Circuit Court for Prince George's County
Case No. CAE11-14643

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1151

September Term, 2016

BARBARA DANSBY, *et vir*.

v.

THE JACKSON INVESTMENT COMPANY, LLC

Nazarian,
Friedman,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: August 3, 2017

"There can only be one."
Duncan McCloud, *Highlander* (1986)

FACTS AND LEGAL PROCEEDINGS

This action began as a commercial lease dispute between the lessor/Appellee, The Jackson Investment Company, LLC ("Jackson"), and the lessees/Appellants, Barbara and Timothy Dansby ("the Dansbys"). The Dansbys owned and operated in Maryland, for over thirty years, a charter bus rental company, T & B Dansby Bus Rental. Seeking a new property on which to store their buses, the Dansbys considered a .73 acre parcel, owned by Jackson, at 711 Eastern Avenue in Fairmont Heights in Prince George's County ("the Property"), on which a small building existed on an otherwise undeveloped lot. After speaking with a broker at Jackson's property management company, Lewis Real Estate Services ("Lewis"), the Dansbys agreed to rent the Property. Acting prior to executing a lease, in reliance on alleged statements by employees of Lewis that the Dansbys could store their buses on the Property, the Dansbys installed a fence around the perimeter of the Property.

The Dansbys executed a lease for the Property on 21 October 2010. The lease specified that

> [d]uring the term of this Lease, Tenant shall use the Leased Premises solely as a parking lot for Tenant's fleet of buses, with associated office use of the Building, and for no other use without Landlord's consent, which consent shall not be unreasonably withheld, delayed or conditioned. Tenant shall be responsible for obtaining any consents from any governmental authorities for said use. Such use shall be subject to applicable zoning or other restrictions of record. Landlord makes no representation that the existing zoning classification of the Leased Premises permits the above-described use, and it

> shall be Tenant's sole responsibility to satisfy itself that the above-described use is permitted.

Additional pertinent provisions required that 1) the Dansbys must purchase the Property at the conclusion of the lease term for $350,000; and, 2) "[i]f any legal action or other proceeding is brought for the enforcement of this Lease, or because of an alleged dispute, breach, or default of this Lease, or to interpret this Lease or any of the provisions hereof, the successful or prevailing party shall be entitled to recover reasonable attorneys' fees and other costs."

After signing the lease, the Dansbys discovered that the Property was zoned C-S-C (Commercial Shopping Center), a zone under the Prince George's County Zoning Ordinance without a permitted use or any available exception, permit, or variance to authorize the storage of buses. They relocated their buses to their previous rental property and ceased rent payments to Jackson.

The Dansbys challenged in the Circuit Court for Prince George's County in 2011 the validity of the lease. Jackson counterclaimed for breach of the lease, unpaid rent, and specific performance of the lease's purchase provision. At a bench trial on 3 December 2014, Jackson prevailed on its motion for judgment with respect to the Dansbys' claims because, the court determined, the lease allocated validly to the Dansbys responsibility for ensuring the legal ability to store their buses on the Property. On Jackson's counterclaims, the court found the Dansbys in breach of the lease for failure to pay rent and liable for the purchase of the Property. Accordingly, on 7 January 2015, the court awarded to Jackson $544,579.69 (judgment entered on 17 and 18 March 2015), comprised as follows:

1. $90,704.44 for rent and other charges . . . ;
2. $3,650.00 for expenses, per Defendant's Trial Exhibit 6;
3. $350,000.00, per the decreed specific performance [i.e., requiring the Dansbys to purchase the property at the end of the Lease term] . . . ; [and,]
4. $98,103.50 for attorneys' fees and $2,121.75 of expenses . . . .[1]

The Dansbys appealed to this Court, challenging the lease's validity, several procedural and evidentiary decisions by the circuit court, and the legal propriety of specific performance as a remedy for the purchase provision. In an unreported opinion, dated 15 April 2016, we affirmed (1) the circuit court's dismissal of the Dansbys' claims and (2) the Dansbys' liability for the unpaid rent and the lease requirement that they purchase the Property. The panel considering the first appeal determined, however, that the circuit court, although finding no merit in the Dansby's arguments, fashioned an incorrect remedy as to the purchase provision. Because Jackson, in 2014, removed the small building from the Property after the lease was executed (on order of the County because of the dilapidated condition of the structure), the Property could not be conveyed to the Dansbys in the form and condition as it existed at the time the lease was executed. Thus, the Court vacated the $350,000 specific performance award and remanded the case to the circuit court with instructions to determine a proper breach of contract damages remedy as to the purchase provision.[2]

[1] Jackson produced at trial evidence (in accordance with Md. Rule 2-703) supporting its attorney's fees claim.

[2] It does not appear from the opinion of the panel of this Court in the first appeal that the Dansbys argued specifically that specific performance was unavailable because the building had been demolished. Nonetheless, it appears the panel based its conclusion as to vacation of the specific performance award solely on that ground.

On remand, counsel for Jackson proffered that his client received, in the meantime, a written offer from a third-party to purchase the Property for $350,000, and aborted pursuit by Jackson of its claim against the Dansbys in this regard. The court entered, on 25 May 2016, its 19 May 2016 order (1) dismissing the Dansbys' complaint; (2) declaring the lease valid, enforceable, and not infected by any mutual mistake of fact; and, (3) awarding to Jackson on its counterclaim against the Dansbys the amount of $194,579.69, apportioned as follows:

1. $90,704.44 for rent and other charges . . . ;
2. $3,650.00 for expenses . . . ; [and,]
3. $98,103.50 for attorneys' fees and $2,121.75 of expenses . . . .

In response to this judgment, the Dansbys filed, on 27 May 2016, a Motion to Alter or Amend the Judgment, arguing that the "reversal" by the first panel of this Court of the circuit court's 7 January 2015 order as to the $350,000 specific performance award anointed them the sole "prevailing party" in the litigation under the lease's fee-shifting provision, thus entitling them to attorney's fees and inferentially none for Jackson. Jackson maintained that it remained the prevailing party in the proceedings. The court denied by order (no hearing was requested), on 12 July 2016, the Dansbys' motion.

On 2 August 2016, the Dansbys noted this appeal from the court's denial of the Motion to Alter or Amend. On appeal, the Dansbys ask that we consider "whether the trial court erred in determination of the 'prevailing party' and the award of attorney's fees." (formatting changed to sentence case).

STANDARD OF REVIEW

The Dansbys propose that we review the merits of their appeal, without deference to the trial court, as a matter of law, i.e., a question of contract interpretation. Before we may grapple with that issue, however, we shall consider the appeal under Md. Rule 8-131, Scope of Review. "Ordinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." Md. Rule 8-131(a). "The primary purpose of Rule 8-131(a) is to ensure fairness for all parties in a case, which is accomplished by requiring counsel to bring the position of their client to the attention of the lower court so that the trial court has an opportunity to rule upon the issues presented." *Wajer v. Baltimore Gas & Elec. Co.*, 157 Md. App. 228, 236, 850 A.2d 394, 399 (2004) (citations and quotation marks omitted).

> We recognize that we have discretion under Maryland Rule 8–131(a) "to address an issue that was not raised in or decided by the trial court." But, this discretionary power is one
>
> > that appellate courts should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.
>
> *Chaney v. State*, 397 Md. 460, 468, 918 A.2d 506, 511 (2007).

Barber v. Catholic Health Initiatives, Inc., 180 Md. App. 409, 437, 951 A.2d 857, 873 (2008).

ANALYSIS

I. Any Contention Regarding the Amount of Any Attorney's Fees Award or Whether Both Parties may be deemed as "Prevailing" in this Litigation is Beyond the Scope of Our Review On This Record.

Jackson argues that, under Md. Rule 8-131, "the Dansbys failed to preserve the issue of attorney's fees for appellate review by failing to properly raise the issue before the Circuit Court." There are typically two questions that arise in these circumstances: (1) the antecedent question of who prevailed in the litigation; and, (2) once that is determined, what award of attorney's fees is reasonable. Usually these questions are pleaded and addressed at the same time. As for the Dansbys, their contention that they were the sole "prevailing party" on remand was the sole question presented below, albeit imperfectly so in a Rule 2-534 motion. The Dansbys' Motion to Alter or Amend, if one recognizes its arguable objectives of eradicating Jackson's $98,103.50 attorney's fees award and declaring the Dansbys to be the sole "prevailing party" on remand, excluded any consideration of what the Dansbys' attorney's fees might be. The Dansbys continued in their brief in this appeal to argue that they were the sole "prevailing party" and that the Jackson's "loss" of the $350,000 specific performance award entitled them to no attorney's fees, despite the affirmance of the judgment in favor of Jackson as to its other and substantial claims.

At oral argument, counsel for the Dansbys maintained that, during the hearing on remand, he "attempted to raise the issue of attorney's fees," and then raised successfully the issue "immediately after the first remand" in the Motion to Alter or Amend.

According to Md. Rule 2-705(f)(1), "[i]f the party seeking attorneys' fees prevailed with respect to a claim for which fee-shifting is permissible, the court shall consider the factors set forth in Rule 2-703(f)(3) and the principal amount in dispute in the litigation, and may consider the agreement between party seeking the award and that party's attorneys and any other factor reasonably related to the fairness of an award." Md. Rule 2-703(f)(3), in turn, states:

> (3) *Factors to Be Considered.*
> (A) the time and labor required;
> (B) the novelty and difficulty of the questions;
> (C) the skill required to perform the legal service properly;
> (D) whether acceptance of the case precluded other employment by the attorney;
> (E) the customary fee for similar legal services;
> (F) whether the fee is fixed or contingent;
> (G) any time limitations imposed by the client or the circumstances;
> (H) the amount involved and the results obtained;
> (I) the experience, reputation, and ability of the attorneys;
> (J) the undesirability of the case;
> (K) the nature and length of the professional relationship with the client; and
> (L) awards in similar cases.

Additionally, "[t]he party requesting [attorney's] fees has the burden of providing the court with the necessary information to determine the reasonableness of its request." *Myers v. Kayhoe*, 391 Md. 188, 207, 892 A.2d 520, 532 (2006) (citing *Atl. Contracting & Material Co. v. Ulico Cas. Co.*, 380 Md. 285, 316, 844 A.2d 460, 478 (2004)).

No clear challenge to the 7 January 2015 award of attorney's fees to Jackson was mounted in these proceedings until a buried and ambiguous thrust in the Dansbys' Motion

to Alter or Amend,[3] which failed otherwise to preserve properly the Dansbys' claimed entitlement to any amount of fees or that, alternatively, both parties could be deemed as "prevailing." First, the 19 May 2016 order (1) dismissed the Dansbys' complaint, (2) declared the lease valid, enforceable, and without mutual mistake of fact, (3) entered judgment on Jackson's counterclaim (except as to the specific performance remedy of $350,000 on the purchase provision in the lease), and (4) reiterated the fee and expenses award from the earlier order. The new order did not address on remand (nor was it directed to do so) any dispute as to who was the "prevailing party" in the litigation as remanded or who and how much should be the resulting recipient(s) of an attorney's fees award. At the 19 May 2016 hearing on remand, the circuit court rebuffed the Dansbys' attempts to raise orally (and for the first time) any mention as to attorney's fees, stating:

> I don't think we're here for that [based on remand as per our earlier opinion]. . . . I think this is the first time that the Court's heard this, . . . I don't know if it's the first time that Defense Counsel has heard it. . . . There was nothing filed. You're now making an oral argument that again this is not the proper time or place to make that argument.

Counsel for the Dansbys responded, "[n]ow I can file a motion [for attorneys' fees], you know, tomorrow or the next day – [,]" to which the court replied, "[w]ell, then that's what you should do if you feel that that's appropriate . . . ."[4]

---

[3] Although neither the Motion to Alter or Amend, nor its supporting memorandum of points and authorities, framed plainly a specific request that the prior attorney's fees award to Jackson should be reconsidered, one could infer from paragraph number 12 of the memorandum that the Dansbys believed that the award should be "vacated" solely because of the disposition of the specific performance award of $350,000.

[4] The Dansbys made no suggestion at the 19 May 2016 hearing that they were prepared to address then, with proper evidence, the factors identified in Md. Rule 2-703(f)(3) as to their reputed attorney's fee claim.

Second, the Dansbys did not file such a motion, filing instead the Motion to Alter or Amend Judgment that did not address virtually any of the Rule 2-703(f)(3) factors to support an as-yet unspecified amount of attorney's fees. Moreover, the Motion to Alter or Amend did not contain a request for a hearing on the motion or to produce evidentiary allegations to support a proposed specific fee award.

II. The Dansbys are Not "The" Prevailing Party

Despite not addressing in their Rule 2-534 motion the amount of their claims for attorney's fees or adequately why Jackson was not entitled to any attorney's fees despite prevailing on all issues other than a dollar amount remedy for breach of the purchase provision of the lease, a fair reading of the Motion to Alter or Amend reflects that the Dansbys were arguing that they were the sole "prevailing party." On its face, this argument is as unpersuasive as it appeared to be to the trial judge.

"In the context of an award of attorney's fees, a litigant is a 'prevailing party' if he succeeds 'on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Royal Inv. Grp., LLC v. Wang*, 183 Md. App. 406, 457, 961 A.2d 665, 695 (2008) (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 433, (1983)). In *Royal Investment Group*, this Court held the appellee to be "the 'prevailing party' because the trial court ruled in his favor on the core claims that formed the basis of the dispute between the parties . . . ." 183 Md. App. at 458, 961 A.2d at 695. In 2014, Judge Moylan, writing for this Court, explored the foundational federal statutory fee-shifting jurisprudence, which underlies Maryland's contractual first-party fee-shifting, "prevailing party" common law:

The [U.S. Supreme] Court made clear that, in fashioning an award in a case with multiple claims, "[t]he result is what matters" and "the most critical factor is the degree of success obtained."

> *Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.* Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. *The result is what matters.*
>
> *If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith.* Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. *Again, the most critical factor is the degree of success obtained.*

[*Hensley*] at 435–36, 103 S.Ct. at 1940–41 (emphasis supplied) (footnote omitted).

The Court reiterated that, in cases where the plaintiff achieves less than full success on all claims, the trial court has wide discretion to reduce a fee award accordingly.

> There is no precise rule or formula for making these determinations. *The [trial] court* may attempt to identify specific hours that should be eliminated, or it *may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment.* This discretion, however, must be exercised in light of the considerations we have identified.

Id. at 436–37, 103 S.Ct. at 1941 (emphasis supplied).

Thus, the Court held:

> [T]he extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. § 1988. Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim

> should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the [trial] court did not adopt each contention raised. *But where the plaintiff achieved only limited success, the [trial] court should award only that amount of fees that is reasonable in relation to the results obtained.*
>
> *Id.* at 440, 103 S.Ct. at 1943 (emphasis supplied).

Ochse v. Henry, 216 Md. App. 439, 462–63, 88 A.3d 773, 787 (2014).

Jackson prevailed on the unpaid rent claim, a not inconsequential sum and certainly a core claim of the litigation. But for the fortuity (through no apparent effort on the part of the Dansbys) of the post-remand, third-party offer to purchase the Property, Jackson stood to recover breach of contract damages in an amount less than $350,000, i.e., the value of the Property less the removed building. Additionally, the trial court dismissed all counts in the Dansbys' Third Amended Complaint, a holding affirmed on appeal and reiterated on remand. Even if the Dansbys were deemed to have prevailed with respect to the disposition of the purchase provision simply by virtue of evading the original $350,000 specific performance remedy, they had "limited success" only. Jackson prevailed on multiple "significant issues in litigation." Therefore, we agree with the circuit court's inferred conclusion that the Dansbys are not the sole prevailing party.

We do not consider here the extent to which each party may be deemed to have prevailed because the Dansbys did not embrace this possibility until oral argument before us, at which time counsel for the Dansbys stated, "I want to first of all reveal to the Court a realization that I've come to . . . . Frankly, I've come to the conclusion that the only way to really look at this case and make any sense out of it that's consistent with what we know

of how these issues are dealt with in the case law is to basically start with the proposition that there either has to be two prevailing parties or no prevailing party." This "realization" represents a deviation from the "sole prevailing party" argument that was the basis of the Dansbys' Motion to Alter or Amend, and which argument is the thrust of their appellate brief.

Thus, neither the issue of whether there were two "prevailing parties" regarding the contractual attorney's fees provision (an interesting issue had a better record been made), nor the reasonableness of any attorney's fees amount sought by the Dansbys, nor the unreasonableness of Jackson's fee award on remand, "plainly appear[] by the record to have been raised [properly] in or decided by the trial court." Further, the Motion to Alter or Amend failed on its face to present a prima facie case that might have supported the broad relief sought, or even holding a hearing thereon (had one been requested). We cannot say, on this record, that Jackson was not a prevailing party after remand, given the claims on which it prevailed and the absence of any contribution by the Dansbys to the abandonment of the breach of the purchase provision claim. Neither are we moved to remand this case to the circuit court for an evidentiary hearing because we have grave doubts, based on how this matter has been litigated to date, whether a more complete record will likely occur such that we might grapple meaningfully in a subsequent appeal with the complex issues of whether there were two "prevailing parties" and, if so, any guidance as to how the attorney's fees might be calculated by the trial court.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.