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## EFFECTIVE ASSISTANCE OF COUNSEL:

### ADVISING OF IMMIGRATION CONSEQUENCES OF PLEADING GUILTY

*Denisyuk v. State*, No. 45, 2011 Md. LEXIS 648 (Md. Oct. 25, 2011).

In *Denisyuk*, Petitioner pled guilty to second degree assault pursuant to a plea agreement. Neither defense counsel, the trial court, nor the State advised Petitioner Denisyuk of the removal, previously called deportation, consequences of such a plea. Petitioner was soon facing removal proceedings as a result of his conviction in this matter. Petitioner then submitted a Petition for Post-Conviction Relief with affidavit asking the court to vacate the conviction and institute a new trial. In Petitioner's affidavit he "swore that he would have rejected the plea offer and gone to trial had he been made aware of the immigration consequences of the plea." *Denisyuk, supra*, 2011 Md. LEXIS 648, at \*4-5. The post-

conviction court granted post-conviction relief and a new trial, only to be reversed by the Maryland Court of Special Appeals following the State's appeal. The Maryland Court of Special Appeals came to its decision based upon the "separate[] [treatment of] direct consequences [and] collateral consequences" and federal law indicating the collateral consequence of deportation fell outside the Sixth Amendment's guarantee of effective assistance of counsel. *State v. Denisyuk*, 991 A.2d 1275, 1300-05 (Md. Ct. Spec. App. 2010).

Just two-days after the Maryland Court of Special Appeal's issued its opinion in the *Denisyuk* matter, the United States Supreme Court issued its opinion in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), finding no recognized distinction between "direct" and "collateral" consequences with regard to immigration *and* that the Sixth Amendment right to effective

counsel does require counsel to notify his or her client of the removal (also commonly called deportation) consequence of a guilty plea. *Id.* at 1482. The Court clearly provided:

[C]ollateral versus direct distinction [of consequences] is . . . ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation[,] [and therefore] that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.

*Id.* The U.S. Supreme Court articulated the Sixth Amendment obligation in light of the complexity of immigration law, stating that where the consequences of a plea are “unclear or uncertain” and the law “not succinct and straightforward” that defense counsel’s duty shall be fulfilled by advising a “noncitizen client” that actions with regard to a criminal charge “may carry a risk of adverse immigration consequences.” *Id.* at 1483 (footnote omitted).

Understanding the U.S. Supreme Court’s decision in the context of the collateral review of Petitioner’s conviction, the Maryland Court of Appeals applied the two-pronged test established in *Strickland v.*

*Washington*, 466 U.S. 668 (1984), in light of *Padilla* to determine whether Petitioner, a criminal defendant, was entitled to relief as a result of constitutionally deficient representation. The test requires that: (1) a defendant must show the counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms; and (2) a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Denisyuk, supra*, 2011 Md. LEXIS 648, at \*9 (citing *Strickland, supra*, 466 U.S. at 694).

First, the Court of Appeals found Petitioner satisfied the first prong of *Strickland, Padilla*” to determine duties under the Sixth Amendment with respect to immigration consequences of pleading guilty. *Denisyuk, supra*, 2011 Md. LEXIS 648, at \*30. The Court reiterated that direct versus collateral evaluation of immigration consequences was inappropriate or “ill-suited” to *Strickland* analysis, and thus refused to apply such methods. *Id.* at \*32-33 (citing *Padilla*, 130 S. Ct. at 1483). The Court next found the first prong of the *Strickland* test satisfied holding that *Padilla* merely applied

settled precedent to a new factual situation such that it applies retroactively (rejecting the State’s argument that this was a new rule mandating only prospective application). *Id.* at \*23-24; compare *id.* at \*27 n.8 with *id.* at \*25 n.7. From this, the failure to advise of deportation consequences in the Petitioner’s situation was retroactively covered by the *Padilla* decision. To illustrate its conclusion, the Court provided:

Consequently, under Maryland retroactivity jurisprudence, *Padilla* is retroactively applicable to convictions, like Petitioner’s, that are based on guilty pleas that came after the effective date of the 1996 changes to the immigration laws. Because, under *Padilla*, Petitioner’s trial counsel was obligated, but failed, to provide advice on deportation consequences of Petitioner’s plea, we hold that Petitioner’s trial counsel’s performance was constitutionally deficient.

*Id.* at \* 30-31. Additionally, the Court held that counsel fell below professional standards, noting that Maryland Rule 4-242(e) requires an “on-the-record advisement of the immigration consequences of a

plea” with the committee notes to reflect the drafter’s intention to permit ineffective assistance-based collateral challenges. *Denisyuk, supra*, 2011 Md. LEXIS 648, at \*35-34 (citing Md. Rule 4-242(3) (2006)). This rule “mandates the advice, and it charges defense counsel with the obligation, if not to advise the client himself directly on the record, then, at a minimum to ensure that the advice is given, on the record.” *Id.* at \*35.

The Maryland Court of Appeals, in substantially shorter analysis, determined the existence of prejudice as required by *Strickland*’s second prong. The Court, understanding the post-conviction court was the proper fact-finder in the matter, therefore accepted the factual findings of the post-conviction court based on Petitioner’s uncontroverted affidavit, and concluded the petitioner would likely not have pled guilty if he had been informed of the deportation consequences. The Court found this action reasonable and likely stating, “[w]e are not alone in understanding that many noncitizens might reasonably choose the possibility of avoiding deportation combined with the risk of a greater sentence over assured deportation combined with a lesser sentence.” *Id.* at \*43.

Thus, the court concluded Petitioner satisfied both prongs of *Strickland*’s test for the Sixth Amendment’s ineffective counsel and, therefore, the post-conviction court properly vacated the guilty plea and granted the new trial to Petitioner.

Judge Battaglia dissented finding that the Petitioner’s affidavit was merely a “self-serving declaration” which should not suffice to vacate a guilty plea. *Id.* at 847 (Battaglia, J. dissenting). Rather, Judge Battaglia would have the court consider other factors including prior criminal history, presence of other offenses affecting deportation, documentation of the individual, strength of the prosecution’s case, the presence of a viable defense, and the nature of the benefit received from the guilty plea. *Id.* at \*47-52.

Judge Adkins also dissented, arguing that *Padilla* should have been considered a new rule and not application of precedent to new facts. *Id.* at \*52 (Adkins, J. dissenting). From this, Judge Adkins argued for prospective application of *Padilla* and objected to the retroactive application permitted by the Court. *E.g. id.* at \*59.

## CONTRACT LAW:

### MARYLAND HOME IMPROVEMENT LAW

*Stalker Bros., Inc. v. Alcoa Concrete Masonry, Inc.*, No. 57, 2011 Md. LEXIS 641 (Md. Oct. 24, 2011).

In *Stalker Brothers, Inc. v. Alcoa Concrete Masonry, Inc.*, the Maryland Court of Appeals decided whether a claim by an unlicensed sub-contractor against a general contractor could properly go forward. The Maryland Court of Appeals affirmed the finding by the Maryland Court of Special Appeals that the Maryland Home Improvement Law would not bar Alcoa Concrete Masonry, Inc. (“Alcoa”) from recovering under its subcontract with a general contractor, Stalker Brothers, Inc. (“Stalker”). *Stalker Bros., Inc. v. Alcoa Concrete Masonry, Inc.*, No. 57, 2011 Md. LEXIS 641 (Md. Oct. 24, 2011). The Court of Appeals cites to the reasoning of the Court of Special Appeals heavily in its opinion, really only indicating its agreement to the lower court’s opinion. *See generally id.* at \*13-14.

First, the Court of Appeals reiterates the Court of Special Appeals finding that Maryland Home Improvement Law was enacted for the public benefit, providing regulation to benefit

homeowners specifically. The Court finds that, as between a subcontractor and a general contractor, “it seems to us that the technical requirements of the licensing statute play no part in the determination of just claims between persons in the same business field who have contracted with knowledge of each other’s respective professional qualifications.” *Id.* (referencing a case cited with approval by the Maryland Court of Special Appeals by way of advancing its own argument) (quoting *Kenroy v. Graves*, 300 S.W.2d 568, 570 (Ky. App. 1957)). From this, the Court of Appeals agreed finding that this interpretation would benefit the public more, as the Act intended, “by reducing a general contractor’s incentive to enter into a contract with an unlicensed subcontractor.” *Id.* at \*14.

Second, the Court of Appeals agrees with the exact language of the opinion set forth by the Court of Special Appeals, finding that Alcoa’s complaint was appropriate and could proceed because it sought payment under the contract at a time when it was “a duly licensed contractor within the State of Maryland.” *Id.* at \*14-16. The Court of Special Appeals concluded, and the Court of Appeals affirmed, that regulations requiring a license at

time of payment also served public policy. The Maryland Court of Appeals provided that “[t]he requirement that contractors withhold payment until a subcontractor is licensed ferret out, and causes to be licensed, otherwise unlicensed subcontractors and in that way furthers the Act’s aim of protecting homeowners.” *Id.* at \*16 (quoting, agreeing, and adopting the language of the Court of Special Appeals).

From this, the judgment of the Court of Special Appeals was affirmed.

#### **TORT LAW:**

##### **UNIFORM CONTRIBUTION AMONG JOINT TORT-FEASORS ACT**

*Spence v. Julian*, No. 1511, 2011 Md. App. LEXIS 142 (Md. Ct. Spec. App. Oct. 26, 2011).

The case of *Spence v. Julian* arises out of a medical malpractice action. In 2005, the Plaintiffs, Wycinna and Christopher Spence (“Spence”), filed a lawsuit against Emerson Julian, M.D., Emerson Julian, M.D., P.A., and Harbor City OB/GYN (collectively “Julian”) and Mercy Medical Center and its employees (“Mercy”), for their son, Caleb’s, injuries before and during his birth. Before the trial, Mercy and the Spences entered into a settlement release agreement

which provided that “no other person would be entitled to a reduction of damages by reason of the settlement ‘unless and until’ Mercy was ‘adjudicated to be a Joint Tortfeasor’ with the other person.” *Spence v. Julian*, No. 1511, 2011 Md. App. LEXIS 142, at \*2 (Md. Ct. Spec. App. Oct. 26, 2011). Subsequently, the Plaintiff’s claim only proceeded to trial against Dr. Julian, and the jury found him liable for the Spence’s son’s injuries. Julian paid the full amount of damages awarded.

On April 17, 2009, the Spences filed a complaint for declaratory judgment and injunctive relief; they requested the Circuit Court pronounce that Julian was barred from seeking any right of contribution from Mercy. On June 15, 2009, Julian filed a claim against Mercy, arguing that it was liable to him for contribution as a joint tortfeasor. While both of these cases were heard in Circuit Court, the hearings took place before different judges. On November 25, 2009, in the declaratory judgment action, a judge found that Julian had the right to file a claim for contribution against Mercy. On August 27, 2010, a different judge dismissed Julian’s contribution claim against Mercy finding that Mercy was relieved from liability to make contribution to

Julian pursuant to the Release Agreement Mercy signed with the Spences.

Both the Spences and Julian appealed. The Maryland Court of Special Appeals affirmed the Circuit Court's decision in the declaratory judgment action and reserved the Circuit Court's decision in the judgment dismissing Julian's contribution claim against Mercy.

The issue presented on appeal was, when "a release provides for a reduction of damages awarded against a nonsettling defendant, but only if the settling defendant is adjudicated to be a joint tortfeasor, whether the nonsettling defendant is required to litigate the settling defendant's joint tortfeasor status in the underlying action, or whether he has the option to litigate that issue in a separate contribution action." *Id.* at \*25-26.

At common law, in Maryland, there was no right to contribution among joint tortfeasors. *Hashmi v. Bennett*, 416 Md. 707, 721 (2010). As a result, when the injured party releases one of several joint tortfeasors, it releases all of the joint tortfeasors. The Maryland Uniform Contribution Among Joint Tort-Feasors Act ("UCATA") was enacted to create a statutory right to contribution among joint

tortfeasors. Pursuant to Section 3-1402, it creates the right to contribution among joint tortfeasors and specifies that a joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his share of the common liability. Pursuant to Section 3-1404, a release by the injured party of one joint tortfeasor, either before or after judgment, does not discharge the other joint tortfeasors unless the release so states, but it does reduce the claim against the others in the amount paid for the release. Pursuant to Section 3-11405, a non-settling joint tortfeasor's claim for contribution is barred if two conditions are met: (1) the release "is given before the right of the other tort-feasor to secure a money judgment for contribution has accrued;" and (2) it "[p]rovides for a reduction, to the extent of the pro rata share of the released tort-feasor, of the injured person's damages recoverable against all other tort-feasors." *Id.* at 29-30.

While in this case, there was no dispute that the first condition was met, whether the second condition was met was contested.

The Maryland Court of Appeals has made it clear on several occasions that, under the

UCATA, in order for the non-settling tortfeasor to get the benefit of the reduction of damages solely by operation of statutory law, the settling defendant and the non-settling defendant must be joint tortfeasors. *Allgood v. Mueller*, 307 Md. 350, 355 (1986).

One way to be a joint tortfeasor is to stipulate to that status in a settlement agreement. *See Jones v. Hurst*, 54 Md. App. 607, 610 (1983). The second way is for the parties to be judicially declared as joint tort-feasors.

In this case, there wasn't a statement in the release agreement that Mercy was a joint tortfeasor. In fact, Mercy had expressly denied liability as a joint tortfeasor. As such, pursuant to the terms of the release agreement, there could be no automatic statutory reduction of the damages against Julian.

However, the Maryland Court of Special Appeals held that the determination of whether Mercy and Julian were joint tortfeasors was not required to take place in the underlying action. There are many strategic reasons for a defendant to hold off on filing a cross-claim or third-party claim until after the resolution of the underlying "primary" action. For example, if the defendant is successful in the primary matter,

then the secondary action will become moot.

Therefore, the Court held that Julian's failure to bring a cross-claim against Mercy or to file a third-party claim against Mercy after it was dismissed did not preclude an independent claim of contribution.

#### **TORT LAW:**

#### **BOTH PARENTS MAY SUE FOR "WRONGFUL BIRTH" IN VIRGINIA**

*Khadim v. Lab. Corp. of Am.*,  
No. 3:11-CV-00019, 2011 U.S.  
Dist. LEXIS 128493 (W.D. Va.  
Nov. 7, 2011).

In *Khadim v. Lab. Corp. of Am.*, the Plaintiffs, Seema Khadim ("Khadim") and Sultan Zeb ("Zeb"), are unaffected carriers of the "thalassemia beta trait." Essentially, there was a one in four chance that a child of theirs would inherit both defective genes, and have a condition called Cooley's anemia. Those with Cooley's anemia lack a blood protein that maintains iron levels in the body and must have frequent blood transfusions. When Khadim became pregnant, they sought genetic counseling to determine whether their child would have the disease. If so, they planned to terminate the pregnancy. The genetic material was sent to Defendant LabCorp, who represented that they were "equipped to perform such

testing quickly and accurately." *Khadim v. Lab. Corp. of Am.*, No. 3:11-CV-00019, 2011 U.S. Dist. LEXIS 128493, at \*8 (W.D. Va. Nov. 7, 2011).

Ultimately, the Plaintiffs were incorrectly informed by Defendant LabCorp that their unborn child was an unaffected carrier. As such, the Plaintiffs continued the pregnancy and had the child. Soon after the child's birth, it was determined that she was affected with beta thalassemia, and at one month old, she underwent her first blood transfusion. The child continues to frequently undergo transfusions and the intravenous administration of chelation therapy to remove heavy metals from her body.

The parties filed cross-motions for partial summary judgment. The two questions presented were: (1) whether Plaintiff Zeb, as the father, was a proper plaintiff in the "wrongful birth" action; and (2) whether Defendant LabCorp was a "health-care provider" under the Virginia Medical Malpractice Act ("VMMA"), thus, being subjected to the damages limitation provided by the act.

The Court held that Zeb, the husband, was a proper plaintiff in his own right because Defendant LabCorp knew or should have known that Zeb would rely upon its testing.

After all, the purpose of genetic testing is so that "'parents can know in advance whether *their* child or fetus is affected' and that 'generally *parents* who do the prenatal testing want those results so *they* can act on it.'" *Id.* at \*16. Since such test results could impact two parents, not just one, and LabCorp knew that when it evaluated a separate test performed on Zeb, the Court held that Zeb suffers his own, unique damages compensable under Virginia law.

The Court further explained that it was rejecting Defendant LabCorp's argument that it owed no duty to Zeb because he was not a "patient." Defendant LabCorp "undertook for consideration 'to render services to another which LabCorp should recognize as necessary for the protection of the other's person or things' and . . . Zeb has suffered and continues to suffer 'harm because of his reliance upon the undertaking.'" *Id.* at \*24. As such, the Court held that Defendant owed Plaintiff Zeb a duty under traditional negligence principles and Plaintiff Zeb is a proper plaintiff in his own right.

In regard to the second issue, the Court found that Defendant LabCorp is a health care provider under the VMMA. In order to qualify as a health care provider under the statute, an entity must: "(a) be a

corporation or other entity, (b) which employs or engages a licensed health care provider, and (c) which primarily renders health care services. *Id.* at \*54. As Defendant LabCorp mainly provides health care services in order for patients to receive proper medical testing and diagnoses, and it is a corporation that employs and engages, as independent contractors, doctors in Virginia, the Court held that it was a health care provider under the VMMA. Therefore, the damages cap in VMMA applies.