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COURT OF APPEALS

Attorney Grievance Commission v. Sandy F. Thomas-Bellamy, Misc. Docket AG No. 7, September Term 2016, filed November 22, 2016. Opinion by McDonald, J.

<http://www.mdcourts.gov/opinions/coa/2016/7a16ag.pdf>

ATTORNEY DISCIPLINE – RECIPROCAL DISCIPLINE PROCEEDING –
MISREPRESENTATION ON BAR APPLICATION – CORRESPONDING DISCIPLINE

Facts:

The Attorney Grievance Commission (“AGC”) petitioned the Court to impose reciprocal discipline on Sandy F. Thomas-Bellamy under Maryland Rule 19-737 based on a prior one-year suspension imposed on her by the District of Columbia Court of Appeals.

In 2012, Ms. Thomas-Bellamy was under investigation by the AGC after four clients filed complaints that she had neglected their cases. During the investigation, Ms. Thomas-Bellamy completed three of the clients’ cases to their satisfaction and refunded the money paid to her by the fourth client. This investigation eventually resulted in her indefinite suspension from the practice of law in Maryland with the right to apply for reinstatement after six months. While this investigation was ongoing, however, and with knowledge of it, Ms. Thomas-Bellamy attested in a supplement to her District of Columbia bar application that she was not “subject of any . . . grievances . . . concerning [her] conduct as an attorney.”

Ms. Thomas-Bellamy was admitted to the District of Columbia Bar. In 2014, the District of Columbia Court of Appeals suspended her from the practice of law in that jurisdiction for six months as reciprocal discipline based on her earlier six-month suspension in Maryland related to the client complaints. The following year, that court also disciplined her after it learned about the misrepresentation in her bar application and suspended her for one year, to run consecutive to the earlier six-month suspension. Both of those suspensions required a showing of fitness as a prerequisite to reinstatement in the District of Columbia Bar.

The AGC then petitioned the Court of Appeals of Maryland to impose reciprocal discipline.

Held:

The appropriate corresponding discipline is indefinite suspension, with the right to apply for reinstatement one year after the date of this decision.

Under Maryland Rule 19-737, the appropriate sanction in a reciprocal discipline proceeding is one that “corresponds” to the discipline imposed by the other jurisdiction, unless “extraordinary circumstances” exist that indicate that the conduct “warrants substantially different discipline” in Maryland. Although the Court has denied admission to applicants and disbarred attorneys for deliberate misrepresentations on their bar applications, this Court has also imposed less severe sanctions for less-serious bar application misrepresentations. In this case, Ms. Thomas-Bellamy’s misrepresentation was isolated and not intended to cover up serious misconduct. Additionally, she took full responsibility for her misconduct and fully cooperated in the disciplinary proceedings. The Court held that there were not extraordinary circumstances that warranted a greater or lesser sanction. Therefore, corresponding discipline in the form of a one-year indefinite suspension – not disbarment – is the appropriate sanction.

Kevon Spencer v. State of Maryland, No. 94, September Term 2015, filed November 23, 2016. Opinion by Greene, J.

Barbera, C.J., dissents in part.

Watts, J., concurs and dissents.

McDonald and Getty, JJ., dissent.

<http://www.mdcourts.gov/opinions/coa/2016/94a15.pdf>

CONSTITUTIONAL LAW – FOURTEENTH AMENDMENT – *BATSON* CHALLENGE

Facts:

A jury convicted Petitioner, Kevon Spencer (“Spencer”), of attempted second-degree murder, first-degree assault, two counts of second-degree assault, three counts of malicious destruction of property, and various traffic violations. Spencer maintains that he did not possess the requisite specific intent to kill to sustain the conviction of attempted murder in the second-degree. Further, Spencer challenges the trial judge’s finding that defense counsel’s explanations for striking jurors, in light of a *Batson* Challenge, were a pretext for racial discrimination.

In an attempt to flee officers, Spencer engaged in a police chase for several miles. The three officers attempted to “box in” Spencer. In response to the “box in” Spencer accelerated and drove onto the grass and paved shoulder and collided with cyclist Andrew Kinn (Kinn). Spencer’s car clipped Kinn on the left leg, causing him to be thrown into the air and resulting in serious injuries. The officers testified that they had seen Kinn before the collision. Keevin Robinson (Robinson), the passenger who sat directly behind Spencer in the Kia, testified that throughout the chase the occupants were screaming for Spencer to stop and pull over, but that Kinn was only seen almost immediately before the collision. Spencer never indicated that he intended to hit Kinn, or anyone else, nor did he acknowledge that he had seen the bicyclist.

During jury selection, the State approached the bench and raised a *Batson* challenge, indicating that defense counsel was striking mostly white jurors and requested that defense counsel put on the record the reasons for those strikes. Defense counsel indicated he struck jurors 166 and 191 because of their professions as a farmer and mechanic. Further, he struck juror 168 because the juror did not list his occupation and is an older person. Counsel explained that he believed older jurors are less sympathetic to defendants; however, he did not strike two other older African-American jurors because they had family members who were either charged or convicted of crimes; thus, they would be more sympathetic to the defendant. However, the trial judge found those reasons were not legitimate and that counsel’s peremptory strikes were a pretext for racial discrimination due to counsel’s alleged pattern of discrimination. The judge’s beliefs, which he perceived to be developed in other trials and demonstrated in the present case, were disputed and

not documented on the record. The court then ruled on the *Batson* challenge and reseated jurors 166, 168, and 191.

Held: Reversed.

A party may raise a *Batson* challenge when it perceives that opposing counsel is exercising peremptory strikes in a discriminatory manner to exclude jurors based on race or gender. *Batson v. Kentucky*, 476 U.S. 79, 97–98, 106 S. Ct. 1712, 1723–24, 90 L. Ed. 2d 69, 88–89 (1986). The *Batson* analysis requires: first, that the challenging party make a *prima facie* showing of unlawful discrimination; second, that the challenged party rebut the *prima facie* case by providing race neutral justifications for striking the jurors; and third, that the trial judge determine whether those justifications are valid or if they are a pretext for racial discrimination. *Gilchrist v. State*, 340 Md. 606, 625–27, 667 A.2d 876, 885–86 (1995).

Defense counsel articulated valid, race neutral explanations for striking white jurors, based on occupation and age. On the record before the Court, the trial judge was clearly erroneous in finding that counsel’s explanations for making peremptory strikes were a pretext for racial discrimination. Thus, the trial judge’s conclusion based upon disputed facts that were not in the record of this case and our inability to review the trial judge’s undocumented beliefs warrants a reversal.

In addition, the Court held that Spencer is entitled to a reversal of the conviction of attempted murder in the second-degree. There is no evidence that Spencer’s goal was to harm Kinn; his goal was to avoid apprehension by the police. Engaging in extremely reckless activity is not sufficient to sustain attempted murder. There was no evidence of a specific intent, based on Spencer’s acts or words that he actually saw and intended to hit Kinn. The evidence presented in the State’s case in chief was legally insufficient to establish that Spencer possessed the requisite specific intent to kill to sustain the conviction.

State of Maryland v. Tevin Hines, No. 4, September Term 2016, filed November 10, 2016. Opinion by Greene, J.

<http://www.mdcourts.gov/opinions/coa/2016/4a16.pdf>

CRIMINAL LAW—JOINDER OR SEVERANCE OF COUNTS OR CODEFENDANTS

Facts:

Respondent Tevin Hines (“Hines”) was jointly tried by a jury with his co-defendant Dorrien Allen (“Allen”) for robbery and murder. Hines and Allen were both identified by a surviving victim as the assailants. Allen gave a recorded statement to police detectives, which was introduced by the State at trial. In the statement, Allen told police that on the day of the shooting, he remained home until around midday when he went to record a music video at his friend “Mike’s” house. According to Allen’s statement to the police, he did not know “Mike’s” real name. Allen told police that “Mike” lives on the 300 block of Lyndhurst Avenue. The detectives then showed Allen a surveillance video of Allen at a convenience store during the time at which he claimed to have been home. The video, which was also shown to the jury at trial, shows Allen with a man who is clearly Hines. Allen admitted to detectives that he was in the video but claimed to not know who Hines was. Allen also maintained that he went to the store with “Mike.” Throughout the recorded interview, the detectives made statements of disbelief as to Allen’s version of the events that took place on that day. The detectives also implied that they knew “Mike” was a fictitious person. Evidence was also admitted at trial that established Hines’ address was 301 Lyndhurst Avenue.

Hines made a pretrial motion for severance, arguing that introduction of Allen’s recorded statement, which was inadmissible against Hines, would prejudice Hines. At the pretrial motions hearing, counsel for Hines articulated to the trial judge the exact prejudice that would—and did—ensue from the admission of Allen’s statement at a joint trial. The trial judge admitted the statement, subject to a limiting instruction to the jury that the statement was only evidence against Allen and was not to be considered against Hines. The Court of Special Appeals, in an unreported opinion, reversed the trial court’s ruling, and held that “Hines was prejudiced by having to defend himself against . . . evidence that would not have been admissible had he been tried separately.”

Held: Affirmed.

The Court of Appeals held that the trial judge abused his discretion in failing to sever the trials of Hines and Allen, and held that Hines is entitled to a new trial.

Maryland Rule 4-253 permits a trial judge to sever joint defendants or joint offenses if a joinder would result in prejudice to the defendant. Prejudice under Maryland Rule 4-253 is damage from evidence that would be inadmissible against the defendant had he or she been given a separate trial. In this case, the Court, for the first time, squarely addressed the application of the offense joinder analysis set forth in *McKnight v. State*, 280 Md. 604, 612, 375 A.2d 551, 556 (1977) to the context of defendant joinder. Under *McKnight*, when a defendant is tried by a jury in a joint trial of similar but unrelated offenses, and evidence will be admitted that is admissible as to one or more offenses but inadmissible as to other offenses, prejudice occurs as a matter of law and severance of the offenses is mandated. In cases of codefendant joinder, it is foreseeable that in some instances, evidence that is non-mutually admissible may not unfairly prejudice the defendant against whom it is inadmissible because the evidence does not implicate or even pertain to that defendant. Therefore, unlike in the offense joinder context, prejudice does not exist as a matter of law upon the admission of non-mutually admissible evidence, and the trial judge must separately inquire into the existence of prejudice.

Accordingly, the Court clarified that in the context of defendant joinder jury trials, non-mutual admissibility alone does not entitle a defendant to a separate trial from his codefendant. Instead, the trial court must first determine whether non-mutually admissible evidence will be introduced and then must determine whether the admission of such evidence will unfairly prejudice the defendant seeking a severance. If the trial judge finds that the admission of non-mutually admissible evidence will result in unfair prejudice, the judge must exercise his or her discretion to remove the prejudice by either granting a severance or other relief (*e.g.*, such as redacting evidence so as to implicate only the defendant against whom the evidence is admissible).

Allen's statement, which was inadmissible against Hines, implicated Hines in a manner so obvious that there is a risk that the jury would not have followed the limiting instruction and not have considered Allen's statement against Hines. The Court noted that the trial judge could have redacted the statement so as to omit any unduly prejudicial implication against Hines, but concluded that the statement, as admitted, resulted in unfair prejudice to Hines and warranted separate trials.

William Todd Jamison v. State of Maryland, No. 6, September Term 2016, filed November 15, 2016, Opinion by Battaglia, J.

Barbera, C.J., and McDonald, J., concur in the judgment.

<http://www.mdcourts.gov/opinions/coa/2016/6a16.pdf>

CRIMINAL PROCEDURE – OTHER POSTCONVICTION REVIEW – DNA EVIDENCE – POSTCONVICTION REVIEW – MD. CODE ANN., CRIM. PROC. § 8-201 (2008 Repl. Vol., 2009 Supp.)

Facts:

William Todd Jamison was indicted in 1990 in Baltimore County on fifteen charges related to a sexual assault to which he entered an *Alford* plea to first degree rape and kidnapping and was sentenced to life imprisonment plus 30 years. In 2008, Jamison filed a Petition for DNA Testing, alleging that newly discovered slides contained cellular material from swabs taken from the victim. Jamison’s petition was granted and DNA testing was conducted. Jamison then filed a Motion to Vacate Conviction pursuant to Section 8-201 of the Criminal Procedure Article of the Maryland Code. Judge Vicki Ballou-Watts of the Circuit Court for Baltimore County held a hearing on the motions and denied them. Jamison appealed the circuit court’s denial of the motion.

Held: Affirmed.

The Court of Appeals held that the Petition for DNA testing, under Section 8-201 of the Criminal Procedure Article, was not available to an individual who earlier entered an *Alford* plea, considered a guilty plea, to the same offense where Section 8-201 neither expressly permitted nor prohibited a person who had pled guilty from accessing post-conviction DNA testing. An analysis of the legislative history of Section 8-201 revealed that a person who has pled guilty may not avail himself of post-conviction DNA testing based on an amendment to Section 8-201 that required a petitioner to show a “substantial possibility exists that the petitioner would not have been convicted if the DNA testing results had been known or introduced at trial,” which the Court of Appeals determined indicated that the statute did not apply to those who have pled guilty because the standard can only be measured against a trial, and an *Alford* plea, like a guilty plea, is not a trial. The Court of Appeals also noted that Section 8-201, in its original form, included a requirement that a petitioner make a showing that “identity was an issue” at trial in order to obtain post-conviction DNA testing, a requirement that our sister states have interpreted as prohibiting a person who has pled guilty from obtaining such testing, even though the requirement is no longer in the statute.

Wendy Cane v. EZ Rentals, No. 1, September Term 2016, filed November 29, 2016. Opinion by McDonald, J.

<http://www.mdcourts.gov/opinions/coa/2016/1a16.pdf>

LANDLORD-TENANT LAW – SUMMARY EJECTMENT – RENT ESCROW – TENANTS ABILITY TO ASSERT A RENT ESCROW DEFENSE IN A SUMMARY EJECTMENT ACTION

Facts:

Petitioner Wendy Cane rented an apartment in a house in Calvert County managed by Respondent EZ Rentals. EZ Rentals filed a summary ejectment action against her to collect unpaid rent for the month of January 2015 and to regain possession of the unit. At the initial District Court hearing, the trial judge ruled in favor of EZ Rentals. Ms. Cane appealed that decision to the Circuit Court for a *de novo* bench trial. During her bench trial in the Circuit Court, Ms. Cane attempted to submit evidence of what she asserted were serious defects in the rental property, including a leak that resulted in a threat to shut off water service to the property. The Circuit Court declined to accept Ms. Cane’s proffered evidence on the ground that it would be relevant only in an affirmative rent escrow action which, the court believed, must be filed as a separate action. Ultimately, the Circuit court entered a monetary judgment in favor of EZ Rentals and awarded possession of the rental unit to the landlord.

Held:

Ms. Cane was entitled raise the issue of serious defects or conditions in her rental unit during a summary ejectment action. Under the rent escrow statute, a tenant “may refuse to pay rent and raise the existence of the asserted defects or conditions as an affirmative defense to an action for distress for rent *or any complaint proceeding brought by the landlord to recover rent or the possession of the leased premises.*” Real Property Article §8-401(d).

Here, EZ Rentals brought a summary ejectment action seeking to recover rent and possession of the lease premises. Under the rent escrow statute, Ms. Cane was permitted to raise serious defects or conditions in her apartment unit as a defense to EZ Rentals summary ejectment action. The trial court erred when it did not allow Ms. Cane to submit evidence in support of that defense.

Simply because a tenant alleges defects in her rental unit does not itself amount to a valid defense to a summary ejectment action. Accordingly, the Court vacate the judgment of the Circuit Court and remanded the matter so that the Circuit Court could consider whether Ms.

Cane's proffered evidence was sufficient to trigger the remedies available under the rent escrow statute.

Katherine Seley-Radtke v. Ramachandra S. Hosmane, No. 19, September Term 2016, filed November 22, 2016. Opinion by Watts, J.

McDonald and Getty, JJ., dissent.

<http://www.mdcourts.gov/opinions/coa/2016/19a16.pdf>

PURELY PRIVATE DEFAMATION – STANDARD OF PROOF TO OVERCOME COMMON LAW CONDITIONAL PRIVILEGE – PREPONDERANCE OF EVIDENCE

Facts:

Katherine Seley-Radtke (“Seley-Radtke”), Ph.D., Petitioner, and Ramachandra S. Hosmane, Ph.D. (“Hosmane”), Respondent, were colleagues in the Department of Chemistry at the University of Maryland, Baltimore County (“UMBC”). Hosmane was employed as a professor of chemistry at UMBC from 1982 until 2010, when he resigned following allegations of sexual assault of a graduate student. Based on allegations that Hosmane had sexually assaulted one of his graduate students, Brahmi Shukla (“Shukla”), UMBC officials conducted an administrative investigation and determined that Hosmane had violated UMBC’s sexual harassment policy. Hosmane resigned and retired, effective January 1, 2010. As a result, UMBC did not make public the findings of its investigation, nor was Hosmane sanctioned by UMBC.

On December 10, 2010, Hosmane filed in the Circuit Court for Baltimore County (“the circuit court”) a complaint against UMBC and other defendants related to his resignation from UMBC (“the UMBC case”). On July 6, 2012, Hosmane filed in the circuit court a two-count complaint against Seley-Radtke seeking damages for defamation and false light invasion of privacy. In the complaint, Hosmane alleged that Seley-Radtke had made defamatory statements about him to members of the Chemistry Department and UMBC administration, including, among other things, that Hosmane was “an unbalanced individual who has done some crazy and bizarre things,” that he was a “nutcase,” and that she worried for her safety and that of her students if he continued to be present on campus. Hosmane also asserted that Seley-Radtke had told members of the Chemistry Department that Hosmane had stolen confidential documents—an allegation that Hosmane denied.

On April 4, 2013, Hosmane filed an amended complaint naming UMBC and the State as additional defendants in the Seley-Radtke case. The circuit court subsequently consolidated the UMBC case and the Seley-Radtke case for the purpose of trial only. On April 29, 2014, the circuit court granted the State’s and UMBC’s motion for summary judgment as to Hosmane’s claims for defamation and invasion of privacy in the Seley-Radtke case on the basis of sovereign immunity. The UMBC case and Hosmane’s case against Seley-Radtke proceeded to a jury trial.

Before closing arguments, the circuit court reviewed proposed verdict sheets and jury instructions. Seley-Radtke contended that her statements regarding Hosmane were protected by a common interest conditional privilege. The circuit court ruled, as a matter of law, that Seley-Radtke was entitled to a conditional privilege for the allegedly defamatory statements. Hosmane requested that the circuit court give Maryland Civil Pattern Jury Instruction 12:12, which provides that, “[i]n order to recover, the plaintiff must prove by a preponderance of the evidence that the defendant made the statement with actual knowledge that the statement was false, coupled with the intent to deceive another person by means of the statement.” MPJI-Cv 12:12 (4th ed., 2013 Supp.). Seley-Radtke argued that the pattern jury instruction should be “modified” to use language that the standard of proof is clear and convincing evidence, not a preponderance of the evidence. The circuit court agreed with Seley-Radtke and determined that the applicable standard of proof to overcome the conditional privilege was clear and convincing evidence.

On May 9, 2014, the jury found in favor of Seley-Radtke. Hosmane noted a timely appeal to the Court of Special Appeals. On February 24, 2016, in a reported opinion, the Court of Special Appeals reversed the circuit court’s judgment and remanded the case for a new trial. *See Hosmane v. Seley-Radtke*, 227 Md. App. 11, 16, 132 A.3d 348, 351 (2016). Seley-Radtke thereafter filed a petition for a writ of *certiorari*, which this Court granted on May 20, 2016. *See Seley-Radtke v. Hosmane*, 448 Md. 29, 136 A.3d 816 (2016).

Held: Affirmed.

The Court of Appeals held that that the standard of proof required to overcome a common law conditional privilege in a purely private defamation action is preponderance of the evidence. The Court of Appeals observed that Maryland common law on this matter has consistently sought to balance the protection of the free flow of information with the State’s interest in providing a remedy for individuals who have been victims of defamation. *See Marchesi v. Franchino*, 283 Md. 131, 135, 387 A.2d 1129, 1131 (1978). The Court of Appeals concluded that the important State interest of protecting private individuals from defamation is best served by allowing a plaintiff to defeat a common law conditional privilege by a preponderance of the evidence. The Court of Appeals explained that requiring plaintiffs to overcome a common law conditional privilege by clear and convincing evidence would run counter to well-established Maryland defamation jurisprudence.

The Court of Appeals concluded that its holding was supported by both the United States Supreme Court’s and Maryland’s defamation jurisprudence. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976). Specifically, the Court of Appeals observed that the United States Supreme Court’s refusal in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974), to apply the heightened *New York Times* definition of malice—knowledge of falsity or reckless disregard for the truth—to defamation claims involving private plaintiffs was premised on the important State interest in

protecting private individuals from defamatory injury. The Court of Appeals further noted that, following *Gertz*, the Court of Appeals consistently recognized that private individuals are more vulnerable than public officials and public figures, and, as such, require greater protection.

The Court of Appeals held that imposing a greater requirement for private individuals asserting a defamation claim than that which is set forth in the case law would undermine the defamation jurisprudence developed by the Court of Appeals post-*Gertz*. The Court of Appeals concluded that requiring a plaintiff to prove malice necessary to rebut a common law conditional privilege by clear and convincing evidence—which requires actual knowledge of a statement’s falsity as opposed to reckless disregard for the truth—would interfere with the State’s well-established interest in providing a remedy for private individuals who have been victims of defamation.

The Court of Appeals determined that the application of the preponderance of the evidence standard of proof to purely private defamation claims would not hinder consistency in the law of defamation nor lead to jury confusion. The Court of Appeals observed that the distinction between the standards of proof for claims implicating the First Amendment and those brought by private individuals had already been clearly delineated in prior Maryland defamation jurisprudence. Specifically, the Court of Appeals noted that First Amendment claims are public claims that serve to prevent granting “public servants an unjustified preference over the public they serve[,]” whereas purely private defamation actions pertain only to the private individuals affected by the case. *New York Times*, 376 U.S. at 282. As such, the Court of Appeals declined to enmesh the standards for the sake of simplicity, thus evincing the importance of the private/public distinction in defamation claims in Maryland.

The Court of Appeals observed that any concern regarding juror confusion is largely alleviated by the Maryland Civil Pattern Jury Instructions on overcoming a common law conditional privilege. Whereas the jury instructions for punitive damages refer to “malice” and state the standard of proof is clear and convincing evidence, the instructions regarding common law conditional privilege do not use the word “malice,” but rather provide its definition: “[i]n order to recover, the plaintiff must prove by a preponderance of the evidence that the defendant made the statement with actual knowledge that the statement was false, coupled with the intent to deceive another person by means of the statement.” MPJI-Cv 12:12 (4th ed., 2013 Supp.). Thus, the Court of Appeals held that the burden for a private individual seeking to overcome a common law conditional privilege in a purely private defamation action should not be raised beyond requiring the plaintiff to demonstrate malice, already a heightened definition, and that the applicable standard is proof by a preponderance of the evidence.

COURT OF SPECIAL APPEALS

Anthony Lewis, et al. v. Baltimore Convention Center, et al., No. 1920, September Term 2015, filed December 1, 2016. Opinion by Nazarian, J.

<http://www.mdcourts.gov/opinions/cosa/2016/1920s15.pdf>

BALTIMORE CITY CHARTER – CONTRACT DISPUTES – ARTICLE II SECTION 4A(c) – LIMITATIONS

Facts:

Anthony Lewis and other employees of the Baltimore Convention Center joined the recurring employment contract between Baltimore City and their union, AFSCME Local 44, in 2008. The recurring employment contract covers most Baltimore City employees. The employees had previously been treated as “mayoral appointees,” subject instead to the City’s Administrative Manual.

The employees filed suit in the Circuit Court for Baltimore City claiming that the City owed them overtime pay under the employment contract, that their union failed to properly represent them when they filed a grievance in an effort to collect the overtime pay, and that the union tortiously interfered with the recurring employment contract between the City and the union. The Circuit Court for Baltimore City dismissed all claims against Baltimore City and AFSCME Local 44. The employees appealed.

Held:

The Court of Special Appeals affirmed the Circuit Court for Baltimore City’s dismissal of the employees’ claims against Baltimore City and AFSCME Local 44.

The Court of Special Appeals affirmed the dismissal of the breach of contract claim against the City because the claim was brought more than one year after the latest moment the claim could have possibly accrued. The applicable one-year limitations period is found at Article II, Section 4A(c) of the Baltimore City Charter. The general three-year limitations period for civil claims found at Section 5-101 of the Courts and Judicial Proceedings Article (“CJ”) does not apply because the more specific provision of the Baltimore City Charter regarding contract claims against the City applies.

The Court of Special Appeals affirmed the dismissal of the claims against AFSCME Local 44 because the duty of fair representation claim failed the general three-year limitations period found at CJ § 5-101, and the tortious interference claim was not cognizable.

John W. Green, III v. State of Maryland, No. 490, September Term 2015, filed December 1, 2016. Opinion by Graeff, J.

<http://www.mdcourts.gov/opinions/cosa/2016/0490s15.pdf>

STATE’S DISCOVERY OBLIGATIONS – CLOSING ARGUMENT

Facts:

On October 23, 2013, Jeff Meyers was shot and killed in the driveway of his Cecil County residence while sitting in his pickup truck. It was not disputed that appellant was present at the time of the murder, and that Jonathan Copeland, who was taller and skinnier than appellant, was the only other person with appellant at the time of the shooting. The contested issue was the identity of the shooter.

During the testimony of the only eyewitness to the shooting, the prosecutor asked the witness if she could identify the “taller skinnier” man if she saw him. The witness responded: “I think so.” The State then informed the court that it intended to have her identify Mr. Copeland. Appellant objected on the ground that the State violated its discovery obligations in failing to disclose that the witness would identify the accomplice at trial. Appellant contends that the trial court erred in permitting the State to bring Mr. Copeland into the courtroom, where the witness identified Mr. Copeland as the non-shooter.

Held: Affirmed.

Rule 4-264(d)(7) requires the State, “[w]ithout the necessity of a request,” to provide to the defense: “All relevant material or information regarding: . . . (B) pretrial identification of the defendant by a State’s witness.” This language is plain and unambiguous. It does not include a co-defendant, or even “a” defendant, but rather, it requires disclosure of pretrial identifications of “the defendant.” Given this plain and unambiguous language, we hold that the term “defendant” does not include a co-defendant or other participants in the crime. Therefore, the State did not violate its discovery obligation in failing to disclose to the defense that it intended to have an eyewitness perform an in court identification of an accomplice who was not on trial.

The circuit court did not abuse its discretion in permitting the prosecutor, during closing argument, to replay portions of a recording, which was played for the jury but never physically offered into evidence. Because a party is entitled during closing argument to discuss the evidence, counsel may repeat the evidence by replaying a recording that the jury already heard, similar to reading a transcript of testimony.

State of Maryland v. Merritt Pavilion, LLC, et al., No. 128, September Term 2016, filed November 29, 2016. Opinion by Arthur, J.

<http://www.mdcourts.gov/opinions/cosa/2016/0128s16.pdf>

PUBLIC SCHOOL CONSTRUCTION – REGULATORY AUTHORITY OF BOARD OF PUBLIC WORKS

DECLARATORY JUDGMENTS – CONSOLIDATION OF RELATED ACTIONS

Facts:

In the early 1950s, the Baltimore County Board of Education purchased a 28-acre property in Dundalk. The property served as the site of North Point Junior High School until the school closed in 1981. The County Board of Education determined at that time that the property was no longer needed for school purposes.

Through a deed executed in 1981, the County Board of Education conveyed the property to Baltimore County. At that time, the State was still obligated to pay \$89,808 of school construction bond debt relating to the property. The deed included a covenant, which expressly acknowledged the State's financial interest in the property, and which promised that the County would not convey any portion of the property without prior written consent from the Board of Public Works. In 1982, the Board of Public Works approved the transfer subject to the conditions that the County would assume responsibility for the outstanding bond debt and that transfer documents would require the County to obtain approval from the Board of Public Works for any subsequent transfer of the property.

By the end of 1988, the County had paid off the balance on the outstanding bond debt. Meanwhile, the County converted the former school building into a local government center for use by various county agencies. The County also maintained several athletic fields on the other parts of the property, which bordered on an elementary school that continued to operate.

In 2013, the County decided to cease operating the local government center on the property and to sell the property for private redevelopment. The County accepted a proposal to sell about 15 acres of the property to Vanguard Commercial Development. The plans called for the construction of a commercial complex in place of the school building, as well as a new recreation center on the remaining acres, which would continue to be owned by the County. After further negotiations, the County reached an amended agreement in 2014 with Merritt Pavilion, LLC, a Vanguard affiliate. The contract was not conditioned on receiving approval from the Board of Public Works, even though the 1981 deed covenant and a regulation issued by the Board in 2007 both required the County to obtain the Board's approval.

In July 2015, the County submitted a request to the IAC for approval to dispose of the property. A week later, five nearby residents including Ms. Karen Cruz sued Merritt Pavilion and the County. The Cruz litigants contended that the contract was illegal because the Board had not yet approved the disposition. The IAC then completed its review of the proposal and recommended that the Board approve the disposition, but the IAC expressed some concern about the community opposition to the project. During a Board of Public Works meeting in October 2015, the Governor's office and the Comptroller announced that they would not vote on the project unless the County and the developer renegotiated the transaction to better address the community concerns.

In January 2016, Merritt Pavilion filed a declaratory judgment complaint in the Circuit Court for Baltimore County. Merritt Pavilion named the County as the sole defendant. The theory of the complaint was that the 1981 deed covenant, which required the County to obtain the Board's approval before disposing of the property, had become an unlawful restraint on alienation because the State no longer had a financial interest in the property. The County filed an answer in which it admitted all allegations. The County asked the court to grant Merritt Pavilion's motion for summary judgment.

The State successfully moved to intervene in the action. The State opposed Merritt Pavilion's motion for summary judgment and cross-moved for summary judgment in its own favor. The State asked the court to declare that the covenant was valid but that, even without the covenant, a regulation promulgated by the Board of Public Works independently required the County to seek the Board's approval before disposing of the former school property.

Shortly before the court ruled on the cross-motions for summary judgment, the State moved to consolidate the action with the other pending declaratory judgment action in which Ms. Cruz and other residents had challenged the same transaction. The court ultimately declined the request for consolidation.

On March 25, 2016, the court entered a declaratory judgment in favor of Merritt Pavilion. The court reasoned that the "singular purpose" of both the 1981 deed covenant and the regulations of the Board of Public Works was to protect financial interests the State might have in the property. The court found that the State no longer had the financial interest mentioned in the covenant because the County had long since paid off the outstanding bond debt for the property. The court then declared: (1) that the 1981 deed covenant was "invalid and of no legal force and effect"; and (2) that the regulations of the Board of Public Works were "inapplicable to and unenforceable against" the proposed sale of the property.

The State appealed.

Held: Reversed.

Before discussing the issues on appeal, the Court of Special Appeals addressed some preliminary matters. The Court concluded that it had appellate jurisdiction. The clerk of the circuit court had stamped a filing date on the declaratory judgment order and had made notations in the electronic case management system to indicate that the court granted Merritt Pavilion's summary judgment on March 31, 2016, and denied the State's cross-motion on that same date. Even though the clerk did not make separately-numbered and separately-dated docket entries for the judgment, the clerk's notations qualify as an entry of judgment under Md. Rule 2-601(b)(2).

As another preliminary matter, the Court granted Baltimore County's motion to strike Ms. Karen Cruz and her co-plaintiffs as appellees and to strike their appellate brief. The "appellee's brief" from the Cruz parties was improper because they were not parties to this appeal. The Court nevertheless denied the County's motion to strike an appendix to the State's reply brief and all references to that appendix. The appendix reproduced a transcript from a hearing in the Cruz case to show that Merritt Pavilion had taken inconsistent positions in the two cases. The Court declined to strike the hearing transcript because it was an official public document subject to judicial notice.

As one question on appeal, the State had raised the threshold issue of whether it was proper for the circuit court to issue any declaratory judgment here without first consolidating the case with the related Cruz case. The State's consolidation request purported to rely on *Haynie v. Gold Bond Building Products*, 306 Md. 644 (1986). *Haynie* and its progeny hold that, when a party brings a declaratory judgment action to resolve a discrete issue that is currently pending in a preexisting common-law action, a court should not issue a declaratory judgment but it should instead permit the issues to be resolved in the preexisting common-law action.

For four reasons, the Court rejected the argument that consolidation of the two actions was required. The *Haynie* rule did not apply here because: (1) this situation involved two, successive declaratory judgment actions rather than a conventional adversarial proceeding followed by a declaratory judgment action; and (2) the two actions did not involve the same or substantially the same parties or issues because the citizen-plaintiffs in Cruz had no affiliation with the State, needed to overcome a standing challenge, and attempted to raise many issues that were unrelated to this case. Even if *Haynie* rule did apply, though, (3) that rule does not require, address, or even permit, consolidation of actions. Finally, (4) the consolidation request had become moot because another circuit court judge has already dismissed the Cruz action, and thus the court could no longer grant effective relief.

The Court then proceeded to a de novo review of the declaration, beginning with the court's determination that the regulations of the Board of Public Works could not govern the proposed disposition of the former school property.

The Board's power to make regulations derives from public school construction program legislation that was first enacted in 1971. The heart of the program was the State's assumption of the costs of financing public school construction projects and related capital improvements throughout the State. To implement that program, the General Assembly authorized the Board of

Public Works to make regulations on a broad range of activities. That statute is now codified at section 5-301(d) of the Education Article. Regulations adopted under this subsection are treated as substantive or legislative regulations that have the force of law. All State and local government entities, including the counties governments, are subject to those regulations.

Under its rulemaking power, the Board promulgated COMAR 23.03.02.24, which governs a county's disposition of "former school property." This regulation requires counties seeking to dispose of former school property to submit a request to the IAC, which then makes a recommendation to the Board of Public Works. The Board may then "approve, disapprove, or conditionally approve the request" and "may require that the disposition documents specifically incorporate the conditions."

The term "former school property" in the regulation plainly includes the North Point property, which had formerly served as the site of a public school. Nothing in the regulation or its surrounding provisions expressed an intent that it should apply only to properties as to which the State retains a direct financial interest. Moreover, the circuit court could not declare the regulation to be "inapplicable" merely because the court determined that regulation's purpose has been satisfied.

The Court of Special Appeals rejected the premise that the "singular purpose" of the regulation is to protect the State's financial stake in particular properties. Because the State has an ongoing responsibility to finance construction of schools and school-related improvements throughout the State, it is rational for the Board to oversee dispositions of previously-constructed facilities in each county. The requirement that counties seek Board approval regardless of when they dispose of former school property safeguards the long-term interests of the school construction program.

The Court also rejected the contention that this regulatory approval requirement exceeded the Board's statutory authority. The Board's power to make regulations in matters related to school construction is not expressly contingent on any direct State financial interest as to individual properties. In addition to some expressly enumerated areas, a vaguely-worded provision permits the Board to make requirements for "[s]chool construction and capital improvements necessary or appropriate for the proper implementation of this section[,]” Md. Code, Education Article, § 5-301(d)(2)(x). This provision confers some discretion on the Board to make regulations that may not fit neatly into any enumerated category. Precedent regarding other administrative agencies supported this broad and deferential interpretation of the Board's regulatory power.

Contrary to the arguments of Merritt Pavilion, the caption for section 5-301 of the Education Article in Michie's Annotated Code ("State payment of certain public school construction and capital improvement costs") is a mere catchword to indicate the contents of the section. The caption does not create limitations not found in the operative language of the statute. Nor does subsection 5-301(i), a narrowly-drawn provision regarding the proceeds from the sale, lease, or disposal of certain properties, impose any sweeping limits on the other regulatory powers conferred by subsection 5-301(d).

In sum, section 5-301(d) contains a broad grant of rulemaking power in matters related to school construction and improvements. That power is not strictly limited to the enumerated areas in the statute. The statute does not express a legislative intent to limit the Board's power only to properties in which the State retains a direct financial interest.

As a final argument against the application of COMAR 24.03.02.24, Merritt Pavilion and the County contended that enforcing the regulation would violate common-law rights to free alienation of property. They argued that the Board's regulation amounted to a "retrospective regulatory abrogation" of common-law principles secured by the Maryland Declaration of Rights. This argument was unavailing because the State's modifications of a county's power to dispose of property are not subject to the same constitutional restraints that apply to the State's restrictions of existing private property rights.

Like other expressly granted powers, a county's power to dispose of property may be extended, modified, amended or repealed by the General Assembly. Through § 5-301(g) of the Education Article, the General Assembly made the powers of county governments subject to the Board's regulations and provided that those regulations would prevail in the event of a conflict. Section 5-301 thus authorizes the Board of Public Works to limit a county's power to dispose of property, which the Board did when it enacted COMAR 23.03.02.24.

Finally, after upholding the regulation, the Court declined to reach the remaining issues regarding the validity of the 1981 deed covenant. Because the terms of the regulation control and because the County would be subject to the regulation even if the covenant were invalid, it would serve no useful purpose at this time to declare the parties' rights under the covenant. Relying on the ripeness doctrine, the Court concluded that the State was entitled to only a limited declaration regarding the regulation.

The Court concluded that the State was entitled to a declaration stating that COMAR 23.03.02.24 applies to Baltimore County's request to dispose of the North Point property; that Baltimore County is subject to that regulation; that the State need not demonstrate that it has a direct financial interest as to the property or the transaction; and that the regulation requires Baltimore County to seek and obtain the approval of Board of Public Works before disposing of the former school property.

Wesley Hosford v. Chateau Foghorn LP, No. 852, September Term 2015, filed September 1, 2016. Opinion by Kehoe, J.

<http://www.mdcourts.gov/opinions/cosa/2016/0852s15.pdf>

REAL PROPERTY – LANDLORD TENANT – PREEMPTION

Facts:

Chateau Foghorn LP (“Foghorn”) owns and manages Ruscombe Gardens, a federally-subsidized apartment building in Baltimore. Wesley Hosford, disabled by incomplete quadriplegia, has resided there since 1989.

In 2014, exterminators were treating Ruscombe Gardens for a bedbug infestation and noticed a marijuana plant growing in a bathtub in Hosford’s apartment. Hosford was charged with possession of less than 10 grams of marijuana in the District Court for Baltimore City. These charges were later nol prossed.

Foghorn brought an eviction action against Hosford in the District Court pursuant to Real Property Article (“RP”) § 8-402.1. The case was transferred to the Circuit Court for Baltimore City because Hosford requested a jury trial. Foghorn filed a motion for summary judgment. Foghorn asserted:

(1) federal law gives landlords discretion to initiate eviction proceedings when tenants engage in drug-related criminal activity; and (2) federal law preempts RP § 8-402.1’s requirement that a court can order eviction only if the breach is substantial and warrants eviction.

In response, Hosford asserted two relevant defenses:

(1) He possessed marijuana for medical purposes which is legal under Maryland law. Therefore, he did not breach the lease.

(2) RP § 8-402.1 is not preempted by federal law and the court or jury must still determine whether the breach was “substantial” and “warrants eviction.”

The circuit court granted Foghorn’s motion for summary judgment, concluding that the discretionary authority generally granted to courts in eviction proceedings by RP 8-402.1 is preempted by federal law in cases involving federally-subsidized housing.

Held: Vacated and remanded.

Real Property Article § 8-402.1 states in pertinent part (emphasis added):

Proceedings upon breach of lease.

(b) Judgment for restitution of possession of premises. — (1) If the court determines that the tenant breached the terms of the lease and that the breach was substantial and warrants an eviction, the court shall give judgment for the restitution of the possession of the premises and issue its warrant to the sheriff or a constable commanding the tenant to deliver possession to the landlord. . . .

The Court of Special Appeals held that RP § 8-402.1(b)'s requirements that a breach of lease must be "substantial" and "warrant eviction" are not preempted by the federal law. Preemption occurs in one of three forms: "express," "field," and "conflict." The Court identified conflict preemption as the applicable doctrine. As a result, the discretionary authority granted by RP § 8-402.1(b) is preempted only if it conflicts with the execution and accomplishment of the federal law, namely 42 U.S.C. § 1437f and 24 C.F.R. § 5.858. The Court next noted that its preemption analysis begins with a presumption against preemption. Because landlord-tenant law is a regulatory area that is traditionally within the domain of state law, the state law is only preempted if it causes major damage to a clear and substantial federal interest.

The Court examined the pertinent federal statute, 42 U.S.C. § 1437f(d)(1)(B)(iii), and implementing regulation, 24 C.F.R. § 5.858, to identify purposes or goals embedded that might potentially conflict with a state court's exercise of discretion in an eviction action involving federally-subsidized rental housing.

The Court identified two relevant federal interests: (1) to provide a safe and drug-free environment to tenants federally-subsidized housing; and (2) to preserve a landlord's ability to initiate eviction actions against tenants whose conduct threatens the first goal. In order to accomplish the second goal, federal law permits, but does not require, a landlord to consider equitable factors in determining whether to pursue an eviction action for drug-related criminal activity. However, landlords cannot engage in self-help but must proceed pursuant to state and local laws in order to evict a tenant.

The Court stated:

To be sure, had it wished to do so, Congress could have required state courts to order evictions upon a finding of a breach of the lease due to drug-related activity. Congress did not do so and the reason is not difficult to discern. A Congressional mandate that state courts rubber-stamp a landlord's decision, without considering otherwise applicable equitable factors arising from state law, would intrude upon not only the concept of comity that is the cornerstone of our federal system of government but also upon the functioning of the judiciary as an independent branch of government.

Additionally,

a state law that allows the court to consider equitable factors is, in our view, consistent with the basic purpose of the Section 8 program itself, that is, providing decent housing for a class of people who otherwise would not have it. To require a state court, as a matter of law, to evict a disabled member of that class out of the home he had resided in for 24–25 years for having one marijuana plant in his bathtub, for his own medical use, with no evidence of distribution or attempted distribution, furthers no Congressional intent that we have been able to identify.

.....

We believe that courts can strike the proper balance between federal policy and state law by presuming that drug-related criminal activity is a breach that ordinarily warrants eviction under RP § 8-402(b)(1), but that this presumption may be rebutted by equitable factors that arise in a given case. This approach gives proper weight both to the exercise of the landlord’s discretion accorded under federal law to seek eviction, and to Maryland’s public policy, embodied in RP § 8-402.1(b), that tenants—especially impoverished and disabled ones—not be evicted automatically when good reasons are presented and credited to show that such eviction would be not only unduly harsh but not necessary to accommodate the Federal objectives

Action Committee for Transit, Inc. et al. v. Town of Chevy Chase, No. 1204, September Term 2015, filed September 1, 2016. Opinion by Kehoe, J.

<http://www.mdcourts.gov/opinions/cosa/2016/1204s15.pdf>

MARYLAND PUBLIC INFORMATION ACT – FEE WAIVERS

Section 4-206 of the Maryland Public Information Act sets out the circumstances under which the official custodian may waive a fee. The custodian may waive the fee if the applicant asks for a waiver, and the applicant is indigent and files an affidavit of indigency, or the custodian determines the waiver would be in the public interest.

MARYLAND PUBLIC INFORMATION ACT – MEANING OF PUBLIC INTEREST

Whether a custodian should waive a fee in the public interest depends on a number of factors, such as whether the disclosure of records will shed light “on a public controversy about official actions,” or on “an agency’s performance of its public duties.” 81 Op. Att’y Gen. 157-158 (1996).

PERSUASIVE AUTHORITY – WEIGHT OF THE MPIA MANUAL

No reported opinion has yet articulated what weight should be afforded to the Office of the Attorney General’s Maryland Public Information Act Manual even though the Manual has been referenced in several reported appellate decisions. *See Mayor & City Council of Baltimore v. Maryland Comm. Against the Gun Ban*, 329 Md. 78, 81 (1993); *Leopold*, 223 Md. App. at 117; *Gallagher v. Office of the Atty. Gen.*, 127 Md. App. 572, 578 (1999), rev’d on other grounds, 359 Md. 341 (2000). There is no constitutional or statutory mandate requiring the Attorney General to publish the MPIA Manual. Although the Manual may not rise to the dignity of a formal opinion by the Attorney General, it is nonetheless a useful, although not binding, resource for courts.

MARYLAND PUBLIC INFORMATION ACT: JUDICIAL REVIEW OF AGENCY DECISION

When a Maryland court addresses an MPIA dispute, the court considers not only the agency record, but also facts generated by “pleadings, affidavit, deposition, answers to interrogatories, admissions of facts, stipulations and concessions.” *Prince George’s County v. The Washington Post Co.*, 149 Md. App. At 304.

MARYLAND PUBLIC INFORMATION ACT – FEE WAIVER REQUESTS

When presented with a waiver request, a custodian must consider the ability of the applicant to pay the fee and other relevant factors to decide whether the waiver would be in the public interest. See GP § 4-206(e)(2). When a custodian’s decision to deny a waiver request is challenged, the court must have sufficient information before it to satisfy itself that the

custodian's decision was not arbitrary or capricious. *See City of Baltimore v. Burke*, 67 Md. App. 147 (1986).

Facts:

The Action Committee for Transit ("ACT") is a non-stock, non-profit organization that advocates for public transportation in Montgomery County, Maryland. The Town of Chevy Chase is a Maryland municipal corporation and, as such, is subject to the Maryland Public Information Act ("MPIA").

The controversy between the parties concerns the Purple Line, which is a multi-billion dollar project that is proposed to be funded through a combination of federal, State, local, and private sources. Current plans call for a portion of the Purple Line to run through a portion of the Town's boundaries. The Town opposed the Line's construction due to the impact it will have on the Town's residents.

To that end, the Town retained the services of several lobbying firms to represent its interests in opposing the Purple Line before the state and federal legislatures and agencies. In 2014, ACT filed a request to inspect the Town's public records relating to its relationship with the lobbying firms pursuant to the MPIA. ACT also sought a waiver of any and all fees associated with the processing of their requests pursuant to the General Provisions Article ("GP") § 4-206(e)(2). Benjamin Ross, a published author who had written articles in print and electronic media about the Purple Line, also filed an MPIA request for the same documents.

The Town denied ACT's request for a fee waiver. In explanation, the Town stated only that it had considered ACT's arguments for a fee waiver, and was denying it. The Town also denied Ross's request on the basis that he was affiliated with ACT. The Town provided ACT with an estimate of \$879 for the fee the Town would charge to respond to the request and requested that amount as a deposit before the Town processed ACT's request.

In January, 2015, ACT and Ross filed a complaint in the Circuit Court for Montgomery County challenging the Town's denial of the fee waiver requests. The complaint alleged that the Town violated the MPIA when it: (1) denied the requests for access to the minutes of the closed meetings between the Town and the lobbying and public relation firms; (2) denied their requests for waivers of the fees associated with the requests; (3) denied providing them with two hours of free research for the requests; and (4) denied ACT's and Ross's requests to review the minutes of closed meetings in which the Town's relationship with the lobbyists were discussed. The circuit court issued a bench opinion granting the Town's motion for summary judgment. The court denied ACT's and Ross's requests for access to minutes of the closed sessions of Town Council meetings. The court concluded that, since the MPIA does not state that an agency or government must name the factors it relied on in deciding to deny the fee waiver, the Town's statement that it considered relevant factors was sufficient.

This appeal followed.

Held: Vacated and remanded.

In the present case, the Town's response to ACT's waiver request was that it was considered and is denied. This bald and conclusory statement provides no insight whatsoever as to the actual considerations that motivated the Town to deny the request. A court must necessarily consider the actual decision-making process by the custodian in order to decide whether the custodian gave appropriate consideration to "other relevant factors." *City of Baltimore v. Burke*, 67 Md. App. 147, 156-57 (1986).

When, after a review of agency record and other information presented to it, the court is satisfied that a significant factor in denial of the fee waiver request was the content of the requester's prior, constitutionally-protected, speech. The First Amendment's guarantee of free expression of speech protects persons from the imposition of financial burdens based upon the content of their speech. *See Rosenberger v. Rector and Visitors of the U VA.*, 515 U.S. 819, 828 (1995). A decision to deny a fee waiver request based upon such unconstitutional considerations is arbitrary and capricious.

Because the Town did not identify any reason for denying Ross's request other than his affiliation with ACT, we hold that the Town's decision to deny his waiver request was also arbitrary and capricious.

Forks of the Patuxent Improvement Association, Inc., et al. v. National Waste Managers/Chesapeake Terrace, No. 361, September Term 2015, filed October 25, 2016. Opinion by Kehoe, J.

<http://www.mdcourts.gov/opinions/cosa/2016/0361s15.pdf>

ZONING AND PLANNING – GROUNDS FOR GRANTING OR DENYING A VARIANCE

Facts:

National Waste Managers/Chesapeake Terrace (“National”) has sought to construct and operate a rubble landfill on a 481-acre tract of land in Anne Arundel County (the “Project Site”) since 1991. After obtaining a special exception and variance from the Board to construct and operate a rubble landfill and a sand and gravel operation on the Project Site in 1993, National had 18 months to obtain a construction permit for the project; if it failed to do so, the special exception would lapse, unless it obtained a variance for an extension of time. Anne Arundel County Code § 18-16-405. A solid waste refuse disposal permit from the Maryland Department of the Environment (the “MDE”) was a prerequisite for obtaining the construction permit.

National’s initial application with the MDE stalled during protracted litigation between National and the County. However, in 2001, the MDE resumed the review process. When the MDE was unable to complete the review within the 18 month period required under the County Code § 18-16-405, National filed for a variance for an extension of time to begin construction. The Board of Appeals approved the variance requests in 2006 and 2011. The extension granted in 2011 expired on January 3, 2013.

In 2013, National applied for a variance to extend the time period for obtaining construction permits for the project. The variance application found its way to the Anne Arundel County Board of Appeals. The Forks of the Patuxent Improvement Association, Inc. (the “Association”), as well as several individuals, opposed the variance. In its variance application, National sought an additional two year extension to obtain the necessary permits. An administrative hearing officer granted the application after a public hearing. The County Code provides that aggrieved persons may appeal an AHO’s decision to the Board, which conducts its own de novo proceeding. County Code § 18-16-402. Appellants filed such an appeal.

The Board issued its decision in December 2013. Two members of the Board (the “Approving Members”) were in favor of granting the application and two members (the “Denying Members”) voted to deny it. The Board concluded that the evenly-divided vote constituted a denial and entered an administrative order to that effect.

National filed a petition for judicial review of the Board’s decision in the Circuit Court for Anne Arundel County. The court concluded that: (1) the evenly-divided Board decision had the effect

of denying the application; (2) the court's focus should be on the reasoning and findings of the Denying Members because their decision was dispositive on the application; and (3) the Denying Members applied erroneous standards to the evidence. The court set out its view of the appropriate legal standards, vacated the Board's decision, and remanded the matter to the Board for further proceedings consistent with its opinion. The Association appealed, and National cross-appealed, the circuit court's judgment.

Held: Vacated and remanded.

First, the Court of Special Appeals held that its opinion in *Lohrmann v. Arundel Corp.*, 68 Md. App. 309 (1985), rendered an evenly divided vote of the Board a denial. As the Denying Members constituted a prevailing minority, it is their findings of fact and conclusions of law that are considered in a judicial review action.

Next, the Court reviewed the Board's reasoning itself. The Court noted that the relevant period to measure National's diligence or lack thereof is 2011 to 2013, which was the extension period granted by the Board's most recent variance. A lack of diligence would be relevant only if National could have obtained the necessary permits during that time, and the Denying Members did not address the issue. Moreover, the Court held that the Denying Members' finding that National exhibited a lack of diligence was by itself insufficient to deny the variance, as that finding must be paired with a finding that the lack of diligence caused an undue delay in obtaining the permits.

The Court then turned to the Denying Members' analysis of the requirement in County Code § 3-1-207 that the variance be the minimum necessary to afford relief. The Denying Members found that because the MDE review process would likely exceed the two year period the Board typically granted, the minimum necessary requirement was not satisfied. However, the Court held that this was not the appropriate analysis. The statutory requirement that a variance be no more than the minimum necessary to provide relief to the applicant does not mean that the Board can deny an application because obtaining permits might take longer than the period requested by the applicant, and the Board's denial based on that criterion was erroneous.

Finally, the Court noted that both the Denying Members and the Approving Members used incorrect legal analyses to determine whether granting the variance application would change the essential character of the neighborhood, impair the use and development of surrounding properties or otherwise be detrimental to the public welfare. The proper framework for deciding whether granting the variance will alter or adversely impact the surrounding neighborhood or be detrimental to the public welfare, the Court held, is to focus on whether the project is incompatible with the surrounding neighborhood as it currently exists.

John Viles et al. v. Board of Municipal and Zoning Appeals, No. 1401, September Term 2014, filed October 27, 2016. Opinion by Kehoe, J.

<http://www.mdcourts.gov/opinions/cosa/2016/1401s14.pdf>

ZONING AND PLANNING – JUDICIAL REVIEW

Facts:

The Baltimore City Council enacted an ordinance establishing a planned unit development (“PUD”) called the “25th Street Station PUD” on a parcel in the Remington and Charles Village neighborhoods. When a proposed major tenant abandoned the development, the Baltimore Planning Commission approved an amendment to the PUD.

The appellants, which include John Viles and other individuals opposed to the modifications to the PUD, appealed to the Baltimore City Board of Municipal and Zoning Appeals (the “Board”). However, the Board concluded that Article VII § 86 of the Baltimore City Charter prohibited it from reviewing Planning Commission decisions and therefore declined to address the merits of the appeal. The Circuit Court for the City of Baltimore affirmed the Board’s decision.

Held: Reversed.

The State’s grant of land use authority to the City of Baltimore is now codified as Title 10 of the Land Use Article (“LU”). The jurisdiction of the Board is set out in LU § 10-404(a)(1), which authorizes the Board to:

hear and decide appeals when it is alleged that there was an error in any order, requirement, decision, or determination made by an administrative official or unit under [Land Use Article Title 10] or any local law adopted under [Title 10].

The Court concluded that (1) the Baltimore Planning Commission constitutes an “administrative official” for the purposes of LU § 10-404(a)(1); (2) the Commission’s decision to approve the modifications of the PUD was an administrative decision; and (3) Section 10-404(a)(1) authorizes the Board to review the Planning Commission’s decisions.

Finally, the Court examined the City’s argument that the Baltimore City Charter precludes the Board from considering Planning Commission decisions. While § 86 of the City Charter prevents the Zoning Board from being given the power to review Planning Commission decisions, LU § 10-404(a)(1) specifically authorizes the Board to review Planning Commission decisions.

If there were a conflict between the Land Use Article and the Charter, the provision of the Land Use Article would control, as public general law prevails over a conflicting provision in a local government charter. The Court construed § 86 to mean only that the City Council could not authorize the Board of Appeals to review Planning Commission decisions. Section 86 does not limit the General Assembly's power to authorize the Board to consider appeals from administrative decisions by the Planning Commission.

ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated November 1, 2016, the following attorney has been
disbarred by consent:

BRUCE MICHAEL SMITH

*

This is to certify that the name of

BRUCE DAVID BLUM

has been replaced upon the register of attorneys in this Court as of November 3, 2016.

*

By an Order of the Court of Appeals dated November 4, 2016, the following attorney has been
placed on inactive status by consent:

PATRICK J. CHRISTMAS

*

By a Per Curiam Order of the Court of Appeals dated November 4, 2016, the following attorney
has been disbarred:

PHILIP JAMES SWEITZER

*

This is to certify that the name of

KEITH ERIC TIMMONS

has been replaced upon the register of attorneys in this Court as of November 14, 2016.

*

*

By an Order of the Court of Appeals dated November 15, 2016, the following attorney has been placed on inactive status by consent:

DAVID MICHAEL LUX

*

This is to certify that the name of

DAVID N. HONICK

has been replaced upon the register of attorneys in this Court as of November 21, 2016.

*

This is to certify that the name of

SANDRA LYNN RENO

has been replaced upon the register of attorneys in this Court as of November 21, 2016.

*

By an Opinion and Order of the Court of Appeals dated November 21, 2016, the following attorney has been indefinitely suspended:

SUSAN MYRA GELLER KIRWAN

*

By an Opinion and Order of the Court of Appeals dated November 22, 2016, the following attorney has been indefinitely suspended:

SANDY F. THOMAS-BELLAMY

*

JUDICIAL APPOINTMENTS

*

On October 21, 2016, the Governor announced the appointment of **HON. JEANNIE EUN-KYUNG CHO** to the Circuit Court for Montgomery County. Judge Cho was sworn in on November 15, 2016 and fills a new judgeship created by the General Assembly.

*

On October 21, 2016, the Governor announced the appointment of **DEBRA LYNN DWYER** to the Circuit Court for Montgomery County. Judge Dwyer was sworn in on November 17, 2016 and fills a new judgeship created by the General Assembly.

*

On October 21, 2016, the Governor announced the appointment of **MARK KENNETH BOYER** to the Circuit Court for Washington County. Judge Boyer was sworn in on November 18, 2016 and fills the vacancy created by the elevation of the Hon. Donald. E. Beachley to the Court of Special Appeals.

*

On October 21, 2016, the Governor announced the appointment of **ROBYN STEELE ENNIS RIDDLE** to the District Court of Maryland – Calvert County. Judge Riddle was sworn in on November 21, 2016 and fills the vacancy created by the retirement of the Hon. Robert B. Riddle.

*

On November 16, 2016, the Governor announced the appointment of **DENNIS MICHAEL ROBINSON, JR.** to the Circuit Court for Baltimore County. Judge Robinson was sworn in on Wednesday, November 30, 2016 and fills a new judgeship created by the General Assembly.

*

On November 11, 2016, the Governor announced the appointment of **MARK WALTER CROOKS** to the Circuit Court for Anne Arundel County. Judge Crooks was sworn in on December 1, 2016 and fills a new judgeship created by the General Assembly.

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*

On November 11, 2016, the Governor announced the appointment of **JULIA AUGUSTA MARTZ-FISHER** to the Circuit Court for Frederick County. Judge Martz-Fisher was sworn in on December 2, 2016 and fills a new judgeship created by the General Assembly.

*

UNREPORTED OPINIONS

	<i>Case No.</i>	<i>Decided</i>
A.		
ARW Trust v. Independent Mortgage	0871 *	November 18, 2016
ARW Trust v. Piel	1950 **	November 18, 2016
Aytenfsu, Million v. Tefera	0654	November 29, 2016
B,		
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