IN THE COURT OF APPEALS OF MARYLAND

No. 27
September Term, 2020

WHITNEY WHEELING, et al.,

Petitioners,

v.

SELENE FINANCE, LP, et al.,

Respondents.

On Appeal from the Circuit Court for Baltimore City
(The Honorable Yolanda Tanner)
Pursuant to a Writ of Certiorari to the Court of Special Appeals

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BRIEF OF PETITIONERS

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INTRODUCTION

This case presents this Court with the opportunity to interpret a remedial statute in the way that effectuates its legislative purpose of protecting the rights of victims of threats of unlawful self-help eviction. Before the Court are three critical rulings of first impression by the Court of Special Appeals that, if not reversed, will impermissibly limit the claims that protected persons may raise in this context. The Court of Special Appeals erroneously held that Md. Real Prop. ("RP") Code § 7-113 requires a protected person to have vacated a residential property as a condition precedent to bringing suit for a threat of eviction, despite the fact that the statute protects against both threats and actual dispossessions. The lower court also improperly adopted a heightened pleading standard for non-economic, emotional distress damages under the Maryland Consumer Protection Act ("MCPA") (Md. Com. Law § 13-101, *et seq.*). Finally, the court incorrectly rejected a claim for actual loss or injury under the MCPA in the form of a lawyer's fee that was not incurred in this action, that was a result of Respondents' bad acts. For the reasons given below, Petitioners respectfully ask this Court to reverse the Court of Special Appeals' affirmance of the circuit court's dismissal of their claims under RP § 7-113 and the MCPA.

STATEMENT OF THE CASE

On March 1, 2017, Petitioners Eric and Whitney Wheeling and Joanne Rodriguez initiated this action in the Circuit Court for Baltimore City, on their behalf and on behalf of a proposed class and subclass of persons similarly situated, against Respondents

Selene Finance LP ("Selene Finance") and Gina Gargeu d/b/a Century 21 Downtown ("Ms. Gargeu" or "Century 21") for violating RP § 7-113, and against Selene Finance for violating the MCPA. E.003, 042–68.

On May 30, 2017, Mr. and Mrs. Wheeling and Ms. Rodriguez filed an Amended Complaint. E.005. Century 21 moved to dismiss the Amended Complaint on June 16, 2017, and Selene Finance moved to dismiss the Amended Complaint on July 7, 2017. E.007, 009. On December 4, 2017, the circuit court entered orders granting the motions to dismiss. E.008–09. Petitioners timely noted an appeal, E.234, and the Court of Special Appeals affirmed in a reported decision on May 29, 2020. Petitioners timely filed a petition for certiorari, which this Court granted on September 14, 2020.

QUESTIONS PRESENTED

1. Did the Court of Special Appeals err in holding that a defendant's violation of RP § 7-113 does not give rise to a cause of action unless the protected resident physically vacates the residential property?
2. Did the Court of Special Appeals err in holding that a consumer's claim for emotional damage, such as fear, anxiety, anger, and accompanying physical manifestations, does not adequately allege an injury to state a private cause of action under the MCPA?
3. Did the Court of Special Appeals err in holding that attorneys' fees incurred as a result of a defendant's unfair and deceptive misrepresentations made in violation of the MCPA do not constitute a recoverable injury supporting a private cause of action?

STATEMENT OF THE FACTS

This case arises from Respondents' unlawful threats to evict the Petitioners using self-help.

A. Residential Property Self-Help Evictions

In pertinent part, RP § 7-113(b) states:

> (b)(1) Except as provided in paragraph (2) of this subsection, a party claiming the right to possession may not take possession or threaten to take possession of residential property from a protected resident by:
>
> (i) Locking the resident out of the residential property;
>
> (ii) Engaging in willful diminution of services to the protected resident; or
>
> (iii) Taking any other action that deprives the protected resident of actual possession.
>
> (2)(i) Except as provided in subparagraph (ii) of this paragraph, a party claiming the right to possession may take possession of residential property from a protected resident only in accordance with a writ of possession issued by a court and executed by a sheriff or constable.
>
> (ii) A party claiming the right to possession of residential property may use nonjudicial self-help to take possession of the property, if the party:
>
> 1. Reasonably believes the protected resident has abandoned or surrendered possession of the property based on a reasonable inquiry into the occupancy status of the property;
>
> 2. Provides notice as provided in subsection (c) of this section; and
>
> 3. Receives no responsive communication to that notice within 15 days after the later of posting or mailing the notice as required by subsection (c) of this section.

RP § 7-113(b). Subsection (c) of § 7-113 goes on to read:

> (c)(1) If a party claiming the right to possession of residential property reasonably believes, based on a reasonable inquiry into the occupancy status of the property, that all protected residents have abandoned or surrendered possession of the residential property, the party claiming the right to possession may post on the front door of the residential property and mail by first-class mail addressed to "all occupants" at the address of the residential property a written notice . . .

Id. at (c). Finally, the remedies provision of this statute, subsection (d), reads:

(d)(1) If in any proceeding the court finds that a party claiming the right to possession violated subsection (b) of this section, the protected resident may recover:

(i) Possession of the property, if no other person then resides in the property;

(ii) Actual damages; and

(iii) Reasonable attorney's fees and costs.

(2) The remedies set forth in this subsection are not exclusive.

Id. at (d).

B. Mr. and Mrs. Wheeling

Mr. and Mrs. Wheeling and their children reside in Anne Arundel County, Maryland at 167 Cardamon Drive, Edgewater, Maryland 21037 (the "Wheeling Property"). E.017. From May 2015 through March 2016, the Wheelings were renting the Wheeling Property and were bona fide tenants of Donna Poole, the then-owner of the property. E.042. Prior to the Wheelings' tenancy, Ms. Poole had obtained a mortgage loan but defaulted on it. *Id.* After Ms. Poole's default, Christiana Trust, a Division of Wilmington Savings Fund Society, FSB, as Trustee for Normandy Mortgage Loan Trust Series 2013-9 ("Normandy Mortgage"), acquired the defaulted mortgage loan on August 6, 2013. *Id.* Respondent Selene Finance acted as the mortgage servicer and authorized agent on behalf of Normandy Mortgage.[1] E.042.

[1] Selene Finance is a mortgage lender and servicer licensed to operate in Maryland. E.017. Its business model involves representing mortgage collection agencies and debt collectors that have acquired delinquent, non-performing mortgage loans from more traditional mortgage lenders at a steep discount. E.039. Most of these defaulted mortgage loans result in foreclosure, deeds in lieu of foreclosure, or short sales of the properties. *Id.*

On or about May 15, 2015, Selene Finance, on behalf of Normandy Mortgage and as a part of its debt collection practices, claimed to have a right to possess the Wheeling Property and posted an eviction notice on the home. E.043. The notice stated, in relevant part:

> IMPORTANT NOTICE ABOUT EVICTION
>
> A person who claims the right to possess this property believes that this property is abandoned. If you are currently residing in the property, you must immediately contact:
>
> Selene Finance . . .
>
> If you do not contact the person listed above within 15 days after the date of this notice, the person claiming possession may consider the property abandoned and seek to secure the property, including changing the locks without a court order.

Id. When the notice was placed on the home, the Wheeling Property was not subject to any foreclosure or landlord-tenant action in any court. E.043–44. Nor did Selene Finance have any reasonable basis to believe that the Wheeling Property was vacant. *Id*. On the contrary, Mr. and Mrs. Wheeling and their children openly occupied the home and Selene Finance was in the process of negotiating with Ms. Poole about a short sale. E.043–44.

In reliance on the eviction notice, Mr. Wheeling contacted Selene Finance at the telephone number listed on the eviction notice on or about May 19, 2015. E.044. A Selene Finance representative falsely informed Mr. Wheeling that it had initiated foreclosure proceedings against the Wheeling Property. *Id.* No foreclosure proceeding had in fact been filed related to the Wheeling Property in any court. E.043. Selene's authorized representative further told Mr. Wheeling that Selene believed that the property

was abandoned solely because the Wheelings were not the owners. E.045. The representative also stated that if the Wheelings did not vacate the property by June 1, 2015, the locks would be changed, and they would be evicted with the assistance of the Sheriff's Department. E.045.

As a result of, and in reliance on, the eviction notice and the statements made by Selene Finance's representative, Mr. and Mrs. Wheeling incurred legal expenses by seeking legal advice to understand their rights as tenants of the Wheeling Property. *Id.* They did not understand how Selene Finance could threaten them with an illegal, self-help eviction even though they were bona fide tenants. *Id.* Mr. and Mrs. Wheeling also suffered emotional distress with physical manifestations. E.045–47. They were frustrated by Selene Finance's eviction notice and subsequent statements and reasonably feared that its representative(s) would take their possessions and evict them from their home though they were current on the obligations under their lease with Ms. Poole. E.045–46. They also suffered anxiety due to the threat that their family would be evicted through no fault of their own. E.046–47.

Each of Selene Finance's actions and statements were committed as part of its routine mortgage servicing practices on behalf of Normandy Mortgage, which wanted to acquire the Wheeling Property as quickly as possible without regard to the rights of the occupants. E.046. Selene Finance does not have procedures in place to allow tenants to contest abandonment determinations during the pre- and post-foreclosure period. *Id.*

C. Ms. Rodriguez

From February 21, 2017, to March 27, 2017, the period relevant to this action, Ms. Rodriguez resided in Baltimore City at 2418 Edmondson Avenue, Baltimore, Maryland 21223 (the "Rodriguez Property"). E.017. Ms. Rodriguez purchased the property on October 21, 2008, through a mortgage loan backed by a Federal Housing Administration ("FHA") mortgage program.[2] E.047. Unfortunately, due to a severe reduction in her income and health issues, Ms. Rodriguez defaulted on the loan. *Id.* While the loan was in default, her mortgage lender transferred the loan to HUD. *Id.* The loan was then sold as part of a sale of distressed HUD assets and transferred to Christiana Trust, as Trustee for Sunset Mortgage Loan Trust, Series 2014-1 ("Sunset Mortgage"). *Id.*

Sunset Mortgage and Selene Finance foreclosed on the Rodriguez Property in the Circuit Court for Baltimore City. E.048. On June 9, 2016, Sunset Mortgage was the successful bidder at the foreclosure sale and acquired the property for the sum of $42,000. *Id.* Ms. Gargeu, transacting as Century 21, is a licensed real estate agent and is an agent of Selene Finance as part of its mortgage servicing eviction work. E.017. On February 10, 2017, Selene Finance, through Century 21 Downtown, requested that the

[2] In 1934, Congress enacted the National Housing Act, which created the FHA, with a goal to increase homeownership in the United States. *See Capitol Mortg. Bankers, Inc. v. Cuomo*, 222 F.3d 151, 152 (4th Cir. 2000). In 1965, the FHA became a part of the U.S. Department of Housing and Urban Development (HUD). *Id.* FHA created a mortgage program that enabled borrowers with low credit scores to obtain affordable loans. E.023. Because FHA mortgage program participants typically have lower incomes and less savings, and are subject to more frequent periods of unemployment, they are entitled to benefits that make mortgage repayment more manageable. E.024. For instance, mortgage servicers are required to provide participants with alternatives to foreclosure. *Id.*

Baltimore City Sheriff schedule an eviction of the occupants of the Rodriguez Property. *Id.* Based on that request, on February 10, 2017, the Sheriff's designee issued and posted a notice to the occupants of the Rodriguez Property. E.048. It stated, in relevant part:

> Dear Occupant(s):
>
> Per an Order of the Court issued out of the Circuit Court for Baltimore City, I do hereby command you to vacate the premises of:
>
> 2418 Edmondson Avenue, Baltimore, Maryland 21223
>
> Before: March 28, 2017[.] The eviction will be executed on the date included in this letter. Any property left on the foreclosure property will be considered abandoned and may be disposed of on execution of the Writ of Possession. This is the final notice of the date of eviction, even if the eviction date is postponed by the Sheriff or the Court.

E.049. Ms. Rodriguez began preparing to vacate the property in reliance on the deadline stated in the Sheriff's notice. *Id.*

At this time, Selene Finance and Century 21 knew that Ms. Rodriguez was still represented by the lawyer who had represented her in the foreclosure proceedings. *Id.* This fact was also a matter of public record. *Id.* Despite this knowledge and their awareness that the Sheriff had scheduled the eviction for March 28, 2017, Century 21, acting on behalf of Selene Finance, caused another eviction notice to be posted on the Rodriguez Property on February 22, 2017. *Id.* The notice stated, in relevant part:

> IMPORTANT NOTICE ABOUT EVICTION
>
> A person who claims the right to possess this property believes that this property is abandoned. If you are currently residing in the property, you must immediately contact:
>
> Gina Gargeu/Century21 Downtown . . .

> If you do not contact the person listed above within 15 days after the date of this notice, the person claiming possession may consider the property abandoned and seek to secure the property, including changing the locks without a court order.

E.050. When this eviction notice was placed on the home, Selene Finance and Century 21 had no reasonable basis to believe that the Rodriguez Property was vacant because Ms. Rodriguez opposed Selene Finance's request on behalf of Sunset Mortgage in the foreclosure proceeding for a Writ of Possession. E.050–51. Selene Finance and Century 21 also knew that Ms. Rodriguez had not abandoned the property as her possessions remained in place and she was represented by counsel in the foreclosure. E.051. Selene Finance did not disclose to Ms. Rodriguez's lawyer in the foreclosure that it posted the February 22 eviction notice. *Id.* Instead, Century 21 communicated its threat to evict Ms. Rodriguez directly to her despite not having the authority to do so. *Id.*

In reliance on, and in response to, the February 22 eviction notice, Ms. Rodriguez's friend, Dermot Delude-Dix, contacted Century 21 using the telephone number listed on the notice. *Id.* Mr. Delude-Dix spoke with Ms. Gargeu and confirmed that Selene Finance had retained Century 21 and Selene Finance had authorized it to post the eviction notice. *Id.* Fearing that she might come home from a medical appointment to find her personal possessions placed on the curb or stolen, Ms. Rodriguez incurred additional legal expense by consulting her lawyer in the foreclosure to understand her rights concerning Selene Finance and Century 21 having threatened to carry out an eviction at a date and time prior to that included on the Sheriff's February 10 eviction

notice. E.051–52. Ms. Rodriguez also suffered severe emotional distress including fear, anxiety, and anger with physical manifestations. E.052.

Selene Finance's actions were committed as part of its mortgage servicing practices on behalf of Sunset Mortgage. *See* E.048. Selene Finance does not have procedures in place to allow occupants like Ms. Rodriguez to contest abandonment determinations during the pre- and post-foreclosure period. E.052.

D. Procedural History

On March 1, 2017, Mr. and Mrs. Wheeling and Ms. Rodriguez initiated this action in the Circuit Court for Baltimore City on their behalf and on behalf of a class and subclass of persons similarly situated. E.003. In that action, they alleged that Selene Finance and Century 21 wrongfully threatened to evict them in violation of RP § 7-113, and that Selene Finance's actions and representations violated the MCPA. 058–68. On May 30, 2017, Petitioners filed an Amended Complaint. E.005. Century 21 moved to dismiss the Amended Complaint on June 16, 2017, and Selene Finance moved to dismiss the Amended Complaint on July 7, 2017. E.007, 009.

On November 28, 2017, the circuit court granted Century 21's motion to dismiss, finding that the subject eviction notices were "in conformity" with RP § 7-113(c)–(d).[3]

[3] The court also found that Ms. Gargeu/Century 21 was exempt from liability under that statute as a real estate salesperson. E.232. Petitioners conceded below that their MCPA claim is only alleged against Selene Finance, E.185, but the Amended Complaint inadvertently includes Ms. Gargeu/Century 21 in the money judgment demand. E.068. Petitioners, therefore, did not challenge the circuit court's ruling on this claim as to Ms. Gargeu/Century 21 in the Court of Special Appeals and do not challenge it in this Court.

E.232. The court also granted Selene Finance's motion to dismiss, finding that the Amended Complaint failed to state a claim because Petitioners "were not evicted or otherwise deprived of their property and therefore did not suffer an actual injury which is objectively identifiable."[4] E.233.

On appeal, in a reported decision, the Court of Special Appeals first held that the Petitioners were unable to bring suit under § 7-113 because they had not vacated their respective properties in reliance on the eviction notices. Second, the lower court held that the Petitioners did not plead sufficiently specific facts in support of their claim for non-economic loss or damages for emotional distress. Finally, the lower court rejected the Petitioners' entitlement to claim as economic damages their legal expenses incurred to understand their rights.

STANDARD OF REVIEW

This Court reviews "a trial court's grant of a motion to dismiss, without deference, to determine whether it was legally correct." *Barclay v. Castruccio*, 469 Md. 368, 373 (2020). In doing so, the Court "must assume the truth of all relevant and material facts that are well pleaded and all inferences which can be reasonably drawn from those pleadings." *Id.* at 373–74 (quoting *Lloyd, et al. v. Gen. Motors Corp., et al.*, 397 Md. 108, 121 (2007)). A motion to dismiss may only be granted where the allegations presented do not state a cause of action. *Id.* at 374.

[4] On June 12, 2017, Petitioners filed a Motion for Partial Summary Judgment, which the court denied on December 4, 2017. E.006–007. Petitioners do not challenge the denial of that motion.

Likewise, pure questions of law are reviewed *de novo*, that is, this Court gives no deference to the trial court's nor the Court of Special Appeals' interpretation of the law. *See Goshen Run Homeowners Ass'n, Inc. v. Cisneros*, 467 Md. 74, 88 (2020). Similarly, the Court reviews issues of statutory interpretation *de novo*. *Harvey v. Marshall*, 389 Md. 243, 290 (2005). Because the issues of first impression presented in this case arise on a motion to dismiss for failure to state a claim and are pure questions of law involving statutory interpretation, the applicable standard of review is *de novo* review.

ARGUMENT

This case concerns important remedial legislation adopted expressly to abrogate the common law right to self-help eviction. After this Court held that self-help eviction under the common law was permissible in *Nickens v. Mount Vernon Realty Grp.*, 429 Md. 53 (2012), the General Assembly exercised its constitutional power and expressly abrogated that holding by enacting 2013 Maryland Laws Ch. 514. The courts below held that the Petitioners, though protected under RP § 7-113, cannot sue persons threatening them with eviction without the legal right to do so. However, the General Assembly expressly prohibited unlawful threats like those carried out by Respondents here.

This Court should reverse the lower courts' judicially created limitations on RP § 7-113, which are wholly inconsistent with the General Assembly's intent, and hold that protected persons may pursue claims under RP § 7-113 for threats of unlawful self-help eviction. Additionally, this Court should reject the intermediate court's erroneous heightened pleading standard and hold that the Petitioners have properly stated claims for emotional distress damages under the MCPA. Finally, this Court should recognize that a

lawyer's fee incurred in order to understand one's rights in the face of another's unlawful conduct is an economic loss or injury that is objectively identifiable and recoverable as damages under the MCPA. The current extraordinary circumstances of the COVID-19 pandemic bring into sharp focus the potentially devastating consequences of unlawful threats of eviction to protected persons and underscore the importance of this Court's swift and decisive action in this case.

I. The Court of Special Appeals erred in holding that a defendant's violation of RP § 7-113 does not give rise to a cause of action unless the protected resident has physically vacated the residential property.

The Court of Special Appeals erred when it held that a protected person under RP § 7-113 must have vacated the property as a result of an eviction notice posted without the requisite reasonable inquiry in order to seek relief under § 7-113(b) and (d). *See Wheeling v. Selene Fin. LP*, 246 Md. App. 255, 279 (2020) ("The statutory cause of action does not extend to persons, like appellants, who did not vacate their properties even if the parties seeking possession violated § 7-113(b) and (c) by not making the required inquiry before posting."). This holding directly contravenes the plain language in § 7-113(b) that prohibits parties seeking possession from making threats to evict statutorily protected persons. Furthermore, this holding also contravenes this statute's stated legislative intent, which the Court of Special Appeals acknowledged, and is ultimately the result of erroneous statutory construction. Accordingly, this Court must reverse the Court of Special Appeals in order to effectuate the statute's remedial intent.

It is well settled that an appellate court aims to "ascertain and effectuate the real and actual intention of the legislature" whenever it is asked to engage in statutory

construction. *Wash. Suburban Sanitary Comm'n v. Phillips*, 413 Md. 606, 618 (2010) (quoting *Lockshin v. Semsker*, 412 Md. 257, 274 (2010)); *see also Pak v. Hoang*, 378 Md. 315, 323 (2003). Accordingly, this Court has very clearly explained how Maryland courts should approach the interpretation of Maryland statutes.

> To ascertain the intent of the General Assembly, we begin with the normal, plain meaning of the language of the statute. If the language of the statute is unambiguous and clearly consistent with the statute's apparent purpose, our inquiry as to legislative intent ends ordinarily and we apply the statute as written, without resort to other rules of construction. We neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute, and we *do not* construe a statute with "forced or subtle interpretations" that *limit* or extend its application.
>
> We, however, do not read statutory language in a vacuum, nor do we confine strictly our interpretation of a statute's plain language to the isolated section alone. Rather, the plain language must be viewed within the context of the statutory scheme to which it belongs, considering the purpose, aim, or policy of the Legislature in enacting the statute. We presume that the Legislature intends its enactments to operate together as a consistent and harmonious body of law, and, thus, we seek to reconcile and harmonize the parts of a statute, to the extent possible consistent with the statute's object and scope.

Bd. of Educ. of Prince George's Cty. v. Marks-Sloan, 428 Md. 1, 19 (2012) (emphasis added); *see also Wash. Suburban*, 413 Md. at 618. Thus, when interpreting RP § 7-113, this Court should begin with the statutory language.

The lower court's judgment compels reversal because the court erred in three significant ways. First, the court's strict construction of the statute ignored the statute's plain language that prohibits threats of self-help eviction and gives residents a cause of action for such conduct separate from eviction itself. Second, the court strictly construed this remedial statute in violation of this Court's well-settled law that remedial statutes

"must be liberally construed." *Lockett v. Blue Ocean Bristol, LLC*, 446 Md. 397, 424 (2016). And third, the court's strict construction led to its errant and unsupported reasoning that Petitioners are not entitled to *any* remedy because they are not seeking *all* remedies provided for in subsection (d) of the statute.

A. The Court of Special Appeals' holding erroneously reads into the statute a condition precedent that forecloses a cause of action for the threat of eviction in violation of RP § 7-113(b) that is neither explicitly nor implicitly provided in the statute.

Reversal is required because RP § 7-113 does not require a protected person to deprive herself of actual possession of the property merely to be able to bring suit under it. Such a reading of the statute improperly adds words and meaning to the statute that were not intended by the General Assembly and obfuscates the stated legislative intent, which is what the Court of Special Appeals purported to not do. *See Wheeling*, 246 Md. App. at 279 (citing *Walzer v. Osborne*, 395 Md. 563, 572 (2006)).

The Court of Special Appeals explicitly agreed with the Petitioners that a reasonable inquiry into the occupancy status of a dwelling must precede the posting of an abandonment or eviction notice. *See id.* at 277. Additionally, the lower court also agreed that Respondents violated § 7-113(b) and (c) because of their failure to conduct such a reasonable inquiry into the occupancy statuses of the properties. *See id.* at 279. However, despite these agreements, the court improperly imported a non-existent condition precedent into the statute by holding that the protected person must first vacate the dwelling—even when the purported party claiming the right to possession clearly violates the statute, as the lower court recognized, by repeatedly threatening the protected person

with an illegal, self-help eviction. *See Id.* The statute includes the prohibitive language "may not" which limits both the subject (the party claiming the right to possession) and the actions that subject can perform (take possession or threaten to take possession). Accordingly, there is no reason for the General Assembly to expressly prohibit a party from threatening to take possession of property if it intended to establish a cause of action only for taking possession. Stated another way, the Court of Special Appeals' reading of the statute would render the separate and specific cause of action for the threat of eviction "surplusage, superfluous, meaningless or nugatory." *SVF Riva Annapolis LLC v. Gilroy*, 459 Md. 632, 640 (2018) (quoting *Douglas v. State*, 423 Md. 156, 178 (2011)).

In doing so, the lower court created a judicial exemption to RP § 7-113 that excludes threats of eviction from the scope of the statute. Generally, this Court has explained that judicially created exemptions in remedial statutes are disfavored. For example, in *Andrews & Lawrence Prof'l Servs., LLC v. Mills*, the Court said "that if the General Assembly believes that [an] exemption should be expanded…, it may do so." 467 Md. 126, 165 (2020). In RP § 7-113, if the General Assembly had intended to create the exemption created by the Court of Special Appeals—that claims against unlawful threats of eviction may only be pursued if the protected person has vacated the property—it would have done so. However, the legislature did not, and therefore, the Court should reverse the lower court's improper creation of a judicial exemption. *See Dutta v. State Farm Ins. Co.*, 363 Md. 540, 553 (2001) ("The rules of statutory construction relating to statutory provisions that create exceptions or exemptions from other statutory provisions reinforces our view that no other exceptions were intended. It is

not our proper function to add to the statute another class of exemptions. That is a legislative function."); *see also Md. Auto. Ins. Fund v. Sun Cab Co., Inc.*, 305 Md. 807, 816–17 (1986) (explaining that "[w]e shall accept the plain and consistent meaning rather than the one which would treat as nonexistent the specific amendment to a subsection of the statute;" in so doing the Court rejected an interpretation of the statute that excludes what was explicitly provided for in the statute).

B. A remedial statute, such as RP § 7-113, must be liberally construed so that its broad remedial purpose will be given the proper effect.

The Court of Special Appeals' strict construction of RP § 7-113 cannot be reconciled with the well-settled rule that a statute which provides remedies not available at common law is remedial and must be construed liberally. *See Lockett*, 446 Md. at 422. Courts must construe a remedial statute liberally "in order to effectuate [its] broad remedial purpose." *Id*. at 424 (quoting *Pak*, 378 Md. at 326) (alteration in original).

In *Pak v. Hoang*, this Court explained that a remedial statute is one that "provide[s] a remedy, [sic] or improve[s] or facilitate[s] remedies already existing for the enforcement of rights and the redress of injuries. [Remedial statutes] also include statutes intended for the correction of defects, mistakes, and omissions in the civil institutions and the administration of the state." 378 Md. at 324 (quoting *Langston v. Riffe*, 359 Md. 396, 408–09 (2000) (internal quotations omitted); *see also Md. Comm'n on Human Relations v. Amecom Div. of Litton Sys., Inc.*, 278 Md. 120, 125 (1976) ("An act is remedial in nature when it provides only for a new method of enforcement of a preexisting right."); *Weathersby v. Kentucky Fried Chicken Nat'l Mgmt. Co.*, 86 Md. App. 533, 550 (1991)

rev'd on other grounds, 326 Md. 663 (1992) ("Under Maryland law, statutes are remedial in nature if they are designed to correct existing law, to redress existing grievances and to introduce regulations conducive to the public good.") (citation omitted).

Section 7-113 must be liberally construed so that its legislative purpose will be given full effect because it is a remedial statute that created protections not provided in the common law. The preamble of this statute states that its purpose is to

> prohibit[] a party claiming the right to possession from taking *or threatening to take* possession of residential property from a certain protected resident in a certain manner; [and] establish[] that a party claiming the right to possession may take possession of residential property from a certain protected resident only under certain circumstances.

2013 Maryland Laws Ch. 514 (S.B. 642) (emphasis added); *see also* Residential Property– Prohibition on Nonjudicial Evictions, 2013 Maryland Laws Ch. 514 (H.B. 1308) (same).

The General Assembly also expressly stated that § 7-113 was "intended to supersede the ruling of the Court of Appeals of Maryland in *Nickens*, and modify any right to self-help eviction that certain persons may possess in the context of residential foreclosures, . . .[and] landlord-tenant actions." 2013 Maryland Laws Cn. 514 at § 2. In *Nickens v. Mount Vernon Realty Grp.*, this Court considered whether a foreclosure purchaser unlawfully used self-help measures to remove the personal property of an occupant of the foreclosed property in order to take possession of the property. 429 Md. at 63–64. It held that a Baltimore City ordinance, which created a judicial process for eviction after foreclosure, supplemented rather than abrogated peaceable self-help measures and need not be followed. *Id.*

Recognizing that self-help is rarely peaceable and is unnecessary given the summary eviction laws available to foreclosing mortgagees and landlords, the General Assembly expressly sought to overturn *Nickens*. It recognized the potential harm caused by that decision, as common law self-help left bona fide tenants and former owners on the brink of homelessness. Further, the General Assembly understood that the improper use of self-help could easily result in a confrontation and the prospect of violence. *See State v. Rendelman*, 404 Md. 500, 522 (2008) ("History has taught us that, if people take the law into their own hands, an endless cycle of violence can erupt, and we therefore encourage people to take their problems to court.") (citation omitted). Thus, recognizing the dire consequences of nonjudicial, self-help evictions, the General Assembly sought to ensure that they would be used only when the property is abandoned and only after completing a reasonable inquiry to make sure that the property is abandoned.

Section 7-113 is plainly a remedial statute which should be construed liberally because it intentionally and significantly limits the ability of a mortgagee, or similar party, to avail itself of self-help eviction and provides remedies to the resident when such action is taken unlawfully. The Court of Special Appeals nevertheless based its erroneous interpretation of § 7-113 on the canon of statutory construction which provides that a statute in derogation of the common law must be strictly construed. *See Wheeling*, 246 Md. App. at 278. But as commentators have long recognized, "there are two opposing canons on almost every point." *See* Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 401 (1950). "No canon of interpretation is absolute" and "[e]ach may be

overcome by the strength of differing principles that point in other directions." Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 59 (2012). Though RP § 7-113 is a statute in derogation of the common law, it is also a remedial statute which, for the reasons previously stated, must be construed liberally so that its legislatively-intended, remedial purpose will be given full effect.

As this Court has observed when interpreting legislation which, like § 7-113, provides remedies unavailable at common law: "When the legislature enacts a statute designed . . . to provide remedies not available at common law . . . [its statutory] construction should [not] be mindlessly guided by a slogan, such as 'statutes in derogation of the common law must be narrowly construed.'" *Neal v. Fisher*, 312 Md. 685, 693–94 (1988). This is because "statutes of this nature 'are remedial and designed to close a gap in the preexisting law . . . .'" *Id.* (quoting *State v. Sherman*, 234 Md. 179, 184 (1964)). Accordingly, "[a] court should not permit 'a narrow or grudging process of construction to exemplify and perpetuate the very evils to be remedied . . . .'" *Id.* (quoting *Van Beeck v. Sabine Towing Co., Inc.*, 300 U.S. 342, 350–351 (1937)). As this Court has long recognized, "[c]anons of construction, like the one relied on by the trial court here, may sometimes be useful guidelines, but they

> 'are not a set of Procrustean beds, to the dimensions of which all statutory language must be made to conform, however poor the fit . . . . We look at the words of the statute in the context of their adoption and from that perspective determine the meaning of the language in a manner consistent with the goal the legislature was trying to achieve.'"

Id. (quoting *Carolina Freight Carriers v. Keane*, 311 Md. 335, 339 (1988)).

The same admonition applies here because the lower court's statutory interpretation leads to a result that is diametrically opposed to the statute's stated purpose and is "unreasonable, illogical, unjust, or inconsistent with common sense." *Pak*, 378 Md. at 323; *see also Gordon Family P'ship v. Gar on Jer*, 348 Md. 129, 138 (1997) ("Nor may we read a statute in a way that is inconsistent with, or ignores, common sense or logic.") (citing *Frost v. State*, 336 Md. 125, 137 (1997)). RP § 7-113(b) expressly protects bona fide residents from the threat of eviction from another person claiming the right to possess a property. *See* RP § 7-113(b)(1) (". . . a party claiming the right to possession *may not* take possession *or threaten to take possession* of residential property from a protected resident . . . ."). Thus, due to the corrective and supplanting nature of § 7-113, this Court should hold that § 7-113 is a remedial statute and liberally construe it in favor of protected persons as defined therein.

C. <u>The Court of Special Appeals' interpretation of "and" in subsection (d) leads to an erroneous and legally unsupported result that no remedies are available to Petitioners because they are not seeking all remedies available under the statute.</u>

The intermediate court also erred in reasoning, without supporting authority, that subsection (d)'s "use of the conjunctive 'and'—as opposed to 'or'"—indicated that Petitioners are not entitled to any remedy because they are not seeking all remedies enumerated in the statute. *Wheeling*, 246 Md. App. at 278. The statute's remedial purpose required the Court of Special Appeals to construe "and" to mean "or," *i.e.*, to function in the disjunctive, in order to give proper effect to the statute. *See Comptroller of Treasury v. Fairchild Indus., Inc.*, 303 Md. 280, 286 (1985) (stating that courts have authority to

construe "and" to mean "or" as required by context in order to comply with the clear legislative intent); *see also Reier v. State Dep't of Assessments & Taxation*, 397 Md. 2, 32 (2007) (stating that "[i]t is well settled that the terms 'and' and 'or' may be used interchangeably when it is reasonable and logical to do so.") (internal citation omitted).[5]

RP § 7-113(d) states:

> (d)(1) If in any proceeding the court finds that a party claiming the right to possession violated subsection (b) of this section, the protected resident *may* recover:
>
> (i) Possession of the property, if no other person then resides in the property;
>
> (ii) Actual damages; and
>
> (iii) Reasonable attorney's fees and costs.
>
> (2) The remedies set forth in this subsection are *not exclusive*.

RP § 7-113(d) (emphasis added). Subsection (d)(1) includes the word "may," rather than the mandatory term "must," which connotes that recovery of any remedy is permissive, *i.e.*, optional. The plain language in subsection (d)(2) confirms that the remedies set forth are not exclusive. Understanding that "or" is typically used as an "exclusive disjunction because only one proposition in the disjunction can be true," there are times where "or" is intended to be an "inclusive disjunction [that] assumes that either one or [all] of the terms or propositions on either side of the disjunction are true." *See* Ira P. Robbins, *"And/Or"and the Proper Use of Legal Language*, 77 Md. L. Rev. 311, 318 (2018). The

[5] This Court has reinforced the interchangeability of "and" and "or" even outside of the statutory context. *See, e.g.*, *Fidelity & Deposit Co. of Maryland*, 176 Md. 217, 226 (1939) (holding that where doing so would give effect to parties' contractual intent, "the conjunctive 'and' should be construed in the disjunctive 'or'"); *Little Store, Inc. v. State*, 295 Md. 158, 162–63 (1983) (holding that it was not reversible error for the trial judge to use "or" when giving the jury two options, both with multiple prongs, in a jury instruction though it may have been more grammatically prudent to use "and").

"and" in subsection (d)(1) is intended to function like an "or" that behaves like an inclusive disjunction. Stated another way, "'[a]nd' can convey that the members of a group are to be considered together, but it can also convey that they are to be considered together and separately." *See* Kenneth A. Adams & Alan S. Kaye, *Revisiting the Ambiguity of "And" and "Or" in Legal Drafting*, 80 St. John's L. Rev. 1167, 1172 (2006). Thus, in accordance with the proper construction of RP § 7-113, a claimant has the option to seek all or a combination of the available remedies. Any other reading of this language, such as the lower court's holding, denies any available remedies to a protected person who manages to avoid dispossession but, nonetheless, has suffered actual injury or loss as a result of an unlawful threat of such dispossession that is separately and expressly outlawed by the statute. This Court should reject such an absurd result.

The lower court's narrow legislative interpretation is also inconsistent with numerous other remedial statutes that provide similarly for multiple remedies, not all of which must be claimed. For example, the Maryland Credit Services Business Act's damages provision utilizes similar language when allowing a protected homeowner the right to recover actual damages, treble damages, "and" costs of the action along with reasonable attorney's fees. *See* Md. Com. Law § 14-1912(a). No Maryland court has held that a plaintiff must pursue all such forms of relief in order to recover *any* one or a combination, and any such ruling would be an absurd result. Similar language can be seen in Md. Com. Law § 14-1221, which allows a protected consumer the right to recover actual damages, punitive damages, "and" attorney fees from a consumer credit reporting

agency for reporting false, derogatory credit information to other persons. *See* Md. Com. Law § 14-1221(a)–(b). The latter example is particularly useful, because, obviously, not all violations of this statute would give rise to punitive damages; thus, there can be no reasonable construction that would require a plaintiff to claim all of the relief enumerated in the law.

The result must be the same under RP § 7-113(d). Since the statute separately prohibits threats and dispossessions, there is no reasonable construction that would require a person seeking relief from a threat to claim a remedy only available in the event of dispossession. The Court should therefore enforce the statute as the General Assembly clearly intended.

II. The Court of Special Appeals' holding will not only frustrate the legislative intent of RP § 7-113, but also that of its companion statute, RP § 8-216, which has the same language and legislative purpose and must be harmonized and read consistently in order to properly effectuate each statute.

RP § 8-216, passed along with RP § 7-113, includes the same prohibitive, anti-threat language and frames it in the landlord-tenant context. *See* Md. Real Prop. Code § 8-216(b)(1); 2013 Maryland Laws Ch. 514 § 2. Accordingly, if the Court of Special Appeals' interpretation of RP § 7-113 is allowed to stand, then this decision will also frustrate the purpose of RP § 8-216, which was enacted to protect occupants of residential property from landlords' unlawful threats of eviction.

Title 7 of Maryland's Real Property Code regulates the actions of mortgagees and lienholders of residential properties, while Title 8 of the same code regulates the actions of landlords with respect to tenants in residential leases. Significantly, RP § 7-113 and RP

§ 8-216 are companion statutes that were made effective on the same day, June 1, 2013. Most importantly, RP § 8-216 and § 7-113 were enacted with the same purpose of superseding this Court's *Nickens* ruling. *See* 2013 Maryland Laws Ch. 514, § 2.

The two statutes share not only the same legislative purpose and effective date, but also the same language and organizational structure. Each statute contains the same definition of the language presently at issue, "threaten to take possession." *Compare* § 7-113(a)(5) ("'Threaten to take possession' means using words or actions intended to convince a reasonable person that a party claiming the right to possession intends to take imminent possession of residential property in violation of this section.") *with* § 8-216(a)(2) ("'Threaten to take possession' means using words or actions intended to convince a reasonable person that the landlord intends to take imminent possession of the property in violation of this section."). Similarly, subsection (b) in both statutes prohibits the same conduct and features the same statutory language that is at issue in this appeal. *Compare* § 7-113(b)(1) ("Except as provided in paragraph (2) of this subsection, a party claiming the right to possession *may not* take possession or *threaten to take possession* of residential property from a protected resident.") *with* § 8-216(b)(1) ("Except as provided in paragraph (2) of this subsection, a landlord *may not* take possession or *threaten to take possession* of a dwelling unit from a tenant.") (emphasis added).

This Court has long held that when "a statute to be construed is part of a statutory scheme, the legislative intention is not determined from that statute alone, rather it is to be discerned by considering it in light of the statutory scheme." *Gov't Employees Ins. Co. & GEICO v. Ins. Comm'r*, 332 Md. 124, 132 (1993); *see also Harvey v. Marshall*, 389

Md. 243, 290 (2005); *Breitenbach v. N.B. Handy Co.*, 366 Md. 467, 480 (2001). "Statutes which are a part of a statutory scheme are to be construed together and in light of the statutory scheme, [sic] and harmonized to the extent possible." *Popham v. State Farm Mut. Ins. Co.*, 333 Md. 136, 148–49 (1993) (internal citations and quotations omitted).[6]

Here, the lower court's interpretation of the anti-threat provision in RP § 7-113 frustrates the legislative intent of not only § 7-113 but also § 8-216. *See Gov't Employees*, 332 Md. at 132 ("When, in that scheme, two statutes . . . address the same subject, they must be read together, *i.e.*, interpreted with reference to one another, and harmonized, to the extent possible, both with each other and with other provisions of the statutory scheme."). The proper meaning of the anti-threat provision in both statutes is to recognize a cause of action for threats of eviction which violate § 7-113 and § 8-216.[7]

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[6] *See also State v. Crescent Cities Jaycees Found., Inc.*, 330 Md. 460, 468 (1993) (". . . [W]here statutes relate to the same subject matter, and are not inconsistent with each other, they should be construed together and harmonized where consistent with their general object and scope.") (citing *Bridges v. Nicely*, 304 Md. 1, 10 (1985)); *Md.-Nat'l Capital Park & Planning Comm'n v. Anderson*, 395 Md. 172, 183 (2006) ("Therefore 'when two statutes appear to apply to the same situation, this Court will attempt to give effect to both statutes to the extent that they are reconcilable.'") (quoting *State v. Ghajari*, 346 Md. 101, 115 (1997); *Mundey v. Erie Ins. Grp.*, 396 Md. 656, 666–67 (2007) (citing *Gordon Family P'ship*, 348 Md. at 138)).

[7]The current public health crisis demonstrates the dire need for a correct interpretation of these laws. It has put hundreds of thousands of Marylanders at risk of eviction. Katherine Lucas McKay, Zach Neumann, & Sam Gilman, *20 Million renters are at risk of eviction; policy makers must act now to mitigate widespread hardship*, The Aspen Institute (June 19, 2020), https://www.aspeninstitute.org/blog-posts/20-million-renters-are-at-risk-of-eviction/ (showing that approximately 329,924 Marylanders are at risk of eviction by the end of this year). Despite, and perhaps because of, moratoria on evictions temporarily in place, unlawful threats of eviction, intended to intimidate and scare residents into leaving their homes, are on the rise. *See* Regina Garcia Cano & Michael Casey, *Tenants behind on rent in pandemic face harassment, eviction*, Baltimore Sun (June 14, 2020, 1:48 PM), https://www.baltimoresun.com/coronavirus/bs-md-ci-tenants-rent-pandemic-20200614-

In sum, Petitioners respectfully ask this Court to reverse the Court of Special Appeals' decision affirming the dismissal of their claims pursuant to RP § 7-113.

III. The Court of Special Appeals erred as a matter of law when it articulated the standard of proof for non-economic, emotional damages under the MCPA as the pleading standard for such damages, when the MCPA itself neither explicitly nor implicitly provides a pleading standard stricter than the general civil pleading standard.

This Court has previously explained that, generally, there is no heightened pleading standard for most claims under the MCPA, including those at issue in this case.[8] For example, in *Golt v. Phillips*, this Court recognized that claims under Md. Com. Law § 13-301(1)-(3) only require "a false or deceptive statement that has the capacity to mislead the consumer tenant." 308 Md. 1, 11 (1986). Additionally, in *McCormick v. Medtronic, Inc.*, the Court of Special Appeals even recognized that claims pleaded under § 13-301(1), such as the claims here, are not a replica of the common-law fraud claim and need not be pleaded with particularity. 219 Md. App. 485, 493–94

6zwrg4ercvci3dxnmwskfrmbmy-story.html (explaining that, if the courts have been closed and if tenants cannot be evicted during the pandemic, landlords are sending "threatening emails, text messages, asking for rent, threatening to lock tenants out"); Talia Richman and Wilborn P. Nobles, III, *Maryland families fear 'tsunami' of evictions when courts reopen and federal aid dries up at the end of July*, Baltimore Sun, (Jul. 2, 2020, 2:59 PM), https://www.baltimoresun.com/coronavirus/bs-md-eviction-tsunami-20200702-dbuifibn7bbtrc5abkujcc3k7m-story.html (explaining that the Fair Housing Action Center of Maryland has seen a 450% increase in requests for help from Maryland residents that are reporting incidents of tenant harassment and threats of illegal evictions).

[8] *See* E.064, 066 (identifying that Petitioner's MCPA claims against Selene are based solely on Md. Com. Law § 13-301(1)-(4)). The notable exception is claims sounding in fraud under § 13-301(9). *Luskin's, Inc. v. Consumer Prot. Div.*, 353 Md. 335, 366–67 (1999). Petitioners have not brought claims under that provision in this case.

(2014). Notwithstanding the clear precedent before it, the lower court erroneously heightened the pleading standard for these claims. Accordingly, this Court must reverse.

Rule 2-303(b) states that

> [e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings are required. A pleading shall contain only such statements of fact as may be necessary to show the pleader's entitlement to relief or ground of defense. It shall not include argument, unnecessary recitals of law, evidence, or documents, or any immaterial, impertinent, or scandalous matter.

By the Court of Special Appeals' own acknowledgment, "[t]his is the general rule. Were it applicable to the causes of action at play in the present appeal, the amended complaint's sparse allegations as to the nature of appellants' damages might suffice." *Wheeling*, 246 Md. App. at 282. There is hardly ever a time where this rule is generally inapplicable in a civil action. Statutes might raise the pleading standard for specific causes of action, either explicitly or implicitly, but Rule 2-303 is the minimum pleading standard in Maryland. *See generally Buckingham v. Fisher*, 223 Md. App. 82, 91 (2015). However, and most importantly, the legislature did not raise the pleading standard for non-economic, emotional distress damages under the MCPA. This Court's and the Court of Special Appeals' precedent acknowledges this conclusion. *See Luskin's*, 353 Md. at 366-367; *Golt*, 308 Md. at 11; *McCormick*, 219 Md. App. at 493–94. Thus, since neither RP § 7-113 nor the claims asserted here under the MCPA require the use of a stricter pleading standard, Rule 2-303 governs the pleadings.

The MCPA allows a person to "bring an action to recover for injury or loss sustained by him as the result of a practice prohibited by this title." Md. Code Com. Law

§ 13-408(a); *see Citaramanis v. Hallowell*, 328 Md. 142, 152 (1992). This plain language neither lowers nor heightens the applicable pleading standard under Rule 2-303. This Court has interpreted the MCPA time and again in various factual and legal contexts, but the pleading standard for non-economic, emotional distress damages has never been heightened in those contexts. The Court of Special Appeals improperly relied on this Court's decisions in *Lloyd, et al. v. Gen. Motors Corp., et al.*, and *Hoffman v. Stamper*, and the United States District Court of Maryland's decision in *Sager v. Housing Comm'n of Anne Arundel Cty.* to reach its errant result. Additionally, the lower court incorrectly applied what this Court has firmly stated has "more to do with proving" rather than pleading this kind of injury. *Hoffman v. Stamper*, 385 Md. 1, 35 (2005). At bottom, this Court must decide the pleading standard.

In *Lloyd*, this Court reversed the Court of Special Appeals' dismissal of the petitioners' claims under the MCPA, *inter alia*. In relevant part, the petitioners brought claims under the MCPA purely for economic loss, not for non-economic, emotional distress damages such as the Petitioners here seek. *Lloyd*, 397 Md. at 140–50 (explaining that the petitioners' claim for unfair or deceptive trade practices under the MCPA survives dismissal because "actual physical injury to a person . . . is not required to state a cognizable injury under the Consumer Protection Act" and that actual loss as required of private causes of action under the MCPA can be demonstrated through economic loss).

Though *Lloyd* does not deal with the issue of non-economic, emotional distress damages, this Court properly recalled its own cautionary admonition in *Ronald M. Sharrow, Chartered v. State Farm Mut. Auto. Ins. Co.*, that "[t]here is, of course, a big

difference between that which is necessary *to prove* the commission of the tort and that which is necessary *merely to allege its commission*." *Lloyd*, 397 Md. at 121–22 (citing *Sharrow*, 306 Md. 754, 770 (1986)) (emphasis added). The Court further explained that at the motion to dismiss stage, "the court's decision does not pass on the merits of the claims; it merely determines the plaintiff's right to bring the action." *Id.* at 122 (citing *Figueiredo-Torres v. Nickel*, 321 Md. 642, 647 (1991)). Following *Sharrow*, the *Lloyd* Court also held the same: "We reiterate that the standard for whether an allegation states a claim upon which relief can be granted does not require the petitioner to assert facts sufficient to *prove* the claim, but rather those necessary to *allege* a claim." *Id.* at 132 (emphasis added). Following this precedent, the pleading here satisfies Rule 2-303(b). *See Sharrow*, 306 Md. at 770.

Notably, the U.S. District Court of Maryland's decision in *Sager* directly contradicts the Court of Special Appeals' holding in this case. Specifically, the district court held that the plaintiffs' complaint, which requested "$10,000 in damages for 'emotional distress and mental anguish'" under the MCPA, survived a motion to dismiss for failure to state a claim. *Sager v. Housing Comm'n of Anne Arundel Cty.*, 855 F. Supp. 2d 524, 531, 549 (D. Md. 2012). The court did not dismiss the claim, as the intermediate court did here, because the accompanying physical manifestations of those emotional harms were not particularized in the complaint. In fact, the complaint in that case did not even plead that the emotional distress was accompanied by physical manifestations. Moreover, the *Sager* decision does not read into the statute the higher pleading requirement for those damages that the lower court applied here. The court simply relied

on language from this Court's decisions in *Hoffman* and *Vance* to confirm the well-settled law that a plaintiff may recover these types of damages under the modern physical injury rule. *Id.* at 549. In this case, the Petitioners pleaded more than the plaintiffs in *Sager*, because they explicitly stated that their emotional harms were accompanied by physical manifestations. At the pleading stage, they are not required to do more.

In *Hoffman*, a case that proceeded through trial and reached a final judgment, this Court explained that the modern rule as articulated in *Vance*, "[e]xamined analytically . . . ha[s] more to do with proving, rather than defining, this kind of injury." *Hoffman*, 385 Md. at 34-35. The modern rule is a modified version of the physical injury rule for claims of negligent infliction of emotional distress. *See Vance v. Vance*, 286 Md. 490, 496–98 (1979). In *Vance*, this Court explained that

> [u]nder the traditional rule, formulated in the nineteenth century, courts did not recognize a duty to refrain from the negligent infliction of emotional distress and therefore recovery of damages solely for mental distress was not permitted. . . . The early cases generally denied recovery for mental distress when the alleged physical injury resulted solely from the internal operation of mental or emotional stresses, although an exception to this rule was sometimes made where there was physical impact upon the plaintiff coincident in time and place with the occasion producing the mental distress. . . . The Court evaluated these concerns and decided that no sound reason existed to deny a right of action for mental distress when such distress results in a 'material physical injury.' Consequential physical harm coupled with the initial mental distress was believed by the Court to provide a sufficient guarantee of genuineness that would otherwise be absent in a claim for mental distress alone.

Id. As this Court is well aware, *Vance* "gave an elastic definition to the word 'physical,'" *Hoffman*, 385 Md. at 34, and used the term to "represent that the injury for which recovery is sought is capable of objective determination." *Vance*, 286 Md. at 500. Since

Vance, this rule has been applied to cases under the MCPA. *See generally Hoffman*, 385 Md. at 38 ("We see no reason to create an exception for . . . cases [under the MCPA] to the carefully crafted rule enunciated in *Vance* and the subsequent cases.").

Under *Vance*'s expansive definition of "physical injury," this Court held and has continued to hold that "depression, inability to work or perform routine household chores, loss of appetite, insomnia, nightmares, loss of weight, extreme nervousness and irritability, withdrawal from socialization, fainting, chest pains, headaches, and upset stomachs" all fall within it. *Vance*, 286 Md. at 501. Nonetheless, in relying on *Hoffman*, the Court of Special Appeals apparently ignored this Court's articulation that physical injuries need to be *proven* with particularity, not pleaded with particularity. *See Hoffman*, 385 Md. at 35. While Petitioners do not dispute the applicability of the modern rule for proving emotional damages, the lower court impermissibly heightened the pleading standard for emotional distress damages by incorrectly superimposing that standard at the pleading stage. This is incorrect.

In sum, this Court must reverse the Court of Special Appeals so that the pleading standard does not become an unintended barrier to a claimant's ability to bring suit under the MCPA. The statute does not require the detailed "variety of minute circumstances" that the lower court suggests is required. *See Miller v. Howard*, 206 Md. 148, 153 (1953). Accordingly, Petitioners' complaint is compliant with Maryland's general pleading standard, as applied to pleading a claim for emotional damages—that is, a "simple, concise, and direct statement" of the facts necessary to continue onward with suit. Rule 2-

303(b); *see also* 2-305 ("A pleading that sets forth a claim for relief . . . shall contain a clear statement of the facts necessary to constitute a cause of action . . . .").

IV. The Court of Special Appeals erred when it held that the Petitioners' legal expenses including a lawyer's fee incurred due to the Respondent's unfair and deceptive misrepresentations made in violation of the MCPA do not constitute a recoverable economic loss under that statute.

It is undisputed that a prevailing plaintiff may recover her attorney's fees for litigation under a statute's fee shifting provision; however, that is not the only way to recover attorney's fees and is not the only context in which they arise. This Court has recognized that a party may recover damages in the form of attorney's fees incurred as the result of the bad acts and omissions of another. *See generally E. Shore Title Co. v. Ochse*, 453 Md. 303, 344 (2017) (holding that "a party may recover attorney's fees actually incurred, as damages, pursuant to the collateral litigation doctrine, when the expenses were the proximate result of the complained-of injury, incurred necessarily and in good faith, and the amount is reasonable."); *Montgomery Vill. Assocs. v. Mark*, 95 Md. App. 337, 344 (1993) (affirming judgment that included attorney's fees incurred in related but separate proceedings as damages that "were the result of the appellants' wrongful acts"); *Tully v. Dasher*, 250 Md. 424, 441–42 (1968) (holding that plaintiffs were able to recover attorney's fees incurred in defending themselves in a malicious prosecution action).

Similarly, the U.S. District Court of Maryland has held the same. *See, e.g.*, *Ademiluyi v. PennyMac Mortg. Inv. Tr. Holdings I, LLC*, 929 F. Supp. 2d 502, 536–37 (D. Md. 2013) (recognizing that a plaintiff may pursue a claim for attorney's fees as

damages incurred in a separate action to "defend[] against allegedly improper debt collection activities"); *Hauk v. LVNV Funding, LLC*, 749 F. Supp. 2d 358, 370 (D. Md. 2010) (holding at the motion to dismiss stage that "if the plaintiffs succeed in proving that [defendant] violated the MCPA . . . when it filed lawsuits against them, and that the expenditure of attorneys' fees to defend themselves in those actions was 'reasonable and necessary,'. . . they may be entitled to recover those costs as actual damages."). This is consistent with this Court's longstanding holding that if "the wrongful acts of the defendant have involved the plaintiff in litigation with others, or placed him in such relations with others as make it necessary to incur expense to protect his interest, such costs and expense should be treated as the legal consequences of the original wrongful act." *McGaw v. Acker Merrall & Condit Co.*, 111 Md. 153, 73 A. 731, 734 (1909).

Unfortunately, in this case, the Court of Special Appeals did not even consider whether the Petitioners were entitled to separate damages in the form of their lawyers' consultation fees as an economic loss recoverable under the MCPA. In fact, the lower court apparently conflated the separate economic loss damages for consultations about their rights when faced with unlawful threats of eviction with the attorney's fees award available for the successful prosecution of their MCPA claims under its fee-shifting provision and otherwise failed to address it.[9] Here, the Petitioners alleged as damages the

[9] *See Wheeling*, 246 Md. at 286 ("This result [dismissal of the claims for emotional damages] doesn't change because appellants also alleged that they contacted attorneys for advice as to their rights after learning of the notices. If, for the purposes of a private action under the MCPA, attorney's fees incurred for such purposes were enough to satisfy Com. Law § 13-408(a)'s requirement that a plaintiff demonstrate an 'injury or loss sustained' as the result of the violation of the statute, the limitations imposed by *Lloyd*,

lawyer fees incurred when they were unlawfully threatened with eviction. E. 045; 051–52. Because Respondents threatened them with eviction, the Petitioners sought legal advice and incurred legal expense to know if those specific threats of eviction were valid. *Id.* Specifically, the Wheelings sought legal advice on how to protect themselves from imminent eviction that was communicated via an unlawful threat, in direct violation of RP § 7-113. They incurred legal expense to determine if they were legally required to vacate the premises, and why in the first instance they were being threatened with eviction despite their amicable and ongoing landlord-tenant relationship with Donna Poole. In turn, Ms. Rodriguez incurred legal expense when forced to consult her attorney about the ramifications of Respondents' threat to evict her earlier than the foreclosure proceeding allowed. E.048. They therefore sustained economic damages that they should be entitled to recover. The lower court erred because it held that protected persons like the Petitioners are not entitled to seek such lawyer's fees as damages even though those fees were incurred as a result of the unlawful threats of eviction by the Respondents in

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Citaramanis and other decisions would be rendered meaningless."). However, the lower court was mistaken even in this limited assessment. The damages sought in *Lloyd* and in *Citaramanis* were economic damages. *See Lloyd*, 97 Md. at 166–67 (holding that the plaintiffs' sought-after economic loss damages in the form of the costs needed to remedy defective seatbacks is a cognizable injury for a claim of breach of implied warranty of merchantability under the MCPA); *see also Citaramanis v. Hallowell*, 328 Md. 142, 158–59 (1992) (declining to award plaintiffs' sought-after economic loss damages in the form of restitution for eighteen months' worth of rent paid to defendant-landlords for an unlicensed dwelling, explaining that the plaintiffs were not entitled to restitution because they "received everything that they bargained for" and thus, could not prove actual injury). Neither of these cases has any bearing on how the emotional distress damages must be pleaded or on whether a lawyer's consultation fee separate from fees for pursuing the MCPA claims themselves is an economic loss that can be objectively determined and is recoverable as damages.

violation of RP § 7-113 and the MCPA. These are different in kind from the attorney's fees that may ultimately be recovered by prevailing plaintiffs for successful prosecution of their MCPA claims. This is the wrong result; accordingly, this Court should reverse.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that this Court reverse the Court of Special Appeals' affirmance of the dismissal of their claims and remand for further proceedings.

Respectfully submitted,

/s/

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CITATION AND TEXT OF PERTINENT STATUTES & RULES

STATUTES

Md. Code Ann., Real Prop. Code § 7-113

§ 7-113. Restrictions relating to taking or threatening to take possession of residential property

(a) Definitions

(a)(1) In this section the following words have the meanings indicated.

(2) "Party claiming the right to possession" means a person or successor to any person who:

(i) Does not have actual possession of a residential property; and

(ii) Has or claims to have a legal right to possession of the residential property:

1. By the terms of a contract or foreclosure sale;

2. Under a residential lease or sublease that has an initial term of 99 years renewable forever and that creates a leasehold estate subject to the payment of periodic installments of an annual lease amount; or

3. Under a court order, including a court order extinguishing a right of redemption.

(3) (i) "Protected resident" means an owner or former owner in actual possession of residential property.

(ii) "Protected resident" includes a grantee, tenant, subtenant, or other person in actual possession by, through, or under an owner or former owner of residential property.

(iii) "Protected resident" does not include a trespasser or squatter.

(4) "Residential property" means a building, structure, or portion of a building or structure that is designed principally and is intended for human habitation.

(5) "Threaten to take possession" means using words or actions intended to convince a reasonable person that a party claiming the right to possession intends to take imminent possession of residential property in violation of this section.

(6) "Willful diminution of services" means intentionally interrupting or causing the interruption of heat, running water, hot water, electricity, or gas by a party claiming the right to possession for the purpose of forcing a protected resident to abandon residential property.

(b) Restrictions relating to taking or threatening to take possession of residential property

(b)(1) Except as provided in paragraph (2) of this subsection, a party claiming the right to possession may not take possession or threaten to take possession of residential property from a protected resident by:

(i) Locking the resident out of the residential property;

(ii) Engaging in willful diminution of services to the protected resident; or

(iii) Taking any other action that deprives the protected resident of actual possession.

(2) (i) Except as provided in subparagraph (ii) of this paragraph, a party claiming the right to possession may take possession of residential property from a protected resident only in accordance with a writ of possession issued by a court and executed by a sheriff or constable.

(ii) A party claiming the right to possession of residential property may use nonjudicial self-help to take possession of the property, if the party:

1. Reasonably believes the protected resident has abandoned or surrendered possession of the property based on a reasonable inquiry into the occupancy status of the property;

2. Provides notice as provided in subsection (c) of this section; and

3. Receives no responsive communication to that notice within 15 days after the later of posting or mailing the notice as required by subsection (c) of this section.

(c) Abandonment or surrender of possession of residential property

(c)(1) If a party claiming the right to possession of residential property reasonably believes, based on a reasonable inquiry into the occupancy status of the property, that all protected residents have abandoned or surrendered possession of the residential property, the party claiming the right to possession may post on the front door of the residential property and mail by first-class mail addressed to "all occupants" at the address of the residential property a written notice in substantially the following form:

"IMPORTANT NOTICE ABOUT EVICTION

A person who claims the right to possess this property believes that this property is abandoned. If you are currently residing in the property, you must immediately contact:

_____
Name

_____
Address

_____
Telephone

_____
Date of this notice

If you do not contact the person listed above within 15 days after the date of this notice, the person claiming possession may consider the property abandoned and seek to secure the property, including changing the locks without a court order.”.

(2) The written notice required by this subsection shall be:

(i) A separate document; and

(ii) Printed in at least 12 point type.

(3) The outside of the envelope containing the mailed written notice required by this subsection shall state, on the address side, in bold, capital letters in at least 12 point type, the following: “Important notice to all occupants: eviction information enclosed; open immediately.”.

(d) Remedies for violation of section

(d)(1) If in any proceeding the court finds that a party claiming the right to possession violated subsection (b) of this section, the protected resident may recover:

(i) Possession of the property, if no other person then resides in the property;

(ii) Actual damages; and

(iii) Reasonable attorney's fees and costs.

(2) The remedies set forth in this subsection are not exclusive.

(e) Parties governed by Title 8, Subtitle 2, or Title 8A

(e) This section does not apply if the parties are governed by Title 8, Subtitle 2, or Title 8A of this article.

Md. Code Ann., Real Prop. Code § 8-216

§ 8-216. Restrictions relating to taking or threatening to take possession of dwelling unit

(a) Definitions

(a)(1) In this section the following words have the meanings indicated.

(2) "Threaten to take possession" means using words or actions intended to convince a reasonable person that the landlord intends to take imminent possession of the property in violation of this section.

(3) (i) "Willful diminution of services" means intentionally interrupting or causing the interruption of heat, running water, hot water, electricity, or gas by the landlord for the purpose of forcing a tenant to abandon the property.

(ii) "Willful diminution of services" does not include a landlord choosing not to continue to pay for utility service for residential property after a final court order awarding possession of the residential property, if the landlord has provided the tenant reasonable notice of the landlord's intention and the opportunity for the tenant to open an account in the tenant's name for that service.

(b) Restrictions relating to taking or threatening to take possession of dwelling unit

(b)(1) Except as provided in paragraph (2) of this subsection, a landlord may not take possession or threaten to take possession of a dwelling unit from a tenant or tenant holding over by locking the tenant out or any other action, including willful diminution of services to the tenant.

(2) A landlord may take possession of a dwelling unit from a tenant or tenant holding over only:

(i) In accordance with a warrant of restitution issued by a court and executed by a sheriff or constable; or

(ii) If the tenant has abandoned or surrendered possession of the dwelling unit.

(c) Remedies for violation of section

(c)(1) If in any proceeding the court finds in favor of the tenant because the landlord violated subsection (b) of this section, the tenant may recover:

(i) Actual damages; and

(ii) Reasonable attorney's fees and costs.

(2) The remedies set forth in this subsection are not exclusive.

(d) Temporary measures taken by landlord

(d) This section may not be construed to prevent a landlord from taking temporary measures, including changing the locks, to secure an unsecured residential property, if the landlord makes good faith attempts to provide reasonable notice to the tenant that the tenant may promptly be restored to possession of the property.

Md. Code Ann., Com. Law § 13-301

§ 13-301. Unfair or deceptive trade practices defined

Unfair, abusive, or deceptive trade practices include any:

(1) False, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers;

(2) Representation that:

(i) Consumer goods, consumer realty, or consumer services have a sponsorship, approval, accessory, characteristic, ingredient, use, benefit, or quantity which they do not have;

(ii) A merchant has a sponsorship, approval, status, affiliation, or connection which he does not have;

(iii) Deteriorated, altered, reconditioned, reclaimed, or secondhand consumer goods are original or new; or

(iv) Consumer goods, consumer realty, or consumer services are of a particular standard, quality, grade, style, or model which they are not;

(3) Failure to state a material fact if the failure deceives or tends to deceive;

(4) Disparagement of the goods, realty, services, or business of another by a false or misleading representation of a material fact;

(5) Advertisement or offer of consumer goods, consumer realty, or consumer services:

(i) Without intent to sell, lease, or rent them as advertised or offered; or

(ii) With intent not to supply reasonably expected public demand, unless the advertisement or offer discloses a limitation of quantity or other qualifying condition;

(6) False or misleading representation of fact which concerns:

(i) The reason for or the existence or amount of a price reduction; or

(ii) A price in comparison to a price of a competitor or to one's own price at a past or future time;

(7) Knowingly false statement that a service, replacement, or repair is needed;

(8) False statement which concerns the reason for offering or supplying consumer goods, consumer realty, or consumer services at sale or discount prices;

(9) Deception, fraud, false pretense, false premise, misrepresentation, or knowing concealment, suppression, or omission of any material fact with the intent that a consumer rely on the same in connection with:

(i) The promotion or sale of any consumer goods, consumer realty, or consumer service;

(ii) A contract or other agreement for the evaluation, perfection, marketing, brokering or promotion of an invention; or

(iii) The subsequent performance of a merchant with respect to an agreement of sale, lease, or rental;

(10) Solicitations of sales or services over the telephone without first clearly, affirmatively, and expressly stating:

(i) The solicitor's name and the trade name of a person represented by the solicitor;

(ii) The purpose of the telephone conversation; and

(iii) The kind of merchandise, real property, intangibles, or service solicited;

(11) Use of any plan or scheme in soliciting sales or services over the telephone that misrepresents the solicitor's true status or mission;

(12) Use of a contract related to a consumer transaction which contains a confessed judgment clause that waives the consumer's right to assert a legal defense to an action;

(13) Use by a seller, who is in the business of selling consumer realty, of a contract related to the sale of single family residential consumer realty, including condominiums and town houses, that contains a clause limiting or precluding the buyer's right to obtain consequential damages as a result of the seller's breach or cancellation of the contract;

(14) Violation of a provision of:

(i) This title;

(ii) An order of the Attorney General or agreement of a party relating to unit pricing under Title 14, Subtitle 1 of this article;

(iii) Title 14, Subtitle 2 of this article, the Maryland Consumer Debt Collection Act;1

(iv) Title 14, Subtitle 3 of this article, the Maryland Door-to-Door Sales Act;2

(v) Title 14, Subtitle 9 of this article, Kosher Products;

(vi) Title 14, Subtitle 10 of this article, Automotive Repair Facilities;

(vii) Section 14-1302 of this article;

(viii) Title 14, Subtitle 11 of this article, Maryland Layaway Sales Act;3

(ix) Section 22-415 of the Transportation Article;

(x) Title 14, Subtitle 20 of this article;

(xi) Title 14, Subtitle 15 of this article, the Automotive Warranty Enforcement Act;4

(xii) Title 14, Subtitle 21 of this article;

(xiii) Section 18-107 of the Transportation Article;

(xiv) Title 14, Subtitle 22 of this article, the Maryland Telephone Solicitations Act;5

(xv) Title 14, Subtitle 23 of this article, the Automotive Crash Parts Act;6

(xvi) Title 10, Subtitle 6 of the Real Property Article;

(xvii) Title 14, Subtitle 25 of this article, the Hearing Aid Sales Act;7

(xviii) Title 14, Subtitle 26 of this article, the Maryland Door-to-Door Solicitations Act;8

(xix) Title 14, Subtitle 31 of this article, the Maryland Household Goods Movers Act;9

(xx) Title 14, Subtitle 32 of this article, the Maryland Telephone Consumer Protection Act;10

(xxi) Title 14, Subtitle 34 of this article, the Social Security Number Privacy Act;11

(xxii) Title 14, Subtitle 37 of this article, the Online Child Safety Act;

(xxiii) Section 14-1319, § 14-1320, or § 14-1322 of this article;

(xxiv) Section 7-304 or § 8-801 of the Criminal Law Article;

(xxv) Title 7, Subtitle 3 of the Real Property Article, the Protection of Homeowners in Foreclosure Act;

(xxvi) Title 6, Subtitle 13 of the Environment Article;

(xxvii) Section 7-405(e)(2)(ii) of the Health Occupations Article;

(xxviii) Title 12, Subtitle 10 of the Financial Institutions Article;

(xxix) Title 19, Subtitle 7 of the Business Regulation Article;

(xxx) Section 15-311.3 of the Transportation Article;

(xxxi) Section 14-1324 of this article;

(xxxii) Section 14-1326 of this article;

(xxxiii) The federal Military Lending Act;

(xxxiv) The federal Servicemembers Civil Relief Act; or

(xxxv) § 11-210 of the Education Article; or

(15) Act or omission that relates to a residential building and that is chargeable as a misdemeanor under or otherwise violates a provision of the Energy Conservation Building Standards Act,12 Title 7, Subtitle 4 of the Public Utilities Article.

Md. Code Ann., Com. Law § 13-408

§ 13-408. Action for damages

(a) In addition to any action by the Division or Attorney General authorized by this title and any other action otherwise authorized by law, any person may bring an action to recover for injury or loss sustained by him as the result of a practice prohibited by this title.

(b) Any person who brings an action to recover for injury or loss under this section and who is awarded damages may also seek, and the court may award, reasonable attorney's fees.

(c) If it appears to the satisfaction of the court, at any time, that an action is brought in bad faith or is of a frivolous nature, the court may order the offending party to pay to the other party reasonable attorney's fees.

(d) Notwithstanding any other provision of this section, a person may not bring an action under this section to recover for injuries sustained as a result of the professional services provided by a health care provider, as defined in § 3-2A-01 of the Courts Article.

RULES

Md. Code Ann., Rule 2-303

(a) Paragraphs, Counts, and Defenses. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each cause of action shall be set forth in a separately numbered count. Each separate defense shall be set forth in a separately numbered defense.

(b) Contents. Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings are required. A pleading shall contain only such statements of fact as may be necessary to show the pleader's entitlement to relief or ground of defense. It shall not include argument, unnecessary recitals of law, evidence, or documents, or any immaterial, impertinent, or scandalous matter.

(c) Consistency. A party may set forth two or more statements of a claim or defense alternatively or hypothetically. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has, regardless of consistency and whether based on legal or equitable grounds.

(d) Adoption by Reference. Statements in a pleading or other paper of record may be adopted by reference in a different part of the same pleading or paper of record or in another pleading or paper of record. A copy of any written instrument that is an exhibit to a pleading is a part thereof for all purposes.

(e) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 10,703 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/
Olivia N. Sedwick

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 2020, a copy of the foregoing Brief of Petitioners was served electronically, through the MDEC system, and two copies each were served by first-class mail, postage prepaid, on:

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