UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1476

September Term, 2014

DAVID MARC, *et ux*.

v.

RICHMOND AMERICAN HOMES OF MARYLAND, INC., *et al.*

Arthur,
Leahy,
Reed,

JJ.

Opinion by Arthur, J.

Filed: November 12, 2015

David and Deborah Marc filed suit in the Circuit Court for Howard County, complaining that the developers and owners of several adjacent properties had caused flooding and erosion by regrading those properties for development, creating impervious surfaces, and installing stormwater management facilities. The circuit court dismissed the action on the ground that the Marcs had failed to exhaust administrative remedies pertaining to the approval of the stormwater management facilities on the adjacent properties. The Marcs appealed, and we reverse.

QUESTIONS PRESENTED

The Marcs raise two primary questions, which we rephrase as follows:

1. Did the circuit court err in granting defendants' motion to dismiss plaintiffs' common-law action on the ground that plaintiffs failed to exhaust their administrative remedies?

2. Did the circuit court abuse its discretion when it denied plaintiffs' motion to alter or amend?

Because we hold that the Marcs were not obligated to exhaust administrative remedies, we answer the first question in the affirmative. In view of our answer to the first question, it is unnecessary to address the second.

FACTUAL AND PROCEDURAL BACKGROUND

According to the Marcs' fourth amended complaint, they own and reside on the property that is located at 6145 Old Washington Road, Elkridge, Maryland. An adjacent tract is known as Lebanon Lane.

Defendants Richmond American Homes of Maryland, Inc., Emily's Delight, LLC, John F. Liparini, and Nicholas F. Liparani allegedly are or have been the developers or

owners of the recently subdivided property along Lebanon Lane. Other defendants are the purchasers of some of the subdivided lots and their homeowners' association.

The salient allegations of the Marcs' pleading are these:

> 10. Commencing on January 31, 2011, Defendants, their agents, servants and employees, their predecessors in interest and/or their privities re-graded the adjoining property for a housing development, created impervious surfaces and installed storm-water management facilities, which altered the natural course of the surface water on the adjoining property, causing the water to run onto Plaintiffs' property in inordinate amounts, other than in a manner that would be natural and reasonable. Defendants have continued to develop the property, and the storm-water run-off onto Plaintiffs' property has consequently increased since approximately February 2013.
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> 11. As a proximate consequence of the foregoing, substantial and inordinate amounts of natural surface water were diverted from and around Defendants' properties onto Plaintiffs' property on a frequent and continuing basis, causing flooding to and sediment deposition on Plaintiffs' property, as well as past and future damage and other injury, including, but not limited to, erosion, loss of trees and a general degrading of the natural habitat. Defendants thereby have interfered with the ordinary comfort, pleasure and use of Plaintiffs' occupancy of their property and have injured Plaintiffs' property. As Defendants' property continues to be developed, the storm-water run-off from Defendants' property will increase the water run-off onto Plaintiffs' property, and thereby the interference to Plaintiffs' use and occupancy of their property, and the damage to Plaintiffs' property.

Although these allegations appear in a single-count complaint, the Marcs have characterized them on appeal as common-law claims for trespass or nuisance.

The Marcs requested "an injunction prohibiting the continuing diversion of excessive and unreasonable run-off water onto Plaintiffs' property and directing Defendants to abate and cure those conditions," damages, and such other and further relief as justice may require.

After the Marcs had amended their complaint on several occasions to add their new neighbors as defendants, the current developer, Richmond American, moved to dismiss the pleading on the ground that the Marcs had failed to exhaust administrative remedies that allegedly would have allowed them to challenge Howard County's approval of the stormwater management plan for the adjacent property. Richmond American was joined by the homeowners' association and the purchasers of the new residences.

In support of its motion, Richmond American asserted that on November 22, 2010, Mr. Marc had written to the Director of the Howard County Department of Planning and Zoning to express his "objection to the orientation outfall of [the] storm water management pond for" the Lebanon Lane development. In a letter dated February 3, 2011, Charles Dammers, the Chief of the Development Engineering Division of the Department of Planning and Zoning, provided Mr. Marc with information about stormwater management and run-off. Mr. Marc reiterated his complaints in a letter to Mr. Dammers on February 16, 2011. Mr. Dammers responded in a letter dated March 7, 2011, in which he, in Richmond American's words, "concluded" that the stormwater management facility was "'properly designed.'"[1]

[1] The Marcs complained that Richmond American had placed these letters into the record without complying with Rule 2-311(d), which states that "[a] motion . . . that is based on facts not contained in the record shall be supported by affidavit[.]" Ironically, in a motion to alter or amend the judgment, the Marcs arguably cured that defect by attaching the same documents and authenticating them in an affidavit from Mr. Marc. In view of our decision on the merits, we need not decide whether the court erred in considering the documents without an affidavit from Richmond American, (continued…)

Richmond American characterized Mr. Dammers's statement as an administrative "decision" that the Marcs were required to appeal to the Howard County Board of Appeals within 30 days. Because the Marcs failed to appeal the Dammers "decision," Richmond American argued that they had failed to exhaust their administrative remedies.

After a hearing, the circuit court agreed that the Marcs had administrative remedies, which they had failed to exhaust. Consequently, the court dismissed the fourth amended complaint. The Marcs have now taken this appeal.[2]

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or whether any such error was harmless. *Cf. Worsham v. Ehrlich*, 181 Md. App. 711, 731-32 (2008) (court committed harmless error in not conducting required hearing under 2-311(f) before granting motion to dismiss); *Vinogradova v. Suntrust Bank, Inc.*, 162 Md. App. 495, 510-11 (2005) (harmless error for court to fail to hold required hearing under Rule 2-311(f)); *Green v. Taylor*, 142 Md. App. 44, 60 (2001) (trial court's grant of motion to amend judgment without holding mandatory hearing under Rule 2-311(e) was harmless error).

[2] In dismissing the complaint, the court did not enter judgment as to two of the defendants, John F. Liparini and Nicholas F. Liparani, as they were in bankruptcy. Because the court's order thus "adjudicate[d] the rights and liabilities of fewer than all the parties to the action," it was "not a final judgment[.]" *See* Md. Rule 2-602(a). The Marcs attempted to create an appealable final judgment by dismissing the claims against the Liparinis without prejudice and obtaining a second order in which the court formally decreed the entry of a final judgment as to all remaining parties. That tactic, however, is in tension with *Miller and Smith at Quercus LLC v. Casey PMN LLC*, 412 Md. 230, 250 (2010), which holds that parties cannot create finality and confer jurisdiction on an appellate court by dismissing parties or claims without prejudice. Nonetheless, because the circuit court dismissed the Marcs' claims against one or more but fewer than all of the parties, the court could have certified its ruling as a final judgment under Rule 2-602(b) had it expressly determined, in a written order, that there was no just reason for delay. Because the circuit court could have certified its ruling as a final judgment under Rule 2-602(b), we may, and hereby do, enter a final judgment on our own initiative under Rule 8-602(e). *Zilichikhis v. Montgomery Cnty.*, 223 Md. App. 158, 174, *cert. denied*, 444 Md. 641 (2015); *McCormick v. Medtronic, Inc.*, 219 Md. App. 485, 506 (2014).

DISCUSSION

We conclude that the circuit court erred in dismissing the Marcs' complaint because the Marcs were not obligated to exhaust administrative remedies before pursuing the common-law causes of action that they have outlined in their complaint.

"Whenever the Legislature provides an administrative and judicial remedy for a particular matter or matters, the relationship between that administrative remedy and a possible alternative judicial remedy will ordinarily fall into one of three categories." *Zappone v. Liberty Life Ins. Co*., 349 Md. 45, 60 (1998). "First, the administrative remedy may be exclusive," meaning that "there simply is no alternative cause of action for matters covered by the statutory administrative remedy." *Id.* "Second, the administrative remedy may be primary but not exclusive," meaning that the "claimant must invoke and exhaust the administrative remedy, and seek judicial review of an adverse administrative decision, before a court can properly adjudicate the merits of the alternative judicial remedy." *Id.* "Third, the administrative remedy and the alternative judicial remedy may be fully concurrent, with neither remedy being primary[.]" *Id.* at 61. In that event, "the plaintiff at his or her option may pursue the judicial remedy without the necessity of invoking and exhausting the administrative remedy." *Id.*

A "remedy will be treated as exclusive only when the Legislature has indicated that the administrative remedy is exclusive or when there exists no other recognized alternative statutory, common law, or equitable cause of action." *Id.* at 62. By contrast, "where neither the statutory language nor the legislative history disclose an intent that the administrative remedy is to be exclusive, and where there is an alternative judicial

remedy under another statute or under common law or equitable principles, there is no presumption that the administrative remedy was intended to be exclusive." *Id.* at 63.

Richmond American does not (and could not plausibly) contend that that is so in this case, as the Marcs have sketched out common-law claims concerning riparian rights and the unreasonable run-off of water and sediment from the neighbors' properties. At most, Richmond American contends that the Marcs' alleged remedy is primary and not exclusive.

Where a conventional cause of action "is wholly or partially dependent upon the statutory scheme which also contains the administrative remedy, or upon the expertise of the administrative agency, the Court [of Appeals] has usually held that the administrative remedy was intended to be primary and must first be invoked and exhausted before resort to the courts." *Zappone*, 349 Md. at 65. For example, when the employee of a state agency claimed to have been denied his right to disability benefits under a statutory pension plan that vested him with contractual rights, the Court of Appeals held that he was required to exhaust the administrative remedies under the plan before he could assert a claim for breach of contract. *Quesenberry v. Washington Suburban Sanitary Comm'n*, 311 Md. 417, 423-34 (1988).

"On the other hand, where the alternative judicial remedy is entirely independent of the statutory scheme containing the administrative remedy, and the expertise of the administrative agency is not particularly relevant to the judicial cause of action, the Court has held that the administrative remedy was not intended to be primary and that the plaintiff could maintain the independent judicial cause of action without first invoking

and exhausting the administrative procedures." *Zappone*, 349 Md. at 65-66. For example, in *Zappone*, a consumer was not required to exhaust administrative remedies under the Insurance Article before he could pursue common-law claims against the insurance agent who had allegedly misrepresented the terms of his insurance policy. *Id.* at 66-68. Similarly, in *Leatherbury v. Gaylord Fuel Corp*., 276 Md. 367, 377-79 (1975) the Court allowed landowners to pursue a nuisance action to enjoin the operation of a quarry on adjacent land even though the landowners had failed to exhaust administrative remedies before the relevant permitting authorities. *See Zappone*, 349 Md. at 65-66 & n.8 (characterizing the nuisance action in *Leatherbury* as "entirely independent of the statutory scheme containing the administrative remedy").

Although whether a person must exhaust an administrative remedy "is ordinarily a question of legislative intent" (*id.* at 61), Richmond American cites no provision of Howard County law that permits or requires the Marcs to participate in the County's decision to approve a neighbor's stormwater management plan. In fact, the Marcs complaint does not appear to challenge the approval of the stormwater plan in any way. Their complaint does not allege that the plan fails to comply with County law, or that the County ought not to have approved the plan, or that the County should have imposed more exacting requirements than it did. Instead, the Marcs' complaint mentions the "storm-water management facilities" only in passing, in the course of alleging common-law and equitable claims concerning the excess flow of surface water over their property. The Marcs even insist that they can prevail on a claim for trespass or nuisance even if the stormwater plan remains in place with no alteration whatsoever. *Cf. Leatherbury*, 276

Md. at 377-79 (permitting an independent action to enjoin a nuisance despite the failure to exhaust an express statutory remedy).

In these circumstances, the approved stormwater management plan may be a defense to the Marcs' claims (*see Wietzke v. Chesapeake Conference Ass'n*, 421 Md. 355 (2011)), but we see no reason to conclude that the Marcs were obligated to pursue some ill-defined administrative challenge to the approval of the plan before they could assert the common-law and equitable claims in their fourth amended complaint.[3]

JUDGMENT OF THE CIRCUIT COURT OF HOWARD COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE APPELLEES.

[3] Our conclusion is fortified by the apparent absence of any administrative remedy for the Marcs to pursue. Richmond American contends that the Marcs were obligated to pursue an administrative appeal when Mr. Dammers, the Chief of the Development Engineering Division of the Department of Planning and Zoning, wrote, among other things, that "[t]his project was designed and found to be in compliance with" the provisions of "both [the Maryland Department of the Environment] and Howard County Design manuals" concerning the "high frequency, low precipitation rates associated with the one-year storm event." The Marcs would have had the right or obligation to appeal from Mr. Dammers's letter only if it represented "an order of the Department of Planning and Zoning[.]" Howard County Code, § 16.105(a). The letter, however, is by no means "an order," as it does not mandate, command, or authoritatively direct anyone to do anything. *See Black's Law Dictionary* 988 (5th ed. 1979) (defining an "order" as "[a] mandate; precept; command or direction authoritatively given; rule or regulation"). Rather, the letter represents a County employee's response to a citizen's concerns.