
**IN THE
COURT OF APPEALS OF MARYLAND**

September Term 2015

No. 29

FELICIA LOCKETT,

Petitioner

V.

BLUE OCEAN BRISTOL, LLC,

Respondent

**ON CERTIORARI TO THE CIRCUIT COURT FOR BALTIMORE CITY
(Jeffrey M. Geller, Judge)**

**BRIEF OF CIVIL JUSTICE, INC. AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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INTRODUCTION

This case presents the opportunity for this Court to greatly strengthen the protections available to Maryland consumers by ruling that a trial court commits reversible error if it denies, without explanation, a fee award to a prevailing plaintiff under a consumer protection statute with fee-shifting provisions. Such a ruling is

consistent with prior rulings by this Court and the recently-adopted Maryland Rules regarding fee petitions. *See* MD. RULE 2-703 (g). Such a ruling would also have an immediate and significant impact on private lawyers' confidence that courts will accept and carefully consider fee petitions and would encourage attorneys to take on representation of consumers, many of whom could not afford to hire an attorney and would otherwise have little chance of recourse against a business that violates the law. This in turn would result in wider enforcement of consumer protection statutes and greater deterrence of the misconduct that these statutes prohibit. Thus, reversing and remanding the trial court's ruling denying attorneys' fees would serve the exact legislative purpose behind fee-shifting statutes in consumer protection statutes.¹

STATEMENT OF THE CASE

Amicus Curiae adopts the Statement of the Case as set forth by Petitioner.

QUESTION PRESENTED

Did the trial court err or abuse its discretion by failing to award attorneys' fees to a tenant who prevailed on a retaliation defense and counterclaim pursuant to the fee-shifting provision in RP § 8-208.1 without articulating any reasoning for denying fees?

¹ This case also involves the trial court's application of MD. CODE ANN., REAL PROP. § 8-208.1. Civil Justice shares the Petitioner's view that the trial court incorrectly interpreted that statute. However, because Civil Justice's focus is on fee-shifting statutes more broadly and the impact their application has on Civil Justice's member-attorneys and its mission to increase access to justice, Civil Justice will address only the issue of the trial court's denial of the Petitioner's request for attorneys' fees.

INTEREST OF THE AMICUS CURIAE

Amicus Curiae Civil Justice, Inc. (“Civil Justice”) is a non-profit public interest organization founded in 1998 for the purpose of increasing the delivery of legal services to clients of low and moderate income while supporting a statewide network of solo, small-firm and community-based lawyers who share a commitment to increasing access to justice. Civil Justice has represented hundreds of Maryland consumers individually, and thousands in public interest litigation, who have been victimized by predatory practices. Civil Justice has been accepted as *amicus curiae* in numerous cases in this Court and the Fourth Circuit. *See, e.g., Monmouth Meadows Homeowners Ass’n, Inc. v. Hamilton*, 416 Md. 325 (2010); *Poku v. Friedman*, 403 Md. 47 (2008); *Wells Fargo Home Mortgage Inc. v. Neal*, 398 Md. 705 (2007); *Capital Mortg. Bankers, Inc. v. Cuomo*, 222 F.3d 151 (4th Cir. 2000).

As part of its mission to increase access to justice, Civil Justice maintains a lawyer referral service which receives thousands of calls each year from low and moderate-income Marylanders who do not qualify for representation through the various legal services organizations. Many callers are referred to Civil Justice’s member-attorneys who have made a commitment to increasing access to justice. Accordingly, Civil Justice has hands-on experience with the importance of fee-shifting provisions in consumer rights statutes to securing legal representation for consumers. Civil Justice encourages its member-attorneys to consider fee-shifting statutes when determining the terms of any representation and provides support and training to lawyers taking on such matters.

Yet Civil Justice consistently has difficulty placing potential clients with strong claims under consumer rights statutes with private attorneys, especially when the consumer's actual damages are small. Civil Justice member-attorneys routinely express skepticism of trial courts' willingness to award attorneys' fees under fee-shifting statutes even in strong cases with solvent defendants. These private attorneys report that courts will frequently simply deny fee petitions without explanation in cases where the private attorney was relying on the fee-shifting provisions to receive any compensation from the matter at all, normally because the injured consumer lacked the financial means to pay the attorney and the damages would be modest.

Accordingly, Civil Justice has a strong interest in this matter. While Civil Justice is optimistic that the new Maryland Rule 2-703 regarding fee petitions will help alleviate Maryland attorneys' skepticism of taking fee-shifting cases by establishing a clear procedure for fee petitions and requiring the judge to give an explanation of the judge's reasoning on the record if the judge decided to deny a fee petition, the Court can further alleviate the skepticism by ruling that a trial court's failure to explain the reasons for a denial of a fee petition is grounds for reversal. Such a ruling would remind trial courts that they must consider the purposes of the fee-shifting statute in ruling on fee petitions and must explain their reasoning on the record, which in turn will help alleviate concern by attorneys that their fee petitions could be denied based on improper factors without any means of securing appellate review. This, in turn, would ultimately increase access to justice and deter the misconduct that the fee-shifting statute was designed to prevent.

STATEMENT OF FACTS

MD. CODE ANN., REAL PROP. § 8-208.1 is a consumer protection statute that prohibits landlords from taking certain retaliatory actions against residential tenants, provided various preconditions are met. Pursuant to REAL PROP. § 8-208.1(c)(1), a court that finds in favor of a tenant because a landlord engaged in a retaliatory action may award damages and may also award the tenant “reasonable attorneys’ fees.”

On December 11, 2014, Petitioner filed a counterclaim in a *de novo* appeal of a district court matter in the Circuit Court for Baltimore City asserting violations of REAL PROP. § 8-208.1 against Respondent, her landlord. E8-E11. Petitioner requested damages for violation of the statute, as well as an award of reasonable attorneys’ fees. E11. At trial on January 22, 2015, the Circuit Court found that Respondent had violated REAL PROP. § 8-208.1 and entered a money judgment of \$2,511.00 in favor of Petitioner representing three times Petitioner’s monthly rent – the maximum damages available under the statute. E207. After the Circuit Court announced its ruling from the bench, the following colloquy occurred:

[COUNSEL FOR PETITIONER]: Your Honor, there are significant attorneys’ fees. As counsel for [Petitioner] I’ve incurred -- the Public Justice Center, although we are a non-profit legal organization, our staff time and other resources were heavily used for this case. May I submit an affidavit for attorneys’ fees in a post-judgment posture?

THE COURT: Well, bear with me. Well, I guess, Counsel, I’m not really sure why, if that was being requested that wasn’t presented as part of your case.

[COUNSEL FOR PETITIONER]: I apologize, Your Honor. I think normal course is -- actually says to provide an affidavit after a

judgment. It would not take long for me to prepare one as I -- as I did provide -- I did prepare one for the District Court. Since there's significant time before and during trial, I did not prepare one, an affidavit, that would include all of that time so that I could submit it today. But --

[COUNSEL FOR RESPONDENT]: I would -- I would oppose that request, respectfully.

THE COURT: All right. Well, that request is denied. The statute indicates that it's permissive. The Court may enter judgment and the Court may award attorneys' fees. So that request is denied.

E207-E208.

ARGUMENT

A trial court commits reversible error if it denies, without explanation, a fee petition by a prevailing plaintiff under a consumer protection statute with a fee-shifting provision. The recently-adopted Maryland Rules regarding fee petitions require the trial court to state on the record or in a memorandum the basis for its grant or denial of a fee petition. MD. RULE 2-703 (g). This requirement is supported by sound public policy because it will help Maryland lawyers more accurately understand the grounds for any denial of a fee petition, predict a court's willingness to award fees, and confirm that the trial court is considering the remedial purposes of the statute that authorizes the fee-shifting. As explored in detail below, the uncertainty caused when courts do not explain the basis of a denial of a discretionary award of attorneys' fees to a prevailing plaintiff severely interferes with the ability of injured Maryland consumers to secure legal counsel.

I. Requiring Trial Courts to State Their Reasons for a Denial of a Fee Petition is Supported by Strong Public Policy.

As the Maryland Access to Justice Commission eloquently stated:

Markets are shaped by incentives. Incentives, in turn, are shaped by the laws and regulations that govern the market. When it comes to access to justice, a market that matters is the market for legal representation in civil rights and other types of cases with low or non-monetary relief potential. Under ordinary market conditions, few attorneys have an incentive to offer representation to these claimants, despite the relatively large number of potential claims. Statutes that authorize an award of attorney's fees in such cases can shift market forces, creating incentives for attorneys to take clients and pursue meritorious claims that do not normally make sense from a business perspective. Fee-shifting, in other words, connects the individuals who may have been harmed with counsel who can aid them in seeking to enforce their rights under the law. The action of these private individuals provides a significant public benefit by enforcing the law, deterring future misconduct and promoting compliance with the law. Fee-shifting also reduces the need for government resources for enforcement of critical remedial laws.

The Maryland Access to Justice Commission, *Fee-Shifting to Promote the Public Interest in Maryland*, 42 U. BALT. L.F. 38, 38 (2011). *See also Friolo v. Frankel*, 403 Md. 443, 457, 942 A.2d 1242, 1250 (2008) (“the goal of fee-shifting statutes in general is to ensure that individuals, when injured by violations, or threatened violations, of certain laws, have access to legal counsel by a ‘statutory assurance that [his or her counsel] will be paid a reasonable fee’”). Indeed, when fee-shifting was added to the private cause of action under the Maryland Consumer Protection Act by 1986 Md. Laws 344, the bill’s sponsors, Senators Jimeno and Wagner, explained “the problem” that the bill was seeking to address in very similar terms:

Many consumer cases involve relatively small dollar amounts. Unless consumers are allowed to recover attorney's fees in such cases, the cost of litigation far outweighs any possible recovery and therefore legitimate claims go without redress. Often times those people who cannot afford to pursue claims are those who can least afford to suffer the loss which would prompt a suit.

Statement of Senators Jimeno and Wagner regarding SB 551 (1986), attached hereto as Exhibit 1.

The Standing Committee on Rules of Practice and Procedure noted that as of 2013, there were “over 100 Maryland statutes permitting the recovery of attorneys’ fees for violation of the statute.” 177TH REPORT OF THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, 4 n. 2 (2013). Because those numerous fee-shifting statutes are designed to incentivize attorneys to take on cases, predictability in the application of the fee-shifting statutes is critical. If an attorney does not know the types of factors a judge considers in deciding whether to grant a fee petition, the uncertainty prevents the attorney from being able to accurately value a given case. MD. RULE 2-703 (g) will greatly reduce the uncertainty that could interfere with the effectiveness of fee-shifting statutes, and will be all the more impactful if the Court rules that the denial of a fee petition without explanation is reversible error.

MD. RULE 2-703 was adopted on October 17, 2013 with an effective date of January 1, 2014. Accordingly, that Rule applied to the trial of the Petitioner's counterclaim in this case. *See* MD. RULE 7-112 (d)(3) (with a few exceptions not relevant here, *de novo* appeals to the Circuit Court are tried pursuant to the rules governing cases instituted in the Circuit Court). MD. RULE 2-703 (g) provides in relevant part: “[t]he

court shall state on the record or in a memorandum filed in the record the basis for its grant or denial of an award.”

This requirement is supported by sound public policy that was illustrated by Justice Roberts for the unanimous Supreme Court in *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005). There, the Supreme Court discussed the discretionary award of attorneys’ fees in removal actions upon a finding that removal was improper:

The fact that an award of fees under [28 U.S.C.] § 1447(c) is left to the district court’s discretion, with no heavy congressional thumb on either side of the scales, does not mean that no legal standard governs that discretion. We have it on good authority that ‘a motion to [a court’s] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.’” *United States v. Burr*, 25 F.Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.). Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike.

Martin, 546 U.S. at 139.

This Court has also imposed restrictions on the discretion of trial courts considering fee petitions. In *Ocean City, Md., Chamber of Commerce, Inc. v. Barufaldi*, 434 Md. 381, 75 A.3d 952 (2013), the Court confirmed that a trial court deciding whether to make a fee award under the discretionary fee-shifting of the Maryland Wage Payment and Collection Law “‘should exercise [its] 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.’” *Id.* at 385, 75 A.3d at 954, quoting *Friolo v. Frankel*, 373 Md. 501, 518, 819 A.2d 354 (2003). The Court has also ruled that the “‘good reason” why a fee award would be inappropriate cannot include the ability of a

defendant to pay. *Barufaldi*, 434 Md. at 397, 75 A.3d at 961. Nor can the “good reason” be that the trial court disagrees with the facts found by the factfinder. *See Programmers’ Consortium, Inc. v. Clark*, 409 Md. 548, 561, 976 A.2d 290, 298 (2009) (“[o]n remand... the Circuit Court was not empowered to deny that claim on the ground that the wages had been withheld ‘as a result of a bona fide dispute’”). Similarly, the Court of Special Appeals has held that a trial court abused its discretion in reducing a fee award to a prevailing consumer under the Consumer Protection Act when it “(1) applied a proportionality rule and (2) based its reduction of fee, in part, on the erroneous belief that the case should have remained in the District Court.” *Blaylock v. Johns Hopkins Fed. Credit Union*, 152 Md. App. 338, 361, 831 A.2d 1120, 1133 (2003).

Thus, as confirmed by MD. RULE 2-703 (g), a trial court must explicitly articulate a “good reason” if it wishes to entirely deny a fee petition. The validity of the reasoning provided by the trial court can then be reviewed on appeal, if appropriate. *Barufaldi*, 434 Md. at 391, 75 A.3d at 957 (“[t]he standard that a trial court applies in evaluating whether to award attorneys’ fees and costs is a legal decision”). At a minimum, the trial courts’ rulings on the record regarding fee petitions will create a body of decisions that can help Maryland attorneys more accurately predict whether a fee petition is likely to be granted, which will make them more likely to be able to help those “people who... can least afford to suffer the loss” who were intended to be protected by fee-shifting. *See Exhibit 1.*

II. A Ruling that a Trial Court's Failure to State its Reasons for a Denial of a Fee Petition Constitutes Reversible Error will Effectuate the Legislative Purpose of the Fee-Shifting Provision.

The importance of this case is highlighted by an empirical study of fee-shifting provisions published in 2008. Debra Pogrud Stark & Jessica M. Choplin, *Does Fraud Pay? An Empirical Analysis of Attorney's Fees Provisions in Consumer Fraud Statutes*, 56 CLEV. ST. L. REV. 483 (2008). There, the authors measured the willingness of attorneys to represent a consumer in a consumer fraud case based on the nature of the fee-shifting statute at issue.

The authors started by categorizing potential fee-shifting statutes into one of four groups:

Statutory Version 1. The consumer fraud act permits a court in its discretion to award attorney's fees to either the prevailing plaintiff or a prevailing defendant.

Statutory Version 2. The consumer fraud act permits a court in its discretion to award attorney's fees to the prevailing plaintiff, but not to a prevailing defendant, unless the defendant can show that the case was frivolous.

Statutory Version 3. The consumer fraud act requires a court to award attorney's fees to the prevailing plaintiff, but not to a prevailing defendant, unless the defendant can show that the case was frivolous.

Statutory Version 4. The consumer fraud act requires a court to award attorney's fees to the prevailing plaintiff, but not to a prevailing defendant.

Id. at 506. The authors then surveyed a group of attorneys as follows:

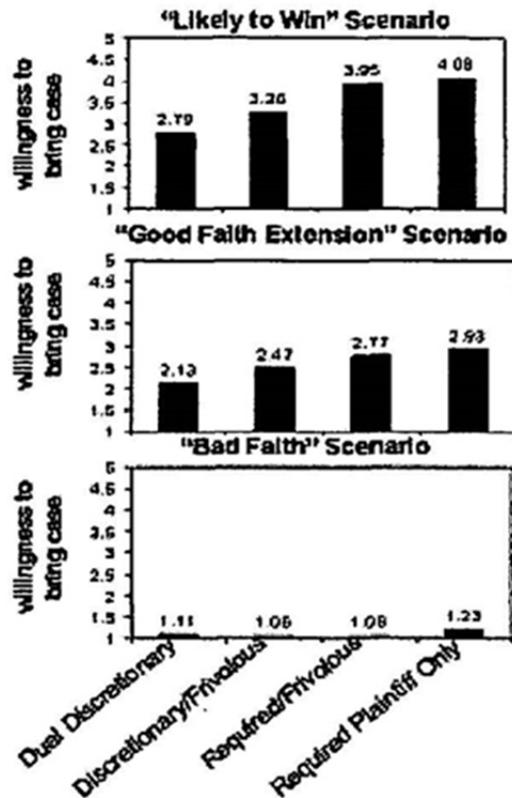
They were instructed to assume that they had an active general litigation practice with no conflict of interest in representing a

consumer in a lawsuit against an insurance company. A potential client met with them to seek their representation of her. She told them of how she was defrauded by her insurance company, and they determined that they would have a very good chance of winning the case under the state's consumer fraud act, but that it was likely that it would cost more to litigate the case than the amount that she had been damaged by her insurance company. They were also instructed to assume that the client did not want to pay them any legal fees unless the fees came from her recovery against the insurance company. They then were instructed to rate their willingness to take on the case in this “likely to win” scenario on a 5-point scale, where 1 represented that they were “highly unwilling to take on the case” and 5 represented that they were “highly willing to take on the case” under Statutory Version 1, then Statutory Version 2, then Statutory Version 3, and then Statutory Version 4.

Id. at 510. The attorneys were then instructed to rate their willingness to take on a case under each statute when there was no valid claim (the “bad faith scenario”) or where the outcome was uncertain because it was based on a new and untested argument (the “good faith extension scenario”). *Id.* at 510-11. The authors also noted that “even if there is only a small difference in likelihood to take the case due to the discretionary rather than mandatory language,” such a difference would have a “significant impact on the ability of consumers to find competent attorneys” because of the small numbers of consumer lawyers. *Id.* at 499.

The results of the survey are reproduced below for convenience:

[GRAPHIC APPEARS ON FOLLOWING PAGE]



Id. at 511. As can be seen, even for cases where they were likely to win, attorneys only rated their willingness to take on a case with discretionary fee-shifting an average of 3.26 out of 5, compared to 3.95 out of 5 if the award of attorneys' fees to a prevailing consumer is required. Thus, the authors concluded that "attorneys rated themselves as statistically less willing to bring both a 'strong meritorious claim' and a 'good faith extension of the law' claim when the attorney's fees provision was discretionary rather than mandatory." *Id.* at 514-15. Although the study does not squarely address the impact that clear standards for discretionary awards would have on attorneys' willingness to take cases, the statistical disparity between discretionary awards and required awards

can be attributed to the uncertainty of a discretionary fee award even in a strong consumer case.

These conclusions are consistent with the experience of Civil Justice regarding Maryland fee-shifting statutes. As part of its mission to increase access to justice, Civil Justice maintains a lawyer referral service which receives thousands of calls each year from low and moderate-income Marylanders who do not qualify for or who cannot obtain free legal representation. Many of the callers are referred to Civil Justice's member-attorneys who have made a commitment to increasing access to justice. Civil Justice encourages its member-attorneys to consider fee-shifting statutes when determining the terms of any representation and provides support and training to lawyers taking on such matters.

Yet Civil Justice routinely meets difficulty placing potential clients with strong claims under consumer rights statutes with private attorneys, especially when the consumer's actual damages are small. Civil Justice member-attorneys routinely express skepticism of trial courts' willingness to award attorneys' fees under fee-shifting statutes even in strong cases with solvent defendants. These private attorneys report that courts will frequently simply deny fee petitions without explanation in cases where the attorney was relying on the fee petition to receive any compensation at all.

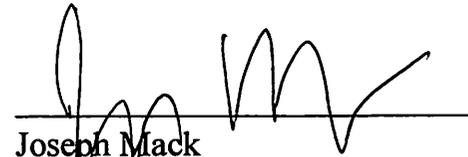
Accordingly, just as the shift from discretionary to required fee-shifting causes what the authors called "a significant impact on the ability of consumers to find competent attorneys to take on these cases," *id.* at 499, so too would a ruling by this Court that a trial court commits reversible error when it does not explain its reasons for

the denial of a fee petition. Such a ruling would greatly increase the predictability of fee-shifting awards and consequently help to effectuate the legislative purpose of the fee-shifting provision. In addition, it would help secure representation for numerous Maryland consumers who cannot afford to hire an attorney.

III. Conclusion.

Accordingly, *Amicus Curiae* respectfully requests that this Court reverse and remand to the Circuit Court for further proceedings regarding attorneys' fees.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Joseph Mack', is written over a horizontal line.

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CERTIFICATE OF SERVICE

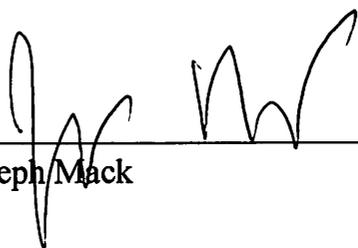
I hereby certify on this 2nd day of October, 2015, copies of this *amicus curiae* brief in support of the Petitioner were served on the following counsel of record via first class mail, postage prepaid:

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Senate Bill 551
Consumer Protection Act -- Attorney's Fees
Senator Jimeno and Senator Wagner

THE BILL

Senate Bill 551 permits the courts to award reasonable attorney's fees to a successful plaintiff in a private action brought under the State Consumer Protection Act.

Senate Bill 551 prohibits the awarding of attorney's fees to any person in an arbitration proceeding conducted by the Consumer Protection Division.

SB 551 provides protection for the businessperson against frivolous lawsuits by providing that a court may award attorney's fees to a successful defendant where the court finds that a consumer plaintiff's action is brought in bad faith.

BACKGROUND

A 1984 bill almost identical to SB 551 received a favorable report from the Judicial Proceedings Committee and passed the Senate. It was supported by The Maryland Bar Association, The Maryland Trial Lawyers Association, and The Maryland Volunteer Lawyers Services, Inc.

THE PROBLEM

Many consumer cases involve relatively small dollar amounts. Unless consumers are allowed to recover attorney's fees in such cases, the cost of litigation far outweighs any possible recovery and therefore legitimate claims go without redress. Often times those people who cannot afford to pursue claims are those who can least afford to suffer the loss which would prompt a suit.

Without express statutory authority, the prevailing litigant may not recover attorney's fees.

OTHER ATTORNEY'S FEES STATUTES

. 38 states currently allow the courts to award attorney's fees in private action under their consumer protection acts.

. Maryland law provides for awarding attorney's fees to a successful plaintiff in some specific consumer protection laws, such as the Equal Credit Opportunity Act, the Door-to-Door Sales Act, the Consumer Products Guaranty Act, the Waterproofing Act, the Automotive Warranty Enforcement Act, and in private cases involving the unsolicited sending of merchandise and layaway sales.

. The federal government has recognized that the public interest is served by private enforcement of consumer laws such as the Truth-in-Lending Act and the Magnuson-Moss Warranty Act and provides for attorney's fees under those consumer protection statutes.