In The

Supreme Court of Maryland

No. 10
September Term, 2024

MDEC No. SCM-REG-0010-2024

BOARD OF EDUCATION OF HARFORD COUNTY,

Appellant,

vs.

JOHN DOE,

Appellee.

On Appeal from the Circuit Court for Harford County, Circuit Court Case No. C-12-CV-23-000767,
(The Honorable Alex M. Allman, Judge)

REPLY BRIEF FOR APPELLANT

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ARGUMENT

The ultimate issue before this Court regarding the constitutionality of the purported retroactive elimination of the statute of limitations and statute of repose in the Maryland Child Victims Act of 2023 ("CVA"), 2023 Md. Laws ch. 5 (S.B. 686) (codified at Md. Code Ann., Cts. & Jud. Proc. ("CJ") § 5-117), is clearly one of great public importance to all Marylanders, including public and private employers. Anticipating the importance of the constitutional issue and recognizing the need for expedited resolution of this important issue, the General Assembly took the extraordinary step of providing for an interlocutory appeal "based on a defense that the applicable statute of limitations or statute of repose bars the claim . . . and any legislative action reviving the claim is unconstitutional." 2023 Md. Laws ch. 5, § 1 (E. 92-93); 2023 Md. Laws ch. 6, § 1 (E. 104-105). Appellee's Standing Brief ignores the fact that when the General Assembly enacted this extraordinary interlocutory appeals provision, it made it broadly applicable to "[a] party" – without any exceptions whatsoever. That statutory language clearly did not exclude public employers such as local school boards which the General Assembly surely anticipated were likely defendants if previously time-barred claims were brought back to life on October 1, 2023.[1]

[1] The CVA applies generally to persons and government entities alike in purporting to abrogate the vested protections from suit which former CJ § 5-

The Appellant Board of Education of Harford County (the "Board") should be accorded the same standing as the other non-perpetrator employer tort defendants sued after October 1, 2023, for previously time-barred claims to raise its argument in accordance with this time-sensitive interlocutory appeal provision. Appellee seemingly acknowledges that the Board has a "cognizable interest." *See* Appellee's Standing Brief at 9-10. Appellee also seemingly acknowledges that there have been other cases involving important public issues where this Court has addressed the merits of the important issue without questioning the public body's standing to challenge the constitutionality of state statutes. *See id.*, at 10-11. Appellee concedes that the Board Employees who have been sued alongside the Board have standing to raise the constitutional arguments at issue and that the Board can raise the constitutional arguments on behalf of these Board Employees. *See id.* at 6. Appellee further concedes that, when one party has standing, it is typically "unnecessary" to determine whether other parties likewise have standing. *See id.* at 6-7.

Yet Appellee nonetheless persists in arguing that the Board lacks standing to pursue its interlocutory appeal as provided for by the General

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117(d) (West 2017) provided to non-perpetrator "persons and governmental entities" on claims asserted more than twenty years after the alleged victims of child sexual abuse reached the age of majority.

Assembly at the same time as the other parties. Appellee's standing argument demonstrates an incongruity that makes no sense given the unique circumstances presented in this appeal. Tellingly, Appellee has failed to present a single case where a public body has been denied standing to challenge the constitutionality of a state statute when the public body is a tort defendant. For the reasons discussed in its Opening Brief and for the reasons discussed further below, the Board respectfully submits that the unique circumstances of the CVA coupled with this Court's jurisprudence allows for an exception to the general standing restriction that typically, *but not always*, prevents a state subdivision from challenging the constitutionality of a state statute.

I. In a Civil Tort Action Brought by a Private Plaintiff Against the Board and Board Employees, the Board has Standing to Raise a Defense Challenging the Constitutionality of the CVA.

Unlike in other cases where this Court has ruled that public bodies lack standing to challenge the constitutionality of a State statue by way of mandamus or declaratory judgment,[2] the Board comes before this Court in a

[2] *See, e.g., Bd. of Educ. v. Sec'y of Personnel,* 317 Md. 34, 44-45 (1989) (holding that the Board of Education of Prince George's County, as a creature of the State, had no right to seek a writ of mandamus to compel the Secretary of Personnel to convene a contested case proceeding subject to judicial review contrary to a statute providing only for an exclusive administrative remedy); *State ex rel. Attorney Gen. v. Burning Tree Club, Inc.,* 301 Md. 9, 11 (1984) (holding "that the Attorney General of Maryland could not bring a declaratory judgment action challenging the constitutionality of an enactment of the General Assembly of Maryland").

uniquely different posture as a tort defendant sued for money damages by a private plaintiff. The Board has been sued, and it should have the same right as any other tort defendant to defend against a private party's claims. Appellee has pointed to no case where a public body sued in tort, on a tort theory that is generally applicable to public and private parties alike, has been denied standing to raise the same constitutional defenses asserted by private entity defendants.[3]

The incongruity of Appellee's position that the Board lacks standing is alarming and is particularly misguided when Appellee admits that the Board Employees have standing to challenge the constitutionality of the CVA and that the Board may assert those challenges on the Board Employees' behalf but may not do so on its own behalf. It is respectfully submitted that Appellee's position defies both logic and public policy, as it is the Board, and the Board alone, that is capable of making the essential argument that the CVA threatens to erode funds appropriated exclusively for public education in accordance with Article VIII, § 3 of the Maryland Constitution. This Court has long recognized that

[3] This Court's decision in *Cooper v. Wicomico County*, 284 Md. 576, 584 (1979), illustrates the analogous situation, albeit in the context of a workers compensation benefits claim, where this Court never questioned Wicomico County's standing to challenge the constitutionality of a statute that retroactively increased an employee's final benefit award and this Court held that because the evidence demonstrated that the statute in question "unconstitutionally affect[ed] the appellee's contractual *and other vested rights*, the lower court correctly concluded that the supplemental award of compensation to Cooper cannot be sustained." *Id. at* 584 (emphasis added).

when individual governmental employees have standing to challenge the constitutionality of a State statute, the question of the governmental entity's standing is not relevant to the determination of the constitutional issue. *See, e.g., Baltimore v. Concord Baptist Church, Inc.,* 257 Md. 132, 138-39 (1970) (rejecting argument on appeal of a church condemnation case where the constitutionality of a statute was at issue that there was "no reason" why the City of Baltimore should be dismissed on standing grounds when the "individual appellants had standing," and noting that "where the issues presented are of great public interest and concern, the interest necessary to sustain standing need only be slight"); *State's Attorney v. City of Baltimore*, 274 Md. 597, 602 (1975) ("Since one of the plaintiffs, Commissioner Embry, had standing to bring the action, it is unnecessary for us to consider the matter of Baltimore City's standing.").[4] If this well accepted exception to the standing bar

[4] *Accord Sugarloaf Citizens' Assn. v. Dep't of Env't.,* 344 Md. 271, 297 (1996) *quoting People's Counsel v. Crown Dev. Corp.,* 328 Md. 303, 317 (1982) (reasoning that it "is a settled principle of Maryland law that, 'where there exists a party having standing to bring an action . . . we shall not ordinarily inquire as to whether another party on the same side also has standing'" and that, as a result, because one party "had standing to maintain this action . . . it is unnecessary to determine whether any of the other plaintiffs also had standing").

proposition holds true for when public entities are *plaintiffs,* shouldn't the same hold true when the public entities are *defendants* in private party tort actions?

In answering that question, this Court should be guided by the recent decision of the Colorado Supreme Court in *Aurora Pub. Sch. v. A.S.*, 531 P.3d 1036 (Colo. 2023), which recognized the standing of a public school system to successfully challenge the constitutionality of the "Child Sexual Abuse Accountability Act" ("CSAAA"). There, as in the case at bar, the tort plaintiff argued that the school system lacked standing, as a political subdivision, to "challenge the actions of superior state entitles, including legislation passed by the general assembly." *Id*. at 1045. However, the Court rejected the plaintiff's arguments and, in so doing, recognized that it had reviewed constitutional challenges by public entities "on multiple occasions" and that the school district and an individual defendant "raise[d] the same argument regarding the unconstitutionality of the CSAAA" on the grounds that the "Act is unconstitutionally retrospective to the extent it permits the plaintiffs to bring a claim for alleged sexual misconduct that predated the Act and for which any previously available causes of action are time-barred." *Id*. at 1045-46. Since the individual defendant's standing was uncontested, the court concluded that it had "subject matter jurisdiction over this dispute due to [the individual

defendant's] standing," and thus "it [wa]s not necessary to address the standing of the school district to bring the identical claim." *Id*. at 1046.

It is respectfully submitted that this Honorable Court should adopt the same line of reasoning as expressed in the *Aurora Pub. Sch.* case in holding that the Board has standing in this appeal. Here, as in the *Aurora Pub. Sch.*, individual Board Employees have standing to challenge the constitutionality of the CVA, and so it is unnecessary to address the Board's standing. In this case, the Board has the duty to defend the Board Employees and it must pay any judgment that may be entered against them.[5]

The Board's liability in such cases is always vicarious based upon the actions of its employees, and it is the education budget that is always at risk for the payment of such judgments. For that reason, the General Assembly

[5] *See* CJ § 5-518(d), (e), and (h); ED §§ 4-104, 4-105, 4-106 (requiring boards of education to defend board employees and volunteers and to pay judgments entered against them for tortious conduct committed within the scope of employment or the volunteer's duties); *Montgomery County Bd. of Educ. v. Horace Mann Ins.*, 383 Md. 527 (2004) (holding that because there was at least a potentiality of coverage, the local board of education had the duty to defend a teacher sued by a student for tortious conduct including allegations of sexual abuse and was thus liable to reimburse her private insurer for the costs of her defense); *Neal v. Balt. City Bd. of Sch. Comm'rs,* 467 Md. 399, 424-27 (2020) (discussing the obligation of local boards of education to remain in a case as necessary parties while litigation is pending against school employees for alleged tortious conduct committed within the scope of employment and to pay any judgment entered against an employee for tortious conduct committed within the scope of employment).

beginning in 1971 mandated a "valid educational expense" for the purchase of comprehensive insurance or self-insurance in the prescribed amount corresponding with the limited sovereign immunity waiver.[6] Where, as here, there is a risk of liability in excess of the funds set aside as a "valid education expense" there is an impact upon other funds appropriated exclusively for the education of children and the operation of the public schools in accordance with Article VIII, § 3 of the Maryland Constitution. Only the Board can make these important arguments, and this Honorable Court should recognize the Board's standing to do so.

II. When Public Entities Have Raised Constitutional Challenges of Great Public Importance, the Interest Necessary to Sustain Standing is Minimal.

This Court has expressly recognized that "where the issues presented are of great public interest and concern, the interest necessary to sustain standing need only be slight." *Concord Baptist Church, Inc.,* 257 Md. at 138. This Court has also implicitly recognized the same concept in other cases of extreme public importance where Maryland school boards have challenged the

[6] *See* ED § 4-105; CJ § 5-518. Prior to October 1, 2016, the sovereign immunity cap set forth in CJ § 5-518 (West 2016) was $100,000, and the corresponding comprehensive insurance requirement set forth in ED § 4-105 was similarly set at $100,000. *See* 2016 Md. Laws Ch. 680. The sovereign immunity cap and corresponding required insurance coverages were increased prospectively to $400,000 effective October 1, 2016. *See id.* at § 2. The CVA amended CJ 5-518 effective October 1, 2023, to increase the immunity cap for claims arising out of alleged child sex abuse to $890,000.

constitutionality of State statutes and the issue of standing was not even mentioned. *See, e.g., Hornbeck v. Somerset County Board of Educ.,* 295 Md. 597 (1983);[7] *Md. State Board of Educ. v. Bradford*, 387 Md. 353 (2005).[8] Although we concede Appellee's argument that the Court's silence on an issue does not, without more, create a binding precedent, *see* Appellee's Standing Brief at 11, the point remains that these are but two examples of cases of great public importance where the issue of standing did not prevent the Court from addressing the preeminent constitutional issues.[9]

The same treatment should apply here. There can be no question that the issues presented in this appeal are of profound public importance. Indeed,

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[7] In *Hornbeck*, several school boards brought suit challenging the constitutionality of Maryland's statutory school system funding program. After judgment was entered in favor of the Plaintiff school boards, this Court reversed, not for reasons of standing, but upon a conclusion that Md. Const. art. VIII required a "thorough and efficient" system of free public schools but not a "uniform" system.

[8] In *Bradford*, the Board of School Commissioners of Baltimore City joined other parties in a suit against the State seeking, *inter alia*, a declaration that the State had failed in its obligation under Md. Const. art. VIII to provide a "thorough and efficient" education for Baltimore City's public school children.

[9] The *Cooper* case, discussed *supra* n. 3, provides another example of when a public subdivision successfully challenged the constitutionality of a State statute without being impeded from doing so on the basis of standing. *See Dua v. Comcast Cable, Inc.*, 370 Md. 604, 625 (2002) (citing *Cooper* as an example of where this "Court took the position that the retroactive statute affected the employers' 'contractual and other vested rights' and, therefore, was not 'in conformity with . . . due process requirements'").

that is why the General Assembly provided for an expedited interlocutory appeals process. The issues presented in this appeal are not only of great importance to the public generally but are especially important to the Board and the 23 other Maryland public school systems.[10]

In this case, the question on the constitutionality of the retroactive elimination of the statute of repose and the statute of limitations is particularly significant when it comes to the Board because it, along with Maryland's 23 other local school boards, risks suffering substantial losses that might neither be budgeted, funded, nor insured against if the CVA is found constitutional. Such a finding would not only adversely impact the finances of the Board, but would also violate the mandate of Article VIII, Section 3 of the Maryland Constitution requiring that education funds "shall be kept inviolate and appropriated only to the purposes of Education." The question of whether the CVA constitutes an unconstitutional abrogation of the vested right to be free from the litigation of previously time-barred claims thereby potentially impairing the education fund mandated and protected under Article VIII, Section 3 is clearly an important one. The Board has a cognizable stake in the

[10] *Accord Hornbeck*, 295 Md. at 682 (Cole, J., dissenting) (reasoning that public education is generally considered "the most important function of any state"); *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments.").

resolution of this important issue, which should be sufficient to confer standing upon the Board to make its arguments in this case.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that it has standing to present its arguments that the CVA unconstitutionally revived John Doe's claims against it and that those claims are barred under the applicable statute of limitations and statute of repose. Denying standing to the Board would be contrary to this Court's jurisprudence that both explicitly and implicitly allows public entities to make arguments in cases of great public importance where other parties already have standing. In this case, the potential impact of the CVA upon the Board, Board Employees, and upon educational funding appropriated and protected in accordance with the mandates of Article VIII, Section 3 of the Maryland Constitution should be sufficient to confer standing upon the Board to make its arguments in this case.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT
AND COMPLIANCE WITH RULE 8-112

1. This brief contains 2,808 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ Edmund J. O'Meally

Edmund J. O'Meally, AIS # 8501180003

RULE 8-504(a)(8) STATEMENT OF FONTS

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CERTIFICATE OF SERVICE

I CERTIFY that, on this 26th day of August, 2024, the foregoing Appellant's Reply Brief was filed and served electronically via MDEC upon all counsel of record.

/s/ Edmund J. O'Meally

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