UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1853

September Term, 2014

BERTRAM MILLER

v.

BOARD OF EDUCATION OF BALTIMORE COUNTY

Woodward,
Friedman,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: September 2, 2016

In June 2010, appellant, Dr. Bertram Miller, facing a recommendation of dismissal, resigned from his teaching position with New Town High School ("New Town"), a Baltimore County public school. Miller filed suit against appellee, the Board of Education of Baltimore County ("the Board") in the Circuit Court for Baltimore County, alleging that members of the administration of New Town breached Miller's employment contract by conducting unfair teaching evaluations and by failing to comply with the appeal procedures set out in the Teachers' Association of Baltimore County ("TABCO") Master Agreement ("TABCO contract").[1]

A jury trial was held from May 12 through May 14, 2014, on the last remaining count of Miller's complaint.[2] At the conclusion of the trial, the jury returned a verdict in favor of the Board, finding that, although the Board breached the contract, Miller voluntarily resigned before completing the appeal process. Concluding that Miller's retirement excused the Board from its duty to continue with Miller's appeals, the court entered judgment for the Board. Miller noted a timely appeal, and presents the following questions for our consideration, which we have rephrased:

I. Whether the circuit court abused its discretion by failing to reconsider summary judgment entered for the Board on Miller's discrimination claim after Miller presented the court with new evidence?

[1] Miller also named four members of the New Town High School administration as defendants in his suit. These defendants were dismissed from the case following the court's grant of summary judgment for them.

[2] Miller's nine other counts were resolved against him on summary judgment. *See* pages 9 and 10, *supra*.

II. Whether the trial court abused its discretion in denying Miller leave to file his third amended complaint?

III. Whether the trial court abused its discretion in rendering certain evidentiary rulings during the trial proceedings?

IV. Whether there was sufficient evidence to allow the jury to decide the case?

V. Whether the trial court abused its discretion in revising the jury verdict sheet and instructing the jury on Miller's retirement from Baltimore County Public Schools?[3]

[3] Miller phrased his questions as follows:

1. A. Did the Jury commit reversible error when it concluded that Appellant had retired (voluntarily E-534 line 15) and was not constructively terminated? B. Did the Jury commit reversible error when it concluded that Appellant's (allegedly voluntary [E-534 line 15]) retirement had extinguished his entitlement to the due process of law guaranteed by the 14 th Amendment to the Constitution?
2. Did Judge Cahill commit reversible error by denying Appellant's requests for Jury Instructions and Verdict Questions?
3. Did Judge Cahill commit reversible error when he A) denied Appellant's request to introduce into evidence the brochure entitled, Maryland's Response to Hate Crimes; B) sustained objections to Appellant's line of questioning of Witnesses Cruse and Dowling regarding the (victimization by Theresa Vaccaro; C) sustained Appellee's objection to Appellant's request to introduce into evidence i) Witness Cruse's formal report of the pinned-lemon incident, and ii) an internet video; D) prejudiced Appellant's chance to receive a settlement offer; E) prejudiced the Jury by declaring in open court that he was "astonished" that Appellant could not see the relevance of a legal point and allowed Appellee to violate its own Motion in Limine;; F) often sustained "objections" that Appellee's attorney had not asserted; G) presented his own erroneous Jury Instruction about Mrs. Vaccaro's lemons; and H) ruled a witness statement to be hearsay which had been elicited from that witness by Appellee in a prior deposition.
4. Did Judge Cahill commit reversible error when a) he granted Appellee's two Motions to Strike, b) denied Appellant's Motion for Recusal, and c)

(Continued . . .)

For the foregoing reasons, we affirm the judgment of the trial court.

BACKGROUND

Before the filing of his lawsuit, Bertram Miller had been a high school mathematics teacher for over 35 years in the Baltimore County school system. During the 2008-2009 and 2009-2010 school years, Miller was evaluated by a performance appraisal team through several in class observations. His appraisal team consisted of Ms. Barbara Cheswick, Dr. Robert Murray, Ms. Theresa Vaccaro, and Dr. John Staley.[4] Although Miller received some good marks on his evaluations, he was rated "does not meet standards" in the majority of the evaluation criteria. With the help of Raymond Suarez, a TABCO union representative, Miller appealed each evaluation pursuant to Maryland Code (1978, 2014 Repl. Vol.), Education Article ("Educ.") § 4-205(c), but did

(. . . continued)

denied Appellant's Motion to Reinstate Defendants to the Discrimination Count?

5. Did Judge Brobst commit reversible error when she granted summary judgment on nine counts in Appellant's Second Amended Complaint?
6. Did Judge Cahill commit reversible error by rejecting Appellant's Jury Verdict Questions regarding Md. Rule 1-341 and Effect of Applicable Statutes?

[4] The members of the appraisal team had the following roles: Cheswick served as school principal, Murray served as assistant principal, Vaccaro served as Mathematics Department chairperson, and Staley served as coordinator of secondary mathematics for the Board.

not receive a disposition of his appeals before he was notified that he was slated for termination.[5]

On January 8, 2010, Miller initiated a damages action in the Circuit Court for Baltimore County against the Board and the members of his performance appraisal team. On April 27, 2010, Joe Hairston, the superintendent of Baltimore County Public Schools, issued written notice to Miller that he would recommend to the Board that the teacher be dismissed from service on the basis of incompetency, effective June 30, 2010. On May 12, Miller filed an amended complaint seeking an injunction to stop the Board from firing him, which the court denied. After failing to secure this relief, Miller completed his "resignation statement form" and retired from his position on June 29, 2010, to ensure that he would be able to collect monthly retirement pay of approximately $5,000 along with other retirement benefits. The next day, apparently not having received Miller's resignation, the superintendent sent a letter to him notifying him of the recommendation for dismissal and his right to appeal.[6]

Miller filed another amended complaint on September 30, 2010, claiming discrimination under §§ 20-606, -1013 of the State Government Article ("S.G."), along

[5] Suarez is the UniServ Director for the Teacher's Association of Baltimore County ("TABCO"), the Baltimore County teacher's union.

[6] Miller responded with a letter indicating his desire to continue with the administrative appeal process. However, he did not receive any response from the Board, and the Board did not conduct a hearing on his termination.

with other common law claims including defamation, intentional infliction of emotional distress, civil conspiracy, wrongful discharge, and breach of contract.[7]

On August 1, 2011, the Board and individual defendants moved for summary judgment on all claims. Following a hearing held on November 10, 2011, the circuit court issued an opinion and order granting summary judgment as to counts 1, 2, 3, 4, 5, 6, 8, and 9 on January 11, 2012. Regarding the S.G. § 20-602 discrimination count, the court observed that Miller presented no evidence on the issue. The motion judge stated: "[Miller's key witness,] Ms. Dowling was never deposed and provide[d] no affidavit for this court. [Miller] has not properly proffered any information that Dowling could potentially supply. [Miller] provide[d] neither affidavits of independent witnesses nor any independent documentation to corroborate his claim of discrimination."[8] The court also dismissed the individual defendants from the action and granted Miller 30 days leave to amend count 7. The court rejected summary judgment on count 10—breach of contract.

[7] Miller alleged the following in his second amended complaint, filed September 30, 2010: **Count 1**: Defamation; **Count 2**: Intentional Infliction of Emotional Distress (the circuit court had previously granted summary judgment on this count in an Order dated September 29, 2011); **Count 3**: Civil Conspiracy; **Count 4**: Respondeat Superior; **Count 5**: violation of Maryland Declaration of Rights; **Count 6**: Declaratory Judgment (this count was voluntarily dismissed by Miller); **Count 7**: Injunction; **Count 8**: Wrongful Discharge; **Count 9**: Discrimination under State Government Article §§ 20-606, -1013; **Count 10**: Breach of Contract.

[8] Dowling was a former colleague of Miller in the mathematics department at New Town. She allegedly overheard racially discriminatory statements by the mathematics department chair about Miller, discussed more fully on pages 7 and 8, *infra*.

From 2012 to 2014, the Board renewed its motion for summary judgment several times. The court denied the motion each time, and Miller's breach of contract claim proceeded to a trial, scheduled for May 12, 2014. In the spring of 2014, two months before trial, Miller's attorneys requested to withdraw from the case. Miller proceeded pro se, and on April 11, 2014, Miller submitted a third amended complaint. The Board moved to strike the complaint, and, after a hearing on May 7, the court struck the complaint.

At the three-day trial held from May 12 to May 14, 2014, Miller called several witnesses to describe the circumstances leading up to his resignation. Union representative Raymond Suarez described Miller's attempts to appeal his unsatisfactory evaluations. He said that he and Miller chose to proceed under Educ. § 4-205, which allowed for the consolidation of grievances, but did not provide a deadline for the resolution of appeals. This contrasted with the grievance procedure outlined in the TABCO contract, which required the Board to provide a hearing within ten days of a request and a disposition of an appeal within ten days of the hearing.[9] Although there was no deadline for the disposition of an appeal, Suarez felt that the school administrators unduly delayed in the resolution of Miller's appeals. Regarding Miller's evaluations, Suarez alleged that school administrators did not follow the in-class observation protocol

[9] Daniel Capozzi, manager of the Office of Staff Relations for New Town during the time in question, also testified to the specifics of Miller's grievance appeal process. From his testimony, it appears that Miller proceeded via § 4-205 because he was contesting, among other things, the content of his evaluations, which were not grievable under the terms of the TABCO contract.

required by the TABCO contract. He also testified that many teachers retire, as Miller did here, instead of challenging a recommendation of dismissal, for fear that they would lose their pensions and retirement benefits if the appeals were unsuccessful.

Miller himself testified, and asserted that the conduct of the school administrators in delaying the resolution of his appeals put him in a position where he was forced to resign. Indicating that he was one of the teachers that Suarez alluded to, he said that his need to continue to receive income and to preserve his retirement benefits "put [him] in a situation where [he] had no choice [but to resign]." He also contended that there was no basis for the negative teaching evaluations that he received and that he received those negative evaluations in part due to prejudice from the mathematics department chair, Theresa Vaccaro.

Miller called Tracy Dowling, a former mathematics teacher at New Town. Dowling told the jury that while she was at New Town, she heard Theresa Vaccaro make derogatory statements about Miller, including anti-Semitic remarks such as, "dirty Jew" and "fucking Jew." Dowling also testified that she saw Vaccaro place a lemon with black pins stuck in it on Miller's desk the Friday before school started in August 2009.[10] During Miller's testimony, he related that he felt that the lemon incident was a form of harassment that contributed to a hostile work environment. He reported it to the school administration, and at trial, he contended that the Board failed to take the lemon

[10] Betty Cruse, the department chair of business education, testified that she also received a pinned lemon as a form of intimidation.

seriously, and failed in its duty to file a report with an equal employment opportunity officer based on the incident.

Theresa Vaccaro testified, and denied the allegations made by Dowling above. She stated that she did not make derogatory or anti-Semitic remarks about Miller, and did not hold any racial animus against Jews. Further, she said she did not put a pinned lemon on Miller's desk, nor did she know who placed the lemon there. Robert Murray, the vice-principal of New Town, stated that he had not heard Vaccaro make any anti-Semitic remarks.

Both Vaccaro and Murray testified to the concerns the appraisal team had with Miller's teaching style, classroom performance, and student interactions. These included Miller's failure to participate in professional development; to fully implement the assistance plan developed for him by the appraisal team; and to achieve good student-teacher rapport. Daniel Capazzo testified that in his review of Miller's evaluations, he concluded that the New Town administrators "were looking out for the best interests of those students in their school. And that they were trying as hard as they could to get a teacher who they felt was less than satisfactory out of the building."

After Miller rested his case, the Board moved for judgment, arguing that Miller had, as a matter of law, voluntarily resigned and was not constructively terminated, and thus, he did not have a right to maintain an appeal of the superintendent's recommendation that he be dismissed. Because he had no right of appeal, the Board argued that it did not breach the TABCO contract or Miller's employment contract by

failing to hear his appeal. The court denied the motion, and denied a renewed motion for judgment at the close of all evidence.

Following its deliberations, the jury returned a verdict in favor of the Board. The jury found that 1) Miller was a third party beneficiary of the TABCO contract; 2) the Board breached the contract; 3) Miller had exhausted his administrative remedies; but 4) Miller "retired from his teaching position … and was not constructively terminated." Because of this last finding, the jury did not award damages to Miller. The next day, May 15, 2014, the circuit court entered final judgment consistent with the jury's findings, concluding that Miller's retirement excused the Board from performance under the TABCO contract.

Following the entry of final judgment, Miller filed several motions in which he sought (1) post-trial relief under Maryland Rules 2-533 and 2-535; (2) reinstatement of his discrimination claim; and (3) recusal of the trial judge. The Board filed oppositions, and, after a hearing, the court denied each of Miller's post-trial motions in an order issued on October 7, 2014. Miller filed an appeal to this Court on October 31, 2014.

DISCUSSION

I. Summary Judgment

In a January 20, 2012 order and memorandum opinion, the circuit court granted summary judgment against Miller on nearly all counts in his complaint: Counts 1, 3, 4, 5, 7, 8, and 9. On June 15, 2012, nearly six months after the entry of summary judgment, Miller took the deposition of Tracy Dowling. In the deposition, Dowling recounted that

during the final years of Miller's employment, Theresa Vaccaro made racist and anti-Semitic remarks and relayed Vaccaro's statement that she would "get rid of" Miller. On May 22, 2014, Miller filed a motion to revise judgment, requesting that the court, among other things, reinstate his discrimination claim against the individual defendants. The essence of Miller's contention on appeal is that the circuit court erred in failing to reconsider its entry of summary judgment on this claim in light of the deposition testimony given by Dowling.

Maryland Rule 2-535 dictates the circumstances under which the circuit court may revise its judgment. Within 30 days after the entry of judgment, the court has broad revisory power and control over the judgment. Md. Rule 2-535(a). However, after 30 days, the court may exercise revisory power and control over the judgment only in case of fraud, mistake, or irregularity. Md. Rule 2-535(b). When dealing with newly discovered evidence in a trial setting, the court may grant a new trial on the ground of newly-discovered evidence *that could not have been discovered by due diligence* in time to move for a new trial on motion of any party filed within 30 days after entry of judgment. Md. Rule 2-535(c) (Emphasis added). We review the circuit court's decision to deny a request to revise its grant of judgment under the abuse of discretion standard. *Jones v. Rosenberg*, 178 Md. App. 54, 72 (citing *Mullaney v. Aude*, 126 Md. App. 639, 666 (1999)), *cert. denied*, 405 Md. 64 (2008).

Miller had ample time to conduct discovery between September 30, 2010, when his second amended complaint, and August 1, 2011, when the Board filed its motion for

summary judgment. Based on his statements in his opposition to summary judgment and at the hearing on summary judgment, Miller was aware that Dowling had personal knowledge relevant to his causes of action, but he failed to depose her and failed to obtain an affidavit from her before the summary judgment hearing. Further, Miller makes no allegation of fraud, mistake, or irregularity that would have given the court cause to reopen the judgment more than 30 days after its entry. Even though Dowling, in her deposition and at trial, corroborated the deplorable statements that were alleged by Miller in his complaint, Dowling's testimony came too late. Under these circumstances, we cannot say that the circuit court erred in failing to reconsider its grant of summary judgment.

II. Late Filing of Third Amended Complaint

Miller argues that the circuit court abused its discretion in striking his third amended complaint because the Board mischaracterized the filing as adding parties previously dismissed and because the Board would not have been prejudiced if the court had accepted the complaint. Miller argued to the trial court that the amended complaint should be allowed because he had only then discovered—one month before trial—that the complaint did not allege federal constitutional violations.

"With respect to procedural issues, a trial court's rulings are given great deference." *Schmerling v. Injured Workers' Ins. Fund*, 368 Md. 434, 443-44 (2002). The determination to allow amendments to pleadings or to grant leave to amend pleadings is within the sound discretion of the trial judge. *See Robertson v. Davis*, 271 Md. 708, 710

(1974). "Only upon a clear abuse of discretion will a trial court's rulings in this arena be overturned." *Schmerling*, 368 Md. at 443-44.

Here, Miller filed his third amended complaint on April 11, 2014, 31 days before trial was scheduled to start on May 12, 2014.[11] By the time Miller filed this complaint, the parties had been litigating for almost four years, and, as discussed above, summary judgment had been granted for the Board on all counts but Count 10 two years prior. It is no excuse, that, as Miller alleges, he first discovered that his complaint did not mention federal constitutional violations when his counsel withdrew and he proceeded pro se. In consideration of the broad discretion accorded to trial courts, we hold that the circuit court was not wrong in striking a complaint that could have been filed earlier and that was filed so close to the start of trial. We cannot conclude that there was an abuse of discretion in this case.[12]

III. Whether the trial court abused its discretion in rendering certain evidentiary rulings during the trial proceedings?

Miller argues that the trial court erred when it:

A) "denied [his] request to introduce into evidence the brochure entitled, Maryland's Response to Hate Crimes; sustained objections to [his] line of

[11] We note that, with respect to any claimed violations of due process, Miller was obligated to argue that claim to the court and ask the court for a resolution of the issue. Resolution of legal issues, such as constitutional questions, are not a matter for a jury trial. *See De Bleecker v. Montgomery County*, 292 Md. 498, 511 (1982) (stating that the judiciary is the ultimate authority to determine whether constitutional limitations have been transcended or constitutional restraints have been violated).

[12] In any event, as noted *infra*, footnote 14, the jury's finding of voluntarily retirement would have extinguished Miller's constitutional due process claim.

questioning of Cruse and Dowling regarding . . .victimization by Theresa Vaccaro; and sustained [the Board's] objection to [his] request to introduce into evidence i) Cruse's formal report of the pinned-lemon incident, and ii) an internet video;"

B) "prejudiced [his] chance to receive a settlement offer;" and

C) "prejudiced the Jury by . . . [making inflammatory statements]; often sustained 'objections' that [the Board] had not asserted; . . . and ruled a witness statement to be hearsay which had been elicited from that witness by [the Board] in a prior deposition."

We address each contention in turn.

A. Hate Crime Brochure and Restrictions on Testimony Concerning Racial Motivations

Miller contends that the hate crime brochure should have been admitted because, in his words, he "needed the brochure to classify the pinned lemon as a hate crime." However, it is the trial court that explains the law to the jury, and because this was a civil trial, hate crimes were not authorized to be litigated in this case. With regard to the trial court's restrictions on Miller's questioning of Cruse and Dowling regarding victimization by Theresa Vaccaro, the court appropriately sustained objections to irrelevant hypotheticals and to the introduction of an incident report not related to Miller. The court also did not err in excluding a video by one of Miller's former students praising his teaching.

Moreover, these rulings, even if in error, did not harm Miller. Despite the trial court's rulings, Miller *was* able to question his witnesses about incidences of discrimination and whether his negative evaluations were based on personal or anti-Semitic prejudice. Witness responses to Miller's questions showed the jury that there

may have been some racial animus present, and it was up to the jury to determine the credibility of those witnesses. Miller was also able to testify to his own teaching qualifications and abilities, and suffered no harm in not being able to present a video of a student testimonial to his teaching and relationship with students. Had the jury found that Miller was constructively discharged, the testimony he elicited may have contributed to the amount of damages he was awarded. But the jury awarded no damages here because it found that he had voluntarily resigned. The court did not abuse its discretion in making the above rulings.

B. Court Statements Potentially Affecting Settlement Offer

Miller argues that the trial court prejudiced his chance to receive a settlement offer when it denied the Board's motion for judgment. The court stopped Miller during his response, and denied the Board's motion. When the Board later renewed its motion, the court elaborated:

> Let me just observe here that I'm not at all sure that Mr. Miller has established that he's a third party beneficiary under the Master Agreement or that he has established even a colorable breach of his regular contract with the Board of Education here[.] . . . Moreover, I'm not convinced that Mr. Miller has established a material breach of either of these agreements or . . . established damages. Under the circumstances however, I am inclined to and will deny the Board of Education's Motions for Judgment and let the jury have this case. And we'll see what happens after that.

Miller contends that this statement "foreclosed any likelihood that [the Board] would make a settlement offer to him." However, Miller has no entitlement to a settlement or settlement offer. The circuit court statement was an explanation of its reasoning, and we do not discern any error in this regard.

C. Remainder

We may similarly dispense with the remainder of Miller's contentions—that certain statements made by the trial court "prejudiced the jury" and that the court erred in excluding hearsay testimony that had been elicited at a prior deposition.

Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Rule 5-403 provides that evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Miller objected to the admission into evidence of his end of the year evaluation report for the 2009-2010 school year on the ground of relevance. When the court overruled his objection, and Miller protested, the court stated that it was "astonished" that Miller could not see the relevance of the evaluation. The trial court did not err in overruling the objection; it was relevant to the appropriate grievance procedure that Miller could have pursued and whether he was forced to resign. The court's offhand remark that he was "astonished" did not prejudice Miller. In instructing the jury, the court stated:

> During the course of this trial it has been my duty to rule on a number of questions of law like objections to the admissibility of evidence, the form of questions and other legal points. You should not draw any conclusions

> from any of my rulings either as to the merits of the case or as to my views regarding any witness, any party or the merits of the case itself.
>
> * * *
>
> Now you should not conclude from any conduct or words of mine that I favor one party or another or that I believe or disbelieve the testimony of any witness. . . . You must not be influenced in any way by my conduct during the course of this trial.
>
> * * *
>
> The fact that I sustained objections to [Miller's] questions should not be held against him nor should any of the admonitions that I made or the way that I made them.

Any partiality that could have been read into the court's comment was remedied by the court's instructions.

Miller also argues that the court erred in *sua sponte* excluding evidence and restricted his questioning. "[T]rial judges have broad discretion in the conduct of trials in such areas as the reception of evidence[.]" *Void v. State*, 325 Md. 386, 393 (1992) (quoting *McCray v. State*, 305 Md. 126, 133 (1985)). "It is well-established that a trial judge's discretion to control the conduct of the trial gives a trial court the authority to exclude inadmissible evidence sua sponte." *Kelly v. State*, 392 Md. 511, 546 (2006) (Raker, J. dissenting) (citing *Weaver v. United States*, 374 F.2d 878, 882 (5th Cir. 1967); *United States v. Clarke*, 390 F. Supp. 2d 131, 135 (D. Conn. 2005); *People v. Sturm*, 129 P.3d 10, 23 (2006); *Morris ex rel. Morris v. Thomson*, 937 P.2d 1212, 1218 (1997) *Barber v. State Highway Comm'n*, 342 P.2d 723, 727 (1959)). Further, the Maryland Rules do not "specify that the trial judge must state on the record the reasons for his or her decision to exclude evidence, even though that practice is preferable." *Crane v. Dunn*,

382 Md. 83, 100 (2004). The trial court did not err in excluding evidence when it was clear such evidence would violate the Maryland Rules.

Regarding the hearsay contention, see page 13, *supra*, Miller asked Dowling to recount "What, if anything, did Mrs. Vaccaro mention to you about Mrs. Cheswick's attitude toward me?" Even though an answer would constitute hearsay within hearsay, Miller argues that the question should have been allowed under the party opponent exception to the rule against hearsay. *See* Md. Rule 5-803(a). However, the committee note to Rule 5-803(a) states that "[w]here there is a disputed issue as to scope of employment, representative capacity, authorization to make a statement, the existence of a conspiracy, or any other foundational requirement, the court must make a finding on that issue before the statement may be admitted." Miller did not ask the court to make a foundational finding necessary to admit hearsay statements by Vaccaro or Cheswick. Accordingly, the trial court did not err in excluding hearsay testimony.

IV. Jury Verdict

Miller challenges the factual findings of the jury, specifically the jury's determination that Miller voluntarily resigned and was not constructively discharged.[13] With regard to the appellate courts' review of jury verdicts, we have observed that:

> "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions...." *Darcars Motors*

[13] Miller also contends that the jury "erred" in concluding that his voluntary retirement extinguished his right to prosecute claims for breach of the TABCO contract against the Board. The jury did not determine this, instead it was a legal conclusion made by the trial court. We address any error on this issue, *infra*.

> *of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 272, 841 A.2d 828 (2004). "Our first order of business is to reiterate longstanding Maryland law that it is not the province of an appellate court to express an opinion regarding the weight of the evidence when reviewing a judgment on a jury verdict." *Owens–Corning Fiberglas Corp. v. Garrett*, 343 Md. 500, 521, 682 A.2d 1143 (1996). "'When properly reserved, we pass upon the sufficiency of evidence to take a case to the jury, but we do not review the weight of the evidence after it has been passed upon by a jury.'" *Id.* (citation omitted).

Pulte Home Corp. v. Parex, Inc., 174 Md. App. 681, 711 (2007), *aff'd*, 403 Md. 367 (2008).

Even though Miller contends that the jury "erred" in concluding that he was not constructively discharged and, instead, had voluntarily retired, this is not an appropriate argument in an appellate court—this Court does not review "the weight of the evidence after it has been passed upon by a jury." *Owens–Corning Fiberglas Corp.*, 343 Md. at 521. Had Miller wanted to argue that the jury could have reached no conclusion other than that he was constructively terminated and that the Board violated the TABCO contract, he would have had to file a motion for judgment at the close of evidence, pursuant to Maryland Rule 2-519. Even if he had made that motion, he would have had to move for judgment notwithstanding the verdict after the jury returned its verdict. *See* Md. Rule 2-532. Miller did not pursue either motion in this case. Accordingly, our only function is to determine whether the evidence was legally sufficient to constitute an issue that could be presented to the jury.

Miller presented evidence, in the form of his resignation letter, that he retired under protest because he was concerned that he would lose his pension if he appealed the superintendent's recommendation for termination and his administrative appeal was

resolved against him. However, he also called Murray—the assistant principal and a member of Miller's appraisal team—to testify. On cross-examination and re-direct examination, the jury was presented with evidence indicating that Miller was aware of some legitimate bases for his unsatisfactory evaluations. The parties presented sufficient evidence to submit to the jury the issue of the voluntariness of Miller's resignation. We discern no error in this regard on the part of the trial judge, and we pass no judgment on the jury's resolution of this issue.

V. Jury Instructions and Verdict Sheet

Miller contends that the trial court erred by refusing to use his requested jury instructions on constructive termination.[14] The Board argues that Miller's "failure at trial to object to the trial judge's exclusion of [his] proposed jury instructions precludes him from raising such objection on appeal."

The Court of Appeals articulated the standard of review in *Ruffin Hotel Corp. of Maryland v. Gasper*

[14] Miller also argues that the jury should have been able to consider appropriate damages for alleged due process violations. However, as discussed above, Miller did not allege a due process violation until he requested leave to file his third amended complaint, one month before trial. The circuit court struck the amended complaint. A finding of a due process violation by the court was a prerequisite to Miller receiving any damages on this claim, and, at trial, Miller did not ask the circuit court to consider due process violations as a theory of liability.

Moreover, the court could not have found a due process violation, because the jury determined that Miller voluntarily resigned. *See Stone v. Univ. of Maryland Med. Sys. Corp.*, 855 F.2d 167, 178 (4th Cir. 1988) (where former employee voluntarily resigned, employee "was not 'deprived' of any protected interest in his employment by the state," effectively disposing of the due process claim).

> "We have held that the standard of review for jury instructions is that so long as the law is fairly covered by the jury instructions, reviewing courts should not disturb them." If, however, the instructions are "ambiguous, misleading or confusing" to jurors, those instructions will result in reversal and a remand for a new trial. On the other hand, the instructions must be read in context. "The charge to the jury must be considered as a whole and the Court will not condemn a charge because of the way in which it is expressed or because an isolated part of it does not seem to do justice to one side or the other."

418 Md. 594, 608-09 (2011) (quoting *Smith v. State*, 403 Md. 659, 663-64 (2008) (Internal citations omitted); *see* Maryland Rule 2-520.

If a party takes issue with a particular jury instruction, he or she must object promptly to preserve the issue for appellate review. Md. Rule 2-520(e) ("No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection"); *see Landis Office Ctr. v. Barefield*, 73 Md. App. 315, 322 (1987).

Miller now argues that the trial court should have given his requested jury instructions on the definition of constructive discharge. However, Miller did not object to the court's instructions. Instead, after the court gave the jury instructions substantially in the form requested by the Board, Miller objected to the language of the verdict sheet. Following a bench conference, the court agreed to Miller's requests in significant part and modified the wording of several questions on the verdict. With respect to question

four, the court modified the question to present a dichotomy to the jury, asking them to decide whether Miller retired or was constructively discharged.[15]

During the colloquy between Miller, the Board's counsel, and the court, Miller did not request that the court provide additional jury instructions on constructive discharge.[16] Miller, however, was able to present the issue of constructive discharge to the jury in his closing argument and rebuttal. Miller explained the idea of constructive discharge and took several rhetorical approaches to assert that he was constructively terminated. The jury heard that Miller was constructively terminated because of his financial situation and his need for steady income—the Board "put [him] in a situation where [he] had no choice [but to resign]." We see no error by the circuit court in these circumstances, where Miller did not ask the court to instruct the jury on constrictive termination and where he was able to articulate his argument to the jury.

Miller also objects to the legal conclusion implicit in question four—that if the jury found that he had retired voluntarily, then that entailed a relinquishment of his right to pursue an appeal of the superintendent's recommendation for discharge. We disagree. The trial court was correct in concluding that if Miller had in fact voluntarily resigned, the Board was not obligated to continue with the appeal process contemplated by Educ.

[15] As modified, question four asked, "Do you find that Plaintiff retired from his teaching position with the Board of Education and was not constructively terminated?"

[16] Contrary to Miller's contention in his reply brief, Miller still had an opportunity to object to the jury instructions after the trial court finished instructing the jury. If a party objects to an instruction and the court agrees, the court may issue a new instruction to clarify any discrepancy.

§ 6-202. Simply put, because Miller voluntarily relinquished his status as an employee, he no longer had a right to a hearing and appeal. *See Christie v. United States*, 518 F.2d 584, 588-89 (Ct. Cl. 1975) (after determining that resignation was voluntary, court held that employee was not entitled to a hearing regarding allegations of misconduct against her). The trial court here did not err in granting judgment for the Board after the jury found that Miller had voluntarily resigned.

The rest of Miller's arguments can be similarly disposed of. Miller argues that the trial court abused its discretion in presenting a jury instruction about the pinned lemons without being asked to do so by either party. The court stated,

> It is important to emphasize this concerning the evidence that you heard about another teacher referring to Mr. Miller in a derogatory way, about the episode or episodes with these lemons and about the testimony concerning someone alighting with Mr. Miller's grading book. While these may be serious incidents, none of them could by themselves constitute a breach of contract on the part of the Board of Education of Baltimore County.

We see no problem with this instruction. It is unfortunate that, according to the testimony in the case, Miller may have experienced prejudicial treatment from some of his coworkers. However, the court here was acknowledging the inflammatory nature of the testimony and was reminding jurors not to let this charged testimony unduly influence their verdict. The court did not abuse its discretion in doing so.

Miller also maintains that the court "committed reversible error by denying Appellant's request for Jury Questions . . . regarding violation of Md. Rule 1-341 . . . and Effect of Statutes[.]" Maryland Rule 1-341 allows *a court* to sanction a party and award

attorney's fees and costs for litigation or a defense pursued in bad faith.[17] "Before a court metes Rule 1-341 sanctions, it must make an evidentiary finding of 'bad faith' or 'lack of substantial justification.'" *Thomas v. Capital Med. Mgmt. Associates*, 189 Md. App. 439, 473 (2009) (citing *Legal Aid Bureau, Inc. v. Bishop's Garth Associates Ltd. P'ship*, 75 Md. App. 214, 220 (1988)). The court did not make any findings of bad faith on the part of the Board. Further, even if it had, it is with the circuit court's discretion whether or not to award attorney's fees. *Inlet Associates v. Harrison Inn Inlet, Inc.*, 324 Md. 254, 266 (1991). The court here did not err in failing to give a jury instruction on attorney's fees.

Finally, Miller contends that the trial court "committed reversible error[] when [it] . . . denied Appellant's Motions to Alter or Amend and Motion for Recusal[.]" However, Miller provides no argument and cites to no authority in support of his allegation that the trial court erred in this regard. Accordingly, we will not consider Miller's post-judgment motions here.

[17] "Rule 1-341 sanctions are not to be imposed upon a . . . party because an innovative or tenuous legal theory was not embraced by the court, *Dent v. Simmons*, 61 Md. App. 122, 127-28, (1985), or the relied-upon expected testimony of a witness unravels when given under oath at trial." *Legal Aid Bureau*, 75 Md. App. at 222. Here, as evidenced by the jury's verdict, the Board had substantial justification to defend the action. Even if Miller thinks that the Board relied on a "tenuous legal theory," such reliance does not indicate bad faith.

For the reasons stated above, we affirm the judgment of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLEE.[18]

[18] Pursuant to Rule 8-607 and *Andre v. Montgomery County Pers. Bd.*, 37 Md. App. 48, 65 (1977), we exercise our discretion to assess costs against appellee.