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Casenotes: Torts — Defamation — Comments Made While Petitioning a Legislative Body for a Redress of Grievances Are Absolutely Privileged. *Sherrard v. Hull*, 53 Md. App. 553, 456 A.2d 59, aff'd per curiam, 296 Md. 189, 460 A.2d 601 (1983)

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TORTS — DEFAMATION — COMMENTS MADE WHILE PETITIONING A LEGISLATIVE BODY FOR A REDRESS OF GRIEVANCES ARE ABSOLUTELY PRIVILEGED. *Sherrard v. Hull*, 53 Md. App. 553, 456 A.2d 59, *aff'd per curiam*, 296 Md. 189, 460 A.2d 601 (1983).

While speaking before the Cecil County Board of Commissioners, a county resident made allegedly defamatory remarks about a local businessman.¹ In the subsequent suit for slander brought by the businessman, the court instructed the jury that if it found that the resident was petitioning a legislative body for a redress of grievances,² then her comments before the Board were absolutely privileged.³ Upon the businessman's appeal from an adverse jury verdict, the Court of Special Appeals of Maryland affirmed the trial court's instruction, holding that statements made while petitioning a legislative body for a redress of grievances are absolutely privileged.⁴ The court of appeals affirmed this holding in a *per curiam* opinion.⁵

Courts generally recognize three types of absolute privileges applicable to comments made during governmental activities:⁶ judicial privilege,⁷ legislative privilege,⁸ and executive privilege.⁹ Many jurisdic-

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1. *Sherrard v. Hull*, 53 Md. App. 553, 555, 456 A.2d 59, 61, *aff'd per curiam*, 296 Md. 189, 460 A.2d 601 (1983). The resident implied that the businessman had bribed one of the commissioners to obtain a change in the zoning designation of his property.
 2. This right is protected by the first amendment to the United States Constitution, which provides in pertinent part that: "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.
 3. *Sherrard v. Hull*, 53 Md. App. 553, 560, 456 A.2d 59, 63, *aff'd per curiam*, 296 Md. 189, 460 A.2d 601 (1983).
 4. *Id.* at 555, 456 A.2d at 61. An absolute privilege "protects the speaker or publisher without reference to his motives or the truth or falsity of the statement." BLACK'S LAW DICTIONARY 1077 (5th ed. 1979); *cf.* "qualified privilege," *infra* note 15.
 5. *Sherrard v. Hull*, 296 Md. 189, 460 A.2d 601 (1983) (*per curiam*).
 6. *See generally* W. PROSSER, LAW OF TORTS § 114 (4th ed. 1971) [hereinafter cited as PROSSER].
 7. *E.g.*, *Beeck v. Kapalis*, 302 N.W.2d 90 (Iowa 1981); *Sampson v. Rumsey*, 1 Kan. App. 2d 191, 563 P.2d 506 (1977); *Aborn v. Lipson*, 357 Mass. 71, 256 N.E.2d 442 (1970); *Feldman v. Bernham*, 6 A.D.2d 498, 179 N.Y.S.2d 881 (1958); *Bailey v. McGill*, 247 N.C. 286, 100 S.E.2d 860 (1957). Defamatory comments made by judges, attorneys, parties, witnesses or jurors are absolutely privileged if the comments made are related to the matter before the court. RESTATEMENT (SECOND) OF TORTS §§ 585-89 (1977) [hereinafter cited as RESTATEMENT]. English courts afford an absolute privilege to these comments, whether or not related to the matter before the court. PROSSER, *supra* note 6, at 778.
 8. *E.g.*, *McGovern v. Martz*, 182 F. Supp. 343 (D.D.C. 1966); *Kohn v. Davis*, 390 So. 2d 1246 (Fla. Dist. Ct. App. 1980); *Abercrombie v. McClung*, 55 Hawaii 595, 525 P.2d 594 (1974); *Tocco v. Piersante*, 69 Mich. App. 616, 245 N.W.2d 356 (1976). Defamatory comments made by a legislator during the performance of his legislative functions are absolutely privileged. RESTATEMENT, *supra* note 7, § 590. The absolute privilege also extends to statements by witnesses testifying at a legislative proceeding, provided the statement is relevant to the proceeding. *Id.* § 590A.
 9. *E.g.*, *Barr v. Matteo*, 360 U.S. 564 (1959); *Saroyan v. Burkett*, 57 Cal. 2d 706, 371

tions also recognize a privilege based on a citizen's right to petition the government.¹⁰

The right to petition the government for a redress of grievances, preserved by the first amendment¹¹ and made applicable to the states by the fourteenth,¹² derives from the Magna Carta.¹³ In the 1845 case of *White v. Nicholls*,¹⁴ the Supreme Court recognized a qualified privilege for statements made while petitioning the government.¹⁵ In *White*, a group of citizens sent letters to the President and the Secretary of the Treasury impugning the character of a local customs official and requesting his removal from office.¹⁶ The official sued the citizens for libel, but the Supreme Court held that publications made while petitioning the government for a redress of grievances are qualifiedly privileged.¹⁷

Subsequent cases have also recognized an absolute¹⁸ or qualified¹⁹ privilege for comments made while petitioning.²⁰ Despite this case law development, however, the petitioning privilege does not seem to have gained the general acceptance that the judicial, legislative, and execu-

P.2d 293, 21 Cal. Rptr. 557 (1962); *Lucy v. Muchnok*, 36 Pa. Commw. 272, 387 A.2d 945 (1978); *Hackworth v. Larson*, 83 S.D. 674, 165 N.W.2d 705 (1969); *Gold Seal Chinchillas, Inc. v. State*, 69 Wash. 2d 828, 420 P.2d 698 (1966). Defamatory comments by an executive or administrative officer, whether at the federal or state level, are absolutely privileged, provided they are made while performing his official duties. RESTATEMENT, *supra* note 7, § 591.

10. See *infra* notes 18-19.

11. See *supra* note 2.

12. *Hague v. Committee for Ind. Org.*, 307 U.S. 496 (1939).

13. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 1004 (2d ed. 1983); see also I C. STEPHENSON & F. MARCHAM, SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 125 (2d ed. 1972); B. LYON, A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND 321 (2d ed. 1980).

14. 44 U.S. (3 How.) 266 (1845).

15. *Id.* at 287, 291. A "'qualified privilege' protects defendant from liability only if he uttered defamatory statements without actual malice." BLACK'S LAW DICTIONARY 1117 (5th ed. 1979).

16. 44 U.S. (3 How.) 266, 267-74 (1845).

17. *Id.* at 287, 291. The precedential value of *White's* holding that the privilege is only qualified is diminished by the fact that when the case was decided, the judicial, legislative, and executive privileges were also only qualified. *Id.* at 287-89. The latter three privileges are now held to be absolute. See *supra* notes 7-9.

18. *E.g.*, *Lininger v. Knight*, 123 Colo. 213, 226 P.2d 809 (1951); *Yancey v. Commonwealth*, 135 Ky. 207, 122 S.W. 123 (1909); *Weiman v. Mabie*, 45 Mich. 484, 8 N.W. 71 (1881); *Rainer's Dairies v. Raritan Valley Farms*, 19 N.J. 552, 117 A.2d 889 (1955); *Campo v. Rega*, 79 A.D.2d 626, 433 N.Y.S.2d 630 (1980); *Bloom v. A.H. Robbins Co.*, 479 S.W.2d 780 (Tex. Civ. App.), *cert. denied*, 410 U.S. 983 (1972).

19. *E.g.*, *Pinn v. Lawson*, 72 F.2d 742 (D.C. Cir. 1934); *Ex parte Cypress*, 275 Ala. 563, 156 So. 2d 916 (1963); *Manley v. Harer*, 82 Mont. 30, 264 P. 937 (1928); *Meyer v. Parr*, 69 Ohio App. 344, 37 N.E.2d 637 (1941); *State v. Kerekes*, 225 Or. 352, 357 P.2d 413 (1960); *Kent v. Bongartz*, 15 R.I. 72, 22 A. 1023 (1885); *McKee v. Hughes*, 133 Tenn. 455, 181 S.W. 930 (1916).

20. There is no clear majority or minority rule as to whether the petitioning privilege is absolute or qualified. See 50 AM. JUR. 2D *Libel and Slander* § 217 (1970); 53 C.J.S. *Libel and Slander* § 116 (1948).

tive privileges enjoy.²¹

During the 1960's and early 1970's the Supreme Court bolstered the right to petition in a trilogy of cases.²² The Court found an absolute petitioning privilege that insulates certain conduct from the operation of antitrust laws. This principle, known as the *Noerr-Pennington* doctrine, permits companies to associate for the purposes of influencing the government or obtaining governmental action, when such an association for other purposes would violate the antitrust laws.²³ Even if the companies' intent in petitioning the government is to eliminate competition, their activities are still protected from prosecution under antitrust laws.²⁴ The rationale for this doctrine has two components. First, the government, in order to act on behalf of the people, must have free access to information, since "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."²⁵ Second, a construction of the antitrust laws that would punish petitioning the government would violate the first amendment right to petition.²⁶

The *Noerr-Pennington* doctrine will not, however, protect conduct found to be a "sham."²⁷ Thus, under the "sham exception," conduct that is merely an effort to prevent competitors from gaining similar access to the government,²⁸ or that subverts the integrity of the governmental process through corrupt means or misrepresentations,²⁹ is not privileged.

Over the last decade a number of courts have applied the *Noerr-Pennington* doctrine to other areas of law, extending an absolute privilege to petitioning activity that would otherwise be actionable.³⁰ As in

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21. For example, a discussion of the petitioning privilege is conspicuously absent from the Second Restatement of Torts. RESTATEMENT, *supra* note 7, §§ 583-612.
 22. These cases applied the privilege to the petitioning of all three branches of government. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (judicial); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) (executive); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135-36 (1961) (legislative).
 23. *Trucking Unlimited*, 404 U.S. at 510-11; *Pennington*, 381 U.S. at 670; *Noerr*, 365 U.S. at 139-40.
 24. *Pennington*, 381 U.S. at 670.
 25. *Noerr*, 365 U.S. at 137.
 26. *Id.* at 137-38.
 27. *Trucking Unlimited*, 404 U.S. at 511; *Noerr*, 365 U.S. at 144.
 28. *Trucking Unlimited*, 404 U.S. at 512; *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272, 279 (D.C. Cir. 1972).
 29. *Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n*, 663 F.2d 253, 266 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982); *United States v. American Tel. & Tel. Co.*, 524 F. Supp. 1336, 1362 (D.D.C. 1981).
 30. *E.g.*, *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980) (claim under the federal Civil Rights Act that defendants obtained a zoning change to prevent plaintiffs from building on the property); *Missouri v. National Org. for Women, Inc.*, 620 F.2d 1301 (8th Cir.) (tortious infliction of economic harm without legal excuse), *cert. denied*, 449 U.S. 842 (1980); *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530 (5th Cir. 1978) (tortious interference

the *Noerr-Pennington* antitrust cases, many of these courts determined that the importance of protecting the right to petition outweighs any possible harm to the plaintiffs.³¹

In the 1981 case of *Webb v. Fury*,³² the West Virginia Supreme Court of Appeals extended *Noerr-Pennington* to the defamation area. In *Webb*, a coal company sued an environmental group for libel. The allegedly defamatory communications consisted of the environmental group's filing administrative complaints against the company with two federal agencies, and the group's publishing a newsletter accusing the company of polluting the environment.³³ The West Virginia court held that since both the administrative complaints³⁴ and the newsletter³⁵ were efforts to influence governmental activity, they were protected by an absolute petitioning privilege. Until *Sherrard v. Hull*,³⁶ *Webb* was the only case to apply the *Noerr-Pennington* doctrine to a defamation case.

In *Sherrard*, the court of special appeals noted that Maryland courts generally follow the common law concerning defamation privileges,³⁷ recognizing the judicial,³⁸ legislative,³⁹ and executive⁴⁰ privileges.⁴¹ Until *Sherrard*, however, no Maryland court had addressed the

with a business relationship), *cert. denied*, 444 U.S. 924 (1979); *Weiss v. Willow Tree Civic Ass'n*, 467 F. Supp. 803 (S.D.N.Y. 1979) (conspiracy to harass and delay plaintiffs' application for zoning permits in violation of their civil rights); *Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Cal. 1972) (tortious interference with an advantageous relationship); *City of Long Beach v. Bozek*, 31 Cal. 3d 527, 645 P.2d 137, 183 Cal. Rptr. 86 (1982) (suit by a municipal government for malicious prosecution); *Matossian v. Fahmie*, 101 Cal. App. 3d 128, 161 Cal. Rptr. 532 (1980) (malicious prosecution, tortious business interference, and abuse of process).

31. *See, e.g.*, *Missouri v. National Org. for Women, Inc.* 620 F.2d 1301, 1317 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980); *Sierra Club v. Butz*, 349 F. Supp. 934, 939 (N.D. Cal. 1972); *City of Long Beach v. Bozek*, 31 Cal. 3d 527, 535-36, 645 P.2d 137, 141, 183 Cal. Rptr. 86, 90-91 (1982).
32. 282 S.E.2d 28 (W. Va. 1981).
33. *Id.* at 31-33.
34. *Id.* at 37.
35. *Id.* at 41-42.
36. 53 Md. App. 553, 456 A.2d 59, *aff'd per curiam*, 296 Md. 189, 460 A.2d 601 (1983).
37. *Sherrard*, 53 Md. App. at 556-58, 456 A.2d at 61-63.
38. *E.g.*, *Gersh v. Ambrose*, 291 Md. 188, 434 A.2d 547 (1981); *Adams v. Peck*, 288 Md. 1, 415 A.2d 292 (1980); *Di Blasio v. Kolodner*, 233 Md. 512, 197 A.2d 245 (1964); *Brinsfield v. Howeth*, 107 Md. 278, 68 A. 566 (1908); *Picone v. Talbott*, 29 Md. App. 536, 349 A.2d 615 (1975).
39. *Brush-Moore Newspapers v. Pollitt*, 220 Md. 132, 151 A.2d 530 (1959) (dicta); *Maurice v. Worden*, 54 Md. 233 (1880); *Law v. Scott*, 5 H. & J. 359 (1822).
40. *Walker v. D'Alesandro*, 212 Md. 163, 129 A.2d 148 (1957).
41. One significant departure from the majority of American courts is Maryland's adoption of the "English Rule" regarding the judicial privilege afforded to witnesses' comments. Under this rule, any defamatory statements are absolutely privileged, whether or not they are relevant to the matter before the court. *E.g.*, *Gersh v. Ambrose*, 291 Md. 188, 434 A.2d 547 (1981); *Korb v. Kowaleviocz*, 285 Md. 699, 402 A.2d 897 (1979); *Schaub v. O'Ferrall*, 116 Md. 131, 81 A. 789 (1911);

issue of whether a petitioning privilege exists in defamation cases.⁴²

In deciding this issue, the court first determined that the county resident's appearance before the Board of Commissioners did not come within the scope of either the judicial or legislative privileges.⁴³ The judicial privilege was found inapplicable because the Board was not exercising judicial functions.⁴⁴ The court, unsure of the "contours of the [legislative] privilege in a particular factual situation," also declined to apply that privilege to the facts before it.⁴⁵

Having held the established privileges inapplicable, the court next addressed the petitioning privilege. It held that a privilege does exist in defamation cases for comments made while petitioning a legislative body for redress,⁴⁶ basing its holding on three grounds. The court first noted that the right to petition the government is one of the oldest and "most precious" of the liberties preserved by the Constitution.⁴⁷ The court also reviewed the policy behind the privilege, and found that the promotion of free communication between the government and its citizens is vital in a democratic society.⁴⁸ Finally, the court recognized that the right to petition has been protected in the antitrust area by the Supreme Court through the *Noerr-Pennington* doctrine,⁴⁹ and that this protection has been extended by other courts to various causes of action,⁵⁰ including defamation.⁵¹ The adoption of a petitioning privilege would, therefore, be in line with a trend toward expanding the scope of this privilege, and would recognize the important role it plays in safeguarding one's rights in a democratic society.⁵²

The court further determined that the petitioning privilege should be absolute, rather than qualified.⁵³ The court noted the split of authority on this issue⁵⁴ and recognized that many jurisdictions have adopted a qualified petitioning privilege.⁵⁵ The court determined, however, that the cases holding the privilege to be qualified were decided before the development of the *Noerr-Pennington* doctrine, or were dis-

Hunkel v. Voneiff, 69 Md. 179, 14 A. 500 (1888). The majority of American courts follow the "American Rule." See PROSSER, *supra* note 6.

42. 52 Md. App. at 555, 456 A.2d at 61.

43. *Id.* at 556-58, 456 A.2d at 62-63.

44. *Id.* at 558, 456 A.2d at 62.

45. *Id.*, 456 A.2d at 62-63.

46. *Id.* at 555, 456 A.2d at 61.

47. *Id.* at 561, 456 A.2d at 64 (quoting *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967)).

48. *Id.* at 573, 456 A.2d at 70-71.

49. *Id.* at 561-63, 456 A.2d at 64-65; see *supra* notes 22-26 and accompanying text.

50. *Sherrard*, 53 Md. App. at 563-64, 456 A.2d at 65; see *supra* notes 30-31 and accompanying text.

51. *Sherrard*, 53 Md. App. at 564-65, 456 A.2d at 66; see *supra* notes 32-35 and accompanying text.

52. *Sherrard*, 53 Md. App. at 573-74, 456 A.2d at 70-71.

53. *Id.* at 567, 456 A.2d at 67.

54. *Id.* at 568-70, 456 A.2d at 68-69.

55. *Id.* at 569-70, 456 A.2d at 68-69; see *supra* note 19.

tinguishable in that they did not relate to the direct petitioning of a legislative body.⁵⁶ This fact, coupled with both the "evolution" of the petitioning privilege under *Noerr-Pennington*, and the importance of protecting the free flow of information to the government,⁵⁷ led the court to hold the privilege to be absolute.

The *Sherrard* court also adopted the "sham exception"⁵⁸ to the petitioning privilege.⁵⁹ The exception was held inapplicable, however, since there was no indication that the county resident "was attempting to interfere with the business relationships" of the plaintiff.⁶⁰ Furthermore, the resident's allegedly defamatory remarks were merely incidental to her appearance before the Board; she was addressing the Board in order to obtain governmental action and not simply to pervert the process in an effort to slander the plaintiff.⁶¹

The petitioning privilege adopted by the court of special appeals in *Sherrard v. Hull* is a logical addition to the law of defamation. Since comments made by participants in judicial and legislative functions enjoy an absolute privilege, the same privilege should apply to petitioning, which is another form of participation in governmental activities. Furthermore, the *Noerr-Pennington* doctrine and its subsequent expansion constitute an express recognition of the importance of and the need to protect the right to petition.

However, *Sherrard v. Hull*, as do most precedent-setting cases, leaves a few questions unanswered. The court provides no definition of what kinds of activity constitute petitioning,⁶² simply implying that whether conduct is petitioning is a question of fact for the jury.⁶³ Thus, future participants in governmental activities have little guidance as to what conduct will be protected.

The scope of the "sham exception" also remains undefined. The court found the exception inapplicable in *Sherrard*, but did not indicate whether the exception should be broadly or narrowly construed.⁶⁴ The strong interest in protecting the right to petition indicates that the ex-

56. *Sherrard*, 53 Md. App. at 572, 456 A.2d at 69.

57. *Id.*, 456 A.2d at 69-70.

58. See *supra* notes 27-29 and accompanying text.

59. *Sherrard*, 53 Md. App. at 565, 456 A.2d at 66.

60. *Id.* at 566, 456 A.2d at 67.

61. *Id.*

62. Cases from other jurisdictions applying the petitioning privilege involve several different types of activity and hence offer no definitive guidelines. See *supra* notes 18-19.

63. *Sherrard*, 53 Md. App. at 573, 456 A.2d at 70.

64. For arguments in favor of both a broad and a narrow application of the "sham exception" see Note, *Antitrust — Supreme Court Extends Noerr Immunity from Sherman Act to Attempts to Influence Adjudication*, 76 DICK. L. REV. 593, 603-05 (1972) (narrow construction); Note, *California Motor Transport Co. v. Trucking Unlimited: A New Route for Noerr-Pennington and the Sham Exception* 26 SW. L.J. 926, 933 (1972) (broad construction).

ception will be narrowly construed.⁶⁵ Since, however, the petitioning privilege was held to be absolute the "sham exception" is the only means by which a defamed party can recover damages.⁶⁶ Despite these unresolved questions, the adoption of the petitioning privilege in a "well-reasoned opinion"⁶⁷ is a logical and needed addition to defamation law.

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65. The court's statement that first amendment rights need "breathing space" to survive would indicate that Maryland courts will in the future construe the exception narrowly. *Sherrard*, 53 Md. App. at 567, 456 A.2d at 67.

66. *See supra* note 4.

67. *Sherrard v. Hull*, 296 Md. 189, 189, 460 A.2d 601, 601 (1983).