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COURT OF APPEALS

ADMINISTRATIVE LAW - STATE PERSONNEL - COLLECTIVE BARGAINING AGREEMENTS - GRIEVANCE PROCEDURES

Facts: Appellants, family services case workers employed by the Baltimore County Department of Social Services, a unit of the Department of Human Resources (DHR), filed a grievance concerning multiple issues, including "stand-by" pay pursuant to Title 12 of the State Personnel and Pensions Article (SPP). Appellants were also subject to a memorandum of understanding (MOU), entered into pursuant to SPP Title 3, with its own dispute resolution procedure. The two grievance procedures had some differences, most importantly that under the MOU procedure the final step was an appeal to the State Labor Relations Board, rather than the Office of Administrative Hearings as under the Title 12 procedure.

Notwithstanding the MOU procedure, all of the appellants' grievances were addressed during the first step of the Title 12 grievance procedure, except their demand for retroactive "stand-by" pay. Those claims were based on a provision of the MOU and not on any policy or regulation of DHR or the State Department of Budget and Management (DBM).

Because no agreement was reached at Step 1, appellants appealed to Step 2 within the Title 12 procedure to designees of the secretary of DHR. At that stage, two defenses were raised: whether the appeal was timely filed and whether the dispute constituted a grievance under Title 12. The designees found against appellants on both grounds. With respect to the second issue, they noted that the MOU was the sole basis cited for the claim, that the MOU has its own exclusive procedure for resolving complaints concerning the interpretation of that agreement, and SPP Title 12, excludes from it any employee subject to a collective bargaining agreement that contains another grievance procedure.

Appellants then appealed to Step 3 under Title 12, to the secretary to the Department of Budget and Management, who referred the matter to OAH for a contested case hearing and final administrative decision. The employer party raised identical defenses as those in Step 2. The Administrative Law Judge (ALJ) found that the OAH had no jurisdiction because the dispute over stand-by pay concerned a provision of the MOU and that the MOU resolution procedure, not Title 12, was the exclusive procedure under which to resolve the claim. Appellants sought review in the Circuit Court for Baltimore County, which affirmed the

decision of the ALJ.

Held: Affirmed. A State employee who has complaint arising solely under provisions of memorandum of understanding entered into pursuant to Title 3 of State Personnel and Pensions Article and that is excluded from definition of grievance in 12-101(b) may not use grievance procedure in Title 12 of that Article.

Walker v. Dep't of Human Resources, No. 49, Sept. Term, 2003, filed February, 11, 2004. Opinion by Wilner, J.

APPEAL AND ERROR – DISCRETIONARY APPELLATE REVIEW OF ERRORS – IT WAS NOT AN ABUSE OF DISCRETION FOR THE COURT OF SPECIAL APPEALS TO EXCUSE THE STATE’S FAILURE TO RAISE AN ARGUMENT IN ITS OPENING BRIEF, WHEN THE STATE HAD ALREADY RAISED THE ARGUMENT IN ITS APPLICATION FOR LEAVE TO APPEAL AND REPLY BRIEF, WHERE (1) THE EXERCISE OF DISCRETION RESULTED IN LITTLE, IF ANY, UNFAIRNESS OR PREJUDICE TO THE DEFENDANT AND (2) THE EXERCISE OF DISCRETION STRONGLY FURTHERED THE INTERESTS OF JUDICIAL ECONOMY. MD. RULE 8-131(A).

Facts: In December 1996, Thomas Wayne Jones was convicted in the Circuit Court for Prince George’s County of first degree felony murder and other related offenses. The trial court sentenced Jones to life without the possibility of parole for the felony murder conviction, and the Court of Special Appeals affirmed.

In November 1998, Jones filed a petition for post-conviction relief pursuant to the Maryland Post Conviction Procedure Act, alleging that he had received ineffective assistance of trial and appellate counsel in violation of his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution. As one of his bases for post-conviction relief, Jones argued that his trial and appellate counsel were constitutionally deficient because they failed to object to the admissibility of a hearsay statement contained within the written

statement of a State's witness.

The post-conviction court agreed and granted Jones a new trial. The State filed an Application for Leave to Appeal to the Court of Special Appeals. In the application to appeal, the State presented several legal arguments for the admissibility of the incriminating statement, among which was the argument that the hearsay statement was "clearly admissible as a statement of a co-conspirator made during the course of and in furtherance of the conspiracy." This argument had not been raised in the post-conviction court, nor was it raised in the State's opening brief to the intermediate appellate court. In its reply brief, however, the State again stated the co-conspirator exception to the hearsay rule as an alternative theory for the statement's admissibility.

The Court of Special Appeals initially found that the legal theory, raised for the first time in the reply brief, was not properly before the court and therefore would not be considered. After the Court of Special Appeals affirmed the decision of the post-conviction court, the State filed a Motion to Reconsider, arguing that the court had erred in refusing to consider the co-conspirator exception. Although the Court of Special Appeals rejected the legal grounds of the State's motion, it revised its opinion and, in the exercise of its discretion, ordered a limited remand so that the post-conviction court might determine whether the hearsay statement was admissible under the co-conspirator exception to the hearsay rule. Jones appealed the Court of Special Appeals's exercise of discretion to consider the issue raised in the reply brief.

Held: Affirmed. The Court of Appeals held that Maryland Rule 8-131(a) grants the appellate courts discretion to consider unpreserved issues, even though the ordinary presumption is that appellate review is limited to those issues raised at the trial level. The exercise of such appellate discretion would not be overturned, said the Court, unless it has clearly been abused.

Although declining to issue a fixed formula for the exercise of appellate discretion, the Court explained that because the primary purpose of Rule 8-131(a) is to ensure fairness for all parties and to promote the orderly administration of law, when presented with a plausible exercise of appellate discretion, appellate courts should make two determinations concerning the promotion or subversion of 8-131(a)'s twin goals. First, the appellate court should consider whether the exercise of its discretion will work unfair prejudice to either of the parties. Second, the appellate court should consider whether the exercise of

its discretion will promote the orderly administration of justice.

The Court held that the Court of Special Appeals did not abuse its discretion to consider the unpreserved argument on appeal under Rule 8-131(a) because Jones would suffer little, if any, prejudice by a remand to determine whether the statement was admissible and because the orderly and efficient administration of law would be strongly promoted by the intermediate appellate court's order.

Thomas Wayne Jones v. State of Maryland, No. 57, September Term, 2001, filed February, 18, 2004. Opinion by Raker, J.

ATTORNEYS - DISCIPLINARY PROCEEDINGS - SAFEKEEPING PROPERTY.

Facts: Respondent negligently failed to notify his client's third-party assignee/bank upon receipt of settlement funds and failed to pay to the assignee its interest from the settlement funds. Respondent expressly promised to abide by the bank's assignment and, therefore, the contract between his client and the bank bound him to act in consonance.

After the settlement check for the client's personal injury case was issued to Respondent, he admittedly failed promptly to notify the creditor bank that a settlement had been received. Respondent, while paying other creditors on his client's behalf out of the settlement proceeds, admitted to failing to make payment to the bank due to oversight. Although the oversight was innocent, Respondent, in failing to promptly notify the bank of receipt of the settlement funds and failing to promptly deliver to the bank those funds due it, violated Maryland Rule of Professional Conduct 1.15(b) (Safekeeping Property). As the assignment between the client and the bank gave the bank an enforceable interest in the proceeds of the settlement, Respondent's knowledge and signing of the agreement was sufficient to raise ethical duties to the creditor bank.

Held: The case was remanded to the Attorney Grievance Commission for the parties to determine if disposition under Maryland Rule 16-735(b) (Termination accompanied by warning) could be effected. If not, the Court would determine what sanction would be appropriate.

Respondent was found not to have violated Maryland Rule of Professional Conduct 8.4(d) (Misconduct) because the evidence was insufficient to establish clear and convincingly that Respondent threatened a defamation lawsuit against the bank-if it included in its proposed complaint to the Attorney Grievance Commission that Respondent had misappropriated client escrow funds-as a preemptive strike merely to forestall a grievance complaint from being filed.

Attorney Grievance Comm'n v. Stolarz, Misc. AG No. 96, September Term, 2002, filed 11 February 2004. Opinion by Harrell, J.

ATTORNEYS - MISCONDUCT - MARYLAND RULES OF PROFESSIONAL CONDUCT

Facts: The Attorney Grievance Commission, acting through Bar Counsel filed a disciplinary proceeding against John W. Hermina charging him with several violations of the Maryland Rules of Professional Conduct. The charges stemmed from a lawsuit filed by Hermina on behalf of Kevin Reed against Baltimore Life Insurance Company (BLIC) in the Circuit Court for Montgomery County. The case was one of several filed between Hermina and BLIC and the course of litigation was extremely contentious and often uncivil. Several pre-trial disputes arose involving the mailing of interrogatories, the receipt of discovery materials, the scope of a pre-trial protective order, and the conduct of the attorneys at a mandated pre-trial conference. The trial judge found Hermina's conduct during trial to be "egregious" in that he made misrepresentations and "lied" to the court concerning discovery, falsely accused the court of holding an *ex parte* conference, and falsely accused the courtroom staff of removing documents from the court file.

After a hearing in the Circuit Court of Prince George's County, the hearing judge found that Hermina made deliberate and intentional misrepresentations to the court concerning: the filing of a set of interrogatories, the receipt of discovery materials from BLIC, and the scope of a pre-trial protective order, in violation of Rule 3.3(a)(1). The hearing judge also found that Hermina violated Rules 3.4(c) and (d) by failing to provide discovery after receiving a timely request in violation of a scheduling order, and Rule 3.4(c) by failing to participate in a pre-trial conference. In addition, the hearing judge found that Hermina's failure to participate in the pre-trial conference and statement constituted a violation of Rule 3.2 (Expediting Litigation). Hermina also violated Rule 3.5(a)(8) by objecting to the introduction of documents on the basis that he had not received them, when in fact he had, by moving for a mistrial because BLIC had not answered interrogatories, when the trial judge found they had not been sent, and by moving to disqualify the trial judge for unsupportable reasons. Hermina also wrote a letter to opposing counsel accusing the trial judge of engaging in an *ex parte* conference, which concerned the integrity of a judge and was made with reckless disregard to truth in violation of Rule 8.2. Rules 1.1(Competence) and 1.3(Diligence) were found to have been violated by Hermina's failure to file interrogatories. Violations of Rules 8.4(a), (c), and (d) rested on the facts of the other violations. The hearing judge also found two extenuating circumstances existed, one relating to Rule 3.2 and the other, more generally, relating to Hermina's character and contributions. Both parties filed exceptions attacking numerous findings of the hearing judge.

Held: Reprimand. There was convincing evidence to support the finding that Hermina violated Rule 3.3(a)(1) by misrepresenting the content and effect of a pre-trial protective order and by falsely claiming that he had been precluded from discovery, Rule 3.4(c) by failing to respond to discovery requests, participate in the pre-trial conference, and cooperate in preparing a joint pre-trial statement, and Rule 8.2 by recklessly accusing the trial judge of participating in an inappropriate *ex parte* conference. Those violations also support the violations of Rule 8.4(a), (c), and (d). There was not clear and convincing evidence to support a violation of Rule 1.1, 1.3, 3.2, or 3.5(a)(8).

Attorney Grievance Comm'n v. John W. Hermina, Misc. Docket AG. No.88, September Term, 2002, filed, February 13, 2004. Opinion by Wilner, J.

CORPORATIONS- PIERCING THE CORPORATE VEIL

Facts: Petitioner, Hildreth, was the sole shareholder, director, and officer of a New Jersey corporation known as HCE, Inc. (HCE-NJ). HCE-NJ, engaged in construction-related business in Maryland, but failed to register as a foreign corporation pursuant to Maryland Code §§7-202, 7-202.1, 7-203 of the Corporations and Associations Article. When HCE-NJ began doing business in Maryland, there was already existing a Maryland corporation by the name of HCE, Inc. (HCE-MD).

Respondent, Tidewater, was in the crane rental business and had entered into contracts with petitioner. Petitioner participated in the contract negotiations, but did not sign the contracts—they were signed on behalf of "HCE Inc." Tidewater's representative dealt with several HCE-NJ employees and inspected HCE-NJ's offices and job-site before entering into the contracts. HCE-NJ's place of incorporation was not discussed during negotiations. Eventually HCE-NJ became financially incapacitated and unable to pay its bills. Tidewater filed suit in the Circuit Court for Howard County against HCE-NJ, and Hildreth individually for the unpaid debt, plus interest and attorney's fees pursuant to the contracts. The trial court granted summary judgment against HCE-NJ, and a non-jury trial was held to determine petitioner's personal liability. The court held petitioner personally liable for the entire corporate debt based on the theory that he was acting as an agent for an undisclosed principal. On appeal, the Court of Special Appeals held that petitioner was not acting as an agent for an undisclosed or partially disclosed principal and could not be held liable on such a basis. The Court of Special Appeals, however, did impose personal liability based on an alternate veil-piercing theory, concluding that petitioner's failure to register as a Maryland corporation presented a situation where justice required the disregard of the corporate form in order to enforce a paramount equity.

Held: Reversed. The fact that a foreign corporation does business in Maryland without registering under Corp. & Assoc. Art. §§7-203 to 7-205 and with knowledge that Maryland corporation with same name exists does not warrant piercing corporate veil and imposing liability for corporate debt on stockholder of the corporation.

Hildreth v. Tidewater, No. 32, September Term, 2003, filed December 18, 2003. Opinion by Wilner, J.

CRIMINAL LAW - MULTIPLE ISSUES IN DEATH PENALTY CASE

Facts: John Albert Miller, IV, was charged with the murder, attempted rape, first degree sexual offense, robbery, and false imprisonment of 17 year-old Shen Poehlman. A jury convicted Miller of premeditated murder, first degree sexual offense, robbery, and false imprisonment, but was acquitted on the charge of attempted rape. Miller was sentenced to death for the murder and received a sentence of 30 years in prison for the first degree sexual offense, five years consecutive for the robbery and one year concurrent for false imprisonment. Miller appealed. Just prior to oral argument, Miller filed a motion for a new trial, claiming as new evidence, that the U.S. Supreme Court decisions in *Apprendi v. New Jersey* and *Ring v. Arizona*, rendered the statutory process for weighing mitigating factors against aggravating factors unconstitutional, and that a State's witness against him had received an inducement for his testimony. Miller appealed the denial of his motion for a new trial and raised a total of 15 issues on his direct appeal.

Held: Affirm in part; reverse and remand in part. There is no majority opinion on all of the issues in this case. The verdicts and prison sentences are affirmed, the death sentence is reversed and remanded for a new sentencing proceeding on the murder conviction. The majority of the Court holds that *Apprendi* and *Ring* do not render the preponderance standard, applied only to the judgmental weighing process, unconstitutional. Newly discovered evidence warrants a new trial only if it "may well have produced a different result, that is, there was a substantial or significant possibility that the verdict of the trier of fact would have been affected." Appellant failed to meet his burden in showing that new evidence would yield a different result.

Miller v. State, No. 90, September Term 2000, filed February 18, 2004. Opinion by Wilner, J.

CRIMINAL LAW - RIGHT TO TRIAL BY JURY - ISSUES RELATING TO JURY TRIAL - DELIBERATIONS IN GENERAL - IN A PROCEEDING IN WHICH A DEFENDANT HAS ENTERED PLEAS OF NOT GUILTY AND NOT CRIMINALLY RESPONSIBLE, RULE 4-314 REQUIRES THAT THE ALTERNATE JURORS BE "RETAINED." THE ALTERNATE JURORS SHOULD BE RETAINED THROUGHOUT THE GUILT/INNOCENCE PHASE UNDER ANY RESTRICTIONS IMPOSED BY THE TRIAL COURT. THE TRIAL COURT ERRED IN SENDING THE ALTERNATE JURORS INTO THE JURY ROOM TO DELIBERATE ON THE GUILT/INNOCENCE PHASE OF THE TRIAL.

CRIMINAL LAW - RIGHT TO TRIAL BY JURY - REVIEW - HARMLESS AND REVERSIBLE ERROR - THE PRESENCE OF ALTERNATE JURORS DURING JURY DELIBERATIONS CREATES A PRESUMPTION OF PREJUDICE. IN ORDER TO REBUT PREJUDICE, IT MUST AFFIRMATIVELY APPEAR THAT THERE WAS NOT, AND COULD NOT HAVE BEEN, ANY PREJUDICE. THE PRESUMPTION OF PREJUDICE MAY NOT BE REBUTTED BY INQUIRING INTO THE PROCEEDINGS INSIDE THE JURY ROOM OR INTO THE JUROR'S MENTAL PROCESSES OR ANY STATEMENTS MADE DURING DELIBERATIONS.

Facts: Appellant, Dontee Stokes, was indicted by the Grand Jury for Baltimore City for the offenses of attempted first degree murder; assault; reckless endangerment; use of a handgun in a crime of violence; wearing, carrying, or transporting a handgun; carrying or knowingly transporting a handgun in a vehicle; and discharging a firearm within city limits. He entered pleas of not guilty and not criminally responsible and requested a bifurcated trial. Defense counsel announced in his opening statement to the jury that "we will plead guilty on possession of the handgun." Appellant testified at the trial that he committed acts constituting the crimes of carrying and discharging a handgun.

At the close of the guilt/innocence stage of the trial, over the defense attorney's objection, the court instructed the four alternate jurors to retire with the jury and participate in the deliberations. After a period of deliberations, the jury sent a note to the court with the question, "Do alternates count?" The court then instructed the jury that the alternates were to be mere observers and only the twelve jurors should render the verdict. The jury returned a verdict of not guilty of attempted murder, assault, reckless endangerment, and use of a handgun in a crime of violence. The jury convicted appellant of three counts: wearing, carrying, or transporting a handgun; wearing, carrying, or transporting a handgun in a vehicle; and discharging a firearm within city limits. Appellant withdrew his plea of not criminally responsible in return for the State's recommendation of sentence and the court imposed a sentence in accord with the recommendation.

Appellant noted an appeal to the Court of Special Appeals. The Court of Appeals granted certiorari on its own motion prior to

consideration by the Court of Special Appeals.

Held: Reversed and remanded for new trial. In a proceeding in which a defendant has entered pleas of not guilty and not criminally responsible, Rule 4-314 requires that the alternate jurors be "retained." The alternate jurors should be retained throughout the guilt/innocence phase under any restrictions imposed by the trial court. The Court noted that the language of Rule 4-314(b)(4) closely parallels that of Criminal Law Article § 2-303(d), which governs the treatment of alternate jurors in a capital case. Alternate jurors in both death penalty trials and bifurcated criminal responsibility proceedings should be kept separate and apart from the regular jury during the first phase of deliberations. The Court held that the trial court erred in sending the alternate jurors into the jury room to deliberate on the guilt/innocence phase of the trial.

The Court held that the presence of alternate jurors during jury deliberations sufficiently impinges upon the defendant's constitutional right to a jury trial as guaranteed by the Maryland Constitution and Maryland Rules of Procedure to create a presumption of prejudice. In order to rebut prejudice, it must affirmatively appear that there was not, and could not have been, any prejudice. The presumption of prejudice may not be rebutted by inquiring into the proceedings inside the jury room or into the juror's mental processes or any statements made during deliberations. The Court rejected the State's argument that the presumption of prejudice was rebutted because appellant admitted during his testimony that he committed acts constituting the crimes of which he was convicted and his counsel made certain statements in opening remarks to the jury. The Court held that, under the circumstances of the case, the presumption of prejudice was not overcome.

Dontee Stokes v. State of Maryland, No. 47, September Term, 2003, filed February 18, 2004. Opinion by Raker, J.

INSURANCE - EXCLUSION UNDER AUTO POLICY - COMMERCIAL USE (PIZZA DELIVERY) EXCLUSION - AN INSURER MAY NOT DENY THE MINIMUM STATUTORY LEVELS OF COVERAGE TO ITS INSURED ON THE BASIS OF A POLICY EXCLUSION PROHIBITING THE USE OF THE VEHICLE FOR THE DELIVERY OF FOOD FOR COMPENSATION

Facts: Michael Salamon was the owner and operator of a vehicle involved in a two car 9 April 2001 accident. Salamon, a part-time pizza delivery driver, was delivering pizzas at the time of the accident. The other driver sued Salamon. Salamon's insurance contract with Progressive, providing for the statutory minimum liability coverage of \$20,000/40,000, included a "pizza exclusion" that purported to exclude coverage for injuries or property damage that occur while the insured is delivering property (including food) for compensation. Progressive filed this declaratory judgment action seeking a judgment that it was not liable for the accident, nor had a duty to defend Salamon. The Circuit Court for Baltimore County held that, by the unambiguous terms of the contract, Salamon was not entitled to coverage. It granted summary judgment in favor of Progressive, but filed no written declaratory judgment. Salamon appealed, arguing that the exclusion was invalid. Before the Court of Special Appeals could decide the case, the Court of Appeals, on its initiative, granted certiorari.

Held: Reversed. Contractual exclusions to personal automobile insurance policies that excuse or reduce benefits below the minimum levels set by statute are invalid unless they are expressly authorized by the General Assembly. The "pizza exclusion" Progressive relied upon in denying Salamon coverage, which prohibits the use of the insured vehicle for the delivery of property (including food) for compensation, is not authorized by statute. While some exclusions based on commercial use appear to have been authorized by the General Assembly, e.g. for farm or construction equipment, the "pizza exclusion" is not among them. Progressive's denial of coverage was inconsistent with the compulsory insurance statute and contrary to public policy.

Progressive's argument that a distinction must be made between insurance policy provisions that deny coverage to classes of insureds and provisions that deny coverage based on particular actions of individual insureds is without merit. There is no meaningful class/action distinction to be made in the analysis of insurance policy provisions under the compulsory insurance statute.

The trial court's failure to file a written declaratory judgment specifically defining the rights of the parties was an independent basis for reversal. According to Maryland Rule 2-601(a), every declaratory judgment must be written and must define the rights of the parties.

Case remanded with instructions to grant summary judgment in favor of Salamon and against Progressive, and to file a written judgment declaring the rights of the parties in a manner consistent with this opinion.

Michael Salamon v. Progressive Classic Automobile Insurance, No. 46, September Term 2003, filed 10 February 2004. Opinion by Harrell, J.

TAXATION - MOORING BUOYS - LIABILITY OF PERSONS AND PROPERTY - PERSONAL PROPERTY IN GENERAL - MOORING BUOYS THAT REST ON A RIVER BOTTOM CANNOT BE SAID TO BE "FIXTURES" TO THE RIVER BOTTOM AND TAXED AS REAL PROPERTY. THEY MAY, HOWEVER, BE "TRADE FIXTURES," AND, IF SO, MIGHT BE CLASSIFIED AS PERSONAL PROPERTY FOR TAXATION PURPOSES.

Facts: Hartge Yacht Yard, Inc. ("Hartge") operates a marina on the West River in Anne Arundel County on land that it leases from Whitestake Associates, L.P. ("Whitestake"). Hartge maintains approximately 74 mooring buoys in conjunction with its marina operation. As part of its marina operation, Hartge rents the mooring buoys to boat owners for a fee, which allows a boat owner to tie up and leave a boat attached to a mooring buoy with the expectation that it will remain in place. Each buoy consists of a float with a boat tie and a steel chain connected to an anchor weighing 100 to 300 pounds. These anchors rest on the river bottom, with the rest of the buoy apparatus extending upwards to and on the surface. About every ten years, the entire mooring assembly is pulled up from the river bottom by a crane and placed on a barge for a complete inspection. After any needed repairs are done to the mooring assembly, it is returned to the river bottom.

In 1994, Whitestake successfully appealed a State Department of Assessments and Taxation (SDAT) decision to tax the mooring buoys as Whitestake's property. In 1999, the Supervisor of Assessments of Anne Arundel County sent out two assessment notices to Hartge assessing the mooring buoys owned by Hartge as real property. Hartge challenged this assessment.

In an opinion and "Order," the Maryland Tax Court found that Hartge had a "nonexclusive" privilege to place the mooring buoys on the river bottom and that this privilege was a sufficient use to be taxed as real property under Maryland Code (2001 Repl. Vol.), § 6-102(e) of the Tax-Property Article. The tax court further found that the mooring buoys were permanent fixtures to the river bottom.

On judicial review in the Circuit Court for Anne Arundel County, Judge Nancy Davis-Loomis, in a decision dated December 17, 2002, reversed both rulings of the Maryland Tax Court. First, the Circuit Court held that § 6-102(e) did not apply because Hartge had a renewable license to use the mooring buoys and had not been granted a real property interest in the river bottom. Secondly, the Circuit Court disagreed with the Maryland Tax Court's conclusion that the mooring buoys were permanent fixtures and therefore taxable as real property. The Circuit Court did not find that the mooring buoys were affixed to the river bottom in any way. The Circuit Court then applied the "trade fixture" test and concluded that the mooring buoys were to be considered trade fixtures and, therefore, personal property. Thereafter, the Supervisor of Assessments of Anne Arundel County appealed the Circuit Court's judgment to the Court of Special Appeals. Prior to consideration by the Court of Special Appeals, the Court of Appeals issued a Writ of Certiorari.

Held: The Court of Appeals held that the mooring buoys owned by Hartge and used on the river bottom are, at best, "trade fixtures" and, therefore, are properly taxable, if at all, as personal property. The Court found that the characteristics of the mooring buoys were not indicative of them being fixtures – the moorings were not permanently affixed to the river bottom, their purpose was to provide a means by which Hartge can generate a profit from their rental, and they are not intended to permanently remain on the river bottom and if removed cause no permanent damage.

Supervisor of Assessments of Anne Arundel County v. Hartge Yacht Yard, Inc.. No. 45, September Term, 2003, filed February 12, 2004. Opinion by Cathell, J.

COURT OF SPECIAL APPEALS

COMMERCIAL LAW - MECHANIC'S LIENS - A MECHANIC'S LIEN CLAIMANT, WHO HAS NOT YET OBTAINED A LIEN, IS NOT A "HOLDER OF ANY SUBORDINATE INTEREST IN THE PROPERTY" WITHIN THE MEANING OF MD CODE (1972, 2002 REPL. VOL.), SEC. 7-105(c) (2) OF THE REAL PROPERTY ARTICLE AND RULE 14-206(b). CONSEQUENTLY, THE CLAIMANT IS NOT ENTITLED TO NOTICE OF A FORECLOSURE SALE OF THE PROPERTY.

Facts: This case arises from the aftermath and interplay of three prior proceedings in the Circuit Court for Montgomery County, all involving the same real property, located in Olney, Maryland (the Property).

On March 18, 1998, a foreclosure action was filed against the Property in the Circuit Court for Montgomery County. A foreclosure sale was held on November 4, 1998 and the court ratified this sale on May 24, 1999. Thereafter, the Property was transferred and sold in lots to Hardat and Timini Mahase, Margarita and Anri Petrosyan, and Sam Kanterman and Nataly Stolper, appellees.

Following the foreclosure filing, but prior to the foreclosure sale, on June 15, 1998, Redland Genstar, Inc., appellant, an unpaid supplier of goods and materials to the Property, filed a petition in the Circuit Court for Montgomery County, seeking to establish a mechanic's lien upon the Property. On May 24, 1999, the same day as the foreclosure sale ratification, an order granting the final mechanic's lien was signed, directing the sale of the property.

The Property was scheduled to be sold on March 1, 2001, but this sale was halted when appellant learned of the foreclosure and eventual sale of the Property to appellees. The parties agreed that a quiet title action was the best way to resolve the Property's ownership issues.

On June 6, 2002, appellees filed suit in the Circuit Court for Montgomery County, seeking to quiet title in the Property and seeking a declaratory judgment and injunctive relief.

On January 8, 2003, following a hearing on appellees' cross-motion for summary judgment, the court held that when the property was conveyed at the foreclosure sale on November 4, 1998, appellant maintained no established docketed subordinate interest in the Property. Moreover, the court found that the statutory and case law did not require that appellant receive notice of the foreclosure sale. Thus, on January 31, 2003, the court granted

appellees' motion and declared that appellant's mechanic's lien was null and void with respect to the Property.

Held: The Court of Special Appeals affirmed the judgment of the circuit court, holding that simply filing a mechanic's lien action did not create a subordinate interest in the Property such that appellant was entitled to notice of the foreclosure sale. A mechanic's lien does not come into effect until a court order establishes the lien and the owners of the property in question are provided with notice and an opportunity for a hearing. At the time of the foreclosure sale, on November 4, 1998, appellant had only filed for a mechanic's lien and was not yet a lien holder. As appellant's lien was granted on May 24, 1999, the same day the foreclosure sale was finalized, the earliest date to which appellant could have had an actual mechanic's lien on the Property was May 24, 1999, many months after the foreclosure sale on November 4, 1998. Thus, the Court held that appellant was precluded from asserting an interest in the Property based solely on the existence of a lien.

The Court further noted that there was no authority for appellant's proposition that filing for a mechanic's lien created a protected property interest in the property sought to be made the subject of the lien. In order to have a property interest, a person must have more than a unilateral expectation of it and must have a legitimate claim of entitlement to it. At the time of foreclosure sale, it was uncertain whether appellant would ever have a lien established against the Property. Thus, despite the fact that appellant may have had an expectancy, at the time of the foreclosure sale he did not have any legally protected property right that would entitle him to the benefit of due process notice.

Under Md. Rule 14-206 and § 7-105 of the Real Property Article, there is no requirement that notice be provided to individuals with a potential future interest in the foreclosed property – only individuals with actual subordinate interests are entitled to notice. Appellant was not entitled to notice of the foreclosure, and appellant's subsequently acquired interest in the property was effectively extinguished by ratification of the foreclosure sale.

Redland Genstar, Inc. et al. v. Hardat Mahase et al., No. 3071, September Term, 2002, filed February 3, 2004. Opinion by Eyler, James R., J.

MECHANIC'S LIEN - NOTICE REQUIREMENT - SUBSTANTIAL COMPLIANCE

Facts: Appellant, Benjamin Gravett, was hired as a subcontractor to assist in building an addition on property owned by appellee, Covenant Life Church. Six months into his subcontract, Gravett sent Covenant Life Church a notice of his intention to claim a mechanic's lien pursuant to Md. Code (1974, Repl. Vol. 2003), § 9-104(b) of the Real Property Article ("RP"). Gravett filed a petition to establish a mechanic's lien in the circuit court. The court dismissed that petition because Gravett's notice to Covenant Life Church did not state when Gravett had performed the work or supplied the materials and equipment, as required by RP § 9-104(b).

Held: Affirmed. RP § 9-104(b) requires a notice of intention to claim a mechanic's lien to include a description of the time when the work was done or the materials furnished. A notice of intention to claim a mechanic's lien cannot be in substantial compliance with RP § 9-104(b) if such a description is omitted.

Benjamin Gravett, Individually and trading as Ben Gravett Enterprises v. Covenant Life Church, No. 1430, September Term, 2002, filed February 2, 2004. Opinion by Krauser, J.

CRIMINAL LAW - CONFESSIONS - DELAY IN PRESENTMENT - FACON V. STATE, 375 MD. 435 (2003), WILLIAMS V. STATE, 375 MD. 404 (2003); AND HILIGH V. STATE, 375 MD. 456 (2003), CHANGED THE EFFECT A DELAY IN PRESENTMENT TO A JUDICIAL OFFICER HAS ON THE QUESTION OF VOLUNTARINESS OF A CONFESSION. IF A TRIAL COURT FINDS THE DELAY TO BE UNNECESSARY, DELIBERATE, AND FOR THE SOLE PURPOSE OF OBTAINING A CONFESSION, IT MUST GIVE THE DELAY VERY HEAVY WEIGHT IN ITS DETERMINATION OF VOLUNTARINESS. IF THE CONFESSION IS DETERMINED TO BE VOLUNTARY AND ADMISSIBLE, A JURY MUST BE INSTRUCTED THAT, IF IT FINDS THE DELAY WAS UNNECESSARY, DELIBERATE, AND FOR THE SOLE PURPOSE OF OBTAINING A CONFESSION, IT MUST GIVE THE DELAY VERY HEAVY WEIGHT

IN THE DETERMINATION OF VOLUNTARINESS. THE CIRCUIT COURT DENIED THE DEFENDANT'S MOTION TO SUPPRESS HIS CONFESSIONS. CONSEQUENTLY, BECAUSE OF THE CHANGE IN THE LAW EFFECTED BY THE ABOVE CASES, THE CONVICTIONS ARE VACATED AND THIS CASE IS REMANDED FOR A NEW SUPPRESSION HEARING, WITH AN OPPORTUNITY FOR NEW EVIDENCE, AND FOR A NEW TRIAL.

Facts: On September 15, 1999, veterinarian Nirwan Tharpar and his wife, Shashi Tharpar, were brutally murdered at their animal hospital in Bladensburg, Maryland. Dr. Tharpar was dead when police arrived, having been shot and had his throat slit. Despite having been hit in the back of her head and shot in her head and neck, Mrs. Tharpar was still alive. She described a single assailant - a tall black male. She died shortly after arriving at the hospital.

On August 7, 2000, Keith Mahar informed Prince George's County Detective Joseph Hoffman that Robert Angel Perez, Jr., (appellant or Perez) and Thomas Gordon admitted to killing the Tharpars while robbing the hospital. Shortly after midnight on August 9, 2000, Perez was arrested and taken to the homicide unit of the Prince George's County Criminal Investigation Division ("CID"). Perez was taken to an interrogation room around 12:31 a.m.

At approximately 1:00 a.m. on August 9, Detective Hoffman and Detective Robert Turner entered the room and reviewed Miranda¹ rights with Perez. Perez executed a waiver, indicating that he understood his rights and did not want an attorney.

For about forty minutes, Hoffman and Turner interviewed Perez about his personal and background information. At some point, they discussed a murder involving him and Thomas Gordon, but Perez denied any involvement in the murder. Perez was then left alone for about 45 minutes.

At 2:25 a.m., Hoffman and Turner returned and interviewed Perez for another 80 minutes. Although they had not yet spoken to Gordon, the detectives told Perez that Gordon said Perez was the shooter in the incident. Perez continued to deny any involvement. The detectives left Perez alone, with water, between 3:45 and 4:00 a.m.

Turner resumed the interrogation from 4:40 until 5:50 a.m., with a bathroom break at Perez's request. Prior to this point, Perez admitted to knowing Gordon, but denied any involvement in the

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

murders, denied owning or firing a gun, and denied seeing Gordon with a gun. During this interview, however, Perez admitted that he had seen Gordon fire a gun twice. Perez admitted that he was under investigation for some breaking and enterings, but continued to deny any involvement in the murders.

Perez was again left alone in the interrogation room. At 7:25 a.m., Detective Nelson Rhone, a member of the CID, woke Perez, introduced himself, and reviewed some biographical information with Perez.

At 9:15 a.m., Rhone and Perez completed another Miranda advisement and waiver. Perez was given some water and a break for the bathroom. Rhone then questioned Perez about the murders. Perez admitted to participating in breaking and enterings in Bowie with Gordon. He admitted that Gordon had a gun, but claimed that he never saw Gordon with it.

At a later point in this interview, Perez described an incident where he and Gordon discussed robbing someone. Because they could not find anyone on the street, Gordon suggested that they rob a store. At Gordon's request Perez entered the store to check it out. Perez stated that he knew it was an animal hospital because there were pictures of cats and dogs. Perez stayed inside the store for two to three minutes, saw one white woman, about 40 to 50 years old, and then returned to the car. He told Gordon what he saw inside and that no police were nearby. After parking the car at another location, both men entered the animal hospital. Perez said he heard some shots and then ran out and jumped in his car. Gordon followed and they drove straight to Bowie.

At 12:07 p.m., Rhone provided Perez with a form to write down this statement. Perez wrote six lines, and then Rhone recorded written questions and answers. The statement was completed about 2:00 p.m.

Another break ensued where Perez was given food. At 2:58 p.m., Detective Hoffman reentered the interrogation room, again reviewed Miranda rights, and Perez executed a waiver. Perez then stated that he was present during the robbery and the shooting and that "he went inside to check the place out." Perez admitted to hearing Gordon fire a gun three times and then fleeing the scene. He stated that Gordon followed a short time later. From 3:31 p.m. to 5:01 p.m., Perez wrote a second statement, which was two pages, answered follow-up questions, and signed written answers. Perez also drew a map of the layout of the animal hospital and surrounding area, including where he parked his car.

At approximately 7:00 p.m., Detective Ismael Canales entered the room and advised Perez of his Miranda rights, in preparation for administration of a lie detector test. Perez signed a release form stating that he agreed to submit to the test. Canales left the room at 8:10 p.m.

Around midnight on August 10, Detective Hoffman returned to the interrogation room with another Miranda waiver and a presentment waiver form. Because Perez had been in custody for almost 24 hours, Hoffman had been advised by a senior investigator that he should ask Perez to waive what he described as his right to be presented to a district court commissioner within 24 hours after arrest.

Perez was apparently sleeping when Hoffman entered the room. At 12:08 a.m., Hoffman reviewed Miranda rights, and Perez executed a waiver. At 12:10, Hoffman advised Perez that since he had been in police custody for almost 24 hours, he had a right to be presented before a District Court Commissioner. He then asked Perez a series of seven questions, to which Perez responded that he voluntarily agreed to remain at the station for additional questioning; he had not been promised anything, threatened, or coerced into remaining or signing the waiver; he had been advised of his constitutional rights before being questioned; he had not been denied the use of the bathroom or telephone while in custody; and he had not asked for an attorney to be present.

Hoffman reported that Perez was very cooperative, did not appear tired, and willingly stayed past 24 hours. Hoffman then left Perez to sleep.

Police brought Thomas Gordon to CID from an Anne Arundel County detention facility, which took several hours and required a judge's signature. At 11:30 p.m., Detective Bergstrom spoke with Gordon about the murders.

Rhone returned on the morning of August 10 to ask Perez again about his involvement in the murders, based on what the police learned from Gordon and from Perez's voice stress test. Rhone admitted that the police also wished to speak to Perez because the autopsies indicated that more than one individual committed the murders.

Perez received food in the interrogation room at about 7:15 a.m. At 12:05 p.m., Rhone again advised Perez of his Miranda rights. Perez signed another Miranda waiver and, at 12:10 p.m., another "commissioner's waiver." He began a third written statement at 3:07 p.m. The statement started as written questions

and answers, but the conversation became more in depth.

Perez initially denied that he knew anything about a knife or that he had any weapons. At that point, Rhone let Perez hear, via a two-way radio, what Gordon was telling another detective. Gordon said that Perez was the one that had the knife. After that, Perez admitted having a knife, but said that he gave it to Gordon and did not use any weapons. He also said that Gordon stole a purse and gave him \$30 for his participation. At Rhone's request Perez completed a third written statement at 4:00 p.m.

During the morning of August 11, Rhone took Perez to the commissioner's office.

Prior to trial, an evidentiary hearing was held in early March, 2001, where Perez's counsel argued that Perez's statements resulted from an illegal arrest and that the statements were involuntary. The involuntariness argument was based on traditional grounds, referenced the totality of circumstances, and emphasized Perez's version of the facts. Delay in presentment was argued as a factor to consider.

The court denied all defense motions. Trial followed on April 17-20, 2001. The jury convicted Perez of two counts of felony murder, two counts of robbery with a deadly weapon, two counts of using a handgun in the commission of a crime of violence, and conspiracy to commit robbery with a deadly weapon. He was sentenced to two terms of life without parole, two terms of twenty years, the first five to be served without parole, and a term of ten years.

Perez filed motions for discovery and a new trial, which were denied.

Held: The Court of Special Appeals held that in light of recent Court of Appeals decisions dealing with delay in presentment, appellant's convictions must be vacated and remanded to the circuit court for new pre-trial proceedings and a new trial. For guidance, the court also discussed (1) the court's refusal to instruct the jury, pursuant to Md. Rule 4-212, that the police are obligated to take persons accused of a crime to a district court commissioner "without unnecessary delay and in no event later than 24 hours after arrest," and (2) the trial court's exclusion of testimony with respect to statements made by Mrs. Tharpar shortly before she died.

The Court began by addressing the delay in presentment issue, noting that after oral argument in the instant case, but prior to

the issuance of judgment, the Court of Appeals issued relevant rulings in Williams v. State, 375 Md. 404, 434 (2003); Hiligh v. State, 375 Md. 566, 473-75 (2003); and Facon v. State, 375 Md. 435, 453-54 (2003). In these cases, the Court of Appeals held that when a delay in presentment (1) was unnecessary; (2) deliberate; and (3) designed for the "sole purpose" of obtaining a confession, the delay should be given "very heavy weight" when considering the totality of circumstances related to the voluntariness of a confession.

After considering Williams, Hiligh, and Facon, the State conceded that Perez was entitled to remand for a new suppression hearing and trial. The Court agreed that a new evidentiary suppression hearing should be conducted, explaining that it was not holding that one or more of appellant's statements were inadmissible as a matter of law or that application of the heavy weight standard was mandated. The Court held that this determination should be made by the trial court.

At the new suppression hearing, the trial court should decide whether there was unnecessary delay for the deliberate and sole purpose of obtaining a confession and, based on that determination, apply the appropriate standard. In determining voluntariness, and thus admissibility, the court should resolve factual disputes and identify the circumstances it considered as part of the totality. Importantly, a delay in presentment, even of the type that meets the heavy weight standard, cannot be the sole reason for finding involuntariness. Voluntariness is determined by the totality of the circumstances and compliance with the presentment rule is one factor. The Court explained that since Williams, if it is determined that one of the factors is deliberate noncompliance with the prompt presentment requirement for the sole purpose of obtaining a confession, that factor must be given very heavy weight.

The Court further explained that, as part of the voluntariness determination, the trial court should also consider the 8 waivers executed by appellant: 6 expressly relating to Miranda rights and 2 expressly relating to delay in presentment. Noting that some courts have held that a waiver of Miranda rights constitutes a valid waiver of prompt presentment, the Court instructed the suppression court to consider appellant's waivers as a part of the totality of the circumstances relevant to the voluntariness determination.

Specifically, the Court discussed the effect of a waiver of prompt presentment occurring after the prompt presentment requirement may have been violated. By analogy to Miranda rights,

in the event of a prompt presentment violation, followed by a valid waiver, a confession obtained after a valid waiver would not necessarily be tainted. Perez executed two written waivers expressly relating to delay in presentment. Those waivers, if otherwise effective, waive only any delay in presentment violations that occurred subsequent to the waivers.

Moreover, the waivers are not relevant to determine whether statements made prior to the waivers were voluntary. The subsequent violations of the prompt presentment Rule, however, if validly waived, would not necessarily be tainted by a violation(s) that occurred prior to the waivers. In other words, if the waivers were voluntarily given, even if a violation of the prompt presentment Rule occurred prior to the waiver, and the delay was deliberate and purposeful, subsequent confessions would not necessarily be inadmissible, if they were otherwise voluntary. This statement would also be true if the prior violation, as one factor to consider, resulted in a determination that confessions prior to the waiver were inadmissible. For example, in this case, the remand court could determine that, prior to the express waiver of presentment which occurred after 23 hours, the prompt presentment Rule had been violated, either deliberately and purposefully or merely unnecessarily. When considered with all other relevant factors, the remand court could then find that the earlier confessions were involuntary. The court could nevertheless determine that the waiver of presentment was voluntary and that the subsequent confessions were thus voluntary and admissible.

To guide the trial court and parties on remand, the Court discussed the related issue of whether the trial court should have instructed the jury about the presentment requirement in Md. Rule 4-212, noting that such a determination depends on the circumstances of each case. In this case, where the delay exceeded 24 hours, the Court stated that it is advisable to include the 24 hour provision. When the delay is less than 24 hours, however, it should not be given if it would mislead the jury into believing the State has at least 24 hours. Regardless, the court should take care to explain that the State is not automatically entitled to 24 hours. In all events, the jury should be instructed that unnecessary delay is but one of the factors to consider.

The Court exercised its discretion to offer the remand court guidance with regard to Mrs. Tharpar's dying declaration about her assailant. Perez argued that the trial court abused its discretion and materially prejudiced his defense by precluding testimony from four witnesses who heard Mrs. Tharpar identify the person who shot her as a tall black male. Because Perez is 5'7" and light skinned, and there is no evidence that Perez fired the shots that killed

either of the Tharpars, Perez hoped to use this description of the assailant as an exculpatory dying declaration.

The Court discussed the compelling circumstantial evidence to support a finding that Shashi Tharpar was aware of her impending death. Moreover, there was circumstantial evidence to support a finding that her statements were reliable. Nonetheless, the Court found nothing that necessarily required the trial court to conclude that Mrs. Tharpar believed she was about to die.

The Court noted its concern, however, that the trial court asked for more facts from appellant and then immediately ruled that it was not satisfied Mrs. Tharpar was aware of her impending death. The court did so without saying why it was not satisfied with the "facts" that were presented and without reviewing the three statements by the police officers who were with Mrs. Tharpar before she died. On remand, the Court instructed the trial court to engage in a thorough consideration of all the proffered direct and circumstantial evidence bearing on whether Mrs. Tharpar believed her death was imminent when she described her assailant, as well as a clearly stated explanation for any in limine ruling on this evidence.

Robert Angel Perez, Jr. v. State of Maryland, No. 1139, September Term, 2001, filed February 3, 2004. Opinion by Eyler, James R., J.

CRIMINAL LAW - SPEEDY TRIAL - HICKS RULE - NOLLE PROSEQUI - MD. RULE 4-271 - POSTPONEMENT OF CRIMINAL CASE; MD. CODE. ANN. CRIM. PRO. § 6-103 - REINDICTMENT AFTER NOLLE PROSEQUI; CIRCUMVENTION OF 180-DAY HICKS RULE - TWO-PRONG TEST DETERMINING NECESSARY EFFECT AND PURPOSE OF CIRCUMVENTION - NOLLE PROSEQUI AS PROSECUTORIAL TOOL

Facts: By indictment of the grand jury, appellee was charged with robbery and conspiracy to commit robbery in the Circuit Court for Montgomery County. A privately retained attorney entered his appearance on behalf of appellee on June 20, 2002, starting the

Hicks calendar, requiring appellee be tried not later than December 17, 2002. Trial was set for September 11, 2002. On September 6, 2002, the State moved to continue because a police officer, considered an essential State's witness, was not available on the trial date. The motion was granted and a new trial date was set for October 22, 2002.

The case was called for trial and the State again requested a continuance, which was referred to the administrative judge and denied. The State asked for reconsideration, or to postpone the trial until the next day. The judge denied the continuance, but told the State that after picking the jury, they could wait until the next day to start testimony. Although the administrative judge technically denied the continuance he did, in effect, tell the State that a continuance was not actually needed in the circumstances because witnesses would not be reached until the next day. When the case was called for trial, appellee, by his counsel, waived his right to a jury trial, and elected to have a bench trial. The effect of those elections was to put the State to the task of proceeding immediately to trial, rather than to a motions hearing and jury selection, as had been anticipated, by the State and the administrative judge.

The State chose to dismiss, and reindicted Appellee on October 24, 2002. From his initial appearance on October 28, 2002, until the trial date on December 11, 2002, appellee appeared unrepresented before the court on five occasions, and refused the services of the Public Defender. After the trial did not go forward on December 11, 2002 due to inclement weather, appellee's previous counsel entered his appearance on December 13, 2002, and filed a motion to dismiss for violation of speedy trial rights, and a two-day jury trial was set for January 6, 2003.

At the motions hearing, the lower court ruled that the State entered a *nolle prosequi* of the charges against appellee to circumvent the denial of a continuance by the administrative judge, and dismissed the charges following a re-indictment.

Held: Reversed. The State's use of the *nolle prosequi* had neither the necessary effect or the purpose of circumventing the 180 day Hicks Rule, as more than 50 days remained in the Hicks' time period and as the State was vigorous in its efforts to advance the trial date within the original 180-day calendar.

Because more than fifty days remained in the original *Hicks* calendar when the *nolle prosequi* was entered, the State's action in and of itself did not have the necessary effect of circumventing the 180-day rule. The State's vigorous attempts to reschedule the

case within the original *Hicks* date, are inapposite to the factual scenarios in other cases in which the State is attempting to save a case from dismissal for its failure to bring the defendant to trial within 180 days. Appellee's refusal to obtain counsel cannot be discounted in assessing the time taken to get the case to trial, and the State should not be made to suffer due to a defendant's manipulation of the system.

State v. Akopian, No. 2488, Sept. Term, 2002, filed February 5, 2004. Opinion by Sharer, J.

PUBLIC INFORMATION ACT - GOVERNMENTAL INFORMATION - FREEDOM OF INFORMATION - MARYLAND PUBLIC INFORMATION ACT SECTION 10-618 - CUSTODIAN MUST PROVIDE DETAILED BASIS FOR DENIAL OF REQUEST FOR PUBLIC INFORMATION - COURT CANNOT RESTRICT ACCESS TO PUBLIC RECORDS IF THE INFORMATION IS OBTAINABLE UNDER THE PUBLIC INFORMATION ACT.

Facts: The City of Frederick Police Department executed a search warrant for the home of Angelika Potter after learning that she was running a house of prostitution. The police seized computer equipment, records, and documents containing the names, addresses, and other information relating to Ms. Potter's customers (hereinafter the "black book"). Ms. Potter was charged with operating a house of assignation. She pleaded guilty to that charge but, by virtue of a plea bargain with the State, received a probation before judgment verdict.

The Frederick News Post ("News Post") made a request of the City for copies of the documents seized from Ms. Potter's home pursuant to the Maryland Public Information Act ("MPIA"). The Associated Press ("AP") and one Daniel Trey also made similar MPIA requests.

The custodian of records designated by the City, Debra Borden, denied all the requests, relying on section 10-618(f)(1)(i) of the MPIA, which allows for denial of a request for records of an

investigation conducted by a police department.

The News Post and the AP filed a joint administrative appeal, claiming that the City had no right to deny them access to the records. At the hearing, Ms. Borden stated that she considered the "public interest" prior to denying the requests and said that disclosure would provide unwanted publicity for cooperating witnesses, violate the rights to privacy of the individuals subject to the investigation, hinder law enforcement proceedings, reveal the sources of police information, and would not contribute to the public's understanding of the government.

While the administrative appeal was pending, the City filed an action for declaratory relief in the Circuit Court for Frederick County requesting the court to determine whether Ms. Potter's plea agreement required the City to return the seized evidence to her. The AP and the News Post filed a motion to intervene. While this motion was pending, the City and Ms. Potter's counsel agreed that the City should return all the seized items to Ms. Potter. The pending administrative appeal was then dismissed by the City as moot because (purportedly) the City no longer possessed the documents that were the subject of the MPIA requests.

Upon receiving the documents, Ms. Potter's counsel began to shred them. The AP and News Post sought injunctive relief to stop the document destruction. The circuit court promptly ordered that no more documents be shredded and that the remaining items that had been given to Ms. Potter's counsel be placed in a storage facility.

The News Post and AP then filed a new action in the Circuit Court for Frederick County naming the mayor of Frederick, Debra Borden, the City of Frederick, and the City Attorney as defendants. Count one was brought under section 10-623 of the MPIA and asked the court to determine whether the plaintiffs were entitled to inspect and copy the documents seized by the police. Daniel Trey filed a similar complaint shortly after the AP and News Post's complaint was filed, and later the two cases were consolidated.

The News Post and AP filed a motion for partial summary judgment. At the hearing on the motion, the City's counsel informed the court that the City's attorneys initially thought that they had turned over all of the documents to Ms. Potter's counsel but later learned that the police department had retained some copies of the documents. The City's attorney advised the court that the City did not oppose disclosure to the plaintiffs of the items in storage but believed that the "black book" material in the City's possession was properly withheld under the MPIA.

The circuit court ruled that the City had failed to justify its refusal with particularity or specific facts and therefore failed to demonstrate that withholding the documents was in the public's interest. The court granted partial summary judgment in favor of News Post and AP and also, after a oral motion for partial summary judgment, in favor of Mr. Trey.

At a later hearing, the circuit court added a provision to its prior ruling providing that "the plaintiffs not reveal names to the public, except for names of public officials and/or public figures."

Held: Summary judgment was proper where the custodian of records did not provide a detailed basis for the denial as required by section 10-618(1) of the MPIA. The circuit court erred in restricting the information provided in the documents to the names of public officials and/or public figures.

Once a court determines that a party should be granted access to public records, the court may not restrict the publication of the records.

The City of Frederick v. Randall Family, LLC, t/a The Frederick News Post, et al., No. 1965, September Term, 2001, and The City of Frederick v. Daniel A. Trey, No. 1967, September Term, 2001, filed January 28, 2004. Opinion by Salmon, J.

TORTS - LEAD PAINT POISONING - BROOKS & LEWIN REALTY, III, INC., 2003 Md. Lexis 747 (2003), WHICH HELD THAT A PLAINTIFF MAY ESTABLISH A PRIMA FACIE CASE OF NEGLIGENCE BASED UPON A VIOLATION OF THE BALTIMORE CITY HOUSING CODE BY INTRODUCING EVIDENCE THAT THERE WAS FLAKING, LOOSE, OR PEELING LEAD BASED PAINT IN THE LEASED PREMISES, APPLIES TO CASES THAT WERE PENDING AT THE TIME OF THAT DECISION, WHERE THE ISSUE OF NOTICE WAS PROPERLY PRESERVED FOR APPEAL.

Facts: This case stems from two actions, consolidated for trial, filed by Jasmine Turner, a minor child, appellee, through her mother, Crystal Whittington, in the Circuit Court for Baltimore City. Appellee claimed that she suffered lead paint poisoning as a result of exposure to lead paint in the apartment in which she lived (the Apartment) from the time she was born on April 3, 1990 until August, 1994. Lawrence M. Polakoff (Mr. Polakoff), an appellant, owned the Apartment from 1975 until 1992, when he transferred his ownership interest to C.F.A.S. Limited Partnership (C.F.A.S.), a company in which Mr. Polakoff acts as a Limited Partner.² Mr. Polakoff is President of Chase Management, Inc. (Chase Management), the other appellant, the management company that manages the Apartment.

A trial was held in October, 2002. The only claim submitted to the jury was appellee's negligence claim against appellants and C.F.A.S. The jury returned a verdict in the amount of \$500,000 against appellants and found in favor of C.F.A.S. Appellants filed a motion for judgment notwithstanding the verdict and, in the alternative, to apply the cap on non-economic damages. The court denied the motion for judgment notwithstanding the verdict but, by order entered on January 23, 2003, applied the cap and reduced the judgment to \$350,000. A timely appeal and cross-appeal to this Court were filed.

On November 13, 2003, the Court of Appeals issued its opinion in Brooks & Lewin Realty, III, Inc., 2003 Md. Lexis 747 (2003), reversing prior decisions in which the Court applied the common law requirement of notice or reason to know in order to prove that a landlord was negligent in an action for lead paint poisoning. In Brooks, the Court held that a plaintiff may establish a prima facie case of negligence based upon a violation of the Baltimore City Housing Code by introducing evidence that there was flaking, loose, or peeling lead based paint in the leased premises. This changed the pre-existing notice standard, as held in Richwind v. Brunson, 335 Md. 661, 673-74 (1994), pursuant to which landlords were liable in a lead paint action only if they knew or had reason to know of the existence of flaking, loose, or peeling paint and had an opportunity to correct the condition.

Following Brooks, appellants were given the opportunity to brief the effect of that decision on this case. Appellants conceded that the evidence in the instant case showed the existence of deteriorated lead based paint on the premises, sufficient to

² CFAS was a defendant. The jury found that it was not liable, and therefore, it is not a party to this appeal.

support liability under Brooks. Consequently, the only liability issue on appeal was whether the holding in Brooks applied to this case. Appellee, on cross appeal, challenged the constitutionality of the statutory cap on non-economic damages.

Held: The Court of Special Appeals held that the decision in Brooks applied retroactively to the instant case and affirmed the judgment of the circuit court.

The Court began by discussing the rules regarding retroactive versus prospective application of a court's decision, noting that decisions which do not declare new law will be applied retroactively. This means that when a judicial decision applies a rule of law that existed both before and after that decision, but applies it to a new factual situation in that particular case, the decision applies to the facts that produced the decision and to all pending cases. When a court overrules a prior interpretation of a constitutional or statutory provision and renders a new interpretation, the new holding generally applies to the facts that produced the holding and to all pending cases in which the relevant issue has been preserved for appellate review. Finally, when the Court of Appeals changes the common law of Maryland, exercising its authority under article 5 of the Maryland Declaration of Rights, the holding, while applying in the case which produced the holding, generally applies only to causes of action that accrue after the date of the new decision.

The Court held that while Brooks clearly overruled prior decisions, it did not change the common law; rather, it applied settled common law principles. Specifically, the Court applied the general principle that a violation of a statute designed to protect a class of persons, including appellee, constituted evidence of negligence. The holding in Brooks, which changed the prior law, was that the Baltimore City Housing Code modified the common law notice requirement; thus a plaintiff does not have to prove that a defendant knew or had reason to know of the defective condition that constituted the violation.

The Court noted that while appellants argued that applying the Brooks decision "retroactively" was unfair and created a hardship because landlords based their conduct on the prior law, these arguments did not go to the issue before the Court in the instant case and they were better directed to a legislative body or the Court of Appeals.

As appellants' sole issue on appeal was lack of notice, the judgment of the circuit court was affirmed.

Finally, the Court held that the statutory cap on non-economic damages is constitutional, citing to Murphy v. Edmonds, 325 Md. 342 (1992), where the Court of Appeals held as much.

Lawrence Polakoff et al. v. Jasmine Turner, a Minor, etc. et al., No. 2794, Sept. Term, 2002, filed February 3, 2004. Opinion by Eyler, James R., J.

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated January 29, 2004, the following attorney has been suspended for thirty (30) months, effective immediately, from the further practice of law in this State:

JOHN HENRY PARTRIDGE

*

By an Order of the Court of Appeals of Maryland dated January 29, 2004 the following attorney has been disbarred, effective immediately, from the further practice of law in this State:

NAVRON PONDS

*

By an Order of the Court of Appeals of Maryland dated January 29, 2004, the following attorney has been disbarred, effective immediately, from the further practice of law in this State:

ROBERT MICHAEL SHORT

*

By an Order of the Court of Appeals of Maryland dated February 6, 2004, the following attorney has been disbarred by consent, effective immediately, from the further practice of law in this State:

TERENCE A. COLES

*

By an Opinion and Order of the Court of Appeals of Maryland dated February 17, 2004, the following attorney has been disbarred from the further practice of law in this State:

LOUIS J. DEMAIO

*

By an Opinion and Order of the Court of Appeals of Maryland dated February 17, 2004, the following attorney has been disbarred from the further practice of law in this State:

SALLY L. SOMERVILLE

*

By an Order of the Court of Appeals of Maryland dated February 20, 2004, the following attorney has been disbarred, effective immediately, from the further practice of law in this State:

RONALD LEE KLINGENBERG

*