Circuit Court for Anne Arundel County
Case No. C-02-FM-17-001167

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2207

September Term, 2018

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A. O.

v.

R. D.

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Berger,
Arthur,
Beachley,

JJ.

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Opinion by Beachley, J.

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Filed: May 14, 2019

In this case, A. O. ("Mother") challenges the Circuit Court for Anne Arundel County's order modifying a 2014 Texas decree governing custody and visitation for A., a son born to Mother and R. D. ("Father") in March 2011.[1] Specifically, the circuit court awarded the parties shared physical custody on an alternating week schedule, thereby modifying the Texas decree that granted Mother primary physical custody of A. The circuit court also modified the joint legal custody provisions of the Texas decree by granting Father "tie-breaking" authority as to important decisions regarding A. Mother also challenges the court's assessment of attorney's fees against her and in favor of Father.

Mother's principal contention on appeal is that the court erred in determining that A.'s therapist violated the patient-therapist privilege by disclosing to Mother information about A., which led Mother to temporarily suspend Father's visitation with A. Mother contends that the court's error in this regard permeated the trial and constituted at least a partial basis for the court's decision to modify the Texas decree's provisions concerning physical and legal custody. Mother therefore asserts that the trial court's error was not harmless and, accordingly, the judgment modifying custody must be reversed. We agree and, for the reasons stated herein, we shall vacate the judgment and order further proceedings consistent with this opinion.

## FACTS AND PROCEEDINGS

Mother and Father married in 2010. Their only child, A., was born in March 2011. Due to alleged domestic violence, Mother left the Texas marital home with A. in September

[1] We use the family members' initials in order to protect their privacy.

2013 and moved to her parents' home in Rockville, Maryland. On September 29, 2014, the parties were divorced in Harris County, Texas. The Texas decree sets forth very detailed visitation schedules applicable to periods when the parents live more and less than 100 miles apart. The Texas decree was enrolled in Montgomery County, Maryland in May 2015.

In May 2016, Father relocated to Maryland in order to be closer to A. and more involved in his life. Initially, visitation occurred in accordance with the Texas decree. The precipitating event leading to this litigation occurred in December 2016. According to Mother, after a visit with Father, A. complained about how Father treated him and had "an expression of extreme fear and troubling ideation, including both homicidal and suicidal thought, all related to his relationship with his Father[.]" Mother further alleged that A. reported that his father had physically abused him. Mother took A. to a therapist, Harper Fitzsimmons, to address these concerns about A.'s mental health and his relationship with Father. After four visits, Ms. Fitzsimmons diagnosed A. with Post Traumatic Stress Disorder ("PTSD") and expressed "serious concerns" for the child's mental health. In a letter dated February 23, 2017, (the "February 23 letter") to Mother, Ms. Fitzsimmons opined that

> It is not normal for a 5 year old to have suicidal or homicidal ideation. I am very concerned about what he is saying to me and, based on my evaluation, emergency action needs to be taken. There needs to be an immediate change in visitation with his father; it needs to be modified to much shorter periods of time and it needs to be supervised. A Child Best Interest Attorney needs to be appointed for [A.] and his father should undergo a psychological evaluation to determine his fitness as a parent. In my opinion, [A.] is not safe in his father's care and in extreme danger of self-harm following these visits.

Ms. Fitzsimmons reported the potential abuse to Child Protective Services, but the agency ultimately ruled out child neglect and closed its investigation.

On March 14, 2017, Mother's counsel sent a copy of Ms. Fitzsimmons's February 23 letter to Father. After summarizing Ms. Fitzsimmons's concerns for A., Mother's counsel concluded:

> In the meantime, and until mediation can be conducted and the concerns identified by therapist Fitzsimmons appropriately addressed, we trust that you will appreciate that it is in [A.'s] best interests and necessary that unsupervised visitation with you be immediately suspended, and that, in the meantime, any supervised visitation be limited in time, as per the recommendations of therapist Fitzsimmons.

Four days earlier, on March 10, 2017, Father had filed, in the Circuit Court for Anne Arundel County, a petition to enforce the provisions of the 2014 Texas decree as they related to obtaining a passport for A. Then on April 19, 2017, after being denied visitation with A., Father filed a Petition for Contempt seeking to enforce the visitation provisions of the Texas decree. On July 3, 2017, Father filed a counter-complaint for modification of custody. On July 21, 2017, A., through court-appointed counsel, waived his privilege as to communications with Ms. Fitzsimmons. After a two-day merits hearing in July 2018, the circuit court issued a Custody Order dated August 24, 2018. That Custody Order modified the Texas decree by granting the parties shared physical custody on a "week-on, week-off basis"; modified the Texas decree by granting Father tie-breaking authority for joint legal custody decisions concerning A.; ordered Mother to "provide written authorization as required to obtain a passport for [A.]"; modified Father's child support obligation; and awarded Father $15,000 in attorney's fees, payable by Mother within six

months. Mother filed this timely appeal. We shall provide additional facts as necessary to address the issues raised on appeal.

## DISCUSSION

### I. The Trial Court Erred When It Determined That A.'s Therapist Violated The Patient-Therapist Privilege By Disclosing Information To A.'s Mother

Beginning with opening statements and continuing throughout the trial, the trial court castigated Harper Fitzsimmons, A.'s therapist. Our careful review of the trial transcripts revealed that the apparent genesis of the court's displeasure with Ms. Fitzsimmons was her disclosures to Mother in the February 23 letter. Because of the centrality of the February 23 letter at trial and in this appeal, we reprint it with appropriate redactions:

> Dear Mother,
>
> As A.'s therapist, I would like to summarize my findings. I have seen him on four occasions – 1/31/17, 2/7/17 2/14 and 2/21/2017. On all of these occasions, A. has presented as being quite upset. He has repeatedly expressed extreme fear of his father and he talks about wanting to die in order to avoid the treatment he receives from his father. He further went on to think about killing his father. Basically, A. reports that his father is physically cruel to him. "I could hurt myself to stop being alive or else I could kill my Dad." "I'm too scared to go to my Dad's; I'd rather stop living."
>
> A. is diagnosed with Post Traumatic Stress Disorder in Children 6 Years and Younger in accordance with the DSM 5. A. reports that he is directly experiencing traumatic events by his father swinging him around by the feet so that his head touches the floor and he is left with headache and dizziness, placing him on high places with no way to get down generating great fear and being forced to wrestle his father and being taught to go after the "soft spots" (groin). According to A. his father hurts him while wrestling including spinning him upside down and by lying on top of A. A. describes crying in his bed at his father's house at night because he is so frightened and wants to go home to you and avoid his father. He states that he has to be sure

> his father does not hear him as A. fears this would anger his father and he might hurt him for crying. He also complains that his father will practice soccer with him but kicks the ball hard into A.'s stomach, knocking him down.
>
> A. has witnessed his father's abuse of you, which became physical. You and [boyfriend] have made me aware that he plays out these fears of physical violence and his perception of himself as "stupid and weak," by trying to punch family members and by boxing a [sic] cardboard boxes the family has. A. reports experiencing "over and over again" recurrent, involuntary and intrusive memories of the trauma he experiences with his father. During his sessions here, A. begs not to have to go to his father's house and becomes quite frightened as he thinks about going there. He says that he makes every attempt to avoid being around his father or physical reminders that arouse recollections of being mishandled by his father. A. says that he tries to say he is "very sick" to avoid going to his father's. You and your family report that A. will frequently become angry while at home and begin to punch you and his stepbrother with as much force as he can.
>
> A.'s situation in relation to his father at this point is desperate. From a mental health perspective, I have serious concerns for A. It is not normal for a 5 year old to have suicidal or homicidal ideation. I am very concerned about what he is saying to me and, based on my evaluation, emergency action needs to be taken. There needs to be an immediate change in visitation with his father; it needs to be modified to much shorter periods of time and it needs to be supervised. A Child Best Interest Attorney needs to be appointed for A. and his father should undergo a psychological evaluation to determine his fitness as a parent. In my opinion, A. is not safe in his father's care and in extreme danger of self-harm following these visits.

At various points during the trial, the court opined that disclosure of the contents of the February 23 letter violated A.'s therapeutic privilege. We shall provide *some* of the trial colloquy to demonstrate the significance of this issue at trial.

In light of comments made by the trial court on the first day of trial, Mother's attorney decided to call Ms. Fitzsimmons as a witness on the second day of trial. The court allowed her to testify, saying "I would like to hear some explanations from her." During voir dire as to her qualifications, Father's attorney questioned Ms. Fitzsimmons regarding

the patient-therapist privilege. The following exchange occurred:

> [FATHER'S ATTORNEY]: Do you understand what a patient therapist privilege is?
>
> [MS. FITZSIMMONS]: Yes.
>
> [FATHER'S ATTORNEY]: What -- isn't that that you can't release mental health records or information without a client consent?
>
> [MS. FITZSIMMONS]: Yes.
>
> [FATHER'S ATTORNEY]: Okay. And isn't it true that you released [A.'s] information and diagnosis to his mother without a privilege attorney being appointed in this case? Isn't that correct?
>
> [MS. FITZSIMMONS]: Yes.
>
> [FATHER'S ATTORNEY]: Okay. And isn't that a violation of [A.'s] patient therapist privilege?
>
> [MS. FITZSIMMONS]: Yes. I think it must be. I'm not sure.
>
> THE COURT: Then why did you do it?
>
> [MS. FITZSIMMONS]: I didn't know that it was wrong.
>
> THE COURT: Well, you've been doing this 30 years. You didn't realize that there was a privilege between you and the young boy? I mean, we go through this tedious processes to make sure that a privilege attorney is appointed by the [c]ourt to okay all that. You've never run into that before?
>
> [MS. FITZSIMMONS]: I said over and over again that I can't release this child's information without a waiver.
>
> THE COURT: But you did it.
>
> [MS. FITZSIMMONS]: But I was told it would be okay.
>
> * * *
>
> THE COURT: Who told you?
>
> [MOTHER'S ATTORNEY]: You can answer the question.

> [MS. FITZSIMMONS]: [Mother's attorney].
>
> THE COURT: Okay. I had a feeling. Okay.
>
> * * *
>
> THE COURT: Do you [Father's attorney] accept her as an expert?
>
> [FATHER'S ATTORNEY]: I don't, Your Honor. Based on her testimony, she violated, admittedly, didn't know what a patient therapeutic privilege was in this case. So we would --
>
> THE COURT: *And I have a real problem with that.*
>
> [FATHER'S ATTORNEY]: -- vehemently object.
>
> THE COURT: However, there is a waiver now.
>
> [FATHER'S ATTORNEY]: There is a waiver now. But when she did the treatment and --
>
> THE COURT: Right.
>
> [FATHER'S ATTORNEY]: -- presented these records, there was no waiver.
>
> THE COURT: I understand, counsel. I'm going to accept her as an expert but, you know, I'm going to question her at the appropriate time. *And it's going to go to the weight of her testimony*.

(Emphasis added). Ms. Fitzsimmons continued to testify concerning the contents of the February 23 letter and her interactions with A. and the parties. When Mother's attorney moved to admit Ms. Fitzsimmons's letter, the court sustained Father's objection, stating,

> THE COURT: That report was done before, I believe, the privilege attorney was even appointed. It's an *inappropriate unprofessional* document that should have never been distributed to anyone. So I sustain the objection.
>
> [MOTHER'S ATTORNEY]: Your Honor, this was a direct –
>
> THE COURT: She's here testifying, counsel. And the only reason I'm allowing her to testify, quite frankly, is because you went to a lot of trouble to bring her here. That's it. *Because I don't find her credible at this point.*

> *I have a huge problem with what she's done as a professional in this case*. And that report -- I'm starting to have second thoughts on whether I should have even accepted her as an expert. *I just don't think she has a basis of knowledge to render any credible opinion in this case.* So I sustain the objection.

(Emphasis added). The court punctuated Ms. Fitzsimmons's testimony with expressions of incredulity, remarking that Ms. Fitzsimmons "broke the rules" and concluding that "There was no waiver of this child's privilege. End of story. And you [Ms. Fitzsimmons] as a person who's been in this field for 30 years should have known that." Finally, near the end of her testimony, the court stated, "I can see I'm not getting through to you."

Mother asserts that the trial court erred in determining Ms. Fitzsimmons violated the patient-therapist privilege when she disclosed A.'s mental health information to Mother in the February 23 letter. We begin with the patient-therapist privilege, found in Md. Code (1974, 2013 Repl. Vol., 2018 Suppl.), § 9-109 of the Courts and Judicial Proceedings Article ("CJP"). CJP § 9-109(b) provides:

> (b) *Privilege generally*. – Unless otherwise provided, in all judicial, legislative, or administrative proceedings, a patient or the patient's authorized representative has a privilege to refuse to disclose, and to prevent a witness from disclosing:
>
> (1) Communications relating to diagnosis or treatment of the patient; or
>
> (2) Any information that by its nature would show the existence of a medical record of the diagnosis or treatment.

Subsection (c) establishes that "If a patient is incompetent to assert or waive this privilege, a guardian shall be appointed and shall act for the patient." In the seminal case of *Nagle v. Hooks*, 296 Md. 123 (1983), the Court of Appeals held that CJP § 9-109(c) "is mandatory, and, accordingly, the chancellor erred in refusing to appoint a guardian to act

for the child regarding the assertion or waiver of privilege of nondisclosure[.]" *Id.* at 127. Since *Nagle*, it has been customary for trial courts to appoint "privilege attorneys" in custody cases to act as a guardian for the minor child and protect the patient-therapist privilege in the child's best interest.

It is apparent from the record that the trial court believed that the patient-therapist privilege precluded Ms. Fitzsimmons from divulging any communications or other information related to her diagnosis and treatment of A. in the absence of a guardian's waiver of A.'s privilege as prescribed by CJP § 9-109(c) and *Nagle*. We agree with Mother that the trial court's determination in this regard was legally incorrect.

On its face, CJP § 9-109(b) only applies to "judicial, legislative, or administrative proceedings[.]" Consistent with that statutory language, the *Nagle* Court held that a guardian should be appointed to protect a minor child's therapeutic privilege *in custody proceedings*. *Nagle*, 296 Md. at 128. Here, when Ms. Fitzsimmons sent the February 23, 2017 letter to Mother, there was no pending "judicial, legislative, or administrative proceeding" involving A. (or his parents). Accordingly, the trial court clearly erred in concluding that Ms. Fitzsimmons violated A.'s patient-therapist privilege by sending the February 23 letter to Mother.

To the contrary, Ms. Fitzsimmons, as a licensed clinical professional counselor, was presumably acting within the discretion afforded to her pursuant to Md. Code (2000, 2015 Repl. Vol., 2018 Suppl.), § 4-305 of the Health General Article ("HG"). HG § 4-305(b)(6) and (7) provide:

(b) *Permitted disclosure*. — A health care provider[2] may disclose a medical record without the authorization of a person in interest:

***

(6) *If a health care provider makes a professional determination that an immediate disclosure is necessary, to provide for the emergency health care needs of a patient or recipient;*

(7) To immediate family members of the patient or any other individual with whom the patient is known to have a close personal relationship, provided that:

(i) The disclosure is limited to information that is directly relevant to the individual's involvement in the patient's health care; and

(ii) 1. If the patient is present or otherwise available before the disclosure and has the capacity to make health care decisions:

A. The patient has been provided with an opportunity to object to the disclosure and the patient has not objected; or

B. The health care provider reasonably infers from the circumstances that, based on the health care provider's professional judgment, the patient does not object to the disclosure; or

2. If the patient is not present or otherwise available before the disclosure is made, or *providing the patient with an opportunity to object to the disclosure is not practicable because of the patient's incapacity or need for emergency care or treatment, the health care provider determines, based on the health care provider's professional judgment, that the disclosure is in the best interests of the patient*[.]

[2] Ms. Fitzsimmons, a licensed clinical professional counselor, qualifies as a health care provider under the statute. HG § 4-301(h)(1) defines "health care provider" as "[a] person who is licensed, certified, or otherwise authorized under the Health Occupations Article . . . to provide health care in the ordinary course of business or practice of a profession[.]" Title 17 of the Health Occupations Article governs "Professional Counselors and Therapists."

(Emphasis added).[3]

In her February 23 letter Ms. Fitzsimmons expressed "serious concerns" for A.'s mental health, noting that A. had "suicidal or homicidal ideation." She further opined that "A. is not safe in his father's care and in extreme danger of self-harm following [visitation with Father]." Whether Ms. Fitzsimmons's assessment of A. was correct is immaterial to whether she was legally authorized to disclose the information to Mother. We conclude that Ms. Fitzsimmons could have properly made 1) "a professional determination that an immediate disclosure [was] necessary, to provide for the emergency health care needs" of A. pursuant to HG § 4-305(b)(6), or 2) a determination that a disclosure to Mother, an "immediate family member" of A., was necessary, "based on the health care provider's professional judgment, that the disclosure [was] in the best interest" of A. pursuant to HG § 4-305(b)(7). On remand, the circuit court should afford Ms. Fitzsimmons the opportunity to articulate the basis for her disclosures to Mother.

## II. The Trial Court's Error Was Not Harmless As The Error Permeated The Trial And Served As A Basis For The Court's Decision To Modify Custody

Maryland courts have consistently recognized the appropriate standard for review of a trial court's custody determination:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [MD. RULE 8-131(c)] applies. If it appears that the

[3] Additionally, the Board of Professional Counselors and Therapists code of ethics requires that counselors "[p]rotect the interests of minors" and "[t]ake reasonable precautions to protect clients from physical or psychological trauma." COMAR 10.58.03.04. To this end, a therapist shall "[r]elease mental health records or information about a client only with a client's consent, *or as permitted by Health-General Article, Title 4, Subtitle 3, Annotated Code of Maryland*." COMAR 10.58.03.08 (emphasis added).

> chancellor erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the chancellor's decision should be disturbed only if there has been a clear abuse of discretion.

*Boswell v. Boswell*, 118 Md. App. 1, 27 (1997) (quoting *Davis v. Davis*, 280 Md. 119, 125-26 (1977)). We conclude that the error here, which permeated the trial and served as a basis for the court's custody decision, was not harmless.

The court's error concerning the patient-therapist privilege started with opening statements. During Father's opening statement, the following exchange occurred:

> THE COURT: . . . So what's the problem?
>
> [FATHER'S ATTORNEY]: Your Honor, the problem is . . . back in March of 2017, [Mother] kept [Father] from visiting his child for six months.
>
> THE COURT: And that's very problematic. From what I understand, it was based on a therapist.
>
> [FATHER'S ATTORNEY]: Correct.
>
> THE COURT: And I -- that is beyond ridiculous to rely on a therapist to stop contact and I'm going to want to hear a good explanation about why that happened.
>
> * * *
>
> Because, I'll be honest with you, therapists have no authority to alter court-ordered access. Do you hear me [Mother]?

The circuit court's reliance on its error did not end there. During Mother's opening statement, the court stated that "[i]t sounds like the issues arose when [Mother] followed very bad advice from a therapist. Now, tell me it's more than that." Later, during Mother's testimony, the court again opined that "[i]t seems to me [that Ms. Fitzsimmons] is the -- at

the heart of this problem."

Furthermore, during Ms. Fitzsimmons's testimony, the court made clear that it did not consider her credible because it believed that she violated A.'s privilege. The court begrudgingly accepted her as an expert witness, stating, "I'm going to accept her as an expert but, you know, I'm going to question her at the appropriate time. *And it's going to go to the weight of her testimony*." (Emphasis added). The court repeated this error again when Mother moved to admit the February 23 letter into evidence, stating:

> She's here's testifying, counsel. And the only reason I'm allowing her to testify, quite frankly, is because you went to a lot of trouble to bring her here. That's it. *Because I don't find her credible at this point.*
>
> *I have a huge problem with what she's done as a professional in this case.* And that report -- I'm starting to have second thoughts on whether I should have even accepted her as an expert. *I just don't think she has a basis of knowledge to render any credible opinion in this case.*
>
> * * *
>
> . . . And, you know, *I can't restrain myself from commenting on your use of her letter knowing what we know now and what you should have known then* to send the letter to opposing counsel based on her recommendation is just beyond belief to me that an attorney would have done that.
>
> * * *
>
> No. I don't want to hear an explanation, [Mother's Attorney]. You did it and that's the end of it. So -- and what's even more appalling is, as a result of your letter, even after DSS cleared this case, [Father] still didn't see his child for months and months. And everybody thought that was okay.

(Emphasis added). The court later stated that it "accepted [Ms. Fitzsimmons's testimony]" but it didn't "believe it."

As previously noted, the circuit court significantly modified the Texas decree,

changing custodial access to shared physical custody on a "week-on, week-off basis" and granting Father tie-breaking decision-making authority as to joint legal custody. In its bench opinion, the court stated, in relevant part:

> But what really -- the common core on custody cases, who is fairer and possesses the ability to co-parent is usually the party that prevails. And that just plays out every day in this court, whether it's in my courtroom or my colleague's.
>
> * * *
>
> This is a clear case, in my view, of parent alienation. And she had people who were enabling her. . . .
>
> So, you know, I have a sympathetic feeling towards [Mother] in this case because she was influenced by so many outside influences. *But the biggest one of all was Ms. Fitzsimmons. Incredibly unprofessional in my opinion. And I think she knew that. She had a rough day today and it was not my intention to make her feel bad. But when you do what she did contrary to the standard guidelines by releasing letters to attorneys to have them spread out in litigation without having a child waiver in place is just totally unprofessional.*
>
> * * *
>
> *Then we get to Ms. Fitzsimmons. I found her to be one of the least credible witnesses, particularly an expert witness, that, in my 14 years on this bench, I've had the privilege of having in my courtroom. There was nothing about her testimony that I found credible.* As I said before, PTSD diagnosis after three or four visits. And Mom and boyfriend showed up for that first visit.
>
> But she did say she felt that Mom and boyfriend were influencing the child. She's the one that initiated the CPS complaint but doesn't agree with their finding even though they held the case for almost three months. Contrary to her four visits and her diagnosis of PTSD, she does not agree with CPS. I see CPS in cases daily. I have no reason to question their credibility. And they ruled out any abuse.

(Emphasis added). The court further concluded that "the therapist in this case was totally

misguided" and that "a lot of the problems . . . are attributed to her misguided approach to this case[.]"

Based on the court's comments, we are convinced that the court's error about Ms. Fitzsimmons's violation of the patient-therapist privilege — and its concomitant determination that Ms. Fitzsimmons was "totally unprofessional" and "one of the least credible witnesses" to have appeared before the court — was prejudicial in that the error likely affected the court's decision to modify custody. *Crane v. Dunn*, 382 Md. 83, 91 (2004). Accordingly, the error was not harmless and, as such, the judgment must be vacated.

## III. The Trial Court's Counsel Fee Award Must Also Be Vacated

Finally, Mother challenges the court's award of $15,000 in counsel fees to Father. Because of its brevity, we reprint verbatim the court's entire analysis supporting its counsel fees award:

> Finally, the issue of counsel fees. And the factors I have to consider are the needs and resources of the parties and the justification for the proceedings. I believe that the needs of the parties are there. I believe the mother has had a constant source of help from her family. I believe she set a preference for that and demonstrated that that pretty much is why, in my view, she proceeded with this litigation when it should have been settled back in March or April of 2017. But it continued. And the father was justified in pursuing his rights. Rights that were easy. Rights that were spelled out in a previous court order. I looked at both sides, both counsel fees. I've considered them. And I am going to order the mother to contribute $15,000 to the father's legal fees. And that's to be payable within the next six months or reduced to judgment.

It is apparent from the court's comments that it believed that Mother should have settled the case "in March or April of 2017." Implicit in that determination, at least in part,

is that the case was not settled because Mother unreasonably relied on Ms. Fitzsimmons's advice. We cannot say with any certainty that the court's dim view of Ms. Fitzsimmons had no impact on its assessment of counsel fees. We therefore vacate the counsel fees award against Mother.

**JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY VACATED. CASE REMANDED FOR A NEW TRIAL TO BE SET BY THE ADMINISTRATIVE JUDGE FOR THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY. COSTS TO BE PAID BY APPELLEE.**