

No. \_\_\_\_\_

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**In The  
Supreme Court of the United States**

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LEISER, LEISER & HENNESSY, PLLC,

*Petitioner,*

v.

AUGUST McCARTHY, ESQ.

and

AMANDA ARGYRIADIS,

*Respondents.*

—◆—

**On Petition For A Writ Of Certiorari  
To The Circuit Court Of Fairfax County, Virginia**

—◆—

**PETITION FOR A WRIT OF CERTIORARI**

—◆—

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## I. QUESTIONS PRESENTED

1. In *Goldberg v. Kelly*, this Court held that due process of law requires the decision maker to articulate the legal and factual bases for his decision that deprives a person of his property rights. The Virginia Supreme Court has expressly held that a lawsuit sounding in tort is a property right. When a Virginia trial court grants a dispositive motion that dismisses with prejudice a party, a cause of action, or an entire case, thereby extinguishing the non-moving party's property right in that lawsuit, is that non-moving party entitled to the procedural due process safeguards mandated by *Goldberg v. Kelly*?
2. This Court's prior decisions address the specific dictates of due process that apply in a variety of situations when the decision maker is charged with making *factual* determinations. When the decision is one that involves a pure question of law, does application of the *Mathews v. Eldridge* balancing test require that the decision maker articulate his conclusions of law?
3. In applying the *Mathews v. Eldridge* test, does the absence of an automatic right to appeal a governmental decision that deprives a person of his property right create such a risk of an erroneous deprivation of that right, that due process demands that the decision maker articulate the legal and factual bases for his decision?

## **II. LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT**

In accordance with Sup. Ct. Rule 14.1(b), the parties to the proceeding in the Circuit Court of Fairfax County, Virginia (“the trial court”) were the Plaintiffs, Leiser, Leiser & Hennessy, PLLC and Phillip B. Leiser, Esq. Leiser, Leiser & Hennessy, PLLC is a law firm that is organized as a professional limited liability company under the laws of the Commonwealth of Virginia. There are no parent corporations or publicly held companies owning 10% of Petitioner’s stock. Phillip B. Leiser, Esq. is an individual who is the sole owner of Leiser, Leiser & Hennessy, PLLC. The Defendants were August McCarthy, Esq. and Amanda Argyriadis – McCarthy’s wife. At the trial court level, Plaintiff, Phillip B. Leiser, Esq., took a voluntary nonsuit of the tort claims asserted in CL-2009-0003041, without objection, pursuant to VA. CODE ANN. § 8.01-380(A) (Michie 2007). However, he remained a plaintiff because the contract claims that he had asserted in a separate lawsuit, CL-2010-1888, filed against only McCarthy, had been consolidated with the tort claims.

In the Supreme Court of Virginia, Leiser, Leiser & Hennessy, PLLC was the named petitioner/appellant. August McCarthy, Esq. and Amanda Argyriadis were the named respondents/appellees.

## TABLE OF CONTENTS

	Page
I. QUESTIONS PRESENTED.....	i
II. LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT.....	ii
III. ORDERS ENTERED BELOW .....	1
IV. BASIS FOR JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES .....	1
V. FEDERAL CONSTITUTIONAL PROVI- SIONS IMPLICATED BY THIS CASE.....	1
VI. STATEMENT OF RELIEF SOUGHT .....	1
VII. REASONS FOR GRANTING THIS PETI- TION.....	2
VIII. STATEMENT OF THE CASE .....	3
A. Factual Background .....	3
B. Procedural History .....	5
IX. PRESERVATION OF FEDERAL QUES- TIONS FOR REVIEW BY THIS COURT ...	6
X. SUMMARY OF ARGUMENT.....	13
XI. ARGUMENT .....	15
A. <i>Mathews v. Eldridge</i> adopted a balanc- ing test to determine which procedural due process requirements enunciated in <i>Goldberg v. Kelly</i> apply in any par- ticular situation when government ac- tion deprives a person of his property rights.....	15

## TABLE OF CONTENTS – Continued

	Page
B. In the context of judicial proceedings to adjudicate civil claims, where there is no guaranteed right to appellate review, due process demands that trial courts articulate the reasons for their dismissal of a party’s claim .....	17
1. The substantial private interest that is affected by a trial court’s ruling on a dispositive motion is the ability to pursue a civil claim .....	17
2. In the absence of an automatic right to appellate review, there is substantial risk of an erroneous deprivation of a litigant’s property rights when a trial court declines to explain the rationale for its ruling granting a dispositive motion .....	19
a. In this case, the trial court’s order sustaining the demurrer without leave to amend, entered without explanation, deprived Leiser of his due process rights .....	20
b. The trial court’s decision to dismiss Leiser’s tort claims was apparently based on either its misunderstanding of the law or its antipathy toward those claims .....	22

## TABLE OF CONTENTS – Continued

	Page
c. Unless this Court adopts the rule advocated here, trial court judges will feel free to exercise discretion they do not have to dismiss cases they do not like .....	23
d. The Virginia General Assembly has tacitly recognized that due process of law is routinely denied litigants in the context of child custody cases .....	25
3. Requiring trial courts to articulate the legal and factual bases for their decisions granting dispositive motions in civil cases will substantially minimize the risk of an erroneous deprivation of a litigant's due process rights .....	27
a. The balancing test prescribed by <i>Mathews v. Eldridge</i> requires – at a minimum – that <i>either</i> an aggrieved litigant be afforded the automatic right to appellate review of an adverse decision, <i>or</i> the decision maker articulate the legal and factual bases for that decision, in order to facilitate discretionary appellate review .....	27
b. Providing due process of law cannot be reduced to a shell game ...	31

## TABLE OF CONTENTS – Continued

	Page
4. There will be no appreciable fiscal or administrative burdens placed on the trial courts by mandating that they either provide an automatic right to appeal or else articulate the legal and factual bases for their decisions to sustain dispositive motions in civil lawsuits .....	33
a. The <i>Goldberg</i> court held that administrative and fiscal burdens are not sufficiently weighty to justify deprivations of due process rights.....	33
b. Any <i>de minimus</i> administrative or fiscal burdens would be eclipsed by the enhancement of judicial economy and efficiency resulting from application of the <i>Goldberg</i> rule to trial court judges .....	35
c. Applying the <i>Goldberg</i> rule to judicial proceedings will not open the floodgates to frivolous appeals .....	36
XII. CONCLUSION .....	37

## TABLE OF CONTENTS – Continued

	Page
LIST OF DOCUMENTS INCLUDED IN APPENDIX	
4/30/10 Order sustaining McCarthy’s demurrer, entered by Fairfax County Circuit Court .....	App. 1
4/30/10 Transcript of hearing on McCarthy’s demurrer (Bench Ruling).....	App. 4
9/9/11 Order refusing Leiser’s Petition for Appeal entered by the Supreme Court of Virginia.....	App. 7
4/11/11 Order entering non-suit, entered by Fairfax County Circuit Court.....	App. 8
7/21/10 Order denying Leiser’s motion for reconsideration entered by Fairfax County Circuit Court .....	App. 11
6/17/10 Law Scheduling Conference Screening entered by Fairfax County Circuit Court .....	App. 13
5/13/10 Suspending Order entered by Fairfax County Circuit Court (filed on 5/7/10).....	App. 15
11/14/11 Order denying Leiser’s Petition for Re- hearing entered by the Supreme Court of Virginia.....	App. 17
Excerpts of Leiser’s Petition for Rehearing filed with the Virginia Supreme Court on 10/7/11 ...	App. 18
Excerpts of Leiser’s Petition for Appeal filed with the Virginia Supreme Court on 7/11/11....	App. 25
Leiser’s Notice of Appeal filed with the Virginia Supreme Court on 5/10/11 .....	App. 47

TABLE OF CONTENTS – Continued

	Page
Leiser’s Motion for Reconsideration filed with the Fairfax County Circuit Court on 5/7/10 .....	App. 50
Excerpts from 6/17/10 Scheduling Order en- tered by Fairfax County Circuit Court .....	App. 57
Affidavit of Phillip B. Leiser, Esq., filed with the Fairfax County Circuit Court on 4/11/11 .....	App. 61
Affidavit of Thomas F. Hennessy, Esq., filed with the Fairfax County Circuit Court on 4/11/11.....	App. 64

## TABLE OF AUTHORITIES

	Page
CASES	
<i>Adams v. Robertson</i> , 520 U.S. 83 (1997).....	6, 7
<i>Berean Law Group, P.C. v. Cox</i> , 528 S.E.2d 108 (2000).....	35
<i>Brown v. Commonwealth</i> , 380 S.E.2d 8 (1989) .....	11
<i>Dept. of Revenue of Ky. v. Davis</i> , 553 U.S. 328 (2008).....	13
<i>Evans v. Commonwealth</i> , 170 S.E. 756 (1933) .....	12
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970) .....	<i>passim</i>
<i>Harris v. Rivera</i> , 454 U.S. 339 (1981).....	27, 28
<i>Huaman v. Aquino</i> , 630 S.E.2d 293 (2006).....	17
<i>Lee v. Kemna</i> , 534 U.S. 362 (2002).....	7, 10, 11
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	<i>passim</i>
<i>Michigan v. Long</i> , 463 U.S. 1032 (1983).....	10
<i>Mortarino v. Consultant Engineering Services, Inc.</i> , 467 S.E.2d 778 (1996).....	21
<i>Norris v. Mitchell</i> , 495 S.E.2d 809 (1998).....	8
<i>Pacific Gas and Elec. Co. v. Public Util. Comm. of Cal.</i> , 475 U.S. 1 (1986) .....	13
<i>Riverview Farm Associates Virginia General Partnership v. Board of Sup'rs of Charles City County</i> , 528 S.E.2d 99 (2000).....	20
<i>Smith v. Commonwealth</i> , 172 S.E. 286 (1934) .....	6, 19
<i>Smith v. Commonwealth</i> , 182 S.E. 124 (1935) .....	12

TABLE OF AUTHORITIES – Continued

	Page
<i>Tazewell County Sch. Bd. v. Snead</i> , 92 S.E.2d 497 (1956).....	20
<i>Thompson v. Skate Am., Inc.</i> , 540 S.E.2d 123 (2001).....	20
<i>Wolff v. McDonnell</i> , 418 U.S. 539 (1974).....	30
<i>Wyman v. James</i> , 400 U.S. 309 (1971).....	27
<i>Yee v. Escondido</i> , 503 U.S. 519 (1992).....	6, 12
 Constitution	
U.S. Const. amend. XIV, § 1 .....	1, 13, 29
 STATUTES AND RULES	
28 U.S.C. § 1257(a).....	1
Sup. Ct. Rule 10(c).....	1
Sup. Ct. Rule 14.1(d) .....	1
Sup. Ct. Rule 14.1(e).....	1
VA. CODE ANN. § 18.2-499 (Michie 2009).....	3
VA. CODE ANN. § 18.2-500 (Michie 2009).....	3
VA. CODE ANN. § 20-124.3 (Michie 2009).....	25
VA. R. S. Ct. 1:1 (Michie 2009).....	8
VA. R. S. Ct. 1:8 (Michie 2009).....	21, 23
VA. R. S. Ct. 5:25 (Michie 2009).....	7, 11, 12

### **III. ORDERS ENTERED BELOW**

Under Sup. Ct. Rule 14.1(d), (e), the order sought to be reviewed by this Court was the 4/30/10 order sustaining, without leave to amend, McCarthy's demurrer to Counts 2, 7, and 10 of Leiser's complaint (CL 2009-0003041). An order denying Leiser's motion for reconsideration was entered by the trial court on 7/21/10.

### **IV. BASIS FOR JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES**

Jurisdiction is conferred on this Court by 28 U.S.C. § 1257(a), and in accordance with Sup. Ct. Rule 10(c).

### **V. FEDERAL CONSTITUTIONAL PROVISIONS IMPLICATED BY THIS CASE**

This case involves the interpretation of the due process clause of the Fourteenth Amendment to the United States Constitution, which declares that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

### **VI. STATEMENT OF RELIEF SOUGHT**

Leiser respectfully requests that this Court vacate the trial court's 4/30/10 order sustaining with prejudice McCarthy's demurrer to Counts 2, 7, and 10

of Leiser's complaint, and remand the case back to that court with instructions to provide a hearing that conforms to the due process requirements imposed by *Goldberg v. Kelly*, and in particular, to justify its ruling if it again sustains the demurrer.

## VII. REASONS FOR GRANTING THIS PETITION

There are three unique features of this case that merit the granting of this petition. First, this Court has addressed the required minimum standards of due process in a variety of contexts involving the deprivation of property rights or liberty interests. But it appears that this Court has not previously addressed due process in this context – the extinguishing of a lawsuit as a property right.

Second, the *Mathews v. Eldridge* balancing test, employed by this Court to determine the specific dictates of due process that are required in a particular context, has been applied in various circumstances in which the decision maker was charged with making findings of fact and then applying the governing law to those facts. This case presents the novel question of what due process demands when the decision maker is presented with only a question of law.

Third, it appears that in the prior cases decided by this Court involving deprivations of property rights, the aggrieved individual was entitled to an automatic appeal of the initial decision that terminated his rights. This case presents the unique situation in

which a judicial decision deprived a litigant of his property rights and that litigant did not have an absolute right to appellate review.

## **VIII. STATEMENT OF THE CASE**

### **A. Factual Background**

Leiser is a law firm located in Fairfax County, Virginia. McCarthy was formerly employed by Leiser as an attorney, and Argyriadis is McCarthy's wife.<sup>1</sup> In March 2009, Leiser filed a lawsuit against McCarthy and his wife, setting forth ten counts of various state law intentional tort causes of action arising from and during McCarthy's employment by Leiser. For purposes of this appeal, the only relevant claims are those articulated in Counts 2, 7, and 10 of Leiser's complaint (CL 2009-0003041) – alleging against both McCarthy and his wife the common law causes of action of tortious interference with business expectancy and contract, as well as common law and statutory civil conspiracy to injure business reputation, trade, business, or profession, in violation of VA. CODE ANN. §§ 18.2-499 and -500 (Michie 2009).

The relevant factual allegations are stated in Section B "Statement of Facts" and Counts 2, 7, and

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<sup>1</sup> When referenced collectively, McCarthy and Argyriadis will be referred to as "McCarthy" unless in a particular context that short-hand reference is ambiguous or confusing. To avoid sounding stilted, this petition will refer to Leiser by the pronoun "he" rather than "it."

10 of Leiser's complaint (R. at 2-9, 11-14, 19-21, 23-25), and are briefly summarized here. In early 2007, McCarthy, acting as an agent and employee of Leiser, met with one of Leiser's clients – Client W – and presented to him a representation agreement that he had drafted, which purported to set forth the terms under which Leiser would agree to represent Client W in a legal malpractice case. By its express terms, that agreement diverted 25% of Leiser's anticipated contingency fee on Client W's case, to McCarthy, directly, in order to pay him a "bonus" for his work on that case. McCarthy and Client W executed that representation agreement containing that "bonus" payment, despite the fact that that provision was never authorized or approved by Leiser, and in fact, had been expressly rejected by him.

While McCarthy was still employed by Leiser, he and his wife conspired together and devised the scheme by which they attempted to divert the anticipated proceeds from Client W's lawsuit – funds that would rightfully belong to Leiser – to McCarthy, instead. McCarthy and his wife engaged in this scheme in order to circumvent Leiser's decision refusing to guarantee him a bonus for his work on Client W's case. They also conspired to organize a simultaneous walk-out of many of the firm's other associate attorneys.

Leiser's complaint, which sought hundreds of thousands of dollars in both compensatory and punitive damages, alleged that McCarthy and his wife

were motivated by actual malice – spite, hatred, ill-will, grudge, and the desire to seek revenge against Leiser for his refusal to accede to McCarthy’s demand for a bonus. McCarthy and his wife’s overriding purposes in engaging in the described tortious misconduct were to enrich McCarthy at the expense and detriment of Leiser – his employer; to secure the loyalty of Leiser’s clients to McCarthy; and finally, to economically injure Leiser.

## **B. Procedural History**

McCarthy and his wife filed a demurrer, arguing several alternative bases upon which the trial court should dismiss Leiser’s claims. On 4/30/10, after oral argument, the trial court sustained McCarthy’s demurrer to all three Counts asserted against his wife, without leave to amend and without explanation. The effect of that ruling was to dismiss, with prejudice, McCarthy’s wife from the lawsuit. As an afterthought off the record, the court also dismissed Count 10 as to McCarthy, also without leave to amend. (App. at 1-2). The effect was to dismiss, with prejudice, Leiser’s common law and statutory civil conspiracy claims against McCarthy.

On 4/11/11, the date scheduled for trial, Leiser non-suited his remaining surviving tort claims against McCarthy. (App. at 8-10). He timely noted his appeal to the Virginia Supreme Court on 5/10/11. (App. at 47-49). However, in Virginia, there is no automatic right to appellate review of a civil trial court decision

such as this one. *See Smith v. Commonwealth*, 172 S.E. 286, 287 (1934) (stating the limited circumstances in which the Virginia Supreme Court must accept an appeal as a matter of right). On 9/9/11 the Supreme Court of Virginia entered an order refusing Leiser's petition for appeal, stating simply that, "the Court is of opinion there is no reversible error in the judgment complained of." (App. at 7). Leiser timely filed a Petition for Rehearing which was summarily denied by written order dated 11/14/11. (App. at 17).

## **IX. PRESERVATION OF FEDERAL QUESTIONS FOR REVIEW BY THIS COURT**

Leiser raised this due process claim in Assignment of Error No. 5 and Section IV (F) of his Petition for Appeal to the Supreme Court of Virginia (App. at 25-27, 31-39), as well as in Section IV of his Petition for Rehearing. (App. at 18-24). But that court did not address the claim. "With 'very rare exceptions,' we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997), quoting *Yee v. Escondido*, 503 U.S. 519, 533 (1992).

When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and

the aggrieved party bears the burden of defeating this assumption, by demonstrating that the state court had a ‘fair opportunity to address the federal question that is sought to be presented here.’ *Adams* at 520 U.S. 83, 86-87, citing *Board of Directors of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) and quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981).

Since the Virginia Supreme Court did not address Leiser’s due process claim, he bears the burden of demonstrating that the issue was properly presented to that court. The issue was comprehensively addressed in Leiser’s Petitions for Appeal and for Rehearing. The question, then, is whether Leiser properly preserved the issue for appeal from the trial court. Because the issue was not presented to the trial court, at first blush, Virginia’s contemporaneous objection rule, VA. R. S. Ct. 5:25 (Michie 2009), requiring that objections be “stated with reasonable certainty at the time of the ruling,” *Id.*, seems to constitute an adequate and independent state ground that would preclude this Court’s exercise of jurisdiction over this case.

But Leiser contends that the circumstances of this case defeat the *Adams* presumption. This case presents one of those “rare circumstances” in which “unyielding application of the general rule would disserve any perceivable interest.” *Lee v. Kemna*, 534 U.S. 362, 379-380 (2002). That is so because the trial court deprived Leiser of the opportunity to note his

due process objection, and, consequently, he should not be penalized by application of the contemporaneous objection rule. His procedural default was rendered moot by the trial court's actions that deprived him of the opportunity to raise that objection.

Leiser filed his motion for reconsideration on 5/7/10. (App. at 50-56). On 5/13/10 the trial court entered in chambers an order suspending, for thirty days, its 4/30/10 final order sustaining the demurrer.<sup>2</sup> (App. at 15-16). Shortly thereafter, the judge's law clerk notified Leiser by telephone that a hearing on his motion for reconsideration was scheduled for 7/23/10. She noted a comment on the Scheduling Conference Screening form that "Per L[aw] C[lerk] 13, case should be set for Friday Motions Hearing on Motion to Reconsider." (App. at 13-14). That was the final valid act of the trial court before it lost jurisdiction over those Counts of the complaint as to which it had sustained McCarthy's demurrer, with prejudice.

Under VA. R. S. Ct. 1:1 (Michie 2009), a trial court retains jurisdiction over a case for twenty-one days after entry of a final order, unless before that time it enters an order suspending the entry of its final order. *Norris v. Mitchell*, 495 S.E.2d 809, 811-812 (1998). The court's 4/30/10 order sustaining McCarthy's demurrer was a final order. *Id.* By virtue of the

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<sup>2</sup> The trial court presumably did so to give it time to consider Leiser's motion for reconsideration. A copy of that suspending order was never mailed to Leiser, who was unaware of the duration of the order or even that it had been entered.

entry of the thirty day suspending order on 5/13/10, the trial court retained jurisdiction over the case until 6/12/10, at which time its order sustaining the demurrer became final, by operation of law. But on 7/21/10, two days before the scheduled hearing on Leiser's motion for reconsideration, the court entered an order summarily denying that motion and removing the scheduled hearing from the 7/23/10 docket. (App. at 11-12). That order was entered in chambers without affording counsel the opportunity to note its objections – in particular, the due process objection. The order stated that, “[e]ndorsement of this order by counsel of record for the parties is waived in the discretion of the court. . . .” (App. at 12). That order – entered almost six weeks after the trial court lost jurisdiction over Counts 2, 7, and 10 – was a nullity, and void *ab initio*.

Leiser was entitled to and did rely on the court's last valid act that it took before it lost jurisdiction over the case – notification to him that it had scheduled a hearing on his motion for reconsideration. He reasonably believed that the trial court would not have scheduled a hearing to be held long after it had lost jurisdiction over the case. Had the trial court conducted the promised hearing on the motion for reconsideration before it lost jurisdiction over the case, Leiser was prepared to and would have had the opportunity to object on due process grounds if the court denied the motion for reconsideration, but once again declined to articulate the reasons for its decision. Leiser's reasonable reliance on the trial court's decision to grant a hearing on his motion for reconsideration obviated the need for any further action on

his part. He was not obligated to alert the trial court to his due process objection by supplementing his objections to the 4/30/10 order sustaining the demurrer, because that order would no longer be the “final” order. By allowing the clock to run out on its ability to exercise jurisdiction over the case, the trial court inadvertently – but nevertheless, unfairly – deprived Leiser of the opportunity to raise his constitutional objection to its ruling. Having been unfairly deprived of that opportunity, Leiser should not be penalized for the trial court’s “pocket veto” of the motion for reconsideration.

The order sustaining McCarthy’s demurrer was completely opaque as to the reasons for the trial court’s decision. This Court has recognized that, “. . . ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action.” *Michigan v. Long*, 463 U.S. 1032, 1041 (1983), *quoting Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940). Against that backdrop this Court has unequivocally asserted that, when determining whether its exercise of jurisdiction over a dispute is precluded by adequate and independent state grounds, it will “. . . ascertain for itself . . . whether the asserted non-federal ground independently and adequately supports the judgment.” *Michigan*, 463 U.S. 1032, 1038, *quoting Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931). *Accord, Lee v. Kemna*, 534 U.S. 362, 375-376 (2002).

As in *Lee, supra*, there does not appear to be any published Virginia decision that “directs flawless compliance” with the contemporaneous objection rule “in the unique circumstances this case presents.” *Id.* at 382. Leiser should not be required to object to the trial court’s failure to explain its dispositive decision, when he has relied in good faith on the court’s scheduling of a hearing on a motion for reconsideration which would have obviated his oversight and rendered the court’s initial ruling harmless error. Therefore, this Court should find that the contemporaneous objection rule does not provide an adequate and independent state-law ground that hinders its consideration of Leiser’s federal claims. *Id.* at 387.<sup>3</sup>

Leiser’s petition for appeal at § IV(G) argued that the “ends of justice” exception to the contemporaneous objection rule applied. (App. at 40-42). Citing to *Brown v. Commonwealth*, 380 S.E.2d 8, 11 (1989), Leiser contended that the trial court’s denial of his right to procedural due process of law was so contrary to fundamental notions of justice that it constituted an error whose character squarely meets the reason for the “ends of justice” exception to Rule 5:25. The error was “clear, substantial, and material . . . that to permit it to pass uncorrected would seriously undermine the integrity of the judicial system.” *Id.*

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<sup>3</sup> Leiser raised the foregoing argument in Section III of his Petition for Appeal to the Virginia Supreme Court. (App. at 28-30).

Leiser went on to explain that under the “for good cause shown” exception, where the reason for the objection would be immediately apparent, strict compliance with Rule 5:25 is not necessary. *Smith v. Commonwealth*, 182 S.E. 124, 127 (1935); *Evans v. Commonwealth*, 170 S.E. 756, 763 (1933). Leiser *did* object to the sustaining of the demurrer and to the denial of his request for leave to amend the complaint, and expressly stated some – but not all – of the reasons for his objections. The trial court’s failure to articulate the legal and factual bases for its rulings (a) sustaining the demurrer, and (b) declining to grant leave to amend, was immediately apparent from its written order and lack of explanation from the bench. Therefore, the “for good cause shown” exception to Rule 5:25 applied.

Based upon all of the foregoing, Leiser’s federal due process claim was properly preserved at the trial court level, notwithstanding the fact that he did not expressly raise the objection there. That oversight does not preclude this Court’s exercise of jurisdiction over this case because the federal question was properly presented to the Supreme Court of Virginia which had a fair opportunity to address it.

Although that court’s order was silent as to why it refused the appeal, its denial of discretionary review “express[ed] no view as to the merits [of Leiser’s due process claim].” *See, Yee* at 533. Therefore, that court’s refusal of Leiser’s petition for appeal poses no obstacle to this Court’s review of the federal questions presented here. *See generally*,

*Dept. of Revenue of Ky. v. Davis*, 553 U.S. 328, 337 (2008); *Pacific Gas and Elec. Co. v. Public Util. Comm. of Cal.*, 475 U.S. 1, 7 (1986) (granting *certiorari* notwithstanding the highest state appellate court's decision denying discretionary review).

## **X. SUMMARY OF ARGUMENT**

The issue in this case is whether the process afforded by the state trial court comported with fundamental notions of due process of law mandated by § 1 of the Fourteenth Amendment to the United States Constitution. It is a question of law that is subject to a *de novo* standard of review. The due process clause guarantees a meaningful opportunity to be heard before the government may deprive a litigant of his property rights. According to the Virginia Supreme Court, a tort lawsuit is a property right. Therefore, before a trial court may deprive a litigant of his property right by sustaining with prejudice a demurrer to his tort claims, thereby extinguishing those claims, it must provide him with a meaningful opportunity to be heard.

Implicit in the right to a meaningful opportunity to be heard is the right to be heard by an impartial tribunal that fairly adjudicates a claim by applying the governing law to the facts that have been developed in the record, and that does so in a transparent manner, by articulating the legal and factual bases for its decision. When instead, a court extinguishes a

property right by rendering a decision that denies a claim, dismisses a party, or disposes of an entire case, without explaining the reasons for its decision – as occurred in this case – the court thereby deprives the litigant who asserted the claim of a meaningful opportunity to be heard.

The essence of due process of law is reverence for a fundamental principle that is intrinsic to our constitutional democracy – absolute power should not be vested in a single individual or governmental entity. In order to show deference to this principle, either a safety net or a safety mechanism must exist to protect individuals from the arbitrary and capricious deprivation of their rights by the government. That safety net is triggered after the initial governmental decision is made, in the form of an absolute right to appellate review of an adverse decision. In the absence of that safety net, a safety mechanism that operates concurrently with the decision-making process must be implemented. That safety mechanism is the requirement that the decision maker operate “in the sunshine,” by articulating the legal and factual bases for his decision that deprives a person of his property rights. Such an explanation will help to facilitate a meaningful opportunity for discretionary appellate review.

When a litigant has no automatic right to have an adverse decision reviewed by an appellate tribunal, a lower court’s ruling granting a dispositive motion *must* be supported by findings of fact – where applicable – and conclusions of law; anything less

renders that ruling a nullity. This rule is compelled by this Court's decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970) and the balancing test adopted by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Application of that balancing test results in the determination that the minimal fiscal and administrative burdens imposed by this rule are far outweighed by the significant reduction in risk of erroneous deprivation of constitutional rights by the decision maker, and the enhancement of judicial efficiency and economy.

## XI. ARGUMENT

### A. *Mathews v. Eldridge* adopted a balancing test to determine which procedural due process requirements enunciated in *Goldberg v. Kelly* apply in any particular situation when government action deprives a person of his property rights

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), this Court held that, “[t]he fundamental requisite of due process of law is the opportunity to be heard.” *Id.* at 267 (internal citations omitted). The issue before that Court was the extent to which procedural due process must be afforded to welfare recipients in an informal pre-termination *administrative* hearing designed to determine whether those welfare benefits should be discontinued. Recognizing that

welfare benefits constitute a property right of the recipient, the *Goldberg* court held that,

. . . where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . . Finally, the decision maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. . . . To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on. . . . And, of course, an impartial decision maker is essential. *Id.* at 397 U.S. 254, 270-271 (internal citations omitted).

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court recognized that, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334, quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The determination generally depends on consideration of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function

involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge* at 424 U.S. 319, 335.

**B. In the context of judicial proceedings to adjudicate civil claims, where there is no guaranteed right to appellate review, due process demands that trial courts articulate the reasons for their dismissal of a party's claim**

**1. The substantial private interest that is affected by a trial court's ruling on a dispositive motion is the ability to pursue a civil claim**

According to the Supreme Court of Virginia, an action sounding in tort is a property right. *Huaman v. Aquino*, 630 S.E.2d 293, 296-297 (2006). When a trial court grants a dispositive motion, the effect is to extinguish that property right. In this case, the trial court's ruling sustaining McCarthy's demurrer and dismissing with prejudice certain tort claims asserted by Leiser, extinguished – and thereby deprived – Leiser of its property rights in pursuing those claims.

Unlike the rights to welfare benefits or to a driver's license, the right to have a tort claim adjudicated by a court of law is a fundamental right. The "right" to a driver's license is subject to many threshold requirements, including age restrictions, citizenship and residency requirements, successful completion of a vision test, passing a written or oral exam

indicating knowledge of the rules of the road, and demonstrating proficiency in operating an automobile. Similarly, the right to welfare benefits is subject to citizenship and residency requirements and proving that one's income falls below established limits. But not only are there hurdles to acquiring the right to welfare benefits or a driver's license; those rights can also be forfeited through a variety of means.

By contrast, the right to have a tort claim adjudicated by a trial court is a fundamental right that is automatically conferred on every person. It is a right that belongs equally to adults and infants, convicted felons, incarcerated prisoners, illegal aliens, foreigners, non-residents, the physically handicapped and the mentally incompetent. Even dead people have the right to maintain certain tort actions through their estates. If due process requires the *administrative* decision maker to articulate the legal and factual bases for his decision to *temporarily* terminate a person's welfare benefits or suspend his driver's license, then, *a fortiori*, that requirement must be met at the judicial level in order to protect the fundamental right to pursue a tort claim.

**2. In the absence of an automatic right to appellate review, there is substantial risk of an erroneous deprivation of a litigant's property rights when a trial court declines to explain the rationale for its ruling granting a dispositive motion**

In *Goldberg v. Kelly*, the requirement that the government disclose the reasons for its decision terminating the recipient's welfare benefits was predicated on the Court's recognition of the high risk of "honest error or irritable misjudgment" by the official charged with making the decision. *Id.* at 266. That substantial risk was found to exist notwithstanding the automatic right of the welfare recipient to a *de novo* review of the initial decision. *Id.* at 261. In the context of a civil trial court's adjudication of a litigant's rights, that risk is magnified where there is no guaranteed appellate review of that decision.

In Virginia there is no appeal as of right from the decisions of trial courts of record that adjudicate civil tort claims. Instead, those cases are subject to the discretionary appellate jurisdiction of the Virginia Supreme Court. *Smith v. Commonwealth*, 172 S.E. 286, 287 (1934). As a practical matter, then, the trial court is the court of first and last resort for most litigants. Consequently, there is an unacceptably high risk that some trial court judges – knowing that the likelihood of their decisions being reviewed on appeal is statistically low – will either be lulled into a sense of intellectual complacency, or emboldened to ignore the governing law, disregard the critical facts, and

exercise discretion they do not have in order to reach results that they personally favor.

**a. In this case, the trial court's order sustaining the demurrer without leave to amend, entered without explanation, deprived Leiser of his due process rights**

McCarthy's demurrer speculated that Leiser filed the case against McCarthy's wife out of "spite" and for other unspecified "improper purposes" (R. at 38), but gave no factual support for that contention. In his written response, Leiser explained that, when ruling on a demurrer, the trial court is required to accept as true all of the allegations of fact that are stated in the complaint, all facts impliedly alleged, and all reasonable inferences that flow from those facts. *Riverview Farm Associates Virginia General Partnership v. Board of Sup'rs of Charles City County*, 528 S.E.2d 99, 103 (2000). When considering a demurrer, "the sole question to be decided by the trial court is whether the facts thus pleaded, implied, and fairly and justly inferred are legally sufficient to state a cause of action against the defendant." *Thompson v. Skate Am., Inc.*, 540 S.E.2d 123, 126-127 (2001). "A demurrer presents only a question of law to be decided by the court." *Tazewell County Sch. Bd. v. Snead*, 92 S.E.2d 497, 500 (1956).

In his written response to the demurrer (R. at 73), again at oral argument (App. at 4-6), then in his objections to the trial court's order (App. at 2-3), and, finally, in a timely filed motion for reconsideration

(App. at 50-56), Leiser expressly requested leave to amend any count as to which the court sustained McCarthy's demurrer. Leiser's argument was premised upon VA. R. S. Ct. 1:8 (Michie 2009) which states that, "leave to amend shall be liberally granted in furtherance of the ends of justice," and *Mortarino v. Consultant Engineering Services, Inc.*, 467 S.E.2d 778 (1996), which interpreted Rule 1:8 and held that, ordinarily, it is an abuse of discretion for a trial court to decline to grant leave to amend where the plaintiff has not previously requested it and where it will not result in prejudice to the defendant. *Id.* at 782. Despite its actual knowledge that Leiser had not previously requested leave to amend and that the trial date was nearly a year away (App. at 57), the trial court denied Leiser's request for leave to amend, without offering any explanation for that decision. Contrary to well-settled principles, the trial court applied a "one strike and you're out" rule to Leiser's complaint. It entered its order, uttering only an oblique and cryptic comment from the bench that, ". . . as troubled as I am about the remaining counts [against McCarthy], . . . I believe it [sic] survives a demurrer." (App. at 4-5).

Leiser steadfastly maintains that under the circumstances of this case, it was an abuse of the trial court's discretion to decline to grant leave to amend, but that such leave was unnecessary because the complaint was well-pled as to each and every cause of action that was dismissed with prejudice and without explanation by the trial court. The injustice of this

case underscores the mischief that will inevitably occur unless this Court implements appropriate safeguards to protect litigants' constitutional rights to due process of law.

**b. The trial court's decision to dismiss Leiser's tort claims was apparently based on either its misunderstanding of the law or its antipathy toward those claims**

Besides the cryptic comment noted above, the trial court offered no explanation for its ruling. The only other clue that may help to explain it is the bald assertion in McCarthy's demurrer, opining that Leiser had filed the case against McCarthy's wife out of spite and for other unspecified "improper purposes." (R. at 38).

The judge's ruling that dismissed without leave to amend – and without explanation – the claims against McCarthy's wife, raises serious concerns about whether he exercised the judicial discipline that was constitutionally required of him to adjudicate the demurrer based solely upon a strict application of the governing law to the facts of the case that were developed in the record. At the demurrer stage, the court was required to accept as true all of the factual allegations asserted against McCarthy. § X(B)(2)(a), *supra*. But the court's ruling and lack of explanation for it lends credence to the inference that the court was swayed by McCarthy's bald statement

that Leiser filed the lawsuit out of “spite” and for other “improper purposes.” If the court was so swayed, then it apparently accepted that premise despite the absence of any factual support in the record.

Its acceptance of McCarthy’s premise is the most logical explanation for its decisions to dismiss McCarthy’s wife from the lawsuit and refuse to allow Leiser leave to amend, notwithstanding the Virginia Supreme Court’s admonition that leave to amend “shall be liberally granted in furtherance of the ends of justice.” VA. R. S. Ct. 1:8 (Michie 2009). The court’s ruling on the demurrer may have stemmed from the sound bite created by the case – “law firm sues its former employee *and his wife*.” The absence of a legitimate explanation as to why the court dismissed Leiser’s claims with prejudice, coupled with the silence surrounding that decision, raises the inference that the trial court exercised discretion it did not have to dismiss a case it did not like, effectively ruling that the courthouse doors would remain closed to this particular claim.

**c. Unless this Court adopts the rule advocated here, trial court judges will feel free to exercise discretion they do not have to dismiss cases they do not like**

Unfortunately, what occurred in this case is not an anomaly. In 2007 Leiser litigated a defamation lawsuit against a former client arising out of her

publication of numerous false and defamatory statements on various internet websites. After the conclusion of a motions hearing over which he had just presided, a different Fairfax County Circuit Court judge initiated a private conversation with Leiser and told him that, “the judges of this court are talking about your case and they don’t like it. I strongly encourage you to settle it.” (App. at 61-66).

Those are chilling words for a litigant to hear from a judge. Leiser contends that the judge’s cryptic warning was meant to convey that regardless of the legal and factual merits of Leiser’s case, the judges of that court would likely rule adversely to him in that case, or perhaps in others, because of their personal antipathy toward his claims. The most reasonable interpretation of that warning was that, notwithstanding his demand for a jury trial, Leiser’s case had already been decided by the judges of that court – perhaps while they sat around the lunch table – before the first witness had been sworn, before a single exhibit had been submitted into evidence, and before the first argument had been made. In the final analysis, a judge’s *personal* opinion – even if it has the support of his colleagues – should have no more relevance to the outcome of a case than the personal opinion of the bailiff or the clerk who date-stamped the complaint. The judge’s statement disclosing the sentiments of his colleagues toward Leiser’s defamation case spoke volumes about the urgent need to adopt the rule that Leiser advocates in this case.

**d. The Virginia General Assembly has tacitly recognized that due process of law is routinely denied litigants in the context of child custody cases**

The Virginia General Assembly has dictated certain circumstances – *e.g.*, child custody determinations – in which trial courts *must* announce the legal and factual underpinnings for their decisions. Virginia has enacted a statute that sets forth ten factors that a trial court must consider when it fashions equitable relief concerning the award of custody or visitation of minor children. VA. CODE ANN. § 20-124.3 (Michie 2009) has a curious sentence appended to its end which reads, “The judge shall communicate to the parties the basis of the decision either orally or in writing.” Presumably, the reason for the intrusion by the political branches of government into the conduct of judicial proceedings in this realm, is the profound impact that the exercise of a trial court’s discretion has upon the fundamental rights of both parents and their children – who are likely not even parties to the case and who may not be independently represented by counsel. The legislature’s action in this context, to protect the due process rights of parents and their children, was almost certainly driven by the vacuum resulting from the judicial branch’s routine failure to act to protect those rights.

But that sentence appended to the end of Virginia’s child custody statute is mere surplusage. While it correctly states the law, it is a violation of the

doctrine of separation of powers for the political branches of government to deign to dictate to the judicial branch which types of cases merit adherence by the courts to fundamental principles of due process of law, and which specific due process guarantees will be afforded. Whether a particular cause of action is or is not popular with the legislative and executive branches of government – and by extension, with the general public who form those branches' constituencies – is immaterial to the determination as to whether it warrants due process protection. Moreover, the extent of the due process protections that are constitutionally required in a particular scenario is inherently a judicial determination that must be made in accordance with the *Mathews v. Eldridge* balancing test.

- 3. Requiring trial courts to articulate the legal and factual bases for their decisions granting dispositive motions in civil cases will substantially minimize the risk of an erroneous deprivation of a litigant's due process rights**
  - a. The balancing test prescribed by *Mathews v. Eldridge* requires – at a minimum – that *either* an aggrieved litigant be afforded the automatic right to appellate review of an adverse decision, *or* the decision maker articulate the legal and factual bases for that decision, in order to facilitate discretionary appellate review**

This Court has acknowledged that, “[A]lthough there are occasions when an explanation of the reasons for a decision may be required by the demands of due process, such occasions are the exception rather than the rule.” *Harris v. Rivera*, 454 U.S. 339, 344 (1981). This case presents one such exception to that general rule.

Inherent in the concept of due process of law is the principle that absolute power should not be vested in a single individual or governmental entity. “Power tends to corrupt and absolute power corrupts absolutely.” *See, Wyman v. James*, 400 U.S. 309, 335 (1971) (quoting Lord Acton). In order to respect this

maxim, either a safety net or a safety mechanism must be provided to individuals in order to protect them from the arbitrary and capricious deprivation of their rights by the government. That safety net is triggered *after* the adverse ruling, and is provided in the form of an absolute right to appellate review of a governmental decision that deprives a person of his property rights. Alternatively, in the absence of that safety net, a safety mechanism that operates *concurrently* with the decision-making process must be implemented. That safety mechanism is the requirement that the decision maker act transparently, by articulating the legal and factual bases for his decision, in order to facilitate discretionary appellate review.

The *Harris* court noted the “well-established presumption that [a trial court] judge adhere[s] to basic rules of procedure.” *Harris*, at 454 U.S. 339, 347. That presumption is appropriate in the context of a criminal proceeding such as the one in *Harris*, where, notwithstanding that presumption, the aggrieved defendant is afforded an automatic right to appellate review of the court’s decision. But where, as here, the trial court’s decision is not subject to automatic appellate review, that presumption cannot apply. Indeed, the very existence of appellate courts, which review questions of law, *de novo*, refutes the presumption that trial court judges’ conclusions of law are afforded the presumption of correctness.

In the absence of a right to automatic appellate review of a trial court's conclusions of law, the presumption that the judge followed rules of procedure is not sufficiently strong to defeat the requirement that he articulate the reasons for his decisions on dispositive motions. To hold otherwise requires acceptance of the premise that when a litigant enters the courthouse doors he has arrived in the promised land of justice and due process of law, where the judge should be freed from the shackles of having to explain his dispositive rulings. But to accept that premise is to engage in sheer fantasy, for, when trial courts decline to articulate the legal and factual bases for their rulings, it is generally because – they can't.

Public policy is served by making judicial decisions transparent and due process requires it in circumstances where there is no guarantee that those decisions will be subject to appellate review. It serves neither the interests of litigants nor the broader interests of our justice system to obscure from public view the reasons for a court's decision that deprives a person of his property rights. Indeed, such secrecy has a "star chamber" quality and rightfully breeds distrust and skepticism concerning the integrity of the judicial process. The only interest such a policy serves is the interest of trial judges in minimizing the public's scrutiny of their decisions; shielding them from valid criticism; and insulating them from effective appeals of their rulings. But the Fourteenth Amendment was not ratified to protect judges; it was enacted to protect the people from the tyranny of

government through the arbitrary and capricious deprivation of their rights by incompetent or unscrupulous government officials. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (The “touchstone of due process is protection of the individual against arbitrary action of government.”).

While the executive and legislative branches may often have legitimate reasons – such as national security – that justify the opacity of their decision-making processes, decisions of the judicial branch should not be shrouded in secrecy; instead, they should be made “in the sunshine.”<sup>4</sup> The governing law is always within the public domain as are the facts that have been developed in the record.<sup>5</sup> Likewise, the trial court’s rulings are within the public domain; therefore, there is no justification for keeping the judicial thought process that applies the law to the facts, in deciding dispositive motions, out of the public domain. In the absence of the safety net of mandatory appellate review, *Goldberg* constitutionally mandates such transparency when the court’s ruling will dispose of a litigant’s liberty or property rights.

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<sup>4</sup> Perhaps the only exception to this rule concerns jury deliberations, which are kept secret to protect their independence and integrity.

<sup>5</sup> In limited circumstances, the facts may not be in the public domain – for example, in cases involving minor children (*e.g.*, child custody determinations) and cases that implicate national security concerns (*e.g.*, certain terrorism cases).

An explanation for the decision will help to facilitate a meaningful opportunity for discretionary appellate review and such transparency ensures that our justice system maintains its integrity and the public's confidence. Four of the five due process requirements set forth by the *Goldberg* court – timely notice, ability to confront and cross-examine witnesses, the right to be represented by counsel, an impartial tribunal – clearly apply to judicial proceedings. *Id.* at 266-271. Why, then, would trial court judges be exempt from the fifth requirement – that they base their decisions solely on evidence adduced at the hearing and that they articulate the reasons for those decisions? *Id.* at 271. As Justice Brandeis wrote in 1893, in a letter to his fiancée, “If the broad light of day could be let in upon men’s actions, it would purify them as the sun disinfects.”

**b. Providing due process of law  
cannot be reduced to a shell  
game**

There may be a temptation to relieve judges of the duty to articulate the reasons for their dispositive rulings, by shifting that burden to litigants who are curious about the reason(s) why their cases were dismissed. Currently, they are left scratching their heads in an effort to deduce those reason(s) from the facial expressions of the presiding judge, any oblique comments he happens to make, and, perhaps, by reading the moving party’s briefs filed in support of

the dispositive motion, on the theory that the trial court must have relied on one of the reasons suggested by the moving party. This Court should decline an invitation to leave litigants roaming the wilderness, foraging for scraps and clues that might explain their plight. To do so turns the due process guarantee into a shell game played between the court and the litigant whose case has been dismissed.

In this case, McCarthy offered three alternative arguments for sustaining his demurrer. (R. at 35-44, 57-63). Which of those three reasons – if any – the trial court relied upon remains a mystery. Leiser maintains that none of the reasons asserted for dismissal of his case had any legal merit and the refusal of the trial court to explain its ruling leaves him understandably suspicious of the real motive behind it. In the more generic situation, suppose the moving party postulates reasons A, B, C, D, E, F, G, . . . X, Y, Z as to why the trial court should grant the dispositive motion. The non-moving party should not have to attempt to read the court's mind in order to discern that it relied upon reason G, but disregarded the remaining twenty-five reasons. It is the court's duty to explain to the party whose lawsuit was extinguished by the sustaining of the dispositive motion, the reason(s) why the court decided to deprive him of that property right. By stating in its final order dismissing the case, that it took that action because of reason G, the parties and the appellate courts are better able to focus on whether reason G was a correct reason for dismissing the case, rather than rehashing

each and every one of the other twenty-five arguments advanced by the moving party but rejected by the court.

- 4. There will be no appreciable fiscal or administrative burdens placed on the trial courts by mandating that they either provide an automatic right to appeal or else articulate the legal and factual bases for their decisions to sustain dispositive motions in civil lawsuits**
  - a. The *Goldberg* court held that administrative and fiscal burdens are not sufficiently weighty to justify deprivations of due process rights**

Arguably, imposing the procedural safeguard requiring trial court judges to explain their decisions granting dispositive motions will place *some* additional administrative burdens on them. These additional burdens are *de minimus* and are significantly outweighed by the resulting gains in judicial economy, efficiency, and the public's confidence in our justice system. Nevertheless, the additional administrative burdens – however slight – must be weighed against the benefits to litigants and to the justice system resulting from the imposition of the *Goldberg* requirements on trial court judges. *Mathews* at 424 U.S. 319, 335. In *Goldberg*, the fiscal burden arose primarily because the state was required to continue to pay welfare benefits until and unless it

provided a hearing comporting with fundamental notions of due process. The *Goldberg* court addressed that issue and concluded that in the context of welfare benefits, the increased administrative and fiscal burdens imposed on the State did not outweigh the competing interest in providing due process to welfare recipients before terminating their benefits. That court recognized “the primacy of the public interest in correct eligibility determinations and therefore in the provision of procedural safeguards.” *Id.* at 266.

In the context of judicial proceedings concerning civil lawsuits, no such fiscal burden is imposed on the State. The extent of the additional administrative burden imposed on trial court judges is the *de minimus* requirement that they articulate to the litigants at least the outline of the thought process that they presumably already engaged in to reach their decision. If, in the context of welfare benefits, where the recipient was entitled to a *de novo* review, the state’s interest in conserving its fiscal and administrative resources was subordinated to the recipient’s right to an explanation for the decision to terminate his benefits, then, *a fortiori*, in the context of judicial proceedings that are not subject to an automatic right of appeal, the negligible fiscal and administrative burdens resulting from the imposition of the requirement that trial court judges explain their rulings granting dispositive motions, cannot trump the

primacy of the public interest in correct judicial determinations.<sup>6</sup>

**b. Any *de minimus* administrative or fiscal burdens would be eclipsed by the enhancement of judicial economy and efficiency resulting from application of the *Goldberg* rule to trial court judges**

The *de minimus* administrative cost of implementing this rule is far eclipsed by the enhancement of judicial efficiency and economy resulting from its enforcement. Application of the rule requiring trial court judges to explain the bases for their decisions granting dispositive motions would result in not only more streamlined judicial proceedings at both the trial and appellate levels, but also better informed litigants, counsel, courts, and the general public. First, an explanation of the bases for the court's decision in a particular case would facilitate counsel's ability to focus a motion for reconsideration on the issues that were of concern to the trial court. That, in turn, would afford trial courts a better opportunity to

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<sup>6</sup> Because, in Virginia, the courts "speak through their written orders," *Berean Law Group, P.C. v. Cox*, 528 S.E.2d 108, 111 (2000), trial court judges may have to put pen to paper and jot down a few sentences to justify their dispositive rulings. More likely, they will state on the record the reasons for their decisions and instruct counsel to transcribe those reasons into the written order to be submitted for the court's endorsement.

correct their own mistakes and thereby prevent the needless waste of time, money, and resources necessary to enlist the aid of the appellate courts to correct those errors. Second, knowing the rationale for the trial court's decision will help litigants, their counsel, and the appellate courts to focus in on the erroneous findings of fact and conclusions of law that formed the foundation of the trial court's decision. Third, adherence to this rule, whereby litigants, their counsel, and the public are informed of the reasons for the judge's ruling, will help to instill confidence in and respect for our justice system.

**c. Applying the *Goldberg* rule to judicial proceedings will not open the floodgates to frivolous appeals**

Applying the *Goldberg* rule to civil trials would not place an undue burden on the appellate courts. An appeal would lie for a due process violation only when a trial court judge either declined to articulate the reasons for his decision granting a dispositive motion, or where the reason stated was on its face devoid of any legal or factual merit. Appellate courts are well suited to determine whether a trial court has sufficiently justified its decision to grant a motion that dismisses a party, a claim, or an entire lawsuit. It is important to recognize that trial court judges do not have a constitutional duty to make correct rulings. Their constitutional duty is limited to providing reasoned explanations for their dispositive decisions

that are grounded in the facts and the law of those particular disputes. More likely than not, a trial court judge who is reversed on appeal for insufficiently explaining his reasons for granting a dispositive motion, will be careful to explain his decisions in future cases over which he presides.

## **XII. CONCLUSION**

Etched in stone above the portico of the Supreme Court of the United States are the words, EQUAL JUSTICE UNDER LAW. Those four words constitute not merely a promise, but a sacred oath from our founding fathers as to the kind of justice system that every litigant is entitled to expect when he enters the courthouse doors. They represent what every litigant should expect to receive from every judge in every court in every case.

As a society, we have made tremendous strides toward making the “equal justice” part of the oath a reality. But with respect to the “under law” portion, we have quite a distance to go before our justice system lives up to its creed. The judge’s dismissal of this case without explanation is one in a sea of examples that illustrates the wide chasm that exists between the justice system that was promised to us by our founding fathers and the justice system that is delivered to us on a daily basis by the courts of the Commonwealth of Virginia, and, Leiser surmises, by the trial courts in the other forty-nine states.

That sacred oath promising equal justice under law has been rendered hollow, empty, and vacant by

some trial court judges who lack the judicial discipline to keep that promise. And that lack of judicial discipline fosters an environment in which judicial arrogance is allowed to flourish – arrogance that results in some judges providing no explanation at all for their rulings. Sometimes silence speaks louder than words. In the context of this case, the judge’s silence accompanying his ruling that was handed down from on high, really said, “I rule this way because I’m the judge, that’s why.” That is unacceptable. Nobody trusts that kind of ruling. Nobody ever has; nobody ever will; and nobody ever should. It rendered the trial court’s decision arbitrary and capricious and a deprivation of Leiser’s due process rights.

The courts’ handling of people’s day-to-day affairs determines whether our justice system will remain a trusted institution of government and the forum in which civilized people come to resolve their disputes. If judges fail to preside over the courts in a way that promotes fairness, equality, and justice, then people will not respect the courts because they will not be an institution worthy of respect. And if the public’s confidence in the integrity of our justice system is undermined and eroded, that does not bode well for our democracy.

Litigants have no constitutional duty to respect judges, but judges have a constitutional duty to respect litigants. If judges want the public to respect the courts then they must demonstrate their knowledge of and respect for the law – and the operative word is “demonstrate.” Only by articulating the

legal and factual bases for their decisions granting dispositive motions do judges fulfill that duty.

Requiring judges to justify and explain their rulings when there is no automatic right to appellate review, will have the salutary effect of exposing those emperors who wear no clothes – those judges who either do not know the law or who intentionally choose to ignore it, and instead, decide cases for reasons other than disciplined reliance on the law and the facts. Adherence to the *Goldberg* rule will ensure that when a judge dons his judicial robes he leaves his personal proclivities at home. And it will ensure that the only consideration that will inform his decision is the correct application of the governing law to the facts of the dispute. It will keep judges intellectually honest by imposing judicial discipline that is lacking among some of them, and that is indispensable to the proper administration of justice. By requiring greater judicial discipline and increased transparency in the judicial process, this Court can move our justice system closer to fulfilling its sacred oath to all of us – EQUAL. JUSTICE. UNDER. LAW.

Respectfully submitted,

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