Circuit Court for Montgomery County
Case No. 440338-V

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 81

September Term, 2022

IN THE MATTER OF MONTGOMERY COUNTY, MARYLAND

Kehoe,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: February 16, 2023

The Circuit Court for Montgomery County granted a cross-motion for summary judgment without affording the opposing party an opportunity to respond or to request a hearing and without conducting the hearing that the party had requested in connection with its own motion for summary judgment. We shall vacate the judgment and remand for further proceedings.

BACKGROUND

The substance of this dispute is of little importance to this appeal. What matters, for our purposes, is the procedural background.

The case began in the Workers' Compensation Commission. Appellee Daniel Wetsel, a Montgomery County firefighter from 1963 until 1988, alleged that he had suffered hearing loss and developed tinnitus (ringing in the ears) as a result of his occupational exposure to loud noises. Appellant Montgomery County, the employer, contested the claim.

The Commission conducted an evidentiary hearing. At the hearing, Wetsel testified, and the parties put on conflicting expert testimony.

On the basis of the evidence adduced at the hearing, the Commission found that Wetsel had sustained an occupational disease arising out of and in the course of his employment. The Commission also found that his disability was "the result of the occupational disease."

Pursuant to § 9-745(d) of the Labor and Employment Article ("LE") of the Maryland Code (1991, 2016 Repl. Vol.), the County took a de novo appeal to the Circuit Court for Montgomery County. In that appeal, the Commission's decision was presumed

to be prima facie correct (LE § 9-745(b)(1)), and the County had the burden of proof. LE § 9-745(b)(2). To meet its burden, the County could, however, submit new evidence, rely on all or part of the record before the Commission, argue the probative value of evidence, and challenge the credibility of witnesses. *See, e.g., Bd. of Educ. for Montgomery County v. Spradlin*, 161 Md. App. 155, 183-84 (2005); *see also* Clifford B. Sobin, 2 *Maryland Workers' Compensation* § 22:9 (Oct. 2022 update).

On January 21, 2022, the County moved for summary judgment on three, potentially dispositive legal issues: whether tinnitus can be the subject of a separate award of permanent partial disability in an occupational deafness case, whether the County was the responsible employer for Wetsel's tinnitus or hearing loss, and whether Wetsel was a "covered employee" under the Workers' Compensation Act. The County's motion stated that if the court did not grant summary judgment in the County's favor on those legal issues, a triable issue of fact would remain as to the existence of a causal connection between Wetsel's hearing loss and tinnitus and his employment with the County. The County requested a hearing on its motion.

On January 26, 2022, Wetsel filed what he called an opposition to the County's motion for summary judgment and a cross-motion for summary judgment. In that two-page document, Wetsel contended that the court should grant his cross-motion for summary judgment because, he said, there was no genuine dispute of material fact regarding the compensability of his occupational disease, tinnitus. In support of his contention, Wetsel argued that the County had presented no new evidence on appeal to rebut the statutory presumption that the Commission's decision was factually and legally

correct. In addition, Wetsel argued that under *Montgomery County v. Cochran*, 471 Md. 186 (2020), he was entitled to judgment as a matter of law on the issue of whether he was required to file separate claims for hearing loss and tinnitus. Wetsel represented that he would file a memorandum in support of his opposition to the County's motion for summary judgment and his own cross-motion for summary judgment.

Under Maryland Rule 2-311(b), the County had 15 days to respond to Wetsel's cross-motion for summary judgment. Arguably, the 15-day period would not even begin to run until Wetsel filed the memorandum in which he detailed the legal arguments to which the County would have to respond. Wetsel did not file his memorandum until February 7, 2022.

Meanwhile, on February 3, 2022, before Wetsel had filed his memorandum, before the County's response time had run, and arguably before the time to respond even began to run, the circuit court signed an order granting the cross-motion for summary judgment and denying the County's motion for summary judgment. The court did not conduct a hearing before it ruled.

The clerk entered the order on the docket on February 7, 2022, the date on which Wetsel filed his memorandum.

On February 15, 2022, the County filed a timely motion for reconsideration (i.e., a motion to alter or amend the judgment under Maryland Rule 2-534). In its motion, the County asserted that if it had received the opportunity to respond to the cross-motion for summary judgment, it would have identified the evidence that generated a genuine dispute of material fact on the issue of causation.

On March 8, 2022, the court denied the motion.

The County filed this timely appeal.

QUESTIONS PRESENTED

The County presents the following three questions:

> I. Did the circuit court err in granting a cross-motion for summary judgment without a hearing when a hearing was requested on the original motion for summary judgment?
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> II. Did the circuit court err in granting a cross-motion for summary judgment prior to the expiration of the 15 days during which Montgomery County was entitled to file a response to the cross-motion?
>
> III. Did the circuit court err in granting the cross-motion for summary judgment when a dispute of fact existed on the issue of causation?

For the reasons set forth below, we shall vacate the judgment and remand the case to the circuit court for further proceedings.

STANDARD OF REVIEW

We review an order granting a motion for summary judgment without deference to the circuit court. *See, e.g.*, *Castruccio v. Estate of Castruccio*, 456 Md. 1, 16 (2017). We also review a court's conduct without deference when it grants a dispositive motion without conducting the hearing to which the adverse party is entitled upon request under Maryland Rule 2-311(f) (*see EMI Excavation, Inc. v. Citizens Bank of Maryland*, 91 Md. App. 340, 341 (1992)) or without giving the adverse party the time allotted for a response under the Maryland Rules. *See Baker, Watts & Co. v. Miles & Stockbridge*, 95 Md. App. 145, 161 (1993).

DISCUSSION

It is beyond any serious dispute that the circuit court erred in two respects in disposing of this case on summary judgment. First, the court granted the cross-motion for summary judgment before the County's response was even due. Second, the court rendered a decision dispositive of the County's defenses without conducting the hearing that the County requested, and it deprived the County of the ability to request a hearing on the cross-motion by ruling before the County was obligated to respond.

Maryland Rule 2-311(b) states that "a party against whom a motion is directed shall file any response within 15 days after being served with the motion." Wetsel filed his cross-motion, without the supporting memorandum of law, on January 26, 2022. Therefore, the County was not obligated to respond to the cross-motion until at least 15 days thereafter — February 10, 2022. And arguably, the County was not obligated to respond until 15 days after Wetsel detailed the basis for his cross-motion in the promised memorandum.

The court, however, did not wait. It signed an order granting Wetsel's cross-motion on February 3, 2022, a week before the earliest date on which the County's response would arguably have been due. In fact, the court granted the cross-motion before Wetsel had even filed his supporting memorandum. The court erred in granting the cross-motion before the County had an opportunity to respond (and before the County was even required to respond). Accordingly, we shall vacate the judgment to permit the County to respond to Wetsel's cross-motion and to require the court to consider the County's response before it makes a decision.

We shall also vacate the judgment to permit the court to conduct the hearing that the County requested, and to which it was entitled. Under Maryland Rule 2-311(f), "the court may not render a decision that is dispositive of a claim or defense without a hearing if one was requested as provided[.]" Thus, "[w]hen a hearing has been requested, it must be afforded unless the decision will not be dispositive of a claim or defense." *Phillips v. Venker*, 316 Md. 212, 219 (1989). "The failure to grant a request for a hearing that is required will often result in a remand on appeal." Paul V. Niemeyer, et al., *Maryland Rules Commentary* 252-53 (4th ed. 2014) (citing *Seidel v. Panella*, 81 Md. App. 124 (1989)).

The County's motion for summary judgment asserted one or more pure legal defenses — i.e., defenses that would trump Wetsel's claim even if the court resolved all genuine disputes of material fact in his favor. Thus, in deciding that the County's legal defenses were unmeritorious (as the court necessarily did in denying the County's motion), the court made a ruling that was dispositive of a defense within the meaning of Rule 2-311(f). *See Lowman v. Consolidated Rail Corp.*, 68 Md. App. 64, 76 (1986) (recognizing that a ruling may be "dispositive" of a claim or defense, within the meaning of Rule 2-311(f), even if the ruling is not the final judgment in the case). Because the County had requested a hearing on its motion for summary judgment, the court erred in denying that motion without conducting a hearing.

Furthermore, in granting Wetsel's cross-motion for summary judgment, the court made a ruling that was dispositive of Wetsel's claim and of all of the County's defenses (including its defense that there were genuine disputes of material fact on the issue of

causation). Yet, because the court decided Wetsel's cross-motion for summary judgment even before the County was required to respond to it, the County did not have a chance to request a hearing on that motion. Had the County requested a hearing on the cross-motion, as it almost certainly would have done, Rule 2-311 would have obligated the court to conduct a hearing before granting the cross-motion. Thus, in granting the cross-motion before the County was required to respond, the court deprived the County of the opportunity to request a hearing on a motion that was dispositive of the County's defenses. The court erred in this way as well.

Wetsel does not deny that the court erred in granting the cross-motion for summary judgment without waiting for a response and without conducting a hearing. He defends the ruling chiefly on the ground that the court's errors were harmless or that they were not prejudicial. He is incorrect.

In Wetsel's conception, this case is largely, if not entirely, a dispute about the legal issue of whether he must file separate workers' compensation claims to recover for an occupational disease (noise-induced hearing loss) and a causally-related disease (tinnitus). He contends that circuit court judges (including the judge who granted the cross-motion for summary judgment in this case) have repeatedly decided that legal issue against the County. Hence, he concludes that the County sustained no prejudice as a

result of the court's failure to conduct a hearing at which the County was destined not to prevail.[1]

Wetsel's conception of the case is unduly limited. Although the County moved for summary judgment on the question of whether Wetsel had to file separate workers' compensation claims, it moved for summary judgment on other legal issues as well. Moreover, the County informed the court in its motion for summary judgment that, in the County's view, there were genuine disputes of material fact that would prevent the grant of summary judgment if the court rejected the County's legal contentions. Thus, this was not a one-issue case in which the failure to conduct a hearing was harmless error because the outcome was a foregone conclusion. *See, e.g.*, *Worsham v. Ehrlich*, 181 Md. App. 711, 731-32 (2008) (holding that court erred in not conducting hearing before granting defendant's motion to dismiss, but that error was harmless because the motion presented pure questions of law that court had previously addressed in granting another defendant's motion to dismiss); *Vinogradova v. SunTrust Bank, Inc.*, 162 Md. App. 495, 511 (2005) (holding that error, if any, in dismissing count of complaint was harmless because

[1] At present, there is no precedential appellate decision directly addressing the specific question of whether a claimant must assert separate claims for hearing loss and tinnitus. In *Montgomery County v. Cochran*, 471 Md. 186 (2020), Maryland's highest court reversed this Court's decision that a claimant cannot pursue an award of compensation for tinnitus as part of an occupational deafness claim under LE § 9-505, which does not require proof of disablement. The Court reasoned that the issue had not been before this Court. *Id.* at 241-42. More generally, in *Luby Chevrolet, Inc. v. Gerst*, 112 Md. App. 177, 181 (1996), this Court held that "when the claimant has established a causal link between the initial, compensable disease," in that case, carpal tunnel syndrome, "and the subsequent disease," in that case, cubital tunnel syndrome, "the claimant may reopen and obtain a modification of the award."

plaintiff had full and fair opportunity to raise the same arguments at later hearing on different but related count).[2]

Even if the circuit court had ruled a thousand times that a claimant need not file separate workers' compensation claims to recover for an occupational disease and a causally-related disease, the circuit court had not yet decided whether there was a genuine dispute of material fact about whether the hearing loss and tinnitus suffered by the claimant in this case were caused by the conditions that he experienced while he was employed by the County. The County was entitled to a hearing — or at least was entitled

[2] In certain other circumstances this Court has held that a circuit court committed harmless error in granting a dispositive motion without conducting the hearing that the losing party had requested. *See, e.g.*, *Morris v. Goodwin*, 230 Md. App. 395, 410-11 (2016) (holding that circuit court erred in dismissing personal representative's petition to annul decedent's marriage without conducting hearing, but that error was harmless because personal representative lacked standing to pursue petition); *see also Express Auction Servs., Inc. v. Conley*, 127 Md. App. 447, 450 (1999) (holding that circuit court erred in granting summary judgment without conducting hearing on "a narrow" legal issue of statutory interpretation, but concluding that "no practical purpose" would be "served in remanding the case for a hearing without deciding that issue"); *Williams v. Prince George's County*, 112 Md. App. 526, 560 (1996) (holding that "[t]he preferable practice, particularly when a ruling on a motion is dispositive of a claim, is to conduct a hearing," but under the "unique facts" of that case, "a remand would not present the trial judge with an opportunity to adjudicate any legal issues not already addressed in [the Court's] opinion" and "would be contrary to the very judicial economy" that is "best achieved by a full airing of issues at the trial level"); *Briscoe v. Mayor & City Council of Baltimore*, 100 Md. App. 124, 128 & n.1 (1994) (holding that the court erred in not conducting a hearing on a motion that was dispositive of the claim, but that "no practical purpose would be served by remanding" the case for a hearing because parties agreed that the appeal involved pure issues of law). Unlike this case, which may involve disputes of fact on the issue of causation, those cases involve pure legal issues that the appellate court was in as good a position to decide as the trial court. In at least one of those cases, the parties agreed that there was no need for a remand for a circuit court hearing, presumably because they had spent time and money briefing the legal issue for a decision on appeal. *Briscoe v. Mayor & City Council of Baltimore*, 100 Md. App. at 128 n.1.

to have a chance to request a hearing — before the court entered summary judgment against it on that issue.

Wetsel asserts, however, that, according to the County, there were no genuine disputes of material fact, but only issues of law. Thus, he seems to say that the County invited the court to dispose of the case on cross-motions.

Wetsel's characterization of the County's motion is inaccurate. Although the County's motion identified three legal issues on which the County claimed that it was entitled to prevail as a matter of law, the motion added that genuine disputes of material fact would remain as to the issue of causation if the court disagreed with the County's legal positions and denied the motion. By granting Wetsel's cross-motion for summary judgment before the County had an opportunity to respond, the court prevented the County from discussing the alleged factual disputes that, in the County's view, prohibited the grant of summary judgment in Wetsel's favor.[3]

In arguing that the County suffered no prejudice as a result of the court's failure to wait for a response to the cross-motion, Wetsel cites *Baker, Watts & Co. v. Miles & Stockbridge*, 95 Md. App. 145 (1993). In that case, the defendant moved for summary judgment on the day before the trial began. *Id*. at 156. The next morning, the circuit court heard oral argument and granted the motion over the plaintiff's objection that it had

[3] Wetsel also argues that because it adduced no evidence generating a genuine dispute of material fact, the County failed to overcome the statutory presumption of correctness that attaches to the Commission's ruling and failed to discharge its burden under LE § 9-745. He fails to recognize that the court prevented the County from adducing any such evidence when the court granted the cross-motion for summary judgment without allowing the County to respond.

not been given the required 15 days to respond. *Id.* On appeal, this Court recognized that the court "did not strictly comply with Rule 2-311" when it failed to give the plaintiff an opportunity to file a written response to the motion (*id.* at 161), but held that the error was not prejudicial, in part because the plaintiff's attorney "was able to articulate the facts upon which his client would be relying if the case were to go to trial." *Id.* at 162.

Here, by contrast, the County had no such opportunity, at least as to the facts on which it would rely in opposing the cross-motion, including the basis for its assertion that there was a genuine dispute of material fact as to causation. The court denied the County the opportunity to articulate those facts in writing when it granted the cross-motion before the County could respond, and it denied the County the opportunity to articulate the facts orally when it granted the cross-motion without conducting a hearing. Unlike the error in *Baker, Watts*, the error in this case was obviously prejudicial: the County had no opportunity at all to be heard on the cross-motion.[4]

Wetsel goes on to argue that the court's error was cured because the County had the chance to articulate its opposition to the cross-motion for summary judgment when it filed a post-judgment revisory motion, which the court denied. Wetsel's argument does not account for the significant difference between a motion for summary judgment, in which the court makes a legal determination about the existence of genuine disputes of

[4] Under Maryland Rule 2-504(b)(e), which was adopted after the trial court's decision in the *Baker, Watts* case, a pretrial scheduling order must set a date in advance of trial by which dispositive motions must be filed. Under that rule, if a party filed a summary judgment motion on the eve of trial, a court would almost certainly deny the motion on the ground that it was untimely.

material fact and the moving party's entitlement to prevail as a matter of law, and a post-judgment revisory motion, in which a court makes a discretionary determination about whether to revise a judgment that it has already entered. Because a court typically has broad discretion to deny post-judgment revisory motions, those motions are not a second opportunity to argue for or against summary judgment. *See*, *e.g.*, *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 484-85 (2002). "Above and beyond arguing the intrinsic merits of an issue," the proponent of the revisory motion "must also make a strong case for why a [court], having once decided the merits, should in [its] broad discretion deign to revisit them." *Id*. One could well say that the court abused its discretion in this case, because "an error in applying the law can constitute an abuse of discretion, even in the context of a motion for reconsideration made pursuant to Maryland Rule 2-534." *Morton v. Scholtzhauer*, 449 Md. 217, 232 (2016). As that issue is not before us, however, it will suffice to say that the availability of a post-judgment revisory motion does not deprive an aggrieved party of its right to protest an erroneous summary judgment ruling, nor does it insulate such a ruling from appellate review.

In summary, the circuit court jumped the gun in denying the County's motion for summary judgment and in granting Wetsel's cross-motion for summary judgment without conducting a hearing on the County's motion and without allowing the County to respond to and request a hearing on Wetsel's cross-motion. Consequently, we vacate the judgment and remand the case for further proceedings. On remand, the court shall conduct a hearing on the County's motion, permit the County to respond to Wetsel's cross-motion in accordance within the deadlines established in Rule 2-311(b), and

conduct a hearing on the cross-motion if the County requests a hearing in accordance with Rule 2-311(f). We express no opinion on the merits of the motion or the cross-motion.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY VACATED; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEE.