Circuit Court for Prince George's County
Case No. CAL15-20796

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 997

September Term, 2017

ANA B. YENTY HUEY

v.

GET SMART, INC.

Arthur,
Beachley,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: November 19, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On January 24, 2017, a jury sitting in the Circuit Court for Prince George's County awarded appellant, Ana B. Yenty Huey ("Yenty"),[1] $4,380 in damages under the Maryland Wage Payment and Collection Law ("MWPCL") in a suit for unpaid overtime wages against her former employer, appellee, Get Smart. As to Yenty's separate claim for unpaid overtime under the federal Fair Labor Standards Act ("FLSA"), the jury found in Yenty's favor on liability, but awarded no damages. Yenty thereafter filed a petition for attorneys' fees, and on June 19, 2017, the circuit court awarded her $4,380 in attorneys' fees. Yenty appealed the attorneys' fees award and presents the following questions for our review, which we have rephrased:

1. Did the circuit court err in failing to apply the well-established "lodestar" analysis to determine the appropriate attorneys' fees award under the FLSA?

2. Did the circuit court err by failing to award reasonable litigation costs?

3. Is Yenty entitled to an award of appellate attorneys' fees and costs associated with this appeal?

For the reasons discussed below, we conclude that the circuit court erred in its attorneys' fees analysis by failing to properly apply the lodestar analysis. We also conclude that the circuit court erred by not determining Yenty's reasonable litigation costs. We accordingly remand the case to the circuit court to determine attorneys' fees and costs. On

[1] Throughout the record, appellant is referred to as both "Yenty" and "Huey." In her deposition, she introduces herself as "Ana Yenty," and she refers to herself as "Yenty" in her brief. Therefore, the Court will use "Yenty" when referring to appellant.

remand, the court should include Yenty's appellate attorneys' fees in its lodestar calculations.

FACTS AND PROCEEDINGS

Because this appeal exclusively concerns attorneys' fees and litigation costs, we will provide only a brief factual background for context. Yenty worked for Get Smart, a cleaning services company, from January 30, 2013, through January 11, 2015. According to Yenty, she worked approximately sixty-three hours a week, but was not compensated at the required overtime rate of one-and-a-half times her regular pay when she worked more than forty hours in a week. On February 13, 2015, Yenty sent a demand letter to Get Smart, owned by Caroline Lawal ("Lawal"), which detailed unpaid overtime she claimed she earned while employed by Get Smart. Yenty also requested documents relating to her employment. Get Smart did not respond. On July 15, 2015, Yenty filed a complaint in the District Court against Get Smart and Lawal[2] for unpaid wages under the MWPCL, Maryland Wage and Hour Law ("MWHL"),[3] and FLSA. Get Smart requested a jury trial and the case was transferred to the Circuit Court for Prince George's County.

In its defense, Get Smart alleged that Yenty was an independent contractor, not its employee. Get Smart argued in the alternative that even if Yenty were an employee, Get

[2] Lawal was sued in her individual capacity, but no judgment was issued against her.

[3] This was an alternative claim that Yenty dismissed prior to the court instructing the jury.

(continued)

Smart was not covered by the FLSA because it neither earned enough revenue nor engaged in interstate commerce.[4] Additionally, Get Smart filed a counterclaim alleging that Yenty breached a non-compete agreement.

During discovery, Yenty had difficulty obtaining her time sheets because Get Smart failed to keep proper paperwork documenting the hours she worked. Because of this, Yenty attempted to reconstruct the hours she worked to substantiate her claim. On November 30, 2015, Yenty's counsel sent a letter to Get Smart offering to settle the case for $12,905.76 in wages, and $4,500 in attorneys' fees. After unsuccessful mediation, the case went to trial on January 23-24, 2017.

Yenty and Lawal were the only witnesses during the two-day trial. Yenty testified that she typically started her day by picking up a van and equipment from Lawal between 7:45 and 8:00 a.m. She would then proceed to her first house, sometimes stopping to pick up other employees. She and her team were assigned two to four houses per day and Get Smart did not compensate for travel time. Yenty generally finished her day between 6:30 and 7:00 p.m. Rather than paying by the hour, Get Smart paid its workers a fixed amount per day on the assumption that they would clean three houses per day. As to Yenty's alleged breach of a non-compete agreement, Lawal testified that Yenty took two customers from Get Smart when she left the company.

After deliberating for more than two hours, the jury sent a note to the court

[4] Get Smart did not argue that it was exempted from the MWPCL or MWHL.

containing two questions: "How did counsel for the plaintiff determine award amounts for [the] MWPCL and FLSA?"; and "Is the jury required to award wages for MWPCL and FLSA?" The court answered the first question by explaining that it "was counsel's calculation as to what amount he would like you all to provide." As to the second question, the court answered "no, you are not required[.] [I]t's what, if any award you the jury may determine." Less than fifteen minutes later, the jury returned with a verdict. The jury found in favor of Yenty on her MWPCL claim and awarded her $4,380. The jury determined that Get Smart was liable to Yenty on her FLSA claim, but did not award any damages.[5]

On February 21, 2017, Yenty filed a petition requesting $40,187 in attorneys' fees and $1,321.63 in costs. Yenty later lowered her request for attorneys' fees to $37,808. The circuit court held a hearing on this petition on April 4. In a written opinion dated June 19, 2017, the circuit court awarded Yenty $4,380 in attorneys' fees under the FLSA, but none under Maryland law. The court used a twelve-factor analysis to guide its determination of a reasonable attorneys' fees award.[6]

The court recognized that Yenty's counsel had encountered some challenges in presenting her case due to Get Smart's poor recordkeeping, but found that those challenges did not warrant granting the full amount of the requested attorneys' fees. The court

[5] The jury also found that Yenty did not breach the non-compete agreement. Get Smart did not appeal either the damages award or the adverse verdict on its non-compete claim.

[6] These factors will be discussed in more detail *infra*.

observed that "[t]he amount in controversy was originally $60,226.88, but without [Yenty] requesting treble and double damages, the amount in controversy would have been approximately $25,811.52" and that this was "far less than the amount requested in attorneys' fees." The court was "not convinced that $37,808.00 in attorneys' fees and $1,321.63 in costs [was] a reasonable amount" and instead awarded Yenty $4,380 in attorneys' fees pursuant to the FLSA. The court declined to award any litigation costs.

Finally, the circuit court concluded that Yenty was not entitled to attorneys' fees under Maryland law because she did not plead attorneys' fees under Md. Rule 2-703(b).[7] Yenty filed this timely appeal in which she challenges the circuit court's attorneys' fees award pursuant to FLSA and its failure to award litigation costs.

DISCUSSION

Standard of Review

We review a trial court's award of attorneys' fees for an abuse of discretion. *Hensley v. Eckerhart*, 461 U.S. 424, 453-54 (1983); *Pinnacle Grp., LLC v. Kelly*, 235 Md. App. 436, 476 (2018). "A trial court abuses [its] discretion when it disregards established principles or adopts a position that no reasonable person would accept." *Pinnacle Grp., LLC*, 235 Md. App. at 476; *see also Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 112

[7] Md. Rule 2-703(b) reads:

> (b) **Pleading.** A party who seeks attorneys' fees from another party pursuant to this Rule shall include a claim for such fees in the party's initial pleading or, if the grounds for such a claim arise after the initial pleading is filed, in an amended pleading filed promptly after the grounds for the claim arose.

(4th Cir. 2013) ("A district court abuses its discretion 'by resting its decision on a clearly erroneous finding of a material fact, or by misapprehending the law with respect to underlying issues in litigation.'" (quoting *Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 78 (4th Cir. 1989))). A trial court's "fee award must not be overturned unless it is 'clearly wrong.'" *Plyler v. Evatt*, 902 F.2d 273, 2778 (4th Cir. 1990) (quoting *McManama v. Lukhard*, 616 F.2d 727 (4th Cir. 1980)); *see also Friolo v. Frankel*, 373 Md. 501, 512 (2003) ("*Friolo I*").

I. Lodestar Analysis

Yenty first argues that the circuit court erred when it failed to use the lodestar analysis to calculate its award of attorneys' fees. She claims that the "arbitrary decision to have the attorneys' fees equal the awarded overtime wages," constituted an abuse of discretion. Yenty also contends that the circuit court based its decision on facts that were not supported by the evidence.

The FLSA allows a prevailing employee to recover reasonable attorneys' fees and costs. 29 U.S.C. § 216(b) (2012) ("The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."). The Supreme Court has held that trial courts, when determining reasonable attorneys' fees, should start with "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433; *Blum v. Stenson*, 465 U.S. 886, 888, 897 (1984). This initial calculation, or "lodestar" amount, is the "centerpiece" of attorneys' fees. *Blanchard v. Bergeron*, 489

U.S. 87, 94 (1989). Once the trial court establishes the lodestar amount, the court may use other factors to adjust the award. *Id.* The Supreme Court in *Blanchard* emphasized the centrality of the lodestar: "The *Johnson*[8] factors may be relevant in adjusting the lodestar amount, but no one factor is a substitute for multiplying reasonable billing rates by a reasonable estimation of the number of hours expended on the litigation." *Id.*

Although the federal circuit courts differ on the exact process used to determine attorneys' fees authorized by a federal statute, some courts employ a multi-step process. *See, e.g.*, *McAfee v. Boczar*, 738 F.3d 81, 88 (4th Cir. 2013); *De Jesus Nazarie v. Morris Rodriguez*, 554 F.3d 196, 207 (1st Cir. 2009); *Dillard v. City of Greensboro*, 213 F.3d 1347, 1353 (11th Cir. 2000). In *Dillard*, the Eleventh Circuit enunciated the following three-step process:

> First, a court asks if the plaintiff has "prevailed" in the statutory sense. Second, the court calculates the "lodestar," which is the number of hours (tempered by billing judgment) spent in the legal work on the case, multiplied by a reasonable market rate in the local area. Finally, the court has the opportunity to adjust the lodestar to account for other considerations that have not yet figured in the computation, the most important being the relation of the results obtained to the work done.

Dillard, 213 F.3d at 1353 (internal citations omitted). Regarding the first step, a party "'prevails' when actual relief on the merits of [her] claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that

[8] *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974), *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87 (1989), sets forth twelve factors to be considered in determining an appropriate attorneys' fees award. Those twelve factors will be discussed in more detail *infra*.

directly benefits the plaintiff." *Id*. at 1353-54 (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992)). As to the second step, "[t]he starting point for establishing the proper amount of an award is the number of hours reasonably expended, multiplied by a reasonable hourly rate[,]" *i.e.*, the lodestar analysis. *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 174 (4th Cir. 1994). Finally, for the third step, the court should adjust the award for reasonableness using the *Johnson* factors, if these were not a part of the initial calculations. *Hensley*, 461 U.S. at 434 n.9; *McAfee*, 738 F.3d at 88.

We conclude that the three-step process articulated in *Dillard* provides the proper analytical framework to determine an appropriate FLSA attorneys' fees award. Here, the court correctly determined that Yenty had "prevailed" in the statutory sense, *Dillard*, 213 F.3d at 1353-54, because the jury found Get Smart liable under both the MWPCL and FLSA. Thus, *Dillard*'s first step was satisfied. The court, however, erred when it failed to address the second step of the analysis, *i.e.* calculating the lodestar amount. Although the court noted that Yenty's counsel claimed that he had spent 144.4 hours on the case, the court never determined whether the claimed hours were reasonable. Additionally, despite finding that hourly rates "ranging from $275.00/hr to $460.00/hr" were reasonable, the court failed to determine "the number of hours reasonably expended, multiplied by a reasonable hourly rate" as required by the lodestar formula. *Rum Creek*, 31 F.3d at 174. This initial calculation — the lodestar amount — is the "centerpiece" of any FLSA attorneys' fees calculus. *Blanchard*, 489 U.S. at 94. Accordingly, the trial court's failure to calculate the lodestar amount prior to applying the *Johnson* factors, step three of the

Dillard process, constituted legal error. In other words, the court must complete the second step of the analysis before proceeding to the third step. This error requires reversal. *See Quigley v. Winter*, 598 F.3d 938, 957 (10th Cir. 2010) ("The district court's failure . . . to analyze Quigley's entitlement to attorney fees under the lodestar approach was an abuse of discretion."); *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 982 (9th Cir. 2008) ("Despite a district court's discretion in determining the amount of a fee award, it must calculate awards for attorneys' fees using the lodestar method.") (internal quotation marks omitted); *Pennsylvania Envtl. Def. Found. v. Canon-McMillan Sch. District*, 152 F.3d 228, 232 (3d Cir. 1998) ("However, the cases make clear that before any adjustments are made, the district court must calculate a lodestar.").

To assist the circuit court on remand, we shall address Yenty's assertions of error in the third step — the application of other factors or considerations to the lodestar. Both the Court of Appeals and the Supreme Court have approved the use of the *Johnson* factors in the "adjustment to the lodestar" step of the analysis.[9] *Blanchard*, 489 U.S. at 91; *Friolo v. Frankel*, 403 Md. 443, 454 n.8 (2008) ("*Friolo III*"). These factors are: (1) "[t]he time and

[9] We recognize that the circuit court used the twelve factors set forth in the unreported opinion *Jackson v. Estelle's Place, LLC*, 391 F. App'x. 239, 243 (4th Cir. 2010). The factors in *Jackson* are essentially the same as those articulated in *Johnson* with the exception of factor six. *Johnson*'s sixth factor is "[w]hether the fee is fixed or contingent" while *Jackson*'s is "the attorney's expectations at the outset of litigation." *Johnson*, 488 F.2d at 718; *Jackson*, 391 F. App'x at 243. The Fourth Circuit uses both phrases interchangeably and this distinction does not ultimately affect the analysis because "both formulations address the basic question of how an attorney anticipates being paid." *In re Abrams & Abrams, P.A.*, 605 F.3d 238, 244 n.3 (4th Cir. 2010). We will use the *Johnson* factors in our analysis.

labor required"; (2) "[t]he novelty and difficulty of the questions"; (3) "[t]he skill requisite to perform the legal service properly"; (4) "[t]he preclusion of other employment by the attorney due to acceptance of the case"; (5) "[t]he customary fee" in the community; (6) "[w]hether the fee is fixed or contingent"; (7) "[t]ime limitations imposed by the client or the circumstances"; (8) "[t]he amount involved and the results obtained"; (9) "[t]he experience, reputation, and ability of the attorneys"; (10) "[t]he 'undesirability' of the case"; (11) "[t]he nature and length of the professional relationship with the client"; and (12) "[a]wards in similar cases." *Johnson,* 488 F.2d at 717-19.

We turn to address Yenty's claim that the court erred in its application of the *Johnson* factors, noting that the federal courts apply the "clearly erroneous" standard of review to any fact findings made by the trial court in its factor analysis. *Gagnon v. United Technisource, Inc.*, 607 F.3d 1036, 1043 (5th Cir. 2010); *see also* Md. Rule 8-131(c) ("When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous[.]").

In considering the second *Johnson* factor — "novelty and difficulty of questions" — the court noted "that there was an opportunity for mediation in this case well before trial began." Yenty asserts that the court faulted her for not settling the case through mediation. We see no attribution of fault to either party from the court's observation about mediation. However, on remand, the court should reconsider whether the "opportunity for mediation"

is a proper consideration under the "novelty and difficulty of questions raised" factor and, if so, clarify how mediation factored into its analysis.

For the third factor — "skill requisite to perform the legal service properly" — the court found that "no particular skill" beyond that of a competent and diligent lawyer was required. Yenty argues that the lack of time sheets made this case more challenging because her attorneys "w[ere] also faced with novel and complex questions regarding the burden of proving the overtime hours worked when [Get Smart] failed to maintain accurate records of those hours in accordance with Maryland and federal law." Get Smart responds by arguing that Yenty eventually received the time sheets and their lack of completeness did not make the case more complex. Given the genuine dispute about the level of complexity caused by Get Smart's record keeping, and using the deferential clearly erroneous standard, we discern no error in the circuit court's determination that no specialized legal skill was required to present Yenty's case.

In its written opinion, the circuit court, under a heading titled "The Attorney's Expectations at the Outset of the Litigation," found as follows: "[Yenty's] attorney's expectation was for a verdict in favor for [sic] his client. His client did receive a favorable outcome at the end of the litigation, but the jury did not find it appropriate to award [Yenty] treble damages for her claim." We initially note that the circuit court's findings under this header would more appropriately fall under *Johnson*'s eighth factor, the "results obtained" factor. Yenty correctly asserts that the issue of treble damages was not included in the

written verdict sheet presented to, and completed by, the jury.[10] Yenty therefore contends that the court clearly erred when it determined that "the jury did not find it appropriate to award treble damages[.]" Because the verdict sheet did not ask the jury to consider treble damages, we agree that the court erred by factoring Yenty's failure to obtain treble damages into its analysis.

Under a heading in its opinion titled "The Amount in Controversy and the Results Obtained," the circuit court found that "the case was accepted on a contingency fee arrangement, so counsel was aware that had he not been successful in the matter, he would have had to absorb the fees." Under a separate header titled "The Undesirability of the Case," the court noted that "counsel . . . stated that 'few attorneys who specialize in employment law . . . are willing to take such cases on a straight contingency basis[.]'" Again, the circuit court appeared to conflate the *Johnson* factors as its findings under these headings analytically fall within *Johnson*'s sixth factor, "[w]hether the fee is fixed or contingent." Yenty argues that her counsel took this case on a contingency because of the fee-shifting provisions of the FLSA and MWPCL. Get Smart responds that Yenty failed to provide any information about the fee arrangement. For the court's assistance on remand, we note that contingency fees, while relevant, are not dispositive. *Blanchard*, 489 U.S. at 93. A contingency agreement may "aid in determining reasonableness . . . [but] . .

[10] Prior to the court instructing the jury, Yenty's counsel requested that the verdict sheet include a line for treble damages under the MWPCL. The court rejected that request. The propriety of that determination is not before us.

. does not impose an automatic ceiling on an award of attorney's fees[.]" *Id.* Indeed, *Blanchard* noted that a provision for a "reasonable attorney's fee" in the federal statute under consideration there "contemplates reasonable compensation, in light of all of the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, no more and no less." *Id*.

In considering *Johnson*'s eighth factor — "[t]he amount involved and the results obtained" — the court found that "[t]he initial amount of controversy in this case totaled $60,226.88." Although the court did not articulate how it calculated that amount, we infer that the basis for its calculation was as follows:

MWPCL claim	$25,811.52 ($8,603.84 in overtime wages times three)
MWHL claim	$17,207.68 ($8,603.84 in overtime wages times two)
FLSA claim	$17,207.68 ($8,603.84 in overtime wages times two)
Total	$60,226.88

Although Yenty's initial complaint contained separate MWPCL, MWHL, and FLSA counts, the counts were pleaded in the alternative and Yenty's counsel conceded that the rule against double recovery limited her damages to $25,811.52. Because Yenty's maximum claim against Get Smart amounted to $25,811.52, the court clearly erred in concluding otherwise. On the other hand, in determining the "results obtained," the court properly found that the jury awarded Yenty $4,380.00, which sum approximated "half of the original overtime payments [Yenty] sought."

Finally, as noted previously, the court found that the jury declined to award treble damages. We acknowledge that in most cases the failure to obtain treble damages may properly be considered in the "results obtained" analysis. Here, however, because the issue of treble damages was never submitted to the jury, the court erred in considering the issue. On the other hand, the jury expressly found that Get Smart acted in good faith and had reasonable grounds to believe that its "act or omission was not a violation of the FLSA." Given those findings, Yenty was not entitled under the FLSA to additional liquidated damages equal to the unpaid overtime wages. In our view, the finding of good faith and the concomitant preclusion to obtaining liquidated damages equal to the unpaid wages are relevant considerations under *Johnson*'s eighth factor, and therefore may be considered by the court on remand.[11]

In summary, on remand, the circuit court should first determine the lodestar calculation. After making that preliminary determination, the court should apply the *Johnson* factors. If the court decides to adjust the lodestar amount based on the *Johnson*

[11] Although neither party challenged the circuit court's use of two federal district court cases in evaluating *Johnson*'s twelfth factor (awards in similar cases), we direct the court to consider the *Dillard* Court's observation that "a court should hesitate to give controlling weight to prior awards, even though they may be relevant." *Dillard*, 213 F.3d at 1355.

(continued)

factors, the court "must clearly articulate the factors and reasoning used to calculate the overall figure[.]" *Pinnacle Grp., LLC*, 235 Md. App. at 481.[12]

II. Litigation Costs

Yenty next argues that the court erred by denying her request for costs. In addition to attorneys' fees, a prevailing employee is also entitled to costs under the FLSA. 29 U.S.C. § 216(b). A trial court has the same discretion in assessing costs as it does in assessing reasonable attorneys' fees. *Roy v. County of Lexington*, 141 F.3d 533, 549 (4th Cir. 1998). However, a court abuses that discretion when it disallows reasonable litigation expenses. *Id.*; *Daly v. Hill*, 790 F.2d 1071, 1085 (4th Cir. 1986). Here, although the circuit court acknowledged that Yenty requested litigation costs, it failed to determine whether any of those costs were reasonable. This was error. *Cf. Campusano v. Lusitano Constr. LLC*, 208 Md. App. 29, 42 (2012) (remanding when "[t]he trial court failed to consider appellants' request for fees and costs under the [MWPCL] and [the court's] review of the record reveals no indication whether the trial court was inclined to grant or deny the request."). Accordingly, the circuit court on remand shall determine and award Yenty's reasonable costs.

[12] Yenty asks this Court to determine a reasonable amount of attorneys' fees rather than remand for further proceedings in the circuit court. Although we recognize that some federal circuit courts of appeal have independently determined the amount of attorneys' fees to be awarded, we decline to do so. In our view, the trial court is in the best position to calculate the lodestar and apply the *Johnson* factors. *See Pinnacle Grp., LLC*, 235 Md. App. at 481.

III. Attorneys' Fees for Appeal

Finally, Yenty requests an additional award of attorneys' fees related to the prosecution of her appeal. In *Friolo III*, the Court of Appeals held that an award of appellate attorneys' fees may be appropriate in this type of case:

> Instead, the degree of success on appeal is a standard more congruent with the purpose of the Wage and Payment Laws. Where a plaintiff obtains relief under either of these laws, obtains an award for attorneys' fees incurred while obtaining that relief, and later, on appeal, is successful in procuring an increase in those fees or is successful in correcting a trial court's error, the attorneys' fees incurred during the appeal should be considered as a part of the lodestar analysis required to be conducted on remand and, in that way, be capable of being recouped by the plaintiff.

Friolo III, 403 Md. at 460.

Here, Yenty has convinced us that the trial court erred by failing to calculate the lodestar in its attorneys' fees analysis. Therefore, the "attorneys' fees incurred during the appeal should be considered as a part of the lodestar analysis required to be conducted on remand and, in that way, be capable of being recouped" by Yenty.[13] *Id*.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.

[13] Md. Rule 2-706 provides that "[a] party who seeks an award of attorneys' fees incurred in connection with an appeal . . . shall file a motion for such fees in the circuit court that entered the judgment or order that is the subject of the appellate litigation."