IN THE COURT OF APPEALS OF MARYLAND

No. 102
September Term, 2011

JOY FRIOLO,

Appellant/Cross-Appellee,

v.

DOUGLAS FRANKEL*, et al.*,

Appellees/Cross-Appellants.

On Appeal from the Circuit Court for Montgomery County
(Joseph A. Dugan, Jr., Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals

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BRIEF OF *AMICI CURIAE* THE PUBLIC JUSTICE CENTER, EMPLOYMENT JUSTICE CENTER, METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, AMERICAN CIVIL LIBERTIES UNION OF MARYLAND, AND NATIONAL FEDERATION OF THE BLIND

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December 23, 2013

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SUMMARY OF ARGUMENT

Workers in Maryland and throughout the country are unlawfully denied earned wages at alarming rates. Although Maryland's Wage and Hour Law (WHL) and Wage Payment and Collection Law (WPCL) provide remedies for victims of wage theft, the effectiveness of these laws depends on how well they are enforced. Unfortunately, governmental enforcement of wage and hour laws on both the state and federal level has ranged from weak to non-existent in recent years. Employees must therefore turn to private attorneys to vindicate their rights to receive fair wages for their work.

Private attorneys are able to litigate these cases only if they can rely on being compensated reasonably for meritorious claims. Such reasonable compensation was contemplated by the General Assembly when it enacted the fee-shifting provisions included within the WHL and WPCL. According to this Court, attorneys should be remunerated under the wage laws' fee-shifting provisions through proper application of the lodestar method.

In this case, the Court of Special Appeals devised an unprecedented approach to attorneys' fees that deviates radically from this Court's approved lodestar method and eliminates any reasonable certainty that attorneys will be adequately compensated for bringing successful claims. Under the approach applied below, attorneys will be discouraged from representing low-wage workers, the WHL and WPCL will go unenforced, and workers will be without protection from the widespread practice of wage theft. The approach employed below will also cripple enforcement of other remedial legislation by undermining attendant fee-shifting provisions.

INTERESTS OF *AMICI*

The **Public Justice Center** (PJC), a non-profit civil rights and anti-poverty legal services organization, has a longstanding commitment to promoting the rights of low-wage workers. Towards that end, the PJC has represented thousands of employees seeking to recover unpaid wages from their employers through collective and/or class actions under the state wage and hours laws and the Fair Labor Standards Act (FLSA). *See In re Tyson Foods, Inc., Fair Labor Standards Act Litigation*, MDL No. 1854 (M.D. Ga. Sept. 15, 2011); *Trotter v. Perdue Farms, Inc.*, 2001 WL 1002448, 144 Lab. Cas. ¶ 34,364 (D. Del. Aug. 16, 2001); *Heath v. Purdue Farms, Inc.*, 87 F. Supp. 2d 452 (D. Md. 2000). The PJC has also filed *amici curiae* briefs in this case and others involving the rights of low-wage workers to collect unpaid wages and attorneys' fees under Maryland's wage and hour laws and the FLSA. *See Ocean City, Md., Chamber of Commerce, Inc. v. Barufaldi*, 434 Md. 381, 393 (2013); *Jackson v. Estelle's Place, LLC*, 391 F. App'x 239 (4th Cir. 2010) (unpublished); *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350 (4th Cir. 2011); *Friolo v. Frankel*, 403 Md. 443 (2008); *Friolo v. Frankel*, 373 Md. 501 (2003).

The **Employment Justice Center**[1] (EJC) is a non-profit organization whose mission is to secure, protect, and promote workplace justice in the D.C. metropolitan area. EJC provides legal assistance on employment law matters to the working poor and supports a local workers' rights movement, bringing together low-wage workers and advocates for the poor. Established on Labor Day of 2000, EJC advises and counsels

[1] Formerly known as the D.C. Employment Justice Center.

well over 1000 workers from D.C., Maryland, and Virginia each year on their rights in the workplace. Approximately 25% of ECJ's clinic cases are from Maryland. The most common category of complaints among EJC's clients are wage and hour complaints, especially unpaid wages for work performed; indeed, in 2010, 32.6% of the claims handled in EJC's Workers' Rights Clinic were wage and hour claims. A significant portion of those who have such complaints are undocumented workers, who are hired by unscrupulous employers for the specific purpose of evading their wage payment responsibilities. EJC submitted *amici curiae* briefs previously in this case in *Friolo v. Frankel*, 403 Md. 443 (2008), and *Friolo v. Frankel*, 373 Md. 501 (2003).

The **Metropolitan Washington Employment Lawyers Association** (MWELA) is a legal membership organization with over 300 members who represent employees in employment and civil rights litigation in the metropolitan Washington area. MWELA has participated as *amicus curiae* in this case and in the following recent cases: *Jordan v. Alternative Res. Corp.*, 458 F.3d 332 (4th Cir. 2006); *Haas v. Lockheed Martin Corp.*, 396 Md. 469 (2007); *Manor Country Club v. Flaa*, 387 Md. 297 (2005); *Towson Univ. v. Conte*, 376 Md. 543 (2003). As a longtime advocate in employment and labor law, MWELA appreciates this opportunity to offer the Court its wide-ranging expertise and unique perspective on the issues presented in this appeal. The Court of Special Appeals' disposition of this case threatens to undermine important statutory rights which protect employees in the state of Maryland by deterring competent counsel from accepting such cases. Because the outcome of this case will directly impact the ability of MWELA

members to take cases on behalf of Maryland workers, MWELA has an interest in the fair resolution of the issues presented in this appeal.

The **Washington Lawyers' Committee for Civil Rights and Urban Affairs** (the Lawyers' Committee) is a non-profit civil rights organization established to eradicate discrimination and poverty by enforcing civil rights laws through litigation. In furtherance of this mission, the Lawyers' Committee represents victims of wage and hour violations in individual, class, and collective actions in state and federal courts. *E.g.*, *Montoya v. S.C.C.P. Painting Contractors, Inc.*, 530 F. Supp. 2d 746 (D. Md. 2008); *Granados v. Hann & Hann, Inc.*, No. 8:08-cv-01206 (D. Md.); *Pachina v. Chanticleer of Frederick, Inc.*, No 1:07-cv-03235 (D. Md.). From these cases, the Lawyers' Committee has amassed expertise in issues arising under state wage and hour laws and the FLSA, as well as in awards of attorneys' fees to prevailing plaintiffs in civil rights cases generally. The Lawyers' Committee has also filed *amici curiae* briefs in cases involving awards of attorneys' fees under the FLSA. *E.g.*, *Jackson v. Estelle's Place, LLC*, 391 F. App'x 239 (4th Cir. 2010) (unpublished).

The aforementioned *amici* have a continued interest in an appropriate resolution of this case because the question of attorneys' fees in wage and hour cases significantly impacts low-wage workers' ability to secure legal representation and enforce their rights.

The **American Civil Liberties Union of Maryland** is the state affiliate of the American Civil Liberties Union (ACLU), a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in this nation's Constitution and civil rights laws. Since its founding

in 1931, the ACLU of Maryland, which is comprised of approximately 14,000 members throughout the state, has appeared before various courts and administrative bodies in numerous civil rights, employment, and civil liberties cases against private and public actors, both as direct counsel and as *amicus curiae*. The ACLU, nationally and locally, is extensively involved in the representation of individuals who have been the victims of constitutional and civil rights violations. The ACLU's ability to serve as "private attorneys general" in doing this important work, is made possible by statutory fee-shifting provisions. Without these laws, and courts' willingness to fairly compensate attorneys who prevail in private enforcement of civil rights laws to vindicate individual rights and promote the public good, the ACLU's ability to take on this role would be severely limited. As such, the ACLU often participates in cases like the instant matter, where access to justice is threatened by a cramped reading of the fee-shifting laws.

National Federation of the Blind of Maryland (NFB-Md) is the Maryland state affiliate of the National Federation of the Blind (NFB), the oldest and largest national advocacy organization of blind persons in the United States. The vast majority of NFB-Md's members are blind persons. NFB-Md is recognized by the public, the General Assembly of Maryland, executive agencies of state government and the courts as a collective and representative voice on behalf of blind Marylanders and their families. Its purpose, like that of the NFB, is to promote the general welfare of the blind by (1) assisting the blind in their efforts to integrate themselves into society on equal terms and (2) removing barriers and changing social attitudes, stereotypes, and mistaken beliefs that sighted and blind persons hold concerning the limitations created by blindness and

that result in the denial of opportunity to blind persons in virtually every sphere of life. To effectuate these goals, NFB-Md has brought civil rights actions in its own name and supported litigation by individual blind Marylanders under a variety of statutes that contain fee-shifting provisions for prevailing parties. NFB-Md and NFB often bring such litigation by paying its attorneys their customary hourly fees as they accrue, and then petitioning for a court award of attorneys' fees as part of its total relief when the litigation is successful.

The ACLU of Maryland and NFB-Md previously submitted an *amici curiae* brief in *Friolo v. Frankel*, 403 Md. 443 (2008), and have a continued interest in ensuring the proper application of the lodestar method in fee-shifting cases because of its critical role in encouraging private enforcement of civil rights.

STANDARD OF REVIEW

A trial court exercises its discretion when it determines the amount of attorneys' fees to award pursuant to a fee-shifting provision. *Friolo v. Frankel*, 403 Md. 443, 455 (2008) [hereinafter *Friolo III*[2]]. However, this Court reviews for errors of law the approach applied in order to arrive at that amount. *Friolo v. Frankel*, 373 Md. 501, 512 (2003) [hereinafter *Friolo I*]. *See also Wilson-X v. Dep't of Human Res.*, 403 Md. 667, 675 (2008) ("[T]rial judges do not have discretion to apply inappropriate legal standards, even when making decisions that are regarded as discretionary in nature."). Where the

[2] This Court's second consideration of this dispute is labeled "Friolo III" to prevent any confusion between that decision and the intermediate court's decision in *Frankel v. Friolo*, 170 Md. App. 441 (2006).

lower court employs an incorrect approach, this Court will reverse the decision as a matter of law. *See Friolo I*, 373 Md. at 512.

ARGUMENT

The purpose of the Maryland Wage and Hour Law (WHL), Md. Code Ann., Lab. & Empl. § 3-401 *et seq.*, is "to provide a maintenance level consistent with the needs of the population for their health, efficiency and general well-being."[3] 1965 Md. Laws, ch. 697, § 82. The purpose of the Maryland Wage Payment and Collection Law (WPCL), Md. Code Ann., Lab. & Empl. § 3-501 *et seq.*, is "to provide a vehicle for employees to collect, and an incentive for employers to pay, back wages."[4] *Battaglia v. Clinical Perfusionists, Inc.*, 338 Md. 352, 364 (1994). These purposes will be undermined if the fee-shifting provisions of the WHL and the WPCL are applied as the Court of Special Appeals applied them below. Further, the purposes of other remedial legislation will be frustrated if the fee-shifting provisions in such laws are distorted by the approach endorsed by the Court of Special Appeals.

[3] The WHL requires Maryland employers to pay a minimum wage and overtime wages. *See* Md. Code Ann., Lab. & Empl. §§ 3-413, 3-415.

[4] The WPCL requires Maryland employers to pay their employees their earned wages at least once every two weeks or twice a month. Md. Code Ann., Lab. & Empl. § 3-502. It further requires Maryland employers timely to pay their employees all wages due on cessation of employment. Md. Code Ann., Lab. & Empl. § 3-505.

I. GOVERNMENT ENFORCEMENT IS INSUFFICIENT TO PREVENT OR REMEDY WIDESPREAD WAGE THEFT

Employers commit wage theft when they unlawfully withhold the wages due to their employees. The practice affects millions of American workers. Kim Bobo, *Wage Theft in America: Why Millions of Working Americans Are Not Getting Paid—And What We Can Do About It* 7 (New Press 2009). Although wage theft is committed against workers of all income levels, the prevalence of wage theft in low-wage industries in particular has been well-documented. *See* Siobhan McGrath, *A Survey of Literature Estimating the Prevalence of Employment and Labor Law Violations in the U.S.* (2005), *available at* http://brennan.3cdn.net/ bdeabea099b7581a26_srm6br9zf.pdf.

In 2008, 4,387 low-wage workers in Chicago, Los Angeles, and New York were surveyed regarding their pay during the previous week, resulting in the most comprehensive study of wage theft to date. *See* Annette Bernhardt, et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in American Cities* 2 (2009), *available at* http://www.unprotectedworkers.org/index.php/broken_laws/index. More than one-quarter of the workers surveyed had been paid less than the minimum wage. *Id.* More than three-quarters of those who had worked overtime hours had not received the overtime pay to which they were entitled. *Id.* And 70% of those who had worked early or late had not been paid for the time worked beyond their regular shifts. *Id.* at 3. In all, 68% of the workers surveyed had been subjected to at least one form of wage theft in the previous week. *Id.* at 5.

Wage theft occurs on a similar scale here in Maryland. A 2006 survey of 286 domestic workers in Montgomery County found that slightly over half of the live-in workers surveyed were being paid below the minimum wage. Gregory Gaines et. al., *Workplace Conditions of Domestic Workers in Montgomery County, Maryland* 8 (2006), *available at* http://www6.montgomerycountymd.gov/content/council/pdf/agenda/ cm/2006/060516/ 20060516_hhs01.pdf. The study found that employers had been withholding overtime pay from 75% of the live-in workers surveyed and 82% of the live-out workers surveyed. *Id.* at 8-10. Similarly, a 2006 survey of 75 South-Asian workers in Baltimore City revealed that 76% were not paid overtime wages to which they were entitled. CASA of Maryland, *Wage Theft: How Maryland Fails to Protect the Rights of Low-Wage Workers* 5 (2007), *available at* http://www.casademaryland.org/storage/ documents/wagetheft.pdf. And a 2004 study of 476 day laborers in the Baltimore/Washington metropolitan area found that 58% had simply not been paid at all by an employer at least once. Abel Valenzuela Jr. et al., *In Pursuit of the American Dream: Day Labor in the Greater Washington, D.C. Region* 13 (2004), *available at* http://www.sscnet.ucla.edu/issr/ csup/uploaded_files/DC_Day_Labor_Study.pdf.

In Maryland, the Department of Labor, Licensing, and Registration (DLLR) is responsible for enforcing the laws relating to wage payment. *See* Md. Code Ann., Lab. & Empl. §§ 3-101(b), 3-102, 3-427, 3-507. Yet DLLR's ability to enforce wage laws depends largely on whether the agency is adequately funded. Unfortunately, DLLR is vulnerable to major funding fluctuations depending on the political environment and budgetary constraints. For example, from 2003 to 2007, general fund appropriations to

DLLR from the state budget were cut by 44%. Eleanor M. Carey, *et al.*, *Report on the Department of Labor, Licensing and Regulation: Maryland Transition* 3 (2007), *available at* http://www.governor.maryland.gov/documents/transition/Labor.pdf.

DLLR's Employment Standards Service (ESS), which is charged with investigating wage complaints, has been particularly vulnerable to funding cuts. DLLR has twice eliminated funding to ESS, resulting in a complete cessation of enforcement activity. *Id.* at 2. ESS had a staff of thirty-five when it was disbanded in 1991. *Id.* at 2-3; *see also Baltimore Harbor Charters, Ltd. v. Ayd*, 365 Md. 366, 382 (2001) (observing that "budgetary constraints in 1991 rendered state enforcement of the [Wage] Act a virtual nullity"). When ESS was reestablished in 1994, it had only three wage investigators. *Carey, supra*, at 3. In 2006, ESS was again stripped of funding and lost all of its wage and hour investigators. *Id.* The unit was provided with some funding in 2007. *Id.* However, it currently operates with insufficient enforcement resources. DLLR has 7.5 full-time workers investigating violations of the state's wage laws, including four full-time investigators and three to four "senior citizen volunteers." Irene Lurie, *Enforcement of State Minimum Wage and Overtime Laws: Resources, Procedures, and Outcomes*, 15 Emp. Rts. & Emp. Pol'y J. 411, 421, 437 (2011). That means DLLR has approximately one investigator or volunteer for every 387,320 workers in Maryland.[5]

[5] There were approximately 2,904,900 people working in Maryland in October, 2013. U.S. Dep't of Labor, Bureau of Labor Statistics, Economy at a Glance: Maryland, *available at* http://www.bls.gov/eag/eag.md.htm#eag_md.f.1 (last visited December 14, 2013).

Federal enforcement of national wage and hour laws is also weak. Like its state counterpart, the U.S. Department of Labor's Wage and Hour Division has insufficient staff to address wage theft in any comprehensive manner. Donald Kerwin, *The US Labor Standards Enforcement System and Low-Wage Immigrants: Recommendations for Legislative and Administrative Reform*, 1 J. on Migration and Human Security 32, 33 (2013), *available at* http://jmhs.cmsny.org/index.php/jmhs/issue/view/1. Between 1975 and 2004, the number of investigators in the Wage and Hour Division dropped by 14%, the number of investigations dropped by 36%, and, the number of workers paid back wages dropped by 24%. Annette Bernhardt & Siobhan McGrath, *Trends in Wage and Hour Enforcement in the U.S. Department of Labor* 1 (2005), *available at* http://www.brennancenter.org/sites/default/files/legacy/d/download_file_35553.pdf. Yet during the same period, the labor force grew by 55% and the number of workplaces grew by 112%. *Id.* The Wage and Hour Division conducted fewer than half the number of investigations in 2008 than it did in 1998. David Weil, *Improving Workplace Conditions Through Strategic Enforcement* 7 (2010).

A 2009 Government Accountability Office (GAO) investigation of the Wage and Hour Division's "complaint intake, conciliation, and investigation processes found an ineffective system that discourages wage theft complaints." U.S. GAO, *Wage and Hour Division's Complaint Intake Processes Leave Low Wage Workers Vulnerable to Wage Theft* 1, GAO-09-458T (Mar. 25, 2009), *available at* http://www.gao.gov/new.items/d09458t.pdf. The GAO reported to Congress that there was an eight to ten month backlog of complaints, that many investigations were no more than perfunctory, and that

many complaints were never answered at all. *GAO's Undercover Investigation: Wage Theft of America's Vulnerable Workers: Hearing Before the H. Comm. On Education & Labor*, 111th Cong. 47, 59, 60, 65 (2009) (statement of Gregory D. Kutz, Managing Director, Forensic Audits and Special Investigations, Government Accountability Office), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg48054/pdf/CHRG-111hhrg48054.pdf. The GAO concluded that its "investigation clearly show[ed] that the Department of Labor ha[d] left thousands of actual victims of wage theft who sought federal government assistance with nowhere to turn." U.S. GAO, *supra*, at 24.

As of 2005, the probability of the average workplace in the U.S. being investigated by the federal government for violation of any employment law was well below one in a thousand. David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Underenforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Pol'y J. 59, 62 (2005). Although the Wage and Hour Division has recently hired more investigators, it still acknowledges that "every year there are thousands of workers whose claims [it] cannot resolve because of limited capacity." U.S. Dep't of Labor, Wage & Hour Div., *Bridge to Justice: Wage and Hour Connects Workers to New ABA-Approved Attorney Referral System, available at* http://www.dol.gov/whd/resources/ABAReferralPolicy.htm (last visited December 14, 2013). The Division suggests that such workers bring private litigation to resolve their complaints. *See id.*

II. LOW-WAGE WORKERS IN MARYLAND ARE DEPENDENT ON THE WHL AND WPCL FEE-SHIFTING PROVISIONS FOR PROTECTION FROM WAGE THEFT

Given the major gap in public enforcement of wage laws, private enforcement constitutes the primary means of vindicating workers' rights to the wages they have earned. The WHL, which provides for minimum and overtime wages, has been enforceable by private litigation since its enactment in 1965. *See* 1965 Md. Laws, ch. 697. The WPCL, which requires the timely payment of all earned wages both during employment and on termination, has included a provision allowing employees to bring private actions for unpaid wages since 1993. *See* 1993 Md. Laws, ch. 578.

Indeed, the WPCL's private right of action was enacted out of a recognition that public enforcement of the law was insufficient. The legislature added the provision in response to the 1991 budget cuts that eliminated all funding to ESS. *See Friolo I*, 373 Md. at 516; *Battaglia v. Clinical Perfusionists, Inc.*, 338 Md. 352, 363-64 (1995). "In reaction to the demise of that unit, two bills (SB 274 and HB 1006) were introduced into the 1993 session to permit employees to file their own actions for unpaid wages under the Payment Law." *Friolo I*, 373 Md. at 516. The Maryland legislature intended for workers to obtain the services of private attorneys in order to enforce their rights under Maryland's wage laws, each worker acting as a private attorney general.

But the legislators were cognizant of the likelihood that many aggrieved workers would have claims for relatively small amounts and would find it difficult to obtain representation. The Executive Director of the Maryland Volunteer Lawyers Service testified before the House that the majority of WPCL claims were made by low-income

people for amounts between $150 and $200. *Id.* at 517. The House Economic Matters Committee observed that "many employees whose employers fail to pay them as required by law are low and minimum wage employees who may be unable to afford legal representation." *Wage Payment and Collection Law, 1993: Hearings on H.B. 1006 Before the House Economic Matters Committee* (on file with State library).

To allow for such workers to vindicate their rights, the legislature enacted a fee-shifting provision under the WPCL as a part of the private right of action. Under that provision, which remains unchanged today, a court may order that an employer pay its employee's reasonable counsel fees and other costs upon a finding that the employer violated the WPCL and that the violation was not a result of a bona fide dispute. Md. Code Ann., Lab. & Empl. § 3-507.2(b).[6] In a similar provision, the WHL states that a "court may allow against [an] employer reasonable counsel fees and other costs" if the court "determines that [an] employee is entitled to recovery in an action under" the WHL. Md. Code Ann., Lab & Empl. § 3-427.[7]

[6] The provision was added as § 3-507.1 in 1993. *See* 1993 Md. Laws, ch. 578. It was renumbered as § 3-507.2 in 2010. *See* 2010 Md. Laws, ch. 52.

[7] Legislative history regarding § 3-427 is not as ample as it is for § 3-507.2, most likely because the former statute was enacted decades prior to the latter. Although explicit legislative pronouncements of the purpose of the WHL fee-shifting provision are lacking, the reasoning of the Legislature in enacting § 3-507.2 is persuasive in this context as well. In *Friolo I*, the Court of Appeals noted that although the 1993 enactment of § 3-507.1 dealt only with the Wage Payment and Collection Law:

> [I]t was clear that the problem sought to be remedied—the inability of the Commissioner to continue to pursue claims for unpaid wages—existed under the Wage and Hour Law, which, as noted, also provided for employee suits and the award of counsel fees. Unquestionably, the

The fee-shifting provisions of the WPCL and WHL are just as crucial today as they were on the dates they were enacted. A 2008 study found that low-wage victims of wage theft lost an average of $51 per week out of an average weekly wage of $339. Bernhardt et al., *supra*, at 5. At $51 withheld per week, even a lawsuit for wages withheld over the course of many weeks is unlikely to recover enough to money pay an attorney to bring the suit.[8] It simply is not economically feasible for such workers to pay for legal representation to seek the wages they are owed. It is only due to the fee-shifting provisions that low-wage workers can find private attorneys to litigate such cases.

A few low-income victims of wage theft might be able to get pro bono legal assistance. However, there are far too few attorneys available on a pro bono basis to meet the demand for their services. A 2009 study by the Legal Services Corporation (LSC) determined that nationwide, "roughly one-half of the people who seek help from LSC-funded legal aid providers are being denied service because of insufficient program resources." LSC, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* 12 (2009), *available at* http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf. Likewise, a 2006 report of the Maryland Court of Appeals' Committee on Pro Bono Legal Service cited several studies showing that considerably fewer than half of low-income

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> provisions for counsel fees in § 3-427(d) and § 3-507.1(b) are remedial in nature and should therefore be given a liberal interpretation.

Friolo I, 373 Md. at 517.

[8] A claim for wages withheld over the full three-year limitations period would be for less than $8,000.

Marylanders with legal needs were able to obtain representation. Standing Comm. of the Court of Appeals on Pro Bono Legal Serv., *State Action Plan & Report* 3-5 (rev. 2006), *available at* http://www.courts.state.md.us/probono/pdfs/stateactionplan12-18-06.pdf. *See also* Md. Access to Justice Comm', *Interim Report and Recommendations-Fall 2009* 19, *available at* http://www.courts.state.md.us/mdatjc/pdfs/interimreport111009.pdf (comparing the total number of persons per lawyer in Maryland (162.8) with the number of low-income persons in Maryland per legal services lawyer or pro bono equivalent (455.7)).

Low-income workers are therefore dependent on the fee-shifting provisions of the WHL and WPCL for access to justice. These provisions "permit the favored suitor to obtain counsel that, because of legal or practical fee limitations, might otherwise be unavailable." *Friolo I*, 373 Md. at 528. They were "designed to ensure that an employee will have the assistance of competent counsel in pursuing what is likely to be a relatively small claim." *Ocean City, Md., Chamber of Commerce, Inc. v. Barufaldi*, 434 Md. 381, 393 (2013) (discussing the WPCL's fee-shifting provision).

Fee-shifting provisions not only provide employees with a vehicle for redress after violations have occurred, but also "stimulate voluntary compliance with the law." *Md. Nat'l Capital Park & Planning Comm'n v. Crawford*, 59 Md. App. 276, 302 n.12 (1984). The "provision for counsel fees is an important element in ensuring that the law is obeyed." *Friolo I*, 373 Md. at 518. Fee-shifting provisions deter potential violators by (1) heightening concern among employers that more employees will successfully sue for the wages they are owed and (2) raising the potential cost to an employer that violates the

law. "The action of these private individuals provides a significant public benefit by enforcing the law, deterring future misconduct and promoting compliance with the law." Md. Access to Justice Comm'n, *Fee-Shifting to Promote the Public Interest in Maryland* 1 (2010). "Those private actions put violators on notice that the law will be enforced, deterring future non-compliance. Under the private attorney general doctrine, this larger social benefit justifies the award of attorney's fees to the successful plaintiff." *Id.* at 4.

But neither the larger social benefit nor the private benefit of restored wages will inure unless the fee-shifting provisions are applied in such a way that private attorneys have reason to accept meritorious wage payment cases. The only way that the wage laws will be enforced is if attorneys are able to rely on "the statutory assurance that [they] will be paid a reasonable fee" for litigating meritorious wage dispute cases on behalf of low-wage workers. *Friolo I*, 373 Md. at 526 (quoting *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986)).

III. THE LODESTAR APPROACH TO ATTORNEYS' FEES IS DESIGNED TO DETERMINE THE NUMBER OF HOURS REASONABLY EXPENDED TO OBTAIN THE RELIEF AWARDED

In *Friolo I*, this Court "conclude[d] that the lodestar approach, with its adjustments, is the presumptively appropriate methodology to be used under the Wage and Hour Law and the [Wage] Payment [and Collection] Law" to provide attorneys with the assurance of reasonable fees. *Friolo I*, 373 Md. at 529. The approach incentivizes attorneys to litigate wage cases because it provides "a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983).

The lodestar approach begins with a calculation of "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Friolo I*, 373 Md. at 523. Time spent solely on unsuccessful claims is excluded. *Id.* at 524. Likewise, time spent solely on claims that are not subject to fee-shifting is excluded. *Millea v. Metro-North R.R. Co.*, 658 F.3d 154 (2d Cir. 2011).

A court may then adjust the resulting figure upwards or downwards, taking into account a number of factors. The "most critical" of these factors is "the degree of success obtained." *Hensley*, 461 U.S. at 436. This factor calls for a court to "focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* at 435. In doing so, a court should consider only (1) successful fee-shifting claims and (2) non-fee-shifting claims and unsuccessful fee-shifting claims that "involve a common core of facts or [are] based on related legal theories" when compared to the successful fee-shifting claims. *Id.* at 434-35.

The court must determine whether "the plaintiff achieve[d] a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award." *Id.* at 434. If the overall relief is generally excellent but "the plaintiff failed to prevail on every contention raised in the lawsuit" (such as where the court rejects or fails to reach alternative grounds for a desired outcome), then there "is not a sufficient reason for reducing a fee" because "[t]he result is what matters." *Id*. "If, on the other hand, a plaintiff has achieved only partial or limited success[,] the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Id.* at 436.

In the latter circumstance, a trial court must determine "whether the expenditure of counsel's time was reasonable in relation to the success achieved." *Id.* "There is no precise rule or formula for making these determinations." *Id.* Comparing the total number of issues in the case with the number of issues prevailed upon does not reflect the different number of hours reasonably necessary to develop each particular issue. *See id.* at 435 n.11 (rejecting "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon" because "[s]uch a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors."). Similarly, comparing the total number of dollars sought with the number of dollars awarded does not reflect the different number of hours reasonably necessary to develop the theories and facts leading to each subset of dollars requested.[9] Instead of employing a rule or a formula, a trial court must address each case individually to determine "the attorneys' fees that contributed to any success that the court determines the plaintiff had." *Friolo III*, 403 Md. at 461.

Only by taking into account the complexity of the facts and theories involved in a particular plaintiff's successful claims can a trial court ensure that its ruling serves the twin purposes of the fee-shifting provisions within the WHL and the WPCL. First, by excluding hours unnecessary to obtain the successes achieved, the court does not reward a plaintiff for losing claims and does not incentivize an attorney to spend excessive hours on weak claims. Second, by including all of the hours reasonably necessary to obtain the

[9] The latter comparison also fails to account for injunctive relief, which may justify a full fee award even where damages have been denied or were not sought. *Hensley*, 461 U.S. at 435 n.11.

relief that was awarded, the court ensures that lawyers will remain willing to bring litigation that the legislature has designated as a public priority. A reasonable fee excludes time spent that was unnecessary to obtain the successful results achieved; however, "a 'reasonable' fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious [wage payment] case." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010).

IV. THE FORMULA DEVISED BY THE COURT OF SPECIAL APPEALS MISAPPLIES THE LODESTAR APPROACH AND UNDERMINES THE WHL, THE WPCL, AND OTHER LAWS CONTAINING FEE-SHIFTING PROVISIONS

In the decision below, the Court of Special Appeals created its own peculiar formula for quantifying the "degree of success" factor. *See Friolo v. Frankel*, 201 Md. App. 79, 117-28 (2011) [*Friolo IV*]. The intermediate court relied on the differences between the total amount of monetary relief sought by the plaintiff, the amount awarded to the plaintiff by the jury, and the amount of any settlement offer by the defendant. *Id.* The court calculated as follows:

> As it happened, Friolo demanded $78,164.00 in damages at trial, while appellees offered $3,000.00, and the jury awarded $11,778.85. Using our formula, Friolo's demands exceeded the judgment by $66,385.15, while appellees' offer to settle fell short by $8,778.85. Thus, out of the $75,164.00 disagreement between the two parties, Friolo was responsible for eighty-eight percent of the difference. Had Friolo been completely successful, she would have been entitled to the entire $69,637.50 lodestar amount. Under the circumstances, however, Friolo's degree of success relative to her claims and appellees' parallel—but lesser—contribution to litigation reduced her entitlement to statutory attorney's fees by eighty-eight percent, for a legally proper statutory award of $8,356.50 in fees for the trial stage of litigation.

Id. at 123-24 (footnotes omitted).[10] The formula's stated purpose was "to balance the parties' incentives and account for each side's relative contribution to causing unnecessary litigation." *Id.* at 122.

When the intermediate court adopted this formula, it misapplied the lodestar approach. In doing so, it undermined the purpose of the fee-shifting provisions contained within the WHL and the WPCL. It also established a precedent with the potential to undermine a large number of other statutes enacted to protect the residents of Maryland.

A. THE FORMULA IS BASED ON A FEDERAL RULE THAT MARYLAND HAS NOT ADOPTED AND THAT CONFLICTS WITH THE PURPOSE OF FEE-SHIFTING PROVISIONS

The Court of Special Appeals devised its rule in light of Federal Rule of Civil Procedure 68, pursuant to which a defendant may "serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued." Fed. R. Civ. P. 68(a), (c). "If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." Fed. R. Civ. P. 68(d). Under this rule, "the proper 'baseline' to measure success is the defendant's willingness to pay." *Friolo III*, 201 Md. App. at 121. The Court of Special Appeals invented its formula based on a determination that this "baseline" should also be reflected in the lodestar calculation of attorneys' fees under the WHL and the WPCL.

The intermediate court did not explain why the lodestar approach adopted for the purpose of determining fee awards under Maryland remedial statutes should be based on

[10] Ms. Friolo disputes the accuracy of some of the numbers used by the Court of Special Appeals. *Amici* quote this passage only to illustrate how the lower court's formula was applied.

an unrelated rule applying generally to federal civil litigation. Maryland has no state analog to Fed. R. Civ. P. 68. Indeed, the Rules Committee has rejected proposals to adopt a similar rule four separate times. *See* Court of Appeals Standing Committee on Rules of Practice and Procedure (Rules Committee), Minutes of Meeting Held April 15, 1983, 39-41 (1983); Rules Committee, Minutes of Meeting Held May 16-17, 1986, 9-14 (1986); Rules Committee, Minutes of Meeting Held September 7-8, 1990, 39-44 (1990); Rules Committee, Minutes of Meeting Held March 10, 2000, 22-29 (2000).

The two most recent times that the Rules Committee has rejected a proposal to adopt a state analog of Federal Rule of Civil Procedure 68, the Committee has done so in part because of the Committee's view that the Rule unfairly penalizes parties that are litigating in good faith. In 1990, Committee member James Lombardi, Esq., observed that the Rule "penalizes litigants for guessing wrong" and stated that "[a] party who makes or rejects an offer should not be penalized if the jury later makes a different award." Rules Committee, Minutes of Meeting Held September 7-8, 1990, 43 (1990). In 2000, Committee Vice Chair Linda Schuett objected on the ground that "[t]here m[ight] be a good faith dispute over liability, and the offer of judgment may have a chilling effect on access to the courts" because "[i]f there is a threat that one party must pay the other side's attorney's fees, the rule may keep out people who should have access to the courts." Rules Committee, Minutes of Meeting Held March 10, 2000, 25 (2000).

The concerns that have led the Rules Committee to reject the adoption of a Federal Rule of Civil Procedure 68 analog in Maryland apply with even greater force in the context of the formula that the Court of Special Appeals has devised for calculating

attorneys' fees under the WHL and the WPCL. Under the formula, attorneys are severely penalized for guessing wrong about how much to seek in a case. In fact, they are penalized even for guessing *right* about whether to reject a settlement offer, because a plaintiff's attorneys' fees are reduced based on a defendant's settlement offer even if the settlement offer is less (even substantially less) than the amount eventually awarded at trial. If this approach is affirmed, attorneys will be chilled from accepting wage dispute cases at all, because they will have no "statutory assurance that [they] will be paid a reasonable fee" for litigating such dispute cases. *Friolo I*, 373 Md. at 526 (quoting *Del. Valley Citizens' Council for Clean Air*, 478 U.S. at 565). This, in turn, will curtail access to justice for victims of wage theft.

B. THE FORMULA IMPROPERLY ADJUSTS THE AWARD OF ATTORNEYS' FEES BASED ON CLAIMS THAT WERE ALREADY EXCLUDED BY THE LODESTAR CALCULATION

The intermediate court's formula measures a plaintiff's supposed contribution to unnecessary litigation by subtracting the amount awarded by the jury from the amount requested by the plaintiff. *Friolo IV*, 201 Md. App. at 122-23. But the plaintiff's damages request reflects claims that will have already been excluded in a proper application of earlier steps of the lodestar calculation. In effect, the formula adopted by the Court of Special Appeals improperly deducts for such claims twice by excluding them from the lodestar calculation and then using them again in the "degree of success" factor to diminish the lodestar calculation a second time.

In particular, the lodestar calculation excludes all time spent working on unsuccessful claims that are unrelated to successful claims. *Friolo I*, 373 Md. at 524.

See, e.g., Friolo III, 403 Md. at 455. The result of the initial calculation thus awards a plaintiff zero dollars in attorneys' fees for unsuccessful fee-shifting claims. *See, e.g., Weichert Co. of Md., Inc. v. Faust*, 192 Md. App. 1, 10 (2010), *aff'd* 419 Md. 206 (2011) (rejecting a party's claim for attorneys' fees when it had been unsuccessful on the only one of its claims that was covered by a fee-shifting provision of a contract). A plaintiff's lack of success on a fee-shifting claim therefore "provide[s] no basis for adjusting the lodestar" when calculating the award of fees for a successful separate claim. *Millea*, 658 F.3d at 168. But the formula devised by the Court of Special Appeals includes those unsuccessful claims in its "degree of success" adjustment when it compares the plaintiff's damages request to the jury verdict.

It is particularly striking that among the unsuccessful claims that the formula "double counts" against a plaintiff are non-fee-shifting claims. Hours spent preparing for non-fee-shifting claims that are unrelated to successful fee-shifting claims simply do not give rise to fee awards. *Friolo III*, 403 Md. at 456 (absent a fee-shifting provision "each party to a case is responsible for the fees of its own attorneys, regardless of the outcome"). Accordingly, the plaintiff's "lack of success on [a non-fee-shifting] claim provides no reason to adjust the lodestar because the lodestar should have already excluded this claim." *Millea*, 658 F.3d at 168. The formula devised by the Court of Special Appeals nonetheless inappropriately reduces attorneys' fees on the basis of claims that should be entirely irrelevant to the fees calculation.

Similarly, the intermediate court's formula improperly increases a plaintiff's award of attorneys' fees based on any successful non-fee-shifting claims that are

unrelated to the plaintiff's successful fee-shifting claims. Where a plaintiff is successful in litigating a claim, the inclusion of that claim in the jury's verdict will increase the difference between the amount awarded and any settlement offer from the defendant, thus increasing the proportion of the litigation deemed to be "unnecessarily caused" by the defendant. The corresponding increase in the fee award under those circumstances is improper. *See Wales v. Jack M. Berry, Inc.*, 192 F. Supp. 2d 1313, 1327 (M.D. Fla. 2001) ("[A] modification in the lodestar amount should not be affected by a recovery on [a] non-fee-shifting claim."). *See also Diamond Point Plaza Ltd. P'ship v. Wells Fargo Bank, N.A.*, 400 Md. 718, 760 (2007) ("Some claims may allow fee-shifting while others may not, and the lawyer must be prepared to establish how much time is allocable to the claims for which fee-shifting is sought.").

The adjustment of the lodestar based on claims that have already been excluded from the calculation departs from the approach adopted by this Court. And when such an adjustment is a "double deduction" for unsuccessful claims that are unrelated to the successful fee-shifting claims, the adjustment results in attorneys' fees that are lower (potentially substantially lower) than they should be under a proper lodestar calculation. The intermediate court's formula thus impermissibly denies a plaintiff with unsuccessful claims "the attorneys' fees that contributed to any success that the court determines the plaintiff had." *Friolo III*, 403 Md. at 461. And without the incentive of such fees, private attorneys will be financially incapable, and therefore generally unwilling, to litigate wage claims on behalf of low-income workers.

C. THE FORMULA IMPROPERLY ACCOUNTS FOR THE PLAINTIFF'S DAMAGES REQUEST

The formula devised by the Court of Special Appeals is fundamentally flawed because it is not a reliable proxy for a direct determination of "whether the expenditure of counsel's time was reasonable in relation to the success achieved." *Hensley*, 461 U.S. at 436. The formula attempts to draw a correlation between the plaintiff's damages request and the hours actually expended to obtain the various damages amounts included within the request. In fact, no such correlation exists. Consequently, the inclusion of the damages request in the intermediate court's formula will inexorably lead to improper fee awards.

For instance, a plaintiff's attorneys may spend very little time pursuing a claim that is legally and factually uncomplicated (and therefore requires few attorney-hours) but is potentially worth a great deal of money. The plaintiff may eventually be unsuccessful in prosecuting that claim. The formula invented by the Court of Special Appeals will take a large deduction from the attorneys' fees based on the "lack of success" in pursuing the claim solely due to the fact that the claim potentially could have been worth a significant amount. The formula improperly considers the amount of the damages instead of the hours actually spent pursuing the damages. The formula therefore accounts for the plaintiff's damages request in a manner that is unrelated to the goal of deducting hours other than those "that contributed to any success that the court determines the plaintiff had." *Friolo III*, 403 Md. at 461.

Because of the role of the plaintiff's damages request, the formula is faulty even where a large, unsuccessful claim is appropriately considered within the lodestar calculation because it has facts or theories in common with a successful claim. The size of the unsuccessful damages claim is not necessarily related to the number of hours expended on it or the corresponding increase in attorneys' fees requested. Discounting the fees in the proportion dictated by the formula is therefore improper even if the fees are not subject to the "double-discounting" described above. *See supra* Part IV.B.

The formula's use of the plaintiff's damages request can also result in an inappropriately inflated attorneys' fees award. A plaintiff may have a number of related claims, most of which are successful and one of which is unsuccessful. If the plaintiff's attorneys spend many hours developing the unsuccessful claim, and that claim is for a relatively small amount of money, then applying the formula devised by the intermediate court will result in an improper fee award. The attorneys' fees will be reduced only slightly under the formula, because the unsuccessful claim accounts for only a small portion of the amount identified in the plaintiff's damages request. But if a court is to determine the hours reasonably necessary to obtain the relief awarded, then the fees should be reduced significantly to reflect the large number of hours spent pursuing the unsuccessful claim. The formula simply fails to accomplish the goal of the lodestar approach to calculating attorneys' fees.

In addition to producing improper attorneys' fees awards, the formula's use of the plaintiff's damages request will result in a perversion of litigation incentives. Because the formula reduces the award of attorneys' fees based on the difference between the

damages request and the eventual recovery, it puts economic pressure on attorneys to set damages requests low in order to minimize that difference. Yet setting damages requests low is directly antithetical to clients' interests in getting the largest recoveries possible under the law. The formula incentivizes attorneys to put their clients' interests at risk in order to avoid reduction of their own fees. This Court should not embrace a formula that creates such a conflict of interest between counsel and client.

D. THE FORMULA UNDERCUTS THE TREBLE DAMAGES PROVISION OF THE WPCL

The formula's creation of attorney-client conflicts is particularly problematic in the context of the WPCL because it undermines the operation of that law's treble damages provision. The WPCL provides for a discretionary award of up to treble damages against employers that are found to have withheld wages in bad faith.[11] The provision has a crucial deterrent effect on unscrupulous employers. But if the formula devised by the Court of Special Appeals is affirmed, then attorneys who pursue treble damages on behalf of their clients will put a large portion of their attorneys' fees at risk.

The WPCL's treble damages provision deters both the defendant in a given case and other employers from unlawfully withholding wages from their employees. Without the threat of treble damages, an employer can simply withhold wages, count on the likelihood that very few workers will know their rights or have the wherewithal to file suit, and pay the few successful plaintiffs nothing more than the amount that the plaintiffs

[11] *See* Md. Code Ann., Lab. & Empl. § 3-507.2(b) ("If . . . a court finds that an employer withheld the wage of an employee in violation of this subtitle and not as a result of a bona fide dispute, the court may award the employee an amount not exceeding 3 times the wage.").

were owed all along. An economically savvy (if morally questionable) employer is incentivized to withhold wages from its employees in the absence of the treble damages clause. In that context, withholding wages owed to employees is a reliable, albeit unlawful, way to reduce payroll costs. But the treble damages clause gives employers good reason to think twice (or thrice) before unlawfully withholding wages.

The formula devised by the Court of Special Appeals eviscerates the deterrent protection provided by the threat of treble damages. The formula strongly discourages attorneys from asserting treble damages claims on behalf of their clients. The discouragement stems once again from the formula's use of the plaintiff's damages request.

A treble damages claim increases the damages request by an amount equivalent to an additional three times the wages owed. This does not reflect the hours reasonably necessary to litigate a multiple damages claim. Such a claim might require differing amounts of attorney-hours depending on (1) how aggressively an employer defends against a finding that it has withheld wages in bad faith and (2) how many hours the plaintiff must spend responding to such a defense. There is no reason to assume that such a claim will invariably (or even frequently) multiply the attorney-hours required by *four*. Yet the damages request included in the intermediate court's formula will be multiplied by four to reflect the additional request of treble damages.

If the (wholly discretionary) request for treble damages is denied, then the difference between the damages requested and the damages awarded will correspondingly balloon and the attorneys' fees awarded under the intermediate court's

formula will significantly decrease. While a proper lodestar calculation excludes time spent exclusively on unsuccessful claims, the intermediate court's formula will exclude far more hours than should be excluded almost every time an unsuccessful treble damages request is made. An attorney can therefore no longer be assured that he or she will be reasonably compensated for the hours spent litigating the plaintiff's successful claims; the disproportionate decrease in attorneys' fees due to the denied discretionary award is too drastic to allow for such an assurance. Consequently, it is in an attorney's interest to avoid claiming multiple damages, regardless of whether such a claim is in the interest or his or her client and regardless of the fact that regular enforcement of the treble damages clause is in the interest of all employees in Maryland.

Of course, an attorney might ignore his or her own financial interest and choose to litigate a case fully, making a treble damages request where it is warranted. If the unpaid wages are awarded but the treble damages request is denied, as is all too common, that attorney will likely lose a significant portion of his or her fees. Attorneys willing to request multiple damages will therefore lose the "incentive, based on a realistic expectation of reasonable compensation, . . . to agree to take on wage dispute cases, even where the dollar amount of the potential recovery may be relatively small." *Friolo III*, 403 Md. at 457-58. Because of the intermediate court's formula, the only attorneys willing to provide quality representation to low-income workers will be financially precluded from doing so. This Court should not countenance such a result.

E. THE FORMULA IMPROPERLY ACCOUNTS FOR THE DEFENDANT'S SETTLEMENT OFFERS

The inclusion of the plaintiff's damages request is not the only component of the intermediate court's formula that makes it an improper method for calculating the fees reasonably expended in pursuit of the relief awarded. The formula further diverges from a proper lodestar calculation because of the manner in which it accounts for settlement offers from the defendant. The formula overlooks the lack of a consistent relationship between the amount of a defendant's settlement offer and the hours reasonably expended to obtain an award on fee-shifting claims.

The formula purports to measure the defendant's "relative contribution to unnecessary litigation" as the difference between the defendant's settlement offer, if any, and the amount recovered by the plaintiff. *Friolo IV*, 28 A.2d at 781. This means that a defendant can substantially reduce its eventual liability for attorneys' fees by making a settlement offer that is, for example, half of what the plaintiff is actually entitled to and eventually recovers. Under the formula, the defendant's supposed "contribution to unnecessary litigation" will be halved, and its liability for attorneys' fees correspondingly reduced, solely because such an inadequate offer was made and rejected.

But this reduction does not necessarily relate in any way to the hours reasonably expended pursuing the results achieved. For instance, a plaintiff might win $10,000 at trial. The plaintiff's attorney will receive a significantly lesser amount in fees if the defendant made a settlement offer of $5,000 than the attorney will receive if the defendant made a settlement offer of $1. But either way, the plaintiff was correct to

reject the settlement offer and the attorney was correct to advise rejecting it.[12] Most importantly, whether the defendant offered $1 or $5,000, the amount of hours reasonably expended to obtain the $10,000 jury award does not change by even one hour. The attorney was justified in spending those hours, and "the expenditure of counsel's time was reasonable in relation to the success achieved." *Hensley*, 461 U.S. at 436.

The manner in which the formula adopted by the Court of Special Appeals accounts for a defendant's settlement offer fails to reflect the hours reasonably expended in pursuit of the results achieved. But if attorneys are not paid for those hours in full, then they will decide (due to the economic realities imposed by the intermediate court's formula) to make themselves unavailable to litigate wage payment cases. And the fee-shifting provisions of the WHL and WPCL will be eviscerated because low-income workers will no longer be able "to obtain counsel that, because of legal or practical fee limitations, might otherwise be unavailable." *Friolo I*, 373 Md. at 528.

[12] Savvy defendants will use this aspect of the intermediate court's formula to reduce attorneys' fees awards artificially by making settlement offers that a reasonable plaintiff could not accept but that that will nonetheless significantly impact the formula's results. Unscrupulous defendants could even use the improperly low "degree of success" multiplier to drive up the hours that plaintiffs' attorneys must expend on litigation while avoiding compensating them for those hours as otherwise required by the well-settled lodestar analysis. These defendants' attorneys will know that their clients will only have to pay for a fraction of the plaintiffs' attorneys' fees even if the litigation is mostly successful. The intermediate court's formula is therefore at counter-purposes with fee-shifting provisions, which are intended to deter defendants from driving up fees because (under a proper lodestar calculation) a defendant "cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response." *City of Riverside v. Rivera*, 477 U.S. 561, 581 n.11 (1986) (quoting *Copeland v. Marshall*, 641 F.2d 880, 904-05 (D.C. Cir. 1980) (en banc)). In contrast to the proper lodestar approach, which discourages scorched-earth litigation tactics, the formula devised by the Court of Special Appeals creates the opportunity (and perhaps even the incentive) for defendants to drive up plaintiffs' attorney-hours with impunity.

F. THE FORMULA IMPEDES THE ENFORCEMENT OF MANY STATUTES ENACTED TO PROTECT VULNERABLE MARYLANDERS

The formula devised by the intermediate court threatens to undermine not only the WHL and the WPCL, but also a whole host of other statutes enacted by the General Assembly to protect the citizens of Maryland. Many of our state's most vulnerable residents depend on fee-shifting provisions for the enforcement of important protective legislation. For instance, fee-shifting provisions enable Marylanders to find legal representation to seek redress when they are victims of employment discrimination, *see* Md. Code Ann., State Gov't § 20-1015, or housing discrimination, *see* Md. Code Ann., State Gov't § 20-1035(e)(2). Fee-shifting provisions make possible private enforcement of the Consumer Protection Act, *see* Md. Code Ann., Com. Law § 13-408(b); the Motorized Wheelchair Warranty Enforcement Act, *see* Md. Code Ann., Com. Law § 14-2705; the Family Support Act, *see* Md. Code Ann., Fam. Law § 10-325(b); and the Maryland Mortgage Fraud Act, *see* Md. Code Ann., Real Prop. § 7-406(b). Because of fee-shifting provisions, attorneys will agree to litigate on behalf of Marylanders who are victims of salary discrimination, *see* Md. Code Ann., Lab. & Empl. § 3-307(e), or whose landlords wrongfully retain their security deposits, *see* Md. Code Ann., Real Prop. § 8-203(b)(2). These are but a few examples of remedial laws in Maryland that rely on a fee-shifting provision to promote access to the courts.

If the formula devised by the Court of Special Appeals is affirmed, then attorneys can have no expectation of reasonable compensation when they represent clients who are dependent on fee-shifting provisions for the enforcement of any of the above remedial

legislation. For the same reasons that the protections of the WHL and WPCL will be undermined, the protections of these other laws will also be impaired. Attorneys will be incentivized to make low damages requests at their clients' expense. Attorneys will risk being paid insufficient fees for litigating successful claims if even one claim in the lawsuit is unsuccessful (whether the unsuccessful claim is subject to fee-shifting or not). And attorneys' fees will be diminished as a result of settlement offers even when no reasonable attorney or client would have accepted the offer.

With respect to laws that (like the WPCL) provide for discretionary damages in addition to mandatory compensatory damages, attorneys will be incentivized either to refuse to request such discretionary damages or to refuse to initiate any litigation under such laws. For example, attorneys who request punitive damages in housing discrimination suits will risk a significant reduction in attorneys' fees if such punitive damages are denied. *See* Md. Code Ann., State Gov't § 20-1035(e)(1) (providing for discretionary punitive damages "if the court finds that a discriminatory housing practice has occurred"). And attorneys who request treble damages in suits under the Maryland Mortgage Fraud Act will risk a significant reduction in attorneys' fees if multiple damages are denied. *See* Md. Code Ann., Real Prop. § 7-406(c) (providing for discretionary damages "equal to three times the amount of actual damages" if the court finds the defendant violated the law). These punitive and multiple damages provisions will be entirely undermined if this Court affirms the intermediate court's formula.[13]

[13] A similar concern applies to statutes that allow for compensatory damages for noneconomic injury, such as pain and suffering or economic distress, that may be hard to

At the most basic level, the difficulty with the lower court's formula is that it conflicts with the core purpose of fee-shifting provisions. The intermediate court's focus on discouraging or penalizing plaintiffs for supposedly unnecessary litigation runs counter to the concept that animates fee shifting: that litigation by "private attorneys general" on behalf of plaintiffs who cannot otherwise afford counsel is necessary in order to enforce certain laws that have been enacted in the public interest. Fee-shifting provisions "are not policy-neutral" and "are usually designed to encourage suits that, in the judgment of the legislature, will further public policy goals."[14] *Monmouth Meadows Homeowners Ass'n., Inc. v. Hamilton*, 416 Md. 325, 334 (2010) (quoting *State v. Native Vill. of Nunapitchuk*, 156 P.3d 389, 403 (Alaska 2007)). Fee shifting provisions "constitute a legislative pronouncement that . . . [violations of the law] represent a[] substantial threat to the public interest." *Id.* at 336. By contrast, the formula invented by the Court of Special Appeals constitutes a judicial pronouncement that undermines the legislation enacted to protect Marylanders from such threats. *Amici* therefore urge this Court to reject the formula proposed below.

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quantify. *See, e.g.*, Md. Code Ann., State Gov't §§ 20-1009(b), 20-1013(d) (allowing for emotional distress claims in employment discrimination suits). The lower court's formula would have a tremendous chilling effect on asserting such damages claims.

[14] For this reason, *Amici* take issue with the pronouncement made by the Court of Special Appeals that the plaintiff's "continued attempts to paint herself and her counsel as crusaders of the public good are pretensions at best." *Friolo IV*, 201 Md. App. at 125 n.34. By enacting the fee-shifting provisions at issue in this case, the General Assembly indicated that successful plaintiffs under the WHL and WPCL achieve not only a private but also a public good.

CONCLUSION

For the reasons given above, this Court should vacate the intermediate court's entry of judgment and should rule that the novel formula devised by the intermediate court conflicts with the purpose of fee-shifting statutes.

Respectfully submitted,

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December 23, 2013

STATEMENT OF TYPE STYLE AND POINT SIZE

This brief uses 13-point Times New Roman font.

PERTINENT STATUTES AND RULES

Maryland Wage and Hour Law
Md. Code Ann., Lab. & Empl. §§ 3-401 to 3-431 (Selected Provisions)

§ 3-413. Minimum wage payment required

(a) In this section, "employer" includes a governmental unit.

(b) Except as provided in § 3-414 of this subtitle, each employer shall pay:

(1) to each employee who is subject to both the federal Act and this subtitle, at least the greater of:

(i) the minimum wage for that employee under the federal Act; or

(ii) a wage that equals a rate of $6.15 per hour; and

(2) each other employee who is subject to this subtitle, at least:

(i) the greater of:

1. the highest minimum wage under the federal Act; or

2. a wage that equals a rate of $6.15 per hour; or

(ii) a training wage under regulations that the Commissioner adopts that include the conditions and limitations authorized under the federal Fair Labor Standards Amendments of 1989.

§ 3-415. Payment of overtime to employees

(a) Except as otherwise provided in this section, each employer shall pay an overtime wage of at least 1.5 times the usual hourly wage, computed in accordance with § 3-420 of this subtitle.

(b) This section does not apply to an employer that is:

(1) subject to 49 U.S.C. § 10501;

(2) an establishment that is a hotel or motel;

(3) an establishment that is a restaurant;

(4) considered a gasoline service station because the employer is engaged primarily in selling gasoline and lubricating oil, even if the employer sells other merchandise or performs minor repair work;

(5) a bona fide private country club;

(6) a not for profit entity and is engaged primarily in providing temporary at-home care services, such as companionship or delivery of prepared meals, to aged or sick individuals, individuals with disabilities, or individuals with a mental disorder;

(7) a not for profit concert promoter, legitimate theater, music festival, music pavilion, or theatrical show; or

(8) an amusement or recreational establishment, including a swimming pool, if the establishment:

(i) operates for no more than 7 months in a calendar year; or

(ii) for any 6 months during the preceding calendar year, has average receipts in excess of one-third of the average receipts for the other 6 months.

(c) This section does not apply to an employer with respect to:

(1) an employee for whom the United States Secretary of Transportation may set qualifications and maximum hours of service under 49 U.S.C. § 31502;

(2) a mechanic, partsperson, or salesperson who primarily sells or services automobiles, farm equipment, trailers, or trucks, if the employer is engaged primarily in selling those vehicles to ultimate buyers and is not a manufacturer; or

(3) a driver if the employer is engaged in the business of operating taxicabs.

§ 3-427. **Action against employer**

(a) If an employer pays an employee less than the wage required under this subtitle, the employee may bring an action against the employer to recover the difference between the wage paid to the employee and the wage required under this subtitle.

(b) On the written request of an employee who is entitled to bring an action under this section, the Commissioner may:

(1) take an assignment of the claim in trust for the employee;

(2) ask the Attorney General to bring an action in accordance with this section on behalf of the employee; and

(3) consolidate 2 or more claims against an employer.

(c) The agreement of an employee to work for less than the wage to which the employee is entitled under this subtitle is not a defense to an action under this section.

(d) If a court determines that an employee is entitled to recovery in an action under this section, the court may allow against the employer reasonable counsel fees and other costs.

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Maryland Wage Payment and Collection Law
Md. Code Ann., Lab. & Empl. §§ 3-501 to 3-509 (Selected Provisions)

§ 3-502. Payment of wage by employer

(a) (1) Each employer:

(i) shall set regular pay periods; and

(ii) except as provided in paragraph (2) of this subsection, shall pay each employee at least once in every 2 weeks or twice in each month.

(2) An employer may pay an administrative, executive, or professional employee less frequently than required under paragraph (1)(ii) of this subsection.

(b) If the regular payday of an employee is a nonworkday, an employer shall pay the employee on the preceding workday.

(c) Each employer shall pay a wage:

(1) in United States currency; or

(2) by a check that, on demand, is convertible at face value into United States currency.

(d) (1) In this subsection, "employer" includes a governmental unit.

(2) An employer may not print or cause to be printed an employee's Social Security number on the employee's wage payment check, an attachment to an employee's wage payment check, a notice of direct deposit of an employee's wage, or a notice of credit of an employee's wage to a debit card or card account.

(e) This section does not prohibit the:

(1) direct deposit of the wage of an employee into a personal bank account of the employee in accordance with an authorization of the employee; or

(2) credit of the wage of an employee to a debit card or card account from which the employee is able to access the funds through withdrawal, purchase, or transfer if:

(i) authorized by the employee; and

(ii) any fees applicable to the debit card or card account are disclosed to the employee in writing in at least 12 point font.

(f) An agreement to work for less than the wage required under this subtitle is void.

§ 3-505. Payment on cessation of employment

(a) Except as provided in subsection (b) of this section, each employer shall pay an employee or the authorized representative of an employee all wages due for work that the employee performed before the termination of employment, on or before the day on which the employee would have been paid the wages if the employment had not been terminated.

(b) An employer is not required to pay accrued leave to an employee if:

(1) the employer has a written policy that limits the compensation of accrued leave to employees;

(2) the employer notified the employee of the employer's leave benefits in accordance with § 3-504(a)(1) of this subtitle; and

(3) the employee is not entitled to payment for accrued leave at termination under the terms of the employer's written policy.

§ 3-507. Enforcement by Commissioner

(a) Whenever the Commissioner determines that this subtitle has been violated, the Commissioner:

(1) may try to resolve any issue involved in the violation informally by mediation;

(2) with the written consent of the employee, may ask the Attorney General to bring an action in accordance with this section on behalf of the employee; and

(3) may bring an action on behalf of an employee in the county where the violation allegedly occurred.

(b) (1) If, in an action under subsection (a) of this section, a court finds that an employer withheld the wage of an employee in violation of this subtitle and not as a result of a bona fide dispute, the court may award the employee an amount not exceeding 3 times the wage, and reasonable counsel fees and other costs.

(2) If wages of an employee are recovered under this section, they shall be paid to the employee without cost to the employee.

§ 3-507.2. Recovery of unpaid wages

(a) Notwithstanding any remedy available under § 3-507 of this subtitle, if an employer fails to pay an employee in accordance with § 3-502 or § 3-505 of this subtitle, after 2 weeks have elapsed from the date on which the employer is required to have paid the wages, the employee may bring an action against the employer to recover the unpaid wages.

(b) If, in an action under subsection (a) of this section, a court finds that an employer withheld the wage of an employee in violation of this subtitle and not as a result of a bona fide dispute, the court may award the employee an amount not exceeding 3 times the wage, and reasonable counsel fees and other costs.

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Other Statutory Provisions

Md. Code Ann., Com. Law § 13-408(b)

(b) Any person who brings an action to recover for injury or loss under this section and who is awarded damages may also seek, and the court may award, reasonable attorney's fees.

Md. Code Ann., Com. Law § 14-2705

(a) A violation of this subtitle shall be an unfair or deceptive trade practice under Title 13 of this article.

(b) In addition to pursuing any other remedy, a consumer may bring an action to recover for any damages caused by a violation of this subtitle. The court shall award a consumer who prevails in such an action twice the amount of any pecuniary loss together with costs, disbursements, and reasonable attorney fees and any equitable relief that the court determines is appropriate.

Md. Code Ann., Fam. Law § 10-325. Costs and fees

(a) The plaintiff may not be required to pay a filing fee or other costs.

(b) If an obligee prevails, a responding tribunal may assess against an obligor filing fees, reasonable attorney's fees, other costs, and necessary travel and other reasonable expenses incurred by the obligee and the obligee's witnesses. The tribunal may not assess fees, costs, or expenses against the obligee or the support enforcement agency of either the initiating or the responding state, except as provided by other law. Attorney's fees may be taxed as costs, and may be ordered paid directly to the attorney, who may enforce the order in the attorney's own name. Payment of support owed to the obligee has priority over fees, costs, and expenses.

(c) The tribunal shall order the payment of costs and reasonable attorney's fees if it determines that a hearing was requested primarily for delay. In a proceeding under Part VI of this subtitle a hearing is presumed to have been requested primarily for delay if a registered support order is confirmed or enforced without change.

Md. Code Ann., Lab. & Empl. § 3-101. Definitions

(a) In this title the following words have the meanings indicated.

(b) “Commissioner” means the Commissioner of Labor and Industry.

(c) (1) “Employ” means to engage an individual to work.

(2) “Employ” includes:

(i) allowing an individual to work; and

(ii) instructing an individual to be present at a work site.

Md. Code Ann., Lab. & Empl. § 3-102. Management

(a) In addition to any duties set forth elsewhere, the Commissioner shall:

(1) enforce Subtitle 2 of this title;

(2) carry out Subtitle 3 of this title;

(3) enforce Subtitle 4 of this title; and

(4) enforce Subtitle 9 of this title.

(b) If the Governor declares an emergency or disaster, then, with the consent of the Governor, the Commissioner may suspend enforcement of any provision of Subtitle 2 of this title until the emergency or disaster ends.

Md. Code Ann., Lab. & Empl. § 3-307. Action against employer

(a) (1) If an employer violates this subtitle, an affected employee may bring an action against the employer to recover the difference between the wages paid to male and female employees who do the same type work and an additional equal amount as liquidated damages.

(2) An employee may bring an action on behalf of the employee and other employees similarly affected.

(b) On the written request of an employee who is entitled to bring an action under this section, the Commissioner may:

(1) take an assignment of the claim in trust for the employee;

(2) ask the Attorney General to bring an action in accordance with this section on behalf of the employee; and

(3) consolidate 2 or more claims against an employer.

(c) An action under this section shall be filed within 3 years of the act on which the action is based.

(d) The agreement of an employee to work for less than the wage to which the employee is entitled under this subtitle is not a defense to an action under this section.

(e) If a court determines that an employee is entitled to judgment in an action under this section, the court shall allow against the employer reasonable counsel fees and other costs of the action.

Md. Code Ann., Real Prop. § 7-406. Damages and attorney's fees

(a) (1) In addition to any action authorized under this subtitle and any other action otherwise authorized by law, a person may bring an action for damages incurred as the result of a violation of this subtitle.

(2) A person may bring an action for damages under this section:

(i) Without having to exhaust administrative remedies under this subtitle; and

(ii) Regardless of the status of an administrative action or a criminal prosecution, if any, under this subtitle.

(b) A person who brings an action under this section and who is awarded damages may also seek, and the court may award, reasonable attorney's fees.

(c) If the court finds that the defendant violated this subtitle, the court may award damages equal to three times the amount of actual damages.

Md. Code Ann., State Gov't § 20-1009(b). Remedies for unlawful employment practices

(b) (1) If the respondent is found to have engaged in or to be engaging in an unlawful employment practice charged in the complaint, the remedy may include:

(i) enjoining the respondent from engaging in the discriminatory act;

(ii) ordering appropriate affirmative relief, including the reinstatement or hiring of employees, with or without back pay;

(iii) awarding compensatory damages; or

(iv) ordering any other equitable relief that the administrative law judge considers appropriate.

(2) Compensatory damages awarded under this subsection are in addition to:

(i) back pay or interest on back pay that the complainant may recover under any other provision of law; and

(ii) any other equitable relief that a complainant may recover under any other provision of law.

(3) The sum of the amount of compensatory damages awarded to each complainant under this subsection for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, or nonpecuniary losses, may not exceed:

(i) $50,000, if the respondent employs not fewer than 15 and not more than 100 employees in each of 20 or more calendar weeks in the current or preceding calendar year;

(ii) $100,000, if the respondent employs not fewer than 101 and not more than 200 employees in each of 20 or more calendar weeks in the current or preceding calendar year;

(iii) $200,000, if the respondent employs not fewer than 201 and not more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year; and

(iv) $300,000, if the respondent employs not fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year.

(4) If back pay is awarded under paragraph (1) of this subsection, the award shall be reduced by any interim earnings or amounts earnable with reasonable diligence by the person discriminated against.

(5) In addition to any other relief authorized by this subsection, a complainant may recover back pay for up to 2 years preceding the filing of the complaint, where the unlawful employment practice that has occurred during the complaint filing period is similar or related to an unlawful employment practice with regard to discrimination in compensation that occurred outside the time for filing a complaint.

Md. Code Ann., State Gov't § 20-1013(d). Remedies

(d) If the court finds that an unlawful employment practice occurred, the court may provide the remedies specified in § 20-1009(b) of this subtitle.

Md. Code Ann., State Gov't § 20-1015. Award of fees and costs

In an action brought under this part, the court may award the prevailing party reasonable attorney's fees, expert witness fees, and costs.

Md. Code Ann., State Gov't § 20-1035(e). Relief

(e) (1) In a civil action under this section, if the court finds that a discriminatory housing practice has occurred, the court may:

(i) award to the plaintiff actual and punitive damages; and

(ii) subject to subsection (f) of this section, grant as relief, as the court considers appropriate, any permanent or temporary injunction, temporary restraining order, or other order, including an order enjoining the defendant from engaging in the practice or ordering affirmative action.

(2) In a civil action under this section, the court may allow the prevailing party reasonable attorney's fees and costs.

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Federal Rule of Civil Procedure 68
Offer of Judgment

(a) Making an Offer; Judgment on an Accepted Offer. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) Offer After Liability is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time--but at least 14 days--before the date set for a hearing to determine the extent of liability.

(d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 2013, I caused to be mailed first class, postage prepaid, two copies each of the foregoing brief to:

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