

WES MOORE, et al.,

Petitioners

v.

MARYLAND HEMP
COALITION, INC., et al.

Respondents

* IN THE APPELLATE COURT
*
* OF MARYLAND
*
* Case No. ACM-REG-1590-2023
*
*
*
*
*
*
*
*

**APPELLEES’ MOTION PURSUANT TO RULE
8-425 TO ENJOIN APPELLANTS/CROSS-APPELLEES
FROM ISSUING NEW RECREATIONAL CANNABIS LICENSES**

The Appellees, by and through undersigned counsel, file this Motion Pursuant to Rule 8-425 to Enjoin Appellants/Cross-Appellees (hereinafter referred to as Appellants or as “the State” for brevity and clarity) from issuing new recreational cannabis licenses during the pendency of this appeal and the litigation below, and state:

1. Appellees, a group comprised of retailers, producers, farmers, and consumers of hemp derived products, filed suit in the Circuit Court for Washington County on July 24, 2023, Maryland Hemp Coalition Inc., et al. v. Gov. Wes Moore, et al., Case No. C-21-CV-23-000348. That Complaint was superseded by a First Amended Complaint filed on September 5, 2023, which was the operative complaint at the time of issuance of the preliminary injunction in this case on October 12, 2023. (First Amended Complaint, Exhibit A).

2. This suit seeks relief from certain provisions of the Maryland Cannabis Reform Act that effectively put the Appellees out of business. The original Complaint and subsequent First Amended Complaint seek a declaratory judgment as to the Constitutionality of the Cannabis Reform Act under Articles 24 and 41 of the Maryland Declaration of Rights, and also raise claims related to what is commonly called a taking or inverse condemnation. The Appellees sought a temporary restraining order and a preliminary injunction.

3. After a brief hearing on the request for temporary restraining order, on July 27, 2023, the Circuit Court (the Hon. Brett R. Wilson) denied the request for temporary restraining order based upon a view that the Appellees would not suffer irreparable harm in the time that would elapse between the time of the order denying a temporary restraining order and the date of the hearing upon the motion for preliminary injunction. However, the Circuit Court also set the matter for a two-day hearing on the motion for preliminary injunction.

4. On September 11 and 12, 2023, the Circuit Court (the Hon. Brett R. Wilson) took evidence and heard argument upon the motion for preliminary injunction. Three witnesses, all of whom are hemp retailers, producers, or farmers, testified for the Appellees. The Appellees also called William Tilburg,

one of the Appellants, as an adverse witness. William Tilburg and Andrew Garrison, who are also named as Defendants below, testified for the State.

5. Up until July 1, 2023, the Appellees had sold hemp derived products containing Delta 8 THC that is lawful to sell under Federal law, rather than the Delta 9 THC products sold in the State licensed dispensaries. However, the new Cannabis Reform Act, in an effort to limit competition and increase prices, swept virtually all THC product sales under the same narrow scheme, set forth in Md. Code Ann. Alc. Bev. §36-1102 as follows, in relevant part:

(b) (1) A person may not sell or distribute a product intended for human consumption or inhalation that contains more than 0.5 milligrams of tetrahydrocannabinol per serving or 2.5 milligrams of tetrahydrocannabinol per package unless the person is licensed under § 36-401 of this title and the product complies with the:

(i) manufacturing standards established under § 36-203 of this title;

(ii) laboratory testing standards established under § 36-203 of this title; and

(iii) packaging and labeling standards established under § 36-203 of this title.

(2) A person may not sell or distribute a product described under paragraph (1) of this subsection to an individual under the age of 21 years.

(c) A person may not sell or distribute a cannabinoid product that is not derived from naturally occurring biologically active chemical constituents.

(d) (1) Notwithstanding subsection (b) of this section and subject to paragraph (2) of this subsection, it is not a violation of this section for a person to sell or distribute a hemp-derived tincture intended for human consumption that contains:

(i) a ratio of cannabidiol to tetrahydrocannabinol of at least 15 to 1; and

(ii) 2.5 milligrams or less of tetrahydrocannabinol per serving and 100 milligrams or less of tetrahydrocannabinol per package.

(2) To sell or distribute a hemp-derived tincture under this subsection, a person must provide, as required by the Administration, tincture samples for the purpose of testing to determine chemical potency and composition levels and to detect and quantify contaminants.

(e) A person who violates subsection (b) of this section is guilty of a misdemeanor and on conviction is subject to a fine not exceeding \$5,000. . . .

6. As confirmed at the preliminary injunction hearing, almost all of the products formerly lawfully sold by the Appellees, prior to the issuance of the injunction, could only be sold by the holder of a cannabis license issued by the State of Maryland.

7. At the preliminary injunction hearing, the Appellees raised a challenge to the new recreational cannabis licensing scheme, which also provides, at Md. Code Ann. Alc. Bev. §36-401(D), in relevant part:

(d) The Administration may not issue more than the following number of licenses per type, including licenses converted under subsection (b)(1)(ii) of this section:

(1) for standard licenses:

(i) 75 grower licenses;

- (ii) 100 processor licenses; and
- (iii) 300 dispensary licenses;
- (2) for micro licenses:
 - (i) 100 grower licenses;
 - (ii) 100 processor licenses; and
 - (iii) 10 dispensary licenses;
- (3) for incubator space licenses, 10 licenses; and
- (4) for on-site consumption licenses, 50 licenses.
- (e)
 - (1) This subsection applies to all licenses, including licenses converted under subsection (b)(1)(ii) of this section.

8. In addition, in order to even participate in the first round of lottery license issuance, one must meet certain factors purported to address "social equity concerns" as follows:

Md. Code Ann. Alc. Bev. §36-101(ff) states:

“Social equity applicant” means an applicant for a cannabis license or cannabis registration that:

- (1) has at least 65% ownership and control held by one or more individuals who:
 - (i) have lived in a disproportionately impacted area for at least 5 of the 10 years immediately preceding the submission of the application;
 - (ii) attended a public school in a disproportionately impacted area for at least 5 years; or
 - (iii) for at least 2 years, attended a 4-year institution of higher education in the State where at least 40% of the individuals who attend the institution of higher education are eligible for a Pell Grant; or

(2) meets any other criteria established by the Administration.

9. Meanwhile, a "disproportionately impacted area" is defined as in the same section, at Md. Code Ann. Alc. Bev. §36-101(r), as "a geographic area identified by the Office of Social Equity that has had above 150% of the State's 10-year average for cannabis possession charges." However, without any legislative guidance as to how such geographic areas would be defined, the State had simply decided to use zip codes as the relevant geographic regions, without apportionment for population. (See Opinion, Exhibit B, Apx. 050).

10. On October 12, 2023, the Circuit Court issued a detailed opinion as to its findings of fact and conclusions of law and ordered that enforcement of Md. Code Ann. Alc. Bev. §36-1102 be enjoined until the conclusion of the litigation. (Exhibits B and C, Opinion and Order of October 12, 2023). The Opinion did not consider every argument raised by the Plaintiffs, but in summary, it did find that the State's lottery system for awards of licenses, the numerical limitation upon the numbers of licenses, and the social equity criteria for the first round of licensing, were all violative of Articles 24 and 41 of the Maryland Declaration of Rights.

11. The social equity factors and geographical factors were found by the Circuit Court to have no rational relationship to public safety or health concerns (See Opinion, Exhibit B, Apx. 052, ¶ 2), but instead, are specifically

designed to restrict the market and keep prices high, and discriminate against residents of some geographic areas in Maryland in favor of others. (See Opinion, Exhibit B, Apx. 052, ¶3). The Appellees argued, and the Circuit Court agreed, that this is a classic prohibited monopoly, a violation of the equal protection provisions of Article 24 of the Maryland Declaration of Rights, and an illegitimate exercise of the power of the State.

12. The Circuit Court, despite the urging of the Appellees, did not enjoin the State from continuing to license applicants under the same scheme that the Circuit Court has clearly signaled is quite likely illegal.

13. The State is presently accepting applications from social equity applicants and intends to issue licenses to the persons who win the “lottery” as scheduled. (See Exhibit E, Apx. 064, Application Information from State’s website, originally attached as Exhibit A to Motion to Revise and/or Amend filed in the Circuit Court).

14. The continuation of the licensing scheme is problematic for numerous reasons:

15. First, if the State manages to persuade the appellate courts that it should be able to enforce a numerical limit upon licenses, but fails in the other aspects of its appeal, the State will then argue mootness in the Circuit Court, as it will have already given out most or all of the licenses available, and will

argue that it “wouldn’t be fair” to take the licenses back, even though the applicants received the licenses unfairly.

16. Second: At the same time, the State appears to be accepting applications and application fees from social equity applicants without warning them that the matter is presently under judicial review and that the present licensing scheme may not be lawful. If permitted to continue, there is a significant potential of confusion and additional litigation over licensing rights in the future.

17. Third: The State is also proceeding with an application process that requires that an official with the Maryland Cannabis Administration review, and either approve or disapprove, a subjective “diversity statement” as part of the application process. This part of the law gives the Maryland Cannabis Administration a power over licensee employment practices far in excess of what is allowed by law, and also serves as a *de facto* and arbitrary method of simply granting discretionary licenses to whoever is favored by the MCA and rejecting applications from whomever is not, with no apparent remedy for review of such a decision. (See Exhibit F, Evaluation Worksheet from State Website, at Apx. 067, and Affidavit of Nevin L. Young as to the authenticity and source of that document, Exhibit G). The requirement of an arbitrary diversity plan was one of the issues raised by the First Amended

Complaint, Exhibit A, at Apx. 027, ¶35.d, Apx. 038, §C of prayer for relief, Apx. 041, §C of prayer for relief.

18. It will do the Plaintiffs no good to win their lawsuit as to the equal protection, social equity, and lottery elements, if at the end, the Appellate Court might uphold a numerical cap in the form asserted by the State, and the State is then to claim mootness due to having already issued all available licenses.

19. The State should therefore be enjoined from issuing licenses under the present scheme, which the Circuit Court has already indicated is quite likely to be found unlawful.

20. The Maryland Declaration of Rights declares, at Article 19, “[t]hat every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.”

21. By proceeding with licensing despite the Court’s Opinion and Order, the State may be allowed to continue to perpetrate a wrong that has no remedy, and should be enjoined from proceeding with the licensing scheme in its present form.

22. The Appellees filed a Motion to Revise and/or Amend the Judgment to expand the scope of the injunction as granted by the Circuit Court

on October 23, 2023. (Because the Motion seeks to expand the scope of the original interlocutory order, rather than to stay enforcement of it, the Motion was filed as a Motion to Revise rather than as a Motion pursuant to Rule 2-632). The State responded with an Opposition to that Motion on November 7, 2023. Meanwhile, the licensing program proceeds apace, and the actual issuance of licenses may be highly prejudicial both to the Appellees and to other applicants.

WHEREFORE, the Appellees/Cross-Appellants hereby pray, that the Appellants be enjoined from issuing new recreational cannabis licenses until the litigation in the Circuit Court is resolved, or until further order of the Court.

Respectfully Submitted,

____s/Nevin L. Young_____
Nevin L. Young
CPF No. 0512150328
170 West Street
Annapolis, Maryland 21401
410-353-9210
nevinyounglaw@gmail.com

REQUEST FOR HEARING

The Appellees hereby request a hearing for oral argument on this matter.

_____s/Nevin L. Young_____
Nevin L. Young
CPF No. 0512150328

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2023, a copy of the foregoing was served via the MDEC filing system upon:

James Tansey, Esq.
Heather Nelson, Esq.
Office of the Attorney General
300 W. Preston Street
Suite 302
Baltimore, Maryland 21202

_____s/Nevin L. Young_____
Nevin L. Young
CPF No. 0512150328