IN THE
COURT OF APPEALS OF MARYLAND

No. 42
September Term, 2011

UNIVERSITY OF MARYLAND
MEDICAL SYSTEM CORPORATION

Appellant/Cross-Appellee

v.

GUISEPPINA MUTI, et al.

Appellees/Cross-Appellants

Appeal from the Circuit Court for Baltimore City (Cannon, J.)

On Writ of *Certiorari* to the Court of Special Appeals of Maryland

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BRIEF OF *AMICUS CURIAE* MARYLAND DEFENSE COUNSEL, INC.

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Date: November 15, 2011

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STATEMENT OF THE CASE

Amicus curiae Maryland Defense Counsel, Inc. (MDC) adopts the Statement of the Case set forth at pp. 1-2 of the brief of Appellant University of Maryland Medical System Corporation (Hospital).

QUESTION PRESENTED

I. Does Plaintiffs' failure to name all wrongful death beneficiaries as either plaintiffs or use plaintiffs within three years of the decedent's death require dismissal of the wrongful death claim without leave to amend?

STATEMENT OF FACTS

Amicus curiae MDC adopts the Statement of Facts set forth in the Hospital's brief at pp. 3-5.

ARGUMENT

I. The Circuit Court correctly dismissed the wrongful death action without leave to amend.

A. The joinder of all plaintiffs in a wrongful death action is a condition precedent under the statute, not a procedural matter governed by Rule 15-1001.

The crux of the Mutis' argument is that while the three-year deadline is a condition precedent to bringing an action under MD. CODE ANN., CTS. & JUD. PROC. ("C.J.P.") § 3-904, the requirement to join all beneficiaries, which they admittedly violated, is not. Appellees' Brief at 9-12. Rather, they argue that the latter is a mere procedural limitation of Rule 15-1001 that can be excused and/or circumvented by a "totality of the circumstances" inquiry under Rule 1-201(a). Their theory cannot be squared with either the Act's language, principles of statutory construction, or this Court's precedents.

The source of the join-all-beneficiaries requirement is not Rule 15-1001, as the Mutis assert, but the Wrongful Death Act itself, C.J.P. § 3-901 *et seq.* As with all statutes, the starting point for interpreting the Act is the language of the enactment: courts are to give that language its natural and ordinary meaning in attempting to determine the legislature's intent. *Breslin v. Powell*, 421 Md. 266, 286, __ A.3d __ (2011) (citations omitted). A statute "should be construed according to the ordinary and natural import of the language used, unless a different meaning is clearly indicated by its context, without resorting to subtle or forced interpretations for the purpose of extending or limiting its operation." *Slate v. Zitomer*, 275 Md. 534, 539, 341 A.2d 789 (1975), *citing Balto. County v. White*, 235 Md. 212, 218, 201 A.2d 358 (1964). If the legislative intent is expressed in clear and unambiguous language, this Court will carry it into effect, even if it believes the policy of the legislation is unwise, harsh or unjust, as long as it impairs no constitutional guarantees. *Slate*, 275 Md. at 540, *citing Md. Medical Service, Inc. v. Carver*, 238 Md. 466, 478, 209 A.2d 582 (1965).

The statutory language here allows for only one wrongful death action, § 3-904(f), sets forth the list of primary beneficiaries (wife, husband, parent, child), and expressly requires that that action be for their benefit, § 3-904(a)(1). It long has been construed to allow only one judgment per defendant. *State use of Bashe v. Boyce*, 72 Md. 140, 19 A. 366 (1890). The combined effect of these well-established requirements is that the statute imposes a duty to join all beneficiaries as plaintiffs, in the single action it allows, to be filed within three years of death. While Rule 15-1001 spells out ancillary procedural matters such as how non-participating beneficiaries are to be designated on

the caption (Rule 15-1001(b)), notified of the suit (Rule 15-1001(c)), and described in the complaint (Rule 15-1001(d)), those requirements do not, and cannot, change the fact that the statute itself requires all beneficiaries to be parties to the action. *See*, Rule 1-201(c) ("Neither these rules nor omissions from these rules supersede common law or statute unless inconsistent with these rules"). As such, Rule 15-1001 cannot provide the Mutis the escape hatch they seek for their failure to join Ricky Muti.

The Court of Special Appeals viewed Ricky Muti's omission as a matter governed by Rule 15-1001, rather than the statute, because it is "a procedural matter to be covered by rules and not an issue of substantive law." Opinion, pg. 12, *citing Jones v. Prince George's County*, 378 Md. 98, 117, 835 A.2d 632 (2003) (*Jones I*). That was erroneous. In *Jones I*, this Court held the issue of standing under the Wrongful Death Act to be a procedural one governed by the Maryland Rules because the statute said nothing about standing, 378 Md. at 110-111, 117-118. But in the same decision, it held that choice of law *was* governed by the statute, specifically because that issue is addressed by the statutory text. *Id.* at 107, *citing* C.J.P. § 3-903 (emphasis added). Likewise, the issue of including all beneficiaries in the action is addressed in the statutory text, § 3-904(a) ("an action under this subtitle shall be for the benefit of" the listed beneficiaries), and thus is not a merely procedural matter. It is akin to choice of law in the Act, rather than standing, and Rule 15-1001 does not control the analysis, contrary to the Court of Special Appeals's ruling.

By way of analogy, this Court long has deemed the filing deadline in § 3-904(g) a substantive, rather than procedural, one:

> The rule in Maryland is that, since the wrongful death statute created a new liability not existing at common law, compliance with the period of limitations for such actions is a condition precedent to the right to maintain the action. The period of limitations is part of the substantive right of action.

Slate, 275 Md. at 542 (citation omitted).

The same reasoning extends to the inclusion of all statutory beneficiaries. Compliance with the requirement that there be a single action, for the benefit of all listed beneficiaries, is a condition precedent to maintaining the action. Just as compliance with the three-year deadline is part of the substantive right of action, so too is inclusion of all statutory beneficiaries. *See*, § 3-904(a)(1); *see also Jones v Jones*, 172 Md. App. 429, 915 A.2d 471 (2007) (*Jones II*) ("[u]nlike the issue of standing, which is procedural, the issue of who has the legal right to recover damages for the wrongful death of a decedent is substantive").

"[C]ourts may not attempt, under the guise of construction, to supply omissions or remedy possible defects in the statute, or to insert exceptions not made by the Legislature." *Slate*, 275 Md. at 540, *citing Amalgamated Insurance v. Helms*, 239 Md. 529, 535-536, 212 A.2d 311 (1965). In deeming the non-joinder of statutory beneficiaries a "procedural" question governed by Rule 1001-15 – and thus, eligible for "totality of the circumstances" review under Rule 1-201 – the Court of Special Appeals incorrectly disregarded the statutory text.

Other principles of statutory construction buttress this conclusion. Statutes that are in derogation of the common law, such as the Wrongful Death Act, are to be strictly construed. *Flores v. King*, 13 Md. App. 270, 282 A.2d 521 (1971). Where there is any

doubt about the statute's meaning or intent, it is to be given the meaning "which makes the least rather than the most change in the common law." *Azarian v. Witte*, 140 Md. App. 70, 95, 779 A.2d 1043 (2001), *citing* 3 Sutherland, *Statutory Construction,* § 61.01 (5th ed). "In fact, unless the legislature makes it *expressly clear* that its purpose is to change the common law, it is presumed that no such change was intended." *Id.* at 95, *citing Robinson v. State*, 353 Md. 683, 693, 728 A.2d 698 (1999) (emphasis added). Further, statutes are presumed to change the common law "only to the extent absolutely required for that statute's enactment." *Id*, *citing Lutz v. State*, 167 Md. 12, 15, 172 A. 354 (1934).

As has long been recognized:

> It is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required . . .the law rather infers that the act did *not* intend to make any alteration *other* than what is *specified*, and besides *what has been plainly pronounced*."

Azarian, 140 Md. App. at 95-96, *quoting State v. North,* 356 Md. 308, 312, 739 A.2d 33 (1999) and *Hooper v. Mayor & C.C. of Balto.*, 12 Md. 464, 475 (1859) (emphasis in original) (internal quotation marks omitted); *see also*, *Breslin*, *supra*, op at 22 ("it is not to be presumed that the Legislature by creating statutory assaults intended to make any alteration in the common law other than what has been specified and plainly pronounced") (internal quotation marks, brackets, and citations omitted). "[L]egislation creating liability where no liability existed at common law should be construed most favorably to the person or entity subjected to the liability, and against the claimant for damages." 3 Norman J. Singer and J.D. Shambie Singer, *Statutes and Statutory*

Construction (7th ed), § 61.1, *citing Hardy Bros. Body Shop, Inc. v. State Farm Mut. Auto Ins. Co.*, 848 F. Supp. 1276 (S.D. Miss. 1994) and *McMillan v. Rodriguez*, 823 So.2d 1173 (Miss. 2002).

Those canons support the view that naming all plaintiffs, within the three-year deadline, is a condition precedent to maintaining an action for recovery under the Wrongful Death Act. While the Mutis assert (without citation to authority) that the three-year time limitation is "the only condition precedent" in § 3-904, Appellees' Brief at 12, the legislature in permitting wrongful death actions actually set forth several requirements, all of which plaintiffs must comply with to avoid the common-law bar. Thus, a plaintiff can bring only one wrongful death action in respect to a person's death. § 3-904(f). That action must be brought within three years of death. § 3-904(g). And it shall be "for the benefit of" all the various beneficiaries listed in the statute. § 3-904(a) and (b). Because the Wrongful Death Act is to be given the meaning "which makes the least rather than the most change in the common law," *Azarian*, 140 Md. App. at 95, and "construed most favorably to the person or entity subjected to the liability, and against the claimant for damages," Singer, § 61.1, each of those requirements – filing a single action, naming all beneficiaries, within three years of death – must be deemed a condition precedent to availing oneself of the legislature's limited abrogation of the common-law bar on wrongful death actions. As with any condition precedent, if one is not complied with, the action fails. *Georgia-Pacific Corp. v. Benjamin*, 394 Md. 59, 84, 904 A.2d 511 (2006), *citing Rios v. Montgomery County*, 386 Md. 104, 127-28, 872 A.2d 1 (2005).

This Court's precedents also compel that conclusion. In *Waddell v. Kirkpatrick*, 331 Md. 52, 626 A.2d 353 (1993), this Court held that § 3-904(g)'s three-year filing deadline was a condition precedent, noncompliance with which barred the action. 331 Md. at 57-58, 64 (citations omitted). The legislature's 1971 amendment merely extended the previous two-year deadline into the current three-year one, the Court held, but did not transform the concept from a condition precedent to a limitation period, even where the amendmentt referred to the deadline as a limitation. "Had the Legislature intended such a radical change, it easily could have done so; it certainly knew how to do it." *Id.* at 61.

Indeed, even calling something a "limitation" does not necessarily render it something other than a condition precedent. In *State v. Sharafeldin*, 382 Md. 129, 132, 854 A.2d 1208 (2004), the one-year deadline for filing a breach-of-contract claim against the state set forth in MD. CODE ANN., STATE GOVERNMENT, § 12-202 was deemed a condition precedent for the waiver of sovereign immunity, and thus to the right of action itself. In so holding, this Court relied heavily on

> ...the well-recognized but more general rule, to which we have adhered, that, where a statute creates a new cause of action and fixes a time within which a suit under the statute must be filed, "the time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone." *The Harrisburg*, 119 U.S. 199, 214, 7 S. Ct. 140, 147, 30 L. Ed. 358, 362 (1886). The *Harrisburg* Court noted that, in such a situation:
>
> > "Time has been made of the essence of the right and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are therefore to be treated as limitations of the right."

Sharafeldin, 382 Md. at 147, *citing The Harrisburg*, 119 U.S. at 214.

The Court went on to note not only that it continues to adhere to that rule despite the overruling of *The Harrisburg* on other grounds, but that it has adopted and applied it to the wrongful death statute. *Id.* at 147-148, *citing State use of Stasciewicz v. Parks*, 148 Md. 477, 479-82, 129 A. 793-94 (1925) and *Waddell*, 331 Md. 52. The Court in *Sharafeldin* ultimately held that § 12-202 "is not a mere limitation but sets forth a condition to the action itself." 382 Md. at 148.

So it is with joinder of all beneficiaries. In derogation of the common law, the legislature enacted a statute that permits one action to be filed, on behalf of all listed beneficiaries, within three years of the decedent's death. The liability and the remedy are created by the same statute, and those three limitations on the remedy "are therefore to be treated as limitations of the right." *Sharafeldin*, 382 Md. at 147.

This Court's recent decision in *Hansen v. City of Laurel*, 420 Md. 670, 687-688, 25 A.3d 122 (2011), supports this conclusion. In *Hansen*, the Court held that the notice requirement of the Local Government Tort Claims Act is a condition precedent, and that plaintiff must plead satisfaction of it before suit can be brought. 420 Md. at 682-687. On the decisive issue, this Court reiterated that its understanding of what constitutes a condition precedent derives from the rule set forth in *The Harrisburg*, that where the legislature via statute creates a new right, restrictions correspondingly imposed act as a limit on the right itself, not just the remedy – in other words, a condition attached *to the right to sue at all*. *Id.* at 687, *citing The Harrisburg*, 119 U.S. at 214. This Court refused to ascribe any significance to the fact that substantive rights and procedural requirements

for their exercise were set forth in different statutory sections: "The way in which a plaintiff may bring a claim is connected fundamentally to the type of claims that a plaintiff may bring, such that whatever restrictions the General Assembly imposes should be deemed 'conditions precedent.'" 420 Md. at 689. So too, here – the way in which plaintiffs may recover for wrongful death is to bring one action, within three years, and name all plaintiffs in it. Those are conditions precedent to recovery, and, as with all conditions precedent, "the action itself is fatally flawed if the condition is not satisfied." *Georgia-Pacific Corp.*, 394 Md. at 84, *citing Rios*, 386 Md. at 127-28.[2]

B. A "totality of the circumstances" inquiry under Rule 1-201 is inappropriate, and even if conducted, would compel dismissal of the Mutis' complaint.

The Mutis also argue that the trial court erred in not conducting a "totality of the circumstances" inquiry under Rule 1-201, Appellees' Brief at 33-34, but their argument

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[2] While the Mutis expressly concede that § 3-904's time limitation is a condition precedent with which they must comply in filing their action, Appellees' Brief at 9-10, their supporting *amicus* asserts that the 1997 amendment to § 5-201 legislatively overruled *Wadell*, and converted the three-year deadline from a condition precedent to a procedural limitation period. Brief of MAJ at 7. But given that that time deadline originated as a condition precedent imposed by the legislature in the course of derogating the common-law ban on wrongful death actions, far more is needed to transform its status away from that of condition precedent.

Where the legislature has sought to avoid the canon calling for strict construction of statutes in derogation of the common law, it has said so expressly. Thus, § 9-102(b) of the Labor and Employment Article states unambiguously that "[t]he rule that a statute in derogation of the common law is to be strictly construed does not apply to this title." *Azarian*, 140 Md. App. at 96. No similar statement appears in the post-1997 version of § 5-201. Further, this Court continues to cite *Wadell* with approval, most recently in August 2011. *Hansen*, 420 Md. at 687-688 n.12, 695. The report of its overruling, like the news of Twain's demise, appears somewhat exaggerated.

overlooks more-applicable components of that interpretive rule that compel a different result.

As a threshold matter, no inquiry under the Rules can salvage the Mutis' claim, since their failure to meet all conditions precedent extinguishes their action. *See Georgia-Pacific Corp.*, 394 Md. at 89. The Circuit Court correctly dismissed without allowing leave to amend, since amendment would be futile. *RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638, 673-674, 994 A.2d 430 (2010) (citation omitted).

That aside, the primary rule of construction set forth in Maryland Rule 1-201 is that the Rules "shall be construed to secure simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay." Rule 1-201(a). As one commentator has noted,

> This obviously represents Maryland's attempt to walk the fine line between the canons of construction that frustrate justice through a harsh, unyielding application of procedural rules and the frustration of justice inherent in excessive leniency toward inattention to the rules.
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> * * *
>
> If an interpretation of a rule that may deprive a litigant of a claim or defense does not also advance simplicity of procedure, fairness in the administration of justice, *or* the elimination of unjustifiable expense or delay, such an interpretation may be unwarranted.

John A. Lynch Jr. and Richard W. Bourne, *Modern Maryland Civil Procedure* (2d ed.), pp. 1-5 to 1-6 (emphasis added).

Those principles weigh heavily in favor of requiring wrongful death plaintiffs to name all statutory beneficiaries in the complaint within three years, under pain of dismissal. Such an interpretation would advance *all three* underlying aims served by

Rule 1-201(a). Enforcing the plain terms of Rule 15-1001(b) and requiring joinder of all plaintiffs to a complaint filed within three years of death will prevent most if not all recurrences of the situation *sub judice*, where some statutory beneficiaries unilaterally deem another undeserving of being named in the complaint or sharing in any judgment or settlement. It advances simplicity of procedure, since it gives beneficiaries not only an incentive to name all other beneficiaries, but a bright-line deadline for doing so. And it minimizes delay, since it puts the onus on those in the best position to identify all statutory beneficiaries, to do so promptly. This is especially important now that this Court recognizes the failure to include a known statutory beneficiary to be a jurisdictional defect that can be raised at any time. *Ace American Ins. Co. v. Williams*, 418 Md. 400, 422-423, 15 A.3d 761 (2011), *aff'g Williams v. Work*, 192 Md. App. 438, 995 A.2d 744 (2010).

Most important, that interpretation allows for fairness in the administration of justice – not only for defendants such as those that MDC's members represent, but for the world's Ricky Mutis, beneficiaries under § 3-904 who, for whatever reason, are not in close contact with other beneficiaries and may not even know of the decedent's passing. It takes little effort to imagine someone in a distant war zone, on an extended Peace Corps tour, in prison, or in any one of a thousand other possible situations – including that of just leading a quiet life two towns over – who could be unjustly excluded from a wrongful death judgment if the Mutis' position prevails. Conversely, while the Hospital's interpretation would leave Ricky Muti without a remedy in this case, it will doubtless benefit countless others in his position in the future, who will be promptly named as

"use" plaintiffs, rather than serve as pawns in a game of "hide the ball." That will allow members of both *amici*, and their clients, to get on with the business of litigating and resolving the substance of wrongful death actions, rather than dealing with perpetual uncertainty over what other beneficiaries might be out there lurking. Lastly, it will further Maryland's public policy that a defendant should not be vexed by several wrongful death suits brought by or on behalf of different plaintiffs for the same injury, when all could have been joined in one action. *Ace American Ins. Co.*, 418 Md. at 401-402 (citations omitted).

Conversely, acceptance of the Mutis' position would only encourage gamesmanship from future litigants. If wrongful death plaintiffs can avoid naming all beneficiaries until their identities are smoked out at a deposition or through other discovery, some percentage of "use" plaintiffs undoubtedly will go unnamed, through and beyond judgment. This not only will flout Rule 15-1001's directive that all beneficiaries "shall be named," but more important, will severely undercut the legislature's stated intent that a wrongful death action "shall be for the benefit of" all statutory beneficiaries. C.J.P. § 3-904(a). Had the Hospital's counsel not asked the deposition question regarding other children of Elliott Muti, this action doubtless would have concluded "for the benefit of" only *some* of those listed in the statute, not all of them.

Even the subsection of Rule 1-201(a) on which the Mutis rely does not support allowing them to proceed in the manner they wish. While that rule calls for a court to determine the consequences of noncompliance with a rule (where not spelled out in the

rule itself) in light of "the totality of the circumstances and the purpose of the rule," commentators caution against using it as a springboard to unlimited remedial action:

> The proposition that interpretation of the Maryland Rules must be viewed in light of overriding objectives of the rules themselves does not open up to appellate courts the opportunity to second-guess on a grand scale the decisions of trial courts harried by burgeoning caseloads. Many of the critical decisions committed to a trial judge in the course of a suit, such as matters of *amendment*, discovery, new trial, [and] revision of judgment, are committed to the trial court in its equitable capacity. In such capacity, a trial court is invested with an implicit trust that it will not suffer justice "to be entangled in technicalities." *Crain v. Barnes*, 1 Md. Ch. 151, 155 (1847). Such decisions are within the discretion of trial judges except "where it is apparent that some serious error or abuse of discretion or autocratic action has occurred." *Northwestern Nat'l Ins. Co. v. Samuel R. Rosoff, Ltd.*, 195 Md. 421, 436, 73 A.2d 461 (1950).

Modern Maryland Civil Procedure, pg. 1-6 (emphasis added). As that treatise further notes, "The great faith rested in trial judges is one of the clearest aspects of the Maryland Rules." *Id.*

The Circuit Court made the correct decision in dismissing the Mutis' claim without leave to amend, and its ruling should not be second-guessed. This is especially so where the reversal of that ruling includes a remand for determination of whether the Mutis should be allowed to amend, since in the Circuit Court they never sought to amend, even after their omission of Ricky Muti was raised via motion. The Court of Special Appeals even noted as much, commenting that their refusal to amend to add Ricky Muti as a "use plaintiff," until such time (if ever) that he was located, put the Circuit Court "in an untenable position." Opinion, pg. 16 n.7. That should bar any appellate relief, given the "invited error" doctrine, which "stems from the common sense view that where a party

invites the trial court to commit error, he cannot later cry foul on appeal." *State v. Rich*, 415 Md. 567, 575, 3 A.3d 1210 (2010) (citation omitted).

This Court in *Hansen* considered whether a plaintiff who engaged in a similar course of action deserved a remand for leave to amend, and answered in the negative. Plaintiff in *Hansen* responded to a trial-court motion arguing that he had not pleaded satisfaction of the LTGCA's notice requirements by attaching various documents to his motion response, but did not seek leave to amend his pleading to cure the defect. This Court reaffirmed that while the rules are not to work a manifest injustice on a litigant, neither are they to be ignored. "In some circumstances . . . non-observance of these legal rules should have consequences; otherwise they are not rules at all." *Hansen*, 420 Md. at 696. The circumstances here warrant the same outcome: where the Mutis opposed dismissal but did nothing to amend their complaint in the Circuit Court, and gave no indication that they ever would seek to do so, that court correctly imposed the same consequence as in *Hansen*: dismissal without leave to amend.

CONCLUSION

For the foregoing reasons, *amicus curiae* Maryland Defense Counsel, Inc. asks this Court to reverse that portion of the Court of Special Appeals' decision vacating the

Circuit Court's dismissal of the wrongful death claim, and order that that claim be dismissed with prejudice, and without leave to amend.

Respectfully submitted,

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RULE 8-504(a)(8) STATEMENT

This brief was printed using Microsoft Word 2007 and proportionally spaced font. The body and footnotes are printed in Times New Roman font, 13 point.

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2011, in accordance with Maryland Rules 8-502(c) and 1-321, I served this brief *amicus curiae* on:

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