Circuit Court for Prince George's County
Case No. CAL18-10797

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1529

September Term, 2019

JUAN CARLOS TERRONES ROJAS, *et al.*

v.

F.R. GENERAL CONTRACTORS, INC., *et al.*

Kehoe,
Beachley,
Shaw Geter

JJ.

Opinion by Shaw Geter, J.

Filed: March 2, 2021

This is an appeal from a judgment entered by the Circuit Court for Prince George's County in favor of appellees. Appellants timely appealed and present the following questions for our review:

1. Did the Circuit Court err in granting appellees' motion for judgment at the close of appellants' evidence based upon the federal Portal-to-Portal Act and contrary to Maryland law under the Maryland Wage and Hour Law, the Maryland Wage Payment and Collection Law, and the Code of Maryland Regulations?

2. Did the Circuit Court err in dismissing the entire action when appellees did not move for judgment on appellants' unjust enrichment claim?

3. Did the Circuit Court err in denying appellants' motion for class certification, motion to reconsider, and renewed motion for class certification in relying on "assertions" and "proffers" of the appellees in the face of appellants' sworn testimony?

For reasons discussed below, we conclude there was no error and we affirm.

BACKGROUND

Appellants, Juan Carlos Terrones Rojas and Jose Carlos Rueda Torres were employed by appellees, F.R. General Contractors, Inc. and Commercial Interiors, Inc., to perform carpentry work at the MGM National Harbor resort and casino ("MGM") located in Prince George's County, Maryland. Appellants worked on the MGM construction site for approximately two months, from late 2015 through early 2016. Appellants gained access to the construction site at the MGM by parking at the Rosecroft Raceway and riding a shuttle bus provided by Whiting Turner Contracting Company, the general contractor for

the MGM project, at no cost to appellants.[1] Appellants went through security and clocked-in upon reaching the MGM construction site. At the end of their shifts, appellants rode a shuttle back to their vehicles parked at Rosecroft. Appellants stated they were told to park at the Rosecroft lot and to ride a shuttle to the MGM construction site at an orientation conducted by Whiting-Turner. A Whiting-Turner project safety manager testified that workers were not told they were required to take a shuttle from the Rosecroft lot. He further testified that workers were not permitted to park in delineated nearby lots but could be dropped-off in those lots or park in other lots that were not explicitly prohibited. He also relayed that employees were permitted to take public transportation or use the ride-sharing app, Uber. No employee parking was available at the construction site.

Appellants were not compensated for wait and travel time on the shuttle, or time spent passing through security upon entry and departure from the MGM site. The driving distance from the Rosecroft lot to the construction site is approximately two and one-half miles. Appellees did not track the amount of time appellants spent waiting and traveling between Rosecroft and the MGM site. While waiting for and riding the shuttle bus, appellants did not receive work directives or instructions; load or maintain tools or equipment; don or doff protective or specialty equipment; or perform any construction work. All construction work was performed by appellants at the MGM site.

Appellants filed a Complaint and Jury Demand on April 5, 2018, and appellees filed

[1] Rosecroft Raceway is located at 6336 Rosecroft Drive, Fort Washington, Maryland, 20744. Whiting-Turner directed subcontractor employees to park at Rosecroft Raceway and ride shuttle busses to the MGM site.

an Answer on August 30, 2018. Thereafter, appellants filed a Memorandum in Support of their Motion for Class Certification and requested a hearing and appellees filed a Memorandum in Opposition. On April 9, 2019, the court entered an order finding that appellants "failed to meet their burden of proof on both the numerosity and commonality factors under Maryland Rule 2-231(a)" and denied appellants' motion. Appellants then filed a Motion to Reconsider Denial of Class Certification and Request for Hearing and a Supplement and appellees filed their opposition. On June 5, 2019, the circuit court entered an order, again, denying appellants' motion, finding that appellants failed to meet the numerosity and commonality requirements.

On July 12, 2019, appellees filed a Motion for Summary Judgment and on July 24, 2019, appellants filed a Motion for Partial Summary Judgment. Both parties filed their respective responses and oppositions. Appellants then filed a Renewed Motion for Class Certification, or in the Alternative, Second Motion to Reconsider Denial of Class Certification, Motion for Sanctions, and to Shorten Time, and Request for Hearing. At a motions hearing on August 21, 2019, the court bifurcated the case on the issues of liability and damages and reserved ruling on the issue of class certification until a trial on the merits.

A jury trial was held from August 26, 2019 through August 29, 2019. At the close of evidence, appellees made a motion for judgment, which the court granted. The court, in its oral ruling, stated:

> . . . In Maryland the law is clear. Employees are entitled to be compensated for all hours worked. "Hours of work" means the time during a workweek that an individual employed by an employer is required by the employer to be on the employer's premises, on duty, or at a prescribed workplace." And that's COMAR [0].9.12.41.10A.

> In this matter, no reasonable jury could find that the [appellants] did anything other than park at Rosecroft. There was no instruction given, no equipment loaded, no work assigned or received, no principal or integral activities were performed.
>
> Additionally, under Maryland law, travel time may be included in computing work hours if the individual travels during regular work hours, travels from one worksite to another, or is called out after work in emergency situations. And that's COMAR, the same cite, 09.12.41.10C.
>
> In this matter, no reasonable jury could find that the [appellants] in this matter were traveling during regular work hours, nor that they were traveling from one worksite to another. And Subsection C of that section does not apply to this case.
>
> As such, based on the evidence in the light most favorable to the [appellants] in this matter, the [c]ourt will grant judgment in favor of the [appellees] and the trial—the case will not resume. It will not be presented to the jury.

On September 12, 2019, the court granted a judgment in favor of appellees.

STANDARD OF REVIEW

In Maryland, the grant or denial of a motion for judgment is governed by Rule 2-519. "We review the decision to grant or deny a motion for judgment (in whole or in part) *de novo*. *DeMuth v. Strong*, 205 Md. App. 521, 547 (2012) (citing *Thomas v. Panco Mgmt. of Md., LLC*, 423 Md. 387, 393–94 (2011)). "In doing so '[w]e conduct the same analysis that a trial court should make when considering the motion for judgment.'" *C & B Constr., Inc. v. Dashiell*, 460 Md. 272, 279 (2018) (quoting *Thomas v. Panco Mgmt. of Md., LLC*, 423 Md. 387, 406–07 (2011)). Therefore, we "evaluate all evidence and reasonable evidentiary inferences, viewed in a light most favorable to the non-moving party" *Estate of Blair by Blair v. Austin*, 469 Md. 1, 17 (2020) (quoting *C & B Constr., Inc. v. Dashiell*, 460 Md. 272, 279 (2018)) (internal quotation marks omitted).

In Maryland, Rule 2-231 governs class certification. We review a circuit court's decision to grant or deny class certification "for abuse of discretion, based upon the 'recognition that the basis of the certification inquiry is essentially a factual one, and thus, deference is due.'" *Frazier v. Castle Ford, Ltd.*, 430 Md. 144, 155 (2013) (quoting *Creveling v. GEICO*, 376 Md. 72, 90 (2003)). "A less deferential standard of review applies when there is a question whether the court applied the proper legal standard for certification." *Frazier v. Castle Ford, Ltd.*, 430 Md. 144, 155 (2013) (citations omitted). "[W]hether the trial court used a correct legal standard in determining whether to grant or deny class certification is a question of law that we review *de novo*." *Creveling v. Gov't Employees Ins. Co.*, 376 Md. 72, 90 (2003) (citations omitted).

"The decision to bifurcate a trial is within the discretion of a trial judge. Such a decision is subject to the abuse of discretion standard of review. Primary considerations for application of the rule are convenience and avoiding prejudice." *St. Joseph Med. Ctr., Inc. v. Turnbull*, 432 Md. 259, 267–68 (2013) (quoting *Newell v. Richards*, 83 Md. App. 371, 387 (1990), *rev'd*, 323 Md. 717 (1991)).

Discussion

A. Motion for Judgment

Appellants argue that because Maryland has not explicitly adopted, the Portal-to-Portal Act, the federal amendment cannot be used to interpret the Maryland Wage and Hour Law ("MWHL"). However, in *Amaya v. DGS Constr., LLC*, ___ Md. App. ___, ___, No. 1857, Sept. Term 2019, slip op. at 14 (filed Feb. 24, 2021), we stated "it is unnecessary for Maryland to specifically express that we have adopted an amendment to a federal statute

where the Legislature has enacted a state's equivalent of the federal statute." We reiterated that "[i]ncorporating statutory provisions by reference, *partially or entirely*, into legislation has been long recognized as an acceptable practice on both the state and federal levels unless prohibited by constitutional provisions." *Id.* at 14 (quoting *Hanrahan v. Alterman*, 41 Md. App. 71, 81 (1979) (footnotes omitted)). We concluded that "the MWHL and its regulations must be read as interrelated parts of the statutory scheme that includes the FLSA, the Portal-to-Portal Act and accompanying regulations." *Id.* at 15. We held that "to determine what constitutes a worksite, [courts] examine not whether the employee was required to report to a location, but instead whether the employee performed part of their job function at the location." *Id.* at 21 (alteration not in original).

Appellants argue that Rosecroft was a worksite using the definition contained within the general contractor's Project Manual which defined the site to include "any and all material staging, lay down, storage, office, and parking areas located within a twenty-five (25) mile radius of the beltway parcel and which are under the control of Prime General Contractor and whose use is related to work performed at the Project." However, the Manual is not dispositive of appellants' claims under Maryland law. *See Amaya v. DGS Constr., LLC*, ___ Md. App. ___, ___, No. 1857, Sept. Term 2019, slip op. at 21 (filed Feb. 24, 2021) ("to determine what constitutes a worksite, we examine . . . whether the employee performed part of their job function at the location.").

Based on our examination of the record, carpentry at the MGM worksite was appellants' job function and principal activity. Rosecroft was not a worksite because, while there, appellants were not engaged in activities that were part of their functions as carpenters. Thus, appellants were not entitled to travel time from the Rosecroft parking lot to the MGM worksite and the circuit court did not err in granting appellees' motion for judgment.

B. Unjust Enrichment

Maryland Rule 2-519(a) provides:

> A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence. The moving party shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of an opposing party's case.

Appellants argue that the circuit court erred in dismissing their unjust enrichment claim when appellee did not move specifically for judgment on that claim. Appellants claim appellees' motion for judgment failed to meet the particularity standard under Maryland Rule 2-519(a). According to appellants, this Court, in *Kent Vill. Associates Joint Venture v. Smith*, interpreted Maryland Rule 2-519(a) to mean that "if a party does not move with particularity *or at all* with respect to a specific claim, jury resolution is appropriate." *See*, 104 Md. App. 507, 517 (1995). In *Kent Vill.*, we explained: "Rule 2-519(a) requires that, in making a motion for judgment, the moving party "shall state with particularity all *reasons* why the motion should be granted." *Id.* at 516–17 (emphasis added). We concluded that the Rule 2-519(a) requirement ". . . means what it says. Failure

to state a reason 'with particularity' serves to withdraw the issue from appellate review." *Id.* (citations omitted). The particularity requirement serves two purposes. "First, the trial judge must have a reasonable opportunity to consider all arguments when deciding which issues to submit to the jury and when framing jury instructions. Second, other parties must also have a fair opportunity to address all legal and evidentiary challenges and formulate their own trial strategies." *Brendel v. Ellis*, 129 Md. App. 309, 313–14 (1999) (citing *Kent Vill.*, 104 Md. App. at 517). *Kent Vill.* is not instructive here, as, the question of whether appellees stated, with particularity, reasons as to why their motion for judgment should be granted is not before us. Rather, the issue is whether appellees moved for judgment on the issue of unjust enrichment.

Appellants also cite *Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md. App. 605, 635–36 (1997), for the proposition that a court may not enter judgment on an issue absent a motion made with particularity. In *Commercial Union Ins. Co.*, we stated: "It has long been established that a trial judge may not grant summary judgment *sua sponte* in the total absence of a motion for summary judgment by the parties, even when the factual and legal situation seems to cry out for it." *Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md. App. 605, 635 (1997) (citations omitted). The issue in *Commercial Union* was whether a motion for summary judgment made by a party would have been enough to support a judgment in favor of the opposing party, even absent a motion by the opposing party. *Id.* at 636. We explained that a judge "may grant a judgment not only for the moving party but also against the moving party (to wit, in favor of the opposing party). A cross ruling is no longer dependent on a cross motion. The prerogative to grant a summary

judgment is now at least two-directional, even if not multi-directional." *Id.* (emphasis removed). Here, the circuit court granted a motion for judgment, not *sua sponte*, but based on appellees' motion for judgment. Therefore, *Commercial Union Ins. Co.*, is not applicable.

Appellees seem to argue that the circuit court may, *sua sponte*, grant a motion for judgment. For support, they cite *Slick v. Reinecker*, 154 Md. App. 312, 349 (2003), where this Court stated: "It is . . . clear that Rule 2-519, governing civil procedure, is to be construed consistently with Rule 4-324, its precise counterpart in criminal cases." Appellees note that Rule 4-324, "Motion for Judgment of Acquittal[,]" provides that the court may grant a judgment of acquittal on its own motion. Rule 4-234(a) also provides, in pertinent part:

> A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence.

Similarly, Rule 2-519(a) provides, in relevant part:

> A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence.

We explained, in *Slick*, "[i]t was with respect to that criminal counterpart" that in *Williams v. State*, 5 Md. App. 450, 455–56(1968), we observed:

> It is because of this difference in the posture of the issue of the sufficiency of the evidence that we may entertain the issue on appeal in a jury case only upon the denial by the lower court of a motion for judgment of acquittal but we must entertain the issue in a non-jury case when presented on appeal even in the absence of a motion for judgment of acquittal below.

Id. at 349. Here, as previously stated, the court dismissed appellants' claims, not *sua sponte*, but based on appellees' motion for judgment. Therefore, *Slick v. Reinecker* is not on point.

Appellees' counsel, in moving for judgment, argued:

> I would submit to the [c]ourt that there is simply no factual issue to submit to this jury at this time. What the law is, is for the [c]ourt. What COMAR says it means is for the [c]ourt. What the statutory term "worksite" and "workplace" mean in COMAR is for the [c]ourt. What the—what does the contract mean, what's the contract language mean, that's for the [c]ourt.
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> There's just nothing, I would submit, for the jury to decide as a matter of law. And under Federal law, which is applicable, and COMAR, which is most definitely applicable, it's—we didn't have work at a worksite, and travel commuting time is just not compensable. Thank you.

Following argument, the court, in its oral ruling, stated:

> All right. We've come to the end of Plaintiffs' case, and this [c]ourt must consider the evidence in the light most favorable to the Plaintiff and determine whether or not it is sufficient to justify sending the issues to the jury as to whether there has been any violation of the [MWPCL], as well as the MWHL.
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> * * *
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> The question presented here is: Must [appellants] be compensated for the time spent traveling and waiting?

As appellees aptly note, that question would include the unjust enrichment claim. Unjust enrichment is defined as a "quasi-contract" remedy "to provide relief for a plaintiff when an enforceable contract does not exist but fairness dictates that the plaintiff receive compensation for services provided." *County Com'rs of Caroline County v. J. Roland Dashiell & Sons, Inc.*, 358 Md. 83, 96–97 (2000) (citations omitted). The elements of unjust enrichment are:

> 1. A benefit conferred upon the defendant by the plaintiff;
> 2. An appreciation or knowledge by the defendant of the benefit; and
> 3. The acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.

James B. Nutter & Co. v. Black, 225 Md. App. 1, 25 (2015).

The circuit court ruled that: "[N]o reasonable jury could find that the [appellants] did anything other than park at Rosecroft." The court then granted judgment in favor of the appellees. The Court of Appeals, in *Nelson v. Carroll*, stated:

> the sufficiency of the particularity of the reasons for a Rule 2-519(a) motion is determined in light of legal arguments that have been made in the course of the action, with particular emphasis on whether the trial judge could identify, through a process analogous to incorporation by reference, the argument that was being made in support of the motion.

350 Md. 247, 250 (1998). On the record in this case, we hold that appellees moved for judgment on all claims for liability and the court's ruling was in direct response to their motion. Thus, the court did not err.

Assuming, arguendo, the lower court did not understand appellees' motion to encompass the unjust enrichment claim, we find that the court's determination that appellants did not perform compensable work when parking and riding the shuttle is dispositive of the unjust enrichment claim. As we previously explained, unjust enrichment is a "quasi-contract" remedy "to provide relief for a plaintiff when an enforceable contract does not exist but fairness dictates that the plaintiff receive compensation for services provided." *County Com'rs of Caroline County*, 358 Md. 83, 96–97 (2000) (citations omitted). Here, the court found that appellants did not perform compensable services or work when parking and riding the shuttle. Therefore, the circuit court properly dismissed

the unjust enrichment claim.

C. Class Certification

Appellants argue the circuit court erred in denying their motions for class certification and in bifurcating damages and liability. Appellants contend that a court's determination on class certification "may not be rested upon the merits of the underlying cause(s) of action." *Philip Morris Inc. v. Angeletti*, 358 Md. 689, 726 (2000) (citing *Eisen*, 417 U.S. at 177–78). Appellants cite the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*, where the Court found "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." 417 U.S. 156, 177 (1974).[2]

We note the *Eisen* Court further explained,

> such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained.

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177–78 (1974). The Court also noted:

> a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant.

Id. at 178.

[2] Federal Rule of Civil Procedure 23 provides prerequisites that must be satisfied before a district court may certify a class. *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982).

In the present case, appellants filed a motion for class certification that was denied by the court. They then filed a motion for reconsideration which was also denied. Several months later, appellants filed a renewed motion for class certification, wherein they requested the court: "(1) certify the class . . . *or* . . . *(2) bifurcate liability for trial . . . and reserve on certification, if and until after liability is found for [appellants]*." (emphasis added).

Maryland Rule 2-231 provides, in relevant part:

> . . . the court shall determine by order *as soon as practicable* after commencement of the action whether it is to be maintained as a class action . . . The order shall include the court's findings and reasons for certifying or refusing to certify the action as a class action. The order may be conditional and may be altered or amended before the decision on the merits.

(emphasis added). Maryland Rule 2-503(b) provides:

> (b) Separate Trials. In furtherance of convenience or to avoid prejudice, the court, on motion or on its own initiative, may order a separate trial of any claim, counterclaim, cross-claim, or third-party claim, or of any separate issue, or of any number of claims, counterclaims, cross-claims, third-party claims, or issues.

In *Myers v. Celotex Corp.*, this Court concluded that bifurcation of the issues at trial was proper where an outcome in favor of the defendants on the first issue eliminated the need to present evidence on the remaining issues, and bifurcation was a convenience to the court, the jury and the parties. 88 Md. App. 442, 448–49 (1991). In *Myers*, we approved the circuit court's decision to trifurcate a trial, involving cancer-related deaths allegedly caused by exposure to asbestos, into three phases: (1) whether the parties contracted an asbestos-related disease, and compensatory damages; (2) product identification; and (3) state of the art testimony and other defenses. *Id.* at 447.

Here, the court's decision to bifurcate the trial served the purpose of Rule 2-503 in that, if there was no liability, the issue of class certification would be moot and there would be no need for a trial on the issue of damages. We also observe that appellants' second motion to reconsider class certification alternatively invited the court to reserve ruling on its motion. We, therefore, hold the circuit court did not abuse its discretion and acted pursuant to Rule 2-503(b) by bifurcating the issues of damages and liability. Due to the court's finding of no liability, the issue of class certification is moot.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANTS.