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Recent Developments: Posadas De Puerto Rico Associates v. Tourism Co. of Puerto Rico: Supreme Court Upholds Constitutionality of Regulations Restricting Advertising Aimed at Puerto Rico Residents

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aside the regulations as unconstitutional. Nevertheless, as in *Agins*, the court of appeals did not find an unconstitutional taking because "the refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development. Accordingly, the complaint fails to state a cause of action." *MacDonald*, 54 U.S.L.W. at 4783.

The Supreme Court granted the appellants petition to consider the constitutional issue involving a regulatory taking. But, in a decision that essentially mirrored the lower courts reasoning, the Supreme Court did not make a final decision on the merits because a final determination had not been made by the Board of Commissioners concerning the permitted use of the appellants property, thus making the issue not ripe for decision despite the prohibition on the housing development. *Id.* at 4784.

In refusing to decide on the merits, the Court followed *Agins* in permitting local governments the power of land use control through regulations that limit intensive development. The Court centered its reasoning behind two related components. First, that the appellant must establish that the regulation has "taken" his property or has "gone too far." Second, that any proffered compensation is simply not just. *MacDonald*, 54 U.S.L.W. at 4784.

The Court, in resolving the two components, examined the progeny of "taking" cases evolving from *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), through *Penn Central v. New York City*, 438 U.S. 104 (1978); *Agins*, 447 U.S. 255 (1980), and *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981), to *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. ____ (1985). *MacDonald*, 54 U.S.L.W. at 4784.

In *Williamson*, the appellant-developer failed to exhaust available state avenues to permit development or receive just compensation. *MacDonald*, 54 U.S.L.W. at 4784. And in *Agins*, the Court failed to recognize a taking because development, albeit less intensive, was still permitted. In applying the facts in this action to their past examinations, Justice Stevens went on to conclude that as in *Agins*, *Williamson*, and *San Diego Gas*, the Court cannot decide whether the Constitution requires a monetary remedy to redress some regulatory takings because the appellant had left the Court uncertain as to whether a taking had occurred. *MacDonald*, 54 U.S.L.W. at 4785. The appellant had received the Board's determination on only the subdivision plan, thus leaving open the "final, definitive position regarding how [the board] will apply the regulations at issue to the particular land at issue." *Id.* Consequently, the appellant had not established that their property had been taken and the Board's decision was upheld.

Justice White, in his dissent, felt that a taking did occur when the Board denied the subdivision plan. *MacDonald*, 54 U.S.L.W. at 4785. He refuted the majorities application of *Agins*, finding that the appellant would be unable "to develop his property in some economically beneficial manner" because further application for development would be futile. *MacDonald*, 54 U.S.L.W. at 4786. The dissent went on to conclude that based on the facts, a taking had occurred and the Court should remand for an explanation by the court of appeals as to the precise basis for its judgment. *Id.* at 4788.

The impact of this decision will favor municipalities that seek to limit growth by denying high density housing developments and support state regulations such as Maryland's recently enacted Critical Areas Legislation. Conversely, developers will certainly feel as the dissent, that any limit to use is a taking deserving of compensation. Nevertheless, the Court seems to be assured of maintaining the view outlined in *MacDonald* as long as the 5-4 majority is maintained. And even with the recent change in the make-up of the Court, which essentially effects the dissent's side, it seems likely that similar land use controls will be sustained by the Court.

–Michael D. Mallinoff

Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico: SUPREME COURT UPHOLDS CONSTITUTIONALITY OF REGULATIONS RESTRICTING ADVERTISING AIMED AT PUERTO RICO RESIDENTS

In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 54 U.S.L.W. 4956 (U.S. June 24, 1986), the Supreme Court continued to explore the contours of first amendment protection for commercial speech which the court had initially recognized in 1976. The Court held that a Puerto Rico statute and regulations restricting the advertising of casino gambling aimed at the residents of Puerto Rico, but not at tourists, does not facially violate the first amendment or the due process or equal protection guarantees of the Constitution.

Beginning in 1948, the Puerto Rico Legislature has legalized various forms of casino gambling, adding additional games since the initial Games of Chance Act of 1948, Act No. 221 of May 15, 1948 (Act). P.R. Laws Ann. tit. 15, § 71 (1972). However, the Act states that "[n]o gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico." P.R. Laws Ann. tit. 15, § 77 (1972). Furthermore, the Economic Development Administration of Puerto Rico issued regulations which specified and expanded the scope of the prohibition of advertising of casino gambling directed at the inhabitants of Puerto Rico and requiring prior approval by the Tourism Development Company of any casino advertising. P.R.R. & Regs. tit. 15, § 76-218 (1972).

In 1981, the Appellant Posadas de Puerto Rico Associates, doing business as Condado Holiday Inn Hotel and Sands Casino, filed a declaratory judgment action against the Tourism Company in the Superior Court of Puerto Rico, seeking a declaration that this regulatory scheme violated appellant's commercial speech rights under the United States Constitution. The court upheld the facial constitutionality of the Act, narrowly construing it as "the only advertisement prohibited by law originally is that which is contracted with an advertising agency, for consideration, to attract the resident to bet at the dice, card, roulette and bingo tables." 54 U.S.L.W. at 4958. The appellant's appeal was dismissed by the Supreme Court of Puerto Rico as "it [did] not present a substantial constitutional question." *Id.* at 4959. However, the United States Supreme Court granted the petition for *writ of certiorari* filed by Posadas de Puerto Rico Associates.

The Supreme Court, in a five to four decision, upheld the decision and narrowing construction issued by the lower court. Justice Rehnquist, writing for the majority, found two reasons for the Court's holding. First, he determined that by applying the first amendment analysis concerning commercial speech restrictions as dictated by *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), the Puerto Rico regulatory scheme passed constitutional muster. Second, the Court, creating a new form of first amendment analysis parturient of greater enroads on the protection of speech, held that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." 54 U.S.L.W. at 4961.

The Court reiterated that a limited form of first amendment protection for commercial speech was first recognized in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S.

748 (1976). However, the Court stated that the proper analysis is guided by the four-prong test found in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). 54 U.S.L.W. at 4960.

Applying the first prong of the *Central Hudson* test, the Court held that "[t]he particular kind of commercial speech at issue here . . . concerns a lawful activity and is not misleading or fraudulent." *Id.* Moving on to the next prong, the Court found that regulatory scheme passed muster as "the Puerto Rico Legislature's interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest." *Id.* The third prong was also found to be met as the restrictions on commercial speech "directly advance" the government's asserted substantial interest by attempting to reduce the demand for casino gambling. Finally, the Court found that the restrictions on commercial speech, as narrowly construed by the lower court, are no more extensive than necessary to serve the government's interest since they "will not affect advertising of casino gambling aimed at tourists, but will apply only to such advertising when aimed at the residents of Puerto Rico." *Id.* at 4961. Thus, the Court concluded that the regulations, as construed by the lower court, were facially constitutional under the *Central Hudson* test.

The Court then addressed the appellant's second argument that the advertising restrictions were constitutionally defective under the holdings in *Carey v. Population Services Int'l*, 431 U.S. 678 (1977), (striking down a ban on any "advertisement or display" of contraceptives); and *Bigelow v. Virginia*, 421 U.S. 809 (1975), (reversing criminal conviction based on advertisement of an abortion clinic). However, the Court found those cases where "the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the State" distinguishable from casino gambling which the Puerto Rico Legislature could have prohibited altogether. 54 U.S.L.W. at 4961. Thus, the Court arrived at the conclusion that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." *Id.* The Court restated this new first amendment analysis more generally as "it is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restriction of advertising." *Id.* (emphasis in original). Continuing on, the Court observed that "[l]egislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution has varied from out right prohibition on the one hand . . . to legalization of the product or activity with restrictions on stimulation of its demand on the other hand." *Id.* "To rule out the latter intermediate kind of response would require more than we find in the First Amendment," the Court concluded. Thus, the restrictions on advertising were upheld as constitutional.

Justice Brennan dissented, stating that "I see no reason why commercial speech should be afforded less protection than other types of speech where, as here, the government seeks to suppress commercial speech in order to deprive consumers of accurate information concerning lawful activity." *Id.* at 4962. Justice Brennan also disagreed with the majority's deferral "to what it perceives to be the determination by Puerto Rico's legislature that a ban on casino advertising aimed at residents is reasonable." *Id.* at 4963.

Justice Stevens also dissented, finding that "Puerto Rico blatantly discriminates in its punishment of speech depending on the publication, audience, and words employed." *Id.* at 4965.

The first part of the Court's holding simply represents an extended application of the *Central Hudson*, first amendment analysis for commercial speech. However, it is the Court's introduction of "the greater power necessarily includes the lesser power" language into first amendment constitutional analysis which gives this case special significance. Expansion of this new analysis, even beyond that alluded to by the Court in its opinion, could eventually permit further erosion of the various analysis under the freedom of speech. For example, a content-based restriction could possibly be disguised by the "greater includes the lesser" analysis. It remains to be seen whether this is the direction the new Court, possibly under Justice Rehnquist, will take.

—Eric P. Macdonell

Frye v. Frye: MARYLAND REAFFIRMS THE PARENT-CHILD IMMUNITY RULE

In *Frye v. Frye*, 305 Md. 542 (1986), the Court of Appeals of Maryland declined to overturn the parent-child immunity rule which has existed in Maryland for fifty-six years. The court also declined to create an exception to the rule for cases involving the negligent operation of a motor vehicle.

In *Frye*, the plaintiffs, George L. Frye III, a minor, and his mother, Barbara Frye, received injuries when the automobile in which they were passengers went off the road and collided with a culvert. At the time of the occurrence, the automobile was being operated by George L. Frye, Jr., who was the father and husband of the passengers.

Suit was brought in the Circuit Court for Prince Georges County by Barbara Frye, individually and as guardian and next friend of George L. Frye, III, against George L. Frye, Jr. for damages incurred as a result of the defendant's negligence. The court granted a motion to dismiss the action as to Barbara Frye, individually, on the ground that the doctrine of interspousal immunity had been in effect upon the accrual of her cause of action and thus, relief could not be granted. The court also dismissed the action brought on behalf of George L. Frye, III on the ground that no relief could be granted under the parent-child immunity rule.

Barbara Frye appealed to the court of special appeals. In the meantime, the court of appeals granted Mrs. Frye's request for the court to certify the records and proceedings before a decision was rendered by the court of special appeals.

On appeal, the plaintiff contended that the parent-child immunity rule should be abrogated as to torts sounding in negligence in light of the court's recent abrogation of interspousal immunity. *See Boblitz v. Boblitz*, 296 Md. 242, 462 A.2d 506 (1983). In the alternative, the plaintiff contended that an exception should be carved from the parent-child immunity rule for motor vehicle torts. The court refused to create the exception.

Parent-child immunity, a creation of the American judicial system, was adopted by the court of appeals in *Schneider v. Schneider*, 160 Md. 18, 152 A. 498 (1930). As construed in Maryland, the rule bars suits by a child against his or her parent and by a parent against his or her child for personal injury arising from a tort. The court of appeals has recognized two exceptions to the rule. First, the court has held that a minor child has a right to maintain a cause of action against his or her parent for "cruel and inhuman treatment or for malicious and wanton wrongs." *Mahnke v. Moore*, 197 Md. 61, 68, 77 A.2d 923, 926 (1951). Secondly, the court has declined to extend the parent-child immunity rule to encompass a suit between an emancipated child and a parent. *Waltzinger v. Birsner*, 212 Md. 107, 128 A.2d 617 (1957).

Frye is the first case, since the adoption of parent-child immunity in Maryland, in