In The

Court of Appeals of Maryland

No. 111

September Term, 2010

THE METROPOLITAN WASHINGTON ORTHOPAEDIC ASSOCIATION, CHARTERED, *et al.*,

Petitioners,

v.

CHRISTINA L. CERVIERI, M.D.,

Respondent.

On Writ of Certiorari to the Court of Special Appeals of Maryland

BRIEF OF *AMICI CURIAE* MARYLAND EMPLOYMENT LAWYERS ASSOCIATION, METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION and PUBLIC JUSTICE CENTER IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

Amici Curiae, the Maryland Employment Lawyers Association (MELA) and the Metropolitan Washington Employment Lawyers Association (MWELA) are sister local affiliates of the National Employment Lawyers Association, a national organization of attorneys, primarily plaintiffs' counsel, who specialize in employment law. The joint membership of MELA/MWELA comprises over 300 members who represent and protect the interests of employees under state and federal law. The purpose of MELA/MWELA is to bring into close association employee advocates and attorneys to promote the efficiency of the legal system and fair and equal treatment under the law. MELA and/or MWELA have frequently participated as amicus curiae in cases of interest to their members, including the following: *Jordan v. Alternative Res. Corp.*, 458 F.3d 332, *reh'g en banc den.,* 467 F.3d 378 (4th Cir. 2006); *Addison v. Lochearn*, 411 Md. 251, 983 A.2d 138 (2009); *Newell v. Runnels*, 407 Md. 578, 967 A.2d 729 (2009); *Hoffeld v. Shepherd Elec. Co., Inc.*, 404 Md. 172, 945 A.2d 1283 (2008); *Friolo v. Frankel*, 403 Md. 443, 942 A.2d 1242 (2008); *Haas v. Lockheed Martin Corp.*, 396 Md. 469, 914 A.2d 735 (2007); *Manor Country Club v. Flaa*, 387 Md. 297, 874 A.2d 1020 (2005); and *Friolo v. Frankel*, 373 Md. 501, 819 A.2d 354 (2003).

Members of MELA and MWELA have represented numerous clients seeking to enforce federal and state wage laws. As longtime advocates in employment law, MELA/MWELA appreciate this opportunity to offer the Court their wide-ranging expertise and unique perspective on the issues presented in this appeal. MELA/MWELA have a significant interest in this case to ensure that Maryland courts construe state wage laws to fulfill the legislative intent to protect Maryland employees by encouraging competent counsel to represent them in wage cases.

The Public Justice Center, Inc. (PJC), a non-profit civil rights and poverty law organization founded in 1985, has a longstanding commitment to ensuring that persons harmed by their employers, in particular low-wage workers, are not denied a judicial remedy. The PJC has submitted or joined in briefs of *amicus curiae* in recent cases involving claims by individuals faced with illegal employment actions. *See, e.g.*, *Jackson*

v. Estelle's Place, LLC, No. 10-763 (U.S.) (pending); *Perez v. Mountaire Farms, Inc.*, No. 09-1917 (4th Cir.) (pending); *Jordan v. Alternative Res. Corp.*, 467 F.3d 378 (4th Cir. 2006); *Ocheltree v. Scollon Productions, Inc.*, 335 F.3d 325 (4th Cir. 2003); *Lark v. Montgomery Hospice, Inc.*, 414 Md. 215, 994 A.2d 968 (2010); *Friolo v. Frankel*, 403 Md. 443, 942 A.2d 1242 (2008); *Haas v. Lockheed Martin Corp*., 396 Md. 469 (2007); *Friolo v. Frankel*, 373 Md. 501, 819 A.2d 354 (2003).

The PJC has an interest in this case because this Court's interpretations of the Maryland Wage Payment and Collection Law, in particular the provisions for treble damages and statutory attorneys' fees, impact low-wage workers disproportionately. Because the outcome of this case will have broad implications for the ability of moderate- and low-income workers to vindicate their right to be paid their wages earned for their work performed, MELA, MWELA, and PJC have a specific interest in the fair resolution of the issues presented in this appeal. We therefore present our views to assist this Honorable Court.

STATEMENT OF THE CASE

Amici adopt the Petitioner's Statement of the Case.

QUESTION PRESENTED

As a matter of law, does a bona fide dispute exist between employee and employer when a jury awards an employer a judgment for monetary damages relating to the employee's wage claim?

STATEMENT OF FACTS

Amici adopt the Petitioner's Statement of Facts.

ARGUMENT

I. Overview

The Maryland Wage Payment and Collection Law ("MWPCL") provides that an employee may sue an employer to recover unpaid wages:

> (a) In general.- 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.

MD. CODE LAB. & EMPL. § 3-507.2 (formerly § 3-507.1). As often noted, the Legislature created this private right of action because the Commissioner of Labor and Industry lacked the funding and staff necessary to prosecute these claims. *E.g., Battaglia v. Clinical Perfusionists, Inc.*, 338 Md. 352, 363-64, 658 A.2d 680, 686 (1995).

This case presents the opportunity for this Court to further refine its construction of the term "bona fide dispute". Since enactment of the statute, Maryland courts have grappled with the meaning and application of the "bona fide dispute" provision, as the absence of a bona fide dispute as to the wages owed is the predicate for an award of treble damages and statutory attorneys' fees.[1] In the leading case, *Admiral Mortgage*, this Court explained that a "bona fide dispute" means that "the party making or resisting

[1] *See, e.g., Programmers' Consortium, Inc. v. Clark*, 409 Md. 548, 976 A.2d 290 (2009); *Friolo v. Frankel*, 373 Md. 501, 819 A.2d 354 (2003); *Medex v. McCabe*, 372 Md. 28, 811 A.2d 297 (2002); *Baltimore Harbor Charters, Ltd., v. Ayd*, 365 Md. 366, 780 A.2d 303 (2001); *Admiral Mortgage, Inc. v. Cooper*, 357 Md. 533, 745 A.2d 1026 (2000); *Barufaldi v. Ocean City, Maryland, Chamber of Commerce, Inc.*, 196 Md. App. 1, 7 A.3d 643 (2010); *Aronson & Co. v. Fetridge*, 181 Md. App. 650, 675, 957 A.2d 125, 140 (2008); *Himes Assocs., Ltd. v. Anderson*, 178 Md. App. 504, 943 A.2d 30 (2008); *Stevenson v. Branch Banking & Trust Co*., 159 Md. App. 620, 861 A.2d 735 (2004); *see also Rogers v. Savings First Mortgage, LLC*, 362 F. Supp. 2d 624 (D. Md. 2005).

the claim has a good faith basis for doing so, whether there is a legitimate dispute over the validity of the claim or the amount that is owing." *Admiral Mortgage, Inc. v. Cooper*, 357 Md. 533, 543, 745 A.2d 1026, 1031 (2000). Shortly thereafter, in *Ayd*, this Court determined that "[t]he existence of a bona fide dispute under § 3-507.1 is a question of fact left for resolution by the jury, not the trial judge." *Baltimore Harbor Charters, Ltd., v. Ayd*, 365 Md. 366, 396, 780 A.2d 303, 320-21 (2001) (citing *Admiral Mortgage*, 357 Md. at 551, 745 A.2d at 1035) (emphasis supplied).

By contrast, this Court has held that the judge then separately determines the amount of attorneys' fees due to the employee, brightening the line between the jury's resolution of the bona fide dispute factual predicate question and the judge's resolution of the amount of attorneys' fees. *See Admiral Mortgage*, 357 Md. at 553, 745 A.2d at 1036 ("For all of these reasons, we conclude that . . . the determination of attorneys' fees, and costs, is for the judge.").

Importantly, lower courts have accepted and relied on this Court's determination that the bona fide dispute finding is a question of fact for the jury: "The question of whether there existed a 'bona fide dispute' under LE section 3-507.1 is 'not one of law to be decided summarily, but rather properly reserved for resolution by the jury.'" *Aronson & Co. v. Fetridge*, 181 Md. App. 650, 675, 957 A.2d 125, 140 (2008) (quoting *Medex v. McCabe*, 372 Md. 28, 44, 811 A.2d 297, 306-07 (2002)) (emphasis supplied).

Questions remain, however, whether in certain circumstances a court may determine as a matter of law that the employer withheld the wage of the employee as a result of a bona fide dispute. Amici respectfully suggest that, to the extent that the existence of a bona fide dispute can be determined as a matter of law, two principles should guide that determination:

- The first principle examines the employer's justification for withholding pay. A "bona fide dispute" within the meaning of the statute cannot arise from a counterclaim seeking a set-off for some debt allegedly owed to the employer that

is not directly related to the reason, or justification for, why the employer did not pay the wages at issue in the action brought by the employee.

- The second principle evaluates the employer's timing. A "bona fide dispute" as to the wage withheld cannot be generated *post hoc* by an employer's discovery (or invention) of grounds upon which it could have withheld the wage, where those grounds were not the original and actual reason for withholding at the time the employer withheld.

Put differently, a "bona fide dispute" must concern – and only concern – the wages that were unpaid in the first place *and* the actual reason for withholding the wages that existed at the time of non-payment. Construing and applying the statute in accordance with these principles will help fulfill the legislative intent to protect Maryland employees by giving employers a strong incentive to pay wages due. Employers will be disabused of the notion that employees bringing valid actions for unpaid wages can be scared off with aggressive litigation tactics such as filing counterclaims which, even if meritorious, do not contest the wages at issue in the action brought by the employee, and therefore do not constitute a "bona fide dispute" as to the withholding of said wages.

Construing and applying the statute in accordance with Amici's suggested principles will also help fulfill the legislature's intent to protect Maryland employees by encouraging competent counsel to help them prosecute their wage claims. Employees and their counsel can be assured that employees' ability to recover treble damages and statutory attorney's fees for successfully prosecuting their claims will not be undermined by employer counterclaims raised only to manufacture a "bona fide dispute" designed to defeat treble damages and attorney's fees.

Amici therefore respectfully suggest that this Court affirm the decision of the Court of Special Appeals, and provide further guidance on meaning and application of the "bona fide dispute" provision of the Maryland Wage Payment and Collection Law.

II. An Employer's Counterclaim Does Not Automatically Generate a "Bona Fide Dispute" as to an Employee's Claim for Unpaid Wages.

"The principal purpose of the [Maryland Wage Payment and Collection] Act 'was to provide a vehicle for employees to collect, and an incentive for employers to pay, back wages.'" *Medex*, 372 Md. at 39, 811 A.2d at 304 (2002) (quoting *Battaglia*, 338 Md. at 364, 658 A.2d at 686 (1995)). Accordingly, the Legislature provided that when an employee brings an action to collect unpaid wages, the employer may be liable for treble damages and the employee's attorney's fees and costs for bringing the action. The trigger for such liability is the absence of a "bona fide dispute" as to the particular unpaid wages that the employee has brought an action to recover. If the employer refused to pay the wages at issue without a good faith reason to believe that they were not owed, the employer may be penalized or, seen another way, the employee may be compensated for the unjustified delay in payment and the costs of having to litigate to obtain payment of wages that were due. *See Admiral Mortgage*, 357 Md. at 549-50, 745 A.2d at 1034-35 (noting punitive and compensatory aspects of treble damage provision); *see also Ayd*, 365 Md. at 397-98, 780 A.2d at 321-22 (referring to "the penalty provision of § 3-507.1"). It is the employee, of course, who suffers from delay of payment of earned wages – the employer has already obtained the full benefit of the work performed.

On the other hand, the Act was <u>not</u> intended to facilitate employers' "self-help" in recovering debts allegedly owed by their employees. Earned wages are not a security deposit to be withheld by an employer and offset against an employer's claim for damages in the workplace. Indeed, as demonstrated by the MWPCL's section regarding "Deductions" from wages, the Legislature has jealously guarded employee wages by providing that an employer may not deduct from an employee's wages unless such deduction is formally authorized, that is, ordered by a court, authorized expressly in writing by the employee, allowed by the Commissioner of Labor and Industry, or otherwise made in accordance with a law or governmental rule or regulation. *See* MD. CODE LAB. & EMPL. § 3-503.

Hence, although it may be appropriate as a matter of civil procedure and judicial economy to address an employee's unpaid wage claim and an employer's employment-related counterclaim in one proceeding, *see* Md. Rule 2-331, the MWPCL does not permit employers to bootstrap any and every employment-related dispute into a "bona fide dispute" about unpaid wages, thereby negating the employee's ability to recover treble damages, attorney's fees and costs. Rather, a "bona fide dispute" must concern – and only concern – the wages that were unpaid in the first place and the actual reason for withholding the wages that existed at the time of non-payment.

A. As a matter of statutory construction, a "bona fide dispute" as to the wage withheld cannot arise from a counterclaim seeking a set-off for some debt allegedly owed to the employer which is not directly tied to the wages at issue in the action brought by the employee.

As this Court has repeatedly recognized: "[T]he cardinal rule [of statutory construction] is to ascertain and effectuate legislative intent. To this end, we begin our inquiry with the words of the statute and, ordinarily, when the words of the statute are clear and unambiguous, according to their commonly understood meaning, we end our inquiry there also." *Allen v. Dackman*, 413 Md. 132, 142, 991 A.2d 1216, 1222 (2010) (citation omitted).

Subsection (a) of MWPCL Section 3-507.2, "Action to recover unpaid wages", provides that "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." MD. CODE LAB. & EMPL. § 3-507.2(a) (emphasis added). In other words, subsection (a) provides that, when an employer does not pay an employee compensation due for work that the employee has performed, the employee may file a lawsuit against the employer to recover the earned but unpaid wages.

Subsection (b) of MWPCL Section 3-507.2 refers directly back to subsection (a). Subsection (b) provides that "[i]f, 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 [treble damages, attorney's fees and costs]." MD. CODE LAB. & EMPL. § 3-507.2(b) (emphasis added). Since subsection (b) refers back to subsection (a), "the wage" at issue in subsection (b) must mean "the unpaid wages" that were the subject of the action that the employee brought under subsection (a). Likewise, the phrase "withheld the wage . . . not as a result of a bona fide dispute" in subsection (b) can only mean "withheld the unpaid wages that were the subject of the action that the employee brought under subsection (a) . . . not as a result of a bona fide dispute".

Thus, under the plain language of the MWPCL, a "bona fide dispute" can only concern the reasons for non-payment of "the wage" at issue in the employee's initial "action against the employer to recover the unpaid wages" that were "withheld" by the employer. That is "the wage" which the employee has already earned for work performed but which the employer is refusing to pay. As a pure matter of statutory construction, a "bona fide dispute" cannot arise from a counterclaim seeking a set-off for some debt allegedly owed to the employer where the debt is not directly tied to the wages at issue in the action brought by the employee.

The MWPCL's legislative history is consistent with this statutory construction. *See Ayd*, 365 Md. at 379, 780 A.2d at 311 ("We may always consider, however, relevant case law, legislative history, and other material concerning the drafting of the statute in order to understand the context in which it was enacted."). In considering the "bona fide dispute" provision, the Department of Legislative Reference advised as follows:

> If a court finds that an employer withheld the wages of an employee in violation of the wage payment and collection law and not as a result of a 'bona fide' dispute, the court may make an award to the employee. Although 'bona fide' addresses 'good faith', the Commissioner suggests that the condition was intended to restrict 'dispute' to a matter material to the violation. The General Assembly may wish to clarify its intent.

See Report on House Bill 1 from the Department of Legislative Reference, 13 (January 14, 1991) (relevant portions attached hereto). Though perhaps not conclusive, this report to the General Assembly suggests that insertion of the "bona fide dispute" requirement was designed to tie any employer disputes about wage payment to the actual wages that were not being paid. There is also no legislative history that suggests that the phrase "bona fide dispute" was designed to encompass any and all disputes between the employer and employee that could result in a monetary award for the employer. Under this reading, courts should therefore screen out an employer's various unrelated claims when making assessments about the existence of a "bona fide dispute."

A few examples should help to clarify the distinction between a counterclaim that would not be founded on a "bona fide dispute" within the meaning of the MWCPL, and one that could possibly be:

Example A: Employee is paid every two weeks. Employee quits. Employer withholds Employee's final paycheck as a set-off for "uniform cleaning fees". Employee sues Employer for the unpaid wages, and Employer counterclaims for the "uniform cleaning fees". In this scenario, Employer's counterclaim would not represent a "bona fide dispute" as to Employee's unpaid wage claim because it does not arise from the wages at issue in the action brought by Employee, but rather from an independent debt.

Example B: Employee is paid every two weeks. Employee quits. Employer withholds Employee's final paycheck because discrepancies on Employee's time cards for the multiple pay periods raise a substantial question about the number of hours worked. Employee sues for the unpaid wages, and Employer counterclaims to recoup overpayment of wages. In this scenario, Employer's counterclaim could possibly represent a "bona fide dispute" as to Employee's unpaid wage claim because it directly relates to the subject wages at issue in Employee's action.

B. This construction of the "bona fide dispute" provision is consistent with the overall statutory scheme.

This construction of the MWPCL's "bona fide dispute" provision is also consistent with the overall statutory scheme. When construing even the "plainest language" of a statute, this Court is "always free to look at the context in which the statutory language appears" in order to "seek out the legislative purpose, the general aim or policy, the ends to be accomplished, the evils to be redressed by a particular enactment." *Morris v. Prince George's County*, 319 Md. 597, 603-04, 573 A.2d 1346, 1349 (1990). Here, the MWPCL's provision regarding "Deductions" lends further support toward restricting the scope of what can constitute a "bona fide dispute" as to earned wages.

The MWPCL provides that:

> An employer may not make a deduction from the wage of an employee unless the deduction is:
>
> (1) ordered by a court of competent jurisdiction;
>
> (2) authorized expressly in writing by the employee;
>
> (3) allowed by the Commissioner because the employee has received full consideration for the deduction; or
>
> (4) otherwise made in accordance with any law or any rule or regulation issued by a governmental unit.

MD. CODE LAB. & EMPL. § 3-503. Through this provision, the Legislature demonstrated its intent to provide strong protection for employee's earned wages. An employer may not withhold wages, even those for which is has a legitimate claim of reimbursement, unless the deduction is formally authorized by meeting at least one of the four statutory requirements. *See Marroquin v. Canales*, 505 F. Supp. 2d 283, 292-93 (D. Md. 2007) (without written authorization, employer was not allowed to take offsets for food and lodging in lieu of overtime pay under MWPCL); *see also Imgarten v. Bellboy Corp.*, 383 F. Supp. 2d 825, 846 (D. Md. 2005) (citing MWPCL § 3-503: "[T]he Payment Law

expressly limits the circumstances under which an employer may withhold wages. A material breach of an employment agreement is not one of the enumerated circumstances."). An employer cannot simply engage in "self-help" by withholding from earned wages whatever amount the employer unilaterally decides it is owed.[2]

In a wage action brought by an employee under the MWPCL, an employer could presumably bring a counterclaim seeking an offset for deductions against an employee's wages. Particularly in low-income service industry jobs, the potential for nickel-and-dime deductions is wide-ranging. But such a counterclaim, even if meritorious, should not constitute a "bona fide dispute" as to earned wages, thereby depriving the employee of the ability to recover treble damages and statutory attorney's fees for successfully prosecuting his wage claim. Permitting such a counterclaim to generate a "bona fide dispute" would undermine the legislative intent of Section 3-503 to protect employee wages, and it would utterly defeat the legislative intent of Section 3-507.2 to "provide a vehicle for employees to collect, and an incentive for employers to pay, back wages."

Even an employer's contractual "right to offset against [the employee's wage] payments it owes" does not, as a matter of law, create a "bona fide dispute" to justify withholding the wages without penalty. *See Fetridge*, 181 Md. App. at 677-80, 957 A.2d at 141-43 (2008). In *Fetridge*, the employer refused to pay the employee's wages because, per the employer's reckoning, all of the wages were offset by an unrelated amount owed to the employer. Nevertheless, the Court of Special Appeals held that the jury must decide based on the facts whether the employer had a "good faith basis" for exercising its setoff right. Because the employer "chose to withhold all [the wages due] without making any effort to determine" whether the employee owed the employer anything at all, and if so, the amount owed, the court could not rule as a matter of law that

[2] *Cf. Camara v. Attorney General*, 458 Mass. 756 (2011) (state wage law was violated where employer's policy was to allow employee to agree to wage deductions in lieu of discipline for damage to company property, and where employer made the unilateral decision as to whether the employee was at fault).

there was a "bona fide dispute" as to the wages withheld. *See Fetridge*, 181 Md. App. at 679, 957 A.2d at 142.

To be sure, in *Admiral Mortgage*, this Court indicated that a "bona fide dispute" means that "the party making or resisting the claim has a good faith basis for doing so, whether there is a legitimate dispute over the validity of the claim or the amount that is owing." *Admiral Mortgage*, 357 Md. at 543, 745 A.2d at 1031 (emphasis supplied). However, Amici urge that the Court provide guidance that the "legitimate dispute over . . . the amount that is owing" should not be read so broadly to mean "the amount that is owing after independent claims for setoff are taken into consideration." Rather, consistent with the legislative intent shown by the statutory language and overall scheme, a "bona fide dispute" over "the amount that is owing" must arise from some question about the unpaid wage itself.

For the foregoing reasons, a "bona fide dispute" within the meaning of the statute cannot arise from a counterclaim seeking a set-off for some debt allegedly owed to the employer, which is not directly tied to the wages at issue in the action brought by the employee. Amici respectfully suggest that the Court set forth this principle in its opinion.

C. A "bona fide dispute" as to the wage withheld cannot be generated post hoc by an employer's discovery (or invention) of grounds upon which it could have withheld the wage, where that was not the original and actual reason for withholding.

In addition, a dispute about the withholding of earned wages can only be "bona fide" where it concerns the employer's genuine "good faith" reason for withholding the wage that existed at the time of withholding. The statute provides that "the employer withheld the wage . . . not as a result of a bona fide dispute . . . ." MD. CODE LAB. & EMPL. § 3-507.2(b) (emphasis supplied). The use of the simple past tense "withheld" indicates an action that happened at a specific time in the past. A "bona fide dispute" cannot be generated *post hoc* by an employer's discovery (or invention) of grounds upon which it could have withheld the wage, where that was not the original and actual reason

for non-payment. This principle is well-established in Court of Special Appeals cases applying the MWPCL.

For example, in the case at bar, the Court of Special Appeals correctly stated:

> [T]he jury could have concluded that the reasons that MWOA actually withheld Dr. Cervieri's wages differed from those offered at trial. Thus the jurors reasonably could find that, while Dr. Cervieri may have taken more leave than allowed under MWOA's policies, that was not one of the reasons MWOA withheld her wages after informing her that her employment contract was not being renewed. . . . [I]t follows that they could have found on the evidence that, when MWOA withheld Dr. Cervieri's wages, it lacked a good faith basis to do so.

The Metropolitan Washington Orthopaedic Assoc., Chtd. v. Cervieri, Nos. 08-2556 & 09-988, slip op. at 20-21 (Md. Ct. Spec. App. May 12, 2010) (emphasis supplied).

Similarly, in *Himes Associates, Ltd. v. Anderson*, the Court of Special Appeals correctly held:

> There was ample evidence adduced at trial to support the court's finding that all of the incidents that Himes put forth to justify Anderson's termination were 'afterthoughts,' i.e., they were not the actual reasons why Anderson was terminated but were justifications cobbled together after the fact in an effort to avoid paying Anderson the severance money owed under the Agreement. That finding supported the trial court's ultimate finding that there was not a good faith dispute between the parties as to whether Anderson was owed three months' severance pay.

Himes Assocs., Ltd. v. Anderson, 178 Md. App. 504, 543, 943 A.2d 30, 52-53 (2008).

And again, in *Fetridge*, the Court of Special Appeals held:

> The evidence was sufficient for the jury to reasonably conclude that Aronson did *not* have sufficient information, at the time the TEC payments were due to Fetridge, to reasonably believe that (1) Fetridge was an employee of B & C, or (2) that he received the compensation paid by former Aronson clients to B & C, or the equivalent thereof, and Fetridge owed Aronson, because of this competition, more than Aronson owed Fetridge. Such a finding would justify the jury's conclusion that Aronson lacked a 'bona fide dispute' that would justify its withholding of Fetridge's wages.

Fetridge, 181 Md. App. at 680, 957 A.2d at 143 (2008) (emphasis in original).

Amici urge that this Court adopt the principle established by the three cases above that a "bona fide dispute" can only concern the employer's original and actual reason(s) for non-payment of the wages at issue in the employee's action. This principle is critical to employees' ability to vindicate their right to be paid their wages earned for their work performed.

Amici have observed a trend among employers toward aggressively filing counterclaims in employment law disputes, or even filing a complaint in response to a demand letter or an administrative charge of discrimination. The Supreme Court of the United States has acknowledged and sought to address the danger of this trend. In 2006, the Supreme Court, in recognizing the broad scope of Title VII's anti-retaliation provision, approvingly cited its own precedent and a Tenth Circuit decision for the proposition that retaliatory lawsuits filed after an employee complained of illegal conduct would be an adverse employment action under the anti-retaliation statutes. *See Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 66-67 (2006) (citing *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983) (anti-retaliation provision prohibited "the retaliatory filing of a lawsuit against an employee")); *id*. at 64 (citing *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (filing of charges against former employee who complained about discrimination constituted actionable retaliation)).

Often these counterclaims are based upon alleged employee misconduct that the employer purports to have discovered only after the employee was fired or filed a lawsuit, or conduct that the employer sanctioned, permitted, or overlooked during the employee's employment, but which apparently became litigation-worthy only after the employee filed suit. Moreover, in some instances, counterclaims may be purely retaliatory or SLAPP lawsuits intended to chill workers from enforcing their legal rights. *See, e.g., Bill Johnson's Restaurant*, 461 U.S. at 740 ("A lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation. . . . [B]y suing an employee who files charges . . . an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a

burdensome lawsuit."); *Darveau v. Detecon, Inc.*, 515 F.3d 334, 343 (4th Cir. 2008) (employers' lawsuit against employee alleging fraud that was filed with retaliatory motive and without reasonable basis in fact or law could constitute retaliation under Fair Labor Standards Act); *Torres v. Gristede's Operating Corp.*, 628 F. Supp. 2d 447, 466-71 (S.D.N.Y. 2008) (counterclaims under state common law "faithless servant" doctrine alleging "discrete allegations of misconduct – sexual harassment and credit card fraud" that were "not related to any aspect of the [wage-and-hour] practices" were "small beer," "flimsy," "untenable," and "*ipse dixit*," and, according to the magistrate judge who presided over a motion hearing, "seemed to be made for the purpose of 'sending a message to people as to opt-in issues, to say hey, you opt in [to the wage action] and we will investigate you and bring retaliation claims against you'"); *Jacques v. DiMarzio*, 200 F. Supp. 2d 151, 155, 162-63 (E.D.N.Y. 2002) (court denounced "*in terrorem* tactics" of counterclaim seeking damages for "harassment, interference with 'business operations' and 'employee morale', and damage to [the employer's] reputation, all caused by [the employee's] claims," including state labor law claim); *see also Imgarten*, 383 F. Supp. 2d at 848 ("The Court has no hesitancy in awarding pre-judgment interest to Imgarten, who has been deprived for years of wages due him. This delay is attributable primarily to the time required to litigate the laundry list of wrongs alleged in Bellboy's failed counterclaim.").

Charles v. Roads Corp., No. 981380E, 1998 WL 1247935 (Mass. Super. Ct. 1998), is particularly instructive in this regard. In *Charles*, the court dismissed the employers' counterclaims for abuse of process, filed in response to employees' state wage law claims, because the court found that the counterclaims were "Strategic Lawsuits against Public Participation", also known as "SLAPP suits". *Charles*, 1998 WL 1247935 at *3. "The objective of SLAPP suits is not to win them, but to use litigation to intimidate opponents' exercise of rights of petitioning and speech." *Id*. at *2 (citation omitted). The court noted that the state Attorney General, who was entrusted with criminal enforcement of the state wage laws at issue in the employees' complaint, filed an amicus brief in support of the employees. *Id*. at *1. The Attorney General suggested

that the "defendants' abuse of process counterclaim[s] ha[ve] the effect of chilling the current and future employees' valid exercise of their constitutional right to petition for the redress of grievances." The Attorney General further suggested that the resolution of the employees' wage claims would produce "aid to future litigants and provide for more effective enforcement of the labor laws." *Id*. at *1. In short, the Attorney General and the court recognized the public benefit – civil enforcement of the state wage laws – derived from the employees' exercise of their private right of action. In light of this public benefit, the court refused to countenance the employers' attempt to SLAPP down the employees' wage claims, and granted the employees' motion to dismiss the counterclaims. *Id*. at *3.

Similarly in *Hytel Group, Inc. v. Butler*, 938 N.E.2d 542 (Ill. App. Ct. 2010), the trial court dismissed an employer's suit for breach of fiduciary duty and fraud, filed after the employee filed a wage claim with the State Department of Labor, as a SLAPP suit. *Id*. at 548. The appellate court upheld the dismissal. *Id*. at 557-58. The court noted that the employee's administrative wage action was not a "purely private dispute":

> [T]he prompt payment of wages by employers is not a matter entirely devoid of public concern . . . [A]n employer's denial of benefits earned by its employees burdens the State financially and socially, by decreasing the tax base and potentially depleting State assistance funds. Indeed, we presume that such public concerns underlie the decision to authorize the Department of Labor to pursue wage claims, rather than requiring unpaid employees to pursue their employers themselves.

Id. at 552 (internal citations and quotations omitted).

With respect to Maryland wage cases, if an employer's counterclaim constitutes a "bona fide dispute" as to an employee's wage claim as a matter of law, as the employer argues here, that would completely undo the legislative intent of the MWPCL. The Legislature created the private right of action in the first place because the Commissioner was unable to prosecute these claims. The Legislature thus put employees in the position of "private attorneys general" to enforce Maryland wage laws. To enhance employees' ability to enforce the law through private lawsuits, the Legislature provided that they

could be awarded treble damages, attorneys' fees and costs. If, however, employers can manufacture "bona fide disputes" after the fact by raising counterclaims – even meritorious counterclaims – then the entire legislative scheme for civil enforcement of state wage laws will be undone.

For the foregoing reasons, a "bona fide dispute" cannot be generated *post hoc* by an employer's discovery (or invention) of grounds upon which it could have withheld the wage, where that was not the original and actual reason for non-payment. Amici therefore respectfully suggest that the Court set forth this principle in its opinion.

CONCLUSION AND RELIEF SOUGHT

As this Court has recognized, the purpose of the Maryland Wage Payment and Collection Law is to protect employees from the "abuse of non-payment of wages from their employers." *Ayd*, 365 Md. at 311-12, 780 A.2d at 380-81. For the foregoing reasons, Amici respectfully suggest that this Honorable Court affirm the decision of the Court of Special Appeals.

Respectfully submitted,

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This brief was printed in Times New Roman 13-point font.

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* The views expressed in this Amici Brief are those of the University of Maryland School of Law Workers' Rights Clinic only. They do not expressly or impliedly represent the views of the University of Maryland School of Law, or of the University of Maryland Law School Clinical Law Program in general.

** Student-attorney practicing pursuant to Rule 16 of the Rules Governing Admission to the Bar of Maryland.

APPENDIX

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APPENDIX

The following pertinent statutes and ordinances were referred to in the Brief of Amici Curiae, and the text has been provided below:

****

Md. Code § 3-503. Deductions.

An employer may not make a deduction from the wage of an employee unless the deduction is:

(1) ordered by a court of competent jurisdiction;

(2) authorized expressly in writing by the employee;

(3) allowed by the Commissioner because the employee has received full consideration for the deduction; or

(4) otherwise made in accordance with any law or any rule or regulation issued by a governmental unit.

[Ann. Code 1957, art. 100, § 94; 1991, ch. 8, § 2.]

****

Md. Code § 3-507.2. Action to recover unpaid wages.

(a) In general.- 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) Award and costs.- 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.

[1993, ch. 578; 2010, ch. 151, § 1.]

Report on House Bill 1 from the Department of Legislative Reference
(January 14, 1991) (excerpts)

Department of Legislative Reference

General Assembly of Maryland
Legislative Services Building
90 State Circle
Annapolis, Maryland 21401-1991

F. CARVEL PAYNE
Director
841/858-3865

MICHAEL I. VOLK
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Library and Information Services Division
841/858-3810

MYRON H. MILLER
Research Division
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Computer Services Division
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January 14, 1991

REPORT ON HOUSE BILL 1

LABOR AND EMPLOYMENT ARTICLE

I. PURPOSE AND SCOPE OF CODE REVISION.

The proposed Labor and Employment Article (House Bill 1) is a product of the continuing revision of the Annotated Code of Maryland by the staff of the Legislative Division of the Department of Legislative Reference. The first revised articles were enacted at the First Extraordinary Session of 1973, and, to date, 20 revised articles have become law: Agriculture, Business Occupations and Professions, Commercial Law, Corporations and Associations, Courts and Judicial Proceedings, Education, Estates and Trusts, Family Law, Financial Institutions, Health - Environmental (now Environment), Health - General, Health Occupations, Natural Resources, Real Property, State Finance and Procurement, State Government, Tax - General, Tax - Property, and Transportation.

Each revised article is a formal bulk revision under the guidelines set in 1970, which include improvement of organization, elimination of obsolete or unconstitutional provisions, resolution of inconsistencies and conflicts in the law, correction of unintended gaps or omissions in the law, deletion of repetitive or otherwise superfluous language, and general improvement of language and expression. See § 2-1318 of the State Government Article.

The basic thrust of the revision is formal; the primary purposes of the work are modernization and clarification, not policymaking. Nonetheless, a revision sometimes must touch on the substance of the law. Every effort is made to ensure that a proposed revision conforms as nearly as possible to the intent of the General Assembly, and all these revisions are highlighted in the appropriate revisor's notes. In other instances, the staff has used revisor's notes to call to the attention of the General Assembly fundamental policy issues that are beyond the purview of the revision process but has made no attempt to resolve the policy problems. The significant issues in both of these categories encountered in preparing the proposed Labor and Employment Article are highlighted in Section VI of this Report.

Overtime compensation, under Federal law, is based on an "8 and 80 rule", which allows computation of overtime for a 2-week period. Under State law, different rules for overtime compensation apply to different occupations. The Labor and Employment Article Review Committee believes that most employers are unaware of the specific and divergent provisions in the State law and, instead, honestly but mistakenly believe that they are satisfying both the State and federal law by following the "8 and 80 rule". Compare Article 88A, § 17A-2(c), which limits the hours a recipient of public assistance may be required to work on a public job to 40 hours per week or 8 hours per day, and Article 100, § 76, which provides that, generally, overtime for a State employee shall be computed on the basis of hours worked in excess of 40 hours per week. the Committee notes that, under Article 100, § 76(a)(3), overtime for a State employee in a hospital or care facility is based on the 8 and 80 rule". See the revisor's note to § 3-420.

Employers are required to post a summary of Subtitle 4 and a copy or summary of each regulation. The approval of the Commissioner is required only for a summary of the subtitle, although an employer also may post a summary of the regulations. See the revisor's note to § 3-423.

A person aggrieved by a regulation or order to pay wages may file a complaint in circuit court. However, the law does not specify in which circuit court. See the revisor's note to § 3-426.

Under Maryland Rule B4a, absent an extension, an appeal from any final administrative action must be filed within 30 days after the action. Article 100, § 86(c) sets a 60-day period for filing an order for appeal from a regulation or order to pay wages. See the revisor's note to § 3-426.

Subtitle 5. Wage Payment and Collection.

Subtitle 5 contains the provisions that govern payment of wages to and collection of wages by employees.

The law allows an employer to make a deduction from the wage of an employee if the deduction is ordered by a court, authorized in writing by the employee, allowed by the Commissioner, or otherwise made in accordance with any law or any rule or regulation issued by a governmental unit. The Commissioner posits that the reference to "any law or any rule or regulation issued by a governmental unit" was intended to encompass only statutes and regulations, notwithstanding the broad use of the word "law" and the fact that a "court" is a governmental unit". Thus the Commissioner would exclude case law generally and rely on the specific reference to a court as delineating the role of a court. The General Assembly may wish to clarify its intent. See the revisor's note to §3-503.

If a court finds that an employer withheld the wages of an employee in violation of the wage payment and collection law and not as a result of a "bona fide" dispute, the court may make an award to the employee. Although "bona fide" addresses "good faith", the Commissioner suggests that the condition was intended to restrict "dispute" to a matter material to the violation. The General Assembly may wish to clarify its intent.

Article 23, § 139, which first was enacted by Ch. 589, Acts of 1902, and required associations and corporations engaged in certain types of business to use certain methods to make wage payments to "wageworkers" and to make the payments within specified time limits, may have been superseded. Since 1966, all employers, including associations and corporations, have been subject to the similar requirements of Article 100, § 94 -- revised as Subtitle 5 of this title. See State v. Coblentz, 167 Md. 523, 527 (1934). However, the Labor and Employment Article Review Committee notes that Article 23, § 139 expressly makes officers subject to the criminal penalties to which the associations and corporations are liable. A myriad of questions result, including whether an express reference to an officer is needed and, if so, whether the provisions of Article 23, § 139 that relate to officers can be severed from the provisions that relate to the association or corporation. Similar questions arise with respect to other provisions of this article where an "employer" is made subject to penalties and, indeed, with respect to other criminal statutes. See, e.g., the General Revisor's Note to Title 13, Subtitle 10 of the Tax -- General Article. See also Moniodis v. Cook, 64 Md. App. 1, 13, cert. denied, 305 Md 631 (1985). The Committee was apprised that violations on wage payments frequently arise in instances where the assets of an entity have been dissipated unlawfully. In those instances, there may be recourse against an officer for the underlying crime, 40 A.L.R. 2d 1209, or for breach of the standard of care. E.g., CA §§ 2-405.1 and 2-405.2. In light of the questions, the Committee choose to leave Article 23, § 139 in the Code but urges the General Assembly to examine the provision. See the General Revisor's Note to Title 3.

Subtitle 6. Wholesale Sales Representatives.

Subtitle 6 contains the provisions that allow a sales representative to collect commissions due from a principal who fails to pay the commissions. While this subtitle is not administered by the Division of Labor and Industry, it was included in Title 3 because its intent is analogous to the intent of the wage payment and collection law.

Subtitle 7. Miscellaneous.

Subtitle 7 contains provisions that govern employers in relation to their employees. These include asking medical questions, using lie detector tests, discharge for participation in volunteer activities, choice of a day rest of rest by employees, and effect of social security payments on pension plans.

The law prohibits an employer from requiring an employee to answer certain medical question. The General Assembly may wish to consider whether an employer should be prohibited from asking an improper question. See the revisor's note to § 3-701.

The law requires an application for employment to include a statement that an employer may not require an employee or applicant for employment to take a lie detector test. It requires an applicant for employment to sign an acknowledgment of the notice. However, current Article 100, § 95 provided no procedures by which an applicant would satisfy the requirement.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2556
September Term, 2008

and

No. 988
September Term, 2009

THE METROPOLITAN WASHINGTON ORTHOPAEDIC ASSOCIATION, CHARTERED, ET AL.

v.

CHRISTINA L. CERVIERI

Eyler, Deborah S.,
Wright,
Matricciani,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: May 12, 2010

In the Circuit Court for Prince George's County, Dr. Christina L. Cervieri, the appellee/cross-appellant, brought an action for breach of contract and violation of the Maryland Wage Payment and Collection Law ("WPCL"), Md. Code (2008 Repl. Vol.) section 3-501 *et. seq.* of the Labor and Employment Article ("LE"), against her then employers, the Metropolitan Washington Orthopaedic Association, Chartered ("MWOA") and Washington Orthopaedic Center, LLC ("WOC"),[1] the appellants/cross-appellees.[2] She asserted that the appellants had wrongfully ceased paying her in breach of her employment contract and in violation of the WPCL. She sought treble damages, in addition to attorneys' fees and costs. MWOA filed a four-count counterclaim,[3] asserting that Dr. Cervieri had been overpaid, that she had taken excessive leave, that she had breached her employment agreement by failing to attend certain meetings, and that she owed MWOA for malpractice insurance premiums paid on her behalf.

A jury found in Dr. Cervieri's favor on her wage claim, awarding damages of $49,807.92. It also found, under the WPCL, that there was not a "bona fide dispute" justifying the withholding of her wages. On MWOA's counterclaim,[4] the jury found that Dr.

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[1]Except where noted, all references to MWOA will refer to both MWOA and WOC.

[2]She also filed suit against the Physical Medicine Rehabilitation Center, the Washington Orthopaedic Center for Orthopaedic Subspecialties, and her supervisor, Dr. Rida Azer. At the close of Dr. Cervieri's case, the circuit court granted judgment as a matter of law in favor of these three defendants. They are not parties to this appeal.

[3]WOC did not join in the counterclaim.

[4]At the close of all the evidence, the circuit court granted judgment in Dr. Cervieri's favor on the third count of MWOA's counterclaim relating to Dr. Cervieri's failure to attend (continued...)

Cervieri had taken excessive leave and awarded $12,115.31 in damages. It found in Dr. Cervieri's favor as to overpayment of wages and the malpractice insurance premiums. MWOA unsuccessfully moved for a new trial. It noted an appeal from the judgment in Dr. Cervieri's favor and Dr. Cervieri noted a cross-appeal as to the judgment on the counterclaim.

Thereafter, the circuit court held a hearing on Dr. Cervieri's petition for attorneys' fees and awarded her $61,842.40 in fees and $6,023.26 in costs. MWOA noted a timely appeal from this judgment as well. On July 21, 2009, the appeals were consolidated by order of this Court.

MWOA presents five questions for our review, which we have rephrased and consolidated as four:

I. Was there a "bona fide dispute" under the WPCL as a matter of law when the jury granted the employer a monetary judgment based on a finding that she took excessive leave or was the jury verdict inconsistent on this issue?

II. Did the circuit court err in refusing to dismiss Dr. Cervieri's case as a sanction for spoilation of evidence?

III. Did the circuit court err in granting attorneys' fees to Dr. Cervieri when she had unclean hands relating to spoilation of evidence?

IV. Did the circuit court abuse its discretion in admitting and failing to admit certain evidence?

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[4](...continued)
meetings. This count accordingly was not before the jury.

On cross-appeal, Dr. Cervieri presents one question for our review:

I. Was the jury verdict in favor of MWOA on the issue of excessive leave against the uncontroverted evidence?

For the reasons that follow, we answer these questions in the negative and shall affirm the judgments of the circuit court in all respects.

FACTS AND PROCEEDINGS

Dr. Cervieri is an orthopedic surgeon. She earned her medical degree at UCLA. Thereafter, she completed a one-year general surgery internship, a four-year orthopedic surgery training program, and a year-long sports medicine orthoscopy fellowship, concluding her training in July of 2004.

MWOA is a general orthopedic and trauma care practice operating for more than 30 years in Maryland, Virginia, and the District of Columbia. Its president is Dr. Rida Azer. WOC is a sub-speciality practice associated with MWOA. It is owned by Dr. Rida Azer's son, Dr. Nigel Azer.[5]

In December of 2004, shortly after completing her sports medicine fellowship in Birmingham, Alabama, Dr. Cervieri interviewed with Dr. Azer for a position at MWOA. Dr. Azer learned during the interview that Dr. Cervieri had not yet become board certified,

[5]We shall refer to Dr. Rida Azer as "Dr. Azer" and his son as "Dr. Nigel Azer."

having failed the written portion of the examination.[6] Dr. Cervieri was offered and accepted a position at MWOA.

On December 20, 2004, Ann Schneider, Dr. Azer's secretary, sent Dr. Cervieri a letter welcoming her to the practice. The letter included applications for licensure in Maryland and the District of Columbia, with a Virginia application to follow, in addition to other preliminary paperwork.

On December 27, 2004, Dr. Cervieri and MWOA entered into a formal Employment Agreement ("the Agreement"). The Agreement was signed by Dr. Cervieri and by Dr. Azer on behalf of MWOA.

The term of the Agreement was two years, commencing upon Dr. Cervieri's receiving the first of her three required state licenses. Section 3 provided that Dr. Cervieri would be paid an annual gross salary of $300,000 for the first year, with a 10% increase ($330,000) for the second year. The annual salary was subject to modification by agreement of the parties if formally approved in writing as an addendum to the Agreement.

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[6]Board certification for orthopedic surgery is a two-step process. First, the candidate must pass a written examination administered each July by the American Board of Orthopedic Surgery. Then, within one year of passing the written portion of the exam, the candidate must pass an oral exam based on clinical procedures. Board certification is not a requirement for the practice of orthopedic surgery, but it often is a requirement for obtaining privileges at certain hospitals.

Sections 4 and 5 stated that Dr. Cervieri was to be employed exclusively by MWOA and "shall devote her full and exclusive time and attention to rendering professional services on behalf of [MWOA.]"

Section 7 stated that MWOA would "pay for and carry professional liability insurance" for Dr. Cervieri "as well as such insurance, medical, and other benefits, as from time to time may be deemed appropriate and necessary."

Section 10 provided that the Agreement was terminable upon the death of Dr. Cervieri, upon the loss of her license or any restrictions on her right to practice medicine, upon her refusal to perform her duties or comply with MWOA's policies and standards, or with or without cause by either party with 90 days prior written notice.

After entering into the Agreement, Dr. Cervieri completed and submitted her applications for licensure. In the interim between submitting the applications and their issuance, she joined a group of physicians traveling to Sri Lanka for two weeks to provide relief efforts following the tsunami disaster in Indonesia.

On February 27, 2005, prior to leaving for her trip, Dr. Cervieri wrote Dr. Azer expressing her intent to begin working on March 21, 2005, "[a]ssuming licensure has occurred by then." She also stated that "[t]he expenses of moving and volunteering in Sri Lanka, following an extended period of unemployment, have added significant financial burden for me. Thus, as soon as you see fit, a moving stipend will relieve this growing pressure."

Dr. Azer replied by email on March 1, 2005,[7] stating "[a]s we agreed, I have given instructions to the Business Office to forward to you a check for $10,000.00 upon your receiving a license. Please notify them of your License Number, and they will forward the check to you."

Dr. Cervieri received her license to practice medicine in Maryland on April 19, 2005, and she commenced her term of employment on April 25, 2005. She received the $10,000 check referenced in Dr. Azer's email sometime in the interim between the issuance of her license and her start date.

Pursuant to the Agreement, Dr. Cervieri initially was compensated at an annual rate of $300,000. She was paid on a bi-weekly basis.

The parties have distinctly different recollections of the first few months of Dr. Cervieri's tenure at MWOA. According to MWOA, less than two months after she started, on June 13, 2005, Dr. Azer met with Dr. Cervieri to discuss concerns about her seriousness. Specifically, he spoke to her about a perceived delay in the issuance of her licenses and hospital privileges, and asked her "if she liked orthopaedics" and whether she was "serious." Dr. Azer also testified that he told Dr. Cervieri that, if she passed the written portion of the Board examination that summer, he would raise her salary for the second year of her term of employment from the agreed upon $330,000 to $350,000.

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[7]The email was sent from his secretary's account, but was signed by him.

Dr. Cervieri confirmed that this conversation occurred, but was unsure of the exact date and did not think it was out of the ordinary. She remembers that she confirmed to Dr. Azer her seriousness about her profession. She also testified that, sometime in July of 2005, Dr. Azer met with her to compliment her on her performance. He informed her that if she continued to perform well, he would raise her salary to $340,000 at the six-month point.

Around this time, Dr. Cervieri was made Division Chief of Sports Medicine for WOC. Dr. Azer also wrote numerous letters on Dr. Cervieri's behalf during the summer months in an attempt to accelerate the granting of privileges at various hospitals. At least one hospital was considering denying Dr. Cervieri privileges because one of her references had not given her an unqualified recommendation.

In November of 2005, Dr. Cervieri's bi-weekly paychecks increased to an amount consistent with an annual salary of $340,000. She testified that this increase reflected the raise Dr. Azer had promised her.

Dr. Azer disputed that an increase in the amount of her paycheck meant that Dr. Cervieri had been given a raise. He testified that physicians employed by MWOA had "accounts" amounting to the total salary they were entitled to receive under their employment contracts. The physicians were permitted, at their discretion, to be paid at an accelerated rate from their accounts if that would ease their financial burdens early in their employment term. A physician merely had to request additional monies from the business office to obtain such an increase. The physician could not, however, exceed the total account. Erik Kloster,

MWOA's outside accountant, also testified to this effect. Accordingly, per Dr. Azer's testimony, Dr. Cervieri's account totaled $630,000 ($300,000 for the first year and $330,000 for the second year), and she was permitted to receive that total amount in whatever increments she chose, subject to certain limitations.[8]

According to Dr. Cervieri, her pay was again increased in April of 2006, following her one-year anniversary date. She testified that she met with Dr. Azer in March of that year and requested a 10% increase ($370,000) over her then current salary of $340,000. She claims that Dr. Azer offered her $350,000 and she accepted.

Dr. Azer disputed this testimony, claiming that because Dr. Cervieri had not passed the written portion of the Board exam, her salary increased pursuant to the Agreement by 10% from $300,000 to $330,000. Any increase in her bi-weekly paychecks again reflected her discretionary decision to receive accelerated payments from her account.

In May of 2006, Dr. Cervieri began being paid by WOC instead of MWOA. At the same time, WOC negotiated a group health insurance plan through CareFirst Bluecross Blueshield. On May 1, 2006, Dr. Nigel Azer's secretary sent Dr. Cervieri forms to enroll in the health plan. Prior to that time, Dr. Cervieri had purchased her own individual health coverage because MWOA did not offer any health benefits. She enrolled in the plan. She

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[8]Mr. Kloster testified that a request for a bi-weekly amount that would increase an employee's annual compensation by more than $50,000 over his or her actual pay rate would have raised a red flag.

was never asked to pay any health insurance premiums and her paychecks did not thereafter reflect any deductions for a premium.

In late 2006, Dr. Cervieri testified that her relationship with Dr. Azer changed, for reasons she did not understand. She felt ostracized and scrutinized by him and that the workplace had become "icy."[9]

On January 24, 2007, MWOA's counsel wrote to Dr. Cervieri to inform her that her employment contract would not be renewed. The letter asked her to notify MWOA "of the date that suit[ed her] to be [her] last day of practice." Dr. Cervieri had not previously been informed that her contract would not be renewed.[10]

On February 9, 2007, Dr. Cervieri responded by letter that she would work until April 24, 2007, the end of her term under the Agreement. MWOA's counsel replied by letter to acknowledge receipt of her letter.

On February 22, 2007, Dr. Azer sent Dr. Cervieri a memorandum asking her to direct all further communications, whether personal or business related, to MWOA's Chief Operating Officer or, in her absence, to one of two other employees of MWOA.

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[9]Around this time, Dr. Cervieri underwent a laser treatment on her face. As a result of the treatment, her face became very red and she experienced some discomfort. She called in sick for one day following the treatment. Upon her return to work, her face remained red. Dr. Azer directed her to cancel her surgical procedures for a few days because of her appearance. He was concerned that patients might think she had an infection. Dr. Cervieri was offended by this suggestion and did not think cancellations were necessary. She agreed to do so upon Dr. Azer's insistence, however.

[10]Although, as we will explain, *infra*, Dr. Cervieri already was aware of that possibility.

On March 8, 2007, Dr. Cervieri received her regular bi-weekly paycheck. Ordinarily, her next paycheck would have issued on March 22. On March 20, however, Dr. Azer called a meeting with Dr. Cervieri and two other MWOA physicians who recently had resigned. The meeting was attended by Dr. Azer, counsel for MWOA, MWOA's administrators, and all other physicians. At the meeting, Dr. Cervieri was told that she had been overpaid by MWOA.

In a letter dated March 21, 2007, counsel for MWOA advised Dr. Cervieri that "demand is hereby made for repayment, in full, of all excess sums paid to you by [MWOA and WOC]." It went on to state that her future paychecks would be "place[d] . . . in escrow, pending resolution of these matters."

Dr. Cervieri responded through counsel the next day that if MWOA and/or WOC withheld her pay, she would immediately file suit and seek treble damages and attorneys' fees under the WPCL; and stated that MWOA's allegations of overpayment were "utterly baseless and lacking good faith."

MWOA requested that Dr. Cervieri attend a meeting on March 23, 2007, with Mr. Kloster, to explain MWOA's position as to the allegation of overpayment. Dr. Cervieri declined to attend the meeting. On March 28, 2007, counsel for MWOA wrote to Dr. Cervieri's counsel, noting Dr. Cervieri's "refus[al]" to attend the meeting. He explained MWOA's position as follows:

> [Dr. Cervieri's] employment agreement allows her $300,000,00 per annum for the first year and $330,000.00 per annum for the second year, which includes

seven weeks of authorized leave for two years of employment. For the days she has worked and will work until April 24, 2007, Dr. Cervieri is entitled to payment of $611,013.69. (On April 24, 2007 she will not have worked a full 2 years).

Her account shows payment as of March 8, 2007:
$632,309.44
+ $ 3,500.00 premiums paid for her Health Insurance (by April 24, 2007 the amount for Health Insurance Premiums will be more).

The total payment she received is $635,809.44.

Without further payments to her until April 24, 2007, for the days she has worked and will work during her employment, she is overpaid $24,795.75.

The letter went on to request that Dr. Cervieri make arrangements to pay this outstanding amount.

Dr. Cervieri did not receive any further paychecks from MWOA or WOC. She filed the instant suit on April 11, 2007. She continued to work for MWOA until April 24, 2007.

Her complaint set forth two counts: breach of contract and violation of the WPCL. She filed an amended complaint on March 3, 2008, seeking damages of $53,307.92,[11] plus pre-judgment interest, attorneys' fees, and costs. She also sought treble damages under the WPCL.

MWOA counterclaimed, setting forth four counts. Under count one, MWOA claimed that Dr. Cervieri had been overpaid in the amount of $24,795.75. Under count two, MWOA

[11]She sought damages of only $49,807.92 under the WPCL count. The difference of $3,500 apparently reflected the cost of Dr. Cervieri's health insurance premium.

alleged that she had taken "extended leave in violation" of the Agreement and was "indebted to MWOA" for the excess leave "calculated on an annualized basis by dividing the amount of days she was contractually required to work into her annual compensation, and then by multiplying that sum times the days or parts of day missed by Dr. Cervieri." Count three alleged that Dr. Cervieri breached the Agreement by failing to attend certain meetings beginning in October of 2006 and failing to "meet any of the economic requirements imposed on each physician employed by MWOA." Count four sought reimbursement for a portion of the prepaid malpractice insurance premium covering Dr. Cervieri for a period of time after her employment terminated.

The case was tried to a jury for five days, from April 29 to May 5, 2009. Dr. Cervieri testified on her own behalf. MWOA called Dr. Azer, Dr. Nigel Azer, and Mr. Kloster as witnesses. As noted, *supra*, at the close of all the evidence, Dr. Cervieri moved for judgment as to count three of MWOA's counterclaim and her motion was granted without objection from MWOA. The case was sent to the jury with a special verdict form.[12]

The jury returned a verdict in favor of Dr. Cervieri on her wage claim, awarding her all of her asserted damages for unpaid wages. It also found in her favor on the question whether, under the WPCL, there was a bona fide dispute as to her entitlement to the unpaid wages. It did not award her any additional damages under the WPCL.

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[12]We will discuss the specific questions asked on the special verdict form, *infra*.

On MWOA's counterclaim, the jury found that Dr. Cervieri had taken excessive leave and awarded MWOA damages in the amount of $12,115.31. It found in Dr. Cervieri's favor on the remaining questions pertaining to the counterclaim, concluding that she had not been overpaid and that she did not owe MWOA for health insurance or malpractice premiums paid on her behalf.

On May 20, 2008, the circuit court entered judgments consistent with the jury verdict. Both parties noted timely appeals from these judgments.

Thereafter, Dr. Cervieri petitioned the court for attorneys' fees and costs. MWOA moved for a new trial based on certain pretrial rulings and evidentiary rulings made during the trial which will be discussed in more detail, *infra*. MWOA's new trial motion was denied.

On February 6, 2009, a hearing was held on the issue of attorneys' fees. The court awarded Dr. Cervieri $67,865.66 in fees and costs. MWOA noted a timely appeal from this judgment.

DISCUSSION

APPEAL

I.

Bona Fide Dispute

MWOA first challenges as inconsistent the jury's finding that, under the WPCL, there was not a "bona fide dispute" as to whether Dr. Cervieri was owed wages, given that the jury

also found that Dr. Cervieri owed MWOA for excessive leave. As we shall explain, Dr. Cervieri's eligibility to seek attorneys' fees rested on this finding. Accordingly, MWOA urges that the award of attorneys' fees and costs should be vacated.

We begin with the pertinent law. The WPCL governs the manner in which employers pay their employees and provides remedies for failure to pay an employee all wages owed. As is relevant to the instant case, it provides, in a subtitle entitled "Payment of wage," that an employer shall pay its employees "at least once in every two weeks or twice in each month." LE § 3-502(a)(1)(ii). It also provides that, upon termination of an employee, the employer shall pay him or her "all wages due for work performed before the termination of employment, on or before the day on which the employee would have been paid the wages if the employee had not been terminated." *Id.* at § 3-505(a). "Wage" is defined as "all compensation that is due to an employee for employment." *Id.* at § 3-501(c)(1).

An employee may bring an action to recover unpaid wages "after 2 weeks have elapsed from the date on which the employer is required to have paid the wages[.]" *Id.* at § 3-507.1(a). In such an action, if "a court find 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." *Id.* at § 3-507.1(b) (emphasis added). Thus, a finding that an employer *did* withhold wages as the result of a "bona fide dispute" as to whether the wages were owed precludes an award of treble damages, attorneys' fees, and costs under the WPCL.

The Court of Appeals has explained that a "bona fide dispute" exists when an employer has "a good faith basis" for withholding wages or when "there is a legitimate dispute over the validity of the claim [for unpaid wages] or the amount that is owing." *Admiral Mortgage, Inc. v. Cooper*, 357 Md. 533, 543 (2000). Thus, the appropriate inquiry is whether there was "sufficient evidence adduced to permit a trier of fact to determine that [the employer] did not act in good faith when it refused to pay" wages to an employee. *Id.*[13]

In the instant case, Dr. Cervieri asserted that MWOA did not withhold her wages as a result of a bona fide dispute and therefore sought treble damages, fees, and costs under the WPCL. The special verdict form presented to the jury provided as follows on Dr. Cervieri's wage claim:

> 2. Do you find that Plaintiff has proven by a preponderance of the evidence that her former employer owes her unpaid wages?
> 3. If your answer to Question 2 is "Yes," do you find that Plaintiff has proven by a preponderance of the evidence that no bona fide dispute existed for the withholding of wages?

The jury answered "Yes" to both of these questions. In answer to Question 4, the jury found the amount of unpaid wages to be $49,807,92.[14] As discussed, *supra*, the jury was permitted to award Dr. Cervieri up to treble damages based on its finding of no bona fide dispute. In answer to Question 5, however, it did not award any additional damages under the WPCL.

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[13]The jury instructions in the instant case were consistent with *Admiral Mortgage* and MWOA does not challenge them.

[14]This amount reflects 296 hours (37 days) of unpaid wages at $168.27 per hour - the gross rate Dr. Cervieri was receiving when she was informed that her contract would not be renewed. That rate amounts to an annual salary of $350,000.

On MWOA's counterclaim, the jury was asked whether MWOA had

proven by a preponderance of the evidence, any of the following claims?

a. Overpayment of Wages
b. Excessive Leave
c. Due Malpractice Premiums
d. Due Health Insurance Premiums.

The jury answered "No" to a, c, and d, but found in MWOA's favor on question b. It awarded MWOA damages in the amount of $12,115.31.

On appeal, MWOA advances two related arguments. First, it argues that, as a matter of law, there is a bona fide dispute as to withholding wages when a jury awards an employer "monetary relief . . . arising out of the employment relationship." Thus, the jury's verdict in its favor on the issue of excessive leave should have precluded a finding in favor of Dr. Cervieri as to a bona fide dispute. Second, it argues that the jury's verdict was irreconcilably inconsistent in that the jury found no bona fide dispute and yet found that Dr. Cervieri owed MWOA $12,115.31 for excessive leave taken.

Dr. Cervieri counters that the jury was permitted to conclude that no bona fide dispute existed when it rejected three of the four justifications offered by MWOA for withholding the wages. She also contends there was sufficient evidence adduced from which the jury could find that her excessive leave was not one of the reasons MWOA withheld wages and accordingly no bona fide dispute existed.

We now turn to the evidence adduced at trial. There was significant testimony and evidence concerning the amount of leave Dr. Cervieri received and the leave she took over

her two year term. It is undisputed that she completed leave slips for the vast majority of her leave and that Dr. Azer approved her requests. Dr. Cervieri calculated that she took approximately 50 days of leave - or 10 weeks - in two years. She also testified and her leave slips reflected that she believed she was entitled to 20 days or 4 weeks of leave each year.[15] Based on this testimony, MWOA took the position in closing arguments that the jury should find that Dr. Cervieri took two weeks of excessive leave and owed MWOA $12,115.38 in damages. The damages award was just $.07 less than that amount. It is implicit in this finding that the jurors accepted MWOA's argument that Dr. Cervieri exceeded her leave quota by two weeks.[16]

Much of the trial testimony was devoted to the reasons that MWOA withheld Dr. Cervieri's wages. MWOA informed Dr. Cervieri of its intent not to renew her contract in January of 2007. It did not inform her for almost two months thereafter of its allegation that she had been overpaid. According to Dr. Cervieri, she was not given any details about the nature of the overpayment.

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[15]There also was testimony that Dr. Azer gave leave as gifts to "incentiviz[e]" his employees and Dr. Cervieri testified that he "gifted" her the extra leave that she took. The jury's finding reflects that they did not credit this testimony, however.

[16]MWOA calculated the amount of damages by reference to a total salary of $630,000 over two years because it disputed that Dr. Cervieri had received any raises. The jurors apparently accepted these calculations. As previously noted, however, the jury awarded Dr. Cervieri unpaid wages based on a higher salary reflecting her receipt of the raises. Neither party challenges this discrepancy.

An internal MWOA document reconciling Dr. Cervieri's account was prepared by Mr. Kloster at Dr. Azer's direction on March 26, 2007 ("Internal Accounting"). Thus, the Internal Accounting appeared to have been prepared six days after Dr. Azer met with Dr. Cervieri and told her she had been overpaid. The Internal Accounting included four figures:

TOTAL AMOUNT DUE: $581,418.81
{ALLOWED LEAVE PAID AND ACCOUNTED FOR}

TOTAL AMOUNT PAID THRU 3-20-07: $636,139.44

OVERPAID AS OF 3-20-07: $54,720.63
{IF SHE WORKS THRU 4-24-07 WITH NO FURTHER PAYMENTS}

OVERPAID THRU 4-24-07: $23,077.13

Mr. Kloster testified that the "total amount due" on this document "dealt with how much money was due to [Dr. Cervieri] based on the number of days that she actually worked for the practice" and the "total amount paid" included all bi-weekly paychecks, $3,500 in health insurance premiums and the $10,000 advance payment made to Dr. Cervieri in April of 2005. He stated that, in calculating the amount Dr. Cervieri was owed, he included leave taken that was deemed to have exceeded the limits. He initially was unable to state how many days of leave were included, however, and estimated that it was at least one month of leave. Under further questioning, he determined that he must have included 43 days (more than 8 weeks) of excessive leave in his calculation. He testified that this number was provided to him by another employee in the business office and he did not know how it was calculated or how much leave Dr. Cervieri was entitled to take or had actually taken.

Dr. Azer testified that he was not aware that Dr. Cervieri had taken excessive leave until after the litigation began; and that he did not believe excessive leave was included in the Internal Accounting that he had directed Mr. Kloster to prepare.[17]

On March 28, 2007, MWOA wrote to Dr. Cervieri and, for the first time, provided a detailed accounting of the alleged overpayment. That letter notes that Dr. Cervieri was entitled to 7 weeks paid leave,[18] but makes no reference to excessive leave. It states that "[f]or the days she has worked and will work until April 24, 2007, Dr. Cervieri is entitled to payment of $611,013.69" and that, assuming she works until that date, Dr. Cervieri will have been overpaid in the amount of $24,795.75. It is unclear why the numbers in this letter were different from the numbers on the Internal Accounting.

The Agreement, which also was introduced into evidence, allowed Dr. Cervieri to be terminated at any time without notice for violating MWOA's policies and procedures. The evidence at trial revealed that no action was taken, however, to terminate Dr. Cervieri for violation of the leave policy.

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[17]As Dr. Cervieri points out, MWOA's amended counterclaim itself is consistent with Dr. Azer's testimony that leave was not included in the calculation. In Count I, MWOA alleges that it overpaid Dr. Cervieri $24,795.75. This is the same figure that appears in the March 28, 2007 letter. In Count II, however, MWOA alleges that Dr. Cervieri "took extended leave in violation of the terms of her contract" and did not repay MWOA for this leave. It seeks damages in an amount to be determined at trial. Thus, it appears that MWOA sought damages for excessive leave in addition to the damages claimed for overpayment in the March 28, 2007 letter.

[18]The source for this figure is unclear. MWOA appears to concede, however, that Dr. Cervieri was entitled to at least 20 days of leave per year, or 8 weeks over the term of the Agreement.

We begin by considering MWOA's argument that the jury verdict in its favor on Count two of the counterclaim was irreconcilably inconsistent with the verdict that no bona fide dispute existed on the issue whether Dr. Cervieri was entitled to wages. Irreconcilably inconsistent jury verdicts cannot stand. *See S. Mgmt. Co. v. Taha*, 378 Md. 461, 487 (2003). A verdict is irreconcilably inconsistent when "the answer to one of the questions in a special verdict form would require a verdict in favor of the plaintiff and an answer to another would require a verdict in favor of the defendant[.]" *S & R, Inc. v. Nails*, 85 Md App. 570, 590 (1991), *rev'd on other grounds*, 334 Md. 398 (1994) (verdict awarded punitive damages on fraud claim despite jury finding that the defendant had acted with implied, rather than actual, malice).

The verdict in this case was not irreconcilably inconsistent. First, we note that MWOA did not object to the special verdict form or argue at trial that it should direct the jury that it could only answer "Yes" to Question 3 if it did not find in MWOA's favor on any of its counterclaims. Second, the jury could have concluded that the reasons that MWOA actually withheld Dr. Cervieri's wages differed from those offered at trial. Thus, the jurors reasonably could find that, while Dr. Cervieri may have taken more leave than allowed under MWOA's policies, that was not one of the reasons MWOA withheld her wages after informing her that her employment contract was not being renewed. The jurors were free to credit Dr. Azer's testimony that Dr. Cervieri's leave was not calculated and included in the review of her account and to disbelieve Mr. Kloster's testimony to the contrary. Mr.

Kloster's testimony on this point was confusing, at best, and the amount of excessive leave he purportedly included in his calculations exceeded the amount MWOA now claims Dr. Cervieri took by many weeks. Given that the jurors rejected the remaining counts of MWOA's counterclaim, it follows that they reasonably could have found on the evidence that, when MWOA withheld Dr. Cervieri's wages, it lacked a good faith basis to do so. It is not our province to second guess the jury's findings on these matters.

For the same reasons, we reject MWOA's related argument that any award of money damages to an employer compels the finding of a bona fide dispute under the WPCL as a matter of law. Under the facts of this case, we have concluded that the jurors reasonably could find that the employer was owed reimbursement *and* that it withheld wages in bad faith. Consequently, this argument must fail.

II.

Spoliation

MWOA next contends the circuit court abused its discretion by not dismissing Dr. Cervieri's case as a sanction for spoilation of evidence. The relevant facts are as follows.

At some time in late 2006 or early 2007, Dr. Cervieri reviewed her employee file, which was located in a file cabinet in her secretary's office. She claims that she was looking for information regarding her hospital credentialing and that other secretaries advised her to look in her own file. Her secretary was not in her office when Dr. Cervieri accessed the file.

According to Dr. Cervieri, while she was searching the file, she came upon three documents that piqued her interest. She removed all three documents from her file and took them with her. She never returned them to her file, nor did she inform anyone at MWOA that she had taken them.

The first document was an unsigned letter to her from Dr. Azer dated November 28, 2006, stating that her employment contract would not be renewed. The letter had not been mailed or delivered to her.

The second document was a memorandum entitled "RE: Dr. Christina Cervieri," dated November 30, 2006, detailing the events of November 27-29, 2006. It discussed Dr. Cervieri's laser treatment, her conversation with Dr. Azer following the treatment, and his instructions to her that she cancel surgeries due to her appearance. It also recorded a meeting occurring between Dr. Azer, Dr. Nigel Azer, and MWOA's COO following these events in which they decided to terminate Dr. Cervieri because there had been too many problems with her. Apparently, the memo was prepared by Dr. Azer's secretary, Ann Schneider,[19] as it was initialed "as" at the bottom.

The third document was the subject of much dispute. It is a memo, titled "RE: Christina Cervieri, MD," and initialed "as," dated July 18, 2005. It says: "PER DR. AZER. After one year salary will be $350,000.00. When she gets her Boards, another $20,000.00."

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[19]Ms. Schneider also was Dr. Cervieri's secretary at that time. It was in her file cabinet that Dr. Cervieri found the employment file in question.

MWOA did not learn that Dr. Cervieri had taken any documents from her employee file until November 6, 2007, the night before her scheduled deposition. That night, Dr. Cervieri produced over 700 documents to MWOA, including the three discussed above. During her deposition, MWOA's counsel questioned her extensively about how and when she had obtained the documents. At the conclusion of the deposition, which lasted more than five hours, MWOA's counsel stated that he intended to keep the deposition open. Dr. Cervieri's counsel objected.

Dr. Azer was questioned during his own deposition about the document that purported to memorialize a conversation he had with Dr. Cervieri in which he offered her a raise to $350,000. He stated that he had never seen that memo before, that it was not prepared by his secretary, and that he believed it to be a forgery.

Over the course of the next several weeks, the parties exchanged numerous hostile letters and emails concerning whether Dr. Cervieri could be deposed again by MWOA or deposed for the first time by WOC,[20] culminating in Dr. Cervieri's filing a motion for protective order on January 4, 2008. WOC opposed that motion and moved to be allowed to depose Dr. Cervieri. On March 7, 2008, the circuit court held a hearing on the motions and ruled that MWOA could depose Dr. Cervieri for an additional three hours and that,

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[20]MWOA noted the first deposition of Dr. Cervieri. MWOA and WOC were represented by the same counsel, however. Dr. Cervieri disputed that WOC was entitled to note its own deposition of Dr. Cervieri.

following that deposition, Dr. Cervieri could depose Mr. Kloster for the first time.[21] Neither of these depositions ever occurred, however, because the parties were unable to mutually agree on a location for them.[22]

On March 5, 2008, shortly before the hearing on the prior motions, MWOA filed a motion to dismiss or, in the alternative, for sanctions for spoilation of evidence. In its motion, MWOA argued that Dr. Cervieri's actions in "stealing" the documents from her employment file had resulted in MWOA's being unable to adequately prepare for her deposition; that she had fabricated the memo purporting to memorialize her conversation with Dr. Azer related to an increase in her salary; that MWOA "no longer [could] be confident in relying on the documents found in [her] employment file"; and that it had only just discovered a "misfiled" document consisting of Dr. Azer's handwritten notes confirming his recollection of the salary discussions with Dr. Cervieri in which he had offered her a raise only if she passed the written portions of the Board exam ("Exhibit F"). MWOA asserted that dismissal was the appropriate sanction under the circumstances, but argued that, at the very least, Dr. Cervieri should be precluded from introducing into evidence any of the three

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[21]Dr. Cervieri previously had noted Mr. Kloster's deposition but MWOA had informed her that Mr. Kloster would not appear based on the parties' ongoing dispute over a second deposition of Dr. Cervieri.

[22]MWOA noted Dr. Cervieri's deposition on an agreed upon date and time to take place at MWOA's offices. On the eve of that deposition, Dr. Cervieri said that she would not agree to be deposed at MWOA's offices, a position she had taken previously, because it made her uncomfortable given her history there. The parties were unable to agree to an alternate location.

documents she took from her file and that the court should instruct the jury on adverse inferences related to spoilation of evidence.

Dr. Cervieri opposed the motion, arguing that her actions did not rise to the level of egregiousness demanding the ultimate sanction of dismissal. Although she admitted taking the documents, she characterized her action as a lapse of judgment that was corrected when she returned the documents to MWOA in her document production.

The motion to dismiss was not ruled upon before the start of trial. On the morning of the first day of trial, MWOA filed a motion *in limine* seeking to preclude Dr. Cervieri from testifying as a sanction for the non-occurrence of the second deposition. Dr. Cervieri also made a motion *in limine* to preclude MWOA from introducing Exhibit F into evidence.[23] The circuit court heard argument on all pending motions after the conclusion of *voir dire*.

The court denied MWOA's motion to dismiss. It ruled that Dr. Cervieri did engage in pre-litigation spoilation by taking documents from her employee file. As a sanction for that conduct, however, the court precluded Dr. Cervieri from introducing into evidence during her case in chief any of the three documents she took from her file. The court denied MWOA's request for a limiting instruction to the jury pertaining to spoilation, with the caveat that it would reconsider that decision at the close of the evidence.[24]

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[23]Her counsel argued that MWOA's objective in filing its motion for sanctions was to convince the court to allow Exhibit F into evidence even though it was not produced in discovery.

[24]Ultimately, the court decided not to give a spoilation instruction to the jury.

The court also denied Dr. Cervieri's motion *in limine* and allowed MWOA to move Exhibit F into evidence. In so ruling, the court referred back to its finding of pre-litigation spoilation, impliedly accepting MWOA's argument that Exhibit F may have been purposely misfiled by Dr. Cervieri. Thus, the net result of the court's two rulings was that MWOA was allowed to introduce into evidence a document supporting its version of the salary discussions but Dr. Cervieri was denied the opportunity to introduce into evidence a document supporting her version of those events.

The court denied MWOA's motion *in limine* with respect to Dr. Cervieri's testimony. Mr. Kloster also was permitted to testify despite never having been deposed by Dr. Cervieri.

As MWOA concedes, the decision to sanction a party for spoliation of evidence is a matter reserved to the sound discretion of the trial court. *See Klupt v. Krongard*, 126 Md. App. 179, 193 (1999). "Dismissal is clearly the ultimate sanction and there is always 'a preference for a determination of claims on their merits.'" *Weaver v. ZeniMax Media, Inc.*, 175 Md. App. 16, 46, *cert. denied*, 401 Md. 174 (2007) (quoting *Holly Hall Publ'ns Inc. v. County Banking and Trust Co.*, 147 Md. App. 251, 267 (2002)).

In *Weaver*, which MWOA relies upon, the plaintiff admitted that he had used a master key to enter the offices of co-workers, log on to their email accounts, and read and print numerous emails relating to his employment with the company. All of this conduct occurred prior to the onset of litigation, but the documents he surreptitiously read were relevant to the contract dispute at the core of his case. After the conduct came to light, the circuit court held

an evidentiary hearing and granted the defendants' motion to dismiss as a sanction for the pre-litigation spoliation of evidence. On appeal, this Court reversed, holding that the trial court abused its discretion because the "conduct and the implications of that conduct are not so egregious as to warrant the ultimate sanction." *Id.* at 48.

In the instant case, Dr. Cervieri admitted taking documents from her file and acknowledged the documents belonged to MWOA. Even assuming as true MWOA's allegations that she purposely misfiled Exhibit F in an attempt to prevent it from being discovered and that she forged the salary memorandum that she turned over in discovery, the conduct certainly is not more egregious than the conduct in *Weaver*. Moreover, as in *Weaver*, the prejudice to MWOA was minimal. The documents found by Dr. Cervieri would have been discoverable and the trial court fashioned a sanction for her conduct that adequately cured any prejudice caused by their removal. In particular, the court's ruling permitted MWOA to introduce Exhibit F into evidence even though it had failed to produce it during discovery. That ruling effectively tipped the scales in MWOA's favor on the issue of Dr. Cervieri's wage. We find no abuse of discretion in the court's ruling.

III.

Attorneys' Fees

In a variation on its spoilation argument, MWOA also contends that the award of attorneys' fees and costs to Dr. Cervieri should be reversed under the doctrine of unclean

hands.[25] It cites to *Friolo v. Frankel*, 373 Md. 501, 518 (2003), in which the Court of Appeals opined that in actions under the WPCL, "courts should exercise their discretion liberally in favor of awarding a reasonable fee, unless the circumstances of the particular case indicate some good reason why a fee award is inappropriate in that case." (citing *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983)). According to MWOA, pre-litigation spoilation is a "circumstance" justifying no award of fees. We have been presented with no case law consistent with this position. The trial court considered Dr. Cervieri's pre-litigation conduct in making a reduction of the fee award.[26] We perceive no abuse of discretion.

IV.

Evidentiary Rulings

MWOA's final contention is that two evidentiary rulings by the trial court - one admitting an exhibit and one denying admission of an exhibit - were erroneous and prejudicial to it. The first exhibit was a recruiting letter on MWOA letterhead signed by Dr.

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[25]MWOA also contends the award should be reversed based on the existence of a bona fide dispute under the WPCL. We already have resolved this issue in Dr. Cervieri's favor, however, *supra*.

[26]Dr. Cervieri sought an award of $99,496 for fees and costs. The court made an initial adjustment downward of $22,193, including a reduction of the total by $8,992 for services rendered related to the motion for sanctions and motion for protective order. After considering the factors set forth in Rule 1.5 of the Maryland Rules of Professional Conduct, the court made an additional reduction of 20%, resulting in an award of $61,842.40 or just over 60% of the requested fees. While the partial success achieved by Dr. Cervieri was the major factor considered by the court in making this reduction, it specifically noted Dr. Cervieri's "self- help" in accessing her employee file as a factor causing additional trial time.

Azer and written to an unnamed doctor.[27] It was dated July 18, 2005, after Dr. Cervieri joined the practice. The letter stated that MWOA could offer a starting salary of $300,000, malpractice insurance, and "ten-thousand dollars relocation expenses." The letter was offered into evidence during Dr. Cervieri's direct examination to support her contention that the $10,000 check she received shortly before she started working for MWOA was a relocation bonus, not an advance on her salary as MWOA contended. She testified that moving bonuses were "standard for the practice"; that she was involved in recruiting employees; and that moving bonuses were "routinely offered to" prospective employees. With respect to the exhibit, she testified that it came into her possession when she was involved in recruitment early in her tenure at MWOA. When she attempted to move the letter into evidence, a bench conference ensued.

MWOA argued that the letter was inadmissible hearsay and being offered in an attempt to prove a fact that preceded it, *i.e.*, that Dr. Cervieri's $10,000 advance also was a relocation bonus. Dr. Cervieri argued that it was admissible to prove a "usual and customary practice" of MWOA. The court admitted the document, subject to Dr. Cervieri's authenticating Dr. Azer's signature on the letter, as a statement by a party-opponent. *See* Md. Rule 5-803(a). We find no error in this ruling.[28]

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[27]The letter was addressed to "Dear Doctor:" and began "[w]e noticed your listing in the American Academy of Orthopaedic Surgeons Placement Service." Thus, it appeared to be a form letter sent to more than one potential candidate.

[28]In its brief, MWOA argues only that the letter was inadmissible to prove a usual and (continued...)

The second ruling that MWOA contends was error concerns a letter to Dr. Azer from MWOA's insurance broker, Kerxton Insurance Agency, Inc. The letter explained that medical malpractice insurance policies purchased by MWOA on behalf of Dr. Cervieri and another doctor only could be cancelled by the named insured. Accordingly, MWOA was without a right to a return premium on either policy despite the fact that both doctors had ceased working for MWOA. The letter further stated that Dr. Cervieri had "chose[n] to continue [her] coverage following the termination of [her] employment" and, accordingly, any "premium adjustment" would need to be negotiated with her directly.

MWOA sought to introduce this letter under the business records exception to the hearsay rule to support its contention that it was owed malpractice premiums paid on Dr. Cervieri's behalf and that she had refused to cancel her policy after leaving MWOA's employ. Dr. Cervieri objected, arguing that the letter was not a business record, but merely a piece of correspondence. The court refused to admit the letter, but allowed Dr. Azer to refresh his recollection with it and to testify that his insurance broker had informed him that the only way MWOA could receive a refund on its premium was through Dr. Cervieri.

We find no error in the court's ruling. The letter in question was not "made and kept in the course of a regularly conducted business activity," Md. Rule 5-803(b)(6). Rather, it

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[28](...continued)
customary practice. It does not attempt to argue that the basis upon which it actually was admitted was erroneous.

was correspondence sent in response to a specific inquiry about two specific employees' malpractice insurance written five months after the instigation of the instant litigation.

CROSS-APPEAL

I.

In her cross-appeal, Dr. Cervieri contends the jury verdict in MWOA's favor on the issue of excessive leave should be reversed because it was "against the uncontroverted evidence adduced at trial." This argument, which challenges the sufficiency of the evidence, is not preserved for our review.

In order to preserve this issue, Dr. Cervieri was required "specifically to make a motion for judgment pursuant to Md. Rule 2-519 at the close of all evidence,"[29] and "state with particularity all reasons why the motion should be granted." *Gittin v. Haught Bingham*, 123 Md. App. 44, 48 (1998). The record in the instant case reflects that Dr. Cervieri made a motion for judgment at the close of all the evidence only as to count three of MWOA's counterclaim, regarding her alleged failure to attend meetings. Her motion was granted. In his argument, counsel for Dr. Cervieri explicitly conceded that there was sufficient evidence to send the issue of excessive leave to the jury:

> [S]o, I don't believe that the Defendants have carried their burden to present evidence on each element of a breach of contract claim as related to Count

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[29]Rule 2-519(a) provides, in pertinent part, that "[a] party may move for judgment on any or all issues in any action at the close of the evidence offered by an opposing party, and in a jury trial a the close of all the evidence. The moving party shall state with particularity all reasons why the motion should be granted."

> Three of the First Amended [Counterclaim]. Obviously, Count One is in dispute. Count Two, with the extended leave, is in dispute. And Count Four, the issue of the malpractice insurance, is in dispute, and there have been facts presented both ways[.]

Having failed to make a motion for judgment as to this issue in the circuit court, Dr. Cervieri may not now argue that there was insufficient evidence upon which the jury could find that she took excessive leave in violation of her employment contract.

JUDGMENTS AFFIRMED. COSTS TO BE PAID 4/5 BY THE APPELLANTS AND 1/5 BY THE APPELLEE.

CERTIFICATE OF SERVICE

Court of Appeals
No. 111, September Term, 2010
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THE METROPOLITAN WASHINGTON ORTHOPAEDIC ASSOCIATION, CHARTERED, *et al.*,
Petitioners,
v.
CHRISTINA L. CERVIERI, M.D.,
Respondent.
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I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by JULIE MARTIN-KORB, Attorney for Amici Curiae MELA/MELA/PJC to print this document. I am an employee of Counsel Press.

On the **24th Day of February, 2011**, I served the within **Brief of Amici Curiae Maryland Employment Lawyers Association, Metropolitan Washington Employment Lawyers Association and Public Justice Center in Support of Respondent** upon:

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via Federal Express, by causing 2 true copies of each to be deposited, enclosed in a properly addressed wrapper, in an official depository of Federal Express.

Unless otherwise noted, 20 copies have sent to the Court on the same date and in the same manner as above.

February 24, 2011 _____