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RECENT DEVELOPMENT

TOMS V. CALVARY ASSEMBLY OF GOD, INC.: NOISE RESULTING FROM LEGALLY PERMISSIBLE FIREWORKS DOES NOT CONSTITUTE AN ABNORMALLY DANGEROUS ACTIVITY, AND THE APPLICATION OF STRICT LIABILITY IS INAPPROPRIATE.

By: Jason C. Parkins

The Court of Appeals of Maryland held that noise emitted from a lawful fireworks display did not constitute an abnormally dangerous activity; therefore, the parties were not subject to strict liability. *Toms v. Calvary Assembly of God, Inc.*, 446 Md. 543, 569, 132 A.3d 866, 881 (2016).

On September 9, 2012, in Frederick County, Calvary Assembly of God, Inc. hosted a fireworks event on Auburn Farms, a property adjacent to Andrew David Toms' ("Toms") dairy farm. Prior to the fireworks display, Calvary acquired all permits as required by section 10-104 of the Public Safety Article ("section 10-104"). Calvary hired a professional fireworks company ("Zambelli") to plan, oversee, and perform the fireworks display. The location of the fireworks display was approved by a fire marshal prior to the event. The fire marshal concluded that the event required a 250-foot radius, clear of structures, surrounding the firing location. The permits acquired for the display demarcated a firing radius of 300 feet. Additionally, a fire marshal was present at the event and supervised the display.

During the fifteen-minute fireworks display, no fireworks malfunctioned. Toms' barn was located between 550 to 600 feet from the firing location, and his cattle were inside his barn when the fireworks display began. Noise from the fireworks display startled the cattle and caused a stampede within the barn. As a result of the stampede, three of the four cattle were euthanized, and the fourth cow became infertile, was unable to produce milk, and was sold for slaughter. In addition to the loss of his cattle, Toms suffered property damage and lost profits from reduced milk sales.

On December 9, 2013, Toms brought an action against Calvary Assembly of God, Inc., Zambelli, Zambelli's employee, Kritopher Lindberg, and Auburn Farms (collectively, "Calvary") in the District Court of Maryland sitting in Frederick County. Toms alleged negligence, nuisance, and strict liability for an abnormally dangerous activity. The district court held that there was no evidence of negligence by Calvary, and that the event was not abnormally dangerous given the 300-foot firing radius. Additionally, the district court found that noise resulting from a fireworks display is not abnormally dangerous.

Subsequently, on May 29, 2014, Toms appealed to the Circuit Court for Frederick County, which affirmed the judgment of the district court. The circuit court held that Calvary was not strictly liable for an abnormally

dangerous activity, because Toms' damages were caused only by the fireworks' noise. Toms filed a petition for *writ of certiorari*, asking the court of appeals to resolve the issue of whether strict liability for an abnormally dangerous activity applied to noise generated by a fireworks display. This was a case of first impression because, typically, fireworks liability has been brought under the theories of negligence and nuisance.

The Court of Appeals of Maryland began its analysis by outlining the six-factor test used to determine whether an activity constitutes an abnormally dangerous activity. *Toms*, 446 Md. at 552-53, 132 A.3d at 871-72 (citing *Kelly v. R.G. Indus., Inc.*, 304 Md. 124, 132, 497 A.2d 1143, 1146 (1985)). Additionally, the court noted that several of the six factors must be present in order for strict liability to be applicable. *Toms*, 446 Md. at 554, 132 A.3d at 872. The first factor is whether the activity generates "high degree of risk of harm to the person, land or chattels of others." *Toms*, 446 Md. at 560, 132 A.3d at 876. The court held that a lawful fireworks display did not generate a high degree of risk because the controlling statutory framework was intended to reduce the risk of the activity. *Id.* at 564, 132 A.3d at 878. The court also concluded that the 300-foot firing radius further reduced the risk of the activity. *Id.* Lastly, the court noted that the General Assembly's lack of regulation regarding noise caused by fireworks indicates an intent not to find fault by this minimal risk. *Id.*

The second factor looks to whether the potential harm resulting from the activity will be severe. *Toms*, 446 Md. at 560, 132 A.3d at 876. The court concluded that harm resulting from the lawful fireworks display would be minimal. *Id.* Given the 300-foot firing radius, the absence of misfires, and the lack of debris on Toms' property, the court concluded that there was little risk for severe harm. *Id.* at 564-65, 132 A.3d at 878-79.

The third factor is whether exercising reasonable care can mitigate the risk of potential harm. *Toms*, 446 Md. at 560, 132 A.3d at 876. As evidence of reasonable care, the court relied upon the fact that all statutory guidelines were followed in the instant case. *Id.* at 566, 132 A.3d at 879-80. The court concluded that this factor weighed against imposing strict liability. *Id.* at 566, 132 A.3d at 880. The fourth factor is whether the activity is of common usage. *Id.* at 560, 132 A.3d at 876. The court clarified that activities are considered matters of common usage if many community members engaged in them. *Id.* at 566, 132 A.3d at 880 (citing *Yommer v. McKenzie*, 255 Md. 200, 225 n.2, 257 A.2d 138, 140 (1969)). Moreover, the court determined that the term "usage," in relation to fireworks, should be broadly interpreted to include spectators. *Toms*, 446 Md. at 567, 132 A.3d at 880. Therefore, the court concluded "lawful fireworks displays are a matter of common usage". *Id.*

The fifth factor is whether the activity is appropriate, given the locale. *Toms*, 446 Md. at 560, 132 A.3d at 876. The court indicated that, within Maryland, this factor is given the most weight. *Id.* at 553, 132 A.3d at 872 (citing *Yommer*, 255 Md. at 226, 257 A.2d at 140). The court noted that the issuance of a permit for the activity implies lawfulness. *Toms*, 446 Md. at

567-68, 132 A.3d at 880. Additionally, it emphasized that two fire marshals testified to the legality of the fireworks display. *Toms*, 446 Md. at 568, 132 A.3d at 880-81. As a result, the court concluded that the display was appropriate relative to the locale. *Id.*

The sixth factor looks to whether the activity's utility to the public outweighs the dangerousness of the activity. *Toms*, 446 Md. at 560, 132 A.3d at 876. The court weighed the public benefit of fireworks displays against their danger. *Id.* at 568-69, 132 A.3d at 881. Because the event was open to the public, held by a church, and the significant role of fireworks in American culture, the court concluded that the benefit outweighed the danger. *Id.*

Toms further argued that, as a matter of policy, the court should expand the doctrine of abnormally dangerous activities to include lawful fireworks displays. *Toms*, 446 Md. at 569, 132 A.3d at 881. He argued that a narrow application of the doctrine is overly burdensome to landowners. *Id.* The court concluded that a broad application of the doctrine is impermissible given the regulating statutory framework. *Id.* Ultimately, given the lack of evidence presented by *Toms* to demonstrate appropriate noise levels of public fireworks displays, the court determined that fireworks are not abnormally dangerous activities and not subject to strict liability. *Id.*

In *Toms*, the court held that noise resulting from a lawful fireworks display does not constitute an abnormally dangerous activity and, therefore, does not subject parties to strict liability. As a result, individuals that put on lawful fireworks displays cannot be held strictly liable for resulting property damage caused by noise. However, the question of whether an unlawful fireworks display causing similar damage would constitute an abnormally dangerous activity remains unanswered. The court found the six-factor test weighed against imposing strict liability, primarily based on the statutory framework regulating fireworks displays. Presumably, if the regulation of such displays rendered them not abnormally dangerous, it is likely that an unlawful fireworks display of a similar scale may constitute an abnormally dangerous activity and subject responsible parties to strict liability.