IN THE

COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2012

No. 9

JAMES COLEMAN,
Petitioner,

v.

SOCCER ASSOCIATION OF COLUMBIA, *et al.*
Respondents.

ON WRIT OF *CERTIORARI* TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF *AMICI CURIAE* LOCAL GOVERNMENT INSURANCE TRUST MARYLAND ASSOCIATION OF COUNTIES MARYLAND MUNICIPAL LEAGUE MAYOR AND CITY COUNCIL OF BALTIMORE

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TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 2

STATEMENT OF THE CASE 3

QUESTIONS PRESENTED 3

STATEMENT OF FACTS 3

ARGUMENT 4

I. In Accordance With The Doctrine Of *Stare Decisis*, This Court Should Stand By Its Decision In *Harrison* And Defer To The General Assembly To Determine As A Matter Of Public Policy Whether The Longstanding Common Law Defense of Contributory Negligence Should Be Replaced With A System Of Comparative Fault 4

II. This Court Should Not Abrogate The Longstanding Common Law Defense Of Contributory Negligence As It Provides Substantial Tort Protection To Local Governments 15

CONCLUSION 22

APPENDIX A-1

TABLE OF CITATIONS

Cases **Page**

Baltimore Police Dept. v. Cherkes, 140 Md. App. 282 (2001) 19

Barclay v. Briscoe, 2012 Md. LEXIS 385 (Md. June 27, 2012) 14

Bd. of Trustees of the Baltimore County Community Colleges v. RTKL Associates, Inc., et al., 80 Md. App 45 (1989) 15

Boblitz v. Boblitz, 296 Md. 242 (1983) 8

Bozeman v. Bozeman, 376 Md. 461 (2003) 8

DRD Pool Service v. Freed, 416 Md. 46 (2010) 13, 14

Frye v. Frye, 305 Md. 542 (1986) 9

Funston v. School Town of Munster, 849 N.E.2d 595 (Ind. 2006) 10

Harrison v. Montgomery County Board of Education, 295 Md. 442 (1983) ..... Passim

Johnson v. Mitchell Supply, Inc., 33 Md. App. 99 (1976) 18, 19

Khawaja v. City of Rockville, 89 Md. App. 314 (1991) 20

Mason v. Board of Education of Baltimore County, 375 Md. 504 (2003) 12, 13

Montgomery County, MD v. Valk Manufacturing Co., 317 Md. 185 (1989) 17

Murphy v. Edmonds, 325 Md. 342 (1992) 13

Oaks v. Connors, 339 Md. 24 (1995) 13

Parler & Wobber, et al. v. Miles & Stockbridge, P.C., et al., 359 Md. 671 (2000) 17

State v. Minster, 302 Md. 240 (1985) 8, 9

State v. Sowell, 353 Md. 713 (1999) 11, 12

State v. Wiegmann, 350 Md. 585 (1998) 10, 11

Stewart v. Hechinger Stores Company, 118 Md. App. 354 (1997) 15

Warren v. Warren, 336 Md. 618 (1994) 9

Statutes and Constitutional Provisions

Laws of Maryland of 2000, Chapter 339 12

Md. Code Ann., Courts and Judicial Proceedings Article, §§ 5-301 2

Md. Code Ann., Courts and Judicial Proceedings Article, § 5-303 (d) 19

Md. Code Ann., Courts and Judicial Proceedings Article, § 3-1401 16

Md. Code Ann., Insurance Article, §19-602 2

Maryland Declaration of Rights, Article 5 5

Maryland Rule 8-504(a)(8) 23

Maryland Rule 8-511 1

Miscellaneous

Ind. Code § 34-51-2-2 10

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In a motion filed on June 28, 2012, Local Government Insurance Trust (the "Trust"), Maryland Association of Counties ("MACo"), Maryland Municipal League ("MML") and Mayor and City Council of Baltimore (the "City") requested permission from this Court pursuant to Maryland Rule 8-511 to file a Brief of *Amici Curiae* in support of the position of the Respondents.

INTEREST OF *AMICI CURIAE*

The Trust is organized pursuant to Insurance Article, § 19-602, which authorizes public entities to pool together to purchase casualty insurance, property insurance, or health insurance or to self-insure against casualty, property, or health risks. Pursuant to this authority, the Trust operates a self-insured liability pool for its members, which include 132 municipal corporations and 16 counties, all of which enjoy the protections afforded by the Maryland General Assembly in the Local Government Tort Claims Act, Courts and Judicial Proceedings Article, §§ 5-301 *et seq.* (the "LGTCA").

MACo is a non-profit and non-partisan organization that serves Maryland's counties primarily by articulating the needs of local government to the Maryland General Assembly, and in other fora as well. The Association's membership consists of county elected officials and representatives from Maryland's 23 counties and the City. Since 1969, MACo has represented all 24 political subdivisions of the State of Maryland.

MML's mission is to strengthen and support municipal government through advocacy and the development of effective leadership. MML was founded in 1936 and represents 157 municipal governments and two special taxing districts throughout the State of Maryland. MML is a voluntary, non-profit, non-partisan association controlled and maintained by city and town governments. MML is the only statewide organization in Maryland composed solely of municipal officials and devoted to the promotion of all branches of municipal administration.

The City is the largest (by population) municipal corporation in the State of Maryland. Its litigation activities that may be affected by this case reverberate

throughout the State, given its prominence and large liability burden. The City is self-insured.

The dramatic change in the common law of the State requested by the Petitioners has the potential to expose counties and municipal corporations in Maryland to substantial and unprecedented liability and to deprive them of the protections afforded by the defense of contributory negligence. Moreover, a ruling by this Court in favor of the Petitioner will create extensive and expensive litigation of an array of collateral legal issues that will require time to resolve, leaving local governments in a sea of uncertainty for years.

The Trust, together with the counties and municipal corporations it insures, MACo, MML and the City have an interest in having this Court rule in favor of the Respondents.

STATEMENT OF THE CASE

Amici Curiae adopt the Statement of the Case of the Respondents.

QUESTION PRESENTED

Should this Court abrogate by judicial action the longstanding common law defense of contributory negligence or should this Court defer to the General Assembly to set important public policy?

STATEMENT OF FACTS

Amici Curiae adopt the Statement of Facts of the Respondents.

ARGUMENT

I. In Accordance With The Doctrine Of *Stare Decisis*, This Court Should Stand By Its Decision In *Harrison* And Defer To The General Assembly To Determine As A Matter Of Public Policy Whether The Longstanding Common Law Defense Of Contributory Negligence Should Be Replaced With A System Of Comparative Fault.

In *Harrison v. Montgomery County Board of Education*, 295 Md. 442 (1983), this Court affirmed the judgment of the Circuit Court for Montgomery County entered on a jury verdict in favor of the defendants. The trial judge had instructed the jury, in accordance with the established law of Maryland, that if the injured plaintiff was contributorily negligent, it would be a complete bar to the plaintiffs' claim. The trial judge defined contributory negligence as "the failure of a plaintiff to act with that degree of care which a reasonably prudent person would have exercised for his own safety under the same or similar circumstances." *Id.* at 445-46.

On appeal, the plaintiffs asked this Court to abrogate the longstanding common law doctrine of contributory negligence and to adopt in its place the doctrine of comparative negligence, which apportions losses on the basis of fault, with each party bearing the portion of the loss directly attributable to that party's conduct. This Court, with only Judge Davidson in dissent, declined the plaintiffs' invitation and reaffirmed the doctrine of contributory negligence in Maryland.

In confirming that the doctrine of contributory negligence is the established law of Maryland, Chief Judge Murphy, writing for the majority, observed that the doctrine of contributory negligence "is a fundamental principle of Maryland negligence law, one

deeply imbedded in the common law of this State, having been consistently applied by Maryland courts for 135 years." *Id.* at 458.[1] The Chief Judge then invoked the doctrine of *stare decisis* to guide the Court in its analysis:

> When called upon, as here, to overrule our own decisions, consideration must be given to the doctrine of *stare decisis* – the policy which entails the reaffirmation of a decisional doctrine of an appellate court, even though if considered for the first time, the Court might reach a different conclusion.

Id. at 458 (citation omitted). Under the doctrine of *stare decisis*, to promote certainty and stability, changes in decisional law are ordinarily left to the General Assembly.[2]

Without question, this Court has the power to abrogate the common law doctrine of contributory negligence. The question in this case, as it was in *Harrison*, is whether, under established principles of *stare decisis*, this Court should exercise that power.

> [I]n considering whether a long-established common law rule – unchanged by the legislature and thus reflective of this State's public policy – is unsound in the circumstances of modern life, we have always recognized that declaration of the public policy of Maryland is normally the function of the General Assembly.... The Court, therefore, has been particularly reluctant to alter a common law rule in the face of indications that to do so would be contrary to the public policy of the State.

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[1] According to Chief Judge Murphy, "Maryland adopted the doctrine of contributory negligence in 1847 in *Irwin v. Spriggs*, 6 Gill 200." *Id.* at 450. The doctrine of contributory negligence has now been consistently applied by Maryland courts for 165 years.

[2] Under Article 5 of the Maryland Declaration of Rights, the General Assembly is expressly empowered to revise, amend, or repeal the common law of Maryland.

Id. at 460 (citations omitted). As Chief Judge Murphy observed, the prior decisions of this Court "plainly reflect our initial deference to the legislature where change is sought in a long-established and well-settled common law principle." *Id.* at 461.

Two features of the policy debate over contributory negligence confirmed for the *Harrison* Court the appropriateness of deferring to the General Assembly to determine if the common law doctrine of contributory negligence should be replaced by a comparative fault system. First, as Chief Judge Murphy explained, there had been substantial legislative activity on the subject for many years.

> The rationale underlying [the Court's prior decisions deferring to the legislature] is buttressed where the legislature has declined to enact legislation to effectuate the proposed change. It is thus important in the present case to note that in the period from 1966 through 1982, the General Assembly considered a total of twenty-one bills seeking to replace the contributory negligence doctrine with a comparative fault system. None of these bills was enacted. Although not conclusive, the legislature's action in rejecting the proposed change is indicative of an intention to retain the contributory negligence doctrine.

Id. at 461-62 (footnote and citations omitted).[3] Second, the Court recognized that a change from contributory negligence to comparative negligence would be one of great magnitude, with far-reaching implications in the trial of tort actions in Maryland.

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[3] Chief Judge Murphy noted that of the 21 bills considered by the General Assembly between 1966 and 1982, only two emerged from committee. *Id.* at 462 n. 13. By comparison, from 1983 through 2012, the General Assembly considered a total of 19 bills seeking to replace the common law defense of contributory negligence with a comparative fault system. Between 1984 and 1988, five Senate bills were passed by the Senate and crossed over to the House of Delegates. Four of these Senate bills died in the House Judiciary Committee. Only one Senate bill – Senate Bill No. 21 (1985) – reached the floor of the House of Delegates, and it failed on third reader. Since 1988, no bill

> The comparative negligence doctrine is not...a unitary doctrine but one which has been adopted by other states in either a pure or modified form.... Whether the "pure" proportional fault system is preferable to any of the several types of modified comparative negligence..., or to the doctrine of contributory negligence, is plainly a policy issue of major dimension. Which of these doctrines best serves the societal need is a debatable question. Not debatable is the conclusion that a change from contributory negligence to any form of comparative negligence would be one of great magnitude, with far-reaching implications in the trial of tort actions in Maryland.

Id. at 462-63. "In the final analysis," concluded Chief Judge Murphy, "whether to abandon the doctrine of contributory negligence in favor of comparative negligence involves fundamental and basic public policy considerations properly to be addressed by the legislature." *Id.* at 463.

The question before the Court in this case is quite simple and direct: Has anything occurred in the last 30 years to call into question the decision in *Harrison*?[4] More specifically, in light of this Court's heavy reliance in *Harrison* on the doctrine of *stare decisis* to reaffirm the common law doctrine of contributory negligence, is there anything in the decisional law in the last 30 years that would suggest that this Court should no longer defer to the General Assembly in determining the major policy issue of whether in Maryland the common law defense of contributory negligence should be replaced with a system of comparative fault?

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introduced in either the Senate or the House of Delegates has emerged from committee. *See* Appendix.

[4] It is clear what has not changed. The legislative activity has continued unabated, with the General Assembly persisting in its refusal to enact legislation to replace contributory negligence with comparative fault. *See* Appendix.

Less than four months after the *Harrison* decision, the Court of Appeals abrogated the interspousal immunity rule as to cases sounding in negligence. *Boblitz v. Boblitz*, 296 Md. 242 (1983). A comparison of *Boblitz* and *Harrison* is instructive.

Like the doctrine of contributory negligence, the interspousal immunity rule at issue in *Boblitz* was a creature of the common law that resulted exclusively from judicial decisions. *Id.* at 244. In reaching its decision to abrogate the interspousal immunity rule, the Court recognized the value of the doctrine of *stare decisis* as articulated in *Harrison*. *Id.* at 273. However, the Court distinguished *Harrison* in two regards. First, in *Harrison*, the General Assembly had repeatedly rejected efforts to replace contributory negligence with a system of comparative fault. Second, the requested change in *Harrison* required selection from several forms of comparative fault, each producing markedly different effects on the rights and obligations of all parties in negligence litigation. *Id.* at 274. Relying on these distinctions, the Court felt comfortable in exercising its authority to abrogate the common law rule of interspousal immunity, which it found it unsound in the circumstances of modern life. *Id.*[5]

In 1985, in reliance on *Harrison*, the Court of Appeals declined to abrogate the common law rule barring a prosecution for murder when the victim dies more than a year and a day after being injured. *State v. Minster*, 302 Md. 240 (1985). Writing for a

[5] Even with these distinctions, Judges Couch and Rodowsky dissented on the ground that the General Assembly, not the Court, should effect this policy change. *Id.* at 282-88. In 2003, without a dissent, this Court completed the task and abrogated the interspousal immunity rule as to all cases alleging an intentional tort, again distinguishing *Harrison* as the majority did in *Boblitz*. *See Bozeman v. Bozeman*, 376 Md. 461, 492-93 (2003).

unanimous Court, Judge Couch explained why deference to the General Assembly was appropriate:

> [W]e find there is a great difference of opinion surrounding the appropriate length of the period after which prosecution is barred and some doubt whether the rule should exist at all. Consequently, we believe it is the legislature which should mandate any change in the rule, if indeed any change is appropriate in Maryland. The legislature may hold hearings on this matter; they can listen to the testimony of medical experts; and they may determine the viability of this rule in modern times.

Id. at 245-46 (citations omitted). Judge Couch's statement has equal force when applied to the doctrine of contributory negligence.

In *Frye v. Frye*, 305 Md. 542 (1986), this Court was asked to exclude motor vehicle torts from the common law parent-child immunity rule. The Court declined to do so, in part in reliance on *Harrison*. Noting that the exclusion would impact the State's compulsory motor vehicle liability scheme, the Court concluded that the General Assembly should resolve the nature and consequences of this impact.

> [T]he exclusion of motor torts from parent-child immunity "involves fundamental and basic public policy considerations properly to be addressed by the legislature." If we effect the exclusion by judicial action, "we discard our robes for legislative hats without the electoral accountability that legitimizes the legislative product or executive enforcement."

Id. at 567 (citations omitted).[6]

[6] This Court reaffirmed its holding in *Frye* in *Warren v. Warren*, 336 Md. 618, 627-28 (1994), declining to create an exception to parent-child immunity in motor tort cases and holding that "any such exception must be created by the General Assembly after an examination of appropriate policy considerations in light of the current statutory scheme."

Likewise, the change from contributory negligence to comparative fault would necessarily have a major impact on the public policy underlying the LGTCA. As this Court concluded in *Frye*, the General Assembly should resolve the nature and consequences of this impact when it considers legislation to adopt a comparative fault system.[7]

In *State v. Wiegmann*, 350 Md. 585 (1998), this Court, in reliance on *Harrison* among other cases, declined to abrogate the longstanding common law rule permitting individuals to resist an illegal warrantless arrest. Judge Cathell, writing for the majority, explained:

> We believe this change is best left to the Legislature and its primary power to, in the first instance, declare the public policy of this state.

Id. at 607. As in *Harrison*, the Court relied on the doctrine of *stare decisis* to reach this conclusion.

> Under the principle of *stare decisis*, "for reasons of certainty and stability, changes in decisional doctrine ordinarily should be left to the Legislature."

Id. at 604 (citations omitted). Citing *Harrison* with approval, Judge Cathell continued:

> This Court has recognized that in determining whether a long-standing common law rule now conflicts with modern policy, the declaration of public policy normally is the function of the Legislature. In that same vein, we have said that the

[7] In Indiana, for example, the legislature retained the doctrine of contributory negligence for torts committed by governmental entities or public employees. *See* Ind. Code § 34-51-2-2 (expressly excluding application of the Indiana Comparative Fault Act to governmental entities and public employees). *See also Funston v. School Town of Munster*, 849 N.E.2d 595, 598 (Ind. 2006).

> Legislature's failure to change a common law rule is reflective of this state's public policy.

Id. at 605 (citations omitted).

The strength of the policy of *stare decisis* in Maryland is well-illustrated by this Court's decision in *State v. Sowell,* 353 Md. 713 (1999), in which the Court was asked to abrogate the longstanding common law distinction between principals and accessories. Judge Cathell, again writing for the Court, recognized the Court's power to alter a common law rule in situations in which, in light of changed conditions or increased knowledge, the rule has become unsound or unsuitable in the circumstances of modern life. *Id.* at 723.

> "In considering whether a long-established common law rule – unchanged by the legislature and thus reflective of this state's public policy – is unsound in the circumstances of modern life, we have always recognized that declaration of the public policy of Maryland is normally the function of the General Assembly." We have recognized that the General Assembly's failure to amend or abrogate a common law rule sometimes reflects its desired public policy.

Id. at 723-24 (citations omitted).

In *Sowell*, the Court noted that the General Assembly had not attempted to abrogate the common law doctrine of accessoryship for any crime other than homicide even though, at the time *Sowell* was decided, Maryland was the *only* jurisdiction in the United States that had not rejected the common law distinction between principals and accessories. Nonetheless:

> Given the relative importance in completely abrogating an ancient and historic common law doctrine such as accessoryship, we believe such a task is generally better left

> to the legislative body of this State. We decline, at this time, to abrogate the doctrine by judicial action.

Id. at 726 (citation omitted).[8] Assuredly, the same statement can be made with equal force as to the doctrine of contributory negligence.

In *Mason v. Board of Education of Baltimore County*, 375 Md. 504 (2003), this Court declined to abrogate the common law rule that an individual attains a given age on the day preceding the anniversary of the individual's birth. The rule was established in England in the Seventeenth Century and adopted by Maryland pursuant to Article 5 of the Maryland Declaration of Rights. In *Mason*, the rule was applied to bar a negligence action by an individual who was injured while a minor. The complaint was filed on the third anniversary of the plaintiff's eighteenth birthday. The circuit court granted defendant's motion for summary judgment, holding that on the basis of the common law rule the plaintiff came of age on the day before her eighteenth birthday and that she had until three years after the date on which she came of age to file the suit. The action was barred by limitations because it was filed one day late. The Court of Appeals affirmed.

The plaintiff complained that the common law rule was a trap for the unwary. The Court disagreed.

> We do not believe that the affirmation of a principle which has been in existence for over three centuries and remains the law of most states can be deemed a "pleading trap." Such a departure from the common law is more properly the domain of the legislature.

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[8] In response to *Sowell*, the General Assembly abrogated the distinction between an accessory before the fact and a principal. *See* Chapter 339 of the Laws of Maryland of 2000.

Id. at 514-15 (citation and footnote omitted). Once again this Court relied on *Harrison* in reaching its decision not to abrogate a common law rule but instead to defer to the General Assembly to change public policy.

The most recent articulation of the doctrine of *stare decisis* clearly and forcibly reaffirms the result in *Harrison*. In *DRD Pool Service v. Freed*, 416 Md. 46 (2010), this Court was asked to revisit an issue first decided 20 years earlier – namely, whether the statutory limit on non-economic damages is constitutional. Prior to *DRD Pool Service*, this Court had found the limit constitutional on two occasions. *See Oaks v. Connors*, 339 Md. 24 (1995); *Murphy v. Edmonds*, 325 Md. 342 (1992). In reaffirming these earlier decisions, the Court relied on the principle of *stare decisis*. Writing for the majority, Judge Greene described the policy underlying the doctrine of *stare decisis*:

> We have said that stare decisis means "to stand by the thing decided," and is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."

DRD, 416 Md. at 63 (citations omitted).

Illustrating the bedrock importance of the doctrine, Judge Greene noted that "[t]he tests for departing from *stare decisis* are extremely narrow in Maryland, and there are few exceptions for when this Court should set aside precedent." *Id.* (citation omitted).

> We have recognized two circumstances when it is appropriate for this Court to overrule its own precedent. First, this Court may strike down a decision that is, "clearly wrong and contrary to established principles." Further, "previous decisions of this Court should not be disturbed...unless it is plainly seen that a glaring injustice has been done or some

> egregious blunder committed." Second, precedent may be overruled when there is a showing that the precedent has been superseded by significant changes in the law or facts.

Id. at 64 (citations omitted). The Court found that neither exception applied to its earlier decisions in *Oaks* and *Murphy* upholding the constitutionality of the statutory limit on non-economic damages. In that the earlier decisions were not "clearly wrong," and had not been superseded by "significant changes," sound public policy required the Court to "stand by" these decisions.[9]

Applying these tests to the *Harrison* precedent yields the same result. The analysis in *Harrison* was not "clearly wrong," and no "significant changes" have occurred to supersede the *Harrison* decision. Sound public policy, as expressed in the principle of *stare decisis*, requires this Court to reaffirm its holding in *Harrison* that the adoption of a system of comparative fault in Maryland should be the product of legislation, not judicial action.[10]

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[9] Without challenging Judge Greene's examination and analysis of the principle of *stare decisis* or its application to this case, Judge Murphy dissented.

[10] Two weeks ago, this Court reaffirmed the importance of judicial deference to the legislative branch in setting public policy. *See Barclay v. Briscoe,* 2012 Md. LEXIS 385 (Md. June 27, 2012). There, the Court declined to find a duty on behalf of an employer to a third party, injured by a commuting employee, based solely on the fact that an employee's fatigue was a foreseeable consequence of the employment. In declining to create this common law duty, Judge Greene, writing for a unanimous Court, again acknowledged deference to the General Assembly in setting public policy, quoting approvingly from *Felder v. Butler*, 292 Md. 174, 183 (1981) ("[T]he Court has always recognized that declaration of public policy is normally the function of the legislative branch of government.") and *Grady v. Unsatisfied Claim & Judgment Fund Board*, 259 Md. 501, 505 (1970) ("The question of [creating] social policy... is peculiarly appropriate for legislative, not judicial, determination."). (Slip Op. at 37.)

II. This Court Should Not Abrogate The Longstanding Common Law Defense Of Contributory Negligence As It Provides Substantial Tort Protection To Local Governments.

Despite the passage of time, nothing has changed to justify overruling *Harrison.* The Petitioner's arguments in this case are the same conclusory ones offered in *Harrison*, and are devoid of any empirical evidence demonstrating that social circumstances have changed so significantly as to justify a dramatic change in Maryland law. In such case, as explained above, it is appropriate for this Court to respect the doctrine of *stare decisis* to maintain stability and certainty in tort law and theory. *See Harrison,* 295 Md. at 458-59; *See also Stewart v. Hechinger Stores Company,* 118 Md. App. 354, 359 (1997) (even harsh consequences of doctrine of contributory negligence does not justify abandoning it; court is in "no position to do so" absent significant change in "circumstances of modern life."); *Bd. of Trustees of the Baltimore County Community Colleges v. RTKL Associates, Inc., et al.,* 80 Md. App 45, 54 (1989) (new trial ordered where jury appeared to apportion negligence as under a comparative negligence scheme because Maryland law provides for contributory negligence.)

If this Court abolishes the common law defense of contributory negligence, the potential negative impact on local governments is incalculable. The liability exposure of local governments is broad given the range of services they provide and functions they perform. Governments operate recreational facilities, landfills, schools, transit systems and police departments. Citizens demand much of their governments, and when injured by a government official or employee, they demand compensation. The payment of

settlements and judgments has a direct fiscal impact on the local governments' ability to perform their other vital functions.

For these reasons, representatives of local governments have consistently testified in committee hearings opposing legislative proposals to replace contributory negligence with some form of comparative negligence. *See Appendix.* Contributory negligence as a complete defense to tort liability benefits local governments and taxpayers by reducing the number of meritless claims presented and the amount of liability incurred. Those who cause or contribute to their own injuries often do not seek recompense from government defendants. Those who do are faced with the affirmative defense of contributory negligence. However, under a comparative negligence scheme, these claimants would make claims, attempting to "get something" out of the governmental entity in a settlement, even in spite of their own contributory negligence. The threat of recovering nothing in the face of a contributory negligence defense deters claims, aids in the reasonable and swift settlement of claims, and helps protect local governments from frivolous claims. *See Harrison,* 295 Md. at 455.

It is impossible to calculate the costs of processing, settling and litigating these extra claims, but there can be no dispute that there will be costs – costs that are currently contained by the contributory negligence defense. Similarly, if this Court adopts a comparative negligence standard, local governments will become "funding targets" when multiple defendants are involved in a case, given Maryland's Uniform Contribution Among Tortfeasors Act, Courts and Judicial Proceedings Article, § 3-1401 ("UCATA").

UCATA creates for plaintiffs a right to collect all of their damages from one or several defendants, and for defendants, a right of contribution among themselves as joint tortfeasors. *Montgomery County v. Valk Manufacturing Co.*, 317 Md. 185, 191 (1989). Under this principle, the joint tortfeasors must contribute equitably to discharge the common liability, even if their liability arises from different negligence grounds. *Parler & Wobber, et al. v. Miles & Stockbridge, P.C., et al.*, 359 Md. 671, 686-87 (2000). But because the liability is joint *and* several, a defendant that has the resources and ability to pay the judgment may be liable for the full amount of the damages, with the dismal prospect of collecting against its more impecunious co-defendants.

For this Court to deprive local governments of the defense of contributory negligence in cases involving multiple defendants runs counter to the principles underlying the UCATA. *See Montgomery County,* 317 Md. at 199-200 (UCATA does not remove shield of contributory negligence unless modified by the legislature). Were this Court to adopt a comparative negligence defense instead, there is a great chance that juries will improperly apportion greater liability than is accurate on the government, knowing that the government can and will pay. *See Harrison,* 295 Md. at 454 (noting a criticism of comparative negligence that it leaves recovery "in the unfettered discretion of the jury.")

Local government defendants are particularly vulnerable to having to cover the full amount of the liability under these circumstances, even when their liability is scant, because their resources are stable. In Maryland it is almost unheard of for local governmental entities to declare bankruptcy or become judgment-proof. If necessary, the

government can raise fees and taxes to meet obligations, even when those obligations are to be disproportionately imposed. The defense of contributory negligence protects governments from this eventuality.

If the Court were to impose a comparative negligence principle, there must be a commensurate adjustment to joint and several liability – an adjustment that the Court cannot possibly make in this case, as the issue is not presented here. This reconciliation is a matter for the General Assembly. If this liability standard is not adjusted, a government defendant may be forced to act as insurer for all liable parties, requiring it to provide full recovery to the prevailing plaintiff.

The Petitioners characterize the comparative negligence scheme as being fairer, but in fact, it results in arbitrary designations of relative fault, because fault is "not susceptible of division into degrees or percentages." *Johnson v. Mitchell Supply, Inc.*, 33 Md. App. 99, 108 (1976) (citation omitted). Indeed, as recognized by the Court in *Harrison,* "one of the main arguments against adopting comparative negligence principles is the claimed difficulty, if not impossibility, of making an accurate apportionment of fault." 295 Md. at 454. This apportionment problem may very well lead juries to impose greater than proportionate liability onto local governments under an assumption that they can afford to pay, regardless of actual fault.

Contributory negligence is a clearer principle that is easier to apply, and not unfair. Where both parties are at fault, neither may recover from the other. The defense incorporates the principle of proximate cause, *Harrison,* 295 Md. at 449, an integral component of tort liability. As noted in *Johnson*:

> Negligence and contributory negligence are not essentially different [and] [t]he law imposes the same degree of care in such cases upon both the plaintiff and defendant, but if one is more negligent than the other the law will not undertake to balance the negligence of the respective parties for the purpose of determining which was more at fault.

33 Md. App. at 108-109 (*quoting Busch v. Lilly,* 101 N.W.2d 199, 200 (Minn. 1960)). Thus, the principle of contributory negligence encourages people to be responsible and conform their own conduct to reasonable standards so as to not cause injury to themselves.

Finally, as the *Harrison* court wisely recognized, "a change from contributory to comparative fault involves considerably more than a simple common law adjustment..." 295 Md. 455. For this Court to swiftly make this fundamental change in Maryland tort law would be detrimental to local governments, and deprive them of the protections the General Assembly intended to provide when it enacted the LGTCA.

The LGTCA was enacted specifically to aid local governments in the containment of liability costs and to enable them to obtain liability insurance at affordable rates. *Baltimore Police Dept. v. Cherkes,* 140 Md. App. 282, 316 (2001) (tracing history of enactment of LGTCA as response to an "existing liability crisis"). The limitations of liability within the LGTCA were arrived at within the context of the availability of contributory negligence and other common law tort defenses. *Id.* at 324 (LGTCA preserves common law immunities); Courts and Judicial Proceedings Article, § 5-303(d) (no abrogation of existing common law defenses). If this Court suddenly deprives local governments of the well-established defense of contributory negligence, it undermines

the purpose of the LGTCA and potentially exposes local governments to a new liability crisis.

The LGTCA was not intended to increase or expand the direct or indirect liability exposure of local governments, or to waive governmental immunity, but was a compromise achieved only with the survival of existing common law defenses, including contributory negligence. *Khawaja v. City of Rockville*, 89 Md. App. 314, 324-25 (1991). The abolition of contributory negligence would create a dramatic increase in indirect, if not direct, liability of local governments by depriving their employees of the opportunity to raise the contributory negligence defense in the myriad of negligence claims against them. Thus, the change would radically increase the indirect exposure of local governments to liability under the LGTCA by limiting the ability of local government employees to defend on grounds of contributory negligence. In short, the Court would be inducing a liability crisis, if not an outright insurance crisis, at a time when local governments can least afford it.

Local governments will suffer an increase in litigation costs as well, as it will require years of legal proceedings to sort out the proper application of a new comparative negligence standard, and the related principles of joint and several liability, the last clear chance doctrine, assumption of risk, setoffs and counterclaims, and so forth. *Harrison,* 295 Md. at 455. Local governments will necessarily be embroiled in much of this protracted litigation.

This Court should retain the contributory negligence defense as the common law of Maryland. The standard is sound public policy, and promotes responsible citizen

behavior. The principle offers a clear standard for jury consideration, and is easily comprehensible and rational, as opposed to the comparative apportionment of fault that may be arbitrary and confusing. The likely ill effects of comparative negligence undermines local governments' need for fiscal security and predictability in providing adequate coverage to permit recovery for non-negligent plaintiffs who are injured by the tortious acts of government employees.

The longstanding defense of contributory negligence helps keep insurance costs for local governments reasonable and predictable, and helps to contain adjusting and settlement expenses. It encourages persons to avoid accidents and to assume their own risk through first party coverage, and minimizes frivolous claims and lawsuits and promotes reasonable settlement.

For all of these reasons, the Court should apply *stare decisis* and leave to the General Assembly any policy change so fundamental to Maryland tort law with such a detrimental impact on local governments.[11]

[11] Because local governments and their representatives have consistently opposed comparative fault legislation through committee testimony, the General Assembly has no doubt considered the detrimental impact on local governments in declining to enact comparative fault legislation. *See* Appendix.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that this Court affirm the judgment of the Circuit Court for Howard County.

Respectfully submitted,

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STATEMENT PURSUANT TO MARYLAND RULE 8-504(a)(8)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 11th day of July, 2012, two copies of the Brief of *Amici Curiae* of the Local Government Insurance Trust, Maryland Association of Counties, Maryland Municipal League and the Mayor and City Council of Baltimore were delivered by first class mail, postage prepaid to:

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APPENDIX

APPENDIX

Comparative Negligence Legislative Activity (1983 – 2012)

Year		Bill No.		Type**		Disposition
1983	*					
1984		S.B. 12		Not As Great As		HSE unf jud
1985		S.B. 21		Not As Great As		HSE 3rg fld
1986		S.B. 589		Not As Great As		HSE unf jud
1987		H.B. 1198		Not As Great As	+	HSE unf jud
		S.B. 218		Not As Great As	+	HSE unf jud
1988		H.B. 1314		Not As Great As	+	HSE unf jud
		S.B. 232		Not As Great As	+	HSE unf jud
1989	*					
1990		H.B. 1013		Not As Great As	+	HSE unf jud
1991	*					
1992	*					
1993		H.B. 1094		Not Greater Than	+	HSE wdr jud
		S.B. 266		Not Greater Than	+	SEN unf jpr
1994	*					
1995	*					
1996		H.B. 836		Not Greater Than	+	HSE wdr jud
1997		H.B. 846		Not As Great As	+	HSE unf jud
1998		S.B. 618		Not As Great As	+	SEN unf jpr
1999		H.B. 551		Not As Great As	+	HSE unf jud
2000		S.B. 779		Not As Great As	+	SEN unf jpr
2001		S.B. 483		Not As Great As	+	SEN unf jpr
2002		S.B. 872		Not As Great As		SEN 1rg sru
2003	*					
2004	*					
2005	*					
2006	*					
2007		H.B. 110		Not As Great As	+	HSE wdr jud
		S.B. 267		Not As Great As	+	SEN 1rg jpr
2008	*					
2009	*					
2010	*					
2011	*					
2012	*					

+ Opposed by local governments in committee testimony.

* No comparative fault legislation introduced.

** *See Harrison*, 295 Md. at 448 n. 3, for a description of types of comparative fault.