
In The
Court of Appeals
of Maryland

No. 47
September Term, 2010

BEKA INDUSTRIES, INC.,

Petitioner,

v.

WORCESTER COUNTY BOARD OF EDUCATION,

Respondent.

BRIEF OF *AMICUS CURIAE*
AMERICAN SUBCONTRACTORS ASSOCIATION,
THE AMERICAN SUBCONTRACTORS ASSOCIATION OF BALTIMORE,
AND THE D.C. METROPOLITAN SUBCONTRACTORS ASSOCIATION

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STATEMENT OF THE CASE

The American Subcontractors Association, the American Subcontractors Association of Baltimore, and the D.C. Metropolitan Subcontractors Association (collectively, the “Subcontractor Associations” or “ASA”) support the Statement of the Case set forth in the brief filed by the Petitioner, BEKA Industries, Inc. (“BEKA”), which brief is incorporated and adopted by reference herein pursuant to Maryland Rule 8-503(f).

QUESTION PRESENTED

- I. May a Maryland county school board assert the doctrine of sovereign immunity in defense of claims that arise out of a written contract?

STATEMENT OF FACTS

ASA supports the Statement of Facts set forth in the brief filed by Petitioner, BEKA, which Statement of Facts is incorporated and adopted by reference herein pursuant to Maryland Rule 8-503(f). In addition, ASA states that the Subcontractor Associations are state and national organizations representing the interests of approximately 5,000 subcontractor members who provide labor and materials on construction projects throughout the country. Approximately 345 businesses located in Maryland and the Metropolitan D.C. area, and 270 businesses located in the State of Maryland alone, are members of the ASA. ASA's primary focus is the equitable treatment of subcontractors in the construction industry. ASA has acted in the interest of all subcontractors by promoting education and legislative action and by intervening in significant legal actions that affect the industry at large.

The questions at issue in the above-captioned appeal have the potential to adversely impact the members of the Subcontractor Associations, namely, whether a school board can invoke the doctrine of sovereign immunity in defense of a claim arising out of a written contract. As such, ASA can assist

the Court in understanding the policy issues raised by this appeal by addressing the experience of numerous subcontractors in Maryland and other states, as well as the importance and social desirability of reversing the decision of the Court of Special Appeals as it related to this issue.

ARGUMENT

I.A. The provisions of Md. Ann. Code art. 25B § 13A(a) bar the Worcester County Board of Education from raising the doctrine of sovereign immunity in defense of BEKA's claim.

In order to ascertain whether the Worcester County Board of Education (the "Board") was barred from raising the doctrine of sovereign immunity as a defense to BEKA's written contract, the Court of Special Appeals applied the three pronged test first enunciated by this Honorable Court in *Board of Trustees of Howard Community College v. John K. Ruff, Inc.*, 278 Md. 580, 366 A.2d 360 (1976). The three pronged *Ruff* test essentially examined (1) whether the Board was a state entity that qualified for sovereign immunity protection, if so, (2) whether the Legislature waived the application of the doctrine of sovereign immunity with respect to the Board, and if so, (3) whether there are funds available to satisfy the judgment or whether the state agency has been given the power to raise the funds to satisfy the judgment entered against it. *Ruff* at 586, 366 A.2d at 363; *Board of Education of Worcester County v. BEKA Industries, Inc.*, 190 Md.App. 668, 692-93, 989 A.2d 1181,1195 (2010). As this Honorable Court stated in *Ruff*,

“[e]ven if sovereign immunity had been so waived, the doctrine would nevertheless be applicable ... if no funds were available to the Board for satisfaction of a judgment against it on the contract, and no power was reposed in the Board to raise such funds by taxation.” *Ruff* at 586, 366 A.2d at 363.

After much discussion and analysis, the Court of Special Appeals held that the Board was a state entity that qualified for the protection of the doctrine of sovereign immunity, *BEKA* at 694, 989 A.2d at 1196, and that there exists a legislative waiver of the doctrine of sovereign immunity with respect to claims arising out of written contracts which is found in Md. Code Ann. State Gov’t § 12-201(a). *Id.* at 709, 989 A.2d at 1205.

The Court of Special Appeals proceeded to analyze whether the Board met the third prong of the *Ruff* test relating to the availability of funds to satisfy the judgment or the ability of the Board to raise those funds. The scope of the Court of Special Appeals’ analysis in this regard was inexplicably¹ limited to Md. Code Ann. State Gov’t § 12-203, which applies to the State, and requires the Governor to “include in the budget bill money that is adequate to satisfy a final judgment that, after the exhaustion of the rights

¹ The Court of Special Appeals noted that ASA, in its *Amicus Curiae* brief, relied upon Md. Ann. Code art. 25B § 13A(a) in support of BEKA’s argument barring the Board from raising the doctrine of sovereign immunity as a defense to BEKA’s claims. *BEKA* at 690, 989 A.2d at 1194 n.13. However, the Court of Special Appeals determined to issue its opinion without engaging in any analysis of either Md. Ann. Code art. 25B § 13A(a) or Md. Ann. Code art. 25B § 13A(d).

of appeal, is rendered against the State or any of its officers or units.” S.G. § 12-203. Because the Board is subject to the county, and not the State, budget process, the Court of Special Appeals concluded that the State would not be responsible for paying a judgment against the Board, and that S.G. § 12-203, therefore, was insufficient to satisfy the third prong of the *Ruff* test. *Id.* at 712, 989 A.2d at 1207. Finding no other statutory mechanism providing for funding to satisfy a judgment against the Board, and finding the record insufficient to determine whether, as a matter of fact, the Board had the funds available to satisfy BEKA’s judgment, the Court of Special Appeals remanded the case to the Circuit Court for Worcester County for a new trial at which BEKA would have to prove, and the circuit court would have to find, that the Board had the funds available to satisfy the judgment. *Id.* at 715, 989 A.2d at 1208.

Pursuant to Maryland Rule 8-503(f), ASA adopts and incorporates the arguments raised by BEKA in its brief regarding the application of the three pronged *Ruff* test in the current, post 1976, sovereign immunity regime. BEKA’s arguments notwithstanding, and in the alternative, even if the *Ruff* test is applicable in the instant case, the Board would still be barred from asserting the doctrine of sovereign immunity as a defense to BEKA’s written contract. This is because the Court of Special Appeals’ remand on the sovereign immunity issue was based on its apparent inability to (1) find a

statutory mechanism which provided for funding to satisfy a judgment against the Board, *BEKA* at 712, 989 A.2d at 1207, and (2) its conclusion that the appellate record was insufficient to determine whether the Board actually had the funds available to satisfy BEKA's judgment. *Id.* at 713, 989 A.2d at 1207. Because the Court of Special Appeals looked no further than S.G. § 12-203 for a statutory mechanism which provided funding for the Board to satisfy BEKA's judgment, the Court of Special Appeals ignored the provisions of Md. Ann. Code art. 25B § 13A(d).

While S.G. §§ 12-201 and 12-203 apply to the State, its units, and its agencies, the Legislature enacted similar statutory waivers of the doctrine of sovereign immunity for Maryland counties. Code counties, such as Worcester County, and their agencies and boards, including the Board, are barred by § 13A(a) of Article 25B of the Maryland Annotated Code from raising the doctrine of sovereign immunity in defense of a claim that arises out of a written contract:

Unless otherwise specifically provided by the laws of Maryland, a code county, and every officer, department, agency, board, commission, or other unit of county government may not raise the defense of sovereign immunity in the courts of this State in an action in contract based upon a written contract executed on behalf of the county, or its department, agency, board, commission, or unit by an official or employee acting within the scope of his authority.

See Md. Ann. Code art. 25B § 13A(a). *See also*, Md. Ann. Code art. 23A § 1A(a) (barring municipal corporations from raising the doctrine of sovereign immunity in defense of claims arising out of written contracts); Md. Ann. Code art. 25 § 1A(a) (barring non-charter non-code counties from raising the doctrine of sovereign immunity in defense of claims arising out of written contracts); and Md. Ann. Code art. 25A § 1A(a) (barring charter counties from raising the doctrine of sovereign immunity in defense of claims arising out of written contracts). Moreover, the Legislature enacted a statutory mechanism, similar to the one found in S.G. § 12-203, which provides a funding mechanism to satisfy a judgment entered against counties, their agencies or boards. With respect to code counties, Md. Ann. Code art. 25B § 13A(d) provides as follows:

In order to provide for the implementation of this section, the governing body of every code county shall make available adequate funds for the satisfaction of any final judgment, after the exhaustion of any right of appeal, which has been rendered against the county, or any officer, department, agency, board, commission, or other unit of government in an action in contract as provided in this section.

See, Md. Ann. Code art. 25B § 13A(d). *See also*, Md. Ann. Code art. 23A § 1A(d) (requiring municipal corporations to make funds available to satisfy judgments entered against them); Md. Ann. Code art. 25 § 1A(d) (requiring non-charter non-code counties to make funds available to satisfy judgments

entered against them); and Md. Ann. Code art. 25A § 1A(d) (requiring charter counties to make funds available to satisfy judgments entered against them).

The Legislature enacted the aforementioned statutory provisions in recognition of the “moral obligation on the part of any contracting party, including the State or its political subdivisions, to fulfill the obligations of a contract.” See *Baltimore County v. RTKL Associates, Inc.*, 380 Md. 670, 676, 846 A.2d 433, 436 (2004). However, counties and municipalities had been subject to suit in contract actions long before the Legislature passed Md. Ann. Code art. 25B § 13A(a) and its counterparts. In *American Structures, Inc. v. City of Baltimore*, 278 Md. 356, 359-60, 364 A.2d 55, 57 (1976), this Honorable Court noted that, from as early as 1862,

municipalities and counties have been regularly subject to suit in contract actions, whether the contracts were made in performance of a governmental or proprietary function, as long as the execution of the contract was within the power of the governmental unit.

American Structures, at 359-60, 364 A.2d at 57. Thus, Md. Ann. Code art. 25B § 13A(a) and its counterparts merely codified the long established practice of permitting suits against a county for claims arising out of contracts with the county. Accordingly, regardless of whether this Honorable Court ultimately determines that the three pronged *Ruff* test applies in the instant case or not, the Board is barred by the provisions of Md. Ann. Code

art. 25B §§ 13A(a) and (d) from asserting the doctrine of sovereign immunity in defense of BEKA's claims.

I.B. The interests of governmental and public policy dictate that county boards of education should be barred from raising the doctrine of sovereign immunity in defense of contract claims.

The legislative history behind the Legislature's decision to bar the State, its counties, and their related subsidiaries, from raising the doctrine of sovereign immunity in defense of contract claims indicates that the Legislature was concerned about the ability of governmental entities to enter into contracts absent such a bar. As Judge Willner noted in his dissent in *Stern v. Board of Regents, University System of Md.*, 380 Md. 691, 846 A.2d 996 (2004), the prohibition of invoking the doctrine of sovereign immunity in defense of contract claims was intended "to correct what the Legislature regarded as the injustice of allowing the State and its agencies, with impunity, to breach solemn contracts that they had made." *Id.* at 731, 846 A.2d at 1019.

This injustice is a sword that cuts both ways as it places the government on a different playing field than private industry. The ability of a governmental entity to breach solemn contracts would serve as a disincentive for private industry to contract with the government. This would severely impair the government's ability to procure essential goods and services from private industry. In the rare event that private industry would

design to conduct business with the government, the conditions that would be established by private industry to restore equilibrium would be stifling. The only ways for private industry to level the playing field under these conditions would be to require full payment from the government up-front, or to greatly increase the cost of the goods and services being provided in an attempt to offset the additional risk incurred by virtue of doing business with the government.

Of course, if the government was required to pay in full up front, the government would lose all control over the quality of the goods and services procured, and the effectiveness of its recourse in the event that non-conforming goods and services are provided would be greatly diminished. Moreover, if the government would be required to pay a significant premium to offset the risk private industry would be undertaking by doing business with the government, the government's resources would be quickly depleted. In short, the ability of the government to avoid its contractual obligations by invoking the doctrine of sovereign immunity would significantly impact its ability to efficiently conduct the business of government, to the ultimate detriment of the taxpayers.

The disincentive created by the government's ability to invoke the doctrine of sovereign immunity to avoid its contractual obligations would harm private industry as a significant portion of private industry is devoted

to doing business with the government. And the business that private industry conducts with the government is not limited to the construction field. According to the Board's FY 2010 Budget, at least \$9,327,304, or over 10% of the total budget, is allocated to pay for goods and services procured from outside contractors.² See The Board's FY 2010 Budget, http://www.worcesterk12.com/media/Budget_Book_FY10.pdf.³

While some contractors may be able to offset the risk of the government invoking sovereign immunity by imposing up-front payment terms or by greatly increasing the cost of the goods and services which are to be provided, many contractors, especially those in the construction industry, will be unable to offset that risk.

Like many states, and following the lead of the federal government, Maryland enacted a Little Miller Act to protect construction contractors performing work on public property and who are therefore unable to obtain mechanics' liens on the public property. Maryland's Little Miller Act is codified at Md. Code Ann. State Fin. & Proc. § 17-101, *et seq.* Maryland's

² Included in this amount is \$222,338 for administration; \$153,928 for instructional support services; \$1,840,111 for textbooks and classroom supplies; \$762,330 for other instructional costs; \$404,300 for special education; \$2,675 for pupil services; \$15,611 for health services; \$4,960,690 for pupil transportation; \$575,283 for operation of plant; \$287,843 for maintenance of plant; \$2,225 for capital planning; and \$100,000 for capital improvements.

³ A copy of the Board's FY 2010 Budget is included in the attached Appendix of Statutes and Rules for this Honorable Court's reference.

Little Miller Act requires contractors who perform work for a “public body”⁴ to provide payment and performance securities, most often in the form of bonds, prior to the award of contracts exceeding \$100,000⁵. Md. Code Ann. State Fin. & Proc. § 17-103(a). The payment security is provided “to guarantee payment for labor and materials ... under a contract for construction,” Md. Code Ann. State Fin. & Proc. § 17-101(b), and the performance security is provided “to guarantee the performance of a contract for construction.” Md. Code Ann. State Fin. & Proc. § 17-101(c).

If a contractor fails to timely pay subcontractors for the labor or materials provided to the public construction project, Md. Code Ann. State Fin. & Proc. § 17-108 establishes the means and methods for commencing an action against the security. Consistent with the provisions of the Maryland Little Miller Act, the Board’s contract with BEKA in the instant case required BEKA to provide payment and performance bonds. E. 510 at § 11.5.1 (mandating that BEKA’s payment and performance bonds conform to the requirements of the Maryland Little Miller Act). Thus, in order to

⁴ The term “public body” is defined in Md. Code Ann. State Fin. & Proc. § 17-101(d) as “the State; a county, municipal corporation, or other political subdivision; a public instrumentality; or any governmental unit authorized to award a contract.” See Md. Code Ann. State Fin. & Proc. § 17-101(d)(1)-(4). Boards of education are a part of county government. *Chesapeake Charter v. Anne Arundel Board of Education*, 358 Md. 129, 139-40, 747 A.2d 625, 631 (2000). As such, county boards of education are public bodies pursuant to Md. Code Ann. State Fin. & Proc. § 17-101(d)(2) and are subject to the Little Miller Act.

⁵ Md. Code Ann. State Fin. & Proc. § 17-104(b) provides the public body with the option to require payment and performance security for construction contracts that exceed \$25,000 but do not exceed \$100,000.

perform any significant construction work in the State of Maryland, a contractor must be able to obtain payment and performance securities.

As will be more fully discussed in the *amicus curiae* brief to be filed by the Surety & Fidelity Association of America, among the factors sureties evaluate when considering whether to issue bonds on a particular project are the flexibility of the terms and conditions of the construction contract and whether the contractor is provided with the ability to seek recourse from the owner of the project. If county boards of education are entitled to invoke the doctrine of sovereign immunity in defense of claims arising out of the contract, no surety would issue bonds for the project because, in that case, the surety would be liable to the subcontractors and suppliers who provided labor and materials for the project, and neither the contractor nor the surety would have the ability to recover the amounts paid from the board of education.

The devastating consequence of this would be that construction contractors would be unable to obtain the statutorily required bonds or would be forced to pay an unreasonable premium for them. This would effectively cause virtually all significant school construction and renovation to grind to a halt, harming both the construction industry and the schools. Therefore, this Honorable Court should reverse the holding of the Court of Special Appeals and hold that county boards of education, such as the Board in the instant

case, are barred from raising the doctrine of sovereign immunity as a defense to claims arising out of written contracts.

CONCLUSION

For the foregoing reasons, ASA respectfully requests this Honorable Court to reverse the decision of the Court of Special Appeals and rule that Maryland county boards of education are barred from raising the doctrine of sovereign immunity as a defense to claims arising from written contracts.

Pursuant to Maryland Rule 8-504(a)(8), this brief was prepared using the 13 point Century Schoolbook font.

APPENDIX OF STATUTES AND RULES

Statutes

Md. Ann. Code art. 23A § 1A

Md. Ann. Code art. 25 § 1A

Md. Ann. Code art. 25A § 1A

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Md. Code Ann. State Fin. & Proc. § 11-101

Md. Code Ann. State Fin. & Proc. § 17-101

Md. Code Ann. State Fin. & Proc. § 17-103

Md. Code Ann. State Fin. & Proc. § 17-104

Md. Code Ann. State Fin. & Proc. § 17-108

Md. Code Ann. State Gov't § 12-201

Md. Code Ann. State Gov't § 12-203

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Maryland Rule 8-503(f)

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