UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1043

September Term, 2013

JOSEPHAT MUA

v.

PRINCE GEORGE'S COUNTY BOARD OF EDUCATION, ET AL.

Berger,
Nazarian,
Leahy,

JJ.

Opinion by Nazarian, J.

Filed: July 9, 2015

Josephat Mua appeals from the Circuit Court for Prince George's County's dismissal of his Second Amended Complaint against Board of Education of Prince George's County ("Board"); Board members and employees Verjeana M. Jacobs, Dr. William R. Hite, Jr., Roger Thomas, Synthia J. Shilling, Monica Goldson, and Pierre Dickson ("Officials"); and the Association of Classified Employees, American Federation of State, County, and Municipal Employees Local 2250 and International (the "Unions") (all parties collectively "Appellees"). The underlying litigation features a tortured procedural history, and the current appeal turns on whether, and to what extent, the pending claims repeat claims Mr. Mua has pursued previously. We conclude that they do, and affirm.

I. BACKGROUND

Mr. Mua was employed as a full-time teacher in the Prince George's County Public Schools system between 2002 and 2007. In 2007, he transitioned to an IT Technician position, where he was employed by the Board, and he joined the Unions, which collectively bargained on behalf of its members. Mr. Mua alleges that between 2007 until his termination in 2010, he became aware that several of his co-workers and supervisors had committed various personal and professional indiscretions, behavior he claims to have reported to the Unions, other supervisors, and in some instances, to law enforcement. The last of the alleged misconduct took place in November 2009, when he claims he observed "school employees receiv[ing] personal gratuities from business entities seeking contracts with PG Schools."

Mr. Mua alleges that beginning September 2009, his allegations raised the ire of his immediate supervisor, Pierre Dickson. Mr. Mua claims also that these feelings were engendered in part because Mr. Mua had drawn attention to an alleged affair between Mr. Dickson and another supervisor, Shanita Anderson. Mr. Mua claims that Mr. Dickson retaliated by accusing him of theft in a series of email messages that were shared with other staff and by making disparaging comments about Mr. Mua's alleged Nigerian heritage.[1] Finally, Mr. Mua claims that Mr. Dickson conspired with Ms. Anderson "to remove [Mr. Mua's] work from the data banks to destroy evidence of [his productivity."[2]

Mr. Mua contends that he complained several times to the Officials (other than Mr. Dickson) about both the comments and the conspiracy, both in person and in writing. He claims that the Officials not only failed to rectify this situation, but then fired him on June 18, 2010, at Mr. Dickson's request. The Officials told Mr. Mua that he was "terminated due to his general overall job performance," but Mr. Mua claims that he was fired as a result of his complaints. As an ancillary issue, Mr. Mua claims as well that after he was fired, he was not allowed to collect personal belongings.

Mr. Mua responded by filing suit—not one, but several over time. On September 15, 2010, he filed a complaint in the circuit court that named the Board, Prince George's County Public Schools, and Mr. Dickson as defendants, and alleged defamation

[1] Mr. Mua is actually Kenyan-born, according to his papers.

[2] Mr. Mua claims that Mr. Dickson, Ms. Anderson "and the other Defendants" conspired to destroy his work product, but he only singles out Mr. Dickson and Ms. Anderson by name, and in two separate counts.

and false light invasion of privacy. On November 8, 2010, he filed a separate complaint in the circuit court, alleging breach of contract against the Board. He amended the second complaint on February 23, 2011, adding Dr. Hite as a defendant and adding discrimination and retaliation claims. These two cases were consolidated, and after Mr. Mua amended the consolidated complaint five times (adding and deleting both claims and parties in the process), the Board and Mr. Dickson were left as the two defendants. The ultimate version of this complaint alleged defamation, defamation *per se*, and invasion of privacy/false light, all based on Mr. Dickson's September 2009 emails accusing Mr. Mua of theft. The circuit court granted summary judgment for the defendants, and that decision was affirmed by this Court.

On May 5, 2011—between amendment and summary judgment in the first pair of cases—Mr. Mua filed another suit, this one in the United States District Court for the District of Maryland. *Mua v. Bd. of Education of Prince George's Cnty.*, 2011 WL 9162210 (D. Md. May 5, 2011). The details of that case are not in this record, but Mr. Mua's Complaint is available on Westlaw, and we can (and do) take judicial notice of its contents. *Id.* In that complaint, Mr. Mua alleges the same factual situation as he did in the first state court cases, and the complaint includes counts alleging a hostile work environment and retaliation under Title VI and VII, intentional infliction of emotional distress, and wrongful discharge. *Id.* On June 18, 2012, the federal court issued an Order dismissing Mr. Mua's wrongful discharge claim with prejudice and staying the remainder of his claims "until [Mr. Mua's] administrative proceedings in the County and State have concluded". (More on Mr. Mua's administrative proceedings below).

Throughout this time, Mr. Mua appears to have been in negotiations with the Unions to secure legal representation from them based on his membership. Mr. Mua alleges that at some point he had union-provided counsel, but the Unions dispute this.[3]

Mr. Mua then filed the Complaint in this case, again in the circuit court, on December 16, 2011—before summary judgment was granted in the first circuit court proceeding. He did not effect service until December 2012, but eventually did serve all of the defendants, then amended twice before they filed Motions to Dismiss.[4] At the time the Motions to Dismiss were filed, Mr. Mua's Second Amended Complaint contained twenty-four counts and named the nine appellees. He alleged breach of an employment contract (counts one through three); violation of his right to free speech and the state Whistleblower Protection Act (four and five); breach of the Unions' duty of fair representation (six and seven); violation of the Takings Clause as a result of hours he was required to work and property that was not returned to him (eight); unjust enrichment when the Unions failed to represent him in termination proceedings after taking his dues (nine); defamation against the Board and the Officials in connection with various communications to and about him (ten and eleven); "malicious termination of FMLA leave," (twelve); three different conspiracies (thirteen through fifteen); negligent hiring, supervision or retention against the Board and the Officials for hiring or retaining four of the six individually named

[3] Some correspondence from the Unions indicates that Mr. Mua secured his own counsel for a number of his proceedings, and that the Unions took the position that his decision to hire private counsel forfeited his right to Union representation. Mr. Mua alleges that the Unions are in league with the Board and the Officials to destroy his case.

[4] The Board and the Officials filed one joint Motion and the Unions filed separately.

defendants and Ms. Anderson (sixteen through twenty); abuse of process (twenty-one and twenty-two); and tortious interference with a business relationship (twenty-three and twenty-four).

While the circuit court pondered the Motions to Dismiss this case, Mr. Mua appears also to have litigated claims contesting his termination and the quality of the Unions' representation before the Prince George's County Board of Education (including an appeal to the Maryland State Board of Education) and the Public School Labor Relations Board. As best we can determine, these proceedings yielded an unfavorable result for him—Mr. Mua included in the Record Extract a dissenting opinion from the Public School Labor Relations Board that expressed a favorable view of Mr. Mua's claims, and a Motion for Reconsideration in the Maryland State Board of Education that would not have been necessary had he prevailed.

On July 15, 2013, the circuit court held a hearing on the Motions to Dismiss in this case.[5] At that hearing, Mr. Mua was represented by counsel, John Hopkins, who told the court he had entered his appearance that morning. Mr. Hopkins asked for a continuance as the first order of business. His request was denied. Mr. Hopkins then claimed that Mr. Mua had recently filed a third amended complaint, and asked the court to grant a

[5] In the meantime, and in addition to everything else, Mr. Mua litigated an unsuccessful replevin action against the Board at the District Court for Prince George's County, case no. 050200018872012, and unsuccessfully appealed to the circuit court, case no. CAL13-03801. This case sought the return of personal property that Mr. Mua claims that the Board withheld when it terminated him.

continuance in light of that fact. The hearing judge denied this request, and the record reflects that Mr. Mua never actually filed a third amended complaint.[6]

After a full hearing on the Motions that consumed forty-four pages of transcript, the circuit court granted both Motions to Dismiss.[7] All of his claims were dismissed with prejudice, and the court did so in summary fashion:

> For all of the reasons articulated by Miss Hairston and by defense counsel, I'm going to grant the motion to dismiss . . . with respect to each of the defendants named in the second amended complaint. The motion to dismiss with prejudice is with one caveat, and that is did you file the third amended complaint before today's proceeding[?] That matter has been opposed in a motion to strike. It will be addressed by one of my colleagues, and so that's the only caveat.

Mr. Mua timely filed a notice of appeal. His brief airs many grievances, only some of which are colorable subjects of review in this court. The Board, the Officials, and the Unions responded with a joint brief.

[6] The record suggests that Mr. Mua did mail a third amended complaint to the other parties, if nothing else, because four different Motions to Strike such a complaint were filed.

[7] The Board and Officials' joint Motion actually took the form of a motion to dismiss or, in the alternative, for summary judgment. The court granted the Motion to Dismiss and never addressed summary judgment.

II. DISCUSSION

Before we begin discussion of Mr. Mua's arguments, the appellees raise a threshold issue: Mr. Mua's Record Extract does not comport with the requirements of Maryland Rule 8-501. This is undeniably true, but we will not decide the appeal on this basis.

Maryland Rule 8-501 provides, in relevant part:

> **(c) Contents.** The record extract shall contain all *parts of the record* that are reasonably necessary for the determination of the questions presented by the appeal and any cross-appeal. It shall include the circuit court docket entries, the judgment appealed from, and such other *parts of the record* as are designated by the parties pursuant to section (d) of this Rule.

Md. Rule 8-501(c) (Emphasis added). Mr. Mua's five volume Record Extract contains many, many documents that were not a part of the record at the trial court. The appellees request that the extraneous documents be stricken. They have not, however, asserted any prejudice.

Mr. Mua's nearly indiscriminate compilation of the Record Extract distracts from the merits of his case. But he is (on appeal, as he often was in the trial court) a *pro se* litigant. He is not entitled to a helping hand, but we often exercise our discretion in favor of reviewing cases on the merits rather than disposing of them on procedural grounds, even when the Rules would support dismissal and where the violation creates unnecessary work and aggravation for the other parties and for us. We will, therefore, not strike the portions of the Record Extract highlighted by the appellees, but we note that we have not considered any of the portions that are not "reasonably necessary" and "material" to the appeal. *Hosain v. Malik*, 108 Md. App. 284, 294 (1996).

Mr. Mua lists seven questions on appeal,[8] which really boil down to four:

1. Did the circuit court abuse its discretion when it denied Mr. Mua's request for leave to amend his Second Amended Complaint?

2. Did the circuit court abuse its discretion by denying Mr. Mua's request for continuance on the day of the hearing on the Motions to Dismiss?

3. Did the circuit court abuse its discretion by granting the Motions to Dismiss when Mr. Mua's federal case was stayed pending the outcome of his administrative appeals?

4. Did the circuit court err by dismissing counts three (breach of contract), five (Whistleblower Protection Act), nine (unjust enrichment), fourteen (civil conspiracy-wrongful termination), and fifteen (civil conspiracy-replevin)?

[8] Mr. Mua's original Questions Presented read as follows:

1. Did the [trial] court err in dismissing count three: breach of contract claim of [Mr. Mua's] second amended complaint?
2. Did the [trial] court err in dismissing count five: violation of Maryland's whistle blower law claim of [Mr. Mua's] second amended complaint:
3. Did the [trial] court abuse its discretion in not granting [Mr. Mua's] request for a continuance on July 12, 2013?
4. Did the [trial] court err in dismissing count fourteen and count fifteen: conspiracy claim of [Mr. Mua's] second amended complaint?
5. Did the [trial] court abuse its discretion in not granting [Mr. Mua] leave to amend his second complaint for the purpose of allowing review of [Mr. Mua's] third amended complaint?
6. Did the [trial] court err as a matter of law and/or abuse its discretion in dismissing count nine: unjust enrichment instead of staying that matter pending the resolution of breach of fair representation matter before the Public Schools Labor Relation Board?
7. Did the [trial] court abuse its discretion in dismissing the entire case with prejudice when [Mr. Mua's] discrimination case was stayed in federal court pending the outcome of the administrative appeal?

Mr. Mua argues that the circuit court did abuse its discretion, and did err, in every instance. He argues that he properly stated a whistleblower claim, that it was an abuse of discretion for the circuit court to deny his Motion for Continuance, that Maryland Rule 2-341 required the court to grant him leave to amend his Complaint, that his unjust enrichment claim could be pled independently before the circuit court despite his administrative action at the Public School Labor Relations Board, and that the circuit court was required to stay all claims pending the outcome of his administrative appeals because the federal court had done so.[9] The Board and the Officials argue that many of Mr. Mua's claims are barred by *res judicata* and collateral estoppel, that he failed to exhaust his administrative remedies for some of his claims at the time he filed his lawsuit, that he failed on certain counts to state a claim for which relief may be granted, and that the Officials have statutory immunity from suit. The Unions argue that the International Union is not a proper party, and that Mr. Mua cannot establish any facts to support his claims against Local 2250.

We can dispense with some of these arguments summarily. *First*, Mr. Mua's argument that he was wrongly denied the ability to amend his Complaint is not properly before us. Mr. Mua informed the circuit court at the hearing on the Motions to Dismiss that he *had* filed a third amended complaint, and asked for a continuance for this reason. Mr. Mua also did, confusingly, move orally to amend his Second Amended Complaint. As

[9] He also argues that *res judicata* is not applicable to his breach of contract or unjust enrichment claims.

Maryland Rule 2-341(a) explains, however, a plaintiff may amend his complaint by right so long as he is more than thirty days from trial and not otherwise constrained by a scheduling order:

> A party may file an amendment to a pleading without leave of court by the date set forth in a scheduling order or, if there is no scheduling order, no later than 30 days before a scheduled trial date.

At the time of dismissal, no trial date had been set and no scheduling order had been entered. Rather than ruling on Mr. Mua's oral motion, the court seems to have implicitly recognized Rule 2-431 in its decision:

> [The dismissal] is with one caveat, and that is did you file the third amended complaint before today's proceeding[?] . . . [If so it] will be addressed by one of my colleagues, and so that's the only caveat.

Mr. Mua even acknowledged at the hearing (through counsel) that he could amend by right:

> [H]e has the ability to file amendments without leave of court at this juncture in light of the circumstances.

But, in any event, as he failed to file a third amended complaint, there is no reviewable issue—the circuit court at no point denied Mr. Mua his right to amend or rejected an otherwise proper amended complaint that he in fact filed.

Second, the Officials' statutory immunity claim fails as well. The Officials argue that Education Article §6-108 and Courts and Judicial Proceedings §5-803 protect county board of education employees in "employee dismissal, disciplinary, administrative or judicial proceedings" in instances such as this. The Officials acknowledge, however, that those sections only protect employees who are acting "in the performance of duties, within

the scope of employment and without malice."[10] We have not had occasion to define malice in the context of the Education Article, but in the analogous context of the Local Government Tort Claims Act, the Court of Appeals has defined malice as "conduct 'characterized by evil or wrongful motive, intent to injure, knowing and deliberate wrongdoing, ill-will or fraud.'" *Lee v. Cline*, 384 Md. 245, 268 (2004) (quoting *Shoemaker v. Smith*, 353 Md. 143, 163 (1999)). The Board and Officials do not claim that Mr. Mua has failed to allege malice, and his amended complaint *does* allege it—early and often. He

[10] The Education Article declares:

> A county superintendent or any employee of a county school system who presents or enters findings of fact, recommendations, or reports or who participates in an employee dismissal, disciplinary, administrative, or judicial proceeding relating to a school system employee that results from these actions shall have the immunity from liability described under § 5-803 of the Courts and Judicial Proceedings Article.

Md. Code (1978, 2014 Repl. Vol.), §6-108(B) of the Education Article ("ED"). Courts and Judicial Proceedings §5-803 says in turn:

> A county superintendent or any employee of a county school system who presents or enters findings of fact, recommendations, or reports or who participates in an employee dismissal, disciplinary, administrative, or judicial proceeding relating to a school system employee that results from these actions is immune from any civil liability if the action is:
>
> (1) in the performance of duties;
> (2) within the scope of employment; and
> (3) without malice.

Md. Code (1977, 2013 Repl. Vol.), §5-803(b) of the Courts and Judicial Proceedings Article ("CJ")

claims that the Officials undertook a systematic campaign to eliminate him from the Prince George's County Public School System, supposedly as a result of his efforts to hold his co-workers accountable. Whether or not Mr. Mua can prove anything he claims is not our concern for this purpose; this case comes to us in a motion to dismiss posture, and we only review what has been alleged. And at this juncture, Mr. Mua's allegations are enough to defeat dismissal on statutory immunity grounds.

The circuit court's decisions to grant the Motions to Dismiss and to deny Mr. Mua's request for continuance are, however, proper subjects of appeal. We review rulings on motions for continuance under an abuse of discretion standard. *Vermilya-Brown Co., Inc. v. Dale Dallas, Inc.*, 248 Md. 7, 13-14 (1967). On the other hand, we "accord no special deference to [a] circuit court's legal conclusions" when reviewing a grant of a motion to dismiss, and ask only if the decision was "legally correct." *Heavenly Days Crematorium, LLC v. Harris, Smariga and Associates, Inc.*, 433 Md. 558, 568 (2013). We note, however, that we may affirm a circuit court that is right for the wrong reasons. *Monarc Const., Inc. v. Aris Corp.*, 188 Md. App. 377, 385 (2009) ("[A]n appellate court will affirm a circuit court's judgment on any ground adequately shown by the record, even one upon which the circuit court has not relied or one the parties have not raised."). This is such a case.

A. The Court Did Not Abuse Its Discretion In Denying Mr. Mua A Continuance.

In the context of motions for continuance, the Court of Appeals has defined an abuse of discretion as "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Touzeau v. Deffinbaugh*, 394 Md. 654, 669 (2006) (quoting *Jenkins*

v. City of College Park, 379 Md. 142, 165 (2003)). The Court went on in *Touzeau* to explain that an abuse of discretion occurs when a trial judge denies a motion contrary to law, or when unforeseen events or surprises frustrate the efforts of a diligent counsel. *Id.* at 669-670. Most importantly for our purposes, *Touzeau* explains that we will not "overrule the trial judge's denial of a motion for continuance where the moving *party* has failed to demonstrate due diligence to mitigate the effects as what was alleged to be a surprise." *Id.* at 672 (emphasis added).

The circuit court's ruling speaks to this last principle:

> Your motion for continuance is denied, sir. Your client had ample opportunity to obtain counsel, to file the appropriate pleadings and had adequate notice of today's proceedings. We're going forward today.

We see no abuse of discretion here. Mr. Mua filed his Second Amended Complaint in December 2012. All of the Motions to Dismiss were filed by February 12, 2013. The hearing on the Motions took place on July 12, 2013, a full five months after the last one was filed. Any claims of unfair surprise to counsel as a result of his late appearance or Mr. Mua's desire to amend his pleadings do not excuse the lack of diligence on the part of Mr. Mua to seek out counsel or move the ball forward. We decline to hold that a denial in such an instance was "manifestly unreasonable."

B. The Enumerated Counts Were Properly Dismissed.

When a party fails to state a claim upon which relief may be granted, or is statutorily barred from recovery, a dismissal with prejudice is typically proper:

> Generally speaking, a dismissal with prejudice is ordered in cases where the dismissal is based on an appraisal of the legal

> sufficiency of the claim. It touches the substantive merits of the case. A dismissal without prejudice, on the other hand, is more likely to be ordered in cases where the dismissal is based on some procedural glitch or lapse in the necessary formalities, something that does not engage the merits of *res judicata* and that can be readily rectified on the next try.

Mohiuddin v. Doctors Billing and Management Solutions, Inc., 196 Md. App. 439, 452 (2010); *see also Pulte Home Corp. v. Parex, Inc.*, 174 Md. App. 681, 727 (2007) ("A trial court has discretion to dismiss a claim with prejudice if it fails to state a claim that could afford relief." (citations omitted)).

Mr. Mua singles out Count 3 (breach of contract), Count 5 (violation of Maryland's whistleblower law), Count 9 (unjust enrichment), Count 14 (conspiracy for termination), and Count 15 (conspiracy-replevin action) as unfairly dismissed. But all of these claims suffered from fatal jurisdictional or pleading defects, and all were properly dismissed.

1. Mr. Mua's Breach of Contract Claim Was Statutorily Barred, And Barred By *Res Judicata*.

Count 3 of Mr. Mua's Second Amended Complaint is a breach of contract claim against the Board. Mr. Mua claims in this count that the Board failed to file an "appeal hearing following [his] termination within thirty (30) days." Mr. Mua's curious argument—without citation to the collective bargaining agreement—is that this failure violated ED §4-205, and thus breached the Unions' contract with the school district (of which, presumably, he believes he was a third-party beneficiary). The Board responds that

Mr. Mua's claim was properly dismissed because he failed to exhaust his administrative remedies at the Maryland State Board of the Education.[11]

As noted above, Mr. Mua already was litigating his wrongful termination action at the Maryland State Board of Education when the Motions to Dismiss were filed in this case. Mr. Mua had good reason to take these claims to the MSBE—he was required by statute to do so. ED §6-202(a) provides that before personnel are dismissed by a county board of education, "the county board shall send the individual a copy of the charges against him and give him an opportunity within 10 days to request a hearing." *Id.* The statute continues:

> (3) If the individual requests a hearing within the 10-day period:
>
> > (i) The county board promptly shall hold a hearing, but a hearing may not be set within 10 days after the county board sends the individual a notice of the hearing; and
> >
> > (ii) The individual shall have an opportunity to be heard before the county board, in person or by counsel, and to bring witnesses to the hearing.
>
> (4) The individual may appeal from the decision of the county board to the State Board.

[11] Although no party has raised it, we wonder whether, if the contract at issue is the Unions' agreement with the school district, Maryland (as opposed to federal) law governs such a claim in the first place. *See Taylor v. Giant of Maryland, Inc.*, 423 Md. 628, 643-44 (2011).

Id. The Court of Appeals has held that the State Board of Education has *primary* jurisdiction over controversies arising under ED §6-202, *Arroyo v. Board of Educ. of Howard Cnty.*, 381 Md. 646, 663 (2004), as opposed to *exclusive* or *concurrent* jurisdiction:

> *First,* [an] administrative remedy may be *exclusive,* thus precluding any resort to an alternative remedy. Under this scenario, there simply is no alternative cause of action for matters covered by the statutory administrative remedy.
>
> *Second,* [an] administrative remedy may be *primary but not exclusive.* In this situation, a claimant must invoke and exhaust the administrative remedy, *and seek judicial review of an adverse administrative decision, before a court can properly adjudicate the merits of the alternative judicial remedy.*
>
> *Third,* [an] administrative remedy and the alternative judicial remedy may be *fully concurrent,* with neither remedy being primary, and the plaintiff at his or her option may pursue the judicial remedy without the necessity of invoking and exhausting the administrative remedy.

Id. at 662 (quoting *Zappone v. Liberty Life Ins. Co.*, 349 Md. 45, 60-61 (1998)) (emphasis in original). The Court in *Arroyo* held that the Education Article established administrative appeal to the State Board as the primary, rather than the exclusive or concurrent, avenue for recourse. *Id.* at 663. But the Court also held that while a circuit court cannot adjudicate related claims prior to the agency determination on a primary remedy, it can *accept* those claims:

> [C]ases where the administrative remedy is primary, and there are alternative independent judicial remedies available, the alternate judicial remedy may not be resolved *(although the*

> *action can be brought and stayed)* prior to the exhaustion of the administrative remedy, *i.e.,* the final agency determination.

Id. at 667 (emphasis added).

This calculus might counsel in favor of saving Mr. Mua's breach of contract claim—if he had not already filed a wrongful termination count on the exact same set of facts in the federal district court. But this fact, and the fact that the wrongful termination count was dismissed with prejudice by the federal court, bars Mr. Mua's claim under the doctrine of *res judicata*:

> If [a] second suit is between the same parties and is upon the same cause of action [as a prior suit], a judgment in the earlier case on the merits is an absolute bar, not only as to all matters which were litigated in the earlier case, but as to all matters which could have been litigated (res judicata).

MPC, Inc. v. Kenny, 279 Md. 29, 32 (1977) (quoting *Sterling v. Local 438*, 207 Md. 132, 140 (1955)). *MPC, Inc.* lays out the "same evidence test" to determine whether the claims in a second case between the same parties falls under the heading of "matters which could have been litigated" in the first case. *Id.* at 33. Later cases changed the "same evidence test" to the slightly distinct "transactional test." *Anne Arundel Cnty. Bd. of Educ. v. Norville*, 390 Md. 93, 109 (2005). The Court if Appeals held in *Norville* that under this approach, "if the two claims or theories are based upon the same set of facts and one would expect them to be tried together ordinarily, then a party must bring them simultaneously." *Id.*

Norville, like this case, concerned a Board of Education employee who filed several suits after he was let go. *Id.* at 98-99. In that case, the former employee grounded his first

cause of action (at federal court) in several different theories of relief as a result of his termination. *Id.* at 99-100. After he was unsuccessful in his first case, the employee filed a second case at the circuit court, claiming once more that he was owed relief as a result of his termination, and arguing a couple of new theories that could have been raised in the first case. *Id.* at 101. The Court of Appeals held that this second case was barred by *res judicata*:

> Inasmuch as both of the arguments advanced by Norville arise out of the same set of facts, they form "the basis of the litigative unit or entity which may not be split." *Kent Cnty. y Bd. of Educ. v. Bilbrough,* 309 Md. 487, 498 (1987) (quoting Restatement (Second) of Judgments § 24 cmt. a (1982)). By splitting theories applicable to the same case, Norville seeks a second bite at the apple in the Maryland court system, which res judicata does not permit.

Id. 111-112.

Here, as in *Norville*, a terminated employee cannot expect two bites at the same apple. Mr. Mua cannot turn to the circuit court on a breach of contract theory when he could have and should have brought that claim with his wrongful termination suit at the federal court.

2. Mr. Mua's Count For Violation Of Maryland's Whistleblower Protection Act Did Not State A Claim.

Mr. Mua's whistleblower claim did not draw the required causal connection with sufficient specificity, and therefore was properly dismissed. The Maryland Whistleblower Protection Act states, in relevant part:

> [A] supervisor, appointing authority, or the head of a principal unit may not take or refuse to take any personnel action as a reprisal against an employee who:

> (1) discloses information that the employee reasonably believes evidences:
>
> (i) an abuse of authority, gross mismanagement, or gross waste of money;
>
> (ii) a substantial and specific danger to public health or safety; or
>
> (iii) a violation of law

Md. Code (1993, 2009 Repl. Vol.), §5-305 State Personnel and Pensions Article. As with all complaints, an employee seeking relief under the Act must file a claim with "a clear statement of the facts necessary to constitute a cause of action." Md. Rule 2-305. Furthermore "any ambiguity or want of certainty in [the] allegations must be construed against the pleader." *Read Drug & Chemical Co. of Baltimore City v. Colwill Const. Co., Inc.*, 250 Md. 406, 416 (1968). Finally, the employee must demonstrate "a causal connection between the disclosure and the adverse personnel action." *Lawson v. Bowie State University*, 421 Md. 245, 257 (2011) (citing *Dep't of Natural Resources v. Heller*, 391 Md. 148, 170 (2006)). All told, then, an employee filing a Whistleblower Protection Act claim must allege facts that, if taken as true, connect the causal dots between the protected behavior and adverse employment consequences.

Mr. Mua claimed in his Second Amended Complaint that he "reported abuses of authority, gross mismanagement, and gross waste of money by PG School personnel," and that he "exposed illegal hiring practices which involved nepotism and other irregularities." He further claimed that "as a result of his protected activity, the plaintiff was terminated from his position as a public school employee." But his factual allegations hint only

ambiguously at the conclusion he draws. He claims to have reported abuses and waste over the course of 2006-2009. He does not claim to have exposed any wrongdoing—other than his own mistreatment—for roughly the last eight months he was employed. He ultimately blames his termination not on his alleged exposure of wrongdoing, but on the two vindictive supervisors that, he claims, began giving him negative reviews and sabotaging his work-product after he exposed their romantic relationship. The link between Mr. Mua's earlier protected activity and his termination, if it exists at all in this version of events, was broken by his non-protected dispute with his supervisors, and thus is too attenuated to serve as the causal link for a Whistleblower Protection Act claim.

3. Mr. Mua's Unjust Enrichment Claim Fails To State A Claim.

Count nine presents a straightforward failure to state a claim. Mr. Mua alleges that he was a dues-paying, card-carrying member of ACE-AFSCME, Local 2250 (the "Local"), and ACE-AFSCME International ("International"), that his membership entitled him to legal representation, and that he received Local-funded counsel for at least part of his crusade. But Mr. Mua claims that he was later told by the Local to retain private counsel, and promised by them that he would be reimbursed. He also claims that at some later point, the Local's lawyers worked actively to frustrate his case. He sums up his unjust enrichment claim succinctly:

> [Unions] were unjustly enriched when they collected [Mr. Mua's] dues and failed to provide him fair representation.
>
> [Mr. Mua] conferred a benefit on [Unions, who] retained the benefit; and under the circumstances, [Unions'] retention of the monetary and other benefits is unjust.

The Court of Appeals has held that "unjust enrichment consists of three elements":

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

Hill v. Cross Country Settlements, LLC, 402 Md. 281, 295 (2007) (quoting *Berry & Gould, P.A. v. Berry*, 360 Md. 142, 151-52 (2000)). Mr. Mua's claim fails on this third prong. Under his version of the facts, he paid dues to the Unions, which the Unions do not dispute. Further, under Mr. Mua's version of the facts, he received some legal representation. Although Mr. Mua contends that the Unions ultimately did not represent him throughout his multitude of claims, and indeed later worked to frustrate his claims, those allegations are not relevant to the unjust enrichment calculus. The only question is whether or not the Unions paid the value of the benefit Mr. Mua conferred. Under this set of facts, Mr. Mua would have to allege that he received less than the legal representation to which his dues entitled him and that the Unions inequitably retained a benefit as a result. He has failed to do so, and thus, has failed to state a claim.

4. Mr. Mua's Conspiracy Claims Were Properly Dismissed.

Mr. Mua's first conspiracy count, his wrongful termination conspiracy, does not state a claim upon which relief can be granted. To make out a claim for civil conspiracy, a party must allege

1) A confederation of two or more persons by agreement or understanding;

2) Some unlawful or tortious act done in furtherance of the conspiracy or use of unlawful or tortious means to accomplish an act not in itself illegal; and

3) Actual legal damage resulting to the plaintiff.

Lloyd v. General Motors Corp., 397 Md. 108, 154-55 (2007) (quoting *Van Royen v. Lacey*, 262 Md. 94, 97-98 (1971)). According to Mr. Mua's Second Amended Complaint, the Board, the Officials, and the Unions (1) "worked in conjunction with the other defendants to deny [Mr. Mua] protection [afforded by] the employment contract;" (2) agreed that the Unions "would not substantively oppose [Mr. Mua's] termination;" (3) "conspired to deny [Mr. Mua] was a member of [Unions];" and (4) "conspired not to introduce important evidence to the court and to mislead the court." Each of these claims falls short on the face of the Complaint. Mr. Mua makes the allegations in (1), (2), and (4) out of the blue—he does not allege any facts supporting these conclusions elsewhere in the body of the Complaint. The only mention of this conspiracy among the appellees appears in summary fashion in this count of the Complaint. These claims fail under Maryland Rule 2-503 and *Read Drug & Chemical Co.*, for the same reasons that Mr. Mua's whistleblower claim failed. 250 Md. at 416.

Allegation (3) is not itself, nor does it require, tortious conduct as it is presently stated. In a vacuum, there is nothing nefarious about denying that Mr. Mua is or was a member of a union. This claim therefore fails the second prong of the *Lloyd* test. Without

the requisite sufficiency, and without the necessary underlying tortious conduct, respectively, Mr. Mua has failed to state a claim for conspiracy.

Mr. Mua's second conspiracy claim, the conspiracy to withhold his property, was properly dismissed under collateral estoppel principles. Mr. Mua tried this claim before, and failed, in his replevin action in the District Court for Prince George's County. *Mua v. Bd. of Education of Prince George's Cnty*., Case No. 050200018872012. Stretching this argument somewhat, Mr. Mua's second conspiracy claim also would be barred under collateral estoppel if the underlying tort were found not to have taken place. *See Alleco, Inc. v. Harry & Jeanette Weinberg Foundation, Inc.*, 340 Md. 176, 189-91 (1995) ("This Court has consistently held that "'conspiracy' is not a separate tort capable of independently sustaining an award of damages in the absence of other tortious injury to the plaintiff." (quoting *Alexander v. Evander*, 336 Md. 635, 645 n.8 (1994))); *see also Lloyd*, 397 Md. at 154-55 (holding that in addition to demonstrating a "confederation" of conspirators, a claim for civil conspiracy requires a showing of "some unlawful or tortious act done in furtherance of the conspiracy or use of unlawful or tortious means to accomplish an act not in itself illegal." (quoting *Van Royen*, 262 Md. at 97-98)). In light of the district court's decision that Mr. Mua's property was not withheld, his claim for conspiracy to withhold that property cannot stand.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.