

CA to Consider Gov. Mandel's Bid To Have Immunity from Civil Suits

By Jef Feeley

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Even though it's been 13 years since Marvin Mandel served as Maryland's governor, the Annapolis lawyer has persuaded the state's Court of Appeals to decide whether executive immunity gives him protection from civil fraud claims stemming from the sale of a now-defunct Prince George's County racetrack.

The Court of Appeals is scheduled to hear arguments Wednesday on Mandel's motion to dismiss the case of *James F. O'Hara, III et al. v. Marvin Mandel, et al.*, No. 33, September Term 1990. The suit involves allegations that Mandel and others defrauded two brothers out of their share of Marlboro racetrack in 1971, while Mandel was still governor.

The lawsuit focuses on the same series of events that led to Mandel's resignation as governor and his conviction on mail fraud and racketeering charges. The U.S. Supreme Court later overturned his criminal conviction.

Mandel argues that he should not have to face a civil trial on the fraud claims on the theory that the state's appellate courts have recognized that Maryland's governor has the same absolute immunity from civil suit for his official actions as does the President of the United States.

Unfamiliar faces

And while the Court of Appeals has agreed to hear the case, there will be some unfamiliar faces peering down at Mandel — who is representing himself —

and other lawyers at the argument.

Court of Appeals Chief Judge Robert C. Murphy said that he and four other judges appointed to their posts by Mandel have recused themselves from the case.

In their places, Murphy has asked retired Court of Appeals Judge Marvin Smith to hear the case along with Maryland Court of Special Appeals Judges Theodore G. Bloom, Dale S. Cathell, John J. Garrity and retired CSA Judge James S. Getty.

Joining them to hear Mandel's motion will be present Court of Appeals Judges Harry A. Cole and Lawrence F. Rodowsky.

"None of these judges was ever appointed by former Governor Mandel to any judicial post," Murphy explained. "We wanted to eliminate any possibility of a perception being created in the minds of the public that since he'd appointed some of us, there would be some favoritism shown, even though that would be a total fiction."

Murphy said that this is the first time in his 18-year tenure as chief judge that five Court of Appeals judges have had to remove themselves from consideration of a case.

For his part, Mandel said the fact that the makeup of the court is unusual will not throw him off stride in making his pitch for absolute executive immunity for Maryland's governors.

"All I can say is that I'll argue the law before whoever is up there," the ex-governor turned appellant said. *See Mandel Case, page 9*

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late lawyer said. "They are all judges and they've done this before. The law is the law."

12 years worth of litigation

The Court of Appeals' decision to intervene in the *O'Hara* case is merely the latest round in what has become a tortuous litigation stemming from the nearly 20-year-old sale of the Marlboro race course.

The O'Hara brothers filed a \$15 million fraud suit against Mandel and some of his political allies in 1978, claiming they conspired to defraud them out of their share of the track.

The plaintiffs allege that when Mandel was governor, he, along with Dale Hess, Harry and William Rodgers and the late Irv Kovens, conspired to buy the O'Hara's 14 percent interest in the race track at depressed price by having Mandel veto additional racing days for Marlboro.

Court of Appeals Chief Judge Robert C. Murphy said that he and four other judges appointed to their posts by Mandel have recused themselves from the case to forestall potential claims of favoritism.

Mandel and the other defendants are then alleged to have moved to increase the stock's value by sending out signals to legislators that Mandel would acquiesce to having lawmakers override his veto of more racing days for the track.

Federal prosecutors used all of those allegations to have a federal jury convict Mandel of mail fraud in 1978. More than a decade later, the U.S. Supreme Court decided what Mandel did in the Marlboro racetrack case did not amount to a crime.

The *O'Hara* case took another twist soon after its filing in 1978, when a Baltimore City Circuit Court judge ruled that lawyers for the O'Haras had missed the statute of limitations.

Years later, the Maryland Court of Appeals ruled that a jury should decide whether Ober, Kaler, Grimes & Shriver partner William Snyder, who filed suit on the O'Haras' behalf, had in fact missed the deadline.

But a city jury ruled in September 1989 that Snyder had not filed the suit too late. The fraud claim was scheduled for trial on June 4 of this year before Baltimore City Circuit Court Judge Elsbeth L. Bothe.

Immunity issue raised on eve of trial

But on May 25, Mandel appeared before Bothe with a motion to dismiss the civil action, claiming that he had determined executive immunity applied to his actions in the Marlboro racetrack sale. It was the first time in the litigation that the question of executive immunity had been raised.

Despite the ex-governor's arguments, Bothe denied his motion and his request to stay the trial while he appealed her decision to the state's appellate courts.

Then on May 30, less than a week before trial, Mandel filed a request for a stay with the Maryland Court of Special Appeals so it could review his immunity arguments.

The next day, the CSA granted the stay and the Court of Appeals announced it would review Mandel's arguments on the immunity issue.

Murphy said that the Court of Appeals was forced to make a quick decision on Mandel's petition for *certiorari* because of Bothe's refusal to delay the trial.

"We had to decide whether to hear it or let it go to trial. I understand this may be a thirteen-weeker. So we figured we better address this issue before that got into gear," the chief judge said. "We set the case in for hearing as quickly as possible to try to help speed this thing along."

But the O'Haras' new lawyer, Roy Mason of Baltimore's Montedonico & Mason, said the fact that the Court of Appeals agreed to hear Mandel's immunity argument means the case may not be tried until 1991.

"We've already had some of the main participants, both parties and witnesses, die over the past 12 years," Mason noted. "The defendants were positively gleeful that the case got postponed once again. As a defense lawyer, I know that the strategy is to try to delay going to trial forever. They've almost succeeded in this case."

Mandel's argument

In his brief filed with the Court of Appeals, Mandel pointed out that the Court of Appeals generally acknowledged in a 1980 decision, in the case of *Hamilton v. Verdow*, 287 Md. 544, that the governor of the state stands in the same position as the president when it comes to immunity.

Mandel cited language from the *Hamilton* case, in which the court announced that "... the governor bears the same relation to this state as does the president to the United States, and that generally, the governor is entitled to the same privileges and exemptions in the discharge of his duties as is the president."

In addition, the former governor pointed to the U.S. Supreme Court's decision in the case of *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), in which the justices announced that the president was entitled to "absolute immunity from damages liability predicated on his official acts."

Mandel acknowledged in his brief that the state's appellate courts have never considered the issue of whether a governor in Maryland has absolute immunity from common law tort actions.

However, the Court of Appeals has recognized that other public officials — judges, prosecutors and legislators — are immune from being sued for their discretionary acts while in office.

"This case poses the opportunity for this court to hold as a matter of Maryland law that high executive officers, like legislators and judges, are absolutely immune from civil liabilities for official acts performed within the scope of constitutional responsibility," Mandel urged in his brief.

Mandel not elected king

In their brief, Mason, along with Angus Everton and Gary R. Jones, countered that no Maryland public officials are granted absolute immunity from tort suits under existing state law.

Instead, they argued, Maryland public officials have a qualified immunity from civil suits, so long as the act they committed in their role as public servant was not "malicious."

"There is no question that the governor is a public official, but he is no more than that; no exalted class of government officials exist under our jurisprudence, and none should exist," the O'Haras' lawyers wrote in their brief.

In the hearing before Bothe, Everton pointed out that the type of immunity that Mandel is seeking — to be free from even having to appear at trial or be subpoenaed — is the type to which only the kings and queens of England were historically entitled.

"I don't believe when the people of Maryland elected Marvin Mandel, they elected him monarch," the plaintiffs' lawyer said dryly. "We don't have kings in this country. Not even the President of the United States is above the law. I think the Supreme Court made that clear with Mr. Nixon."