UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0476

September Term, 2015

MALONE INVESTMENTS, LLC

v.

SOMERSET COUNTY SANITARY DISTRICT, INC.

Kehoe,
Nazarian,
Serrette, Cathy Hollenberg
(Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: June 8, 2016

This is the second appeal in an ongoing dispute between Malone Investments, LLC, appellant, and the Somerset County Sanitary District, Inc. Malone is a Maryland limited liability company that desires to build residences on a parcel of land it owns in Princess Anne. The Sanitary District furnishes both water and sewer services in certain areas in Somerset County, including in the town of Princess Anne. The parties' underlying dispute center on a benefit assessment scheme adopted by the Sanitary District in 2005 to recoup the costs associated with an infrastructure upgrade to the sewage system (the "Bypass Project"). Properties that request new or additional allocations of sewer service bear the entire financial burden for the Bypass Project.

Malone, which purchased an 8.6 acre parcel of land in the town of Princess Anne in 2006, was one of the property owners that was charged under the assessment scheme. In 2011, Malone filed a declaratory judgment action and request for injunctive relief in the Circuit Court for Somerset County, claiming that the assessment scheme was unconstitutional because it apportioned the entire cost of the Bypass Project upon only a fraction of the benefitted properties. Among other contentions, Malone argued that the assessment scheme violated its rights to equal protection of the law and constituted an uncompensated taking of its property. The Sanitary District filed a counterclaim that sought a declaratory judgment that the assessment scheme was valid. The case was tried before the circuit court, the Honorable Dale R. Cathell presiding. On March 25, 2013, the court issued a 65 page opinion and order. In relevant part, the court concluded that the

assessment scheme was invalid because it did not fairly allocate the costs of the project among "all users . . . that are actually properly connected to the system or abut street where the system is in place." Although the opinion and order addressed the parties' equal protection arguments in detail, it relegated Malone's takings argument to a single footnote:

> While the 'property rights' clause of the United States Constitution's Bill of Rights is found in the same amendment as other rights that have been held to be fundamental rights, and while the court may, or may not, believe that property rights should be treated the same as the other rights contained in the amendment, it does not believe that this is the appropriate case to apply [a] 'fundamental rights' analysis. The court is unaware of any Supreme Court cases where that Court has applied such a 'fundamental' analysis to the imposition of front foot assessments.

In a separate portion of its opinion, the trial court concluded that the District was not authorized to charge assessments against Malone's property until the property was connected to the sewer system. In a subsequent order, the trial court awarded Malone $270,869.50 in attorneys' fees and costs.

The Sanitary District filed an appeal to this Court. In 2015, a panel of this Court issued an opinion affirming in part and reversing in part the trial court's judgment. *Somerset County Sanitary District, Inc. v. Malone Investments, LLC*, No. 178, September 2013 Term, filed January 9, 2015 ("*Malone I*"). The *Malone I* panel framed the constitutional issues before it as whether "the benefit assessment violated the Equal Protection Clause of the Fourteenth Amendment[.]" Slip op. at 35. The panel answered

that question in the negative. *Id.* at 39–44. The panel also addressed Malone's argument that the assessment scheme constituted a taking of its property in footnote 32 of its opinion:

> In its brief, Malone contends that an entirely different standard—strict scrutiny—applies because property is a "fundamental right" that is guaranteed by the United States Constitution. It cites to specific pages [in the trial court's] opinion and states that the court held that the District's "assessment scheme result[ed] in a taking of Malone's property." Malone's position is, quite simply, incorrect: nowhere in that opinion does the circuit court state that there was a taking of any kind. Malone's "fundamental right" argument runs counter to language in the circuit court's opinion: "This court is unaware of any Supreme Court cases where that Court has applied such a 'fundamental' analysis to the imposition of front-foot assessments." Accordingly Malone's reliance in its briefs on unconstitutional takings cases and strict scrutiny review, *see, e.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 is misplaced.

Id. at 37. The panel reversed the award of attorneys' fees but affirmed the court's conclusion that the Sanitary District had no authority to charge sewer fees until the property was connected to the sewer system. The panel remanded the case to the circuit court for the entry of a declaratory judgment "because the circuit court did not enter one as part of its resolution of the case," citing *Bowen v. City of Annapolis*, 402 Md. 487, 608–09 (2007). *Id.* at 48 n. 37. The *Malone I* mandate read in pertinent part:

> JUDGMENT OF THE CIRCUIT COURT FOR SOMERSET COUNTY AFFIRMED IN PART AND REVERSED IN PART. CASE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION.[1]

[1]The *Malone I* panel also reversed the award of attorneys' fees.

Id. at 48. Malone filed a motion for reconsideration, asserting, among other contentions, that:

> Appellee's principal constitutional claim that appellant's benefit assessment scheme constitutes an unlawful, uncompensated taking of private property for public use should be decided even if the circuit court did not do so explicitly.

In conjunction with the motion for reconsideration, Malone also filed a motion to dismiss the appeal and to vacate the *Malone I* opinion. Malone argued that the "[b]ecause the unconstitutional takings claim in the case has not been adjudicated by the circuit court," the circuit court judgment was not final. The *Malone I* panel denied both motions. Malone then filed a petition for a writ of certiorari, which was denied by the Court of Appeals on December 21, 2015.

On remand, Malone filed a "Request for Hearing Regarding Post Remand Entry of Declaratory Judgment," in which Malone requested the circuit court to address:

> Whether the District's benefit assessment scheme, as applied, is unconstitutional under the Fourteenth and Fifth Amendments as an uncompensated taking of private property.

The circuit court entered a declaratory judgment on April 29, 2015. The judgment did not address Malone's takings claim. Malone then filed this appeal. It presents four issues:

> I. Do the Sanitary District's special benefit assessments constitute an unconstitutional taking, because they are based on (a) the total cost of infrastructure that confers significant benefits on the general public, and (b) the

total cost of certain other infrastructure that confers no special benefit to Appellant?

II. Does the Sanitary District's benefit assessment scheme violate Appellant's right to equal protection because it arbitrarily fails to assess similarly situated and benefitted properties?

III. Did the circuit court correctly find that the Sanitary District had no authority to impose a special benefit assessment on Malone's property and was not entitled to be reimbursed for the cost of the unauthorized and unrequested connection of Malone's property to the sewer and water lines in Sheree Lane until Malone makes actual use thereof to obtain services?

IV. Upon a determination that the District's benefit assessments are unconstitutional on either a takings or equal protection ground, should the Court reinstate the attorneys' fees awarded to Malone by the circuit court pursuant to 42 U.S.C. § 1988(b)?

We will affirm the decision of the circuit court.

Analysis

Law of the Case

Under the doctrine of law of the case, "once an appellate court rules upon a question presented on appeal, litigants and lower courts become bound by the ruling, which is considered to be the law of the case." *Reier v. State Dep't of Assessments & Taxation*, 397 Md. 2, 21 (2007). As such, litigants "cannot prosecute successive appeals in a case that raises the same questions that have been previously decided by this Court in a former appeal of that same case." *Id.* When the Court of Appeals denied Malone's petition for certiorari, the rulings of *Malone I* became final.

However, we also recognize that the doctrine is one of appellate procedure and convenience, rather than a fixed doctrine such as *res judicata* or collateral estoppel. *Hawes v. Liberty Homes, Inc.*, 100 Md. App. 222, 230 (1994). As such, under certain circumstances, this Court will decline to apply the doctrine if: "[(1)] the evidence on a subsequent trial was substantially different, [(2)] controlling authority has since made a contrary decision on the law applicable to such issues, or [(3)] the decision was clearly erroneous and would work a manifest injustice." *Stokes v. Am. Airlines, Inc.*, 142 Md. App. 440, 447 (2002) (quoting *Turner v. Hous. Auth. of Baltimore City*, 364 Md. 24, 34 (2001)).

Malone raises several arguments in support of its contention that the law of the case doctrine does not apply to this appeal. As to the takings issue, Malone first asserts that we did not actually decide the takings claim in *Malone I*, and that our failure to do so was "manifestly unjust." It argues that, in order to correct this injustice, we should remand the case to the circuit court to address the takings claim, or address the takings claim ourselves. Second, it contends that to the extent that we did opine on the takings issue in *Malone I*, our discussion was merely dicta, and, as such, "may not serve as the binding law of the case." As to the equal protection claim, Malone contends that the constitutional fact-finding applied by this Court in *Malone I* was contrary to caselaw and

Maryland Rule 8-131(c),[2] and thus should not bind our decision. We are unpersuaded by these contentions and will address them in order.

(1) The Takings Claim

We will begin with Malone's assertion that neither the circuit court nor the *Malone I* panel addressed its takings claim. We think that Malone is incorrect. The circuit court concluded that the Takings Clause does not provide a remedy to a property owner in a front foot assessment dispute and the *Malone I* panel effectively reached the same result, albeit in different words. It is difficult to conceive how any court could reach a different result. This is because the Takings Clause protects property owners against certain types of government action that *reduce* the value of property. However, the Takings Clause does not impose an affirmative obligation upon government to *enhance* property values:

> [W]e can see absolutely no warrant for the proposition that where the government does not affirmatively prohibit the realization of investment-backed expectations, but merely refuses to enhance the value of real property, a compensable taking has occurred. . . . To find [a denial of sewer service] to be a compensable taking would open an incredible Pandora's Box.

[2]Rule 8-131(c) states:

> **Action Tried Without a Jury.** When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275, 285–86 (4th Cir. 1998); *see also Neifert v. Dep't of Env't*, 395 Md. 486, 522 (2006) (Property owners' "takings claim fails also because they have not demonstrated that access to sewer service is an interest that qualifies for protection as 'property' under the United States or Maryland Constitution." (citations omitted)).

That the Takings Clause does not provide an avenue of possible relief in every sort of dispute that a landowner might have with the government does not mean that Malone was bereft of a constitutional remedy. At the heart of Malone's case are contentions that the benefit assessment scheme required a few property owners, including it, to bear the entire cost of a sewer project that benefitted all customers and that the District's reasons for adopting the benefit assessment scheme were unjustifiable, unreasonable and unfair. This is a paradigmatic basis for equal protection claim. Malone's equal protection claim was addressed in detail by the *Malone I* panel, even though Malone disagrees with the result.

(2) Dicta?

Alternatively, Malone asserts that the panel's analysis of the takings claim in footnote 32 of *Malone I* was merely dicta and thus not binding upon either the circuit court on remand or this panel. We conclude that the *Malone I* panel's disposition on the takings claim was not dictum because "[w]hen a question of law is raised properly by the

issues in a case and the Court supplies a deliberate expression of its opinion upon that question, such opinion is not to be regarded as *obiter dictum*, although the final judgment in the case may be rooted in another point also raised by the record." *Kaye v. Wilson-Gaskins*, ___ Md. App. ___, 2016 WL 1704435 at *7 (2016) (quoting *Schmidt v. Prince George's Hosp.*, 366 Md. 535, 551 (2001)).

Of course, whether footnote 32 is treated as a holding or as dicta doesn't matter because, as we have previously indicated, Malone never had a cognizable takings claim in the first place.[3]

(3) The Equal Protection Claim

We are further unpersuaded by Malone's contention that the law of the case doctrine should not apply to its equal protection claim. In order to persuade us to depart from our policy of applying the law of the case doctrine, our decision in *Malone I* on this issue must be "patently inconsistent with controlling principles announced by a higher court and [] therefore clearly incorrect." *Andrulonis v. Andrulonis*, 193 Md. App. 601, 614 (2010).

[3]Tangentially, Malone argues that there was no final judgment issued by the circuit court if it did not decide the takings issue. We disagree. A judgment is final once it "terminates the litigation in a particular court." *Brewster v. Woodhaven Bldg. & Dev., Inc.*, 360 Md. 602, 611 (2000). Since the circuit court ruled that the assessment scheme was unconstitutional under the equal protection clause, there was no reason for it to also conclude that the scheme was unconstitutional under the takings clause. Its conclusion that the assessment scheme was unconstitutional, thereby voiding the assessments charged to Malone, terminated the controversy. Thus it was a final judgment.

Malone first argues that the Court clearly erred in *Malone I* by reviewing the circuit court's legislative fact-findings under a less deferential standard than the court's other fact-findings. It bases this argument on Rule 8-131(c)'s mandate that an appellate court will not set aside a trial court's factual findings unless "clearly erroneous." However, as the *Malone I* panel observed, appellate courts are often faced with mixed questions of law and fact, and, in those circumstances, we afford the circuit court less deference than on pure questions of fact. *See, e.g., Jones v. State*, 343 Md. 448, 458 (1996).

After reviewing established caselaw, the *Malone I* panel concluded that legislative facts tend to involve questions of law, and thus should be reviewed under the less deferential standard applied for questions of mixed law and fact. Slip op. at 46 (citing, among other authority, *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 n.17 (1984), and *Jones,* 343 Md. at 458). Malone has not persuaded us that this approach is inappropriate.

Malone secondly contends that we clearly erred in applying legislative fact-finding in a case challenging a benefit assessment. It directs us to *Donocom Assoc. v. Wash. Sub San. Comm.*, 302 Md. 501, 512 (1985), arguing that the Court of Appeals held that government charging schemes, including benefit assessments, are not legislative matters. The problem with Malone's argument is that the *Malone I* panel acknowledged

this point, noting that the pertinent legislative facts did not pertain to the assessment scheme itself, but to the purposes served by the Bypass Project as a whole:

> How the District assessed Malone's property is an adjudicative fact, relevant only to the dispute between Malone and the District, and it is an issue we discussed above. However, the overall purpose of the Bypass Project is more properly viewed as a legislative fact because the project exists beyond the narrow boundaries of this dispute.

Slip op. at 46-47.

Because the *Malone I* panel employed the legislative fact-finding standard of review to consider the purpose of the Bypass Project was reasonable, as opposed to the assessment scheme itself, the panel's analysis did not run afoul of the employment of *Donocum Assoc.*

In summary, Malone has not persuaded us that there was error, much less clear error leading to a manifest injustice, on the part of our colleagues in *Malone I.* The doctrine of law of the case bars re-litigation of the matters raised by Malone.

THE JUDGMENT OF THE CIRCUIT COURT OF SOMERSET COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.