Circuit Court for Anne Arundel County
Case No. C-02-CV-21-000569

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1561

September Term, 2021

BRIAN WYNNE, *et al*.

v.

COMPTROLLER OF MARYLAND

Shaw,
Albright,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: March 15, 2023

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

New York Times critic Amanda Hess has written: "The age of the sequel is over. Now it's the age of the sequel to the sequel."[1] This appeal of a tax/refund/interest controversy – the fourth to reach an appellate court – confirms Ms. Hess's observation.[2]

INTRODUCTION

The "feature presentation"[3] and the linchpin to the subsequent litigation is a 2008 constitutional challenge by Brian and Karen Wynne to the limits state law placed on the tax credit allowed for income taxes paid in other states. Maryland law authorized a tax credit against state income taxes, but not county income taxes. The Wynnes attacked Maryland law as discriminating against commerce in violation of Art. I, § 8 of the U.S. Constitution. They prevailed in the circuit court and then again in Maryland's highest Court. *Comptroller v. Wynne*, 431 Md. 147 (2013) ("*Wynne I*").[4]

The Comptroller sought and obtained review in the U.S. Supreme Court. In the meantime, the Maryland General Assembly sprung into action, adding to omnibus budget legislation (the Budget Reconciliation and Financing Act) a refund mechanism that might

[1] Amanda Hess, *The End of Endings*, *The New York Times* (November 15, 2018).

[2] A second sequel is often termed a threequel.

[3] The 2020 decision of the Supreme Court of Maryland referred to the first case as "the prequel" and to its own opinion as "the sequel." *Wynne v. Comptroller*, 469 Md. 62, 73, 78 (2020) ("*Wynne II*"). Judge McDonald was the author of both opinions.

Prior to December 14, 2022, the Supreme Court of Maryland was known as the Maryland Court of Appeals. For clarity, we shall refer to the Court by its current name.

[4] The administrative and judicial proceedings that preceded appellate review need not be discussed here.

be triggered for any credit against county taxes from an adverse U.S. Supreme Court decision.

Specifically, the amendment provided:

> That, notwithstanding any other provision of law, the Comptroller shall set the annual interest rate for an income tax refund that is the result of the final decision under *Maryland State Comptroller of the Treasury v. Brian Wynne, et ux.* 431 Md. 147 (2013) at a percentage, rounded to the nearest whole number, that is the percent that equals the average prime rate of interest quoted by commercial banks to large businesses during fiscal year 2015, based on a determination by the Board of Governors of the Federal Reserve Bank.

2014 BRFA § 16.[5]

The *Wynne* case was still pending in the U.S. Supreme Court when the 2015 General Assembly convened. It once again used the BRFA as a vehicle to address the potential impact of the *Wynne* decision. The legislation provided a credit against county taxes like the one for state income taxes and established a mechanism to enable the Comptroller to pay refunds and pass the cost on to the counties. 2015 BRFA § 4, § 26, § 27. After the legislature adjourned, the U.S. Supreme Court issued its ruling affirming the decision of the Maryland Supreme Court.

The Wynnes received their refunds, but with the statutory rate of interest provided in the 2014/2015 legislation rather than the 13 percent rate applicable to certain refunds. This spawned new litigation challenging the legislative change, as a violation of the Commerce Clause. The Wynnes also contended that the interest limitation violated the Due

[5] It was estimated that this legislation would save some $38.4 million in interest expenditures on potential refunds that would otherwise reduce revenue passed on to local governments. *Wynne II*, 469 Md. at 77.

Process Clause of the 14th Amendment to the U.S. Constitution, resulted in an unlawful taking in violation of the 5th and 14th Amendments and, deprived them of an accrued right in violation of Article 24 of the Maryland Declaration of Rights.

The Maryland tax court agreed with the Wynnes that the interest legislation, just like the earlier tax credit restriction, discriminated against interstate commerce. The Circuit Court for Anne Arundel County reversed and Maryland's highest Court affirmed in an opinion we will later discuss at length. Not addressed by any of these courts were the other constitutional challenges pressed by the Wynnes. But they were not going away.

In the Maryland tax court, the Wynnes argued that the "retroactive interest rate reduction" violated the 14th Amendment's prohibition against deprivation of a property right without due process, the 5th Amendment's protection against the taking of property without just compensation and the prohibition of legislation impairing vested rights in violation of Article 24 of the Declaration of Rights and Article III, § 40 of the Maryland Constitution.[6] The tax court rejected these contentions. The court noted that the right to a 13 percent interest or any refund had not vested before the rate was reduced. The court observed that Maryland was not obligated to cure its constitutional defect by authorizing a refund with a 13 percent interest rate. It went on to note that the Wynnes' envisioned 13

[6] Article 24 is a due process analog while Article III, § 40 is Maryland's version of the Federal Taking Clause. In *Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604 (2002), the Court appeared to merge both provisions in its retroactivity analysis of state laws abrogating a person's right to a particular sum of money or a cause of action in a pending case. *Id.* at 642. One commentator has noted that "[o]nly in a minority of jurisdictions does the 'vested rights' language of the earlier cases still persist." 3 West's Legal Forms, Business Organizations § 142:3 (3d ed.).

percent interest rate on an anticipated refund was a "mere expectation" and thus, they "did not enjoy a protected vested right to the 13 percent interest they seek."

On appeal, the circuit court was equally unsympathetic to the Wynnes' contentions. The court observed that a vested right must become a title, legal or equitable, to the present or future enjoyment of property. The Wynnes maintained that their rights vested and that a cause of action accrued when they submitted a refund claim and pursued it before the Comptroller and the tax court. However, the circuit court said their rights did not accrue until 2015 when the U.S. Supreme Court decided the Commerce Clause issue. "Here, the Wynne[s'] right to a tax refund or interest thereto was contingent on the outcome of their appeal against Maryland's tax scheme, so they had no vested rights that could have been retroactively impaired when the BFRA was enacted."

Distinguishing cases cited by the Wynnes, viz, *Dua v. Comcast*, *supra*, and *Prince George's Cnty. v. Longtin*, 419 Md. 450 (2011), the circuit court said in those cases, rights had vested, while here, they had not. It rejected the due process claim because the interest rate reduction was a remedial measure "nondiscriminatory in nature and in accordance with sound fiscal planning[.]" Finally, the court found no unconstitutional taking of property because the Wynnes did not have "an established property interest in the refund at the time of the alleged taking[.]" This appeal followed.[7]

[7] We review the constitutional questions in this case de novo without deference to the determinations of the lower courts because they are purely legal issues.

DISCUSSION

The Wynnes present two issues to this Court: 1) a state constitutional claim of retroactive impairment of vested rights, and 2) a federal constitutional claim that the interest reduction violates the Due Process Clause of the 14th Amendment. They have abandoned their Federal Takings Clause challenge.[8] To prevail on their state constitutional claim, the Wynnes must show that they have a "vested right."[9] "A vested right is something more than a *mere expectation* based on the anticipated continuance of the existing law*; it must have become a title*, legal or equitable, to the present or future enjoyment of a property[.]" *Muskin v. State Dep't of Assessments and Tax'n*, 422 Md. 544, 560 (2011) (quotation marks and citation omitted). Factors to be considered in determining whether a statute retroactively impairs a vested right include fair notice, reasonable reliance and settled expectations. *Id.* at 558. To the extent the challengers are relying on Article III, § 40, they must show the existence of a property right such as an accrued cause of action, that has been taken without just compensation.

Under the 14th Amendment's Due Process Clause, those challenging the retroactivity of a statute must demonstrate that the legislature acted in an arbitrary and

[8] However, as noted earlier, *see* n.6, *supra*, a takings analysis is subsumed under their state constitutional challenge. However, a claim must be premised on the existence of a property right. Md. Const., Art. III, § 40.

[9] In *Dua*, the Court, which repeatedly uses the term "vested property rights," said: "With some exceptions, the concept includes that which is regarded as a property right under Maryland property law." 370 Md. at 631. *See id.* at 630. *See also* 16A C.J.S. Constitutional Law § 472 ("Vested rights can arise only from property rights, contract rights, statute, and the operation of law.").

irrational way. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). However, if the government can show that the statute (including its retroactivity clause) has a "legitimate legislative purpose furthered by rational means[,]" federal due process is satisfied. *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). Under federal due process principles, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of *entitlement* to those benefits." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) (emphasis added). When retroactivity is at issue, some justices on the U.S. Supreme Court have focused on the reasonable expectations of the plaintiffs and their reliance on continuation of the law. *See E. Enters. v. Apfel*, 524 U.S. 498, 549 (1998) (concurring and dissenting opinion of Justice Kennedy). *But see United States v. Carlton*, 512 U.S. 26, 33 (1994) ("[R]eliance alone is insufficient to establish a constitutional violation. Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code.").

Impact of the 2020 Wynne Opinion

In addressing the Commerce Clause challenge to the asserted interest reduction, the Maryland Supreme Court made the following observations we believe are relevant here:

1) "The State pays interest with respect to a claim for refund of an overpayment of income tax only in limited circumstances. Indeed, it seems safe to say that the vast majority of income tax refunds in Maryland are paid without interest." *Wynne II*, 469 Md. at 68.

2) "Over the years as inflation has waxed and waned, the General Assembly has, at various times, increased the rate of interest, reduced it, or pegged it to a particular benchmark." *Id.* at 69.

3) The Maryland Supreme Court and the U.S. Supreme Court decisions acknowledged that there might be other ways to cure the constitutional defect other than the extension of the tax credit. *Id.* at 75.

4) Receipt of 13 percent annual interest on the refunds would constitute a "windfall" to the Wynnes. *Id.* at 81.

5) The refund provision was a "remedy" and "the state may take into account its 'legitimate interest in sound fiscal planning' by limiting that refund in various ways." *Id.* at 82 (citation omitted).

6) "[T]he rate of interest, if any, that a state chooses to pay on a tax refund may be frequently adjusted in response to macroeconomic forces like the rate of inflation or other factors affecting a state's fiscal outlook." *Id.* at 87.

7) "Pegging an interest rate to be paid on those refunds to one commonly used by banks (and that ultimately exceeded the rate of inflation) ensured fair compensation of those taxpayers while maintaining the fiscal integrity of the State." *Id.* at 90.

8) "Refunds owed to taxpayers other than those occasioned by our decision in *Wynne* may or may not be accompanied by interest at a different rate – or no interest at all." *Id.* at 91.

9) "In response to the observation that business decisions would generally pre-date the determination and timing of a tax refund, the Wynnes imagine a retroactive state tax that discriminates against interstate commerce and argue that such a tax would be unconstitutional, not only under the Due Process clause and other constitutional provisions, but also under the dormant Commerce Clause. Whatever merit that argument may have as a matter of academic discussion, it is not this case, which involves a remedy authorized by the General Assembly." *Id.* at 87 n.39.

10) In discussing *McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18 (1990), which required a state to provide a clear and certain remedy for a Commerce Clause violation that might include a refund, the Court pointed out that "the Supreme Court in *McKesson* did not suggest that interest was a required element of such a refund and indicated that a state could place various constraints on any refunds, such as limiting them only to taxpayers who paid the tax under protest or by enforcing a

> relatively short period of limitations for claiming a refund." *Wynne II*, 469 Md. at 82 n.26.[10]

As this recital suggests, the legislature has set up the tax refund interest rate on shifting sands. The government has never consistently provided interest on all refunds and has never permanently locked into place the interest rate the Wynnes seek. Against such a background, they could not acquire a constitutionally protected "title" to the higher interest rate and thus, a vested right under Article 24 of the Maryland Declaration of Rights. The same shifting legislative sands, of which all taxpayers are deemed to have had notice, undercut the Wynnes' reasonable reliance on or a settled expectation of no change in the interest rate on refunds. For these reasons, even if a vested right existed, it would not have been impaired by the 2014 and 2015 BFRAs.

To the extent the Wynnes rely on Article III, § 40 of the Maryland Constitution to couch their challenge as a taking of an accrued cause of action for a refund with 13 percent interest, that reliance is misplaced. They were not denied the remedy of a refund with a fair interest rate. And because it was a remedy, which the State had great discretion in fashioning, it did not have to include the elements of a traditional cause of action. Moreover, as both the circuit court and the tax court have found, the General Assembly changed the interest rate before a final decision in the Commerce Clause challenge. In

[10] It might be argued that these statements are dicta as far as the issues in this case are concerned and should be disregarded. However, some of these comments are not dicta, given the fact that they speak to the very same statute we examine here and its history. Moreover, this Court has said that "[w]ell-considered *dicta*, of course, is sometimes very good and, therefore, of significant persuasive weight." *State v. Wilson*, 106 Md. App. 24, 37, *cert. denied*, 340 Md. 502 (1995), *rev'd on other grounds*, 519 U.S. 408 (1997). We believe these statements are "well-considered."

short, no cause of action had accrued before the change occurred. In our view, there was no taking.[11]

Turning to the Wynnes' federal due process claim, we believe it fails for many of the reasons that doomed their state law challenge. First, the taxpayers had no property right worthy of due process protection. In light of the fact that their property right had to be derived from a state law that would support "entitlement" to the 13 percent interest rate, rather than an unpredictable expectation of relief controlled by government discretion, the Wynnes have clearly failed to make such a showing. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005) ("Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion.").

The 2014/2015 BFRAs were neither arbitrary or irrational. The 2020 *Wynne* opinion identified a "legitimate [legislative] purpose" furthered by the lower interest rate for refunds: "sound fiscal planning." 469 Md. at 82. The Court explained:

> It is evident that the General Assembly adopted 2014 BRFA § 16 in light of the estimated $200 million in expenditures for thousands of refunds that could be required by an adverse Supreme Court decision in the *Wynne* case, a budget hit that would be exacerbated if a minimum 13% interest rate were applied to that sum – all of which would hinder the State's already slow recovery from the Great Recession. This was consistent with the constitutional responsibility of the Governor and the General Assembly to maintain a balanced budget. Pegging an interest rate to be paid on those refunds to one commonly used by banks (and that ultimately exceeded the

[11] Because Article III, § 40 only prohibits uncompensated takings, it is noteworthy that the 2020 *Wynne* opinion concluded that the 2014/2015 refund remedy "ensured fair compensation of [the] taxpayers." *Wynne II*, 469 Md. at 90. Finally, we note that, for reasons stated earlier, *see* pp. 6-8, *supra*, the Wynnes had neither a property right nor a vested right protected by Article III, § 40. This factor alone distinguishes the Wynnes' case from *Dua* and *Longtin*. *See* p.4, *supra*.

> rate of inflation) ensured fair compensation of those taxpayers while maintaining the fiscal integrity of the State.

Id. at 90.[12]

For all of these reasons, we conclude that the interest rate amount in the 2014/2015 BFRAs does not violate either the state or federal constitution.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.

[12] This case is nothing like *Eastern Enterprises v. Apfel*, *supra*, a plurality opinion that could muster only a single vote for a due process violation by a statute that created liability for events which occurred 35 years previously – a retroactive obligation "of unprecedented scope." *Id.* at 549 (Kennedy, J., concurring in part). That is not true here. Of course, here the interest rate change neither disadvantaged a property right nor operated retroactively.