In the
Court of Special Appeals of Maryland

Case No. 1059, September Term, 2020

Energy Policy Advocates,

Appellant,

v.

Mayor and City Council of Baltimore,

Appellee.

Appeal from the Circuit Court of Baltimore City, Maryland
Circuit Court Case No. 24-C-20-001784
(Honorable John S. Nugent)

Brief of Appellant

Matthew D. Hardin
1725 I Street NW, Suite 300
Washington, DC 20006
Phone: 202-802-1948
Email: MatthewDHardin@protonmail.com

Table of Contents

Table of Authorities

Cases

Secondary Authorities

Statement of the Case

In this case, Plaintiff/Appellant Energy Policy Advocates sought agreements entered into by the City of Baltimore's Department of Law, and certain correspondence between the Department and activist groups, under the Maryland Public Information Act, GP § 4-301 ("MPIA"). Without any factual findings, without *in camera* review of the records at issue, and without requiring the City to make any showing that any of the specific records Energy Policy Advocates requested were exempt from disclosure under the MPIA, the trial court twice dismissed the complaint in this matter.[1] Effectively, the court below improperly and categorically extended a blanket of attorney-client privilege (and apparently also a blanket of work product or "consultant" privilege) to shield records without requiring the City to prove the factual prerequisites for such a privilege to attach.

First, the trial court dismissed the initial complaint, but granted leave to amend. Although it is Energy Policy Advocates' position that the initial Complaint in this matter stated a valid cause of action under the MPIA, Energy Policy Advocates nevertheless filed an Amended Complaint to clarify and amplify its claims that the records at issue in this matter were (and are) subject to disclosure. However, the trial court again dismissed

[1] The initial Complaint was dismissed by Judge Geller in an Order dated July 21, 2020, but Plaintiff was granted leave to amend (E 89-90). Following amendment, the City moved to dismiss the Amended Complaint and moved in the alternative for Summary Judgment (E 141-143). The City's alternative motion was granted and summary judgment was entered on the basis of the pleadings alone (E 167-168).

that complaint by construing the City's motion to dismiss as a motion for summary judgment and improperly granting that motion.

This case turns on the content of the records at issue, and the nature of the relationship between the City of Baltimore's Department of Law and various activist groups. The City has, in this matter, first characterized these activist groups as "outside energy firms" each of which the City considered calling as a testifying expert.[2] The public record makes clear that this in no way accurately characterizes these groups and, after Plaintiff/Appellant pointed this out, without elaboration Defendant/Appellee switched to describing them instead as "outside, for lack of a better way to describe them, environmental groups who are, you know, climate change environmental groups," (Transcript of October 23, 2020 hearing at 4:13 *et seq*., E 187 et seq.) and as "…groups that we were working with and talking to" prior to filing a climate nuisance and product liability lawsuit against nearly two dozen entities (*Id*., at 6:21-7:1, E 189-190).

[2] See, e.g., Defendant Mayor and City Council of Baltimore's Motion To Dismiss, Or In The Alternative, Motion For Summary Judgment and Request For Hearing (E 67 et seq.)

The two named groups, Union of Concerned Scientists ("UCS")[3] and Center for Climate Integrity ("CCI"),[4] have been revealed in public records to be the two principal outside organizations approaching municipalities and attorneys general to lobby them file the purported climate nuisance and similar lawsuits and even, in the case of CCI, paying for private attorneys to bring the municipality's suit.[5]

This role is clear and set forth in numerous responses to public records requests from coast to coast. Public records and, more specifically, "no records" responses affirm that while CCI is, e.g., raising funds for this venture and lobbying officials alongside ideological fellow travelers at the Rockefeller Family Fund, CCI does not enter

---

[3] For information about the Union of Concerned Scientists and its role in attempting to influence government actors to pursue a certain agenda, see, e.g., Findings of Fact and Conclusions of Law, Exxon Mobil Corporation, Petitioner, Case No. 096-297222-18 (District Court of Tarrant County, TX), Opinion dated April 25, 2018, which is available at https://climatelitigationwatch.org/wp-content/uploads/2019/10/Tarrant-County-Facts-and-Conclusions.pdf ¶¶ 11,12, 16. See also, e.g., https://climatelitigationwatch.org/emails-suggest-ucusa-union-of-concerned-scientists-is-at-the-center-of-the-climate-litigation-industry/, https://climatelitigationwatch.org/wp-content/uploads/2018/08/FN-42-UCS-says-working-the-state-AGs-copy.pdf, https://climatelitigationwatch.org/fn-51-frumhoff-coordinated-with-ags-in-prior-briefings/, https://climatelitigationwatch.org/fn-71-frumhoff-to-mote-for-ags-briefing-ucs-fundraiser/, https://climatelitigationwatch.org/fn-frumhoff-has-made-this-argument-to-ags-in-prior-briefings/.

[4] For more information on the Center for Climate Integrity's role, see, e.g., https://climatelitigationwatch.org/more-on-the-government-activist-tort-bar-axis/ (Anne Arundel County, MD), https://climatelitigationwatch.org/emails-reveal-coordination-by-network-of-lawyers-ngos-publications-to-find-climate-litigation-clients/, and John Breslin, "Fort Lauderdale says it has no intention of filing suit against fossil fuel companies over climate change," Florida Record, May 6, 2019, https://flarecord.com/stories/512480648-fort-lauderdale-says-it-has-no-intention-of-filing-suit-against-fossil-fuel-companies-over-climate-change. See also, e.g., https://climatelitigationwatch.org/ghost-writers-in-the-sky/, https://climatelitigationwatch.org/rocky-xxv/, https://climatelitigationwatch.org/emails-reveal-coordination-by-network-of-lawyers-ngos-publications-to-find-climate-litigation-clients/, https://climatelitigationwatch.org/of-smoking-guns-and-just-so-stories/.

[5] See, William Allison, "Key Documents Raise Troubling Questions About Money Behind Hoboken Climate Lawsuit," Energy In Depth, September 3, 2020, https://eidclimate.org/key-documents-raise-troubling-questions-about-money-behind-hoboken-climate-lawsuit/.

consulting arrangements with its recruiting targets. Instead, it lobbies them. Other responses to public record requests also affirm that the Union of Concerned Scientists lobbies to promote litigation against the same defendants, rather than serving as "consultants" for the City. Knowledge of this lobbying was the basis for Plaintiff/Appellant's records request, and is relevant to the privileges Defendant/Appellee claims.

Of course, public record productions to the Plaintiff/Appellant in this matter by other municipalities and attorneys general offices, which provided that knowledge prompting the records request at issue here and supporting the facts alleged on information and belief in Plaintiff's complaint(s), affirm that though these groups lobby state attorneys general and municipal officials, the records generated from such lobbying are not protected from release. Indeed, those other jurisdictions — including so far one other governmental entity in Maryland — acknowledged that attorney-client privilege does not spontaneously attach to all communications of an attorney.

In addition to challenging these claims of privilege not recognized by recipients of those other similar requests,, on information and belief (including events specified in its amended complaint) Plaintiff Alleged that the City failed to search for responsive records (E 94, Amended Compl. ¶12-13). Plaintiff further alleged that the City failed to attempt redactions or to determine whether segregable and non-exempt information was contained in any responsive record (E 94-95). Lastly, the Plaintiff alleged that the City has no consultancy arrangement with the environmental activists who corresponded with the City (E 95, Amended Compl. ¶17-20).

Despite Plaintiff's specific allegations which, if true, demonstrate that the City failed to meet its obligations under the MPIA, this case was twice dismissed and judgment entered in favor of the City on the basis of the pleadings alone. Entering judgment in the City's favor, without providing the Plaintiff any opportunity for factual development or the chance to prove its claims, was in error. This Court should reverse the Circuit Court and remand for further proceedings to allow the parties to prove their respective positions by way of competent evidence.

Questions Presented

1. Whether the Circuit Court's opinion is supported by an "adequate factual basis," as this Court required in *Comptroller of Treasury v. Immanuel*, 216 Md. App. 259, 266 (2014) and as the Supreme Court required in *Haigley v. Dept. of Health*, 128 Md. App. 194, 736 A.2d 1185 (Md. App. 1999)?

2. Whether the Circuit Court properly required the City to meet its burden of proof under Md. Code GP § 4-362(b)(2)?

3. Whether the Circuit Court erred in granting summary judgment in light of serious factual discrepancies between the allegations of the Complaint and the Defendant's Motion to Dismiss, and in the Alternative, Motion for Summary Judgment?

Statement of Facts

The Amended Complaint, dated August 11, 2020, alleges that the City never searched for or reviewed documents responsive to the Plaintiff's MPIA request. (E 94, ¶12 and ¶13). It also sets forth why this is plainly the case. The amended complaint further alleges that the City did not individually examine discrete, requested records for

the purpose of applying necessary legal privileges or exemptions to some or all of their content. (*Id*., ¶14 and ¶15) Instead, the Complaint alleged that the City denied release categorically, and that the City "is withholding correspondence with non-attorney plaintiff-recruiters lobbying the City to sue a tort firm's targeted defendants." (*Id*., ¶17). The Complaint specifically alleged that there is "no attorney-client arrangement with the relevant activist groups…" (*Id*., ¶18) and that the City never memorialized any consulting arrangement by agreement. (*Id*., ¶19).

The trial court never required the City to even file an Answer addressing the allegations that the Plaintiff in this matter raised, much less submit proof to refute the Plaintiff's claims and carry the burden of proof. Instead, the Circuit Court simply treated the City's Motion to Dismiss as a Motion for Summary Judgment and entered judgment in the City's favor.

Discussion

Because this case was decided on the basis of the pleadings alone, this Court has the same information as the trial court. Unfortunately, the trial court's order is devoid of factual findings, and its ruling does not address the discrepancies between the factual allegations in the Plaintiff's Amended Complaint and the assertions of the City in its Motion to Dismiss. This Court must reverse to allow the parties to develop evidence and submit proof to support their conflicting factual assertions.

Standard of Review

This case is brought under the MPIA. This Court's standard of review for a circuit court's decision under MPIA is "whether that court had an adequate factual basis for the

decision it rendered and whether the decision the court reached was clearly erroneous." *Comptroller of Treasury v. Immanuel*, 216 Md. App. 259, 266 (2014). Either lack of an "adequate factual basis" *or* clear error merits reversal.

When a grant of summary judgment turns on a determination of law rather than fact, appellate courts review such a determination without deference to the Circuit Court. *Mathews v. Cassidy Turley Maryland, Inc.*, 435 Md. 584, 598 (2013). No deference is owed to the trial court's assessment of the law. *Tribbitt v. State*, 403 Md. 638, 644 (2008). Because this case was decided on the basis of the pleadings alone, this Court "must assume the truth of, and view in a light most favorable to [Energy Policy Advocates], all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them…" *RRC Northeast, LLC v. BAA Md., Inc.*, 413 Md. 638, 643, 994 A.2d 430 (2010).

The MPIA places the burden of proof on the government, here the City, to sustain its decision to withhold documents. GP § 4-362(b)(2). The Circuit Court here failed to require the City to carry its burden or even to address the specific allegations raised in the Amended Complaint.

Argument

This Court must reverse on three separate but related grounds. First, the Circuit Court's decision was in error because it was not supported by an adequate factual basis. Second, the Circuit Court failed to hold the City to its statutorily-imposed burden of proof. Third, the Circuit Court erred by granting a Motion for Summary Judgment and improperly entering judgment in the City's favor at the pleadings stage and on the basis

of a record that contained hotly disputed facts which merited further development. For all of these reasons, this Court must reverse the decision below.

I. There was no "Adequate Factual Basis" for the Circuit Court's decision.

The Circuit Court's decision was issued on the basis of the pleadings alone, and construed a motion to dismiss as a motion for summary judgment. Thus, any factual findings the court made must be set forth in its opinion. Yet the opinion is entirely devoid of findings of fact, much less findings of fact that provide an "adequate basis" for the decision rendered.

In *Comptroller of Treasury v. Immanuel*, 216 Md. App. at 266, this Court held that a Circuit Court's decision must be supported by an "adequate factual basis" to be upheld on appeal. Conclusions are not factual findings. *E. Outdoor Advert. Co. v. Mayor & City Council*, 146 Md. App. 283, 315, 807 A.2d 49, 68 (2002) ("Conclusions . . . may or may not be supported by facts in the record," but without reference to facts, "there is nothing to let this Court know how [the lower court] arrived at its decision.")

Attorney-client privilege does not spontaneously attach to all communications of an attorney. Instead, facts give rise to its application. In *Newman v. State*, the Court of Appeals held that, "the party seeking the protection of the [attorney-client] privilege bears the burden of establishing its existence," and that, "[o]nce the privilege is invoked, the trial court should 'make a preliminary inquiry… looking at the surrounding facts and circumstances.'" 384 Md. 285, 313 n. 7, 863 A.2d 321, 337 n. 7 (2004). This Court has approvingly cited a federal appellate opinion that remanded a case for "more 'detailed findings,' concluding that 'the record [was] insufficient to support the perfunctory

findings of the district court with respect to the privilege issue.'" *Greenberg v. State*, 421 Md. 396, 410, 26 A.3d 955, 964 (Md. 2011), citing *United States v. Schwimmer*, 892 F.2d 237 (2d Cir.1989).

Yet despite the Circuit Court's holding that various privileges protected the information the Plaintiff sought, the word "fact" never appears in the Circuit Court's written opinion, because the Circuit Court failed to engage with or address the serious factual allegations in the Amended Complaint, or to require the City to demonstrate the factual prerequisites for its claims of privilege. Worse, the Circuit Court failed to address Plaintiff's arguments relating to the inadequacy of the City's search for responsive records, see *Glass v. Anne Arundel Cnty*., 453 Md. 201, 211-212, 160 A.3d 658, 664 (Md. App. 2017), or the Plaintiff's assertions suggesting that attorney-client relationships or consulting relationships either did not exist or did not give rise to an exemption for specific information sought.

In short, the court below improperly extended a blanket of attorney-client privilege (and apparently also a blanket of work product or "consulting" privilege) without requiring the City to prove the factual prerequisites for such a privilege to attach. The City never proved, for example, that the work product privilege applied. This failure of proof arose because the City was never required to demonstrate that the specific documents requested by the Plaintiff were "materials prepared in anticipation of litigation," *Diggs & Allen v. State*, 213 Md. App. 28, 77 (2013), as opposed to records generated "in the ordinary course of business." *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 351 Md. 396, 409 (1998). The City was never required to prove that any or all

of the eight factors for analyzing attorney-client privilege in *du Pont* were met in the context of the instant case. The City asserted, but was never required to prove, a consulting arrangement with various activists whose correspondence with the City Energy Policy Advocates sought in this matter.

That these elements cannot be satisfied explains why Energy Policy Advocates has obtained so much similar correspondence with the same outside parties but from other jurisdictions, including even now from other Maryland governmental subdivisions. Put simply, the records at issue in this case are not privileged communications. Regardless, the record reveals no "adequate factual basis" for the Circuit Court's finding. As such, this Court must reverse the decision of the Circuit Court.

II. The Circuit Court Failed to Require the City to Carry its Burden of Proof.

Md. Code GP § 4-362(b)(2) squarely places the burden of proof in an MPIA case on the custodian of records. Moreover, exemptions in the MPIA are to be narrowly-construed. GP § 4-103(b) requires that in doubtful cases the Act "shall be construed in favor of allowing inspection of a public record." In this case, however, the Circuit Court failed to require the defendant to carry its burden.

This Court has held that attorney-client privilege is also narrowly construed. "The attorney-client privilege withholds relevant information from the fact finder and should be narrowly construed. The privilege should be applied only when necessary to achieve its limited purpose of encouraging full and frank disclosure by the client to his or her attorney." *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 202 Md. App. 307, 363, 32 A.3d 456, 489 (2011).

Against the backdrop of a broad right of public access, narrow exemptions, and narrow common-law interpretations of the attorney-client privilege, this Court should be particularly wary of the City's assertions of privilege over correspondence with activist organizations and individuals, which assertions the trial court uncritically adopted. Indeed, this Court has specifically held that the MPIA applies to government attorneys, even though such attorneys may be able to protect specific types of correspondence or other information. See generally *Harris v. Baltimore Sun Co*., 330 Md. 595 (1993). If the government attorneys in this case are permitted to obtain a dismissal of MPIA claims on the basis of pleadings alone, without the need to file an Answer or submit competent evidence to address any MPIA exemption that might apply, *Harris* is effectively meaningless.

This Court concisely set forth the elements of attorney-client privilege in *Harrison v. State*, 276 Md. 122, 133–34, 345 A.2d 830, 837 (1975). In *Harrison*, this Court has established an 8-part test for determining whether privilege applies. Specifically, attorney-client privilege exists (1) where legal advice of [any] kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relate to that purpose, (4) made in confidence, (5) by the client, (6) are at his insistence permanently protected, (7) from disclosure by himself or by the legal adviser, (8) except the protection [may] be waived. *Id*. at 135, 345 A.2d at 838, quoting 8 Wigmore on Evidence § 2292.

Despite the demanding *Harrison* test, however, the Circuit Court failed to require the City in this case to submit any evidence that the attorney-client privilege attached. And, even assuming (in the absence of evidence) that the first seven of the *Harrison*

factors were met, the Circuit Court also failed to require the City to prove the eighth factor was satisfied, which would have required the City to prove the absence of any waiver of the privilege. Nor did the Circuit Court require the City to prove that the records in question were generated in the context of anticipated litigation rather than "in the ordinary course of business," as this Court, in *E.I. du Pont de Nemours & Co.*, 351 Md. 396, 409, made clear was required.

The MPIA is a broad statute that reverses the ordinary burden of proof in civil cases and creates presumptions in favor of transparency. In this case, the Circuit Court uncritically adopted the arguments of a defendant seeking to withhold records on the basis of the pleadings alone, and failed to require the defendant to submit proof in support of its withholdings or carry its burden to justify such withholdings through the adversarial process. Worse, because this case was dismissed on the pleadings alone, the Plaintiff was deprived of the opportunity to adduce evidence of its own, beyond the informative timeline Plaintiff did point to, which would tend to indicate either that the Defendant never searched for records, and that privileges either never applied to such records, or that any such privileges were waived by the defendant. Because the trial court failed to hold the City to its statutory burden of proof in this case, this Court must reverse.

III. Summary Judgment was Inappropriate in Light of a Disputed Factual Record.

The trial court erred by granting the City's alternative Motion for Summary Judgment and entering judgment in the City's favor. Summary Judgment on the basis of the pleadings was inappropriate in this matter for the same reasons dismissal was

inappropriate: the record reveals serious factual disputes between the parties, as affirmed in their pleadings, and such factual discrepancies merited factual development and eventual adjudication on the basis of admissible evidence following an adversarial proceeding. This Court must reverse so that the factual discrepancies between the City's preferred narrative and the Plaintiff's allegations in the Amended Complaint can be resolved.

As this Court has recognized, "converting a motion to dismiss into a motion for summary judgment carries the risk of unfair prejudice to a non-movant by potentially denying that party 'a reasonable opportunity to present material that may be pertinent to the court's decision as required by Maryland Rule 2-501.'" *Heneberry v. Pharoan*, 232 Md. App. 468, 478, 158 A.3d 1087, 1093 (2017), citing *Worsham v. Ehrlich*, 181 Md. App. 711, 722-23, 957 A.2d 161 (2008).

In *Worsham*, this Court collected cases and explained that

> The question of whether a trial court's grant of summary judgment was proper is a question of law subject to de novo review on appeal. *Livesay v. Baltimore*, 384 Md. 1, 9, 862 A.2d 33 (2004). Summary judgment is appropriate when there is no genuine dispute as to any material fact and the party in whose favor judgment is entered is entitled o judgment as a matter of law. Maryland Rule 2-501(f). On appeal, the appellate court will review the record in the light most favorable to the non-moving party and construe any reasonable inferences that may be drawn from the facts against the moving party. *Myers v. Kayhoe*, 391 Md. 188, 203, 892 A.2d 520 (2006).

Id. at 723-724.

On *de novo* review and in light of the cautionary view of summary judgment on the basis of the pleadings alone as set forth in *Heneberry*, this Court must take a careful look at the specific allegations raised by the Plaintiff. Specifically, the Plaintiff's

Amended Complaint sets forth a reasonable basis for believing the Plaintiff's claim that the City never searched for or reviewed responsive documents (which it instead categorically denied) (E 94, ¶12 and ¶13), that the City did not individually examine discrete records for purpose of applying legal privileges or exemptions to their content (¶14 and ¶15), and that no attorney-client or consulting arrangement existed at the time the records were generated (¶17-20). Perhaps unsurprisingly in light of its factual allegations about the lack of a search, the Plaintiff requested as part of its prayer for relief that the Circuit Court issue an order directing the Defendant "to certify that it has conducted a reasonable search for the relevant records." (E 100, ¶B).

In this case, the trial court's decision to grant the City's motion and forestall any possibility for the Plaintiff to ever prove its claims manifests the sort of prejudice this Court contemplated in *Heneberry.* The Plaintiff's entire claim was dismissed, and judgment was entered in favor of the City, without the Plaintiff being afforded any opportunity for factual development or an occasion on which it could test the defendant's purported evidence in the crucible of the adversarial process. This was done despite inarguably contested factual claims. This Court must reverse, and must require the trial court to rule on the basis of competent evidence following the ordinary procedures.

Conclusion

The trial court's threadbare opinion dismissing the Plaintiff's claim in this matter lacks an adequate factual basis, glosses over serious factual discrepancies between the allegations in the complaint and the Defendant's preferred but unsupported narrative of

events, and fails to hold the government to its burden of proof in an MPIA case. This Court must reverse.

Respectfully submitted this the 30th day of March, 2021,

/s/ Matthew D. Hardin
Matthew D. Hardin
C.P.F. No. 2003160003
1725 I Street NW, Suite 300
Washington, DC 20006
Phone: 202-802-1948
Email: MatthewDHardin@protonmail.com
Counsel for Appellant

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 4,233 words, as calculated using Microsoft Word software, excluding the parts of the brief exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112. It is printed using a 13-point Times New Roman font.

Dated: March 30, 2021

/s/Matthew D. Hardin
Matthew D. Hardin
Counsel for the Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this the 30th day of March, I will upload a true and correct copy of the foregoing via MDEC, which will electronically serve all counsel of record.

Dated: March 30, 2021

/s/Matthew D. Hardin
Matthew D. Hardin
Counsel for the Appellant