



THE
DEFENSE LINE

November 2020

THE DEFENSE LINE

A Publication From Maryland Defense Counsel, Inc.

Landmark Maryland Ruling Adopts *Daubert* as Controlling Law for Admitting Expert Testimony

By Tom Cullen, Gus Themelis,
and Derek Stikeleather



Also Featured

Maryland Court of Special Appeals Affirms Trial Court's Decision that the Improper and Untimely Designation of Experts Results in Summary Judgment

MDC's 2020 Virtual Past President's Reception
Important Reminders For Your Remote Deposition

Maryland Court of Special Appeals Affirms Trial Court's Decision that the Improper and Untimely Designation of Experts Results in Summary Judgment

Amy E. Askew, John A. Bourgeois, and Bradley M. Strickland



On September 10, 2020, the Maryland Court of Special Appeals affirmed, in a published decision, a grant of summary judgment in favor of Kramon & Graham's client, CSX Transportation, Inc. *See Asmusen v. CSX Transp., Inc.*, No. 814, SEPT. TERM, 2019, 2020 WL 5417549 (Md. Ct. Spec. App. Sept. 10, 2020). The Court held that the Circuit Court for Baltimore City did not abuse its discretion in denying Plaintiff Paul Asmusen's request to modify the scheduling order to permit the untimely designation and depositions of his desired experts, or in granting CSX's motion to exclude Mr. Asmusen's expert witnesses. The exclusion of the experts resulted in Mr. Asmusen being unable to meet his burden of proof, and therefore, the grant of summary judgment was proper.

In a claim brought under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., Mr. Asmusen alleged he developed kidney cancer in 2015 from exposures to silica while working for CSX from 1977 to 1988. To support his claims, Mr. Asmusen initially identified four expert witnesses, including two toxicologists, Drs. Joseph Regna and James Dahlgren to testify on causation, and

a treating physician, Dr. Christopher Runz, to testify regarding damages without disclosing the substance of their opinions. After numerous good faith attempts to obtain the information required under Maryland Rule 2-402(g) and the Scheduling Order, CSX filed a motion to compel, which was denied without explanation. Thereafter, in response to an inquiry by CSX, counsel for Mr. Asmusen sent an email proposing dates for the depositions of Drs. Regna and Dr. Runz, and withdrawing Dr. Dahlgren as an expert. The Court of Special Appeals stated this email "prove[d] to be problematic" for Mr. Asmusen for two reasons.

The first problem, as conceded by Mr. Asmusen after Dr. Regna's deposition, was that Dr. Regna was not qualified to opine as to the causation of Mr. Asmusen's kidney cancer. Thus, a week after the deposition, and nearly five months after his deadline to designate experts, Mr. Asmusen redesignated the previously withdrawn Dr. Dahlgren who would replace Dr. Regna as his causation expert. Mr. Asmusen then only provided Dr. Dahlgren's report nearly two months after the discovery deadline.

The second problem with the email sent by Mr. Asmusen's counsel was that he had not actually contacted Dr. Runz when he proposed deposition dates. In fact, Dr. Runz's first contact regarding the deposition was through an untimely subpoena served by Mr. Asmusen less than a week before the scheduled deposition. Dr. Runz was not available for the deposition, no alternative dates were

provided, and he was not deposed.

Given these problems with his experts, Mr. Asmusen moved to modify the scheduling order, claiming good cause existed to extend the discovery deadline because he "substantially complied" with the order and the failure to allow the designation of Dr. Dahlgren and the depositions of Drs. Dahlgren and Runz would "operate as a case-ending sanction." CSX opposed this motion, filed motions to strike Drs. Dahlgren and Runz, and moved for summary judgment based on Mr. Asmusen's failure to provide a standard of care expert or causation expert. In opposition to CSX's motion for summary judgment, Mr. Asmusen provided a 20-page report from Dr. Dahlgren, in the form of an affidavit. The trial court agreed with CSX, denied Mr. Asmusen's motion to enlarge pretrial deadlines, and granted CSX's motion for summary judgment based on Mr. Asmusen's failure to properly designate experts on either standard of care or causation.

The Court of Special Appeals held the trial court did not abuse its discretion by denying Mr. Asmusen's motion to modify or in granting the motion to strike his experts, noting that "there is no substantive difference" between those types of motions. It reached this decision by applying the factors outlined in *Taliaferro v. State*, 295 Md. 376, 390 (1983) for determining when Md. Rule 2-504(c)'s "dual requirements for modification — substantial compliance and good

Continued on page 10

SEE PHOTOS FROM PAST EVENTS AT MDDEFENSECOUNSEL.ORG/GALLERY



(SUMMARY JUDGEMENT) *Continued from page 9*

cause” are met as to permit modification of a scheduling order. Those factors — (1) whether the disclosure violation was technical or substantial; (2) the timing of the ultimate disclosure; (3) the reason for the violation; (4) the degree of prejudice to the parties; (5) whether any prejudice might be cured by postponement; and (5) if such a cure is possible, the overall desirability of a continuance — often “overlap,” and assist the trial court to elucidate the “facts of the particular case” on which it may apply its “large measure of discretion.” Slip op. at 21.

The Court of Special Appeals noted that Mr. Asmussen first provided the substance of Dr. Dahlgren’s findings and opinions six months after the expert disclosure deadline and six weeks after the close of discovery, and observed that even the initial disclosures of Dr. Dahlgren (and Dr. Regna) were insufficient, as they conveyed only “boilerplate” language identifying “the *general subject matter* of the witnesses’ testimony,” without providing the substance of their opinion(s) required by Md. Rule 2-402(g). Slip op. at 25. The Court observed that “in reality” at the time the initial disclosures were provided, “Drs. Regna and Dahlgren had not made any findings or formulated any opinions at all.” *Id.* Because CSX “had no information

regarding the substance of Dr. Dahlgren’s expert opinions and the bases for them until six weeks after the close of discovery,” the violation was substantial, not technical. Slip op. at 26. Moreover, the reason for the delay was a failure to vet Dr. Regna’s qualifications and opinions properly. According to the Court, a “cursory review” and a “few **simple** questions” would have revealed Dr. Regna was not qualified to provide the desired causation opinion. Slip op. at 29. The Court also stated that to allow the late designation of Dr. Dahlgren would “severely prejudice” CSX because, among other reasons, it already invested substantial resources into challenging the opinions of Dr. Regna. Slip op. at 27. Accordingly, the Court held that the refusal to modify the scheduling order was reasonable.

Despite recognizing the “harsh” nature of the rulings, the Court ultimately held that summary judgment was warranted because Mr. Asmussen had no causation expert.¹ Slip op. at 28. Its ruling is a good reminder that expert disclosures must provide “the substance” of the experts’ opinions and findings, not just “the general subject matter” of their opinions. Further, it is of paramount importance that parties carefully evaluate their experts’ opinions and their factual basis

before the experts’ depositions, as the trial court may not be inclined to provide additional time to designate or depose a new expert.

Amy Askeew, Principal at Kramon & Grabam, P.A., is a Maryland trial lawyer with particular experience representing the rail and health care industries. She also represents lawyers in professional responsibility matters. Amy has tried many jury and bench trials to verdict and successfully argued in the appellate courts of Maryland. She has significant experience defending companies in class-action litigation, particularly consumer class actions.

John Bourgeois, Principal at Kramon & Grabam, P.A., is a versatile trial lawyer with extensive jury-trial experience in a variety of civil and criminal cases. In addition to handling high-stakes commercial litigation, John represents clients in business disputes, administrative and licensing proceedings, intellectual property disputes, civil rights litigation, and admiralty and maritime matters. John has particular experience representing individual defendants charged with serious federal and state crimes. He also represents lawyers in malpractice and professional-responsibility proceedings.

Practicing in the firm’s litigation group, Bradley Strickland is a trial attorney at Kramon & Grabam, P.A., who concentrates his practice in matters involving commercial and professional liability, catastrophic personal injury, toxic torts, and products liability. Brad’s engineering background gives him a unique perspective in complex litigation cases, particularly in toxic-tort, mass-tort, and products liability matters.

¹ The Court declined to decide whether summary judgment based on Mr. Asmussen’s failure to designate a standard of care expert was correct, or whether the misrepresentations regarding Dr. Runz’s availability violated the Maryland Discovery Rules or Guidelines.

Maryland Defense Counsel (MDC) Presents Practice Pointers from the Pandemic

Monday, December 7, 2020

9:00 am – 11:45 am

By Zoom

Register at:

www.mddefensecounsel.org

FREE to MDC Members;

\$30 for Non-Members



Join us along with Deans of the Bench and the Bar as we discuss helpful hints for virtual depositions, hearings, and mediations. During this age of social distancing, this seminar will take the civil defense litigator through the COVID-19 pandemic and beyond.