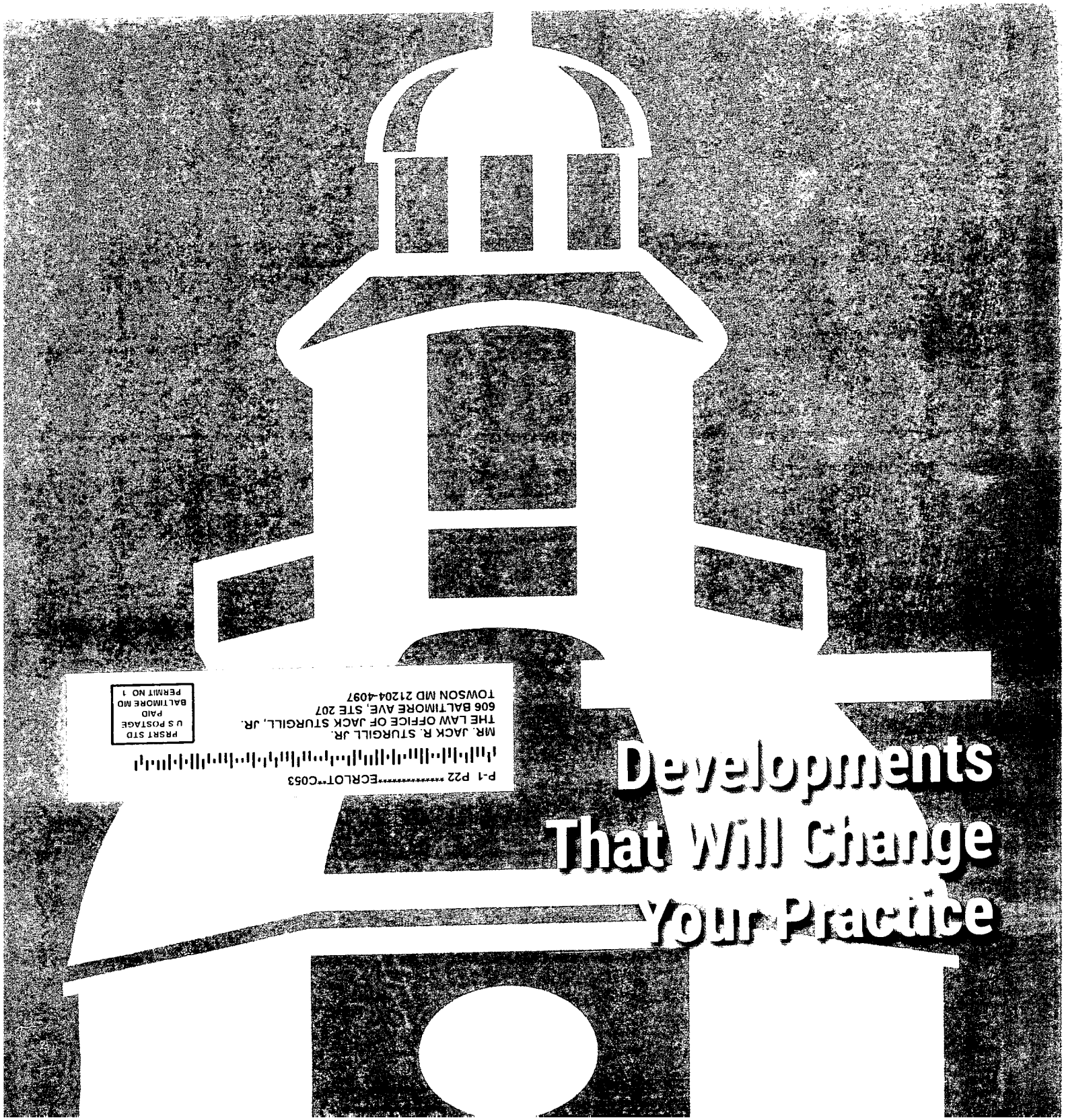
Special Issue 2017

REP

Journal of the Maryland Association for Justice, Inc.



Developments That Will Change Your Practice

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Developments That Will Change Your Practice

FEATURED ARTICLES

IN EVERY ISSUE

Failure to Regulate: Governmental Liability Under *Litz*

by Jack R. Sturgill and Gregg H. Mosson

I. Government Can Be Liable for Property Damage Due to Failure to Regulate

The Maryland Court of Appeals recently held that local and state governments can be sued for damage to property if the damage results from a failure to regulate in the face of an affirmative duty to act. *Litz v. Md. Dep't of the Env't*, 446 Md. 254, 131 A.3d 923 (2016). In *Litz*, the Court held that governmental inaction resulting in polluting and damaging a 140-acre, family-owned, recreational campsite constituted a taking of property under the Maryland Constitution. *See id.* (citing Md. Const. Art. III, § 40). The Court held that the claim was a form of "inverse condemnation," a viable way to assert a takings claim in the absence of condemnation proceedings. Because the Court upheld the viability of tort and negligence claims as well, the Litz decision stands for the proposition that government inaction can create common-law tort liability if there was "an affirmative duty to act."1

Concerning the theory of inverse condemnation in Maryland, before Litz such claims only applied to affirmative governmental acts. These deliberate acts, under prior decisions, sought redress because, for instance, the threat of condemnation or some other governmental act resulted in property damage or loss of value. 446 Md. at 266-69; *see also Reichs Ford Rd . Joint Venture v. State Rds. Comm'n of the State Highway Admin.*, 388 Md. 500, 880 A.2d 307 (2005). Here in Litz, the Court of Appeals held that state and local governments might also be liable due to:

(1) "government inaction"
(2) if there was "an affirmative duty to act"
(3) "under the particular circumstances."

446 Md. at 269, 131 A.3d at 932.

II. What Happened to the Litz Family Campgrounds?

In *Litz*, Plaintiff Ms. Gail B. Litz owned a 140-acre property with a lake in the Town of Goldsboro in Caroline County, Maryland. She had inherited the property from her parents, and continued her family's campground business that centered around a 28-acre lake called Lake Bonnie. Unfortunately, deteriorating septic systems in the township over many years had been polluting Lake Bonnie. These septic systems were individually owned. In fact, the septic system pollution was a widespread problem. The failure-to-regulate claim in Litz held governments accountable for this third-party damage.

The pollution was long-term and well-known. It had come to regulatory attention over two decades before litigation commenced in 2010. For instance, a 1985 Caroline County study highlighted septic system overflow and contamination problems in Goldboro. A 1988 county-issued report documented resulting well-water problems. Finally, in 1996, Maryland Department of the Environment took administrative action. It and the local governments involved signed a consent order requiring remedial and preventative actions. None occurred. In 2004, the Caroline County Health Department issued warnings about increasingly dire septic-system contamination.

The pollution eventually destroyed Lake Bonnie and campground business, according to Ms. Litz's filed complaint. As a result of the loss of income, she could no longer afford her mortgage payments. Around 2010, she lost her family's campsite and grounds to foreclosure. She filed her complaint under various tort, equity, and Constitutional takings theories in March 2010. *Litz*, 446 Md. at 258-61.

The Court of Appeals, in a prior decision, upheld Ms. Litz's right to pursue tort and negligence actions after these actions had been dismissed for failure to file the requisite Tort Claim Act notices. In a narrow reading of her deadline to file, the trial court had dismissed those claims by ruling that once Ms. Litz inherited the property from her parents, she had an immediate duty to file Tort Claim Act notices concerning this longstanding problem. The Maryland Court of Appeals in 2013 reinstated the tort claims because the governmental failure-to-regulate was ongoing and, thus, such a narrow decision unjustified. Systemic pollution and governmental inaction, as alleged here, constitutes a continuous wrong. *See Litz v. Md. Dep't of the Env't*, 434 Md. 623, 631, 76 A.3d 1076, 1080 (2013).

The 2016 *Litz* decision did not map the borders of what constitutes an "affirmative duty to act" that then makes a governmental agency or entity liable. The decision did, however, highlight three key facts. First, the local governments involved here had years of notice of the sewage and septic system problems that destroyed Ms. Litz's campsite business. Second, certain State and local regulators had specific statutory authorization to order remedial measures be taken, a fact noted by the Court, without conducting any statutory analysis. Third, the 1996 administrative consent order issued by the Maryland Department of the Environment, alone, very likely created an affirmative duty to act for those agencies and governments involved, noted the Court. The Court deemed Ms. Litz's claim viable under the totality of these allegations, under a motion to dismiss standard, without further applying them.

III. When Are Governments on Notice?

Future litigation will address the amount of notice to governments required to create an affirmative duty to act before inaction creates liability. The *Litz* decision only outlines it. Simply put, it is not certain yet what constitutes "known" and "longstanding" notice to create "an affirmative duty to abate a known and longstanding public health hazard." One might look to the following eleven-year period, from the 1985 local warning noted by the Court of Appeals about the septic system pollution, to the 1996 issuance of a State remedial clean-up order, as the controlling timeline under this precedent. At the same time, the *Litz* reasoning does not rely exclusively on that administrative order. The Town was aware of the "public health hazard" by the 1985 and 1988 local governmental reports. The 1996 State administrative order came at year eleven of the documented problem. What is "known" and "longstanding" remains to be determined further.

Judge Watts, in her *Litz* dissent, worries that the Court of Appeals has created a "private right of action" over any failure of a government to regulate. This fear is not entirely justified by the detailed facts of the case. However, the primary *Litz* holding is stated quite broadly: "[W]e hold, as a matter of Maryland law, that an inverse condemnation claim is pleaded adequately where a plaintiff alleges a taking caused by a governmental entity's or entities' failure to act, in the face of an affirmative duty to act." 446 Md. at 267.

In conclusion under *Litz*, local and state governments in Maryland can be sued under common-law tort as well as constitutional claims for damage to property if the damage results from a failure to regulate in the face of an affirmative duty to act.

Biographies

Jack, R. Sturgill, Esq., practices in the fields of real estate, land use, eminent domain / condemnation, and administrative law. He is the founder and principal attorney of the Law Office of Jack. R. Sturgill, based in Baltimore County, Maryland, where he utilizes over 40 years of experience in civil litigation to reach his client's goals. Mr. Sturgill formerly served as a Maryland Special Assistant Attorney General and also Assistant County Attorney, Chief of Real Property, for Baltimore County, Maryland, litigating condemnation and real estate cases. He also has become known as a legal expert in the Uniform Standards of Professional Appraisal Practice (USPAP), and represents real-property appraisers before administrative and licensing boards. He is a graduate of the University of Baltimore School of Law, Towson University, and completed graduate courses at Johns Hopkins University.

Gregg H. Mosson, Esq. focuses his practice on employment litigation and counseling, claims for Social Security disability benefits, family law, and on select civil litigation matters in Maryland state and federal courts. He is an attorney at JMBlattner, LLC, in Baltimore County, Maryland. He is a Summa Cum Laude graduate of the University of Baltimore School of Law, where he served as an associate comments editor of the Law Review, litigation fellow, and law scholar in Contracts and Civil Procedure. Before entering the law, he enjoyed a prior career as a professional writer, author, and teacher, and holds an MA from the Johns Hopkins University Writing Seminars. In 2014-2015, he was an adjunct professor in writing and composition at the University of Baltimore.

(Endnotes)

1 In addition, the Litz Court approved the viability of negligence and trespass tort claims against the state and local governments involved under the same facts. These tort claims, of course, would be viable only if the requisite pre-litigation notices under tort claims acts had been provided, and such notice was not considered by the Court of Appeals. Notably, the Local Government and Maryland Tort Claim Acts do not apply to a constitutional taking of property. Litz, 446 Md. at 273-76. This means that the notice and damages-cap provisions of these Acts do not apply to the takings claims here. Id.