Circuit Court for Montgomery County
Case No.: 119470-FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0015

September Term, 2016

SPENCER M. HECHT

v.

JENNIFER L. HECHT

Beachley,
Shaw Geter,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: July 12, 2017

This is an appeal from a Judgment of Absolute Divorce of the Circuit Court for Montgomery County granted to appellant Spencer M. Hecht and appellee Jennifer Lynn Hecht. Appellant was ordered by the court to pay indefinite alimony to appellee, as well as her attorney's fees, amongst other things.

Appellant presents two questions for our consideration:

1) Did the trial court abuse its discretion when it awarded Appellee eleven thousand dollars per month in indefinite alimony after finding that she was self-supporting following a six-year marriage?

2) Did the trial court abuse its discretion in awarding appellee three hundred thousand dollars in additional counsel fees when all fees had been satisfied through trial by either appellant or marital funds?

For the reasons set forth below, we answer both questions in the negative and affirm the decision of the circuit court. Because we affirm the order of the circuit court, we will not address appellee's conditional cross-appeal.[1]

BACKGROUND

Appellant Spencer M. Hecht and appellee Jennifer L. Hecht were married in September of 2007. The parties have two minor children.

On May 7, 2014, appellee filed a Complaint for Absolute Divorce in the Circuit Court for Montgomery County, in which she contended appellant had committed adultery. Relevant to these proceedings, appellee requested indefinite alimony, custody, child support, and reasonable attorney's fees. Appellant filed an answer to the complaint,

[1] Appellee indicated in her brief that, if this Court "affirms alimony and attorney's fees, Ms. Hecht asks the court to pass over her conditional cross-appeal and affirm the entire judgment." Accordingly, we shall consider her cross-appeal withdrawn.

denying appellee's allegations, as well as a counter-complaint for limited divorce, custody and access, in which he requested, *inter alia*, reasonable attorney's fees and child support.

On October 23, 2014, a *pendente lite* hearing was held, where the magistrate made oral findings and recommendations that appellant pay child support and make alimony payments. Appellant filed exceptions to the report and recommendations, which appellee opposed. On December 11, 2014, the exceptions came before the circuit court, which granted appellant's exceptions regarding access, but denied his exceptions regarding his required payments. The parties, thereafter, filed a consent order agreeing to share legal and physical custody of the children.

The parties' divorce proceedings began on August 17, 2015. After five days of testimony, the court took the matter under advisement and directed the parties to file proposed findings of fact and conclusions of law. On November 5, the trial court issued its oral opinion and ruling, granting appellee's complaint for absolute divorce based on the parties' one-year voluntary separation. Relevant to these proceedings, the court also ordered appellant to pay $11,000 a month in indefinite alimony and $300,000 for appellee's attorney's fees.

In awarding alimony, the court found that, at the time of trial, appellant was earning approximately $1,021,348 a year at his firm, Hecht & Associates, and would likely continue to earn that amount. Appellee was earning approximately $115,794 a year as Vice President of Sales, Marketing and Business Development at Bennet

Communications, which the court found would likely remain stable. In making its decision, the trial court addressed all of the statutory factors found in Md. Code (1984, 2012 Repl. Vol.), § 11-106 of the Family Law Article ("FL") regarding alimony, which included the parties' incomes, their respective standards of living, their earning capacities, and the reason for their estrangement. Ultimately, the court found that there would be an "unconscionable disparity" in the parties' respective standards of living after the divorce. It held that "the Hechts lived a high life when together, but the plaintiff cannot achieve and maintain that lifestyle that she had with her husband, without alimony," and, therefore, ordered appellant to pay $11,000 monthly in indefinite alimony.

With respect to attorney's fees, after considering the financial resources and financial needs of both parties, the court specifically stated that appellant "caused the [appellee] to expend a lot more money than would be reasonable, even in a hotly contested divorce case." Thereafter, finding that appellant had the ability to pay, the court ordered appellant to pay $300,000 of appellee's attorney's fees.

This appeal followed.

STANDARD OF REVIEW

"An alimony award will not be disturbed on appellate review unless the trial judge's discretion was arbitrarily used or the judgment below was clearly wrong." *Tracey v. Tracey*, 328 Md. 380, 385 (1992) (internal citations omitted). "This standard implies that appellate courts will accord great deference to the findings and judgments of

trial judges, sitting in their equitable capacity, when conducting divorce proceedings." *Id.* (internal citations omitted).

DISCUSSION

I. The circuit court did not abuse its discretion or commit clear error in awarding appellee monthly alimony in the amount of $11,000 monthly.

"A trial court has broad discretion in awarding alimony, which may include both rehabilitative and indefinite components." *Innerbichler v. Innerbichler*, 132 Md. App. 207, 246 (2000). Family Law § 11-106(b) of the Maryland Code lists "all the factors" a court is required to consider for "a fair and equitable award," including:

> (1) The ability of the party seeking alimony to be wholly or partly self-supporting;
>
> (2) The time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment;
>
> (3) The standard of living that the parties established during their marriage;
>
> (4) The duration of their marriage;
>
> (5) The contributions, monetary and nonmonetary, of each party to the well-being of the family;
>
> (6) The circumstances that contributed to the estrangement of the parties;
>
> (7) The age of each party;
>
> (8) The physical and mental condition of each party;
>
> (9) The ability of the party from whom alimony is sought to meet that party's needs while meeting the needs of the party seeking alimony;
>
> (10) Any agreement between the parties;
>
> (11) The financial needs and financial resources of each party, including:

i. All income and assets, including property that does not produce income;

ii. Any award made under §§ 8-205 and 8-208 of this article;

iii. The nature and amount of the financial obligations of each party; and

iv. The right of each party to receive retirement benefits; and

(12) Whether the award would cause a spouse who is a resident of a related institution as defined in § 19-301 of the Health-General Article and from whom alimony is sought to become eligible for medical assistance earlier than would otherwise occur.

Md. Code § 11-106(b). The statute provides that, generally, an award of alimony shall be temporary, and "[a]t the conclusion of the period of the award of alimony, no further alimony shall accrue." However, Section 11-106(c) allows a "court [to] award alimony for an indefinite period, if the court finds that…even after the party seeking alimony will have made as much progress toward becoming self-supporting as can reasonably be expected, the respective standards of living of the parties will be unconscionably disparate."

"[U]nconscionable economic disparity is more than a numerical calculation." *Innerbichler*, 132 Md. App. at 248 (citing *Ware v. Ware*, 131 Md. App. 207, 229 (2000)). "To be unconscionable, the disparity in the post-divorce standards of living must work a 'gross inequity,' or create a situation in which one spouse's standard of living is 'so inferior, qualitatively or quantitatively, to the standard of living of the other as to be morally unacceptable and shocking to the court.'" *Whittington v. Whittington*, 172 Md. App. 317, 339 (2007) (internal citations omitted). "The Court of Appeals consistently

has declined to adopt 'a hard and fast rule regarding any disparity' in income for purposes of awarding indefinite alimony." *Innerbichler*, 132 Md. App. at 248 (citing *Crabill v. Crabill*, 119 Md. App. 249, 266 (2000)). "Each case depends upon its own circumstances 'to ensure that equity be accomplished.'" *Id.*

Consequently, "economic 'self-sufficiency per se does not bar an award of indefinite alimony if there nonetheless exists an unconscionable economic disparity in the parties' standard of living after divorce.'" *Innerbichler*, 132 Md. App. at 248 (quoting *Tracey v. Tracey*, 328 Md. 380, 392-93 (1992)). "The determination of unconscionable disparity 'requires the application of equitable considerations on a case-by-case basis, consistent with the trial court's broad discretion in determining an appropriate award.'" *Id.* (internal citations omitted).

"[A] trial court's determination of unconscionable disparity under F.L.§ 11-106(c) is a question of fact," which we review under the clearly erroneous standard. *Innerbichler*, 132 Md. App. at 246-47. "When the trial court's findings are supported by substantial evidence, the findings are not clearly erroneous." *Id.* at 230.

Appellant contends that the court inadequately addressed the factors found in F.L. § 11-106, and, as a result, the court "abused its discretion in granting any amount of alimony to [a]ppellee." He argues that the court based its finding of "unconscionable disparity strictly on the disparity between the parties' post-divorce" incomes. According to him, "[w]hen dealing with an award of alimony, the goal is to render the party seeking alimony [to be] self-supporting so as to vitiate any further need for alimony," and

because appellee is self-supporting, the award of alimony was error. Moreover, he contends, "[t]here is nothing in the record that supports a finding that the living standards of the parties would be 'unconscionably disparate' post-divorce absent an award of alimony in any amount." Finally, he contends that the award of alimony was a punitive measure based on appellant's role in the estrangement of the parties.

Appellee, conversely, argues that the court properly considered all of the factors in F.L. § 11-106, including the parties' standard of living prior to the divorce, appellee's contributions to appellant's firm, and the disparity between the parties' incomes post divorce. Moreover, appellee argues that the court's consideration of appellant's affair does not mean the award was punitive, rather, it was "a required consideration for the court to do equity."

In arguing that the record is devoid of evidence of an unconscionable disparity, appellant relies on *Hart v. Hart*, in which this Court found that "[j]ust as it is error to deny a request for indefinite alimony 'without explicitly discussing the disparity issue,' so too is it error to grant such a request without explicitly discussing the disparity issue," to support his proposition. *Hart v. Hart*, 169 Md. App. 151, 170 (2006) (internal citations omitted). The trial court in *Hart* had awarded both rehabilitative and indefinite alimony. The husband challenged the award of indefinite alimony on two grounds: first, he argued that his former wife could become self-supporting in two years, and therefore an award of alimony was not warranted as a matter of law; and second, that the trial judge

had failed to find that their respective standards of living would be unconscionably disparate.

In addressing Hart's first challenge, we found that, becoming self-supporting "would not preclude an award of indefinite alimony." *Hart*, 169 Md. App. at 169. We found that Hart "misconstrue[d] the purpose of indefinite alimony, which he apparently believes to be [to] help the financially dependent spouse become 'self-supporting.'" *Id.*

With Hart's second challenge, we stated that, "[a]lthough the evidence cited by [wife] may well support" a finding of unconscionable disparity, the granting of indefinite alimony was in error because "the court did not make any findings as to what the parties' respective standards of living would be…much less decide whether [wife's] would be unconscionably lower than" the husband's. *Hart*, 169 Md. App. at 170 (internal citations omitted). It is thus clear, from *Hart* as well as F.L. § 11-106, that the court in the present case appropriately held that appellee's being self-supporting did not preclude the award of indefinite alimony.

We also disagree with appellant's second contention that the court inadequately addressed the F.L. § 11-106 factors. The court, in its oral ruling on November 5, addressed each of the applicable factors found in § 11-106, noting its findings of fact. It held that appellee was self-supporting and in a stable job, that the marriage had lasted "eight years and two months," and that "[b]oth parties contributed to the well-being of the family." It found that appellee had "contributed substantially" to appellant's business

by "generating [the] goose that's laying a lot of golden eggs" with the firm's internet presence. It continued:

> "The ability of the party from whom alimony is sought to meet the party's needs while meeting the needs of the party seeking alimony. I will get to that, but I have considered it. Any agreement between the parties. I just considered the custody order…and what the defendant had agreed to in court…Number 11, the financial needs and financial resources of each party. I've considered all of the subsections of 11, which are a, b, c, and d."

The court examined the parties' needs and resources and found that the parties had a very high standard of living while married. "The Hechts enjoyed all the trappings which accompany life on easy street:" "[t]hey lived in an expensive Potomac home, drove luxury cars, took lavish vacations, had a nanny, and joined Woodmont Country Club." Finally, the court stated it had "heavily" weighed the circumstances that contributed to the estrangement of the parties, though clarifying that the court had

> "certainly weighed everything, so no one's confused, and I weigh that heavily because we're not here if you don't have that. But I did consider the usefulness, I've considered everything."

The court detailed appellant's role in the estrangement of the parties, including the mistreatment of his wife and his extra-marital affair. Ultimately, the court held:

> "I find that the plaintiff's income is approximately 11 percent of the parties' total income, and the defendant, and there again I'm talking about the 13 section and the alimony section, which deals with (d), even after the party seeking alimony will have made as much progress towards becoming, the standard of living will be unconscionably disparate. I find that the plaintiff's income is approximately 11 percent of the parties' total income, and the defendant's is approximately 89 percent. **I find that without alimony payments, the respective living standards of the parties will be unconscionably disparate**. **The [appellant's] income of $115,749 will remain pretty much constant. I find that the [appellant] will continue to be able to earn in the neighborhood of $1 million. The Hechts lived**

> **a high life when together, but the plaintiff cannot achieve and maintain that lifestyle that she had with her husband, without alimony. I have considered the parties' expenses and debts…I have considered all the statutory factors for alimony, weighed and compared and contrasted and weighted them, with each and every factor, and every factor in the monetary award**."

As a result, we find the court did sufficiently analyze the required factors and, thus, did not err in this regard.

Appellant further contends that "[l]ooking at [the respective expenses of the parties as reflected on their financial statements]…no one can say that [a disparity] exist[s] between the parties post-divorce." Appellant relies on *Lee v. Andochick*, in which this Court held that the trial court had erred in awarding indefinite alimony when the requesting spouse had failed to establish "that her post-divorce standard of living would be unconscionably disparate to that of [husband] without the grant of indefinite alimony." 182 Md. App. 269, 289 (2008). Appellee, however, argues that, as evidenced in her financial statement, absent the award of alimony, she would be unable to afford post-divorce the standard of living she had acquired throughout the marriage.

In *Lee*, we first noted that the trial court had failed to explicitly find an unconscionable disparity in the parties' respective standards of living, and therefore, the court had committed error in awarding indefinite alimony. This failure was "especially problematic in this case because…'[t]he husband's overall financial ability to support (and not merely his current income)' is one of the controlling factors in determining whether an award of alimony should be made." *Id.* at 288. There, the court had previously found that given husband's personal living expenses, he would be financially

unable to pay the combined "alimony, child support, and school tuition" awarded by the court. *Id.* at 284. We stated:

> "even if the trial judge impliedly made a finding of unconscionable disparity in the standards of living of the two litigants…reversal would still be required because [the requesting party] did not meet her burden of producing evidence to support a finding that post-divorce the living standards of the parties would be unconscionably disparate."

Id. at 288. Appellee had "not testif[ied] as to anything that would be missing from her [married] lifestyle," "[n]or did she provide evidence…that could conceivably lead to the conclusion that her post-divorce standard of living would be unconscionably disparate to that of" her former husband. *Id.* at 289. We held that, because the requesting spouse had only established a "disparity in percentages of gross income," and only a "relatively small deficit" of $10,000 a year, the award should be reversed.

The instant case is distinguishable in several ways. Importantly, we have already established that the trial court did explicitly find an unconscionable disparity in their future standards of living, and that the court attributed this disparity to appellee's inability to maintain her standard of living without alimony, after considering all of the relevant factors in F.L. § 11-106(b).

We have previously stated that in determining whether there will be a post-divorce unconscionable disparity in the parties' standards of living, "the court must 'project [] forward in time to the point when the requesting spouse will have made maximum financial progress, and compar[e] the relative standards of living of the parties at that

future time.'" *Whittington v. Whittington*, 172 Md. App. 317, 338 (2007) (internal citations omitted).

As the lower court held, and as appellant admits, appellee earns, and will likely continue to earn, around $115,000 a year in income and has around $180,000 in expenses a year, for a deficit of $65,000 a year. He argues appellee receives a "windfall" with the $72,000 a year in child support, making appellee's income a total of $192,000 a year, for a surplus of $12,000 a year.[2] By contrast, the court found that appellant makes, and will continue to make, around $1,000,000 a year in income. Subtracting the $72,000 he will pay annually in child support, $100,000 he will pay for three years[3] for appellee's attorney's fees, $150,000 he claims he owes to his own counsel, $132,000 he will pay annually in alimony, $8,712 annually for tuition until the child enters public school, $2,028 annually for the children's insurance, and his own expenses, which he estimates at around $26,000 a month, or $312,000 annually, he still has a surplus of around $223,260 a year, which is more than enough to establish his ability to pay.

Appellee did produce evidence of their standard of living attained during the marriage, which was markedly different from their prior lifestyle. As the trial court stated, they "enjoyed all the trappings which accompany a life on easy street," but that

[2] We note that child support is for the support of the child, and is not considered income for the parent. "In making an award of child support, it is for the trial judge to set an amount reasonably calculated to maintain as nearly as possible the standard of living enjoyed by the child prior to the parents' divorce." *Petrini v. Petrini*, 336 Md. 453, 460 (1994).

[3] $50,000 every six months to total $300,000. Addressed further below.

appellee "cannot achieve and maintain that lifestyle that she had with her husband, without alimony," in conjunction with the other factors addressed by the court. In addition, appellee's income, which the court found would remain stable, is 11% of appellant's income without considering the child support payments, 19.7% of his income including child support payments. Though a discrepancy in income does not itself establish an unconscionable discrepancy, "gross disparities in income levels frequently have been found unconscionable, and have supported the award of indefinite alimony." *Innerbichler v. Innerbichler*, 132 Md. App. 207, 248 (2000) (quoting *Crabill v. Crabill*, 119 Md. App. 249, 266 (1998)). As we stated in *Innerbichler v. Innerbichler*,

> "In this case, it is readily apparent that the court's decision was not based simply on a mathematical computation. Rather, the court made a careful analysis of the various equitable considerations."

Id. In the present case, it is clear that the court considered a multitude of factors in making its finding of a gross disparity in income, and, ultimately, an unconscionable disparity in standards of living.

Appellant also argues that the court's alimony award was a punitive measure. "[I]t is hard to imagine more punitive language in the context of an alimony award," he states, than the court's discussion of appellant's role in the estrangement of the parties. "[T]here can be no question that the plain language of the trial court's ruling as to alimony was punitive in nature and must be reversed." He takes issue with the court's "misunderstand[ing] [of] the timeline of the parties' marriage" and his affair. In his Reply Brief, conversely, he argues that it is "contrary to the law" to "suggest that [his]

affair was relevant to the divorce litigation," because, he contends, the court did not find that he caused the estrangement of the parties.

"[A]limony is 'never a punitive measure." *Welsh v. Welsh*, 135 Md. App. 29, 38 (2000) (internal citations omitted). "Adultery is merely one factor to be considered when the court addresses an award of alimony in determining the circumstances that contributed to the breakup of the marriage." *Id.*

In the present case, the court found that appellant's "continuous pursuit of hedonistic extracurricular activities undermined the marriage's foundation." "Mr. Hecht lacked respect for his wife, demeaned her, and violated his marital vows." The trial court rejected appellant's timeline of the affair, and its relation to the breakdown of the marriage, finding appellant's testimony "evasive and misleading."[4]

The court's finding that appellee attempted to "stand by her man" does not, as appellant contends, undermine its later finding that she "wouldn't[] get over his adulterous affair," or the role the affair played in the estrangement of the parties. Nor was the court clearly erroneous for finding appellant responsible for the dissolution of the marriage. "The trial court is in the best position to observe the witnesses and judge their credibility; as we see it, the court's analysis of the deterioration of the parties' relationship was not clearly erroneous." *Welsh v. Welsh*, 135 Md. App. 29, 39 (2000); *see also* Maryland Rule 8-131(c).

[4] Appellant also argues in his Reply that "the trial court did not find that Mr. Hecht lacked credibility," and that, therefore, *Bryant v. Bryant*, 220 Md. App. 145 (2014), is inapposite. We disagree.

As we stated in *Bryant v. Bryant*, "[t]he fault that destroyed the marital relationship can be considered [as an element of an award]…and that is all the court did here." 220 Md. App. at 167 (internal citations omitted). "The court acted well within its discretion in finding…that he was at fault…for the relationship's breakdown." *Id.* at 168. "These decisions might have had a detrimental *effect* (in Husband's view) on the overall outcome, but the court's reasons were appropriate under the law." *Id.*

In the case at bar, the trial court's discussion of the parties' income discrepancies and appellant's role in the estrangement of the parties, therefore, was both logically and statutorily framed. The court did not solely consider these factors, but further analyzed many factors in making its decision. The court's award was rooted in its factual findings and required statutory analysis. Given the above, we find the court's award was not punitive, clearly erroneous, nor an abuse of discretion.

II. The trial court did not abuse its discretion or commit clear error when it awarded appellee counsel fees and costs.

The final issue before this Court is the trial court's award to the appellee of $300,000 in attorney's fees. Maryland Code, F.L. § 11-110 allows a court to "order either party to pay the other party an amount for the reasonable and necessary expense of prosecuting or defending the proceeding." "Before ordering the payment [of attorney's fees]," however, the statute requires the court consider:

(1) The financial resources and financial needs of both parties; and

(2) Whether there was substantial justification for prosecuting or defending the proceeding.

Maryland Code, F.L. § 11-110; *see also* Maryland Code, F.L. § 12-103(b)[5].

Appellant admits that there was substantial justification in prosecuting and defending the proceeding. Appellant also conceded "[f]or purposes of this appeal" that "he caused his [ex-wife] to expend more money than would be reasonably necessary even in a hotly contested divorce."[6] Appellant, however, contends that "the failure to analyze" appellee's need for an award of attorney's fees "constitutes reversible error." He argues appellee had sufficient funds from the awards of the divorce from which she could pay her own attorney's fees, and had in fact already paid them. Appellee argues that, because she "struggl[ed] [to] pay ongoing attorney's fees, she had to sacrifice most of her share of the proceeds from the sale of the marital home" to pay her fees, whereas appellant "paid his attorney['s] fees from the funds he held in the firm."

"The decision of whether to award attorney's fees is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *Ware v. Ware*, 131 Md. App. 207, 242 (2000). But "[f]ailure of the court to consider the statutory criteria [found in F.L. § 11-110 or § 12-103] constitutes legal error." *Malin v. Mininberg*,

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[5] Maryland Code, F.L. § 12-103(b) states: "Before a court may award costs and counsel fees under this section, the court shall consider:

(1) The financial status of each party;
(2) The needs of each party; and
(3) Whether there was substantial justification for bringing, maintaining, or defending the proceeding.

[6] Appellant denies this concession in his Reply brief, and instead argues that appellee caused the most expenses.

153 Md. App. 358, 435 (2003) (internal citations omitted). "If," however, "the court gives proper consideration to the statutory factors and the circumstances of the case, an award of attorney's fees will not be reversed 'unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong.'" *Henriquez v. Henriquez*, 185 Md. App. 465, 476 (2009) (internal citations omitted).

In the instant case, the court began its ruling "[w]ith respect to the attorney's fees and costs," by stating that, while "the [c]ourt is empowered to grant reasonable and necessary expenses," it "must [first] consider the financial resources and financial needs of both parties, which I have, and whether there was substantial justification for prosecuting or defending the proceedings." Finding that appellant "caused [appellee] to expend a lot more money than would be reasonable, even in a hotly contested divorce case," the court concluded that appellee's attorney's fees totaled $416,360.00.[7] The court continued that:

> "probably the main consideration is the position [appellant] is in with his successful firm, and basically a limitation on the income of the plaintiff."

"And the court having considered all of the considerations," the court awarded appellee attorney's fees and costs, "either being reimbursed or new costs."

[7] Appellant, in his brief, states that "the issue on appeal related to the award of attorney's fees has nothing to do with the amount billed by [a]ppellee's counsel, the reason for the billing, the rate at which [a]ppellee was billed during the proceedings, whether [a]ppellant has the ability to pay for [a]ppellee's counsel fees, or whether there was substantial justification for prosecuting and defending the divorce." He also concedes that the court's finding of appellee's attorney's fee was "corroborated by the invoices that were received into evidence."

We do not find that this was arbitrary or an abuse of discretion. The court has ample discretion to award, or *reimburse*, for attorney's fees. *See Henriquez v. Henriquez*, 185 Md. App. 465, 476 (2009) (holding that the court may "in its discretion and after considering the requisite statutory factors, award reasonable attorney's fees in a case where a party is represented by a non-profit legal services organization, or a pro bono attorney, irrespective of whether a fee agreement exists between the client and the attorney"). As addressed previously, the court was fully aware of the parties' respective finances. Moreover, the court explicitly addressed its consideration of the statutory factors. Therefore, having found that appellant had caused appellee to "expend a lot more money than would be reasonable," we cannot say that the court's discretion was exercised "arbitrarily or [that] the judgment was clearly wrong."

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.