NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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March 28, 2016

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Re: *Metropolitan Washington Airports Authority v. Sara Elizabeth Hagarty, f/k/a Sara Elizabeth Mies*, MI-2015-1557 through 1724

Dear Counsel:

The Court is in receipt of the Defendant's Motion to Reconsider[1] the Court's February 22, 2016 decision denying Ms. Hagarty's pre-trial Motion to Dismiss in which the Court held that the penalties authorized by Code § 46.2-819.1 do not violate the Due Process Clause of the Fourteenth Amendment nor the Excessive Fines Clause of the Virginia Constitution. For the reasons that follow, the Motion to Reconsider is denied.

[1] The motion is titled "Motion to Reconsider The Court's Ruling Whether The Dulles Toll Road Toll Enforcement Scheme Violates The Due Process and Excessive Fines Clauses Of The U.S. Constitution."

OPINION LETTER

In her Motion to Dismiss, Ms. Hagarty's excessive fines claim was brought solely under Article 1, Section 9 of the Virginia Constitution, not the Eighth Amendment to the United States Constitution. Motion to Dismiss at 14-16. Ms. Hagarty relied upon cases applying the Eighth Amendment because of its shared text and history with Article 1, Section 9. Her claim, however, was brought only under the Virginia Constitution. For the first time in her Motion to Reconsider, Ms. Hagarty asks this Court to hold that the Excessive Fines Clause of the Eighth Amendment is applicable to the States and that Code § 46.2-819.1 violates that provision. Assuming without deciding that the Eighth Amendment Excessive Fines Clause is applicable to the States, the analysis and the result are the same. *Southern Exp. Co. v. Commonwealth*, 92 Va. 59, 22 S.E. 809 (1895), applying Aritcle 1, Section 9, and *United States v. Bajakajian*, 524 U.S. 321 (1998), applying the Eight Amendment, employ identical principles in their analyses and thus yield the same result. For the reasons stated in the Court's letter opinion of February 22, 2016, Code § 46.2-819.1 does not violate either the Excessive Fines Clause of the Eighth Amendment to the United States Constitution or Article 1, Section 9 of the Virginia Constitution.

Ms. Hagarty further requests that the Court reconsider its decision in light of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). The Court did not address this case in its letter opinion because Ms. Hagarty did not make a single reference to this case in her brief in support of her Motion to Dismiss. The Court has fully considered that case and finds that it is inapplicable because the penalties sought to be imposed on Mrs. Hagarty are not punitive damages imposed at the discretion of a judge or jury. Instead, the applicable penalties are set by the Legislature in a duly enacted statute.

In *BMW of North America, Inc.*, the U.S. Supreme Court set aside punitive damages of $2,000,000 assessed by a jury[2] that also awarded $4,000 in compensatory damages for BMW's failure to disclose to a buyer that the new car he purchased had been repaired after incurring cosmetic damage during shipping. The U.S. Supreme Court found that the punitive damages were "grossly excessive" and thus violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 568. The Supreme Court explained that

> Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the

[2] The jury's original punitive damages assessment of $4,000,000 was reduced to $2,000,000 by the Alabama Supreme Court. *Id.* at 565-67.

> conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose. Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose for adhering to the nondisclosure policy adopted in 1983, lead us to the conclusion that the $2 million award against BMW is grossly excessive: the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award [the ratio]; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.

Id. at 574-575.

This Due Process analysis applies only to an award of punitive damages by a judge or jury, not to the imposition of penalties imposed pursuant to a statute enacted by the Legislature. The analysis is used to assure that a defendant ordered to pay punitive damages had fair notice that her conduct would subject her to penalty and fair notice as to the amount that could be imposed. This analysis is necessary when punitive damages are awarded at the discretion of a judge or jury, rather than pursuant to a specific statute that identifies the prohibited conduct and the potential penalties. Unlike BMW, Mrs. Hagarty had constitutionally adequate notice because the penalties she faced for driving on the Dulles Toll Road without paying the applicable toll were clearly stated in a statute enacted by the Legislature. Although the factors considered in *BMW* are similar to those applied in the *Southern Exp. Co.* and *Bajakajian*, the *BMW* Due Process analysis is unnecessary when penalties are imposed pursuant to a statute.

It is also inappropriate to apply the *BMW* analysis because that case does not afford the deference due to legislative enactments. Both *Southern Exp. Co.* and *Bajakajian* are predicated on the principle that judgments about the appropriate punishment for an offense belong in the first instance to the Legislature. Both cases next recognize that "judicial determination[s] regarding the gravity of a particular criminal offense will be inherently imprecise. Both of these principles counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense." *United States v. Bajakajian*, 524 U.S. at 336; *see Southern Exp. Co. v. Commonwealth*, 92 Va. at 66, 22 S.E. at 811. Thus, great deference is afforded to the judgment of the People's elected representatives regarding the proper penalties for prohibited conduct. Those representatives, who remain accountable to the People via the ballot, can modify those penalties as needed by legislative amendments. Punitive

damages assessed by judges and juries – who are not so easily held accountable -- do not enjoy that same level of deference. Accordingly, the *BMW* factors are not deferential. To give due deference to the judgment of the elected Legislature, this Court must apply *Southern Exp. Co.* and *Bajakajian*, rather than *BMW.* As such, the Court finds that the penalties sought to be imposed on Mrs. Hagarty do not violate any provision of the Virginia or United States constitutions. [3]

Mrs. Hagarty further argues that the "approximately $81,325.00 in penalties and fees MWAA seeks for the approximately $236.25 in claimed tolls should shock the conscience of the Court as grossly disproportionate." Motion to Reconsider at 2. The total amount of these penalties and fees for the 158 separate violations is, undoubtedly, a substantial figure. However, the Court rejects the notion that the Court should determine whether the penalties are constitutionally permissible based upon an aggregation of the penalties. The reason for this is simple. A penalty that is significant but not unconstitutionally excessive does not become so because the offender may have committed the offense more than 150 times. To adopt such reasoning would have the perverse effect of saving the scofflaw while penalizing the penitent. Rather, whether a penalty for proscribed conduct is constitutionally excessive must be determined based upon the amount of the penalty and whether it bears some relationship to the gravity of the offense for which it is imposed. *United States v. Bajakajian*, 524 U.S. at 334. Each offense and penalty must be evaluated individually and not in the aggregate. When so viewed, the penalties imposed by Code § 46.2-810 are not unconstitutional.

Mrs. Hagarty argues that the Court's ruling "suggest[s] no limiting principle to the power of government to impose pecuniary penalties favoring third parties for trivial amounts in tolls" and thus "renders meaningless the Due Process and Excessive Fines Clauses of the U.S. Constitution and the inherent scheme of checks and balances." Motion to Reconsider at 3-4. She is, of course, incorrect. The limiting principle exists and has been stated with as much precision over the centuries that the English language will permit. Rather than that no limiting principle exists, Mrs. Hagarty's true complaint appears to be that the limiting principle of proportionality is inherently imprecise and too deferential to the Legislature. This criticism notwithstanding, our system of checks and balances – which includes an appreciation of the proper role of the judicial branch in reviewing the acts of the political branches – compels the outcome

[3] In her Motion to Dismiss, Mrs. Hagarty's Fourteenth Amendment Due Process claims were not directed at the amount of the penalties. In her Motion to Reconsider, *BMW* is raised in support of Mrs. Hagarty's Eighth Amendment Excessive Fines claim, although that case does not apply the Eighth Amendment. To the extent that Mrs. Hagarty is raising a Fourteenth Amendment Due Process claim with respect to the amount of the penalties, it is denied.

in this case. The ultimate limit on the government's power to levy fines that the People find to be excessive rests with the People, which they are free to wield publicly by petitioning their elected representatives, or privately in the voting booth.

For the foregoing reasons, the Defendant's Motion to Reconsider is denied. An order consistent with this opinion is enclosed.

Sincerely yours,

[redacted]

Michael F. Devine
Circuit Court Judge

OPINION LETTER

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

DULLES TOLL ROAD	)	**CRIMINAL NUMBERS MI-2015-0001557 through MI-2015-1724**
VERSUS	)	
SARA ELIZABETH HAGARTY A/K/A SARA ELIZABETH MIES		**TOLL VIOLATIONS**

ORDER

The Defendant, SARA ELIZABETH HEGARTY A/K/A SARA ELIZABETH MIES, through her Counsel, David Bernhard, has filed a Motion to Reconsider the Motion to Dismiss this case.

After full consideration of the matters set forth in the motion, the motion to reconsider is **denied** as stated in the Opinion Letter dated March 28, 2016.

Entered on March 28, 2016.

[redacted]

JUDGE MICHAEL F. DEVINE

MFD / aen
MI-2015-0001557