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Return To Rowe Boulevard

Court of Appeals goes back to work with two new judges.

By Steve Lash
Daily Record Legal Affairs Writer

The Court of Appeals will make history this term even before it hears the first case of the September 2008 term on Thursday morning.

For the first time in its 232 years, Maryland's highest court will have three women among its seven members, with the addition this summer of judges Sally D. Adkins and Mary Ellen Barbera to the bench. They join Judge Lynne A. Battaglia.

"I think it represents women having full and equal participation in the legal profession," said Wendy B. Karpel, president of the Women's Bar Association of Maryland. "They are women who are not only talented jurists but add to the legal profession."

Adkins, Barbera and Battaglia are active members of the association, which aims to improve the status of women in the legal profession and in society by eliminating all forms of discrimination, Karpel said.

"Having these three women on Maryland's highest court goes a long way toward meeting these goals," added Karpel, an associate county attorney in Montgomery County.

Adkins, who was sworn in last June, succeeded Judge Dale R. Cathell, who reached the mandatory retirement age of 70 in July 2007.

Barbera, who will be sworn in Tuesday in a private ceremony, succeeds Judge Irma S. Raker, who reached the retirement age in April. Raker had succeeded Rita C. Davidson, the court's first female justice, who joined the bench in 1979.

Their appointments follow last December's addition of Judge Joseph F. Murphy Jr. The new members will make the oral arguments "interesting" for the first few months, as all seven judges get used to a new "working dynamic" in their questioning of attorneys, said University of Maryland law professor William Reynolds.

The judges will be "feeling each other out in the next several months," added Reynolds, the school's Jacob A. France professor of judicial process. "It's quite different from just adding one judge."

Reynolds, though, does not expect much of a shift in the court with the appointment of Adkins and Barbera.

Barbera, "like Judge Raker, is a lawyer's judge and decides cases in the way they are presented," Reynolds said when Gov. Martin O'Malley appointed Barbera to the high court this month.

Adkins "will be right in the middle of the current court," the professor said following Adkins' appointment in May. "She is a judge and not a politician, so she will not change the balance of the court."

Clashes in cyberspace and closer to home

Among the approximately 150 cases the Court of Appeals is expected to hear this term is a clash in cyberspace between the First Amendment right of people to speak and write anonymously and the ability of a person to pursue a claim for defamation based on anonymous comments posted on the Internet. Specifically, the court will consider whether the Constitution permits a trial judge to order an online newspaper to surrender the names of commenters to its blog site who have requested anonymity, but are alleged to have defamed a businessman by characterizing him as being a polluter.

The court also will consider if Baltimore's housing authority is immune from being sued by a mother and son who claim the boy suffered lead poisoning while in public housing.

In addition, the judges will delve into the hot-button issue of religious freedom when they hear arguments over whether a church can erect a huge electrical sign adjacent to the Baltimore Beltway over the Baltimore County zoning authority's objection.

In the Internet case, the court will consider Independent Newspapers Inc.'s argument that Queen Anne's County Circuit Judge Thomas G. Ross unconstitutionally ordered the company to surrender to Zebulon J. Brodie the names of two commenters to its Web site who, in an online exchange, said the Eastern Shore franchisee operated a "dirty and unsanitary-looking" Dunkin' Donuts and that "no one is cleaning the outside of the building and the [garbage is] wafting into the river that runs right alongside."

FILE PHOTO

Attorney Suzanne C. Shapiro wants the court to revive a lead-paint case against the Housing Authority of Baltimore City. HABC's failure to purchase sufficient insurance should not protect it from suit, she says.

On the Web site, the commenters identified themselves only as CorsicaRiver and Suze.

The newspaper, represented by veteran First Amendment attorney Bruce W. Sanford of Washington, D.C., and the Public Citizen Litigation Group, says the First Amendment protects the right of people to speak and write, even anonymously, and that this right can be infringed in a libel action only if disclosing the speakers' identity is essential to the claim and the plaintiff has a "realistic possibility of succeeding in the litigation."

In this case, Brodie's likelihood of victory is slim because the sentiments expressed were constitutionally protected opinions regarding the cleanliness of Brodie's store, the newspaper's attorneys state in its brief to the high court.

"The Internet has the potential to be an equalizing force within our democracy, giving ordinary citizens the opportunity to communicate at minimal cost their views on issues of public concern to all who will listen," the attorneys add.

"Whatever the reason for speaking anonymously, a [judicial] rule that makes it too easy to remove the cloak of anonymity will deprive the marketplace of ideas of valuable contributions," they state. The court's challenge, they say, is to fashion a test "that makes it neither too easy for deliberate defamers to hide behind pseudonyms, nor too easy for a big company or a public figure to unmask critics simply by filing a complaint that manages to state a claim for relief under some tort or contract theory."

Sanford, a partner at Baker & Hostetler LLP, serves as general counsel for the Society of Professional Journalists and has represented many news organizations, including the Tribune Co., The Hearst Corp. and National Geographic.

Brodie's attorney, E. Sean Poltrack, counters that the people who posted the comments are not entitled to shield their identities because their comments were clearly defamatory.

Accusing a restaurant of being dirty and a source of water pollution are factual allegations that would discourage potential customers, thereby harming Brodie's ability to make the shop a going concern, Poltrack added.

"The speech that is at issue in this case is defamatory per se and as such should not be afforded First Amendment protection," says Poltrack, an associate at Foster, Braden & Thompson LLP in Stevensville. "What would a third person think when they hear that" about a place to eat? he added.

The high court, on its own motion, chose to hear the case without having it first considered by the Court of Special Appeals. Arguments in the case, Independent Newspapers Inc. v. Brodie, No. 63 of the September 2008 term, have not yet been scheduled.

No coverage, no suit?

In the lead paint case, lawyers for Devonte A. Brooks will ask the court to reinstate a claim against the Housing Authority of Baltimore City, which says it has immunity against the suit.

Brooks and his mother, Kimberly Wright, say he contracted lead poisoning as a toddler due to the Housing Authority's negligent maintenance of the family's public housing at 107 Albemarle St. in the mid-1990s. The Baltimore City Circuit Court, in a decision upheld by the Court of Special Appeals, had granted summary judgment to the agency based on its argument that it was entitled to governmental immunity from suit.

Under Maryland law, a city agency lacks immunity if the General Assembly has specifically provided a cause of action against it and it can raise funds necessary to satisfy any recovery against it, such as by purchasing insurance, both sides agree.

The authority has argued successfully in the lower courts that the legislature had not rescinded the immunity and even if lawmakers had, the agency retained its immunity because it lacked sufficient insurance coverage to satisfy Devonte's potential recovery.

But Devonte and his mother say the legislature has permitted public-housing residents to sue the agency. In addition, the authority's lack of sufficient insurance coverage should not be a bar to it being sued, as the agency had a legal duty to have sufficient coverage, states the family's attorney, Suzanne C. Shapiro, in a brief to the Court of Appeals.

The agency cannot "manufacture its own immunity from lead-poisoning liability by claiming depletion of insurance coverage," Shapiro writes. The authority maintained a $500,000 policy, which was grossly inadequate to satisfy the 73 potential claims against the agency in the 1995-1996 policy year, she adds in the brief.

"It was foreseeable that [the insurance coverage] wasn't going to cover all the claims that were out there," Shapiro says in discussing the case.

The agency's brief, however, says it had no reason to anticipate a need for additional insurance coverage, because in no year prior to the purchase of the 1995-96 policy had claims ever "approached, much less exceeded, $500,000." The authority adds that state law places no specific dollar figure to the amount of insurance the agency must carry.

"The General Assembly could have specified a minimum amount of insurance coverage. … It did not," the authority's attorneys, J. Marks Moore III and Samuel M. Riley, both of Baltimore, write in the brief. "Although HABC reasonably believed the 1995-96 policy was sufficient to meet its potential liability for lead claims, the mere fact that it purchased the policy, under the applicable law, met HABC's statutory mandate to insure."

Arguments in Brooks v. Housing Authority of Baltimore City, No. 14 of the September 2008 term, are scheduled for Sept. 8.

Divine signage

The court, in the religion case, will consider arguments by the Trinity Assembly of God of Baltimore City Inc. that the Baltimore County Board of Appeals violated federal law by denying the church's 2002 request for a sign variance that would have permitted the assembly to put a 250-square-foot-sign, 25 feet in height, alongside the Baltimore Beltway. The church said the sign — which would be much larger than the 25-square-foot, six-foot-high signs allowed under current zoning regulations — would advance its religious mission by enabling the electronic display of Bible verses and directions to the church.

The board rejected the request, saying the extra-large, electronic sign would distract drivers at the already-dangerous spot where motor vehicles merge onto I-83 or I-695.

The church says the board's denial violated the federal Religious Land Use and Institutionalized Persons Act, which generally prevents governmental agencies from imposing substantial land-use burdens on a group's exercise of its religion, unless the agency has a compelling reason to impose such a burden.

Its signage, by providing directions and inspirational passages, is a form of religious exercise protected by the law, the church says. The board substantially burdened that exercise by limiting the sign's size, thus making it unable to be read from the highway during normal traffic flow, writes the church's attorney, C. William Clark of Towson, in its high-court brief.

In addition, the board had no compelling interest in denying the variance because no proof was presented showing that the large electronic sign would present a safety hazard to drivers, Clark added.

"In fact, a sign that is clearly readable to passing traffic would be less distracting to motorists than a smaller sign that is difficult to read from the highway," writes Clark, a partner at Nolan, Plumhoff & Williams Chtd.

But the board counters in its high-court brief that the church intends for the large, electronic sign to serve a marketing — and not a religious — purpose.

"We dispute that a large sign even fits the intended legislative meaning of 'religious exercise,'" writes the board's attorney, Peter Max Zimmerman, the people's counsel for Baltimore County. "It is an advertising exercise."

Arguments in the case, Trinity Assembly of God of Baltimore City Inc. v. People's Counsel for Baltimore County, No. 27 of the September 2008 term, are scheduled for Oct. 2.

More cases to come

Among the other cases the Court of Appeals will hear this term:

Jane Doe v. Montgomery County Board of Elections, No. 61 of the September 2008 term, will review a judge's decision to permit an Election Day referendum that if approved by voters would strike down a pending Montgomery County law banning discrimination against transgender individuals in employment, public accommodations, housing and cable-television and taxicab service.

Montgomery County Circuit Court Judge Robert A. Greenberg said the transgender-rights group Equality Maryland missed the deadline to challenge signatures on a petition calling for a referendum.

The group was required to file its challenge within 10 days of the board's verification of the signatures on Feb. 20, which would have set the group's filing deadline in the first week of March, Greenberg said. Equality Maryland, which filed its challenge on March 14, argues that the 10-day clock begins when the board formally approves a petition, which it did on March 6. Arguments in the case are scheduled for Sept. 8.

Potomac Valley Orthopaedic Associates v. Maryland State Board of Physicians, No. 18 of the September 2008 term, will examine the scope of the Maryland Patient Referral Law, designed to discourage doctors from ordering unnecessary diagnostic tests by removing the profit incentive

The state board says the law bars doctors from referring a patient to any diagnostic facility in which they have a financial interest. The orthopedists, who lost in lower courts, counter that the board's interpretation of the law is too broad, preventing doctors with in-office diagnostic equipment from best serving the immediate needs of their patients, who are often in great pain.

Arguments in the case are scheduled for Oct. 6.

Jones v. Maryland, No. 37 of the September 2008 term, will take up the question of whether Anne Arundel County detectives, without a warrant, violated James D. Jones' federal and state constitutional rights against unreasonable search by disregarding "no trespassing" signs and stepping around a six-foot-high privacy fence on his property before knocking on the front door of his house.

After five minutes, Jones' wife answered the door and led them to a car, in which the detectives found bloodstains. Jones was subsequently convicted of second-degree murder in the shooting death of Darnell Brown and sentenced to 25 years in prison. The Court of Special Appeals upheld the search, conviction and sentence. In its appeal to the high court, the state public defender's office argues that Jones "clearly demonstrated his desire to exclude trespassing, uninvited guests from his property." The state counters that the Court of Special Appeals correctly ruled that "police officers, who, on legitimate business, approach a dwelling to ask questions do not commit an unlawful search or seizure of property."

Arguments in the case are scheduled for Oct. 2.