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RECENT DEVELOPMENT

***BROOKS v. HOUSING AUTHORITY OF BALTIMORE CITY:* THE HOUSING AUTHORITIES STATUTE EFFECTUATES A COMPLETE WAIVER OF GOVERNMENTAL IMMUNITY FOR THE TORTIOUS ACTIONS OF HOUSING AUTHORITIES IN THEIR MAINTENANCE AND OPERATION.**

By: Heather Pensyl

The Court of Appeals of Maryland held that the General Assembly, through Article 44A of the Maryland Code, completely waived the common law right to sovereign immunity, which would have otherwise applied to the governmental functions of housing authorities for claims resulting from tortious conduct in their maintenance and operation of subsidized housing. *Brooks v. Hous. Auth. of Balt. City*, 411 Md. 603, 984 A.2d 836 (2009) (Article 44A is now re-codified in §§ 12-101 to 12-175 of the Housing and Community Development article). Specifically, the court in *Brooks* overruled its previous decision in *Jackson v. Hous. Opportunities Comm'n of Montgomery County* to the extent that the language of *Jackson* contradicted *Brooks*' holding that Article 44A implemented a complete waiver of governmental immunity. *Id.* at 626, 984 A.2d at 849 (citing *Jackson*, 289 Md. 118, 422 A.2d 376 (1980)).

In 1993, the Housing Authority of Baltimore City ("HABC") purchased a commercial insurance policy from the Housing Authority Risk Retention Group ("HARRG"). Under the terms of the insurance policy, the HABC was insured for, among other things, liability against actions resulting from the ingestion or exposure to lead paint. In May 1997, prior to the insurance policy's expiration, a representative of the HABC presented the HARRG with a list of the names of seventy-three children with elevated levels of lead in their blood. The list included Devonte A. Brooks ("Brooks"), who grew up in Baltimore City. As of September 19, 2003, HABC had exhausted the amount of coverage for lead-based claims under its policy.

On March 15, 2004, Brooks filed suit against the HABC to recover damages for the HABC's alleged negligence and violation of the

Maryland Consumer Protection Act (“CPA”). The HABC responded by filing a motion for summary judgment based on the language in *Jackson*, which indicated that governmental immunity, under Article 44A, only occurred to the extent covered by the insurance policy. The Circuit Court for Baltimore City granted the motion. Brooks then appealed to the Court of Special Appeals of Maryland, which affirmed the judgment. Brooks next filed a petition for writ of certiorari in the Court of Appeals of Maryland, which the court granted.

Brooks made three arguments challenging the trial court’s decision to grant the motion for summary judgment. *Brooks*, 411 Md. at 615-16, 984 A.2d at 843. First, Brooks argued that the circuit court erred by determining that the General Assembly intended a partial, and not a complete, waiver of governmental immunity through the enactment of Article 44A. *Id.* at 615, 984 A.2d at 843. Alternatively, Brooks contended that a dispute of material fact existed as to whether the HABC “manufactured” its immunity through underinsuring. *Id.* Finally, Brooks argued that the HABC should not receive governmental immunity because it acted in a proprietary rather than a governmental function. *Id.* at 615-16, 984 A.2d at 843. The HABC responded to Brooks’ arguments with the contention that, according to *Jackson*, governmental immunity is only waived up to the limits of the insurance coverage. *Id.* at 616, 984 A.2d at 843 (citing *Jackson*, 289 Md. 118, 422 A.2d 376 (1980)). In addition, the HABC argued that, because Brooks did not dispute that the coverage was exhausted, no dispute of material fact existed. *Id.*

The Court of Appeals of Maryland couched its analysis of the two claims, the common law negligence claim and the CPA claim, under one overarching issue: whether the circuit court erred by granting the HABC’s motion for summary judgment on the basis that the HABC had immunity from Brooks’ claims because, during the relevant time period, the HABC had insurance, although the limits of that insurance were exhausted. *Brooks*, 411 Md. at 614, 984 A.2d at 842. Thus, the central focus of the court’s analysis revolved around whether the HABC enjoyed governmental immunity from claims resulting from the HABC’s actions. *Id.* at 615, 984 A.2d at 843. More specifically, the court analyzed whether the General Assembly, through Article 44A, waived any immunity the HABC otherwise may have had. *Id.*

In addressing whether the legislature intended a waiver of immunity, the court reviewed Article 44A, which created the city’s ability to have a housing authority that would be “a public body corporate and politic.” *Id.* at 618, 984 A.2d at 845 (citing MD CODE art. 44A §§ 3, 4, 22 (1937)). The court applied the two-pronged test

first established in *Katz v. Wash. Suburban Sanitary Comm'n* for determining whether sovereign or governmental immunity had been waived: (1) the Legislature must have authorized suits for damages; and (2) a provision for the payment of judgments must exist. *Id.* at 614-15, 984 A.2d at 842-43 (citing *Katz*, 284 Md. 503, 507-08, 397 A.2d 1027, 1030 (1979)). The court noted that section 1-301(1) of Article 44A grants housing authorities the powers to sue and be sued, satisfying the first prong of the *Katz* test. *Id.* at 619, 622, 984 A.2d at 845, 847 (citing MD CODE art. 44A § 1-301 (1957, 2003 Repl. Vol.)). The court then stated that Article 44A meets the second prong of the *Katz* test because the article expressly authorized the satisfaction of judgments through either the purchase of insurance or through the housing authorities' own raising of funds. *Brooks*, 411 Md. at 623, 984 A.2d at 847-48 (citing MD CODE art. 44A §§ 1-301, 1-401 (1957, 2003 Repl. Vol.)).

Having established that Article 44A effectuates a waiver of governmental immunity, the court then decided whether the General Assembly intended the waiver to be complete, rather than limited. *Id.* at 622, 984 A.2d at 847. In determining this, the court reviewed its previous decision in *Jackson*. *Id.* at 618-19, 984 A.2d at 845. The *Jackson* case involved the issue of whether, through the enactment of Article 44A, the General Assembly effected "a waiver of sovereign immunity, either express or implied." *Id.* at 619, 984 A.2d at 845 (quoting *Jackson*, 289 Md. at 120, 422 A.2d at 377). In *Jackson*, the Court of Appeals of Maryland evaluated the specific provisions of Article 44A and noted that these provisions both authorized and mandated the purchase of liability insurance. *Id.* The court in *Jackson* stated that the purchase of liability insurance triggered only a limited waiver of the defense of governmental immunity, up to the amount of coverage under the policy. *Id.* at 620, 984 A.2d at 845.

The court in *Brooks* specified that the "limited waiver" statement in *Jackson* should be considered dictum because the language was not necessary to the court's decision of whether Article 44A effected a waiver. *Brooks*, 411 Md. at 621, 984 A.2d at 846. In addition, the court clarified that, to the extent that the language from *Jackson* referring to the limited waiver would not be considered dictum, it is overruled. *Id.*

To determine the actual degree of the waiver, the court used methods of statutory construction. *Id.* The court reviewed the statute as a whole and compared it with similar statutes because the plain language of Article 44A did not state whether the waiver of immunity would be limited or complete. *Id.* at 622-26, 984 A.2d at 847-49.

Specifically, the court compared Article 44A to other statutes that waived liability and noted that, when the General Assembly intended to limit such a waiver, it expressly stated the limitation within the language of the Act. *Id.* at 624-25, 984 A.2d at 848. The court then stated that the language of Article 44A did not cap the extent of the HABC's liability for tortious acts. *Id.* at 623-24, 984 A.2d at 848. Therefore, the court determined that, because the General Assembly provided no clear indication in the statute to the contrary, Article 44A effected a complete waiver. *Brooks*, 411 Md. at 625, 984 A.2d at 848.

Accordingly, regarding Brooks' common law tort claim, the court held that the lower court erred in granting the motion for summary judgment in favor of the HABC. *Id.* at 626, 984 A.2d at 849. In addition, the court addressed the second claim brought by Brooks under the CPA. *Id.* at 627, 984 A.2d at 850. The court stated that, because the HABC's only argument for immunity from suit under the CPA was that the HABC had immunity to the same degree under the CPA as it did under the common law, the lower court should not have granted the motion for summary judgment with regard to the CPA claim. *Id.*

In *Brooks*, the court's decision clarified that Article 44A completely waives governmental immunity for tortious actions committed by housing authorities. Thus, the court's ruling extends protection to residents within the housing authorities' jurisdiction beyond the limitations of the housing authorities' insurance coverage, increasing the possible liability of the housing authorities. By preventing the housing authorities from manufacturing immunity through the purchase of minimal insurance policies, the court's decision grants legal practitioners a better opportunity for recovery on behalf of clients injured by a housing authority's tortious actions.