Court for Baltimore County
Case No.: 03C14014041

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 47

September Term, 2016

ANNE GEORGE, et al.

V.

BALTIMORE COUNTY MARYLAND,
et al.

Eyler, Deborah S.,
Reed,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.
Dissenting opinion by Harrell, J.

Filed: June 12, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellants, Anne George, Jody Kesner, and Jody Rosoff (collectively, "Appellants") filed suit under the taxpayer standing doctrine on behalf of themselves and all similarly situated taxpayers in the Circuit Court for Baltimore County. They sought a preliminary and permanent injunction, declaratory judgment, and writ of mandamus against Baltimore County, Maryland and three of its officials[1] (collectively, the "County"). Appellants argued that the County was in violation of several provisions of the Baltimore County Code in its operation of the Baltimore County Animal Shelter (the "Animal Shelter"), and ultimately wasting government funds.

After a hearing on the County's motion to dismiss, or in the alternative, motion for summary judgment, the court denied the motion to dismiss and granted the motion for summary judgment. The court found that there was no genuine dispute of material fact regarding pecuniary loss, a required element to establish taxpayer standing, and that the County was entitled to judgment as a matter of law. Appellants filed a timely appeal and present one question for our review:

I. The Court of Appeals has held that taxpayers have the "right to bring a lawsuit in this State to *prevent* waste or unlawful use of public property and funds." *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 560 (2014) (emphasis in original). Can the government eliminate that right by not increasing property tax rates for some period of time?

[1]At the time of this Appeal, Kevin Kamenetz was the County Executive of Baltimore County, Gregory Branch was the Director of Health and Human Services for Baltimore County and the Baltimore County Health Officer, and Thomas Scollins was the Assistant Chief at Baltimore County Animal Control. They were sued in their official capacities.

For the reasons that follow, we answer in the negative, and affirm the decision of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The issues in this case stem from the County's alleged mismanagement of the Animal Shelter, located at 13800 Manor Road in Baldwin, Maryland.[2] The Animal Shelter's operation is governed by Article 12 of the Baltimore County Code. On December 30, 2014, Appellants filed a complaint alleging that the County's actions and inactions violated several provisions of Article 12. *See* BALT. CNTY. CODE §12-6-103(a). Appellants alleged, *inter alia*, that the County failed to provide the sheltered animals with adequate food, water, and veterinary care. Appellants further alleged that the County failed to train its staff and volunteers properly, maintained improper foster and adoption policies, made insufficient efforts to locate the owners of sheltered animals, and allowed for inhumane euthanasia.

Appellants concluded that they and all, similarly situated, Baltimore County taxpayers were injured by the increased tax burden caused by these illegal acts.[3] Specifically, Appellants alleged:

[2] In the time since Appellants filed their complaint, the Animal Shelter has been closed and demolished. A new Animal Shelter, costing approximately $6,000,000, has been constructed. Although the new Animal Shelter may have eliminated, or at least ameliorated, the significant problems alleged, Appellants remain concerned about the County's practices, policies, and procedures regarding the animals.

[3] Appellants also claimed that they suffered other pecuniary injury from personally caring for animals that have been harmed by the County's acts. Appellant Rosoff adopted

- The failure to provide fresh water, adequate food, and veterinary care routinely cause[d] the animals housed at [the Animal Shelter] to become sick or injured animals to further deteriorate, thereby increasing the burden on Baltimore County taxpayers for veterinary care, medicines, and for euthanasia.

- Because sick animals were less likely to be adopted, Baltimore County taxpayers bore the burden for the continued maintenance of the animals and for euthanasia of un-adopted animals. Failure to keep the shelter clean deterred the public from visiting and decreased adoptions. The County thereby sacrificed fees collected upon adoption, such as adoption and licensing fees, which would decrease the burden on Baltimore County taxpayers.

- Not notifying pet owners when their animals had been impounded increas[ed] the number of animals that must be kept and maintained at [the Animal Shelter] at the expense of Baltimore County taxpayers and also increas[ed] the number of animals that must be euthanized at taxpayer expense. By euthanizing animals rather than returning them to their owners, [the Animal Shelter] also gave up kenneling or other fees that it would have collected from pet owners.

- The inadequate volunteer program necessitated that [the County] hire more employees and contractors and purchase more equipment in order to perform duties that could be performed by volunteers thereby increasing the burden on Baltimore County taxpayers.

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a "noticeably malnourished and sick" dog from the Animal Shelter on February 6, 2014, and spent in excess of $1,000 in veterinary care. The dog died within two months of adoption. Appellant George adopted a dog suffering from kidney disease on January 24, 2014, and paid approximately $280 for veterinary care before following a veterinarian's advice to have him euthanized. Appellant Kesner adopted a cat "suffering from severe trauma" from the Animal Shelter on July 9, 2014, and spent approximately $4,000 in veterinary care before having the cat euthanized, as recommended.

In their motion for preliminary injunction, Appellants included numerous affidavits from other individual citizens testifying about their experiences with the Animal Shelter. Former Animal Shelter volunteers, individuals who adopted animals, pet owners who were not informed that their animals had been found, and those who had simply visited the Animal Shelter provided sworn testimony in support of Appellants' allegations. Overall, the affidavits mirror Appellants' complaints regarding lack of veterinary care, the County's euthanasia practices, and failure to provide adequate food.

The County filed a motion to dismiss, or in the alternative, motion for summary judgment on January 28, 2015. The County argued that Appellants lacked taxpayer standing to survive its motion because it failed to adequately allege any act that reasonably could result in a pecuniary loss or a tax increase. In support of its argument, the County submitted the affidavit of Keith Dorsey, Director of Budget and Finance for Baltimore County. Mr. Dorsey testified that from 2013-2015, the years contained in the complaint, "the County levied no new taxes and the property and income tax rates remained unchanged." He further reported that "Baltimore County has not raised the property tax rate in twenty-six (26) years and has not raised the income tax rate in twenty-two (22) years." Mr. Dorsey concluded:

> I have reviewed the complaint filed in this case and I can state that the [Appellants] will not suffer an increase in their taxes as a result of their allegations regarding the Baltimore County Animal Shelter. The budget for the Animal Shelter is minor in relation to the total general fund budget that no taxes would be increased as a result of operation of the Animal Shelter.

> [Appellants] claim that Baltimore County routinely foregoes fee collection upon adoption. The fees referred to are adoption and licensing fees. The claim that if Baltimore County collected these fees, the burden on Baltimore County taxpayers would be decreased is absolutely incorrect. These fees are so minimal that the decision to collect or waive them will not result in any decrease or increase of taxes.

A hearing was held on February 12, 2016, the Honorable Judith Ensor presiding. The court denied the County's motion to dismiss, finding that the Appellants' claims "survive easily [the County's] [m]otion to [d]ismiss" because "[Appellants] have alleged that they are taxpayers, that they are filing suit on behalf of themselves and other taxpayers similarly situated, and that they are suffering distinct pecuniary injury as a result of [the County's] illegal actions and/or inactions." The court granted, however, the County's motion for summary judgment on the basis of taxpayer standing. The court found that Mr. Dorsey's affidavit "established that any alleged illegal acts have not and will not result in increased taxes or pecuniary loss to the [Appellants]." In its memorandum opinion, the court noted:

> Regarding the Motion for Summary Judgment, there certainly exists a dispute of fact as to whether [Appellants'] actions and/or inaction are violative of Article 12 of the Baltimore County Code and, therefore, illegal. [The County], however, conclusively ha[s] put to rest the question of whether any alleged illegal action will result in pecuniary loss to [Appellants]. It has not and will not. There is no material dispute of fact as to the existence or potential existence of pecuniary loss, a required element to establish taxpayer standing, and [the County] [is] entitled to judgment as a matter of law. Therefore, [the County's] Motion for Summary Judgment will be granted."

This appeal followed.

STANDARD OF REVIEW

Under Maryland Rule 2-501, the granting of a motion for summary judgment is appropriate only "if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). This Court reviews the circuit court's grant of summary judgment *de novo*. *See Hines v. French*, 157 Md. App. 536, 550 (2004). Further, we review the record in the light most favorable to the non-moving party and construe any reasonable inferences that may be drawn from the well-pled facts against the moving party. *See State Center*, 438 Md. at 498. An appellate court ordinarily should limit its review of a grant of a motion for summary judgment to "only the grounds upon which the trial court relied in granting summary judgment." *Barclay v. Briscoe*, 427 Md. 270, 281-82 (2012).

In determining whether a fact is material, this Court has held "a dispute as to facts relating to grounds upon which the decision is not rested is not a dispute with respect to a *material* fact and such dispute does not prevent the entry of summary judgment." *Barclay*, 427 Md. at 281 (quoting *O'Connor v. Baltimore Cnty.*, 382 Md. 102, 111, 854 A.2d 1191, 1196 (2004) (emphasis in original)). "A material fact is a fact the resolution of which will somehow affect the outcome of the case." *Matthews v. Howell*, 359 Md. 152, 161, 753 A.2d 69, 73 (2000). Thus, we must determine whether there is a genuine dispute as to the

requirements of taxpayer standing, and if not, whether the moving party was entitled to a judgment as a matter of law.

DISCUSSION

A. Parties' Contentions

Citing *State Center, LLC v. Lexington Charles Ltd.*, 438 Md. 451 (2014), Appellants contend that the circuit court erred when it found that there was no evidence of any pecuniary loss suffered, because pecuniary loss is not limited to increased taxes. Further, Appellants assert that Maryland courts have repeatedly interpreted pecuniary loss with "great leniency" and require a showing that the action being challenged results in *either* a pecuniary loss or an increase in taxes. *Id*. at 561. Relying on *Sun Cab Co. v. Cloud*, 162 Md. 419 (1932), Appellants maintain that the circuit court ignored case law establishing that taxpayer standing protects against other forms of pecuniary loss. Appellants argue that the "waste of government funds" is sufficient pecuniary loss to confer taxpayer standing, and that a genuine dispute exists as to whether "previously-collected taxes were wasted as a result of [the County's] illegal acts."

The County counters that Appellants failed to create any genuine dispute of material fact by failing to rebut Mr. Dorsey's affidavit. The County argues that Appellants' allegations are "woefully inadequate to defeat summary judgment" because they are not supported by any evidence showing that they will suffer some tax increase or pecuniary loss. Because there was no evidence of any pecuniary loss suffered, the County argues, granting summary judgment was proper.

B. Analysis

Taxpayer standing is a common law standing doctrine which "permits taxpayers to seek the aid of courts, exercising equity powers, to enjoin illegal and *ultra vires* acts of public officials where those acts are reasonably likely to result in pecuniary loss to the taxpayer." *State Center*, 438 Md. at 538. In order to bring a taxpayer standing suit, The Court of Appeals has required the taxpayer to show: 1) an action by a municipal corporation or public official that is illegal or *ultra vires*, and 2) that the action may injuriously affect the taxpayer's property, meaning that it reasonably may result in a pecuniary loss to the taxpayer or an increase in taxes. *See Kendall v. Howard Cnty.*, 431 Md. 590, 605, 66 A.3d 684, 693 (2013) (quoting *120 W. Fayette St., LLLP v. Mayor & City Council of Baltimore*, 407 Md. 253, 267 (2009)). At issue in this case is whether Appellants have established the second requirement sufficiently to survive the County's motion for summary judgment, *i.e.*, whether they have shown that the County's actions were "reasonably likely to result in a pecuniary loss to the taxpayer or an increase in taxes." *Id.* In reviewing the case in a light most favorable to the non-moving party, we hold that Appellants have not satisfied this requirement. We explain.

1. Pecuniary Loss

Appellants do not argue that the County's operation of the Animal Shelter reasonably could have resulted in an increase to their taxes. In fact, Appellants do not dispute Mr. Dorsey's affidavit testimony concluding that Baltimore County had not, and would not, increase tax rates. Instead, Appellants argue that they, and all similarly situated

Baltimore County taxpayers, have suffered a different form of pecuniary loss – the waste of government funds.

"This Court has recognized repeatedly that taxpayers have the right to bring a lawsuit in this State to *prevent* waste or unlawful use of public property and funds." *State Center*, 438 Md. at 560 (emphasis in original) (citing *e.g.*, *Hammond v. Lancaster,* 194 Md. 462, 474–75, 71 A.2d 474, 479 (1950); *Matthaei v. Housing Auth.,* 177 Md. 506, 510, 9 A.2d 835, 836 (1939); *Hanlon v. Levin,* 168 Md. 674, 681, 179 A. 286, 289 (1935)). In *State Center*, the Court of Appeals tackled the question of "what types of 'harm' are sufficient to constitute 'waste' so as to confer taxpayer standing upon a complainant." *Id.* at 561. The Court of Appeals explained that, generally, "potential pecuniary loss" is interpreted with great leniency. *Id. See e.g.*, *Baltimore Retail Liquor Package Stores Ass'n v. Kerngood,* 171 Md. 426, 429, 189 A. 209, 210 (1937) ("[A]ccording to past applications of the rule, the interest or injury which will support such a suit is broadly comprehensive."); *James v. Anderson*, 281 Md. 137, 142, 377 A.2d 865, 868 (1977) (holding that an alleged "decrease in efficiency which would result from the alleged ultra vires acts" was "sufficient for a taxpayer of the county involved to maintain a suit"); *Citizens Planning & Housing Ass'n v. Cnty. Exec. of Baltimore Cnty.*, 273 Md. 333, 343 (1974), *superseded by statute on other grounds as stated in Patuxent Riverkeeper v. Maryland Dep't of Environment,* 422 Md. 294, 29 A.3d 584 (2011) (holding that a potential need to fend off charges of illegality may be sufficient to establish taxpayer standing).

Appellants base their argument on, *Sun Cab Co. v. Cloud*, 162 Md. 419, 159 A.2d 922 (1932), which "exemplifies one of the most lenient interpretations of what may constitute a sufficient plea of pecuniary loss." *State Center*, 438 Md. at 563. There, taxpayers sued the Secretary of State and Board of Supervisors of Elections of Baltimore City to enjoin a referendum they claimed was void due to having too few signatures. *Sun Cab Co.*, 162 Md. at 419-22. The Appellants argued that "if the referendum should proceed upon the petitions so charged with fraud, the taxpayers will be put to wrongful expense for the publication of the referendum and the printing of it on the ballots of the next general election." *Id*. at 422. The Court of Appeals upheld taxpayer standing on the grounds that "according to the settled practice, taxpayers interested in avoiding the waste of funds derived from taxation which would be involved in conducting the void referendum may make application to the court for [] remedy." *Id*. at 426.

Case law suggests that the waste of government funds in this case falls under the broad umbrella of a harm that constitutes "potential pecuniary loss." However, our analysis does not end there. The Court of Appeals, in *State Center*, concluded that the ultimate issue is not what type of harm is sufficient necessarily, "but rather whether the type of harm is one that may affect the complainant's taxes." *State Center*, 438 Md. at 565.

2. Reasonably likely to result in a pecuniary loss

We hold that the County's actions were not *reasonably likely to result* in a pecuniary loss to Appellants because the County's actions were not likely to affect Appellants' taxes. Appellants argue that the County wasted taxpayer-derived funds on excess veterinary care,

medications, food, euthanasia, and employees. They also assert that the County lost revenue from potential adoption and licensing fees. Appellants argue that these actions result in an "increased tax burden." The County, however, provided evidence which proves these acts were not reasonably likely to affect Appellants' taxes. Mr. Dorsey's affidavit unequivocally states "that for each of the years [contained in the complaint] the County levied no new taxes and the property and income tax rates remained unchanged[,]" and that Appellants "will not suffer an increase in their taxes as a result of their allegations regarding the Baltimore County Animal Shelter." Moreover, the affidavit states definitively that it is "absolutely incorrect" that if the County collected adoption and licensing fees taxpayers' burden would decrease, directly challenging Appellants' assertion to the contrary. Appellants do not rebut this evidence, therefore, there is no evidence of an increased tax burden or the possibility of a decrease.

CONCLUSION

Appellants' reliance on *State Center* and *Sun Cab Co*. in their argument that this Court should confer taxpayer standing upon them falls short. The attack on taxpayer standing in *State Center* was by way of motion to dismiss. *State Center*, 438 Md. at 538. There, the Court held that the appellees, property owners and taxpayers, had taxpayer standing to *bring* the suit. The Court concluded that the taxpayers "pleaded taxpayer standing doctrine sufficiently and, thus, the Circuit Court denied properly the State Agencies' Motions to Dismiss on standing grounds." *Id*. at 583. Similarly, the Court in *Sun Cab Co.* held that taxpayers sufficiently pled taxpayer standing and, therefore, could "make

application to the court for [] remedy." *Sun Cab Co.*, at 426 (emphasis added). We agree that Appellants have sufficiently *alleged* a reasonable likelihood of pecuniary loss in the form of waste. This is enough, and was enough, to survive a motion to dismiss for failure to state a claim.

At the motion for summary judgment stage, however, Appellants must meet a higher evidentiary standard. The motion and response must show that there is no genuine dispute as to any material fact. Md. Rule 2-501(f). The material fact in this case – the fact which would affect the outcome of the case – is whether the County's actions were reasonably likely to result in a pecuniary loss to the Appellants. We hold that the parties have not created a genuine dispute as to this fact, and granting the County's motion for summary judgment was proper.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.

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I dissent, with the utmost respect. Although the Majority opinion appears to recognize that (1) the relevant financial predicates in order to bring a taxpayer suit are stated in our cases in the disjunctive ("a pecuniary loss to the taxpayer *or* an increase in taxes," *see* Maj. Slip op. at 8 (emphasis added)), (2) "taxpayers have the right to bring a lawsuit . . . to *prevent* waste or unlawful use of public property or funds," *id.* (emphasis in original), and (3) what constitutes "'potential pecuniary loss' is interpreted with great leniency," *id.*, the Majority opinion in its analysis reduces the disjunctive standard of potential pecuniary loss or tax increase into a single category – it is all about taxation. Although I understand that the name of the legal concept at issue is "taxpayer" standing, that does not mean (or justify) collapsing the alternative basis of "potential pecuniary loss" into the separate category of increased taxation.

The cases, albeit without crystal clarity, distinguish that "potential pecuniary loss" is indeed a separate category for standing from increased taxation. For example, the Court of Appeals, in *James v. Anderson*, 281 Md. 137, 377 A.2d 865 (1977), held that alleging a "decrease in efficiency which would result from the alleged [governmental] ultra vires acts" was "sufficient for a taxpayer of the county involved to maintain a suit." 281 Md. at 142, 377 A.2d at 868. The bar is not set high in meeting this standard. In *Sun Cab Co. v. Cloud*, 162 Md. 419, 159 A. 922 (1932), the Court of Appeals demonstrated great leniency in accepting as sufficient a plea of potential pecuniary loss where a plaintiff claimed an interest in avoiding waste of public funds by local government in conducting an arguably invalid referendum vote. 162 Md. at 426, 159 A. at 925.

In the present case, Appellants allege that Baltimore County was grossly defective and/or inefficient in its operation of its Animal Shelter, all of which resulted in the unnecessary or exorbitant expenditure of public funds and even direct personal pecuniary losses to citizens who ended-up having to obtain proper veterinary case (or euthanasia) for adopted animals who had been neglected or mistreated at the Shelter.[4] Mr. Dorsey's (the County's Budget & Finance Director) affidavit, in which the circuit court and the Majority opinion place much stock, made no attempt to counter Appellant's claims of potential or actual pecuniary loss, except as to the unlikelihood of increased or decreased taxes. I conclude that Appellants demonstrated sufficiently a triable controversy. Accordingly, I would reverse the judgment of the Circuit Court for Baltimore County and remand the matter for further proceedings, i.e., discovery and trial.

[4] I am not certain, however, that the individual actual expenditures incurred by the Appellants who claimed to have spent them should receive much weight in the analysis of standing. A tax payer suit is like a class action. *See State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 552–53, 92 A.3d 400, 460 (2014). Depending on the description of the class, Appellants who adopted sick animals and incurred expenses for their care and/or euthanasia may not fit neatly as representative of a larger class of taxpayers as was claimed here.