

# Recent Developments in the Law

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## LETTER

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In order to keep you abreast of recent developments in the law, Saunders & Schmieler's *S&S Recent Developments in the Law* reports on the significance of current decisions of major import in the jurisdictions of Maryland, the District of Columbia, Virginia, and the federal Fourth Circuit.

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## *Recent Developments in the Law*

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## MARYLAND COURT OF APPEALS

### **Exhaustion of Administrative Remedies -**

*Maryland Reclamation Associates, Inc. v. Harford County, Maryland*, 855 A.2d 351 (July 30, 2004).

**A party must  
exhaust all  
administrative  
remedies . . .**

**Holding:** Administrative remedies required a landowner to seek a zoning variance or exceptions before appealing a decision by the Zoning Administrator.

**Case Summary:** In 1989, Maryland Reclamation Associates, Inc. ("MRA") sought the proper government approvals to operate a rubble landfill on its property in Harford County. Initially, the county included MRA's property as an approved rubble landfill sight. However, in 1991, the county passed Bill 91-10, which changed the spatial zoning requirements for a rubble landfill. MRA's property could not

conform to many of the requirements added or changed by Bill 91-10.

Following the enactment of Bill 91-10, MRA filed a complaint (MRA II) against the county challenging the enactment and application of the Bill and sought declaratory and injunctive relief. In that litigation, the Court of Appeals held that because MRA had not exhausted its administrative remedies, the issue of the application of Bill 91-10 was not ripe for judicial determination.

The Court of Appeals stated that MRA could have sought a ruling by the Harford County Zoning Administrator ("HCZA") and appealed any adverse ruling to the Harford County Board of Appeals ("Board of Appeals"). Furthermore, the court held that MRA could have applied for a variance.

After *MRA II*, MRA asked the HCZA for certain interpretations regarding the Bill, as it may have applied to the MRA property. MRA also sought a zoning certificate. Following a lengthy gestation period, the HCZA ruled that the Bill applied to MRA's property and it denied MRA's zoning certificate application. The HCZA ruled that MRA could not establish its proposed rubble landfill on its property unless it obtained variances from the requirements.

**No manufacturing exemption on tax return for nonmanufacturing activity**

MRA filed an administrative appeal from the HCZA's rulings to the Board of Appeals. The Board of Appeals affirmed the HCZA decisions. Ten days later, MRA sought judicial review of the Board of Appeals decision in the Circuit Court for Harford County. The circuit court affirmed the decision of the Board of Appeals and MRA appealed to the Court of Special Appeals. The Court of Appeals issued a writ of certiorari on its own initiative to determine whether the Circuit Court properly affirmed the Board of Appeals.

The Court of Appeals held that MRA was required to exhaust all of its administrative remedies prior to the Circuit Court considering its petition for judicial review. Though MRA had sought a zoning certificate and a review of Bill 91-10 from the HCZA subsequent to *MRA II*, MRA had failed to seek variances from the Board of Appeals. The Court of Appeals vacated the Circuit Court's judgment and remanded the case, directing the Circuit Court to stay final action on MRA's petition for judicial review until after MRA applied for the zoning variances. Then, if MRA was denied any variances, it could properly seek judicial review of the matter.

**Taxation, Manufacturer's Exemption from Personal Property Tax -**

*State Department of Assessments and Taxation v. Consolidation Coal Sales Co.*, 855 A.2d 1197 (August 3, 2004).

**Holding:** A coal blending facility was primarily engaged in storing, shipping, and receiving coal and was not engaged in manufacturing. Therefore, the facility was not entitled to the benefit of a tax exemption for manufacturing activities.

**Case Summary:** Consolidated Coal Sales Company ("CCSC") operated a terminal that received, stored, and shipped coal to domestic and international markets on behalf of coal producers, coal brokers, and utilities. The facility also used a "blending" process to develop specific coal composites that met its customer's requirements. CCSC argued that this blending process allowed it to claim a manufacturing exemption on its tax return under Md. Code, Tax-Prop. § 14-505.

The Maryland State Department of Assessments and Taxation (SDAT) rejected CCSC's application for a manufacturing exemption and denied CCSC the manufacturing exemption. SDAT's determination was upheld throughout the administrative appeals process. The Maryland Tax Court upheld SDAT's ruling. However, the circuit court concluded that CCSC did in fact qualify for the exemption because the blending activities were "a substantial step in the substantial transformation of coal."

The Court of Appeals reversed the circuit court and on remand it ordered the circuit court to affirm the tax court's holding. The Court of Appeals found that the facility did not qualify for the manufacturing exemption because it was used primarily in "administration, management, sales, storage, shipping, receiving, or any other nonmanufacturing activity" as defined under § 7-225(c) of the Maryland Tax-Property Article.

Furthermore, the court found that CCSC's blending activities did not constitute manufacturing under § 1-101(r)(2)(ii) of the Tax-Property Article because the facility did not extract *and* process minerals. Lastly, it rejected the circuit court's finding that the facility "substantially transformed" the coal in the blending process because a "new and different article" was not produced. Therefore, the CCSC was not entitled to a manufacturing exemption under the tax code.

**Partnerships, Limited Partner's Statutory Right to Withdraw -**  
*Della Ratta v. Larkin*, 2004 WL 1857122 (August 20, 2004).

**Holding:** Limited partners have a statutory right to withdraw from a partnership, under RULPA, where the partnership agreement does not specify the circumstances under which the limited partners may voluntarily end their relationship with the partnership.

**Establishing a  
mechanics' lien on  
a condominium  
building owned by  
multiple parties requires  
that notice be given  
to all owners of separate  
condominium units**

**Case Summary:** Joseph M. Della Ratta ("Della Ratta") was the sole general partner of East Park Limited Partnership ("East Park"). In 1992, East Park obtained \$9 million in financing secured by a shopping center it owned in Glen Bernie, Maryland.

Due to certain financial issues, Della Ratta informed East Park's limited partners by letter dated March 1, 2002, that the remaining loan balance of \$7,528,499 could not be repaid by East Park's cash reserves. In the letter, Della Ratta stated that a capital call would be due on September 30, 2002, whereby each limited partner would be required to contribute his or her pro-rata share of the loan balance.

More than six months before the capital call was to be held, certain limited partners informed Della Ratta of their intention to withdraw from the partnership before the capital call became due. Della Ratta responded that the limited partners could not withdraw and accelerated the capital call to a date prior to the announced effective date of the withdrawal of the pertinent limited partners.

The limited partners who wished to withdraw filed a complaint in circuit court seeking a declaratory judgment that they had a statutory right to withdraw from East Park and an injunction barring enforcement of the capital call. The circuit court entered judgment in favor of the limited partners who wanted to withdraw. The remaining partners filed an appeal. While the appeal was pending, the

withdrawing limited partners filed a petition for writ of certiorari to the Court of Appeals, which subsequently issued the writ.

The Court of Appeals cited Maryland's Revised Uniform Limited Partnership Act ("RULPA") in its holding. RULPA § 10-603(b) states that when the partnership agreement does not specify the circumstances under which the limited partners may voluntarily end their relationship with the partners, "a limited partner may withdraw on not less than 6 months' prior written notice to each general partner," so long as additional requirements are met.

The Court of Appeals found that the additional requirements were met and therefore because the withdrawing limited partners gave more than 6 months notice to Della Ratta of their intended withdrawal, that they had the statutory right to withdraw from East Park.

### **Real Property, Mechanic's Lien on a Condominium Building -**

*Southern Management Corp. v. Kevin Willes Construction Co., Inc.*, 2004 WL 1857128 (August 20, 2004).

**Holding:** A mechanics' lien was not established where a subcontractor failed to give notice to all owners of separate condominium units of its intent to file such a lien.

**Case Summary:** Lexington Towers, in Baltimore City, consisted of eight condominium units with general and limited common areas. Baltimore Condo 2-8, LLC ("Baltimore Condo") owned seven of the units. The other unit was owned by RA Baltimore Trust ("RA Trust"). In August of 1999, Southern Management Company ("SMC"), the property manager for Baltimore Condo, and its construction manager, James M. Jost and Company, Inc. ("Jost") entered into an agreement with Willes Construction ("Willes"). Willes was to provide demolition and abatement work for the renovation of Lexington Towers. Willes' services were terminated in October of 1999, before the project was finished. Willes then drafted a notice of its intent to claim a mechanic's lien on the work it performed and served the notice upon SMC, Jost, and Baltimore Condo and not on RA Trust.

The circuit court found that Willes was entitled to the establishment of a mechanic's lien in the amount of \$200,273.00 plus interest and issued a Final Order to that effect. The Court of Special Appeals modified the Final Order to an interlocutory order, finding that there existed a genuine dispute of material fact in regard to the percentage of work completed by Willes under the contract.

The Court of Appeals held that under the notice requirements of Md. Code, Real Prop. § 9-104, a subcontractor must give notice to the owner(s) of property before seeking the establishment of a mechanic's lien against the property. Therefore, the court held that Willes was required under § 9-104 of the Real Property Article to give notice of its intention to file a lien to *all individual unit owners* before a mechanic's lien could be established against the entire Lexington Towers building.

Because Willes did not notify RA Trust and only named Baltimore Condo as an owner, the notice requirement of § 9-104 was not sufficiently met. Thus, the circuit court erred in entering an order establishing a mechanic's lien against the entire Lexington Towers building.

## **MARYLAND COURT OF SPECIAL APPEALS**

**Administrative, Calculation of Attorneys' Fees in Administrative Proceeding - *Flaa v. Manor Country Club***, 857 A.2d 604, 158 Md. App. 483 (September 8, 2004).

**Holding:** Case was remanded for recalculation of attorneys' fees because there was no demonstration

that the administrative panel had employed the lodestar method for calculating the fees.

**Lodestar  
approach to  
calculating  
attorneys' fees  
must be used**

**Case Summary:** The dispute regarding the attorneys' fees arose out of Betty Flaa's marital status discrimination claim against the Montgomery County Office of Human Rights ("MCOHR"). The hearing examiner found in Flaa's favor and recommended that the administrative panel award her \$1,000.00 in damages (the statutory limit), \$4,282.31 in expenses, and \$120,481.00 in attorneys' fees. The panel disagreed with some of the hearing examiner's findings, but held that the Manor Country Club had treated Flaa differently based on her sex. The panel awarded Flaa \$750.00 in damages and only \$3,000.00 in attorneys' fees.

Both parties filed petitions for judicial review in the circuit court. The circuit court found that the panel failed to apply the factors set forth in Montgomery County Code, § 27-7(k)(1) (1987) in determining the award for attorneys' fees and that it failed to refute the hearing examiner's findings that supported his fee recommendation of \$120,481.00. Thereafter, the panel addressed each of the factors in § 27-7(k)(1) and found that Flaa was entitled to attorneys' fees in the amount of \$22,440.00, reflecting 132 hours of work at a rate of \$170.00 per hour. The circuit court upheld this finding.

The Special Court of Appeals held that the panel did not properly apply the "lodestar" approach as explained by the Supreme Court case, *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Under the lodestar approach, "the most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."

After calculating the initial figure, known as the lodestar, reductions should be made for time not reasonably expended. Furthermore, the inquiry should continue by considering other factors that determine any upward or downward adjustments to the lodestar based on the circumstances of a particular case.

The Court of Special Appeals found that the panel failed to provide a rationale for its decision to reduce the attorney fee award recommended by the hearing examiner by 89%. Therefore, the circuit court's holding was vacated and remanded with directions to remand the case to the panel so that it could provide further proceedings consistent with the decision.

**Duty Owed by University in Assigning Roommates -**

*University of Maryland Eastern Shore v. Rhaney*, 2004 WL 2151270 (September 27, 2004)

**Holding:** The University did not breach its duty of care towards a student when it assigned him to share a room with another student, who it knew to have a history of violence and later attacked his roommate because the evidence was insufficient to establish the foreseeability of the assault.

**Evidence of student's  
involvement in one fight  
not enough to establish  
foreseeability of attack  
on roommate**

**Case Summary:** In the fall of 1998, Anthony Rhaney, Jr. ("Rhaney") was an eighteen-year-old

freshman attending the University of Maryland Eastern Shore ("UMES"). That semester, UMES had assigned Ennis J. Clark ("Clark"), a twenty-year-old second semester freshman, to the same dormitory room as Rhaney. On October 29, 1998, while Clark was in the process of moving into another dormitory room, Rhaney began to rearrange the furniture in his room. Rhaney and one of his friends moved Clark's fish tank and noticed that it was leaking. As Rhaney was wiping up the leaking water, Clark returned to the room and "began yelling irately with vigorous hand gestures," asking Rhaney what he had done to Clark's fish tank.

Rhaney testified that after he denied breaking the fish tank, Clark began to walk away from the scene and suddenly turned back and punched Rhaney in the jaw. Rhaney subsequently underwent surgery and had his mouth wired shut for a period of time.

On October 27, 2000, Rhaney filed a complaint against Clark and UMES. Clark alleged that UMES breached its duty of reasonable care to him by assigning Clark as Rhaney's roommate when UMES knew Clark had violent and dangerous propensities.

Rhaney introduced evidence at trial of a violent incident that occurred between March 13 and 14, 1998, where Clark was involved in fights with other students. Clark was suspended after he pled guilty to "fighting or physically assaulting another" and "disorderly conduct" at a Campus Judicial Council hearing.

UMES allowed Clark to return for the fall 1998 semester if he completed a professional counseling course on conflict resolution. Clark successfully completed the course and was re-admitted to UMES, but was placed on probation for one year when he was assigned as Rhaney's roommate.

Rhaney argued that it was unreasonable for UMES to have assigned Clark and Rhaney to the same dormitory room. The jury found in Rhaney's favor and awarded him almost \$75,000 in compensatory damages. UMES appealed the decision.

The Court of Special Appeals overruled the jury verdict, finding that UMES did not breach its duty of care to Rhaney by assigning him and Clark to the same dormitory room. Specifically, the court held that "the mere fact that Clark had previously been suspended for fighting at locations other than a dormitory did not establish the foreseeability that he would assault his roommate."

The court specifically pointed to the following facts: (1) the March 13, 1998 fight occurred at an off-campus party; (2) the March 14, 1998 fight occurred outside a building; (3) neither fight occurred in a dormitory, involved the use of weapons, or resulted in criminal charges; and (4) no evidence was presented that Clark had ever assaulted or threatened to assault any of his roommates. Rhaney's evidence was "insufficient to establish that Mr. Clark had made a habit of assaulting others or that he had a 'propensity' to do so." Therefore, UMES did not breach its duty of care to Rhaney other students by failing to require that Clark reside by himself or off campus.

#### **Defenses to a Payment Bond Claim Waived by Failure to Respond -**

*National Union Fire Insurance v. Wadsworth Golf Construction*, 2004 WL 20006848 (October 12, 2004).

**Holding:** Sureties that failed to answer a subcontractor's claim within 45 days, as required by the payment bond, waived their right to dispute the claim or otherwise defend against it.

**Case Summary:** On November 22, 1999, Clark Construction Group, Inc. ("Clark") contracted with the Maryland Economic Development Corporation ("MEDCO") to serve as the general contractor for the construction of a resort in Cambridge. Clark executed a surety bond in favor of MEDCO for almost \$71

million. Clark then subcontracted with Wadsworth Golf Construction Company ("Wadsworth") to build an 18-hole golf course and other additional work.

**Surety must answer claim within time required by bond or it waives the right to dispute the claim or otherwise defend it**

The surety bond provided that any claimant needed to send notice of a claim to the surety. Once adequate notice was given, the surety was to send an answer to the claimant within 45 days after receipt of the claim, stating the amounts that are undisputed and the basis for challenging any amounts that are disputed. The surety was then to arrange for payment of any undisputed amounts. Clark's subcontract with Wadsworth stated that Wadsworth was only to be paid in proportion to the amount the Owner paid Clark. Under the subcontract, only after Clark received full payment from the Owner could Wadsworth recover full payment from Clark.

After Wadsworth completed its construction work it attempted to unsuccessfully collect the payments Clark still owed it - almost \$721,000. The reason for Clark's nonpayment was due to MEDCO's discontinuance of payments to Clark. Clark in turn, according to the subcontract, discontinued payments to Wadsworth.

On March 23, 2002, Wadsworth notified the sureties by certified letter of its claim for payment under the surety bond. Ten days later, Federal Insurance Company, one of the sureties, notified Wadsworth by letter that it was forwarding the claim on to American International Group ("AIG"), which was the lead surety.

On April 5, 2002, AIG acknowledged receipt of Wadsworth's claim and requested that Wadsworth submit a completed Proof of Claim form. Wadsworth submitted the Proof of Claim to AIG on May 3, 2002 and sent out a follow up letter to AIG on July 23, 2002. After hearing nothing from AIG after the initial or follow up claim letters, Wadsworth filed a complaint against the sureties for the balance of its unpaid work as well as pre and post-judgment interest.

The circuit court granted summary judgment on behalf of Wadsworth, finding that under the terms of the bond itself, that the sureties were estopped from contesting the claim because they did not respond within the 45 day requirement set forth in the payment bond contract. The court also held that even if the sureties were not estopped, the subcontract, which called for "pay-as-paid" or "pay-when-paid" terms were against Maryland public policy.

The sureties argued on appeal that Wadsworth's claim was premature because it was for non-payment of monies that Clark did not yet owe Wadsworth (due to the terms of the subcontract). However, the court stated that this argument could have been made in an answer to Wadsworth's Proof of Claim. And under the terms of the surety bond, upon the filing of what the surety believed was a premature claim, it was incumbent upon the surety to dispute the claim on the ground that payment was not yet due.

Therefore, the Court of Special Appeals held that because the surety failed to dispute the claim within 45 days, the surety waived its right thereafter to dispute the claim.

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