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COURT OF APPEALS

APPEALS - LAW OF THE CASE DOCTRINE - DOCTRINE NOT APPLICABLE TO PURE QUESTIONS OF FACT

STATE PERSONNEL - WRONGFUL TERMINATION - REMEDIES - "FULL BACK PAY" MAY INCLUDE STATE-OFFERED BENEFITS UNDER VERSION OF § 11-110(d)(1)(iii) OF STATE PERSONNEL AND PENSIONS ARTICLE, MD. CODE, EXISTING PRIOR TO 1 OCTOBER 2006

Facts: David Reier, until his termination on 7 October 1996 for asserted misconduct and poor performance, was employed as an assessor in the Carroll County office of the State Department of Assessments and Taxation (SDAT). As an assessor, Reier was responsible for conducting assessments of individual property "accounts" to determine their fair market value for taxation purposes. Reier was charged, among other responsibilities, with reviewing relevant building permits, updating computer files, and conducting external physical inspections of properties in order to complete assessments assigned to him. Reier's work, like that of all assessors, was subject to audit by supervisors upon its completion. Events leading up to the audit process in the final months of the 1996 assessment cycle lead to Reier's eventual termination.

In early August 1996, the Assistant Supervisor of Assessments for Carroll County, Lumen Norris, found a stack of 8 to 10 building permits on top of, or otherwise in close proximity to, a filing cabinet designated for the storage of such permits. Norris noted this because it served as an indication that they were not being considered, as they should, in the assessment process. Norris identified the misplaced permits by their account numbers as ones linked to properties assigned to Reier. Shortly after his discovery, Norris brought the misplaced permits to the attention of the Supervisor of Assessments for Carroll County, Larry White. White decided to use the permits as a sampling of Reier's work for audit purposes. The timeline of the proceeding audit process became the subject of great dispute because of its significance to the determination of the date on which SDAT became aware of the extent of Reier's actionable poor performance and misconduct. The audit revealed excessive errors in Reier's work and evidence that he had derogated his duties as an assessor. After the conclusion of the audit and a conference with Reier as to the audit results, White terminated Reier. Reier pursued an administrative appeal of his termination to the Maryland Office of Administrative Hearings (OAH).

The Administrative Law Judge (ALJ) presiding over the first OAH hearing on the matter affirmed the timeliness of the termination, finding that Reier was given notice of his termination within 30 days of the commencement of the investigation, in accord with Maryland Code (1993), State Personnel and Pensions Article, § 11-106(b). Reier sought judicial review of the decision in the Circuit Court for Baltimore County, which remanded the case to the OAH for application of the Court of Special Appeals's interpretation of § 11-106(b) then just announced in *Western Correctional Institute v. Geiger*, 130 Md. App. 562, 747 A.2d 697 (2000) (*Geiger I*). Aggrieved by the Remand Decision rendered by a different ALJ, Reier again sought judicial review in the Circuit Court, which affirmed the ALJ. On appeal to the Court of Special Appeals (*Reier I*), the intermediate appellate court remanded the case to the OAH to apply the yet newer judicial gloss given § 11-106(b) in the Court of Appeals's *Western Correctional Institute v. Geiger*, 371 Md. 125, 807 A.2d 32 (2000) (*Geiger II*). The same ALJ undertook this case for a third time and, after rendering factual findings varying as to some key dates from her previous findings regarding when the SDAT was on notice of Reier's misconduct, determined that more than 30 days had passed since the SDAT became aware of facts sufficient to prompt an investigation into Reier's job performance. The ALJ ordered that Reier be reinstated and awarded back pay, consisting solely of lost monetary wages. The Circuit Court affirmed Reier's reinstatement and awarded him benefits as part of his back pay. On appeal by the SDAT, the Court of Special Appeals affirmed Reier's reinstatement, concluding that the intermediate appellate court's decision in *Reier I* and the opinion in *Geiger II* effectively vacated the factual findings made by the ALJ on the first remand. The appellate court panel, however, concluded that back pay was limited to monetary wages. *Dep't of Taxation v. Reier*, 167 Md. App. 559, 893 A.2d 1195 (2006) (*Reier II*). We granted both parties' petitions for certiorari , Reier's to consider whether back pay included benefits and the SDAT's to consider whether the ALJ erred with regard to her fact-finding and the refusal by the ALJ to allow additional evidence on the last remand.

Held: The Court of Appeals rejected the SDAT's arguments that the findings of fact made by the ALJ on the first remand, and relied upon by the Court of Special Appeals in *Reier I*, could not be disturbed under the doctrine of the law of the case. The Court noted that the doctrine, which prevents parties from re-litigating issues already decided by a higher tribunal, generally is invoked only for decided questions of law, rather than pure questions of fact. Thus, because the ALJ upon the second remand revised only her findings of fact, which had not been relied upon by the intermediate appellate court in any event, the doctrine of the law

of the case did not apply here. Instead, the revised factual findings were determined to be within the ambit of the directions contained in the mandate and opinion of *Reier I*, which requested a clarification of certain key facts made more significant in light of the new interpretation of the statutory 30 day notice standard interpreted in *Geiger II*. We held that the ALJ's refusal of additional evidence was not an abuse of discretion under the arbitrary and capricious standard, particularly given the ALJ's fresh recollection of the record.

The phrase "full back pay", as it is used in Maryland Code (1993), State Personnel and Pensions Article, § 11-110(d)(1)(iii), does not include explicitly State-offered benefits such as medical, dental, and life insurance; leave; and retirement credit. Because two reasonable alternative interpretations of the statute were presented, the Court deemed the language ambiguous and looked to the legislative history of the law to determine its meaning. The Court determined that adoption of the statute was influenced substantially by a Governor's Task Force Report, which indicated that the word "full" had significance apart from a deleted "other income" set-off provision in an earlier iteration of the bill before enactment. Several factors lead the Court to conclude that "full back pay" must embrace also State-offered benefits. First, Maryland courts previously conflated the provisions of § 11-110(d)(1)(ii) and (iii) to both reinstate and provide back pay with benefits to erroneously terminated employees. Second, the entire State Personnel and Pension Article addresses the pay scheme in a manner that contemplates benefits, such as health care and leave, to be inextricably linked with pay. Third, and contrary to the SDAT's assertion, the Task Force Report belies the notion that § 11-110(d)(1) was written in the disjunctive. Finally, it would be unreasonable for the General Assembly to permit recipients of lesser wrongful discipline to be made whole entirely and simultaneously deprive wrongfully terminated employees of their accrued State benefits.

David Reier v. State Department of Assessments and Taxation, No. 29, September Term 2006, filed 5 February 2007. Opinion by Harrell, J.

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ATTORNEYS MISCONDUCT - ATTORNEY GRIEVANCE COMMISSION - MRPC (MARYLAND RULES OF PROFESSIONAL CONDUCT) 1.1, 1.15(a) and (b) and 8.4(d)

Facts: Respondent, Peter Maignan, was charged with violating several provisions of the MRPC with regard to two clients - Hattie Lipscomb and the Magruders. The matter regarding Ms. Lipscomb involved a delay of four months in remitting $4000 in proceeds derived from the settlement of an action against her former landlord, during which time Maignan's operating account dropped below $4000 on a number of occasions. In Lipscomb, the controversy occurred with regard to what happened to the settlement check after it was received in September, 2002. Respondent deposited the settlement check in his operating account and drew the check from his operating account. Bar Counsel alleged this occurred in September, 2002 and that the proceeds were not distributed. The hearing judge found that the settlement check was misplaced in respondent's office and was not discovered until late December, 2002 and not deposited until January 6, 2003. The hearing judge dismissed respondents contentions as to violations of MRPC 1.1 and 1.3, holding respondent did not violate MRPC 1.4, 1.5, 8.1 or 8.4; Maryland Rule 16-606 or 16-607 or Section 10-306 of the Md. Code, Business Occupations and Professions Article but respondent did violate MRPC 1.15 and 5.3(a) and (b) and Maryland Rule 16-604. Bar Counsel excepted to her failure to find a violation of MRPC 1.15(b), to MRPC 1.1, which he claims he did not concede, and MRPC 8.4(a) and (d). Evidence was submitted that respondent's bank stamped the check as being handled in September, 2002 and respondent did not offer any explanation as to why no January, 2003 dates appeared on the check. Bank records also showed that at various times in October, the operating account fell below $4000.

Held: *Respondent violated MRPC 1.1, 1.15(a) and (b), and 8.4(d), respondent to pay costs.* The Court held that the hearing judge's finding that "the bank records do not evidence deposit of the settlement check until January 2003" was fundamentally and clearly erroneous. The appropriate sanction for those violations is indefinite suspension.

AGC v. Maignan, Misc. Docket AG No. 4, Sept. Term, 2004, filed December 22, 2005. Opinion by Wilner, J.

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CORPORATIONS - DIRECTORS - FIDUCIARY DUTY - DIRECTOR'S RIGHT TO SUE CORPORATION - NOTICE TO THE CORPORATION OF LAWSUIT - DIRECTOR'S RIGHT TO ENFORCE JUDGMENT BY WRIT OF ATTACHMENT.

Facts: Joshua A. Gurland was a member of the board of directors and an officer of Storetrax.com, Inc., a Delaware corporation with its principal place of business in Rockville, Maryland. After the termination of Gurland's employment as an officer, and a letter from Gurland to the board of directors indicating that a lawsuit would be filed if the matter of severance pay was not resolved before a date certain (which letter did not lead to an amicable resolution), Gurland filed suit in the Circuit Court for Montgomery County seeking severance payment under the terms of an employment agreement. Through no fault of either party, the summons, complaint, and accompanying motion for summary judgment was not delivered timely to the corporation by its resident agent, although service on the resident agent was properly made. When the corporation did not respond to the complaint or motion, Gurland caused summary judgment by default to be entered against the corporation. Ten days later, Gurland enforced the judgment entered in his favor by filing a petition for writ of attachment. The trial court issued the writ, and Gurland garnished the corporation's bank account. The corporation, now aware of the suit, in addition to seeking to re-open the breach of contract action, filed a complaint in the Circuit Court alleging that Gurland breached his fiduciary duty as a director of the corporation by: (1) never directly and personally advising the corporation of the existence of his lawsuit; (2) pursuing summary judgment by default after the corporation failed to respond timely to his motion for summary judgment; (3) attaching Storetrax's bank account in the amount of the judgment; and (4) opposing attempts by the corporation to have the judgment and writ of garnishment set aside. The trial court found in favor of Gurland on the breach of fiduciary duty claim after a trial. The Court of Special Appeals affirmed. We granted Storetrax's petition for certiorari.

Held: Affirmed. It is well-settled that directors of a corporation "[o]ccupy a fiduciary relation to the corporation and its stockholders." *Booth v. Robinson*, 55 Md. 419, 436-37 (1881); *see Merchants Mortgage Co. v. Lubow*, 275 Md. 208, 215, 339 A.2d 664, 669 (1975). This fiduciary relationship generally obligates directors of a corporation to act "(1) In good faith; (2) In a manner he reasonably believes to be in the best interests of the corporation; and (3) With the care that an ordinarily prudent person in a like position would use under similar circumstances." Md. Code (1976, 1999 Repl. Vol.), CORPS. & ASS'NS ART., § 2-405.1(a); *see also Booth*, 55 Md. at 436-37. Situations may arise, however, where a corporate director, despite the requirement that a director

adhere strictly to his or her fiduciary obligations, may proceed with an individual plan of action even though the director's interests conflict directly with those of the corporation. When such a situation arises, a director may find "safe harbor" by disclosing to the corporation the conflict of interest and pertinent facts surrounding the conflict so that a majority of the remaining shareholders or directors may take action to protect the corporation's financial interests. Maryland Code (1976, 1999 Repl. Vol.), Corps. and Ass'ns Art., § 2-419(a)-(b).

Under the circumstances of the present case, Gurland notified sufficiently Storetrax of the imminence of the filing of a lawsuit such that he may claim the protections of the "safe harbor" annunciated above. Respondent delivered to Storetrax on 11 December a letter outlining in detail his claimed entitlement to severance benefits under the termination provisions of the employment agreement. In this letter, Gurland stated specifically that "[i]f the issue remain[ed] unresolved as of [21 December 2001]," he would instruct his attorney to file suit in order to enforce the severance provisions of the employment agreement. This 11 December letter indicated unambiguously that litigation was imminent, and set a clear deadline for which action on the part of Storetrax's board of directors was required to avert suit. Storetrax engaged counsel, responded by letter denying Gurland's claims, and otherwise braced for litigation as a result of the 11 December 2001 letter. There is no evidence in the record that Gurland knew that Storetrax had no actual knowledge of the lawsuit at the time he pressed for summary judgment. Nor is there any evidence that Gurland relied on insider information in pursuing his claims, or used his position as director to his advantage. To the contrary, every action taken by Gurland was entirely according to the applicable Maryland Rules.

There are no general rules of law grounded on a director's fiduciary relationship with a corporation forbidding the director from becoming a creditor of that corporation, or otherwise enforcing his or her claims against it. As a creditor, he or she ought to have the same rights to enforce that claim as any other creditor. 3 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 907 (perm. ed., rev. vol. 1999) As such, Gurland acted within his rights when he filed a petition for writ of attachment at the earliest permitted opportunity after entry of summary judgment by default.

Nor was it a continuing breach of Gurland's fiduciary duties for him to refuse to relinquish voluntarily the garnishment in opposing the corporation's efforts to set aside the judgment. The mere fact that Gurland was a director of the corporation does not

impose upon him a legal duty to acquiesce to the demands of the corporation which are adverse to his individual financial interests. *Waterfall Farm Systems, Inc. v. Craig*, 914 F. Supp. 1213, 1228 (D. Md. 1995).

Storetrax.com, Inc. v. Joshua Gurland, No. 40, Sept. Term 2006, filed February 6, 2007. Opinion by Harrell, J.

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CRIMINAL LAW - COMMON LAW RIOT

Facts: In November, 2002, two parties were taking place in adjoining houses and backyards in College Park after a University of Maryland football team victory. Two separate groups of friends attended the parties. One group, which included the appellant, began acting in a boorish, obnoxious manner, deliberately instigating verbal confrontations with other people at the two parties. Although no physical fights ensued in the two homes, confrontations between two individuals in the two groups occurred in the street resulting in a deadly stabbing. Schlamp was charged with first and second degree murder, first and second degree assault and common law riot. A jury in the Circuit Court for Prince George's County acquitted him of murder and first degree assault but convicted him of second degree assault and riot. He was sentenced to ten years in prison for common law riot and three consecutive years for assault. Schlamp's conviction was affirmed by the Court of Special Appeals and the Court of Appeals granted *certiorari* to determine whether the evidence sufficed to establish the common law crime of riot.

Held: Reversed. Maryland is one of only a handful of States that have not codified the crime of riot and that still maintain it as a common law offense. The elements of this crime are consistent with the conception of the crime under English law – three or more persons "unlawfully assembled to carry out a common purpose in such violent or turbulent manner as to terrify others." *See Cohen v. State*, 173 Md. 216, 221, 195 A. 532, 534 (1937), *rearg. denied*, 173

Md. 216, 196 A. 819, *cert. denied*, 303 U.S. 660, 58 S. Ct. 764, 82 L. Ed. 1119 (1938). Common law riot was not regarded as a crime against either persons or property, but rather against the public peace. While most states have codified the crime, a common theme in most of the statutes is the confederation of a group of people – the minimum number varies – who engage in tumultuous or violent conduct that creates a public disturbance or a risk of terror or alarm. The evidence in this case did not suffice to establish the common law crime of riot. Although, while at the party, Schlamp and his comrades were, as noted, boorish and obnoxious, they were not unlawfully assembled. Prior to the stabbing incident, there were no fights, and there was no evidence of other tumultuous behavior that struck terror or was likely to strike terror in anyone. Everyone seemed to agree that the aggression was entirely verbal, apparently one-to-one, and not group-instigated, and was largely diffused or ignored. The two groups were in proximity to one another, but there was no evidence of organized group confrontation and the incident in the street lasted less than 30 seconds.

John Ryan Schlamp v. State of Marlyland, No. 24, Sept. Term 2005, filed February 3, 2006. Opinion by Wilner, J.

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CRIMINAL LAW – SEARCHE AND SEIZURE – SEARCH UNDER WARRANT

Facts: Petitioner, Randy Paul Brown, Jr., was convicted in the Circuit Court for Anne Arundel County of possession with intent to distribute marijuana. The marijuana that formed the basis of petitioner's conviction was taken from him after he arrived at a residence where police were executing a drug-related search warrant. After petitioner knocked on the door of the residence, a police officer opened the door and petitioner took a step inside. The officer identified himself as law enforcement and took petitioner by the arm in order "to keep him away from everybody else to figure out why he was at this residence." The officer then asked petitioner if he had any weapons or drugs on him, and

petitioner responded that he possessed "a quarter pound in his waist." The officer seized the marijuana in petitioner's waist and placed him under arrest. Prior to trial, petitioner filed a motion to suppress that evidence. The Circuit Court denied the motion. Petitioner proceeded to trial on an agreed statement of facts and was found guilty. He noted a timely appeal to the Court of Special Appeals. That court affirmed. *Brown v. State*, 168 Md. App. 400, 896 A.2d 1093 (2006).

Held: Affirmed. The Court of Appeals found that petitioner's detention was lawful and that the motion to suppress was properly denied. Under the holdings in *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981) and *Cotton v. State*, 386 Md. 246, 872 A.2d 87 (2005), law enforcement officials are entitled, for their own safety and that of other persons, to take control of the situation at the scene of an ongoing search made pursuant to a warrant and to ascertain the identity and connection of persons knocking on the door of that residence unless such persons are clearly unconnected with the criminal activity and/or clearly present no potential danger to the police officers involved in executing the warrant.

Randy Paul Brown, Jr. v. State of Maryland, No. 51, September Term, 2006, filed February 7, 2007. Opinion by Raker, J.

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CRIMINAL LAW - SENTENCING - SPLIT SENTENCE

Facts: At trail, Appellant Cathcart was found guilty of first degree assault and false imprisonment. He was sentenced to ten years imprisonment on the first degree assault charges and sentenced to "life, all but ten years suspended" to run consecutively with the first sentence with no probation on the false imprisonment charge. He appealed, arguing that the life sentence was a cruel and unusual punishment for his false imprisonment conviction and pointing out various collateral consequences of a life sentence, chief among them a fifteen year

minimum term before becoming eligible for parole. The Court of Special Appeals upheld the sentence, concluding that ten years with the rest suspended was not cruel and unusual punishment for Cathcart's false imprisonment conviction. Cathcart appealed to the Court of Appeals, arguing that the sentence was illegal as a violation of the prohibition against cruel and unusual punishment and a violation of separation of powers.

Held: *Judgment of the Court of Special Appeals vacated and case remanded with instructions.* In order to impose a split sentence pursuant to Md. Code, § 6-222 of the Criminal Procedure Article, the sentencing court must impose a period of probation attached to the suspended portion of the sentence. Otherwise, the defendant cannot ever be made to serve more than the unsuspended portion of the sentence, and the sentence will be construed as being a finite sentence for the unsuspended period of time. The docket should be amended to reflect that the sentence is one of ten years of incarceration, the remainder of the original sentence being a nullity.

Robin Tyronne Cathcart v. State of Maryland, No. 64, September Term 2006 filed February 9, 2007, Opinion by Wilner, J.

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ELECTIONS - ABSENTEE VOTING - DEADLINES

Facts: The petitioner, a Maryland resident and registered voter in Baltimore County, living out-of-state while attending college, could not vote personally at her precinct polling station during the 2006 Maryland gubernatorial election. She intended to vote by absentee ballot. Petitioner alleged that she requested an absentee ballot by both facsimile and mail in August. The absentee ballot for the general election, bearing the postmark of November 1, 2006, did not arrive in the mail until Monday, November 6, 2006. Although the petitioner received it before midnight, at about 8:45p.m., when she returned home, the time for all routine mail pickups had passed and no post offices near her were open at that

time. She did not mail the absentee ballot until the next day, November 7, 2006.

Because Election Day was on November 7, 2006, and the ballot was not "completed and mailed before election day," it was not counted in the final tally. The petitioner contended that despite her diligence in her request, her right to vote was denied because the Board of Elections failure to process her ballot request in time resulted in her inability to comply with Code of Maryland Regulations ("COMAR") 33.11.03.08(b), which required that absentee ballots be postmarked by November 6, 2006. She requested that the Board accept all absentee ballots postmarked on Election Day, Tuesday, November 7, 2006.

The trial court denied petitioner relief, finding that she had not met her burden of proof. Prior to the Circuit Court's issuance of its written order and mandate, the petitioner, on November 8, 2006, filed a direct interlocutory appeal to the Court of Appeals, and petitioned for a writ of certiorari, which was granted. Oral argument was held on November 13, 2006, and an order affirming the Circuit Court's judgment followed.

Held: Judgment Affirmed. The mere occurrence and/or experiencing of processing problems with absentee ballots does not justify an extension of time for the filing of such ballots, absent proof that those problems were the direct cause for voters not voting.

Fritszche v. Maryland State Board of Elections, No. 73, September Term 2006. Filed February 12, 2007. Opinion by Bell, C.J.

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EMINENT DOMAIN - NATURE, EXTENT, AND DELEGATION OF POWER - PUBLIC USE - IN GENERAL - PARTICULAR USES OR PURPOSES - URBAN RENEWAL; BLIGHT - URBAN RENEWAL MAY CONSTITUTE A VALID PUBLIC PURPOSE WHEN CONDUCTED PURSUANT TO A COMPREHENSIVE DEVELOPMENT PLAN.

EMINENT DOMAIN - NATURE, EXTENT, AND DELEGATION OF POWER - EXERCISE OF DELEGATED POWER - NECESSITY FOR APPROPRIATION - CODE OF PUBLIC LOCAL LAWS OF BALTIMORE CITY, § 21-16, TITLED "QUICK-TAKE CONDEMNATION — IN GENERAL," PROVIDES THE STATUTORY FRAMEWORK FOR QUICK-TAKE ACTIONS IN BALTIMORE CITY. PURSUANT TO § 21-16, IN ORDER TO UTILIZE QUICK-TAKE CONDEMNATION, THE CITY MUST FILE A PETITION UNDER OATH SHOWING THE REASON OR REASONS WHY IT IS NECESSARY IN THE PUBLIC INTEREST FOR THE CITY TO HAVE *IMMEDIATE* TITLE TO AND POSSESSION OF A PARTICULAR PROPERTY. § 21-16(A) AND (D). THUS, THE CITY HAS THE BURDEN TO PROVE IMMEDIATE NECESSITY IN ORDER TO PROCEED WITH QUICK-TAKE CONDEMNATION. IN DOING SO, THE CITY MUST SHOW THAT THE NECESSITY IS FOR A PUBLIC USE OR PURPOSE.

Facts: Arising out of a "quick-take" condemnation action in Baltimore City, this case involves a dispute over a property located at 1924 N. Charles Street ("the Property").

On October 25, 1982, the Mayor and City Council of Baltimore, appellant ("the City"), adopted Ordinance No. 82-799, which established the Charles North Urban Renewal Plan for the Charles North Revitalization Area. The Property is located within the boundaries of the Charles North Revitalization Area and in June 2004, the City specifically authorized the acquisition of the Property by enacting Ordinance No. 04-695. Ordinance No. 04-695 stated that the Property was to be acquired "by purchase or condemnation, for urban renewal purposes."

On March 9, 2006, the City filed a petition for condemnation and a petition for immediate possession and title to the Property in the Circuit Court for Baltimore City. The petition for immediate possession and title to the Property cited an attached affidavit showing the reasons why it was necessary to "quick-take" the Property. The affidavit only stated that the Property "must be in possession of the [City] at the earliest possible time in order to assist in a business expansion in the area."

On March 15, 2006, the Circuit Court granted the City's petitions and sent notice to the owner, George Valsamaki, et al., appellee. Mr. Valsamaki timely filed an answer and a hearing was set for April 18, 2006. Prior to the hearing, Mr. Valsamaki attempted to obtain discovery, but was restricted in his efforts because the expedited process of the quick-take condemnation proceedings required that the hearing would be held before the City would have to comply with discovery. He filed a motion to shorten the time for discovery, but the Circuit Court denied that motion on April 4, 2006.

On April 18, 2006, the hearing was conducted in the Circuit

Court before the Honorable John Philip Miller. The City called two witnesses: Paul J.M. Dombrowski (the Director of Planning and Design for the Baltimore Development Corporation and also the Project Manager for the Charles North area) and M.J. "Jay" Brodie (the President of the Baltimore Development Corporation). Additionally, the City introduced into evidence Ordinance No. 82-799 (the Charles North Urban Renewal Plan), a map of the renewal area, and a photograph of the Property. Mr. Dombrowski testified that there was no plan in existence at that time for the development of the Property. Mr. Brodie, disagreeing in part with Mr. Dombrowski, stated that the plan "was as specific as most urban renewal plans are at that point in time," and that "the specific design for redevelopment will come out of a proposal by a private sector developer."

On May 19, 2006, Judge Miller, after considering the testimony and evidence, issued a memorandum opinion and order, finding that the City "fail[ed] to demonstrate sufficient grounds which warrant the findings of necessity requisite for the immediate taking" of the Property. Thus, the quick-take condemnation was denied.

On May 26, 2006, the City filed a motion for reconsideration to alter or amend judgment. On July 11, 2006, the Circuit Court denied the City's motion. Then, on August 8, 2006, pursuant to Code of Public Local Laws of Baltimore City, § 21-16(c), the City noted a direct appeal to the Court of Appeals.

Held: Affirmed. The Court of Appeals held that the Code of Public Local Laws of Baltimore City, § 21-16, titled "Quick-take condemnation — in general," provides the statutory framework for quick-take actions in Baltimore City. Pursuant to § 21-16, in order to utilize quick-take condemnation, the City must file a petition under oath showing the reason or reasons why it is necessary in the public interest for the City to have *immediate* title to and possession of a particular property. § 21-16(a) and (D). Thus, the City has the burden to prove immediate necessity in order to proceed with quick-take condemnation. In doing so, the City must show that the necessity is for a public use or purpose. The Court of Appeals held that, under § 21-16, the evidence in the record was insufficient to demonstrate the City's necessity for *immediate* possession and title to the Property via quick-take condemnation.

Mayor and City Council of Baltimore City v. George Valsamaki, et al., No. 55 September Term, 2006, filed February 8, 2007. Opinion by Cathell, J.

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EMPLOYMENT - ARBITRATION CONTRACTS

Facts: On November 17, 2000, United Healthcare of the Mid-Atlantic, Inc. offered Ronnie E. Cheek a position of employment as a senior sales executive. The two-page offer letter set forth various conditions of United's offer of employment, including that Cheek accept United's "Employment Arbitration Policy." Cheek accepted the offer in writing, stating that "[a]ll of the terms in your employment letter are amenable to me."

During Cheek's first day of employment with United, he received a copy of United's Employee Handbook, which contained summaries of United's Internal Dispute Resolution Policy and Employment Arbitration Policy (hereinafter, "Arbitration Policy" or "Policy"). United declared in the summary of the Policy that arbitration "is the final, exclusive and required forum for the resolution of all employment related disputes which are based on a legal claim" and that "any party to [such a dispute] may initiate the arbitration process." The summary of the Arbitration Policy also provided:

> United HealthCare reserves the right to alter, amend, modify, or revoke the Policy at its sole and absolute discretion at any time with or without notice. The senior executive of Human Resources has the sole authority to alter, amend, modify, or revoke the Policy.

Cheek subsequently signed an "Acknowledgment Form for the Code of Conduct and Employment Handbook." In that Form, Cheek acknowledged that he had "specifically received and reviewed," among other things, an "Internal Dispute Resolution/Employment Arbitration Policy," and that he understood the Policy to be a binding contract between himself and United, and that he agreed to submit all employment-related disputes based on legal claims to arbitration under United Health Group's policy.

Within seven months, United informed Cheek that United was eliminating his position and his employment was terminated. In response, Cheek filed a four-count complaint against United in the Circuit Court for Baltimore City seeking damages for breach of contract, negligent misrepresentation, and violations of Maryland Code, § 3-501 et. seq. of the Labor and Employment Article. Cheek also claimed under the doctrine of promissory estoppel that United should have been precluded from denying the existence of a valid employment agreement.

United filed a "Motion to Dismiss and/or Compel Arbitration

and Stay Lawsuit" with the Circuit Court, which the Circuit Court granted, dismissing Cheek's complaint and ordering him to submit his claims to arbitration. Thereafter, Cheek noted an appeal to the Court of Special Appeals. The Court of Appeals issued a writ of certiorari prior to any proceedings in the Court of Special Appeals.

Held: Reversed. he Court of Appeals held that the Arbitration Policy did not constitute a valid and enforceable agreement between the employer and the employee. The Court determined that there was no consideration to support an arbitration agreement because the employer's ability to alter, amend, modify, or revoke the Arbitration Policy rendered its promise to arbitrate illusory, and because United's employment of Cheek did not serve as consideration for the Arbitration Policy.

Ronnie E. Cheek v. United Healthcare of the Mid-Atlantic, Inc., No. 141, September Term 2002, filed November 13, 2003. Opinion by Battaglia, J.

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FAMILY LAW - CHILD CUSTODY - JURISDICTION

Facts: Respondent, Deepa Garg, filed a complaint in the Circuit Court for Baltimore County seeking a limited divorce from her husband, petitioner Ajay Garg, custody of their minor child, Chaitanya, spousal and child support, and certain ancillary relief. Petitioner moved to dismiss the complaint because proceedings were already pending in a court in Indore, India. The Circuit Court concluded that, because of the case pending in India, it should not exercise jurisdiction and dismissed the entire action. The Court of Special Appeals vacated that judgment and remanded the case for further proceedings, concluding 1) even if the Maryland court should not exercise jurisdiction over the custody dispute, it had subject matter jurisdiction over the divorce action, 2) the Circuit Court erred deferring a request by respondent to appoint an

attorney for the child pending resolution of the jurisdictional issue, and 3) in revisiting the jurisdictional issue on remand, the trial court was to apply the newly enacted Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) rather than the Uniform Child Custody Jurisdiction Act (UCCJA) that was in effect when the complaint was filed. The Court of Appeals granted *certiorari* to review the rulings of the Court of Special Appeals.

Held: Reversed. The trial court may properly decline jurisdiction in a custody dispute, pursuant to the UCCJA, when proceedings are ongoing in another jurisdiction. The Court of Special Appeals erred in holding that the Circuit Court was required as a matter of law to appoint counsel for the child prior to a hearing on the jurisdictional issues. Although, FL § 1-202 provides that in a contested action for custody or support of a minor child, the court *may* appoint counsel to represent the minor child, the statute merely *authorizes* the appointment of counsel at the discretion of the trial court, reviewable under an abuse of discretion standard. For this case the motion was never formally denied, Respondent did not pursue a ruling, and a hearing proceeded without counsel for the minor child.

The Court of Special Appeals also erred in holding that the newly enacted UCCJEA applied in lieu of the UCCJA. The UCCJEA took effect October 1, 2004 and applies only to cases filed after that date.

Garg v. Garg, No. 97, Sept. Term, 2005, filed June 8, 2006. Opinion by Wilner, J.

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FAMILY LAW - CUSTODY - ABUSE BY PARTY TO PROCEEDINGS

Facts: Appellant and Appellee were involved in a protracted custody dispute over their young daughter, with allegations of sexual abuse by both sides. The appeal stems from the trial court's refusal to find that "the court has reasonable grounds to

believe" that the father had abused his daughter for the purposes of Md. Code, § 9-101 of the Family Law Article, which provides various consequences on custody and visitation rights upon such a finding. There was conflicting testimony by various experts concerning their conclusions about whether the father had abused the child, and, at the close of evidence, the trail court applied a "preponderance of the evidence" standard and concluded that the mother had not proved the father had abused the child by a preponderance of the evidence. The mother appealed, successfully arguing to the Court of Special Appeals that Md. Code, § 9-101 of the Family Law Article requires the application of a lesser standard of proof than "preponderance of the evidence."

Held: *Judgment of the Court of Special Appeals reversed; case remanded to that court with instructions to affirm judgment of Circuit Court for Baltimore County .* Md. Code, § 9-101 of the Family Law Article does not establish a new standard of proof lower than preponderance of the evidence. A preponderance of the evidence standard is generally considered the lowest standard of proof necessary to conclusively determine matters of fact. Application of a lower standard of proof would produce the absurd result of a court depriving a party of visitation and custody of his or her child while actually believing that it is more likely than not that the parent did not abuse the child. There is no indication the that legislature intended such a result, and consequently, the court must believe that the party abused the child by at least a preponderance of the evidence in order to have the requisite "reasonable grounds to believe."

Mikhail Volodarsky v. Kira Tarachanskaya, No. 50, September Term, 2006 filed February 9, 2007. Opinion by Wilner, J.

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MUNICIPAL LAW - POWER TO LEVY TAXES AND FEES

Facts: In November, 1999, J And R Limited Partnership contracted to sell to the Millennium Development Group, LLC,

approximately 122 acres of property located in the City of Frederick and encompassing Gas House Pike from its intersection with Monocacy Boulevard and running to the City's eastern limits.

One month after entering into the contract for the purchase of the property with J And R Limited Partnership, Millennium assigned all of its rights in the property to Riverside Investment Group, LLC, which procured the property to incorporate it into the Riverside Corporate Park Project. The property was to constitute the "South Campus," as one of four campuses of the development plan for the Corporate Park in the City of Frederick. The South Campus was to surround Gas House Pike, which was a vital part of the Extension of Monocacy Boulevard Project, as well as the upgrade of Gas House Pike from its intersection with Monocacy Boulevard to its terminus at the eastern corporate limits of the City.

On November 6, 2000, to "commence and complete" Phase III of the Monocacy Boulevard Project, its final phase, the Mayor of the City of Frederick entered into an agreement (the "November Agreement") with Riverside Investment Group, LLC, Riverside Industrial Properties, LLC, Riverside Technology Park I, LLC, Riverside Technology Park II, LLC, and Riverside Technology Park III, LLC ("Property Owners"). Pivotal to the contract was the Property Owners' agreement to dedicate to the City for no charge "any and all additional rights-of-way needed for the upgrade and widening of Gas House Pike along the frontage of the Property," also to give their consent, and sign all necessary documents to subject the properties to a "Tax Increment Financing District" (TIF) to enable the City to finance the completion of Monocacy Boulevard. In consideration for the Property Owners' dedications and agreement to the TIF, the contract provided that the Properties and Property Owners would be subject to a "deferred contribution special assessment" of $1.00 per square foot of each building to be constructed, in place of any other fees. The contract was signed by a representative of each of the Property Owners and by Mayor James Grimes for the City of Frederick.

In May of 2001, Riverside Investment Group assigned all of its rights in the contract to purchase the South Campus to Riverside South, LLC, and the property was subsequently sold and conveyed to Riverside South, LLC.

On October 3, 2002, the City of Frederick passed Ordinance G-02-19, §1, which levied water, sewer and park development impact fees.

In June of 2004, then Mayor Jennifer Dougherty and the Property Owners entered into a second agreement entitled "Agreement

To Defer Public Improvements" ("the Deferral Agreement"), granting the Property Owners an exception to the City's requirement of the installation and acceptance of necessary public improvements prior to the final approval of subdivision plats and iterated that the property owners "shall, upon issuance of any permit issued by The City of Frederick with reference to any of the Site Plan Lots, pay unto the City of Frederick the Fee, based upon One Dollar ($1.00) per square foot of gross floor area of any proposed building to be constructed on any of the Site Plan Lots."

Riverside South LLC subsequently sold its property rights in the South Campus of the Riverside Corporate Park Project to Riverside Apartments ("Riverside"), a limited liability company consisting of two member companies, River Walk Apartments, LLC, and Monocacy River Apartments, LLC.

In October of 2004, and again in March of 2005, Riverside Apartments submitted applications for shell construction permits for the development of the South Campus of the Riverside Corporate Park Project, along with a payment of the $1.00 per square foot for each proposed structure, as required by both the November and the Deferral Agreement. The City denied the applications, stating that all water, sewer and park impact fees must be paid prior to the issuance of any of the aforementioned building permits.

Riverside responded by filing a complaint for a writ of mandamus and specific performance of the November and Deferral Agreements, and also a motion for summary judgment. The Circuit Court for Frederick County granted summary judgment to Riverside and ordered that the City "not require [Riverside] to pay any additional fees, beyond the one dollar per square foot agreed upon" in the November and the Deferral Agreements in order to acquire the shell construction permits.

The City noted a timely appeal to the Court of Special Appeals, shortly after which River Walk and Monocacy River ("River Walk"), as the successors-in-interests to Riverside's property rights, were substituted for Riverside as appellees. The Court of Special Appeals held that Section 2 of Article 23A and Section 7 of Article II of the City of Frederick Charter mandated that all fees imposed by the City, and any waiver thereof, must be authorized by ordinance, and because no ordinance authorizing either the November or the Deferral Agreement was enacted, they were both *ultra vires* and therefore *void ab initio*

Held: The Court of Appeals affirmed the Court of Special Appeals's judgment and held that fees only may levied by legislative act and therefore, by implication, only may be waived

by legislative act. Thus, neither of the two mayors that entered into the agreements possessed the requisite authority to levy the "special fee" created in the agreements, or to waive the impact fees imposed by the City of Frederick. The Court further concluded that, because municipalities are not bound by those actions which transcend the authority of those acting on its behalf, and neither mayor was authorized to create the special fee or waive the impact fee, the November and Deferral Agreements were *ultra vires* and unenforceable.

River Walk Apartments, LLC v. Roger Twigg, Et. Al., No. 49, Sept. Term, 2006, filed January 10, 2007. Opinion by Battaglia, J.

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REAL PROPERTY - FORECLOSURE - SURPLUS PROCEEDS - HOLDOVER MORTGAGOR

Facts: In each of three consolidated cases, Appellant Legacy Funding LLC purchased at foreclosure parcels of real property occupied by the owners as a residence that was not rented or otherwise commercially productive. After ratification, Legacy failed to timely pay the purchase price, but eventually settled on the properties before the need for a resale and thereafter filed a motion for possession. The court entered orders awarding possession to Legacy unless the mortgagors showed cause by a certain date why that relief should not be granted. Prior to the dates set in the show cause orders, however, Legacy filed a motion in each case seeking payment from the surplus proceeds from the foreclosure sale of amounts equivalent to the fair rental value of the property, commencing from the date of the sale. The court denied these motions for surplus proceeds, from which Legacy appealed.

Held: *Orders denying motions for surplus proceeds vacated; remanded with instructions.* A foreclosure purchaser may be entitled to a portion of any surplus proceeds from the foreclosure sale if a holdover mortgagor interferes with the purchaser's possession of the property, but not until the foreclosure purchaser

is lawfully entitled to possession pursuant to court order or upon payment of the full purchase price and the purchaser subsequently makes a demand for possession on the holdover mortgagor that is refused. The foreclosure purchaser may then recover damages to compensate the purchaser for its loss from any surplus proceeds, which may, under appropriate circumstances, be measured by the fair rental value of the property.

Legacy Funding LLC v. Edward S. Cohn, Substitute Trustees, et al., No. 23, September Term 2006, *Legacy Funding LLC v. Howard N. Bierman, Substitute Trustees, et al.*, No. 25, September Term 2006, & *Legacy Funding LLC v. Thomas P. Dore, Substitute Trustees, et al.*, No. 26, September Term 2006 filed January 9, 2007. Opinion by Wilner, J.

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TORT - PRODUCTS LIABILITY - ECONOMIC DAMAGES

Facts: The petitioners brought this class action to recover from the respondents the cost of repairing and/or replacing the front seats in each class vehicle. They allege that the seats are unsafe because they collapse rearward in moderate and severe rear-impact collisions, and that the cost to fix the defective seatbacks, a proven cause of serious bodily injury or death in these types of accidents, constituted a cognizable injury. More particularly, the petitioners aver that such required remedial expenditures constitute economic loss, which this Court has permitted to be recovered when the product defect factor creates an unreasonable risk of death or serious injury. That economic loss, the petitioners submit, is recoverable. None of the petitioners or any putative class members allege that he or she has experienced personal injury as a result of the mechanical failure that caused the alleged defect. Indeed, persons with such experiences were expressly excluded from this class.

The case was heard in the Circuit Court for Montgomery County.

Before the petitioners filed pleadings seeking certification of a class, the respondents moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The trial court granted the motion, holding that "the economic loss doctrine would not support the cause of action being sought by the plaintiffs in this case, and there is insufficient basis to allow a fraud claim to continue against these defendants." An appeal was taken to the Court of Special Appeals, where, in an unreported opinion, that court affirmed the dismissal of the action, reasoning that the petitioners failed to plead sufficiently the required allegation of injury or actual harm to withstand a motion to dismiss. The petitioners filed a petition for Writ of Certiorari, which was granted.

Held: *Judgment of the Court of Special Appeals Reversed; Case Remanded to that Court with Instructions to Reverse the Judgment of the Circuit Court for Montgomery County and Remand to that Court for Further Proceedings Consistent with this Opinion. Costs in this Court and in the Court of Special Appeals to be Paid by the Respondents.* Even in the absence of actual personal injury, economic loss, the cost to fix the defect alleged, is recoverable where it is also alleged that such defect has caused, in other cases, serious bodily injury and, thus, constitutes an unreasonable risk of death or serious injury.

Lloyd v. General Motors Corp., No. 10, September Term, 2002. Filed February 8, 2007. Opinion by Bell, C.J.

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WORKERS' COMPENSATION - REOPEN CREDIT

Facts: Petitioner, a master electrician for the school board, suffered an accidental injury to his back while lifting a transformer during the course of his employment and filed for temporary and permanent partial disability. The Worker's Compensation Commission found that petitioner suffered a 20% industrial loss and was entitled to $114 per week for 50 weeks, a

first tier award. Pursuant to a stipulation by the parties, this award was increased to $114 per week for 70 weeks, also a first tier award. At some point petitioner filed another petition to reopen based on worsening of condition. Following a hearing, the Commission found a 33% industrial loss qualifying petitioner for $223 per week for 115 weeks, a second tier award, subject to credit "for payments made." Respondent sought judicial review in the Circuit Court for Montgomery County. The Circuit Court granted respondent's motion for summary judgment agreeing with respondent that it was entitled to credit based on the number of weeks for which it had already paid compensation rather than the total dollars it had paid. The Court of Special Appeals affirmed.

Held: *Judgment of Court of Special Appeals affirmed.* The Court of Appeals held that petitioner was entitled to benefits based on a weekly framework and not the total monetary value of permanent partial disability compensation award pursuant to LE § 9-629.

Paul Del Marr v. Montgomery County, No. 60, Sept. Term, 2006, filed February 7, 2007. Opinion by Wilner, J.

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COURT OF SPECIAL APPEALS

CRIMINAL LAW - FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION; PROBABLE CAUSE FOR VEHICULAR STOP; IN CASE WHERE MARTINSBURG,WEST VIRGINIA POLICE WERE INFORMED BY FREDERICK COUNTY MARYLAND POLICE THAT THE VAN, DRIVEN BY APPELLANT AT THE TIME OF THE STOP IN WEST VIRGINIA, FIT THE DESCRIPTION OF THE VEHICLE AT THE SCENE OF THE DOUBLE HOMICIDE ON A STREET IN MARYLAND AND THAT APPELLANT'S FORMER BOYFRIEND HAD TOLD MARYLAND AUTHORITIES THAT APPELLANT HAD SAID THAT HE (THE FORMER BOYFRIEND) WOULD NEVER SEE THE FIVE-MONTH OLD MURDER VICTIM AGAIN, WEST VIRGINIA AUTHORITIES HAD AMPLE PROBABLE CAUSE TO STOP AND SEIZE THE VAN; WEST VIRGINIA CODE, §§ 62-1A3 AND 8-14-3, PROVIDING WHICH LAW ENFORCEMENT OFFICIALS ARE AUTHORIZED TO EXECUTE AND RETURN SEARCH WARRANTS; *STEVENSON v. STATE*, 287 MD. 504 (1980); ALTHOUGH FREDERICK COUNTY, MARYLAND OFFICERS DID NOT HAVE AUTHORITY TO EXECUTE WEST VIRGINIA SEARCH WARRANT OF VAN USED IN DOUBLE HOMICIDE, THEIR PARTICIPATION IN THE EXECUTION OF THE SEARCH WARRANT WAS NOT AS PRIVATE CITIZENS, BUT RATHER THEY OPERATED UNDER THE "COLOR OF HIS OFFICE" BECAUSE OF THE FACT THAT THEY OBTAINED THE INFORMATION THAT ESTABLISHED PROBABLE CAUSE IN THE COURSE OF THEIR DUTIES AS LAW-ENFORCEMENT OFFICIALS; IN LIGHT OF RECEIPT OF SEARCH WARRANT, SUPERVISION OF EXECUTION OF THE SEARCH WARRANT, INCLUDING DOCUMENTATION OF EVIDENCE SEIZED, AND PREPARATION AND FILING OF RETURN BY MARTINSBURG, WEST VIRGINIA PATROLMAN, ROLE OF FREDERICK COUNTY, MARYLAND POLICE AND CRIME SCENE OFFICERS IN RECOVERING EVIDENCE FROM VAN WAS PROPER; MARYLAND RULE 4-212 (f); MD. CODE ANNO., CTS. & JUD. PROC., §10-912; *WILLIAMS v. STATE*, 375 MD.404 (2003) AND *FACON v. STATE*, 375 MD. 435 (2003); PROMPT PRESENTMENT BEFORE JUDICIAL OFFICER; APPLICABILITY OF RULE 4-212 AND §10-912 TO CUSTODIAL DETENTION IN FOREIGN JURISDICTION; EXCEPTION WHERE THERE IS COLLUSION BETWEEN AUTHORITIES FROM DIFFERENT JURISDICTIONS TO CIRCUMVENT MARYLAND LAW REQUIRING PROMPT PRESENTMENT; IN THE PRESENT CASE, WHERE APPELLANT WAS DETAINED FOR QUESTIONING IN WEST VIRGINIA FROM 1:45 A.M. TO 4:00 A.M., WHEN SHE WAS TRANSPORTED TO A HOSPITAL BECAUSE OF CHEST PAINS, AND WEST VIRGINIA LAW PROVIDES THAT SUSPECTS CHARGED WITH "STATE CRIMES" (MAJOR OFFENSES) ARE NOT TAKEN BEFORE A JUDICIAL OFFICER UNTIL THE MORNING FOLLOWING A NIGHTTIME ARREST, THE TRIAL JUDGE'S FINDING THAT THERE WAS NO EVIDENCE OF A DELIBERATE DELAY IN PRESENTMENT WAS NOT CLEARLY ERRONEOUS.

Facts: On October 19, 2002, a dark green mini-van pulled in front of the house of sixteen-year-old Deanne Prichard where, her brother, Lee Prichard, Jr., was out front. Appellant, the driver of the van (also the former girlfriend of "Tracy Frost"), told Lee that she was "Tracy Frost's sister from New York" and that she

wanted to see the baby, referring to five-week-old, Makayla, the daughter of Deanne Prichard and Tracy Frost. When Lee summonsed his mother, Patricia Collins, and his sister, who was carrying Makayla, appellant jumped out of the van holding a black handgun and demanded that Prichard get into the van and, when she refused, pointed the gun at Prichard and fired killing her, then fired a second shot killing Makayla.

As a result of information received at the scene, members of the Frederick County Sheriff's Office proceeded to the Washington County Detention Center where, as a result of interviewing Tracy Frost, they learned that appellant, who resided in West Virginia, and Deanne Prichard had engaged in an altercation at the prison two weeks earlier. The detectives drove to Martinsburg, West Virginia and informed the Martinsburg police that appellant was a suspect in a double homicide investigation and requested that they conduct a stakeout for a green mini-van registered to appellant's father.

On October 19, 2002, at approximately 9:25 p.m., acting on instructions from the Frederick County officers, Martinsburg police officers stopped appellant while driving the green mini-van four blocks from her home. A warrant to search the van was obtained by Martinsburg police at 1:00 a.m. Martinsburg police, accompanied by a Frederick County officer, contemporaneously went to appellant's home and executed the fugitive warrant for her arrest. During interrogation of appellant, which began at 1:48 a.m., she complained of chest pains and was taken to the hospital, where she was treated and released the next morning. At approximately 10:05 a.m. the next day, appellant was taken before a magistrate. At approximately 3:15 p.m., she was again interviewed by deputies and subsequently returned to Maryland, where she faced charges of two counts of first-degree murder and related offenses in Frederick County.

Held: Probable cause to search and seize the getaway vehicle was amply established by (1) several eyewitness identifications of the general description of the assailant and the vehicle as a green mini-van; (2) the identification of appellant by Frost as an unrequited ex-girlfriend who threatened that he would never see Makayla again; and, (3) that appellant's father owned a green mini-van which matched the description of the vehicle used in the crime. As to the authority of the Frederick County, Maryland officers to conduct the search and seizure of the van in West Virginia, they were not acting as private citizens, but rather were operating under "color of their office" because they had obtained the information that established probable cause in the course of their duties as law-enforcement officials.

The exception to the requirements of Maryland Rule 4-212 applies where the detention occurs in a foreign jurisdiction. In such case, Rule 4–212(f) is only violated where there is an attempt to circumvent the Rule by interposing jurisdictional barriers. The product of appellant's interrogation was the admission that she had been in sole possession of the green mini–van at the time of the murders. Appellant's admission was not the product of any deliberate delay in presentment, and is not, therefore, subject to exclusion under Rule 4–212(f).

Sonya Marie Daniels v. State of Maryland, No. 223, September Term, 2005, decided December 26, 2006. Opinion by Davis, J.

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CRIMINAL LAW - SPEEDY TRIAL - MARYLAND RULE 4-326(D); *DENICOLIS v. STATE*, 378 MD. 646 (2003); *MORA v. STATE*, 355 MD. 639 (1999); COMMUNICATIONS BY COURT WITH JURY; THE STATE FAILED TO SHOULDER ITS BURDEN TO SHOW THAT COURT PROPERLY INFORMED APPELLANTS THAT THE JURY HAD SUBMITTED A NOTE MARKED AS EXHIBIT #4 MAKING INQUIRY ABOUT EXPERT BALLISTICS TESTIMONY PROBATIVE OF THE CENTRAL ISSUE OF CRIMINAL AGENCY OR THAT THE HANDLING OF THE NOTE, WHICH NEITHER THE COURT NOR COUNSEL RECALLED, COMPORTED WITH THE REQUIREMENTS OF MD. RULE 4-326; THE INEXPLICABLE CIRCUMSTANCES CONSTITUTE REVERSIBLE ERROR; ASSUMING, *ARGUENDO*, THAT THE COURT NEVER TOOK ACTION WITH RESPECT TO THE NOTE, APPELLANTS WERE NEVERTHELESS DENIED THE RIGHT TO BE PRESENT AT A CRITICAL STAGE OF THE PROCEEDINGS AND, MOREOVER, THE JURY WAS NOT PROVIDED WITH AN ANSWER TO ITS INQUIRY TO WHICH IT WAS ENTITLED; SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION; RIGHT TO SPEEDY TRIAL; IN LIGHT OF PRECEDENT REGARDING WEIGHING OF FACTORS IN DETERMINATION OF RIGHT TO SPEEDY TRIAL, THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANTS' MOTIONS TO DISMISS.

Facts: Appellants were tried and convicted in the shootings of James Bowens, William Courts and Yvette Hollie, which left Bowens dead and Courts and Hollie wounded. The trial judge sentenced Fields to an aggregate of forty-five years imprisonment and Colkley to life imprisonment plus fifty years. At trial, a note apparently

submitted by the jury had been marked as "Court's Exhibit #4" and made part of the record, but neither appellants, their counsel, the prosecutor or the trial judge, as attested in their affidavits filed in the appellate proceedings, had any knowledge of when the note was submitted, nor did an examination of the record transcript disclose whether there had been any communication with the jury in response to the note.

Colkley, invoking Maryland Courts and Judicial Proceedings Article § 6-103, contended that, because his case was postponed over his objection at least five times, he was denied his statutory right to a speedy trial. Both appellants asserted that, because of the unreasonableness of the delays, their rights to a speedy trial under the Sixth Amendment to the Constitution of the United States and Article 21 of the Maryland Declaration of Rights were denied.

Among the other challenges to their convictions, Fields complained that the jury was unfairly prejudiced by the testimony of a detective who confirmed the testimony of a prosecution witness who said he had purchased marijuana from Fields; Colkley complained of the admission of testimony that Courts' brother was killed, from which the jury could infer that Colkley had been involved in his murder. Colkley also objected to the responses of a police witness to questions regarding whether ballistics evidence indicated that a State's witness had been the actual shooter and whether gunpowder residue on one's hand indicates that he has fired a gun. Colkley finally asserted that, because there was no evidence of appellants' actions prior to the shooting and thus no evidence that an agreement had been reached, the evidence in support of his conviction for conspiracy was insufficient.

Held: Reversed and Remanded. The fact that the pedigree of the note could not be established undermined any opportunity of appellants to make a record regarding their denial of the right to be present at a critical stage in the proceedings and to provide input into any response to the jury's inquiry. Because the burden is on the State to demonstrate that any error was harmless, the failure to afford appellants any opportunity to be present during any consideration of the appropriate response or to postulate their proposed response to the note constituted reversible error.

Although, the principal reason for the delay, *i.e.*, personnel and administrative demands on the prosecutor, were unacceptable, because appellants were unable to establish that the delays were purposeful, impaired their ability to present a defense or that they were otherwise prejudiced, they were not denied their Constitutional right to a speedy trial.

The trial court did not abuse its discretion in denying Fields' motion for mistrial based on police officer's testimony that marijuana had been recovered from Fields' residence; testimony regarding shooting death of victim's brother was properly admitted; police officer's testimony regarding guns used in the shootings was properly admitted; testimony of police officer regarding gunshot residue was properly admitted; and evidence was sufficient to sustain convictions for conspiracy.

Darnell Fields v. State of Maryland, No. 751, September Term, 2005 and *Clayton Damon Colkley v. State of Maryland,* No. 753, September Term, 2005, decided February 2, 2007. Opinion by Davis, J.

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CRIMINAL LAW – TERRITORIAL JURISDICTION - CRIMINAL LAW–CHAIN OF CUSTODY

Facts: The appellant, Charnard Demon Jones, was convicted of first-degree sexual offense, second-degree sexual offense, sodomy, and second-degree assault. The evidence at trial showed that the victim was picked up outside of a bar in the Randallstown area of Baltimore County and, against her will, placed in a car by appellant and an accomplice. The accomplice drove the car while the appellant stayed in the back seat with the victim. The victim was driven around, sometimes at high speeds, for four to five hours. The appellant sexually assaulted the victim while she was in the back seat of the car. Eventually, the appellant dragged the victim out of the car and left her in Leakin Park in Baltimore City. The victim was unable to see where she was while she was being driven around because she was forced to keep her head down.

On appeal, the appellant argued that the trial court erred in not providing a jury instruction on territorial jurisdiction because the victim could not be sure that the crimes occurred in Maryland. The appellant also argued that the DNA evidence linking

him to the crimes was unreliable as a matter of law because there were some gaps in the State's chain of custody evidence.

Held: The trial court did not err in failing to give a jury instruction on territorial jurisdiction. The appellant did not preserve this issue for review because he did not request such an instruction. Even if it had been preserved, however, the court should have denied the request for an instruction on territorial jurisdiction because the evidence generated at trial did not raise a genuine dispute about territorial jurisdiction. At most, it raised the mere possibility that the sexual assault could have happened in a nearby state or in the District of Columbia. Evidence of a mere possibility that a crime did not occur in Maryland is not sufficient to create a genuine factual dispute about territorial jurisdiction.

The trial court also did not err in holding that the evidence was legally sufficient to establish a proper chain of custody of the DNA evidence linking the appellant to the crime. Although there were some gaps in the chain of custody evidence, the State met the threshold showing of a reasonable probability that the DNA evidence had not changed in condition, so as to be unreliable, from the time of collection to the time of testing and trial.

Jones v. State, No. 166, September Term, 2006, filed January 30, 2007. Opinion by Eyler, Deborah S., J.

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JUVENILE COURTS - RIGHT TO COUNSEL - WAIVER BY INACTION - MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-20*; IN RE: CHRISTOPHER T.*, 129 MD. APP. 28, 32, 36 (1999); THE FOLLOWING PROVISIONS MUST BE SATISFIED BEFORE A JUVENILE COURT CAN ACCEPT THE WAIVER OF COUNSEL AFTER A PETITION OR CITATION HAS BEEN FILED WITH THE COURT UNDER § 3-8A-20 IF A CHILD INDICATES A DESIRE TO WAIVE THE RIGHT TO THE ASSISTANCE OF COUNSEL: *THE COURT MAY NOT ACCEPT THE WAIVER UNLESS*: *(1) THE CHILD IS IN THE PRESENCE OF COUNSEL AND HAS CONSULTED WITH COUNSEL*, (2) THE COURT DETERMINES THAT *THE WAIVER IS KNOWING AND VOLUNTARY*; IN DETERMINING WHETHER THE WAIVER IS KNOWING AND VOLUNTARY, THE

COURT SHALL CONSIDER, *AFTER APPROPRIATE QUESTIONING IN OPEN COURT AND ON THE RECORD*, WHETHER THE CHILD FULLY COMPREHENDS: (1) THE NATURE OF THE ALLEGATIONS AND THE PROCEEDINGS, AND THE RANGE OF ALLOWABLE DISPOSITIONS (2) THAT COUNSEL MAY BE OF ASSISTANCE IN DETERMINING AND PRESENTING ANY DEFENSES TO THE ALLEGATIONS OF THE PETITION, OR OTHER MITIGATING CIRCUMSTANCES, (3) THAT THE RIGHT TO THE ASSISTANCE OF COUNSEL IN A DELINQUENCY CASE, OR A CHILD IN NEED OF SUPERVISION CASE, INCLUDES THE RIGHT TO THE PROMPT ASSIGNMENT OF AN ATTORNEY, WITHOUT CHARGE TO THE CHILD IF THE CHILD IS FINANCIALLY UNABLE TO OBTAIN PRIVATE COUNSEL, (4) THAT EVEN IF THE CHILD INTENDS NOT TO CONTEST THE CHARGE OR PROCEEDING, COUNSEL MAY BE OF SUBSTANTIAL ASSISTANCE IN DEVELOPING AND PRESENTING MATERIAL THAT COULD AFFECT THE DISPOSITION, AND (5) THAT AMONG THE CHILD'S RIGHTS AT ANY HEARING ARE THE RIGHT TO CALL WITNESSES ON THE CHILD'S BEHALF, THE RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES, THE RIGHT TO OBTAIN WITNESSES BY COMPULSORY PROCESS, AND THE RIGHT TO REQUIRE PROOF OF ANY CHARGES; CIRCUIT COURT ERRED IN FINDING JUVENILE WAIVED HIS RIGHT TO COUNSEL BY INACTION IN CASE IN WHICH JUVENILE APPEARED ON FIRST SCHEDULED HEARING DATE WITHOUT COUNSEL SIX WEEKS AFTER HE WAS SERVED WITH PETITION; ERRONEOUS FINDING THAT JUVENILE WAIVED HIS RIGHT TO COUNSEL WAS NOT RENDERED MOOT BY THE ENTRANCE OF ENTRY OF APPEARANCE OF PUBLIC DEFENDER WHO HAD FORTUITOUSLY BEEN IN THE COURTROOM AND HAD NEVER SEEN, SPOKEN TO OR CONSULTED WITH JUVENILE UNTIL A FEW MOMENTS PRIOR TO THE TIME THAT THE ADJUDICATION HEARING BEGAN.

Facts: Pursuant to a juvenile petition filed by the State against Shawn P. for second-degree assault, appellant was served with a summons on May 1, 2006 to appear for an adjudicatory hearing on June 7, 2006. Notwithstanding that it was appellant's first appearance before the court, the juvenile court found that, because he had not retained counsel, he had waived his right to counsel by inaction. The public defender, who fortuitously happened to be in the courtroom, intervened and implored the Court, to permit him to consult with and advise appellant of his rights pursuant to Rule 11-106. Faced with the choice of allowing appellant to proceed unrepresented or entering his appearance, although unprepared, the public defender entered his appearance and provided substandard representation. Appellant was adjudicated delinquent and placed on indefinite probation. Appellant appealed, asserting that the juvenile court's finding of waiver of counsel by inaction failed to comply with Maryland Rule 11-106 and whether the court's refusal to neither grant a postponement or permit appellant to confer with counsel was an abuse of discretion, resulting in the denial of his right to effective assistance of counsel.

Held: Reversed. Because the determination of waiver by

inaction did not comply with the dictates of Md. Rule 11-106, it was ineffective. The failure to comply with the Statute, coupled with a refusal to allow counsel to consult with appellant, in effect, proximately caused counsel to be ineffective. Because counsel's request for a continuance to prepare a defense was denied, as was his request, in the alternative, to be afforded an opportunity to consult with appellant, appellant was denied the Sixth Amendment right to counsel, which includes the right of counsel to elicit from his client a factual account, which will inform counsel of how best to represent his client.

In Re: Shawn P., No. 1059, September Term, 2006, decided February 5, 2007. Opinion by Davis, J.

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TORTS - WRONGFUL DEATH ACTION – APPLICATION OF SUBSTANTIVE LAW OF RECOVERY OF STATE IN WHICH WRONGFUL ACT OCCURRED – RIGHT TO RECOVER FOR WRONGFUL DEATH IS SUBSTANTIVE, NOT PROCEDURE, UNLIKE STANDING TO SUE

Facts: In the Circuit Court for Prince George's County, Candace Jackson, as next friend of Nina Jones, and Prince Carmen Jones, Sr. (Mr. Jones), brought a wrongful death action against Prince George's County and three Prince George's County police officers over the shooting death of the decedent, Prince Carmen Jones, Jr. Ms. Jackson was the decedent's fiancée and is the mother of his child, Nina Jones. Mr. Jones was the decedent's father. Dr. Mabel S. Jones ("Dr. Jones"), the decedent's mother and the personal representative of his estate, filed a motion to intervene pursuant to Md. Rule 2-214, which was granted.

Evidence at trial only was sufficient to send to the jury a claim against one officer, Corporal Jones, for acts that occurred in Virginia. The jury awarded damages to Candace Jackson, as next of friend of Nina Jones, to Mr. Jones, and to Dr. Jones. Thereafter, the court struck the verdict in favor of Dr. Jones and

Mr. Jones on the ground that they did not have a substantive right of recovery for wrongful death under the Virginia Wrongful Death Act. Dr. Jones appealed.

Held: The trial court properly struck the verdict in favor of Dr. Jones. Under Maryland's Wrongful Death Act, when the wrongful act occurs in another state, the substantive law of the that other state applies. Here, the wrongful act by Corporal Jones was committed in Virginia, and therefore Virginia's Wrongful Death Act applied.

The right to recover damages for wrongful death, unlike the issue of standing to file a wrongful death action, is a matter of substantive law, not procedural law. Thus, Virginia's Wrongful Death Act determined the permissible beneficiaries. Under the Virginia Wrongful Death Act, a parent of a decedent can recover only if the decedent has no minor child. Since the decedent here had a minor child, Dr. Jones did not have a substantive right of recovery.

Jones v. Jones, No. 2780, September Term, 2005, filed January 26, 2007. Opinion by Eyler, Deborah S., J.

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated February 23, 2007, the following attorney has been disbarred by consent from the further practice of law in this State:

JOHN CHRISTOPHER PASIERB

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JUDICIAL APPOINTMENTS

On January 11, 2007 Governor Ehrlich announced the appointment of **A. MICHAEL CHAPDELAINE** to the Circuit Court for Prince George's County. Judge Chapdelaine was sworn in on January 31, 2007 and fills the vacancy created by the resignation of the Honorable Steven I. Platt.

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On January 11, 2007 Governor Ehrlich announced the appointment of **GEORGE L. RUSSELL, III** to the Circuit Court for Baltimore City. Judge Russell was sworn in on February 1, 2007 and fills the vacancy created by the retirement of the Honorable Clifton J. Gordy.

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On January 11, 2007 Governor Ehrlich announced the appointment of **PAMELA JANICE WHITE** to the Circuit Court for Baltimore City. Judge White was sworn in on February 8, 2007 and fills the vacancy created by the retirement of the Honorable Joseph P. McCurdy, Jr.

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