

Circuit Court for Montgomery County
Case No. 366819-V
Hon. Richard E. Jordan

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0186

September Term, 2016

PHOUNG DANG, ET AL.

v.

MONTGOMERY COUNTY, MARYLAND

Wright,
Reed,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: March 17, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Two-year-old Angel Duenas died while in foster care. Phuong Dang, Angel's biological mother, filed suit against Montgomery County for failing to properly supervise and protect Angel. The circuit court granted summary judgment in favor of Montgomery County. We affirm.

FACTUAL BACKGROUND

The Circuit Court for Montgomery County determined that Angel was a Child in Need of Assistance ("CINA"). Pursuant to that determination, the circuit court ordered Angel into the custody and care of the Montgomery County Department of Health and Human Services ("MCDHHS")¹ so that Angel could be placed in a foster home. MCDHHS placed Angel in the home and care of Kathleen Leeson sometime in 2007.

Angel shared a room with his foster sibling in Leeson's home. The children's room contained a window that had venetian blinds. The venetian blinds had two single-tassel cords. Although the window blind cords were usually hung on a nail at the top of the window, on August 9, 2009, Angel became entangled in the window blind cords and subsequently died from strangulation.

PROCEDURAL BACKGROUND

Dang filed a wrongful death action against Montgomery County, MCDHHS, and two MCDHHS social workers. The circuit court dismissed Dang's complaint, finding that

¹ Montgomery County is unique among Maryland counties both in the name of its local department of social services and the manner in which it was established. Md. Code, Human Services ("HU") Art. §§ 3-101(d)(2); 3-201(a)(1); and 3-401 *et seq.*

none of the defendants were proper parties to the action. This Court, in an unreported opinion, held that the county (including MCDHHS) was a proper party, but that the individual social workers were not. *Phuong Dang v. Montgomery Cnty*, No. 997, September Term, 2013, Slip op. at 7 (unreported opinion) (filed August 19, 2014). We remanded the case to the circuit court and, after discovery, the county filed a motion for summary judgment that was granted by the circuit court. Dang noted this appeal.

DISCUSSION

The circuit court ruled that the undisputed facts in the record did not give rise to a common law or statutory duty that Montgomery County owed to Angel, and thus granted summary judgment in favor of the county. Dang argues that the circuit court erred in granting summary judgment, contending that the county owed Angel a duty of care. We are not persuaded that any facts in the record give rise to a tort duty and, therefore, affirm the circuit court's ruling.

A trial court “shall enter [summary] judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.” Md. Rule 2-501(f). We apply a *de novo* standard of review in determining whether the trial court correctly entered summary judgment. *Zilichikhis v. Montgomery Cnty.*, 223 Md. App. 158, 176 (2015).

A negligence action requires a plaintiff to establish four elements: “a duty owed to him ..., a breach of that duty, a legally cognizable causal relationship between the breach

of duty and the harm suffered, and damages.” *Hansberger v. Smith*, 229 Md. App. 1, 14 (2016) (citations omitted). Regarding duty, the general rule is that there is no duty owed to the world at-large. *Valentine v. On Target, Inc.*, 353 Md. 544, 553 (1999) (“One cannot be expected to owe a duty to the world at large to protect it against the actions of third parties.”). Similarly, government entities do not owe a tort duty to the world. A government entity can be liable in tort, however, if it takes an affirmative step to create a duty. That duty can be created in two ways: (1) legally, by adopting a statute; or (2) factually, by creating a special relationship. *Pace v. State*, 425 Md. 145, 156-57 (2012). Determining whether a duty exists is a legal question for the trial court to decide, not the jury. *Corinaldi v. Columbia Courtyard, Inc.*, 162 Md. App. 207, 218 (2005) (“Whether a plaintiff has presented sufficient evidence of the elements of negligence is generally a question for the fact finder, but the existence of a legal duty is a question of law to be decided by the court.”) (citations omitted).

Dang (although she doesn’t quite phrase it in this way) offers four acts by Montgomery County that she argues created a tort duty to her son, Angel: (1) declaring him a CINA and taking him into its custody; (2) inspecting and visiting Angel’s foster home and, in effect, declaring it safe; (3) publishing a newsletter in which it identified window blind cords as a strangulation hazard; and (4) the State legislature adopting a statute after Angel’s death specifically prohibiting unsecured window blind cords in foster homes. The circuit court found that none of these four acts created a tort duty and, as a result, granted the county’s summary judgment motion. We address each act in turn.

I. CINA Program

Montgomery County declared Angel a CINA, took him from his mother, and placed him in foster care. From these facts alone, Dang argues that the county created a special relationship between itself and Angel from which a tort duty arises. We need not pause long on this argument as the Court of Appeals has foreclosed it, holding that CINA status is insufficient to create a tort duty:

Child welfare services pursuant to statute are services to the general public. The State, by creating a program of such services [and Baltimore County Department of Social Services by running such a program], available to the general public, [do] not create a special relationship to any particular individual. Generally, without factual allegations of some other affirmative act beyond that required under the general program, no common law special relationship to any specific individual normally will result.

Pendleton v. State, 398 Md. 447, 487-88 (2007). Thus, in the absence of specific evidence demonstrating that the government acted beyond the requirements of the CINA program, no special relationship arises between the government and a child receiving welfare services.

The mere fact that Angel was a CINA in the custody of MCDHHS does not create a special relationship and, consequently, did not create a duty of care.

II. Investigation Regime

State law requires local departments of social services to inspect and approve potential foster homes before placing children in those homes. At the time of Angel's placement in Leeson's home, that obligation was codified at Section 5-525(j)(5) of the

Family Law Article of the Maryland Code, which provided that the Social Services Administration of the Department of Human Resources “shall adopt regulations that ... establish criteria for investigating and approving foster homes.” Md. Code Ann., Fam. Law (“FL”) § 5-525(j)(5) (2006).²

To effectuate and give content to this statutory inspection requirement, the State Department of Human Services adopted detailed regulations, which—at the time of Angel’s placement in foster care—included:

G. Foster Family Home and Equipment Inspection.

(1) Health and Sanitary Approval. A foster family home shall meet applicable public health and sanitary standards. The local department shall have in writing the approval of the local health department or authorized individual, agency, or organization before approving the foster home. The foster home worker shall perform the inspection for subsequent recertification unless the worker’s visual inspection reveals conditions that require an assessment by the local health department or authorized individual, agency, or organization.

(2) Lead Paint.

(a) A provider may not use paint with lead on any:

- (i) Exterior or interior surface of the home; or
- (ii) Material or equipment used for child care purposes.

² The inspection requirement remains codified at FL § 5-525, but now includes, as described *infra*, additional requirements for window coverings. FL § 5-525 (j)(5) (2012).

(b) If the home was constructed or renovated before 1978, the provider shall ensure that paint on any surface in the house is tested for lead content according to procedures set forth in COMAR 26.02.07:

(i) If the paint is chipping, peeling, flaking, chalking, or deteriorated; or

(ii) Before renovating the surface.

(c) If the completed testing reveals a lead content level that exceeds the maximum allowable lead level set by applicable State or local law, the provider shall follow the management plan for lead paint developed by lead paint abatement procedures in COMAR 26.02.07.

(3) General Safety Requirements.

(a) A foster home worker shall inspect the home to assure that general safety standards are met. The general safety inspection includes the requirements of §G(3)(b) and (c) of this regulation.

(b) *Firearms.* A foster parent who maintains firearms in the home shall:

(i) Follow all federal and State laws pertaining to registration, permits, and maintenance of firearms;

(ii) Keep all firearms and ammunition maintained in the home in a locked room or container that is inaccessible to children;

- (iii) Take all safety precautions to assure that firearms are not accidentally used to injure children in care; and
 - (iv) Assure that loaded firearms are not kept in the home unless required because a State, federal, or local law enforcement officer lives in the household and maintains and stores the firearms, in accordance with State, federal, and local law enforcement offices safety procedures.
- (c) Prescription and non-prescription drugs, dangerous household supplies, tools, and any other household items which are potentially life-threatening or injurious to children shall be kept in a safe location, inaccessible to children.

* * *

I. Fire Safety Approval. The local department shall have in writing the approval of the local or State fire officials or an authorized individual, agency, or private organization that a foster family home meets the safety requirements of the local fire department and any other applicable State or local requirement before approving the foster home. The annual fire safety inspection may be done using a fire safety survey form approved by the local director and provided to the foster parent by the foster home worker. In addition, the foster home shall have an approved smoke detector or detectors installed.

J. Sleeping and Living Quarters.

- (1) The family living quarters shall be adequate to provide space for foster children without disrupting the usual sleeping and living arrangements of the family group as it is documented in the case record. A foster child's

sleeping and living quarters shall have provision for privacy, study at home, and storage of clothes, toys, and personal possessions.

- (2) Each child shall have an individual bed that may not be stacked in vertical bunk bed formation. The bed shall have sufficient cover to protect the occupant from cold conditions.
- (3) A responsible adult shall sleep within call of each child in the home.
- (4) Except for children younger than 2 years old, boys and girls may not sleep in the same room. A teenaged parent may share a bedroom with the parent's infant child until the child reaches 2 years old. A child 2 years old or older may not share a bedroom with an adult unless approved by the local department. A child may not share a bed with an adult or another child at any time.

* * *

M. Safety Requirements for Swimming Pools, Hot Tubs, Spas, and Waterfont Property.

(1) Foster parents shall provide supervision with regard to pool safety commensurate with a child's age and ability.

(2) The caseworker shall:

* * *

(b) Inspect the pool, hot tub, spa, or waterfront property for safety compliance; and

* * *

(3) A swimming pool at the home of a foster parent shall:

- (a) Be maintained in a safe and sanitary condition; and
 - (b) Comply with county zoning, building, or health codes or ordinances.
- (4) An in-ground pool at the home of a foster parent, when not in use, shall:
- (a) Have the pool area completely enclosed by a fence at least 4 feet high, and the fence gate locked;
 - (b) Be completely covered in a manner to prevent access by the child; and
 - (c) Have power safety covers for an in-ground pool that may be used as an alternative to fences.
- (5) Safety requirements for above-ground swimming pools or hot tubs include the following:
- (a) Retractable or removable ladders shall be locked when not in use, or stored away from the pool;
 - (b) A pool shall be 4 feet above ground at all points;
 - (c) Doors and gates that access the pool shall have locks;
 - (d) If a pool has a deck area with a door, the door shall be locked;
 - (e) Permanent steps shall have a locked gate;
 - (f) A pool may not have climbable objects on the exterior of the pool; and

(g) Hot tubs shall have secured covers when not in use.

(6) Waterfront property shall have a fence with a locked door or gate controlling access to the body of water.

COMAR 07.02.25.05 (2002). Thus, the local department of social services, here MCDHHS, must inspect a home for the hazards listed in the regulation prior to approving use of the home for foster care. It is worth noting that, at the time, the regulations included detailed inspection requirements for firearms, lead paint, and swimming pools, but did not mention window blinds nor did they contain a general catch-all provision.

Discovery in this case revealed that MCDHHS conducted an initial inspection of the Leeson home and visited the home on at least eight other occasions. The circuit court ruled that neither the initial inspection of Leeson's home nor the subsequent visits were sufficient to create a tort duty. Dang disagrees. She appears to argue that the fact that a statute and regulation require MCDHHS to conduct inspections of foster homes is sufficient to create a tort duty. Dang also relies heavily on MCDHHS's initial inspection of and frequent visits by Angel's social worker to the Leeson home.

Dang's claim that the inspection regime creates a tort duty produces several interesting questions. *First*, caselaw has uniformly described "statutes" as the manner by which government can affirmatively create a tort duty, but has been silent about regulations. *Pace*, 425 Md. at 156-57; *Pendleton*, 398 Md. at 466-67. We hold that, for these purposes, there is no analytic difference between a statute and a regulation and that government may, by adopting either one, create for itself a tort duty. *Second*, the caselaw

treats the two methods by which government can create a tort duty for itself as exclusive: it may do so by adopting a statute *or* by behavior giving rise to a special relationship. *See Pace*, 425 Md. at 156. Dang’s opposition to summary judgment may be understood to suggest that the regulation here, combined with the facts of the inspections and visits, together create a tort duty. We think that this too is acceptable conceptually, that a statute or regulation combined with behavior may create, in a given situation, a tort duty. Here, however, we agree with the circuit court that no duty was created.

Neither the statute, FL§ 5-525, nor the regulation, COMAR 07.02.25.05, as they existed at the time, required that the investigation include either an inspection for window blinds or a general inspection for safety. Rather, they created a checklist, the completion of which satisfied the inspection requirement. Nothing more was required. And, according to the testimony of Angel’s social worker, who visited Angel several times (although she did not perform the initial inspection of the home), nothing more was done. In fact, she testified that “the blinds looked like they were appropriately put in place and ... tied up out of reach, so I didn’t—I never felt that there was any danger.” Under the circumstances, we agree with the circuit court that nothing about the inspection regime—not the statute, not the regulation, not the initial inspection, not the subsequent visits individually, and not the four taken together—created a tort duty.

III. The Safety Corner Newsletter

Dang has also produced a one-page document, which she claims is an excerpt from a newsletter distributed by Montgomery County. The relevant text of the newsletter provides:

When window cords are within reach, it takes only a few seconds for a young child to accidentally strangle. Infants placed in cribs near windows may be able to grasp a dangling window cord unintentionally wrapping it around their neck.

Toddlers and pre-schoolers playing on beds or climbing on furniture placed near windows can accidentally become entangled or caught in window cords.

Tragically, nearly a dozen children die each year from widow cord accidents. Don't let this happen to your child!

REPAIR OR REPLACE PRE-2001 WINDOW COVERINGS

Today's window covering include manufacturer-installed cord safety features. If your blinds, shades, or draperies were made prior to 2001, they should be repaired, or replaced with today's safer window coverings.

BE CORD SMART!

The Window Covering Safety Council urges parents and caregivers to check all windowed areas of the home for potential window cord hazards by following these important cord-safety rules.

- Move cribs, beds, and other furniture away from windows, preferably to another wall.
- Keep all window cords out of the reach of children. Make sure tasseled pull cords are short, and that the continuous-loop cords are permanently anchored to the floor or on the wall.
- Lock cords into position when lowering the horizontal blinds or shades.
- Repair window blinds, corded shades and draperies manufactured before 2001 with retrofit cord repair devices ... or replace them with today's safer products.
- Consider using cordless window coverings in children's bedrooms and play areas. A wide variety of cordless products are now available.

* * *

Limited number of repair kits available through your foster care licensing social worker.

Regrettably, Dang offers few other details about the newsletter. We discern from the record that the newsletter was a part of a pamphlet called “Fostering Communications,” and that Montgomery County disseminated it, at least, quarterly. But there are several critical things that we don’t know about the newsletter. We don’t know who the target audience was or who was on the distribution list. We don’t know the manner of distribution. Further, we do not know the significance of the reference to social workers in the newsletter. We can imagine answers to these questions that would have given rise to a tort duty. We can also imagine answers to these questions that make clear that the newsletter created no tort duty. In the context of Dang’s opposition to the county’s motion for summary judgment, however, these unknowns must weigh against Dang. *Lightolier v. Hoon*, 387 Md. 539, 552 (2005) (“[O]nce the moving party has provided the court with sufficient grounds for summary judgment, the non-moving party must produce sufficient evidence to the trial court that a genuine dispute to a material fact exists.”). Moreover, “[a]ppellate courts cannot be expected to either (1) search the record on appeal for facts that appear to support a party’s position, or (2) search for the law that is applicable to the issue presented.” *Ruffin Hotel Corp. of Maryland v. Gasper*, 418 Md. 594, 618 (2011) (citations omitted). Therefore, we agree with the circuit court that summary judgment was appropriately granted with respect to this newsletter.

Even if this newsletter was sufficient to create a duty of care owed to Angel by the county, however, we are persuaded that there is no genuine dispute regarding whether the

county breached that duty.³ The newsletter advised that window blind cords be kept out of the reach of children. It is undisputed that Angel's social worker observed Leeson's window blind cords and determined they did not pose a danger to Angel. Specifically, she explained that "the blinds looked like they were appropriately put in place and ... tied up out of reach, so I didn't—I never felt that there was any danger." Thus, the undisputed facts demonstrate that the county had no notice or reason to know that the blinds posed a danger to Angel. For these reasons, even if the newsletter was sufficient to create a duty of care to Angel, we conclude that there is no genuine dispute regarding whether the Montgomery County breached that duty.

IV. Angel's Law

After Angel's death, Ms. Leeson went to the Maryland General Assembly and persuaded it to adopt "Angel's Law," a statutory requirement that, after its effective date, foster homes must have cordless blinds:

(b) This section applies only to foster homes, family child care homes, large family child care homes, and child care centers in the State.

(c)(1) All new and replacement window coverings installed on or after **October 1, 2010**, shall be cordless window coverings.

³ Because the circuit court found the newsletter did not create a duty of care, it did not reach the issue of whether there was a genuine dispute regarding if the county breached that duty. An appellate court, however, "may affirm a trial court's decision on any ground adequately shown by the record even though the ground was not relied upon by the trial court or the parties." *Fischbach v. Fischbach*, 187 Md. App. 61, 88 (2009) (citations omitted).

(2) All window coverings in place before **October 1, 2010**, shall meet minimum safety standards established in regulations jointly adopted by the Department and the State Department of Education that include standards for:

- (i) Roman shades, roll-up shades, woven shades, and all window coverings with exposed and unsecured cords;
- (ii) horizontal blinds, cellular shades, and all window coverings that have draw cords for their operation; and
- (iii) vertical blinds and other window covering products with loops utilized in their operation.

(3) If a person fails to comply with the requirements of subsection (c)(2) of this section, the appropriate agency may require replacement of existing window coverings with cordless window coverings.

FL § 5-505(b)-(c) (emphasis added). Pursuant to Angel’s Law, the State Department of Human Resources also adopted regulations regarding window blind cords in foster care homes:

- (4) Window Coverings. A window covering installed:
 - (i) Before **October 1, 2010** may not have exposed or unsecured cords, beads ropes, or strings; or
 - (ii) On or after **October 1, 2010**, shall be cordless.

COMAR. 07.02.25.04.(G)(4) (emphasis added).

Although her brief and pleadings are not a model of clarity, we interpret Dang’s argument to be that Angel’s Law should be applicable in this case. Thus, despite the effective date of the law being after Angel’s death, she argues that Angel’s Law should be

construed to have created a tort duty for the benefit of Angel himself. The circuit court did not accept this argument and, for two reasons, neither can we. *First*, both the statute and the regulation identify an effective date of October 1, 2010 and, thus, are plainly prospective. This is consistent with the principle that statutes generally apply prospectively. *Langston v. Riffe*, 359 Md. 396, 406 (2000) (“[T]here is a general presumption in the law that an enactment is intended to have purely prospective effect. In the absence of clear legislative intent to the contrary, a statute is not given retrospective effect.”) (citations and quotations omitted). Therefore, we think, on the merits, that Angel’s Law cannot and did not create a tort duty to Angel.⁴

Second, we think that, as a matter of evidence law, that Angel’s Law is in the nature of a subsequent remedial measure and its introduction is, therefore, barred by Rule 5-407. *See* Md. Rule 5-407 (“When, after an event, measures are taken which, if in effect at the time of the event, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.”). Inadmissible evidence cannot be considered in deciding a motion for summary judgment. Md. Rule 2-501(c) (affidavits in support of summary judgment may only contain “facts as would be admissible in evidence”). Thus, we think that the existence of Angel’s Law was inadmissible to prove that the county owed Angel a duty and, therefore, the circuit court was correct in declining to consider it.

⁴ Of course, the outcome of this analysis might well be different if the same set of facts occurred after October 1, 2010.

CONCLUSION

In sum, none of the acts by Montgomery County that Dang presented created a tort duty. The undisputed facts demonstrate that the county did not owe a legally cognizable duty of care to Angel. We, therefore, affirm the circuit court's grant of summary judgment in favor of the county.

**JUDGMENT OF THE CIRCUIT COURT
FOR MONTGOMERY COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**