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News and analysis of legal matters in Maryland

Cases to watch in the 2010 term

Judicial retirement, religious liberty and racial profiling all on the Court of Appeals' calendar

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Maryland's top court begins its 2010-2011 term Wednesday, a session in which the judges will examine the scope of a state constitutional provision close to their own hearts: the one requiring circuit court judges to retire upon reaching age 70.

The issue was bounced to the **Court of Appeals** from the **U.S. District Court** in Baltimore, which is considering whether the mandatory retirement of sitting jurists violates the Equal Protection Clause of the federal Constitution.

Retired Baltimore City Circuit Judge Charles G. Bernstein brought the federal case two months before he turned 70 on Dec. 29, arguing that the state constitution does not treat judges equally because it compels sitting judges to retire but permits non-judges older than 70 to be appointed to the judiciary by the governor or elected to the circuit court by popular vote.

The Maryland attorney general's office counters that no such distinction exists — that, under the state constitution, no one can remain or become an active judge after reaching age 70.

U.S. District Judge Benson E. Legg asked the Court of Appeals if the attorney general's interpretation is correct. (Legg also rejected Bernstein's request for an injunction that would keep him on the bench until the litigation is resolved.)

While the current lawsuit is over a circuit court seat, attorney Michael Wein, who has written extensively on federal and state appellate court processes, noted that the state constitution also requires Court of Appeals judges to retire at age 70.

MAXIMILIAN FRANZ

University of Baltimore School of Law professor Kenneth Lasson says a trial court erred in holding a trial over the Jewish holiday Shavuot over the plaintiff's objection. 'It's obvious to me and to others that the [lower] court was either unaware of the struggle for religious freedom in Maryland or did not countenance its importance,' he says.

"The Court of Appeals might find [the mandatory retirement issue] a little too close to home and are sensitive about that," Wein said.

"[But] the Court of Appeals is the appropriate place to decide that," added Wein, a solo practitioner in Greenbelt who is not involved in Bernstein's case. "They are familiar with the issue and know the [Maryland] constitution better than anyone else in the state."

The court will hear arguments in *Bernstein v. Maryland* on Sept. 7.

Bernstein's case is just one of about 160 the Court of Appeals is expected to hear during its September 2010 term. The court generally hears about four arguments on each of the 40 days it sits each session.

In another high-profile case, the court will consider whether a judge violated an orthodox Jewish litigant's right to religious freedom by holding the trial during the holy days of Shavuot.

It will weigh whether a judge erred in refusing to appoint a guardian for a man he found could not make a responsible decision for himself, in the belief that the man would not listen to a guardian anyway.

The Court of Appeals will examine the breadth of the Supreme Court's recent decision that the federal Constitution's right to keep and bear arms limits the states' ability to enact gun-control laws. Charles F. Williams Jr. argues that his gun-possession conviction should be overturned in light of that *McDonald v. City of Chicago* ruling.

The court will also hear the **Maryland State Police**'s appeal of an

order to surrender to the NAACP 10,000 documents related to how the agency followed up on citizens' complaints that they were singled out for traffic stops because of their race. The State Police argue the documents are personnel records exempt from disclosure under the state's Public Information Act, an argument the intermediate **Court of Special Appeals** rejected this year.

Scheduled during Shavuot

In the religious freedom case, Alexander H. Neustadter is appealing Montgomery County Circuit Judge Louise G. Scrivener's rejection of his request to suspend his medical-malpractice trial against **Holy Cross Hospital** of Silver Spring during Shavuot, which commemorates God having given the Jewish people the Torah, their sacred text. Orthodox Jewish law requires worship during the holiday and prohibits secular activities by the worshipers or their agents, such as an attorney.

Neustadter, through his trial attorney Ronald H. Jarashow, filed a motion with Scrivener on May 1, 2008, requesting that she suspend the trial on June 9 and 10. Scrivener rejected the request, citing the court's crowded docket and the imposition on jurors and witnesses.

Scrivener also rejected a reconsideration request, saying she had no "intention or any desire to affect Mr. Neustadter's religious observance" but that she could not push the trial into a third week.

With Neustadter and Jarashow absent from the courtroom, Holy Cross called two medical experts who testified without objection or cross examination that the doctors who did not reintubate Neustadter's father met the standard of care and should not be held liable in his death from respiratory failure.

The defense rested on June 10. The jury began and finished its deliberation the following day, when it returned a verdict for the hospital.

The Court of Special Appeals upheld Scrivener's decision not to suspend the trial, noting the scheduling conflicts the judge faced.

Neustadter's appellate attorneys, Rockville solo practitioners Rene Sandler and Stephen B. Mercer, petitioned the high court to review the case.

His petition attracted the attention of **University of Baltimore School of Law** professor Kenneth Lasson, who wrote a friend-of-the-court brief on behalf of himself and 11 other legal scholars urging the judges to order a new trial.

The Court of Appeals opens its new term on Wednesday.

"It's obvious to me and to others that the [lower] court was either unaware of the struggle for religious freedom in Maryland or did not countenance its importance," Lasson said.

Maryland has a "very strong history and very compelling history to achieve religious freedom for everyone," he added.

The state's first constitution, adopted in 1776, granted equal protection to "all persons professing the Christian religion" and required "a declaration of belief in the Christian religion" as a condition of holding any office of trust or profit in the state, including being a lawyer or serving as a juror, Lasson said.

This legal discrimination ended after a Presbyterian legislator from Hagerstown, Thomas Kennedy, mounted a seven-year campaign in the 19th century to get an equal rights act passed for Maryland's 150 Jews, Lasson added.

Kennedy's legislation, derided then as a "Jew bill," passed in 1825, Lasson said.

In his brief to the Court of Appeals, Lasson assailed the trial and appellate courts for being "more concerned with docket efficiency than fundamental liberty."

"By affirming a lower court's refusal to postpone trial so that petitioner could observe a Jewish holiday, the Court of Special Appeals casually ignored long held principles of constitutional civil liberties, in the process throwing to the wind fundamental notions of fairness and traditional American justice," he wrote.

Joining Lasson's brief were University of Baltimore law professors Rebecca Korzec, Robert H. Lande, John A. Lynch Jr. and Mortimer Sellers and former Dean Laurence M. Katz. **University of Maryland School of Law** professor Irving Breitowitz also signed on, as did Janet L. Dolgin and Monroe H. Freedman, both of Hofstra University; Nathan Lewin of Columbia Law School; Frank S. Ravitch of Michigan State University; and Steven H. Resnicoff of DePaul University.

Holy Cross' attorneys counter in papers filed with the high court that Scrivener's denial of the motion was grounded "in neutral and generally applicable principles of court docket management" and not targeted at Neustadter's freedom to exercise his religion.

The lawyers added that Neustadter's right to religious freedom was trumped by the court's compelling interest in managing its docket and "in the efficient and orderly administration of justice."

Holy Cross's lawyers, David A. Levin and Michelle R. Mitchell, did not respond to telephone messages seeking comment on the case Friday afternoon.

Levin and Mitchell are with **Wharton, Levin, Ehrmantraut & Klein** PA in Annapolis.

No friend-of-the-court briefs had been filed in support of the hospital as of Friday afternoon, according to the Court of Appeals clerk's office.

The court will hear arguments Wednesday in *Neustadter v. Holy Cross Hospital of Silver Spring Inc.*, No. 12 Sept. Term 2010.

Vulnerable, but uncooperative

In the guardianship case, the **Johns Hopkins Bayview Medical Center** is appealing the denial of its motion to have a guardian appointed for Thomas Carr, a diabetic in his 40s who was admitted to the hospital's intensive care unit 13 times between October 2008 and April 2009 for insulin overdoses and, according to Hopkins, suffers from a psychological disorder.

"Judicial intervention is warranted in this case to prevent the serious harm of bodily injury or death, as we argued in the briefs we filed in this case," said the hospital's attorney, Andrew H. Baida, in explaining the basis for Johns Hopkins' appeal.

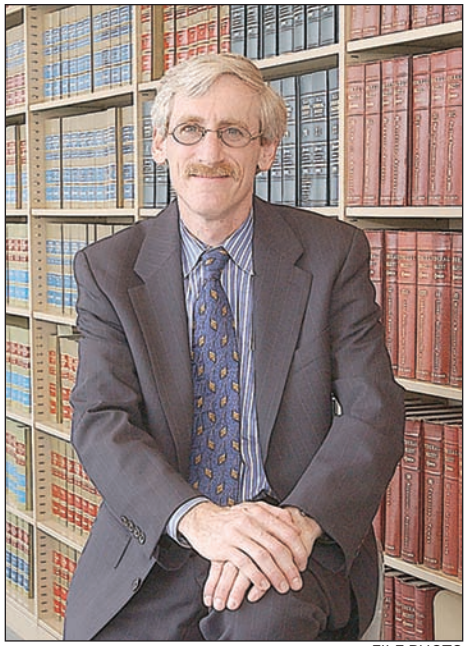
Indeed, Baltimore City Circuit Judge Kaye A. Allison found last year that Carr "lacks sufficient understanding or capacity to make or communicate a responsible decision concerning his person because of a disability." But Allison declined to appoint a guardian, saying such assistance would serve no purpose based on Carr's strongly stated unwillingness to cooperate with a guardian.

Baida, in papers filed with the high court, argues that state law requires a guardian to be named when a court deems a person unable to make decisions for himself or herself.

Judges have an "unqualified obligation to protect disabled individuals who are manifestly unable to care for themselves," wrote Baida, of **Rosenberg|Martin|Greenberg** LLP in Baltimore.

Hopkins spokesman Gary Stephenson said hospitals recognize a similar obligation in requesting the appointment of a guardian.

"Our actions are predicated on what our experts and our medical staffs perceive to be in the best interest of the patient," Stephenson said. "We have a moral and ethical obligation to protect these vulnerable patients and ensure to the best of our ability that their individual best interests are protected and are our top priority."



FILE PHOTO

ASSOCIATED PRESS

Andrew H. Baida (left) and Stuart O. Simms are on opposite sides of a guardianship case.

However, Carr's appellate attorney counters that the law gives courts discretion in ordering the appointment of a guardian. The evidence the hospital presented to the court gave no indication that Carr would "respond any differently to an appointed stranger than he would to the medical staff at Hopkins," the attorney, Stuart O. Simms, wrote in papers filed with the high court.

In discussing the case, Simms said the appeal presents "an interesting issue dealing with the court's finding of fact versus the supposed limitations [on discretion] in guardianship law." Simms is with **Brown, Goldstein & Levy** LLP in Baltimore.

The court will hear arguments Oct. 12 in *Johns Hopkins Bayview Medical Center v. Carr*, No. 13, Sept. 2010.

Maryland's gun laws challenged

The petitioner in the gun-possession case, Charles Williams, bought his handgun legally from a licensed dealer in August 2007.

On Oct. 1, 2007, a Prince George's County police officer saw Williams near the woods and asked what he had hidden in the bushes.

Williams responded, "My gun."

The officer arrested Williams for unlawful gun possession, specifically for violating a provision on carriage and transport. He was convicted and sentenced on Oct. 6, 2008, to three years in prison with all but one year suspended.

The Court of Special Appeals upheld the conviction, setting the stage for the constitutional challenge before the Court of Appeals.

Williams' attorney, James B. Hopewell, called the *McDonald* ruling a "massively new constitutional" decision and urged the Court of Appeals to "see the right for what it is and that it's there and it's not going to go away."

"First and foremost, I want this conviction against my client reversed," said Hopewell, a Riverdale solo practitioner.

Brian S. Kleinbord, who heads the attorney general's criminal appeals division, declined to comment on Williams' appeal. The attorney general's brief in the case is due at the high court Sept. 7.

The court will hear arguments Oct. 7 in *Williams v. Maryland*, No. 16 Sept. Term 2010.

MSP v. NAACP

The Maryland State Police's high-court appeal comes amid the ACLU and NAACP's ongoing concern that troopers may be engaging in racial profiling, despite a 2003 consent decree.

In April 2008, for example, the Board of Public Works approved a $400,000 settlement to resolve damages alleged by individual plaintiffs. State police did not admit to practicing racial profiling in either agreement.

The consent decree, which ended a 10-year legal battle between the parties, requires the state police to submit quarterly reports detailing charges of racial profiling.

In the current case, the NAACP — with the assistance of the **American Civil Liberties Union of Maryland** — seeks documents about the investigation and handling of profiling claims.

In June 2008, Baltimore County Circuit Judge Timothy J. Martin upheld the NAACP's request for the documents under the condition that the names of the officers and their identification numbers be redacted.

Martin also called on the **National Association for the Advancement of Colored People** to select three attorneys to review unredacted State Police records and identify the documents they wanted released in redacted form. Those attorneys would be barred from disclosing the names of any troopers mentioned in the documents, Martin said.

The Maryland appealed, saying the release of a personnel record — no matter how finely redacted — would violate the Maryland Public Information Act's "blanket" exemption barring the disclosure of private information about a state employee.

The ACLU and NAACP, in pressing for disclosure, said the law's "overriding" purpose of shedding light on potential governmental wrongdoing trumps the troopers' privacy interests, especially since the civil rights group does not object to the redactions.

The Court of Special Appeals agreed with the ACLU and NAACP and then went further, saying the documents they sought did not qualify as personnel records.

"Racial profiling complaints against Maryland state troopers do not involve private matters concerning intimate details of the trooper's private life," Judge James P. Salmon wrote for the intermediate court in February. "Instead, such complaints involve events occurring while the trooper is on duty and engaged in public service. As such, the files at issue concern public actions by agents of the state concerning affairs of government, which are exactly the types of material the act was designed to allow the public to see."

The court will hear arguments Nov. 5 in *Maryland State Police v. Maryland State Conference of NAACP Branches*, No. 31, Sept. Term 2010.

Other issues

Other cases the court will hear address the following issues:

• Whether it was harmless error for a judge, in a Baltimore lead-paint case, to have instructed a jury that tenants have a duty to maintain the interior of their residences. The Court of Special Appeals upheld the defense verdict, saying the judge's instruction in total made clear that the relevant issue was the conduct of the landlord, not the tenants. Arguments have not yet been scheduled in *Barksdale v. Wilkowsky*, No. 184 Sept. Term 2010;

• Whether a judge in a Worcester County murder case was required to ask the defendant why he wanted to dismiss his attorney, even though the defendant had not stated in open court that he wanted a new lawyer. The Court of Special appeals had overturned the murder conviction, saying the judge had not properly addressed the pretrial request. Arguments have not been scheduled in *Maryland v. Northam*, No. 179, Sept. Term 2010; and

• Whether a business owner can sue for personal defamation when the allegedly defamatory statements were made about his company and whether the privilege against defamation for comments made in a court filing extends to the re-publication of the filings on the Internet. A trial court and the Court of Special Appeals ruled against Stephen P. Norman, owner of **Sussex Title** LLC (which has been accused of mortgage fraud), on both issues.

Norman, himself an attorney, is suing attorney Peter A. Holland of the **Holland Law Firm**; Benjamin Carney, formerly of Holland's firm; Scott Borison and Janet Legg of the **Legg Law Firm** LLC; and Phillip Robinson of **Civil Justice** Inc.

Arguments have not yet been scheduled in *Norman v. Borison*, No. 191, Sept. Term 2010.