of trust on the Property, and Old Republic National Title Insurance Company ("Old Republic"), Petitioner, issued a title insurance policy ("the Policy") insuring that the refinance mortgage loan would be secured by a first lien against the Property and protecting First Horizon against any issues that could occur during the execution of the mortgage. In the event of a claim, the Policy provided Old Republic the option to attempt to cure any defect in the refinance Deed of Trust or to pay the claim. The Policy extended to First Horizon and First Horizon's successors and/or assigns and insured that the refinance Deed of Trust would be executed by both Heinz and Susan.

In December 2006, the Note and accompanying refinance Deed of Trust were transferred to an intermediary and then to The Bank of New York Mellon ("BNYM"), Petitioner. This transfer was completed pursuant to a "Pooling and Servicing Agreement" dated December 1, 2006 ("the PSA"), an agreement by which BNYM purchased in bulk a pool of notes and mortgages. BNYM purchased the Note and remains the owner of the Note. Under the PSA, BNYM serves as Trustee for the "First Horizon Alternative Mortgage Securities Trust 2006-FA8 Mortgage Pass-Through Certificates, Series 2006-FA8" ("the Trust"), and First Horizon became the master servicer for the Trust. Under the PSA, as master servicer of the refinance mortgage loan and other loans, First Horizon was obligated to "service and administer" the pool of loans—*i.e.*, collect payments. The PSA also authorized First Horizon to take any action "that it may deem necessary or desirable in connection with such servicing and administration, including . . . effectuat[ing] foreclosure or other conversion of the ownership of the Mortgaged Property securing any Mortgage Loan[.]"

After executing the refinance Deed of Trust and the Note, Respondents paid monthly mortgage payments for a number of years before they encountered financial difficulties. In June 2009, First Horizon declared Heinz in default under the Note, and took steps to initiate foreclosure under the refinance Deed of Trust. As a practical matter, however, because Respondents owned the Property as tenants by the entirety, Susan's signature on the refinance Deed of Trust had been required to encumber the Property. Thus, in the absence of Susan's signature on the refinance Deed of Trust, First Horizon could not foreclose on the Property in the event of a default on the refinance mortgage loan by Heinz.

In a letter dated September 2, 2010, First Horizon submitted to Old Republic a title claim under the Policy. In an e-mail dated September 15, 2010, Old Republic's Corporate Legal Department advised First Horizon that Old Republic "elect[ed] to retain counsel to file a lawsuit to reform the [refinance Deed of Trust] to include Susan [] and/or to subordinate the interest of Susan[.]" To that end, Old Republic retained Morton A. Faller, Esquire ("Faller") to represent it.

On September 21, 2010, First Horizon, by and through its attorney, Faller, filed in the Circuit Court for Baltimore County ("the circuit court") a complaint seeking reformation of the refinance Deed of Trust and other equitable relief ("the First Horizon litigation"). Later, First Horizon filed an amended complaint seeking reformation of the refinance Deed of Trust, a declaration that First Horizon had a valid first mortgage lien against the Property, an order directing Susan to execute a confirmatory joinder of the refinance Deed of Trust, a declaration that First Horizon had a mortgage lien through equitable subrogation on the Property, and an order establishing an equitable mortgage against the Property under the refinance Deed of Trust. Although BNYM had become the owner of the Note in December 2006 and First Horizon was the master servicer of the refinance mortgage loan when the complaint and amended complaint were filed in the First Horizon litigation, First Horizon brought the litigation not in a representative capacity or as the servicer, but as the lender and owner of the Note.

Old Republic exercised control over aspects of the First Horizon litigation. For example, in addition to recommending that the action be instituted, Old Republic selected, retained, paid, and regularly communicated with Faller, who served as First Horizon's counsel in the First Horizon

litigation. Indeed, Faller and his law firm regularly invoiced Old Republic for costs, expenses, and attorney's fees related to the First Horizon litigation. And, with respect to the First Horizon litigation, Old Republic discussed and approved litigation strategy, selected trial witnesses, named the plaintiff, and decided whether to appeal the circuit court's rulings.

On April 23 and 24, 2012, before the Honorable Jan M. Alexander ("Judge Alexander"), a trial in the First Horizon litigation was held. On April 20, 2012, First Horizon's counsel e-mailed to Respondents' counsel a document titled "Correction to Caption of Complaint and Name of Plaintiff" ("the correction to caption") in which First Horizon's counsel stated that he wanted to correct the name of the plaintiff from First Horizon to First Horizon as master servicer for BNYM. At the start of trial, First Horizon's counsel filed the correction to caption. Respondents' counsel moved to strike the correction to caption and moved to dismiss the amended complaint on the ground that First Horizon lacked standing. Judge Alexander denied the motion to dismiss the amended complaint and struck the correction to caption, explaining that, in his view, it was actually a motion for substitution of plaintiff. Respondents' counsel then moved to dismiss the case or, in the alternative, for summary judgment based on lack of standing. First Horizon's counsel responded that First Horizon had standing because it was authorized by the PSA to seek reformation of the refinance mortgage loan on BNYM's behalf in its own name. Judge Alexander reserved on the motion for summary judgment and allowed the case to proceed to trial.

At trial, First Horizon attempted to prove that Susan knew that she was supposed to sign the refinance Deed of Trust, that she had intended to sign the refinance Deed of Trust, and that her failure to sign the refinance Deed of Trust was a mistake on her part. According to First Horizon, because it had also made a mistake in failing to have Susan sign the refinance Deed of Trust, there had been a mutual mistake, and the circuit court therefore had the power to reform the refinance Deed of Trust.

One of First Horizon's witnesses testified that, based on the correction to caption, the refinance mortgage loan was part of a group of loans covered by the PSA. First Horizon's counsel offered the PSA into evidence, and Respondents' counsel objected, asserting that First Horizon lacked standing because BNYM, not First Horizon, was the party secured by the refinance Deed of Trust, and First Horizon brought the action as a party and not as BNYM's agent. Respondents' counsel also argued that the PSA was inadmissible because Schedule I, the mortgage loan schedule listing the loans that were subject to the PSA, was not included, and that, absent Schedule I, First Horizon could not prove that the PSA applied to the refinance mortgage loan. Judge Alexander admitted the PSA into evidence.

First Horizon rested, and Respondents' counsel orally moved for judgment, arguing that First Horizon lacked standing and that First Horizon had failed to produce evidence establishing that Susan had made a mistake of fact. After hearing argument from the parties, Judge Alexander granted the motion for judgment based on the merits of the case, orally ruling that First Horizon had failed to produce evidence of a mutual mistake of fact. Immediately thereafter, First Horizon's counsel asked the circuit court to clarify if it was finding that First Horizon had standing. In response, Judge Alexander addressed standing, ruling that First Horizon lacked

standing, explaining that, absent Schedule I, there was no identification of the refinance mortgage loan being subject to the PSA, and that First Horizon was not the owner of the loan and had failed to bring the case in a representative capacity. First Horizon's counsel argued that, if there was no standing, then there was no case to go forward. At that time, Respondents' counsel suggested that Judge Alexander issue alternative rulings as to standing and the merits, and stated that Judge Alexander "could say even if there was standing, I have considered the presentation of the evidence as if there was standing to, for judicial economy, so that we don't have to have a whole new trial." Without objection from First Horizon's counsel, Judge Alexander orally issued rulings on standing and the merits, stating: "That sounds appropriate. I will say that I do not find that they had standing, however, in the alternative, I do not find that [First Horizon] has met its burden of production to have the case go forward based on the evidence for the reasons previously stated." The trial recessed immediately thereafter.

On May 3, 2012, consistent with his oral ruling, Judge Alexander issued an order granting judgment in favor of Respondents. First Horizon appealed, and, on September 30, 2013, the Court of Special Appeals issued an unreported opinion dismissing the appeal due to First Horizon's failure to file a timely notice of appeal.

A couple of months after the Court of Special Appeals's dismissal of the appeal in the First Horizon litigation, on December 5, 2013, BNYM, as trustee, and Old Republic initiated a second lawsuit in the circuit court by filing a complaint against Respondents. The second lawsuit was based on the same facts and legal basis as the First Horizon litigation was—namely, First Horizon and Susan had made a mutual mistake in failing to include Susan on the refinance Deed of Trust. And, in the second lawsuit, Petitioners raised substantially similar causes of action to those that were raised in the First Horizon litigation—equitable claim for reformation of the refinance Deed of Trust, request for an order compelling Respondents to "execute appropriate paperwork, or alternatively reforming the existing refinance [D]eed of [T]rust[,]" equitable mortgage, equitable subrogation, and equitable lien. And, as with the First Horizon litigation, Old Republic paid for counsel in the second lawsuit and determined who was to be named a plaintiff.

On June 5, 2015, Respondents filed a "Motion for Summary Judgment, or for Judicial Decision under [Maryland] Rule 2-502," arguing that Petitioners were in privity with First Horizon, and that the second lawsuit was barred by res judicata and collateral estoppel. On October 30, 2015, the Honorable Julie L. Glass ("Judge Glass") conducted a motions hearing. On December 11, 2015, Judge Glass issued an amended opinion and order denying Petitioners' motion for partial summary judgment and granting Respondents' motion for judicial decision; on December 28, 2015, the amended opinion and order were entered. Judge Glass ruled that all of the elements of res judicata and collateral estoppel had been established, and that the second lawsuit must be dismissed and that Petitioners were precluded from bringing their claims in the second lawsuit. Judge Glass also ruled that Respondents were not judicially estopped from arguing privity, and thus, res judicata and collateral estoppel.

On December 29, 2015, Petitioners noted an appeal. On March 10, 2017, in an unreported opinion, the Court of Special Appeals affirmed the judgment of the circuit court, i.e., Judge

Glass's ruling. Specifically, the Court of Special Appeals held that Judge Glass did not err in finding that Judge Alexander made alternative, independent rulings in the First Horizon litigation, and that Judge Glass correctly determined that those rulings had preclusive effect in the second trial. Thereafter, Petitioners filed a petition for a writ of *certiorari*, which the Court of Appeals granted. *See Bank of New York Mellon v. Georg*, 453 Md. 355, 162 A.3d 837 (2017).

Held: Affirmed.

The Court of Appeals held that the prerequisites that must exist before judicial estoppel may be applied were not satisfied, and, as such, Judge Glass properly declined to apply judicial estoppel to bar Respondents' argument that Petitioners are in privity with First Horizon. Stated otherwise, because the three circumstances that must be fulfilled for the application of judicial estoppel were not established, Judge Glass properly ruled that Respondents' privity argument was not barred by judicial estoppel. The Court stated that, in its view, Respondents' position with respect to privity in the case was not inconsistent with their position with respect to standing in the First Horizon litigation, as standing and privity do not give rise to mutually exclusive arguments, but instead are two separate concepts. The Court explained that standing and privity are two distinct concepts, and they do not give rise to mutually exclusive arguments, such that a party may make an argument only as to standing or privity, but not as to both. A trial court's ruling that a party lacks standing does not preclude a party in a subsequent lawsuit from being in privity with the party that was found to lack standing; as such, it does not follow that, because a party lacked standing, another party in a subsequent lawsuit would be precluded from arguing that the opposing party is in privity with the party that lacked standing.

The Court of Appeals concluded that Respondents' arguments on standing in the First Horizon litigation and privity in the current litigation were plainly not inconsistent. First Horizon's procedural inability to bring the First Horizon litigation in its own name and on its own behalf—*i.e.*, First Horizon's lack of standing—was of no consequence to the issue of whether there was a relationship, and ultimately privity, among First Horizon, BNYM, and Old Republic, such that BNYM and Old Republic were precluded from bringing the second lawsuit.

The Court of Appeals determined that Petitioners were in privity with First Horizon for purposes of res judicata and collateral estoppel. As to BNYM, the record demonstrated that, at the time of trial in the First Horizon litigation, First Horizon was the master servicer of the refinance mortgage loan, but BNYM both actually owned the refinance mortgage loan, and, under the PSA, was the successor-in-interest to First Horizon, which owned the refinance mortgage loan before BNYM. Indeed, both BNYM and First Horizon were parties to the PSA, and First Horizon was obligated under the PSA to service and administer the refinance mortgage loan, and to take any necessary action in connection with servicing and administering the refinance mortgage loan. BNYM thus had a direct interest in the First Horizon litigation, and its interest was adequately protected by First Horizon's prosecution of the First Horizon litigation. Indeed, under the circumstances set forth above, BNYM and First Horizon were identified in interest in one another that they could be said to share the same legal right. And, given the relationship

between the two entities with respect to the PSA, the Court concluded that, with certainty, BNYM's interests were fully represented, with the same incentives, by First Horizon in the First Horizon litigation. In sum, BNYM was in privity with First Horizon because it had a direct interest in First Horizon litigation, it had the same interests in that case as First Horizon, and its interests were protected by First Horizon's prosecution of litigation.

As to Old Republic, the record demonstrated that Old Republic issued the Policy insuring that the refinance mortgage loan would be secured by a first lien against the Property, and protecting First Horizon against any issues that could occur during the execution of the mortgage, and that the Policy extended to First Horizon and First Horizon's successors and/or assigns. Additionally, significantly, the record demonstrated that Old Republic controlled the prosecution of the First Horizon litigation—it selected and retained Faller to file the lawsuit; it paid Faller for costs, expenses, and attorney's fees related to the First Horizon litigation; it regularly communicated with Faller; and it discussed and approved litigation strategy, selected trial witnesses, named the plaintiff in the case as First Horizon, and decided whether to appeal the circuit court's rulings. Clearly, Old Republic and First Horizon shared the same incentive in their separate litigation attempts. And, Old Republic had a direct interest in the First Horizon litigation, and in the advancement of that interest took open and substantial control of its prosecution. The Court determined that, like BNYM, Old Republic was in privity with First Horizon for purposes of res judicata and collateral estoppel.

The Court of Appeals concluded that, although Judge Alexander accepted Respondents' position on standing, because Respondents' position on standing was not the same as its position on privity, the second prerequisite for the application of judicial estoppel was not established. The Court also concluded that there was no evidence in the record to support a conclusion that Respondents maintained inconsistent positions to intentionally mislead either Judge Alexander or Judge Glass to gain an unfair advantage.

The Court of Appeals held that Judge Alexander's rulings on the merits and standing in the First Horizon litigation were not contingent rulings, but rather were independent, alternative rulings, and, as such, the ruling on the merits constituted a final judgment for purposes of res judicata and collateral estoppel. The Court concluded that Judge Glass properly determined that all of the elements of res judicata and collateral estoppel were satisfied, including the final judgment element, and, thus, Petitioners were barred from bringing the claims in the second lawsuit. Stated otherwise, the prerequisites for application of res judicata and collateral estoppel had been established, and Judge Alexander's ruling on the merits had preclusive effect in the second lawsuit.

The Court of Appeals determined that the record unmistakably demonstrated that Judge Alexander's ruling on the merits of the case was the initial ruling, that the ruling on standing followed, and that the two rulings were then reiterated and expressed as "alternative" rulings in response to a request that the rulings be issued as such to avoid the need for a new trial. Judge Alexander's ruling on the merits, in which he found that First Horizon had not produced evidence showing that Susan had made a mistake of fact, was made after First Horizon presented its case-in-chief and rested, after Respondents' counsel moved for judgment on both standing

and the merits, and before any request for a ruling on standing, and, thus, clearly was not contingent on his later ruling on standing. Indeed, it was evident from the trial transcript that the ruling on the merits was intended to be a final judgment on the merits, both at the time that Judge Alexander initially issued the ruling without addressing standing, and at the time that Judge Alexander reiterated the ruling in response to Respondents' counsel's request for a ruling "so that we don't have to have a whole new trial." As the record demonstrated, here, Judge Alexander's primary ruling was as to the merits of the case; it was a decisive and comprehensive ruling addressing the heart of the merits—*i.e.*, lack of mutual mistake—and the case could have ended at that point. Notably, it was only after being prompted by First Horizon's counsel that Judge Alexander issued a ruling on standing. Moreover, when Judge Alexander reiterated the two rulings, both orally and in a later-issued order, the two rulings were expressed said to be "alternative" rulings, not contingent rulings. The sequence of the rulings in the First Horizon litigation and Judge Alexander's discussion with counsel demonstrated that the ruling on the merits was intended to be an independent, alternative ruling that constituted a final judgment for purposes of res judicata and collateral estoppel.

University of Maryland Medical System Corporation, et al. v. Brandon Kerrigan, a minor et al., No. 3, September Term 2017, filed November 28, 2017. Opinion by Greene, J.

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

http://www.mdcourts.gov/opinions/coa/2017/3a17.pdf

CIVIL PROCEDURE – RULE 2-327(c) MOTION TO TRANSFER – PLAINTIFF'S CHOICE OF VENUE

Facts:

Brandon Kerrigan, through his parents and with them in their individual capacity, filed a medical negligence action in the Circuit Court for Baltimore City against seven defendants, all of whom were involved in medical treatment that resulted in Brandon receiving a heart transplant. The alleged negligence arose in Talbot County but continued while Brandon was being treated in Baltimore City. The defendants moved to transfer the case from Baltimore City to Talbot County pursuant to Maryland Rule 2-327(c), and the hearing judge granted the motion. The Court of Special Appeals reversed the hearing judge, holding that the hearing judge abused his discretion when he granted the transfer to Talbot County.

Held: Reversed.

The Court of Appeals held that the hearing judge did not abuse his discretion in transferring the case from Baltimore City to Talbot County. The Court of Appeals recognized that, while the plaintiffs receive deference to their choice of venue as the presumed convenient forum, that deference is minimized when the plaintiffs do not reside in the forum. When applying the law to the facts of this case, where the plaintiffs did not reside in Baltimore City but rather Talbot County, and there were four defendants from Talbot County and three defendants from Baltimore City, the hearing judge properly determined that the balance of the convenience of the parties and witnesses and the interests of justice weighed strongly favor of transfer to Talbot County.

Additionally, the Court of Appeals explained that because an appellate court's review of motions to transfer pursuant to Rule 2-372(c) is limited to an abuse of discretion standard, an appellate court must not substitute its own judgment for that of the trial court. The Court of Appeals reasoned that the hearing judge must find that the balance of convenience and justice weighs strongly in favor of transfer. Once the hearing judge has done so, the role of the appellate court is to determine if the trial court abused its discretion in granting a motion to transfer. Here, the

trial judge did not abuse his discretion when weighing the convenience of the parties and witnesses and the interests of justice.

Jamal Sizer v. State of Maryland, No. 1, September Term 2017, filed November 28, 2017. Opinion by Greene, J.

Adkins and Hotten, JJ., concur and dissent.

http://www.mdcourts.gov/opinions/coa/2017/1a17.pdf

CONSTITUTIONAL LAW – FOURTH AMENDMENT – REASONABLE SUSPICION

CONSTITUTIONAL LAW – FOURTH AMENDMENT – EXCLUSION OF THE EVIDENCE – ATTENUATION DOCTRINE

Facts:

On the evening of November 20, 2015, a group of officers from the Howard County Police Department Pathway Patrol Unit biked the footpaths of Columbia, Maryland. While on the footpath, officers observed a group of eight to ten individuals, including Petitioner Mr. Sizer, standing in a parking lot. Some individuals were passing around what appeared to be an alcoholic beverage. The officers then observed a bottle being thrown and heard it hit the ground, but could not see who threw the bottle. The officers approached the group to investigate, and when the officers were about five feet away, Mr. Sizer fled the group on foot.

One of the officers in the Patrol Unit gave immediate chase, on bike, and wrestled Mr. Sizer to the ground. As he was being taken down, Mr. Sizer revealed that he was carrying a handgun on his person. Within seconds of the takedown, another officer from the Patrol Unit recognized Mr. Sizer as the subject of an outstanding arrest warrant. At that point Mr. Sizer was arrested and taken to the police satellite station. At the satellite station, the officers confirmed the existence of the warrant and performed a search of Mr. Sizer incident to his arrest. The officers recovered a .38 caliber handgun from Mr. Sizer's backpack and twenty-seven pills of oxycodone, a controlled dangerous substance, from Mr. Sizer's sock.

Mr. Sizer filed a motion to suppress the handgun and pills, arguing that they were both obtained pursuant to an unlawful arrest. The State, relying on *Illinois v. Wardlow*, 528 U.S. 119, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000), argued that Mr. Sizer's flight, in what the officers considered to be a high crime area, was enough to give the officers reasonable suspicion to stop and investigate Mr. Sizer. Mr. Sizer offered testimony from one of the arresting officers who described the location of Mr. Sizer's group as being outside of the "high crime area." The hearing judge granted the motion to suppress. The State appealed to the Court of Special Appeals. The Court of Special Appeals reversed the motion to suppress and held that the stop was constitutional and alternatively held that the independent source doctrine would have permitted the admission of the evidence based on Mr. Sizer's pre-existing arrest warrant. Mr. Sizer petitioned this Court.

Held: Affirmed.

The Court of Appeals held that the officers had reasonable suspicion to stop Mr. Sizer and noted that the suppression hearing judge erred in her application of the totality of the circumstances analysis because she based her decision on ambiguous testimony regarding the "high crime area" distinction and because she identified Mr. Sizer's flight as the dispositive factor in her analysis. To determine if officers acted reasonably in such circumstances, due weight must be given to the reasonable inferences an officer is entitled to draw from the facts, in light of his experience. *Terry v. Ohio*, 392 U.S. 1, 27 (1969). The Court's analysis of the totality of the circumstances led it to conclude that when officers observed that a bottle was passed among the group and then was discarded or thrown to the ground, the officers had reasonable suspicion to believe that criminal activity was afoot. Additionally, Mr. Sizer's flight could have reasonably heightened their suspicion that he was the individual responsible for throwing the bottle. Thus, the officers were legally permitted to give chase to Mr. Sizer and stop him to conduct an investigation. *See Holt v. State*, 435 Md. 443, 459 (2013).

The Court of Appeals alternatively held that assuming the stop was illegal, the attenuation doctrine, not the independent source doctrine, would apply in Mr. Sizer's case. The Court held that *Utah v. Strieff*, -- U.S. --, 136 S. Ct. 2056 (2016) controlled based on the officers' discovery of a valid pre-existing arrest warrant. The attenuation doctrine requires the court to consider three factors: the "temporal proximity" between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search, "the presence of intervening circumstances," and "the purpose and flagrancy of the official misconduct." *Utah v. Strieff*, -- U.S. at --, 136 S. Ct. at 2062. As an alternate holding, the Court held that assuming that the stop of Mr. Sizer was unlawful, the discovery of a valid pre-existing arrest warrant as well as absence of flagrant police misconduct, notwithstanding the close temporal proximity between the illegal seizure and the discovery of the pistol, attenuated the connection between any alleged unlawful investigatory stop and evidence seized from Mr. Sizer during the search incident to his arrest and would have resulted in non-suppression of the evidence.

In re: J.J. and T.S., No. 5, September Term 2017, filed November 28, 2017. Opinion by Barbera, C.J.

http://mdcourts.gov/opinions/coa/2017/5a17.pdf

APPELLATE REVIEW — PRESERVATION — MD. RULE 8-131 — EXERCISE OF APPELLATE COURT'S DISCRETION TO ADDRESS CLAIMS NOT PROPERLY PRESERVED FOR APPELLATE REVIEW

FAMILY LAW — COMPETENCY

FAMILY LAW — ADMISSIBILITY UNDER CRIMINAL PROCEDURE § 11-304, THE "TENDER YEARS EXCEPTION"

Facts:

On August 30, 2015, nine-year-old J.J. told her maternal grandmother that her father, Petitioner Mr. J., had sexually abused her twice in the prior week. J.J. and her brother T.S. were living alone with their father Mr. J. at the time of the allegation. Their mother, Petitioner Ms. B., was incarcerated at the time.

That same day, the police department was contacted regarding J.J.'s allegation, and a licensed clinical social worker conducted an audio-recorded forensic interview of J.J.

On August 31, 2015, the Department of Social Services ("Department") removed J.J. and T.S. from their home and placed them in shelter care. After the children had been removed from their home, the Department filed a Petition for Child in Need of Assistance ("CINA") for both children.

Pursuant to Maryland Code Annotated, Criminal Procedure ("CP") § 11-304, the Circuit Court for Wicomico County, sitting as a juvenile court, conducted a hearing on the admissibility for the truth of the matter asserted of J.J.'s out-of-court statement to the social worker. The court determined that J.J.'s statement would be admissible to prove the truth of the matter asserted because the statement possessed the requisite "particularized guarantees of trustworthiness" under CP § 11-304.

The Court of Special Appeals affirmed the judgment of the juvenile court. *In re: J.J. and T.S.*, 231 Md. App. 304, 311 (2016). Addressing Petitioner Mr. J.'s argument regarding competency, raised for the first time on appeal, the Court of Special Appeals held that CP § 11-304 does not require a juvenile court to determine a child's truth competency when ruling on the admissibility of the child's out-of-court statement. *Id.* at 331. The intermediate appellate court then held that the juvenile court complied with the requirements of CP § 11-304 in concluding that J.J.'s statement possessed "particularized guarantees of trustworthiness." *Id.* at 335.

Held: Affirmed.

The Court first held that Petitioner Mr. J. failed to preserve the issue as to whether a juvenile court must determine a child's truth competency when ruling on the admissibility of the child's out-of-court statement under CP § 11-304. The Court, however, exercised its discretion under Rule 8-131 to address the unpreserved issue. The Court concluded that neither the plain language of CP § 11-304 nor its legislative history supports a reading that a juvenile court is required to find that a child is truth competent before admitting that child's out-of-court statement. Accordingly, the Court held that competency is not a prerequisite to admit a child's out-of-court statement for the truth of the matter asserted under CP § 11 304. Consequently, the Court had no need to address whether J.J. herself was competent.

The Court next held that the juvenile court did not err in concluding that J.J.'s out-of-court statement was admissible in her and her brother's CINA proceedings because her statement contained the "particularized guarantees of trustworthiness" required for admission pursuant to CP § 11 304. At the hearing, the juvenile court played the audiotape of J.J.'s statement, heard testimony and considered the evidence, made on-the-record findings as to the requisite guarantees of trustworthiness of her statement, addressed each of the thirteen statutory factors, and deemed her out-of-court statement to be admissible under CP § 11-304. As a result, the Court held that the juvenile court did not err in its conclusion that J.J.'s out-of-court statement was admissible for the truth of the matter asserted: the juvenile court fully "compl[ied] with the foundational requirements of that statute, including the requirement that the court 'make a finding on the record as to the specific guarantees of trustworthiness that are in the statement.'" *Jones v. State*, 410 Md. 681, 700 (2009) (quoting CP § 11 304(f)(1)).

Quanta Brownlee, et al., v. Liberty Mutual Fire Insurance Co. et al., Misc. No. 1, September Term 2017, filed December 18, 2017. Opinion by Hotten, J.

Watts, J., dissents.

http://mdcourts.gov/opinions/coa/2017/1a17m.pdf

CERTIFIED QUESTION OF LAW – PUBLIC POLICY – INSURANCE LIABLILITY

Facts:

Quanta Brownlee, Jamal Brownlee, Shakeira Jones, Daquane Jones, and De'Aunttae Jones (collectively "Appellants") were exposed to lead-based paint at a property, owned by the Salvation Army, located at 1114 North Calvert Street in Baltimore City, Maryland ("the property"). In 1995, Quanta Brownlee and Jamal Brownlee resided at the property, which contained deteriorated lead-based paint. Quanta Brownlee and Jamal Brownlee sustained permanent brain damage and elevated blood lead levels as a result of the exposure to lead-based paint. In 2001, Shakeira Jones, Daquane Jones, and De'Aunttae Jones also resided at the property. Shakeira Jones, Daquane Jones, and De'Aunttae Jones also sustained permanent brain damage and elevated blood lead levels as a result of the exposure to lead-based paint.

Appellants named the Salvation Army as a defendant in their lead-based paint related tort claims in a complaint that is now pending in the United States District Court for the District of Maryland. The Salvation Army insured the property with comprehensive general liability policies issued by Liberty Mutual Fire Insurance Company ("Liberty Mutual") in Georgia, which were effective from October 1, 1993 until October 1, 2001. The Salvation Army asserted that it was immune from liability on charitable immunity grounds, unless and until Liberty Mutual indemnified it as responsible for Appellants' injuries and damages.

The insurance policies governing the Appellants' claim include a pollution exclusion clause. The Supreme Court of Georgia has held that bodily injuries allegedly resulting from the ingestion of lead-based paint are within the pollution exclusion. *See Georgia Farm Bureau of Mut. Ins. Co. v. Smith*, 298 Ga. 716, 784 S.E.2d 422 (2016). The language of the pollution exclusion clause in *Georgia Farm* is identical to the language of the pollution exclusion clause in the Liberty Mutual insurance policies. The Court of Appeals of Maryland has decided that a pollution exclusion clause does not remove an insurer's duty to defend a lead-based paint poisoning action. *Sullins v. Allstate Ins. Co.*, 340 Md. 503, 667 A.2d 617 (1995). Liberty Mutual moved to dismiss the complaint on the ground that Maryland courts follow the doctrine of *lex loci contractus* in choosing the applicable law, and that, under Georgia law, the insurance policy does not cover claims for lead-based paint poisoning. *Cunningham v. Feinberg*, 441 Md. 310, 326, 107 A.3d 1194, 1204 (2015). *Lex loci contractus* dictates that another jurisdiction's law will govern, unless the law is clearly against Maryland's public policy. *Id.* at 337, 107 A.3d at 1211. The United

States District Court sought an affirmation from the Court of Appeals on whether Georgia's law violates Maryland's public policy. If not, Georgia's law governs.

Held: Certified question from the United States District Court for the District of Maryland answered.

The Court of Appeals held that the application of Georgia's interpretation of the pollution exclusion contained in the Liberty Mutual insurance policies does not violate Maryland's public policy. The Court of Appeals relies on the Maryland General Assembly to dictate the State's public policy. *Bethlehem Steel Corp. v. G.C. Zarnas & Co.*, 304 Md. 183, 190, 498 A.2d 605, 608 (1985). The legislature has not expressly dictated that insurance providers cannot exclude lead-based paint from coverage. Further, a review of other legislative initiatives demonstrates that this State's public policy evidences a commitment to eradicate lead-based paint in homes, and aid victims of lead-based paint in the unfortunate event of poisoning. Considering that there is no explicit legislative determination that Georgia's law violates Maryland's public policy, the Court of Appeals held that Georgia's interpretation of the pollution exclusion clause governs the parties' contract.

COURT OF SPECIAL APPEALS

Jing Miao Miseveth v. Jeanne Aelion, et al., No. 2419, September Term 2016, filed December 21, 2017. Opinion by Wright, J.

http://www.mdcourts.gov/opinions/cosa/2017/2419s16.pdf

JUDICIAL REVIEW – DECISIONS MADE BY THE DEPARTMENT OF VETERANS AFFAIRS REGARDING THE PROVISION OF BENEFITS

Facts:

Jing Miao Miseveth, appellant, filed, in the Circuit Court for Prince George's County, a petition for guardianship of the person and property for her husband, Theodore Miseveth. The court ultimately granted appellant's request to be guardian of the person; however, the court ordered that a third-party, Jeanne Aelion, appellee, be guardian of the property.

Aelion was later appointed by the Department of Veterans Affairs (the "VA") to be the fiduciary of Mr. Miseveth's VA benefits (hereinafter "Representative Payee"). As part of that appointment, the VA issued a Fiduciary Agreement that itemized Mr. Miseveth's monthly expenses and how his VA benefits would be used to pay those expenses.

Not long after, appellant submitted an application to the VA requesting that she be named Representative Payee, and that application was granted. As part of that appointment, the VA issued a notice to Mr. Miseveth and Aelion informing them of the new appointment. The VA also created a new list indicating how Mr. Miseveth's VA benefits would be used to pay his expenses. That list of expenses differed significantly from the list that had been issued following Aelion's appointment.

Aelion thereafter filed a petition in the circuit court regarding appellant's appointment as Representative Payee. Aelion argued that, as guardian of the property, she had insufficient funds to cover Mr. Miseveth's expenses because appellant, as Representative Payee, was using some of Mr. Miseveth's VA benefits for "questionable" expenses.

Following a hearing, the circuit court ordered that appellant reinstate Aelion as Representative Payee or, in the alternative, that appellant submit a portion of Mr. Miseveth's VA benefits to Aelion every month.

On appeal, Appellant argued that the circuit court lacked the power to issue its order. Appellant maintained that Section 5502 of Article 38 of the United States Code provides "the Secretary of Veterans Affairs the exclusive power to appoint a fiduciary to receive and distribute veterans' disability benefits" and "extensive authority for supervising those appointed fiduciaries." Appellant further maintained that Section 511(a) of Article 38 of the United States Code provides an exclusive "remedial scheme regarding veterans' benefit determinations" and that, pursuant to that same statute, "the Secretary's authority in the area of determining and providing veterans' benefits is not subject to state court review." Appellant averred, therefore, that the court lacked subject matter jurisdiction to enter its order regarding her appointment as Representative Payee and her use of Mr. Miseveth's VA benefits.

Held: Reversed.

The plain language of 38 U.S.C. § 511(a) makes clear that any decision by the VA "under a law that affects the provision of benefits" is not reviewable by any court, including the circuit court. Moreover, § 511 precludes jurisdiction over a claim if it requires a court to review a decision made by the Secretary in the course of making benefits determinations. This preclusion extends not only to cases where a court must determine whether the VA acted properly in handling a request for benefits, but also to those decisions that may affect such cases.

Here, it was undisputed that, following Aelion's appointment as Representative Payee, the VA conducted a separate investigation and determined that appellant, not Aelion, was best suited to act as the fiduciary of Mr. Miseveth's VA benefits and to receive said benefits on his behalf. It was also undisputed that, as part of its investigation and appointment of appellant as Representative Payee, the VA established a pay schedule for how Mr. Miseveth's VA benefits would be spent. Importantly, there was no indication in the record that appellant deviated from that schedule; rather, the only allegation of "misuse" levied by Aelion was that appellant did not use the funds in a manner consistent with how she, as guardian of Mr. Miseveth's property, wanted the funds to be used.

That being the case, Aelion was required to seek relief via the review scheme established by Congress, as the VA's appointment of appellant as Representative Payee and its determination regarding how Mr. Miseveth's benefits should be spent were clearly decisions made "under a law that affects the provision of benefits by the Secretary to veterans." Consequently, the circuit court's "review" of that decision, which resulted in the court's ordering appellant to reinstate Aelion as Representative Payee and to distribute Mr. Miseveth's VA benefits contrary to the pay schedule established by the VA, was precluded by § 511(a).

Michael Foy v. Baltimore City Detention Center, No. 1472, September Term 2016, filed December 4, 2017. Opinion by Harrell, J.

Eyler, Deborah S., J., dissents.

http://mdcourts.gov/opinions/cosa/2017/1472s16.pdf

JUDICIAL REVIEW – FINAL DECISION OF ADMINISTRATIVE AGENCY UNDER MARYLAND CODE, STATE GOVERNMENT ARTICLE § 10-222(h) – APPEALABLE JUDGMENT

STATUTES – MARYLAND CORRECTIONAL OFFICERS' BILL OF RIGHTS – § 10-910(b)(1), (6) – STATUTORY TIME FRAME FOR APPOINTING AUTHORITY TO INCREASE PUNISHMENT – AND COMPLIANCE WITH REQUIREMENTS IN ORDER FOR COMMISSIONER TO INCREASE PUNISHMENT

Facts:

Until fired by the Commissioner, Michael Foy was a Lieutenant at the Baltimore City Detention Center (BCDC). Foy was accused of using excessive force against a BCDC inmate. He received, as a result, a notice of disciplinary charges recommending his termination. Foy appealed to an administrative hearing board. The hearing board recommended a lesser punishment (reducing rank to Sergeant and transfer to another facility). Baltimore City Division of Pretrial Detention and Services (DPDS) Commissioner, John S. Wolfe, received a copy of the hearing board's recommendation on 23 November 2015. Commissioner Wolfe, apparently inclined to believe that the hearing board's penalty recommendation was inadequate, sought to return Foy's punishment, under § 10-910(b)(6) of the Maryland Code, Correctional Services Article (Corr. Servs.), to that of termination.

On 9 December 2015, Commissioner Wolfe conducted a penalty increase meeting with Foy and his counsel, as required by the statute, so that they could remonstrate with the Commissioner regarding any increase in the punishment. Following the meeting, Commissioner Wolfe discovered that the audio recording equipment used to record the meeting malfunctioned, failing to capture a verbatim record of the contents of the meeting. Commissioner Wolfe notified Foy and his counsel of the equipment failure. Commissioner Wolfe and Foy's counsel agreed to meet again, with Foy in attendance, on 17 December 2015 to hold a compliant penalty increase meeting. A copy of this was not sent contemporaneously to Foy or his counsel.

On 10 December 2015, Commissioner Wolfe memorialized his recollection of what transpired at the unrecorded penalty increase meeting in a written memorandum to Stephen T. Moyer, Secretary of Public Safety and Correctional Services. On 16 December 2015, Foy's counsel confirmed the date of the rescheduled meeting. Later that day, however, the Commissioner canceled unilaterally, and without explanation, the meeting. On 16 December 2015,

Commissioner Wolfe, with the permission of Secretary Moyer, increased the hearing board's recommended punishment of Foy, and terminated his employment with the BCDC.

Foy filed an action for judicial review in the Circuit Court for Baltimore City, arguing solely that Commissioner Wolfe violated the Correctional Officers' Bill of Rights (COBR) when he increased the hearing board's recommended punishment without conducting a timely recorded penalty increase meeting. The circuit court, after reviewing the record and considering counsels' arguments, agreed with Foy that the particular COBR right to a recorded increase meeting had been violated, but remanded the case for Commissioner Wolfe to conduct a compliant penalty increase meeting.

On appeal to the Court of Special Appeals, BCDC moved to dismiss, arguing that the circuit court's remand order was not an appealable final judgement. Foy responded that the circuit court's remand order was authorized by § 10-222(h)(1) of the Maryland Code, State Government Article, as an appealable final judgment under *Metro Maint. Sys. S., Inc. v. Milburn*, 442 Md. 289, 299-307, 112 A.3d 429, 435-40 (2015).

On the merits, Foy avers that Commissioner Wolfe's failure to capture timely the penalty increase meeting on the audio record was in violation of Corr. Servs. § 10-910(b)(6)(ii). The Commissioner's unexplained failure to conduct and record a compliant recorded meeting within the allowed statutory time period precludes him from increasing the hearing board's proposed penalty of Foy. Thus, the hearing board's recommended penalty became, by default, the proper penalty in this case.

Held: Affirmed in part and reversed in part.

Remanded with directions to reinstate the hearing board's penalty and award Foy commiserate back-pay consistent with the hearing board's penalty.

Responding to BCDC's motion to dismiss, the Court of Special Appeals found the circuit court's remand order to be an appealable final judgment. Relying on *Metro Maint. Sys. S., Inc. v. Milburn*, 442 Md. 289, 299-307, 112 A.3d 429, 435-40 (2015), the Court held that a remand after a circuit court has conducted a judicial review of the issue(s) raised in the administrative action, precluding the parties from further contesting or defending the validity of the agency's decision on the merits, is an appealable final judgment. The circuit court here made clear findings on the merits of Foy's sole contention, after reviewing the record and listening to counsels' arguments. The circuit court found that "*an error of law* occurred at the penalty increase hearing" and "Commissioner Wolfe "failed to satisfy the final portion of [Corr. Servs. § 10-910(b)(6)(ii)] when [he] . . . failed to capture the hearing *on the record*." (emphasis added). Thus, a remand ordered under State Gov't § 10-222(h) is an appealable final judgment.

The Court held then that the Commissioner violated Foy's COBR rights when he failed to record a penalty increase meeting within the mandated time frame, as had the circuit court concluded as well. The Court began its analysis by determining when the statutorily mandated clock began to

run (and ran-out) for Commissioner Wolfe to complete his statutory tasks before he could increase Foy's penalty. In this regard, the Court considered the language "[w]ithin 30 days after receipt of the recommendations of the hearing board" in Corr. Servs. § 10-910(b)(1) (emphasis added). The Court noted the COBR's similarity to the Law Enforcement Officer's Bill of Rights (LEOBR). Consequently, it found cases interpreting the LEOBR to be persuasive in its interpretation of the COBR. Relying on *Popkin v. Gindlesperger*, 426 Md. 1, 5, 43 A.3d 347, 350 (2012), and *Maryland-National Capital Park & Planning Comm'n v. Anderson*, 164 Md. App. 540, 576, 884 A.2d 157, 178 (2005), the Court noted that under § 3-108 (d)(1)(ii) of the LEOBR, upon a finding of guilt and suggested discipline by the board, the matter is then forwarded to the chief for review, and the chief is required to issue a final order. The chief has 30 days to issue his/her order. Thus, the Court concluded that the plain meaning of Corr. Servs. § 10-910(b)(1) provides the appointing authority under the COBR 30 days to render a final order, commencing when it receives the hearing board's recommendation. Commissioner Wolfe acknowledged receipt of the hearing board's proposed punishment on 23 November 2015. Thus, the 30-day window for rendering a final penalty decision began on that date and expired on 23 December 2015.

The Court determined next that the pre-increase steps identified in Corr. Servs. § 10-910(b)(6) are mandatory and may not be satisfied by substantial compliance. *Hird v. City of Salisbury*, 121 Md. App. 496, 503, 710 A.2d 352, 356 (1998), convinced the Court that a plain reading indicates that the appointing authority must comply with (b)(6)(i), (ii), (iii), and (iv) before it may increase a hearing board's proposed penalty. The Court found also that, even if substantial compliance were available as a defense, Commissioner Wolfe's conduct failed to meet that standard. Commissioner Wolfe met initially with Foy in compliance with Corr. Servs. § 10-910(b)(6)(ii), but his efforts failed to comply with the requirement that the meeting be on the record. The Court disagreed with the BCDC that the Commissioner's memorandum to Secretary Moyer, setting forth his recollection of what transpired at the unrecorded penalty increase meeting, complied substantially with the "on the record" provision of Corr Servs. § 10-910(b)(6)(ii). Relying on *VanDevander v. Voorhaar*, 136 Md. App. 621, 632, 767 A.2d 339, 345 (2001), the Court found troubling Commissioner Wolfe's unilateral conduct cancelling the scheduled 16 December 2015 meeting, giving no reason for the cancellation, and making no attempt to reschedule the penalty increase meeting before the expiration of the 30-day period. Furthermore, Commissioner Wolfe's memorandum to Secretary Moyer was not provided to Foy in advance of his termination. Moreover, the memorandum was neither objective nor complete. Commissioner Wolfe's failure to comply timely with Corr. Servs. § 10-910(b)(6)(ii) closed the window of opportunity to increase Foy's penalty.

David Leander Ford v. State of Maryland, No. 2193, September Term 2016, filed December 20, 2017. Opinion by Berger, J.

http://mdcourts.gov/opinions/cosa/2017/2193s16.pdf

CRIMINAL LAW – CHARACTER EVIDENCE – VICTIM'S TRAIT OF PEACEFULNESS

CRIMINAL LAW – CONSCIOUSNESS OF GUILT EVIDENCE

Facts:

On the evening of July 8, 2015, Mohamed Eltahir and David Leander Ford were sitting on a park bench. The two began arguing after Ford made a lewd comment about Eltahir's sister. Ford struck Eltahir, and a fight ensued. At some point, Ford drew a knife and stabbed Eltahir in the chest. Ford fled the scene, and Eltahir died as a result of his injuries. That night, Ford hid at the house of Sheila Brown. The next morning, Brown told Ford that he had to leave. Ford cursed Brown and slammed the front door as he left. Upon exiting, he was arrested by police in the front parking lot.

On the way to the Criminal Investigation Division ("C.I.D"), Ford made a number of incriminating remarks. At C.I.D., Ford was interrogated by Detective Kelly Harding and Detective Jason McNemar. Prior to questioning, Ford told the detectives that he needed stitches for a cut on his arm. After reading Ford his Miranda rights, Detective Harding began the interrogation. Ford made a number of incriminating statements, at one point exclaiming, "Lord, forgive me for what I've done, help me." Ford admitted to stabbing Eltahir and told the detectives where the knife was hidden. Later in the interrogation, the detectives called a paramedic to treat Ford's arm.

Ford was charged with first degree murder and carrying a dangerous weapon. Prior to trial, defense counsel filed a motion to suppress Ford's statements to police, arguing that Ford's mental and physical condition rendered his confession involuntary. The trial court denied the motion to suppress, finding that Ford was coherent and understood his rights.

At trial, a number of evidentiary issues arose. When two State's witnesses testified to Eltahir's trait of peacefulness, defense counsel objected that it had not presented any evidence that Eltahir was the first aggressor. The trial court allowed the testimony on the grounds that defense counsel had raised the issue in its opening statement. When Brown described Ford's angry response upon being asked to leave her house, defense counsel objected that the testimony was unfairly prejudicial. The trial court disagreed, ruling that the testimony was admissible to show Ford's "consciousness of guilt." When defense counsel questioned a State's witness, Everett Kane, about a "prior inconsistent statement" that he had made to police, the State objected that the alleged statement was ambiguous without further context. The court agreed and barred the line of questioning.

Ford was convicted of second degree murder. The circuit court sentenced Ford to twenty-five years in prison, with all but twenty years suspended, and five years of probation. Ford timely appealed.

Hel: Affirmed.

The Court concluded that Ford spoke voluntarily to the police at all times and that he knowingly and voluntarily waived his Miranda rights. The Court saw no reason to disturb the circuit court's factual findings that Ford was "coherent and aware" during the interrogation and "had a basic understanding of his rights." Although Ford had not taken medication for his mental illness, he showed no symptoms on the day of the arrest. When Ford complained of low blood sugar, he was provided with food and drink. Although Ford had a minor cut on his arm, the detectives never suggested that they would delay or withhold medical treatment unless Ford provided an inculpatory statement. The circuit court did not err, therefore, in denying Ford's motion to suppress.

The Court further determined that the circuit court had not acted unreasonably in allowing testimony about Eltahir's trait of peacefulness. In a homicide case, Maryland Rule 5-404 allows the prosecutor to offer evidence of the victim's trait of peacefulness "to rebut evidence that the victim was the first aggressor." Although Ford's counsel had not introduced such evidence, his opening statement clearly presented Eltahir as the first aggressor. Under Maryland Rule 5-611, trial courts may exercise reasonable control over the order of interrogating witnesses and presenting evidence. The Court had previously interpreted Rule 5-611 as authorizing trial courts to allow "anticipatory rehabilitation" of a witness whose credibility has been attacked in an opening statement. Furthermore, the Court of Appeals has suggested that a defendant's opening statement may open the door to rebuttal evidence that would otherwise be inadmissible. Under these circumstances, the Court could not say that the circuit court had abused its discretion.

On the subject of Brown's testimony, the Court opined that Ford's emotional reaction tended to show his "consciousness of guilt." The Court rejected Ford's argument that the testimony was cumulative and prejudicial, stating that the circuit court was in the best position to weigh the probative value of Brown's testimony against countervailing considerations. The Court held, therefore, that the circuit court had not abused its discretion in allowing Brown's testimony.

The Court determined, finally, that the circuit court had reasonably barred defense counsel from asking Kane about his "prior inconsistent statement" to police. The Court agreed that the statement was ambiguous without further context and was likely to confuse both Kane and the jury. The Court rejected Ford's contention that the circuit court had violated his rights under the Confrontation Clause. The circuit court did not prevent Ford from using Kane's interview with the police to impeach him; the court merely asked that Ford impeach Kane with his own words

and not the words of a third party. Because the circuit court acted properly within its discretion and in accordance with constitutional law, the Court of Special Appeals affirmed its decision.

Steven Young v. State of Maryland, No. 928, September Term 2016, filed December 1, 2017. Opinion by Raker, J.

http://www.courts.state.md.us/opinions/cosa/2017/0928s16.pdf

EVIDENCE – HEARSAY – PRESCRIPTIONS

Facts:

Steven Young appealed his convictions of possession of heroin, oxycodone, methadone, and alprazolam, each with the intent to distribute. Young claimed that (1) he should have been allowed to introduce prescriptions as a statutory defense for possession of oxycodone, methadone, and alprazolam, and (2) the judge should have ruled on his motion to suppress statements based on an allegedly unlawful arrest.

Before the Court of Special Appeals, Young argued that the judge ruled his prescriptions for oxycodone, methadone, and alprazolam inadmissible incorrectly. The State argued that the prescriptions were hearsay and not authenticated as business records. The judge granted the motion to suppress without allowing the defense to reply.

Young also claimed that the trial court failed to rule or hold a hearing on his motion to suppress statements that followed from his allegedly unlawful detention.

Held: Reversed in part and affirmed in part.

The Court of Special Appeals held that the trial court erred in excluding the prescriptions on the grounds of hearsay. The prescriptions were not hearsay. They were offered as a statutory defense and, as such, were admissible.

Maryland Code Ann. Crim. Law § 5-601 (2002; 2012 Repl. Vol, 2015 Supp.) makes it a crime to possess controlled dangerous substances "unless obtained directly or by prescription or order from an authorized provider acting in the course of professional practice." A prescription for a controlled dangerous substance is a defense to a charge under this section, and is admissible as a defense to disprove this statutory element. Such a use does not seek to prove any assertion the prescription contains. Therefore the prescription is not hearsay.

Section 5-602(2) prohibits "posess[ing] a controlled dangerous substance in sufficient quantity reasonably to indicate under all circumstances an intent to distribute or dispense a controlled dangerous substance." A prescription may constitute a circumstance of possession of a quantity of a controlled dangerous substance without intention to sell it.

Young's claim regarding his motion to suppress was not preserved.

The Court held that medical prescriptions for oxycodone, methadone, and alprazolam are not hearsay when offered as a statutory defense to the offenses of possession of controlled dangerous substances and possession of controlled dangerous substances with intent to distribute.

Lamont Jeffery Geiger v. State of Maryland, No. 2668, September Term 2016, filed December 5, 2017. Opinion by Moylan, J.

http://mdcourts.gov/opinions/cosa/2017/2668s16.pdf

CRIMINAL LAW – FACIAL PROFILING TECHNOLOGY – HEARSAY – PROCEEDING ON "INFORMATION RECEIVED"

Facts:

Leanne Ayers, a Southern Tire saleswoman, received a telephone call from an individual who identified himself as "Brian Johnson" and requested to purchase tires. The caller charged an $85 deposit on the tires to a credit card. The following day "Mr. Johnson" had four tires installed on his car. Because he did not have the credit card on his person, he showed Ayers an ostensible North Carolina driver's license bearing the name "Brian Johnson." The employee photographed the license, and charged the remaining $939.53 balance to the credit card on file. Three weeks later, the credit card company alerted Tiro Joson, an employee of Southern Tire's Accounts Receivable department, that the credit card number had been fraudulently used.

Upon learning of the fraudulent transaction, Detective Matthew Kelly sought to locate the "Brian Johnson" listed on the North Carolina license. Pursuant to doing so, he elicited the assistance of a Sheriff's Office clerk. Detective Kelly relayed to the clerk the identifying information on the license. While Detective Kelly watched, the clerk searched the North Carolina Motor Vehicle Administration database for a "Brian Johnson" with the date of birth appearing on the license. They discovered that a North Carolina driver's license had not been issued to any such person. Through the use of facial profiling technology, Detective Kelly located a Maryland driver's license issued to Lamont Jeffery Geiger ("appellant").

At trial, Ayers identified appellant as the ostensible "Brian Johnson." The State likewise entered into evidence copies of both appellant's Maryland driver's license and the fake North Carolina driver's license. The court found as a matter of fact that the photographs appearing on both licenses depicted appellant.

Held: Affirmed.

The use of facial profiling technology to develop a suspect does not contaminate evidence obtained from subsequent investigative measures. This is so even where the use of facial profiling technology led law enforcement to pursue those subsequent investigative measures.

Appellant first contends that the State used inadmissible hearsay evidence to establish that there was no legitimate North Carolina driver's license issued to a Brian Johnson. It did not. Maryland Rule of Procedure 5–803(b)(10) expressly provides for a hearsay exception where "evidence in

the form of testimony . . . that a diligent search has failed to disclose a record, report, statement, or data compilation made by a public agency . . . when offered to prove the absence of such a record or entry."

Appellant argues in the alternative that because the search of the database was performed by an anonymous clerk rather than Detective Kelly, the latter's testimony as to the result of the search constituted impermissible hearsay. This argument, however, is predicated on the faulty premise that only the clerk participated in the search of a database, and merely communicated his findings to Detective Kelly. To the contrary, a search of a database need not be a solo performance; multiple individuals may jointly participate in such a search. Where, as here, one individual supplies the information that guides another's search, the information-supplier may be competent to testify as to the results of that search.

Appellant next takes issue with the State's use of facial profiling technology to identify appellant as the individual depicted on the North Carolina driver's license, alleging that this evidence constituted inadmissible hearsay. The in-court identification of appellant as the culprit did not, however, consist of the results of facial profiling. It consisted, rather, of Ayers's in-court identification and the photograph of the fake driver's license appellant had used.

Further, the means by which the police discover an unknown suspect's identity is immaterial. As the United States Supreme Court has long held, the manner in which a defendant is taken into custody does not compromise his subsequent prosecution. *See, e.g.*, *Ker v. Illinois*, 119 U.S. 436, 440, 7 S. Ct. 225, 30 L. Ed. 421 (1886). Maryland State case law accords with that principle. *See, e.g., Modecki v. State*, 138 Md. App. 372, 771 A.2d 521 (2001).

Even had the results of the facial profiling technology constituted inadmissible hearsay, this would not prohibit Detective Kelly from testifying about subsequent investigative measures taken on the basis of that hearsay. Where an investigative measure is taken based on inadmissible hearsay, an investigator may omit details regarding that inadmissible link in the investigative chain and merely testify that his subsequent investigative step was taken "upon information received."

The use of facial profiling technology in a criminal investigation to develop a suspect is not impermissible where the use of that technology has not been introduced into evidence. Here, it was neither the State nor Detective Kelly who raised the use of facial profiling technology. It was appellant, rather, who insisted upon a comprehensive account of the source of the "information received." He alone raised facial profiling technology.

Citing this Court's holding in *Zemo v. State*, 101 Md. App. 303, 646 A.2d 1050 (1994), appellant contends that by allowing Detective Kelly to testify as to irrelevant corroborative finding made while investigating, the court erroneously permitted the State to bolster his credibility. This case is only similar to *Zemo*, however, insofar as each case involved a detective's testifying as to his investigation. The nature of the testimony at issue in this case was diametrically different from that in *Zemo*, as was the line of inquiry by which it was elicited. In *Zemo*, the detective offered completely inadmissible, irrelevant, and prejudicial testimony—to wit, the invocation of the right

to silence and gratuitously corroborative incriminating details derived from a confidential informant. The testimony at issue here, by contrast, was both relevant and would have been admissible. Further, in *Zemo*, the State's elicitation of such evidence was both deliberate and sustained, while in this case it inadvertent and fleeting. Appellant's argument is premised on the kind of "overreaction to every passing or random injection of some arguably prejudicial material" which this Court eschewed in *Zemo*. *Id*. at 306.

Jatwan Derrick Boston v. State of Maryland, No. 871, September Term 2016, filed December 20, 2017. Opinion by Eyler, D.S., J.

http://mdcourts.gov/opinions/cosa/2017/0871s16.pdf

MARYLAND WIRETAP ACT – WILLFUL INTERCEPTION OF TELEPHONE CALL – RECORDING OF TELEPHONE CALL BETWEEN INMATE AND THIRD PARTY ADDED TO CALL BY INITIAL RECIPIENT OF CALL WAS NOT WILLFUL INTERCEPTION AND THEREFORE WAS NOT A VIOLATION OF WIRETAP ACT.

Facts:

The day after victim was shot multiple times in the course of a home invasion, the appellant spoke on the telephone to his brother, who was incarcerated at the Baltimore County Detention Center. The brother placed the telephone call to his girlfriend. Before they could speak to each other, a pre-recorded announcement informed them that their call would be recorded. The brother and his girlfriend conversed, and during the call the brother asked his girlfriend to dial his brother (the appellant) into the call. She did so. In the portion of the call between the appellant and his brother, the appellant made incriminating remarks about the crimes against the victim. Immediately before trial, defense counsel orally moved *in limine* to keep the recorded telephone call out of evidence as having been obtained in violation of the Wiretap Act, because the call was recorded without the appellant's consent. The court denied the motion. The appellant was convicted of numerous crimes against the victim and after sentencing noted an appeal.

Held: Affirmed.

The Maryland Wiretap Act makes it illegal to willfully intercept a telephone conversation. In certain circumstances willful interception is legal, including if the parties to the telephone conversation consent to its being recorded. Under the Act, with some exceptions, a recording of a telephone conversation is not admissible in evidence if it was obtained in violation of the Act.

The appellant was not on the line when the pre-recorded announcement was played, so there was no evidence that when he was added to the call the appellant knew that the call was being recorded and implicitly consented by proceeding to speak. Even if the call was recorded without the appellant's consent, however, it only was recorded in violation of the Wiretap Act if it was "willfully intercepted." Willful in this context means intentional-purposeful. The appellant bore the burden to show that the Detention Center intercepted his telephone conversation with his brother willfully. He produced no evidence to show that the Detention Center had knowledge that a third party (the appellant) was added to the telephone call the appellant's brother made to his girlfriend, and that it therefore had the power or control over the call that would make the

recording of the brother's conversation with the appellant willful. Absent proof that the recording was obtained in violation of the Act, the court properly denied the motion *in limine*.

Reginald Faison, Jr. v. MCOCSE, ex rel KaSandra Murray, No. 1486, September Term 2016, filed December 4, 2017. Opinion by Nazarian, J.

http://mdcourts.gov/opinions/cosa/2017/1486s16.pdf

PATERNITY – AFFIDAVIT OF PARENTAGE – MISTAKE OF MATERIAL FACT

Facts:

KaSandra Murray ("Mother") and Reginal Faison, Jr. met in July 2014 while attending Salisbury University. They had sexual relations and began dating shortly thereafter. During that period, Mother informed Mr. Faison that she was pregnant and that the baby was his. Throughout her pregnancy, Mr. Faison believed he was the father of her child. The day after the baby girl ("Child") was born, both Mother and Mr. Faison signed an affidavit of parentage attesting that Mother was Child's mother and Mr. Faison was her father. In the months that followed, Mr. Faison and his family maintained a relationship with Child. Over time, however, Mr. Faison came to suspect that he wasn't Child's father after all, at which point the relationship ceased. In [year], the Montgomery County Office of Child Support Enforcement's ("MCOCSE" or the "Office") filed a child support complaint against Mr. Faison. He denied formally that he was the Child's father, and requested a blood test to determine paternity. The Circuit Court for Montgomery County denied his request, finding the affidavit had created a presumption of parentage and that he had not borne his burden of proving that he signed it as a result of fraud, duress, or a material mistake of fact. Mr. Faison appealed, challenging the circuit court's denial of his motion for genetic testing and its failure to consider whether he met his burden of proving a material mistake of fact.

Held: Reversed and remanded.

The Court of Special Appeals held that the circuit court erred in denying Mr. Faison's motion for genetic testing and reversed and remanded the case for further proceedings. The Court's decision relied heavily on a recent Court of Appeals decision, *Davis v. Wicomico Cty. Bureau*, 447 Md. 302 (2016). Specifically, the Court adopted the concurrence-plus-dissent's statutory analysis of relevant portions of the Family Law Article in determining that a father is entitled to a blood or genetic test on request for the purpose of setting aside a § 5-1032 judicial declaration of paternity or attempting to rescind an affidavit of parentage under § 5-1028. As a result, the Court held that an alleged father may request a blood or genetic test to establish a material mistake of fact in an effort to rescind an affidavit of parentage.

Loren J. Chassels, et al. v. Benjamin L. Krepps, et al., No. 954, September Term 2016, filed December 4, 2017. Opinion by Nazarian, J.

http://mdcourts.gov/opinions/cosa/2017/0954s16.pdf

SETTLEMENT AGREEMENT – ASSUMPTION OF DUTY – PLEADING – UNJUST ENRICHMENT

Facts:

Loren Chassels and Melissa Krepps were married and had a child together in 2002. Mr. Chassels and Mrs. Krepps divorced in 2006 and filed a Separation Agreement regarding the care of their child. As part of the Agreement, Mr. Chassels and Mrs. Krepps each agreed to maintain a $250,000 life insurance policy for the benefit of their child ("Child") and list the other parent as trustee beneficiary. Mrs. Krepps later married Benjamin Krepps.

In 2008, Mr. Krepps took on the responsibility of paying all of the bills for Mrs. Krepps and himself. Mr. Chassels alleges that in the course of marshaling the family assets, Mr. Krepps contacted Mr. Chassels and left a voicemail confirming that Mr. Krepps knew about the Agreement's life insurance requirement and other details about child support, and "that he would do whatever is necessary to make sure the settlement agreement was complied with." In that same time frame, Mr. Chassels apparently requested, and received, proof that Mrs. Krepps was maintaining the required life insurance policy for the Child. Mrs. Krepps confirmed that Mr. Krepps maintained a life insurance policy for Child through his Army benefits, and Mr. Chassels alleged that he received a copy of Mr. Krepps's paystub showing deductions for the life insurance policy.

In January 2013, Mrs. Krepps was diagnosed with a Stage IV melanoma in her brain. That same year Mr. Krepps changed jobs and stopped paying the premiums on the life insurance policy, which caused the policy to lapse. Mr. Chassels had no notice that the premiums weren't being paid or that the policy had lapsed. Mrs. Krepps died in February 2015. A month later, Mr. Chassels contacted Mr. Krepps about the life insurance policy and learned that the policy had lapsed.

Mr. Chassels filed a complaint on behalf of Child, and named both Mr. Krepps and the Estate of Melissa Krepps as Defendants, and stated six counts: Count I—Concealment or Non-Disclosure; Count II—Negligent Concealment or Non-Disclosure; Count III—Constructive Fraud; Count IV—Constructive Trust; Count V—Negligence; and Count VI—Unjust Enrichment. Mr. Krepps filed a motion to dismiss the complaint in December 2015. The circuit court dismissed Counts I-V, but gave Mr. Chassels leave to amend Count VI. Mr. Chassels amended and re-filed the full six-count complaint. Mr. Krepps again moved to dismiss and the circuit court granted Mr. Krepps's motion to dismiss on all counts with prejudice. Mr. Chassels filed a timely notice of appeal.

Held: Affirmed in part, reversed and remanded in part.

A third party may be able to assume a duty by interjecting him- or herself into a pre-existing contract to which they are not a party. A plaintiff may also plead unjust enrichment where the defendant did not receive a benefit beyond cessation of an obligation to pay.

The Court of Special Appeals held that Mr. Chassels had sufficiently alleged a legal duty owed by Mr. Krepps to his step-child, as well as unjust enrichment for at least the amount of the insurance premiums he ought to have paid to maintain Mrs. Krepps's life insurance policy. Mr. Krepps may have assumed a duty to Child by informing Mr. Chassels that he was aware of the life insurance provision in the Agreement and would maintain it, as well as making premium payments to the policy. Mr. Krepps may also have unjustly enriched himself in the amount of the premium payments at Child's expense by not making those life insurance premium payments when he moved to a new job. Therefore, the circuit court erred in dismissing Mr. Chassels's complaint with prejudice.

The Court affirmed the circuit court's dismissal of Mr. Chassels's claim of constructive fraud because that claim required a confidential relationship between Mr. Krepps and himself or Mr. Krepps and Child, which Mr. Chassels had not alleged. The Court also affirmed the dismissal of the claim for a constructive trust because that is a remedy, not a claim unto itself. The case was remanded to the circuit court consistent with these holdings.

R.K. Grounds Care, et al. v. Kevin D. Wilson, No. 1452, September Term 2016, filed December 4, 2017. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2017/1452s16.pdf

WORKERS' COMPENSATION COMMISSION – SUBJECT MATTER JURISDICTION – GARNISHMENT EXEMPTIONS.

Facts:

Wilson and his employer and insurer entered into a settlement of his worker's compensation claim, which was approved by the Commission. When the settlement funds were in the hands of the insurer, the insurer was notified of child support liens against Wilson and then was served with writs of garnishment. The child support judgments exceeded the amount of Wilson's share of the settlement. The insurer answered the garnishment proceeding. Wilson did not file anything in the garnishment proceeding. The insurer paid Wilson's share of the settlement to the local child support enforcement agency, which was the judgment creditor in the garnishment proceeding.

A few months later, Wilson filed "Issues" in the Commission, complaining that the insurer had not paid him his share of the settlement. The parties put before the Commission the question whether Wilson's share was exempt from garnishment under section 11-504(b) of the Courts and Judicial Proceedings Article (CJ). The Commission ruled that the share was partially exempt. RK filed an action for judicial review. The circuit court also addressed the exemption question, ruling that Wilson's share was partially exempt (but by a different amount) and directing that the insurer was to pay Wilson the non-exempt portion of his share, notwithstanding that it already had paid his full share to the judgment creditor in the child support cases. RK noted an appeal.

Held: Reversed.

The circuit court should have ruled that the Commission lacked subject matter jurisdiction to decide whether money that was in the hands of an insurer for settlement of a workers' compensation claim was exempt from garnishment to pay a judgment in a child support action. Only a circuit court has subject matter jurisdiction over garnishments. In the child support garnishment proceeding, Wilson, as judgment debtor, was entitled to file a motion asking the court to find that his share of the settlement monies (or part of his share) was exempt from garnishment under CJ section 11-504. He failed to do so. Instead, he sought relief from the Commission, which did not have jurisdiction over the matter.

Willow Grove Citizens Association, et al. v. County Council of Prince George's County, Maryland, No. 2018, September Term 2016, filed December 20, 2017. Opinion by Berger, J.

http://mdcourts.gov/opinions/cosa/2017/2018s16.pdf

CORPORATIONS & ASSOCIATIONS – FORFEITURE OF RIGHT TO DO BUSINESS IN MARYLAND – EFFECT ON ZONING EXCEPTION APPLICATIONS

Facts:

Presidential, LLC ("Presidential") owns a 7.91 acre property located at 3911 Lottsford Vista Road in Bowie, Maryland ("the Property"). On February 21, 2014, Presidential applied for a special zoning exception to operate a 15-person adult day care facility and a 63-unit assisted living facility on the Property. The applicant was listed as "Presidential Care, LLC, by Stoddard Baptist Home, Inc., Managing Member." Stoddard Baptist Home, Inc. ("Stoddard"), the sole member of Presidential, is a foreign corporation organized in the District of Columbia.

A few years earlier, Presidential had forfeited the right to do business in Maryland and the right to use its name. At the time of its application, Presidential had not yet regained good standing with the State Department of Assessment and Taxation ("SDAT"). Stoddard was not authorized to do business in Maryland because it had not registered with SDAT.

The Zoning Hearing Examiner ("the Examiner") conducted a public hearing. The People's Zoning Counsel, Stan D. Brown ("Brown"), disclosed that he had been involved in the sale of the Property to Presidential. There were no objections to Brown's participation. The Zoning Hearing Examiner approved the application. The decision was appealed to the County Council of Prince George's County, Maryland ("the County Council"), which remanded the matter so that the Examiner could determine whether Presidential and Stoddard were in good standing with SDAT.

In 2015, Presidential regained the right to do business in Maryland and to use its name; the same year, Stoddard registered with SDAT and became qualified as a corporation in Maryland. After a second hearing, the Examiner recommended approval of Presidential's application. On February 8, 2016, the County Council granted a special exception to Presidential.

Various persons of record appealed to the Circuit Court for Prince George's County. The appellants argued that Presidential's application was "a nullity" because neither Presidential nor Stoddard was authorized to do business in Maryland when the application was filed. The appellants also contended that Brown should have recused himself from the proceedings.

The circuit court affirmed the decision. Willow Grove Citizens Association and other persons of record timely appealed.

Held: Affirmed.

The Court held that Presidential's application for a special exception was valid even though Presidential had forfeited its right to do business in Maryland and its right to use its name. The Court stressed that an LLC does not become a non-entity after forfeiture. Under Corps. & Ass'ns § 4A-920, forfeiture "does not impair the validity of a contract or act" made or done by an LLC during the period of forfeiture. Applying the plain language of the statute, the Court concluded that an application for a special exception is an "act" of an LLC and is valid, therefore, notwithstanding forfeiture.

The Court rejected Willow Grove's contention that a zoning proceeding is a judicial proceeding for the purposes of § 4A-920. In *Price v. Upper Chesapeake Health Ventures*, 192 Md. App. 695 (2010), the Court of Special Appeals had interpreted § 4A-920 as prohibiting a forfeited LLC from bringing a lawsuit. In the present case, the Court held that the prohibition against lawsuits specifically applies to actions "in a court of this State."

The Court further held that Stoddard's involvement in the application did not constitute "doing business" in Maryland. Under Corps. & Ass'ns § 7-103, a foreign corporation that maintains an administrative proceeding in Maryland is not "doing intrastate business." In applying for a special exception, Stoddard was maintaining an administrative proceeding. Stoddard's involvement could not, therefore, invalidate the application.

The Court concluded that the application was valid and that Presidential and Stoddard were in good standing with SDAT by the time the special exception was granted. Accordingly, the Court affirmed the decision of the County Council. The Court did not consider whether Brown should have recused himself because the issue was not preserved for review.

ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated December 6, 2017, the following attorney has been placed on inactive status by consent:

PHILLIP GEORGE DANTES

*

By an Order of the Court of Appeals dated December 11, 2017, the following attorney has been disbarred by consent:

DIANA BETH DENRICH

*

By an Order of the Court of Appeals dated December 13, 2017, the resignation from the further practice of law in this State of

JERRY SUSSMAN

has been accepted.

*

By an Order of the Court of Appeals dated December 20, 2017, the following attorney has been placed on inactive status by consent:

DAVID LESLIE McGILL

*

By an Order of the Court of Appeals dated December 14, 2017, the following attorney has been indefinitely suspended by consent, effective December 29, 2017:

FRANCIS A. POMMETT, III

*

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

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

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