**REPORTED**

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0133
September Term, 2004

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**ON MOTION FOR RECONSIDERATION**

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RITE AID CORPORATION

v.

ELLEN R. LEVY-GRAY

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Murphy, C.J.
Kenney
Rodowsky, Lawrence F.
(retired, specially assigned),

JJ.

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Opinion by Rodowsky, J.

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Filed: June 30, 2005

For the reasons stated in *Rite Aid Corp. v. Levy-Gray*, ____ Md. App. ____, ____ A.2d ____ (2005) [No. 0133, September Term, 2004, filed June 3, 2005], this Court affirmed a judgment of the Circuit Court for Baltimore County in the amount of $250,000 in favor of the appellee, Ellen R. Levy-Gray, against the appellant, Rite Aid Corporation. We now are presented with a motion, filed jointly by the parties, for reconsideration of our decision to report the opinion. The parties ask that the opinion be withdrawn from publication because they

> "have now reached a conditional settlement for this lawsuit. The condition is that the lawsuit will be settled for a monetary payment made by Rite Aid to Ellen R. Levy-Gray if this Court agrees to reverse its decision to report the opinion issued in this case."

The motion further advises that, absent our withdrawal of the opinion, Rite Aid Corporation will seek certiorari review by the Court of Appeals. In other words, the request is that the judgment stand but that the opinion have no precedential value. *See* Maryland Rule 1-104.

There is a strong analogy between the instant request and a request that a judgment be vacated, either by the judgment-rendering court or by an appellate court, on the ground that the controversy has become moot by virtue of a voluntary settlement. That issue was presented in *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 115 S. Ct. 386, 130 L. Ed. 2d 233 (1994), in which Justice Scalia wrote for an unanimous court.

There, a United States District Court reversed a ruling by the Bankruptcy Court that had been favorable to a creditor. When the creditor appealed the adverse ruling of the District Court, the Court of Appeals for the Ninth Circuit affirmed. After certiorari had been granted by the United States Supreme Court, and briefs on the merits had been filed, the parties entered into a settlement that mooted the controversy at the Supreme Court level. The creditor then requested the Supreme Court to vacate the judgments below.

The Court distinguished cases in which mootness arises from mere happenstance, where an aggrieved party's obtaining of an appellate decision on the merits of an adverse ruling is frustrated "by the vagaries of circumstance." *Id.* at 25, 115 S. Ct. at 391. *See*, *e.g.*, *Trindle v. State*, 326 Md. 25, 30, 602 A.2d 1232, 1234 (1992) (recognizing that, where a person convicted of crime dies before decision of a pending appeal of right, the judgment of conviction is to be vacated); *Jones v. State*, 302 Md. 153, 158, 486 A.2d 184, 187 (1985) (same); and *see Russell v. State*, 310 Md. 96, 97, 527 A.2d 34, 34 (1987). Where mootness results from settlement, however, the Supreme Court in *Bancorp Mortg. Co.* held that the "extraordinary remedy of vacatur," *id.* at 26, 115 S. Ct. at 392, would be granted only under exceptional circumstances, which "do not include the mere fact that the settlement agreement provides for vacatur[.]" *Id.* at 29, 115 S. Ct. at 393. One of the

policy reasons supporting this conclusion was stated by the Court as follows:

> "As always when federal courts contemplate equitable relief, our holding must also take account of the public interest. 'Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.' Congress has prescribed a primary route, by appeal as of right and certiorari, through which parties may seek relief from the legal consequences of judicial judgments. To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would--quite apart from any considerations of fairness to the parties--disturb the orderly operation of the federal judicial system."

*Id*. at 26-27, 115 S. Ct. at 392 (citation omitted).

Judge Smalkin, in *Keeler v. Mayor and City Council of Cumberland*, 951 F. Supp. 83 (D. Md. 1997), put more bluntly the rationale for denying a motion to vacate an opinion in that case. He said, "What the Government wants here is simply to get an unfavorable decision off the books." *Id.* at 84. *See also Polley v. Odom*, 963 S.W.2d 917, 918 (Tex. App. 1998) ("Because our opinion in this case addresses matters of public importance, our duty as a public tribunal constrains us to publish our decision").

In the instant matter, the parties cannot even assert mootness in support of their motion, inasmuch as the settlement is conditional. The motion is simply an application to this Court's discretion. We exercise that discretion to deny the motion, because certain of Rite Aid's arguments addressed in our reported

opinion involve questions of public importance. Indeed, our view of the policy implications of granting the motion before us was well expressed by the United States District Court for the District of Colorado in a vacatur case. The Court said:

> "A party that can erase negative precedent through vacatur views the lower court's judgment as a bargaining chip: in exchange for the victor's agreement to relinquish the precedential value of the judgment, the loser will offer some form of inevitably pecuniary sweetener. For example, the loser offers not to create the expense and risk of reversal inherent in appeal, or the loser may offer more in a settlement with the victor than the victor initially received, or even demanded in the complaint. At the same time, the victor, notably, is typically not a repeat litigator and has little interest in preserving the precedential value of the judgment below. The victor has little reason to resist vacatur and take its chances on appeal.
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> "The case law becomes what the party with the greatest resources wishes it to be. Economic prowess purchases more persuasive power than the marketplace of ideas and sound reasoning combined. Vacatur allows wealthy litigants to become, in effect, editors of their own treatises on the subjects which concern them. We have no kind words for such a practice. We can imagine few practices condoned by the judicial system that would have a less salutary effect on both the reality and the perception of its integrity."

*Benavides v. Jackson Nat'l Life Ins. Co.*, 820 F. Supp. 1284, 1289 (D. Colo. 1993).

For the foregoing reasons, the motion for reconsideration is denied.