Circuit Court for Anne Arundel County
Case No. 02-C-14-191136

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 623

September Term, 2015

ESTATE OF PETER A. CASTRUCCIO

v.

SADIE M. CASTRUCCIO, *et al.*

Arthur,
Leahy,
Friedman,

JJ.

Opinion by Leahy, J.

Filed: July 11, 2017

This marks the fourth in a series of appeals to this Court stemming from the administration of the estate of Dr. Peter Adalbert Castruccio following his death in 2013.[1] In this case, Dr. Castruccio's widow, Sadie Castruccio (also "Appellee"), sought the removal of John Greiber, Jr., (Dr. Castruccio's longtime friend and attorney) as special administrator of Dr. Castruccio's estate ("Appellant" or "Estate"), based on Mr. Greiber's submission to probate of a codicil to the Register of Wills for Anne Arundel County. Mrs. Castruccio alleged that Mr. Greiber knew that the codicil's witnesses did not sign in Dr. Castruccio's presence, and that the codicil was, therefore, defectively executed. The Circuit Court for Anne Arundel County granted the Estate summary judgment and attorney's fees as sanctions against Mrs. Castruccio and her counsel, Kenneth B. Frank and Ronald H. Jarashow.

Mrs. Castruccio then filed a timely motion to alter or amend, which Messrs. Frank and Jarashow joined. The circuit court granted the motion with respect to the attorney's fees, but it left the summary judgment in place. Mrs. Castruccio then timely filed a notice of appeal containing some irregularities, and the Estate filed a cross-appeal. The Estate

[1] The first opinion, *Castruccio v. Estate of Peter Adalbert Castruccio*, No. 2622, September Term 2014, slip op. at 1 (filed Feb. 3, 2016), *cert. denied*, 447 Md. 298 (2016) ("*Castruccio I*") addressed the validity of several deeds conveying parcels of land from Dr. Castruccio and Mrs. Castruccio as tenants by the entirety to Dr. Castruccio alone. The second, *Castruccio v. the Estate of Peter Adalbert Castruccio*, 230 Md. 118, 128-29 (2016), *cert. granted*, 451 Md. 248 (2017) ("*Castruccio II*"), addressed the validity of Dr. Castruccio's will. The third, *Castruccio v. Estate of Peter A. Castruccio*, No. 862, September Term 2015, slip op. at 1 (filed December 20, 2016) ("*Castruccio III*") addressed contempt sanctions and awards of attorney's fees against Mrs. Castruccio and her attorneys, for the benefit of the Estate.

filed a motion to strike Mrs. Castruccio's notice of appeal, which the circuit court granted, whereupon Mrs. Castruccio filed a second notice of appeal beyond the 30-day appeal period from the court's judgment.[2]

The Estate presents the following questions for our review:

> 1. "Did the Circuit Court abuse its discretion in permitting Messrs. Frank and Jarashow to participate and obtain relief in post-judgment proceedings where neither timely filed a post-judgment motion on his own behalf after the Circuit Court entered adverse findings against each?"
>
> 2. "On a Motion to Alter or Amend, did the Circuit Court abuse its discretion by reversing its previous findings against a party and her two attorneys under Maryland Rules 6-141 and 1-341 because the Circuit Court had made an adverse ruling against the same party in a separate civil contempt action?"

Mrs. Castruccio, in turn, presents one question for our review, "Did the trial court err as a matter of law in granting summary judgment to the Estate on Mrs. Castruccio's Emergency Removal Petition?" Additionally, the Estate has filed a motion to dismiss, based on the putatively defective certificate of service attached to Mrs. Castruccio's original notice of appeal.

We deny the Estate's motion to dismiss and affirm the judgments of the circuit court. We conclude that the circuit court did not err in allowing Messrs. Frank and Jarashow to participate in the post-judgment proceedings, and we conclude that the circuit court properly granted summary judgment in favor of the Estate in a situation in which Mr. Greiber did not misrepresent material facts in the proceedings leading to his appointment

[2] This explains the odd procedural posture of this appeal, in which the Estate is the appellant and cross-appellee, Mrs. Castruccio is the appellee and cross-appellant, and Messrs. Frank and Jarashow are appellees.

and where there is no prejudice resulting from the submission of the Codicil to probate. We also hold that the circuit court should not have relied on facts outside the record in considering whether to grant the motion to alter or amend, but we cannot say that it was error for the court to decide not to award attorney's fees, especially in a situation in which it did not explicitly state the required factual basis upon which it was granting attorney's fees originally.

BACKGROUND

A. Dr. Castruccio's Will

We previously described the facts common to the cases that have spun off the Estate:

> Dr. Peter Castruccio died on February 19, 2013, at the age of 89. He had run various businesses over the decades and, with his wife of 60 years, owned numerous pieces of income-producing real estate. The couple had no children.
>
> John R. Greiber Jr. had been Dr. Castruccio's attorney for many years. In November 2010, Mr. Greiber deposited Dr. Castruccio's six-page will, dated September 29, 2010, for safekeeping with the register of wills. The will revoked all prior wills and codicils, including a 2008 will that Dr. Castruccio had signed.
>
> In February 2013, a week after Dr. Castruccio's death, Mr. Greiber petitioned the register of wills to probate the 2010 will and a brief codicil thereto. Soon thereafter, those documents were admitted to probate in the orphans' court.

Castruccio v. Estate of Peter Adalbert Castruccio, 230 Md. App. 118, 122 (2016), *cert. granted*, 451 Md. 248 (2017) ("*Castruccio II*").

In *Castruccio II*, we discussed and analyzed the circumstances surrounding the execution of the underlying will (the "Will"). Judge Arthur, writing for this Court,

described the Will, which Mr. Greiber drafted, in the following precise terms:

> A testator put his signature on page 5 of a six-page will that had consecutive pagination, consecutive paragraph-numbering, and a single, uniform font and typeface. The witnesses signed on page 6. The will's six pages may or may not have been physically attached to one another by a staple at the time of signing.

Id. at 122. More specifically,

> [t]he will's six pages are consecutively numbered as pages 1 of 6, 2 of 6, etc., through 6 of 6. After two brief, introductory paragraphs, the will contains 11, consecutively numbered "Items" or paragraphs, several of which contain consecutively numbered subparagraphs. The font and type-size are consistent throughout the document.
>
> On page 5 of 6 of the will, Dr. Castruccio signed his name. A few spaces below the signature, the following words appear: "SIGNED, SEALED, PUBLISHED AND DECLARE [sic], BY PETER ADALBERT CASTRUCCIO."
>
> Farther down, the last two lines of page 5 of 6 read: "The above named individual, does declare for his Last Will and Testament this instrument, have hereunto subscribe[d] to have witness[ed] on the date **last mentioned above**, and at the location, and [. . . .]" (Bold in original.) Below that awkward language appears the pagination, which reads "5 of 6."
>
> The next, and last, page appears to be a continuation of the language at the bottom of page 5 of 6, because it is not separated from that language by a period, semi-colon, or other punctuation mark. It reads: "I do hereby attest that the testator to be [sic] of sound mind, fully able to understand this instrument, and the testator voluntarily and freely did sign same." Below these words are the names, printed and signed, of Mr. Greiber; his daughter, Samantha Greiber; and Darlene Barclay's daughter, Kim Barclay. No other text appears on that last page other than the pagination, which, in culmination of the sequence of pages before it, reads "6 of 6."

Id. at 123.

The Will provided for cash bequests of $800,000.00 to Darlene Barclay (an employee and office manager who had worked for Dr. Castruccio for several decades),

$100,000.00 to Adriana Lanata, and $100,000.00 to Ernest Stinchcomb, Jr. [3] *Id.* at 122-23; *Castruccio I*, slip op. at 2. Item 8 of the Will provided for the "rest and remainder of [his] Estate" to go to his wife, Mrs. Castruccio, "should she one, survive [him] and two provided she had made and executed a Will prior to [his] death." *Castruccio II*, 230 Md. App. at 122-23. However, Item 10 of the Will provided that, if Mrs. Castruccio did not have a valid will filed with the Register of Wills of Anne Arundel County before his death, the rest and residue of his property would go to Darlene Barclay.[4] At the time of Dr. Castruccio's death, Mrs. Castruccio had not filed a will with the Register of Wills. *Id.* at 124. Importantly, the Will nominated Mr. Greiber to serve as personal representative. Mr. Greiber; his daughter, Samantha Greiber; and Darlene Barclay's daughter, Kim Barclay witnessed the Will.

Mrs. Castruccio alleged the Will was invalid because Dr. Castruccio and the witnesses' signatures appear on separate pages of a six-page, consecutively paginated

[3] Mr. Stinchcomb was the Castruccios' employee and handyperson.

[4] *Castruccio II* explained this odd provision in the following manner:

> According to Mr. Greiber, Dr. Castruccio was concerned that Mrs. Castruccio would leave her estate to certain family members of whom he did not approve. He wanted assurances that Mrs. Castruccio would not leave her assets, or at least the assets that she received from him, to those family members. Consequently, his will conditioned Mrs. Castruccio's rights on her having made and filed a will that disclosed whether she intended to make testamentary gifts to those family members. According to Mrs. Castruccio, Dr. Castruccio did not inform her that she would receive the balance of his estate only if she had made and filed a will before the date of his death.

Castruccio II, 230 Md. App. at 123 n.2.

document and the signature pages were not physically affixed. 230 Md. App. at 122. After Mrs. Castruccio filed a petition to caveat the Will, the details of which are discussed in more detail *infra*, the Circuit Court for Anne Arundel County granted the Estate's motion for summary judgment. *Id.* at 124, 127-28. On appellate review we concluded that the Will was validly executed, despite the fact that the pages were not physically connected and the fact that Dr. Castruccio and his witnesses signed on different pages, stating "that such a will is valid as long the pages are connected by 'the meaning and coherence of the subject matter' or they may 'identified as one will by their internal sense.'" *Id.* at 139 (citation and some internal quotation marks omitted).[5]

B. The Codicil

Starting in 2011 through the last sixteen months of his life, Dr. Castruccio did not leave his home or come into the office. During the same time period, Mrs. Castruccio did not allow visitors to the Castruccio residence. Mrs. Castruccio testified, in a December 5, 2013 deposition, that she did not allow her husband to go into his office because Dr. Castruccio would return from the office inebriated and that she did not allow Mr. Greiber or Darlene Barclay to visit the house because she alleged that Darlene Barclay took things from the house.

Dr. Castruccio also executed a Codicil to the Will, which is the source of much of the *present* controversy. As with the Will, Mr. Greiber also drafted the Codicil. The

[5] As stated previously, the Court of Appeals has granted certiorari in *Castruccio II*. *Castruccio v. Estate of Peter A. Castruccio*, 451 Md. 248 (2017). No. 90, Sept. Term 2016.

Codicil provided for an additional cash bequest of $100,000.00 to Mr. Stinchcomb (provided he was living and in the employ of Dr. Castruccio at the time of Dr. Castruccio's death). The Codicil bears an execution date of July 13, 2012. Mr. Greiber, Kim Barclay, and Darlene Barclay signed their names as witnesses to the Codicil. Mr. Greiber testified to the following in a deposition dated March 27, 2014:

> [MR. GREIBER:] I drafted a codicil I think in the office, sent it home with Danny Stinchcomb. Danny gave it to Peter, Peter signed it back -- sent it back to me. And then I had a conversation with Peter on the phone regarding the fact that we were not present when he signed the will, that he was at home. Prior to that I had said, "Peter, can we come down for the witnessing of it?" And he said, "No, Sadie doesn't want you or anybody else in the house." And I said, "You do realize that I am supposed to and all witnesses are supposed to see you sign something and sign in each other's presence." And I said that this would be subject to be contested on that ground. And he said, "It's my codicil, it's my wishes. Sadie is well aware of it. She spoke to Gidget[6] about it. And I'm going to send it back to you and you guys sign it." And I said, "Just as long as you know." He said, "Fine."
>
> Q. So the objection that you made him aware of was that you were not able to see him sign the codicil?
>
> [MR. GREIBER:] Yes, that I was not there present nor were Kim or Darlene. But he called us and he spoke to them and they were in my presence when he said, "It is my signature, that's what I want done." Because at that time we were handling the business over the phone; for the last 16 months he was under house arrest with Sadie.
>
> Q. So they did not sign in his presence either, is that correct?
>
> [MR. GREIBER:] Yes, sir.
>
> Q. Nor did you?
>
> [MR. GREIBER:] No, sir.

[6] It is likely that "Gidget" is actually "Bridget," revealed from another part of the record to be Mr. Stinchcomb's wife.

Thus, according to Mr. Greiber's testimony, Dr. Castruccio called Mr. Greiber on the telephone to ask him to draft the Codicil, and Dr. Castruccio executed the Codicil, but neither of the putative witnesses, Darlene or Kim Barclay, were in Dr. Castruccio's presence when they signed their names as witnesses to the Codicil. Darlene Barclay also testified, in a deposition on March 25, 2014, that she did not sign the Codicil in Mr. Greiber's presence, but that Dr. Castruccio "confirmed he signed it."

C. Dr. Castruccio's Death and the Petition for Probate

Dr. Castruccio died on February 19, 2013. *Castruccio II*, 230 Md. App. at 122. On February 26, 2013, Mr. Greiber filed the Will and the Codicil with the Register of Wills for Anne Arundel County, requesting administrative probate—not judicial probate—of a regular estate.[7] This petition was filed under the penalties of perjury. The Register of Wills granted Mr. Greiber letters of administration, and Mr. Greiber became the personal representative of the Estate on February 27, 2013.

Mrs. Castruccio, as mentioned *supra*, filed a petition to caveat the Will in the Orphans' Court for Anne Arundel County on March 27, 2013. The petition alleged that the Will was invalid due to forgery, undue influence, fraud, and execution defects. The petition requested that the Will be declared invalid and further requested that Mr. Greiber be removed from his position as special administrator because of numerous alleged

[7] The petition requesting probate listed Kim Barclay and Samantha Greiber as witnesses and did not list Mr. Greiber or Darlene Barclay. Kim Barclay and Samantha Greiber were witnesses to the Will, however.

forgeries and conflicts of interest. Pursuant to Maryland Code (1974, 2011 Repl. Vol.), Estates and Trusts Article ("ET"), § 6-307, this petition to caveat the Will transformed the role of Mr. Greiber from a personal representative to that of a special administrator.

On July 11, 2013, the Orphans' Court held a hearing on the caveat petition. As a discovery sanction, the Orphans' Court struck Mrs. Castruccio's proposed handwriting expert, and he was not permitted to testify. Because Mrs. Castruccio then had no evidence with which to proceed, she withdrew her petition. During a colloquy between the court, counsel for Mrs. Castruccio, counsel for the Estate, and Darlene Barclay, counsel for Mrs. Castruccio assured everyone that she would not refile her caveat on this precise issue.

D. Mrs. Castruccio's Inconsistent Position on the Codicil

Several months later, in a deposition on December 5, 2013, Mrs. Castruccio testified that she had no objection to the Codicil's increasing the cash bequest to Mr. Stinchcomb. Mrs. Castruccio testified that she and her husband wanted to provide financial support to Danny. Mrs. Castruccio additionally said that she and her husband had discussed increasing the bequest to Danny to $200,000.00 and that she thought the Codicil was valid though she did not see her husband sign it. During the deposition, she further elaborated:

> [DARLENE BARCLAY'S COUNSEL:] Did you discuss the codicil with Danny [Stinchcomb]?
>
> [MRS. CASTRUCCIO:] The codicil, he knows about the codicil. I have nothing to say about it and I have no objection to it.
>
> [DARLENE BARCLAY'S COUNSEL:] Okay. You don't object to the codicil?

[MRS. CASTRUCCIO:] No.

[DARLENE BARCLAY'S COUNSEL:] Okay. So far as the codicil's concerned you're not raising any questions?

[MRS. CASTRUCCIO:] None.

[DARLENE BARCLAY'S COUNSEL:] So as far as you're concerned it's valid?

[MRS. CASTRUCCIO]: It's valid.

[DARLENE BARCLAY'S COUNSEL:] And enforceable?

[MRS. CASTRUCCIO:] Yes.

[MRS. CASTRUCCIO'S COUNSEL:] Objection, objection, calls for a legal conclusion. Don't answer whether it's enforceable.

[MRS. CASTRUCCIO:] Okay.

[DARLENE BARCLAY'S COUNSEL:] Do you think it's a good will – I mean a good codicil?

[MRS. CASTRUCCIO:] For Danny?

[DARLENE BARCLAY'S COUNSEL:] The codicil, is it a good codicil?

[MRS. CASTRUCCIO:] I think so.

[DARLENE BARCLAY'S COUNSEL:] Did you see your husband sign the codicil?

[MRS. CASTRUCCIO:] No.

* * *

[DARLENE BARCLAY'S COUNSEL:] Did Peter talk about the codicil with you?

[MRS. CASTRUCCIO:] He wanted to help Danny in the event anything

happened to us. He wanted to protect him. And so we told him that we would take care of him if anything happened to us, because they rely on us very strongly.

[DARLENE BARCLAY'S COUNSEL:] Yes, I believe they do. Did you have discussions with your husband Peter about making sure that the amount that Danny was getting was going to go up?

[MRS. CASTRUCCIO:] I'm very sorry that my husband is not here because he would have told you he wanted Danny protected.

[DARLENE BARCLAY'S COUNSEL:] Okay. But he wanted to protect him, but did he want the amount that he was leaving him increased like the codicil says?

[MRS. CASTRUCCIO:] Yes.

[DARLENE BARCLAY'S COUNSEL:] Okay. So he wanted Danny to get more than what was in the will?

[MRS. CASTRUCCIO:] Right, because he knew Danny would need that if we weren't there.

[DARLENE BARCLAY'S COUNSEL:] Right. And do you know what Peter left Danny in the will?

[MRS. CASTRUCCIO:] $200,000.

[DARLENE BARCLAY'S COUNSEL:] And what was in the codicil?

[MRS. CASTRUCCIO:] The first one was $100,000.

[DARLENE BARCLAY'S COUNSEL:] The first amount was $100,000?

[MRS. CASTRUCCIO:] Yes.

[DARLENE BARCLAY'S COUNSEL:] And then what did it go to?

[MRS. CASTRUCCIO:] $200,000.

[DARLENE BARCLAY'S COUNSEL:] Okay. And did you discuss with

your husband Peter moving it from $100,000 to $200,000?

[MRS. CASTRUCCIO:] Yes.

[DARLENE BARCLAY'S COUNSEL:] Okay. And you –

[MRS. CASTRUCCIO:] And I'm very satisfied with it.

Therefore, as of December 5, 2013, Mrs. Castruccio was not disputing the validity of the codicil. Mrs. Castruccio, however, maintains in her brief that she learned of the circumstances surrounding the witnessing of the Codicil for the first time during Mr. Greiber's March 27, 2014 deposition, quoted at length *supra*, and thereafter she had doubts regarding the Codicil's validity.

E. The Emergency Petition to Remove Mr. Greiber and the Present Litigation

On April 22, 2014, Mrs. Castruccio filed an emergency petition in the Orphans' Court to remove Mr. Greiber as the special administrator of the Estate, in light of the information revealed during Mr. Greiber's March 27, 2014 deposition. Mrs. Castruccio argued that, because Mr. Greiber submitted an improperly executed Codicil to probate with actual knowledge of the Codicil's improper execution, he misrepresented material facts in proceedings leading to his appointment, and, therefore, must be removed from his position as special administrator. On May 8, 2014, the Estate opposed the motion, arguing, *inter alia*, that (1) removal of a personal representative or special administrator is a remedy of last resort, (2) there must be harm to the Estate or interested persons to sustain a removal, (3) there was no misrepresentation concerning the Codicil, (4) Mrs. Castruccio and her attorneys initiated the emergency removal action in bad faith and without substantial

justification, and (5) that any execution error in the present case should be excused as harmless error.

The Orphans' Court scheduled a hearing on the petition for August 21, 2014. On August 13, 2014, Mrs. Castruccio filed an amended petition to remove Mr. Greiber as special administrator. In response to the amended petition, the Orphans' Court entered a "directive" stating that "the basis for the Petition remains unchanged" and ordered that the hearing on the petition proceed as previously scheduled. On August 18, 2014, Mrs. Castruccio filed a petition to transmit issues to the circuit court, which the orphans' court denied. Mrs. Castruccio appealed this decision.[8]

At the August 21, 2014 hearing before the Orphans' Court concerning the removal petition, Mrs. Castruccio and her attorneys declined to participate, purportedly to protect the right to appeal the denial of the petition to transmit issues to the circuit court. Because Mrs. Castruccio did not participate in the hearing, the Orphans' Court entered an order denying the petition on August 26, 2014. The Orphans' Court also ruled that Mrs. Castruccio and her attorneys were liable to the Estate for fees and costs that the Estate incurred in opposition to the emergency petition.

F. Circuit Court Proceedings

On September 2, 2014, Mrs. Castruccio appealed the August 26, 2014 Orphans'

[8] The appeal of the August 18, 2014 order denying the petition to transmit issues to the circuit court is not before this Court. According to her brief, Mrs. Castruccio dismissed the appeal of the August 18, 2014 order denying the petition to transmit issues to the circuit court "[t]o maximize the use of judicial resources."

Court decision to the Circuit Court for Anne Arundel County. A *de novo* trial was scheduled for January 9, 2015 in the circuit court.

On January 5, 2015, the Estate filed a motion for summary judgment, making the same arguments that it did in the Orphans' Court, and further arguing that there was no dispute of material fact, that Maryland law excuses harmless errors in the execution of a will, and that the Estate was entitled to attorney's fees and costs under Maryland Rules 6-141 and 1-341. Mrs. Castruccio did not file a written response.

At the hearing, Mrs. Castruccio argued that Mr. Greiber's filing the Codicil was "a misrepresentation of material facts in proceedings leading to his appointment," and that, as a result, removal was required. Despite the fact that the written emergency petition and amended emergency petition addressed *only* Mr. Greiber's alleged impropriety in filing the Codicil for probate, Mrs. Castruccio also argued once again that Mr. Greiber was saddled with conflicts of interest and that he had mismanaged property. The Estate reiterated its position against removal and also stated that Mrs. Castruccio's arguments on topics other than the Codicil was "trial by ambush" because Mrs. Castruccio did not raise them in her written petitions.

At the end of the hearing, the circuit court granted the Estate's motion for summary judgment. The court stated:

> Well, I've considered this matter and listened to the evidence;
> I'm going to grant the summary judgment.
> I believe the only issue before me today was the issue of the codicil;
> As indicated no one is harmed by the codicil;
> Everybody agrees to the initial $100,000 to be paid to that gentlemen,

> . . . .
>
> In any event, the other issues that you've raised have been litigated before and decided;
>
> You are on appeal on some issues to the Court of Special Appeals;
>
> But in this case, you bring up the idea that both of the witnesses were not to see him sign. I always understood the law to be that as long as the testator has acknowledged the documents and the two witnesses signed it and he's acknowledged it, that the document itself is valid, but the most important thing is who is harmed? Everyone knew.
>
> In fact, I saw some evidence in here, to the effect that Mrs. Castruccio says she agrees that the additional $100,000 should be paid to . . . .
>
> * * *
>
> Mr. Stinchcomb.
>
> So, under the circumstances, I don't find there is any material dispute of fact in this case;
>
> That summary judgment should be granted in favor of the Defendant in this case, the Estate of Peter A. Castruccio; so under the circumstances, I am going to sign an Order to that [e]ffect.

The court made no specific oral factual findings concerning the putative bad faith of Mrs. Castruccio or her attorneys.

In its January 9, 2015 written order, the circuit court granted summary judgment in favor of the Estate, finding that Mrs. Castruccio had "stated no grounds under [ET] §§ 6-306(a) and 6-404 which justify the removal of John R. Greiber, Jr. as Personal Representative or Special Administrator of the Estate[.]" The court also granted attorney's fees, under Maryland Rules 1-341 and 6-141, to the Estate for the expense of defending the removal petition in the Orphans' Court and circuit court, finding that the pursuit of the removal was "in bad faith and without substantial justification." The circuit court found Mrs. Castruccio and her attorneys of record to be jointly and severally liable for the Estate's

attorney's fees.[9]

On January 16, 2015, the Estate filed a statement that it had spent $113,773.11 attorney's fees defending against Mr. Greiber's removal, which it supplemented on February 4, 2015, claiming $17,567.50 in additional fees.[10]

Mrs. Castruccio filed a motion, through the same three attorneys who had been representing her up to this point, to alter or amend the judgment on January 20, 2015. She argued, *inter alia*, that (1) an award of attorney's fees should be made only in rare and exceptional cases, (2) a court must make specific findings of fact based on sufficient evidence to support an award of attorney's fees, and (3) there was a reasonable basis for the removal petition. Mrs. Castruccio also filed an opposition[11] to the Estate's motion for attorney's fees, on February 2, 2015, arguing both that an award of attorney's fees was improper and that the fees the Estate was claiming were excessive. The Estate filed an opposition to the motion to alter or amend on February 4, 2015, arguing (1) that there was no misrepresentation or concealment, (2) that there was no allegation or proffer of facts warranting removal, (3) that the circuit court properly determined that the removal action

[9] The court's order states "[t]hat Sadie M. Castruccio and each of her attorneys of record are jointly and severally liable to the Estate[.]"

[10] On April 30, 2015, the Estate filed another supplement for another $9,512.50 in additional fees, bringing the claimed fees to a total of $140,966.71 at that point. The Estate also submitted an affidavit from Benjamin Rosenberg, a Baltimore attorney, as to the reasonableness of the fees the Estate incurred.

[11] According to signature pages, the motion and opposition were filed by Kenneth B. Frank, Jeffrey E. Nusinov, and Ronald H. Jarashow.

was filed in bad faith and without substantial justification, and (4) that, as a result, the Estate was entitled to recover attorney's fees.

On March 17, 2016, Mr. Frank and Mr. Jarashow—two of Mrs. Castruccio's attorneys who had been held jointly and severally liable with her—filed a "Notice of Joinder" of her motion to alter or amend and her opposition to the Estate's attorney's fees.[12] Additionally, Mr. Jarashow and Mr. Frank withdrew their appearances as Mrs. Castruccio's counsel on March 16, 2015 and March 20, 2015, respectively.

The Estate opposed the notice of joinder on March 23, 2015, arguing that the notice of joinder was untimely because Maryland Rule 2-534 requires that a party file a motion to alter or amend judgment within 10 days of the judgment, and that the deadline to file such a motion was on January 20, 2015. As such, the Estate argued, Mr. Frank and Mr. Jarashow should not be permitted to participate in the post-judgment proceedings.

On May 1, 2015,[13] the circuit court held a hearing on the motion to alter or amend

[12] Jeffrey Nusinov was not a party to the Notice of Joinder, and it is at this point in the record that his name disappears from any discussion of attorney's fees and sanctions. Only Messrs. Frank and Jarashow have filed briefs in this Court on the attorney's fees issue.

[13] On the same day, before argument on the motion to alter or amend, the circuit court also heard argument on a separate appeal of a July 3, 2014 Orphans' Court order finding Mrs. Castruccio in constructive civil contempt for failure to comply with a July 16, 2013 Orphans' Court order regarding access to Dr. Castruccio's office. In that hearing, the circuit court denied Mrs. Castruccio's motion for summary judgment, granted the Estate's cross-motion for summary judgment, and found Mrs. Castruccio in constructive civil contempt, finding her liable to the Estate for $228,523.26 in attorney's fees and costs. A written order to this effect was entered on May 7, 2015.

This Court recently decided that appeal, *Castruccio III*, No. 862, September Term 2015 (filed December 20, 2016). In that case, we determined that the circuit court did not

at which the Estate, Mrs. Castruccio, Mr. Frank, and Mr. Jarashow presented their arguments. The circuit court granted Mrs. Castruccio's motion as to sanctions, but denied it on the merits. The circuit court stated:

> I'm going to grant your Motion. And they'll be no attorney's fees in this case, because we have it in the other case[, the contempt case]. I mean, this is just getting out of whack, this whole case with attorney's fees. So, I think that under the circumstances, I'm going to reconsider the Order that I passed earlier, and amend it to the effect that there will be no attorney's fees.
>
> * * *
>
> I'm going to deny that motion [as to the summary judgment].

On May 7, 2015, the circuit court entered a written order to this effect. The order specifically stated that "[t]he Motion is **GRANTED** to the extent the Motion requested an amendment of the order reversing this Court's award of sanctions against Appellant and her counsel, Messrs. Frank and Jarashow, pursuant to Maryland Rules 6-141 and 1-341, and eliminating the findings upon which such an award was based[.]" (Emphasis in original). Thus, the order eliminated both the award of attorney's fees and all findings relating to attorney's fees.

Mrs. Castruccio, by her attorney Mr. Frank, filed a notice of appeal on June 5, 2015, as well as a notice of appearance. These were e-filed on Maryland Electronic Courts

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make the requisite findings to support an order of constructive civil contempt under Maryland Rule 15-207 and that the written contempt order lacked an appropriate purge provision and, therefore, vacated the contempt order. *Id.*, slip op. at 12. In addition, we vacated the award of attorney's fees, concluding that the court did not make the requisite factual findings, under Maryland Rules 1-341 and 6-141, to support an award of attorney's fees. *Id.*, slip op. at 16-18.

("MDEC"), the Maryland Judiciary's e-filing system. The certificate of service attached to the notice of appeal contains unsigned signature lines for Mr. Jarashow, not Mr. Frank, and was dated "October __ 2014." According to the Estate, the certificate of service also contains an incorrect office address for one of the Estate's attorneys. However, a printout from MDEC states that the documents were "EServe[d]" to the appropriate parties.

The Estate filed a timely notice of appeal of the May 7, 2015 circuit court orders on June 8, 2015. The Estate also filed a motion to strike Mrs. Castruccio's notice of appeal on June 18, 2015, and no party opposed this motion. On July 22, 2015, the circuit court granted the Estate's motion to strike Mrs. Castruccio's notice of appeal, apparently because of the putatively defective certificate of service.[14] On August 13, 2015, within 30 days of the striking of Mrs. Castruccio's first notice of appeal, she filed a new notice of appeal.

The Estate filed a motion to dismiss Mrs. Castruccio's cross-appeal in this Court on June 18, 2015, and Mrs. Castruccio filed an opposition in this Court on July 17, 2015. This motion was denied on July 28, 2015. The Estate filed a motion for reconsideration, which Mrs. Castruccio opposed on August 31, 2015. This motion was denied on September 24, 2015. With this tangled procedural history presented, we are finally able to address the parties' contentions.

[14] In the same order and for the same reason, the circuit court also struck a notice of appearance of one of Mrs. Castruccio's counsel.

DISCUSSION

I.

The Estate's Motion to Dismiss

In its reply brief, the Estate filed another motion to dismiss Mrs. Castruccio's cross-appeal, which we address before turning to the merits of this appeal. The Estate argues that this Court is without jurisdiction to hear Mrs. Castruccio's cross-appeal because the certificate of service attached to Mrs. Castruccio's June 5, 2015 notice of appeal was defective. The Estate alleges the certificate was defective because it was unsigned, contained the wrong signature line, wrong date, and an incorrect office address for one of the Estate's attorneys. As a result, the Estate maintains that Mrs. Castruccio's cross-appeal was not "filed" within the meaning of Maryland Rule 1-323 because it was not accompanied by a signed certificate "showing the date and manner of making service." The Estate relies on *Lovero v. Da Silva*, 200 Md. App. 433 (2011), for the proposition that failing to file a timely notice of appeal terminates the right to appeal and precludes the appellate courts from exercising jurisdiction. The Estate also maintains that Mrs. Castruccio waived any argument on this issue by omitting any argument on this issue in her first brief.

Mrs. Castruccio counters that the Estate's motion to dismiss should be denied because the certificate of service attached to her notice of appeal substantially complied with Maryland Rule 1-323. Mrs. Castruccio concedes that the certificate of service

contained errors, but she maintains that the notice of appeal was served on all parties[15] thereby satisfying the due process requirement of notice—the purpose behind Maryland Rule 1-323. Mrs. Castruccio distinguishes *Lovero* by pointing out that there was no certificate of service in *Lovero*. Mrs. Castruccio also observes that it filed a corrected certificate of service with its subsequent notice of appeal. Finally, Mrs. Castruccio counters that she did not waive her argument because the Estate had not filed the motion to dismiss at the time she filed her first brief.

A few Maryland Rules address the situation at hand. Rule 1-323 provides that

> [t]he clerk shall not accept for filing any pleading or other paper requiring service, other than an original pleading, unless it is accompanied by an admission or waiver of service or a signed certificate showing the date and manner of making service. A certificate of service is prima facie proof of service.

Maryland Rule 8-202(a) mandates that, in most circumstances, a notice of appeal must be filed within 30 days of the order from which the appeal is taken:

> (a) **Generally.** Except as otherwise provided in this Rule or by law, the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken. In this Rule, "judgment" includes a verdict or decision of a circuit court to which issues have been sent from an Orphans' Court.

In turn, Maryland Rule 8-203 provides that a circuit court may strike a notice of appeal for only four enumerated reasons:

> **(a) Generally.** On motion or on its own initiative, the lower court may strike a notice of appeal or application for leave to appeal (1) that has not been filed

[15] Mrs. Castruccio points out that actual service, along with confirmation of service, occurred in this case because the notice was filed electronically via MDEC and that the Estate does not dispute that it actually received service.

> within the time prescribed by Rules 8-202 or 8-204, (2) if the clerk of the lower court has prepared the record pursuant to Rule 8-413 and the appellant has failed to pay for the record, (3) if the appellant has failed to deposit with the clerk of the lower court the filing fee required by Rule 8-201(b), or (4) if by reason of any other neglect on the part of the appellant the record has not been transmitted to the appellate court within the time prescribed in Rule 8-412.

In *Lovero*, the circuit court granted Lovero a judgment of absolute divorce from Da Silva on July 29, 2009, which the circuit court clerk entered on the docket on July 31, 2009. 200 Md. App. at 436. On August 28, 2009, Lovero, through counsel, filed a notice of appeal, containing neither a certificate of service nor a waiver of service, in contravention of Maryland Rule 1-323. *Id.* at 437. This notice of appeal was not served on Da Silva's attorney. *Id.* On a date past the 30-day period of time for filing a notice of appeal, September 4, 2009, Lovero filed an "Amended Notice of Appeal," this one containing a certificate of service. *Id.* at 437-38. Da Silva's counsel received a copy of the amended notice of appeal on September 8, the same day that the clerk's office entered both notices of appeal on the docket. *Id.* at 438. Da Silva, on September 14, 2009, filed a motion in the circuit court to strike Lovero's notices of appeal. *Id.* at 438. The circuit court, on September 30, 2009, denied this motion without any explanation for its decision. *Id.* at 438-39. Da Silva then filed a motion to dismiss in this Court. *Id.* at 440.

We began our analysis by reiterating that Rule 8-202's 30-day requirement is jurisdictional. *Id.* at 441 (citations omitted). We then held that the clerk of the court cannot accept "a pleading or paper required to be served by Rule 1-321 that does not contain an admission or waiver of service or a signed certificate showing the date and manner of

making service." *Id.* at 446. This Court further stated that, by mandating that proof of service or a waiver of service appear on each pleading or paper, "Rule 1-323 assures the court . . . that each party has been duly notified before action is taken by the court in response to or as a result of the subject pleading or paper." *Id.* We explained that:

> Where, as in the instant case, the notice of appeal contains no proof of service whatsoever, we have no basis upon which to conclude that the notice of appeal was served on the opposing party or parties. **Indeed, it is undisputed here that the Notice of Appeal was never served on Da Silva.**

Id. at 449 (emphasis added). Concerning the definition of "filed" within Maryland Rule 8-202(a), we held that, "where a clerk accepts for filing a notice of appeal that does not contain any certificate of service, and thus should have been rejected under Rule 1-323, such defective notice of appeal is not 'filed' within the meaning of Rule 8-202(a)." *Id.* at 450. Thus, this Court dismissed Lovero's appeal. *Id.* at 453.

After oral argument occurred in the present case, this Court decided *State v. Andrews*, 227 Md. App. 350 (2016). In *Andrews*, the State noted an interlocutory appeal after losing a motion to suppress in the circuit court. *Id.* at 368. The Office of the Public Defender acknowledged service, but the State's notice of appeal failed to list the party that was served, in literal violation of Maryland Rule 1-323. *Id.* Andrews filed a motion to dismiss, but the State countered that it would be improper to dismiss the appeal when there was no dispute that Andrews was served in a timely fashion. *Id.* at 368-69.

After discussing *Lovero*, we noted that there was no dispute that Andrews was served. *Id.* at 370. Further, although there was a technical defect in the certificate of

service, the certificate did meet the literal requirements of Rule 1-323, in that it provided the date and manner of service. We observed that, where there was no evidence of prejudice to Andrews or of delay due to the defect, "'it is the practice of this Court to decide appeals on the merits rather than on technicalities.'" *Id.* (citing *Bond v. Slavin*, 157 Md. App. 340, 352-53 (2004)). Accordingly, we denied Andrews's motion to dismiss the appeal. *Id.* at 371.

We return to the present case and conclude that it was "improper" for the circuit court to strike Mrs. Castruccio's notice of appeal. *See County Commissioners of Carroll County v. Carroll Craft Retail, Inc.*, 384 Md. 384 Md. 23, 42 (2004) (determining that a circuit court has no authority to strike a notice of appeal when the alleged defect it does not fall within an enumerated exception in Maryland Rule 8-203). As in *Carroll Craft*, the defect in Ms. Castruccio's notice of appeal did not fall under any of the enumerated circumstances in which a circuit court may strike a notice of appeal under Maryland Rule 8-203. Further, the notice of appeal did contain a certificate of service, albeit lacking a signature and containing an incorrect date.

There is also no dispute that the notice was served on the Estate's counsel, and that the purpose of Rule 1-323 was fulfilled, which distinguishes this case from *Lovero*, 200 Md. at 449, in which it was undisputed that the notice of appeal was never served on Da Silva. This distinguishing characteristic, in turn, brings the case right in line with *Andrews*, 227 Md. App. at 368-71. Here, the "eService Details" on MDEC state that all necessary parties were eServed. In fact, the same eService Details confirm that several of the Estate's

attorneys had opened the notice of appeal by the time the circuit court struck the notice of appeal. Thus, as in *Andrews*, there is no prejudice to the Estate in the present context.

We also observe that, after the circuit court struck Mrs. Castruccio's notice of appeal, Mrs. Castruccio filed a second notice of appeal in which she appealed the order striking her notice of appeal. As stated in *Carroll Craft*, 384 Md. at 45-46, an order striking a notice of appeal is itself a final appealable order, and Mrs. Castruccio appealed timely from such an order. Thus, Mrs. Castruccio, by filing her second notice of appeal after the circuit court's striking of her first notice of appeal, avoids the fatal procedural error. *See id.* at 42.

Where there is no evidence that the Estate was prejudiced "or that the course of the appeal was delayed by a defect, 'it is the practice of this Court to decide appeals on the merits rather than on technicalities.'" *Andrews*, 227 Md. App. at 370 (citing *Bond v. Slavin*, 157 Md. App. 340, 352-53 (2004)). In these circumstances, we conclude that we have jurisdiction and that Mrs. Castruccio's appeal is properly before us.

II.

Mrs. Castruccio's Cross-Appeal

A. The Codicil's Validity

We address Mrs. Castruccio's cross-appeal concerning the propriety of summary judgment first—the substantive merits of the case—before deciding the Estate's appeal concerning whether sanctions were appropriate.

Mrs. Castruccio argues that ET § 6-306, *Schlossberg v. Schlossberg*, 275 Md. 600

(1975), and *Groat v. Sundberg*, 213 Md. App. 144 (2013) mandate Mr. Greiber's removal as special administrator because his submission of the defectively executed Codicil to the Register of Wills, seeking administrative probate, without disclosure of the defective execution, constituted a fraud on the Register of Wills leading to his appointment. She contends that it is undisputed that Mr. Greiber knew that the witnesses did not sign in Dr. Castruccio's presence. Mrs. Castruccio further maintains that *Groat*, which held that all witnesses must sign within the line of sight of the testator, means that this was not a validly executed codicil. She also argues that she is not estopped from making this argument, based on the dismissal of the first removal action on July 11, 2013, because she did not learn of the defective execution of the Codicil until Ms. Barclay's and Mr. Greiber's depositions in late March 2014. Finally, she contends that the circuit court erred in granting summary judgment because it was incorrect in its analysis on the topics of harmless error, withdrawal with prejudice, and acknowledgement.

The Estate contends that the circuit court granted summary judgment correctly because the Codicil reflected Dr. Castruccio's wishes accurately, was signed by Dr. Castruccio, and was not disputed by any interested party. The Estate also argues that there was no misrepresentation in this case because all parties involved knew of the circumstances surrounding execution of the Codicil. The Estate further maintains that an attestation clause, as is present in this case, renders the Codicil presumptively valid. The Estate contends that harmless error in the execution of wills is excused under the Restatement (Third) of Property: Wills and other Donative Transfers § 3.3.

The Estate also argues that Mrs. Castruccio did not allege or proffer any additional facts that would support the removal of Mr. Greiber because the amended emergency removal petition did not expand the basis for removal from the bases given in the original emergency removal petition, that she did not submit any affidavits or admissible evidence to defeat the Estate's motion, and that she is barred by various estoppel and waiver grounds from relitigating issues decided during the original removal hearing.

The grant of summary judgment is appropriate "where the trial court determines that there are no genuine disputes as to any material fact and that the moving party is entitled to judgment as a matter of law." *Laing v. Volkswagen of Am., Inc.*, 180 Md. App. 136, 152 (2008) (citing Maryland Rule 2-501). A trial court's function in passing on a summary judgment motion "is to determine whether there is a dispute as to a material fact sufficient to require an issue to be tried." *Frederick Rd. Ltd. P'ship v. Brown & Sturm*, 360 Md. 76, 93 (2000) (citations omitted). An appellate court's standard of review "is whether the trial court was 'legally correct.'" *Gordon v. Posner*, 142 Md. App. 399, 410 (2002) (quoting *Goodwich v. Sinai Hosp. of Baltimore, Inc.*, 343 Md. 185, 204 (1996)).

ET § 4-102 describes the witnessing requirements for testamentary documents and provides:

> Except as provided in §§ 4-103 and 4-104 of this subtitle, every will shall be (1) in writing, (2) signed by the testator, or by some other person for him, in his presence and by his express direction, and **(3) attested and signed by two or more credible witnesses in the presence of the testator.**

(Emphasis added).

In *Groat v. Sundberg*, the testator, Frank Halgas, executed a will that left a bequest to two beneficiaries. 213 Md. App. at 147-48. Four years later, he executed a putative codicil—bearing the signatures of Mr. Halgas, Mr. Groat, and Melissa Halgas, Mr. Halgas's niece—giving that same bequest to Irv Groat. *Id.* at 148. That same year, Mr. Halgas died, and Mr. Groat sought to admit the putative codicil to probate. *Id.* at 149. At the hearing on the putative codicil's validity, Mr. Groat testified that Mr. Halgas signed three copies of in front of him and in his presence—and that he signed all three documents in Mr. Halgas's presence. *Id.* Melissa. Halgas testified that she signed the three documents two weeks later, but that she did not "recall" whether Mr. Halgas was in the same room as her when she signed the three documents to witness it. *Id.* at 150-51. The Orphans' Court did not admit the putative codicil to probate, and Mr. Groat appealed. *Id.* at 151.

In our review, we stated that

> [i]t is well established that, with regards to the "in the presence of the testator" requirement of E.T. § 4–102, "the subscription by such witnesses must be made within the unobstructed range of vision of the testator, although if he is able to see it, without any material change of position, the fact that he does or does not avail himself of the privilege is immaterial." *Brittingham v. Brittingham*, 147 Md. 153, 160, 127 A. 737 (1925). This test is referred to the "line-of-vision" test, for which "[i]t is not necessary for the testator to have watched the witnesses sign, as long as the testator *could* have watched them sign." Restatement (Third) of Prop.: Wills and Other Donative Transfers § 3.1 cmt. p (1999) (emphasis added).

Id. at 161-62. Thus, this Court held that the third subsection of ET § 4-102 requires that a witness must sign a will or codicil within the "line-of-vision" of the testator, meaning that the testator must be able to see the witness's signing, though the witness need not actually

see the signing. *Id.*

In *Groat*, the putative codicil contained no attestation clause. *Id.* at 157. We explained that a presumption of due execution attaches to a testamentary instrument containing the testator's signature and an attestation clause that the witnesses have signed. *Id.* at 153 (quoting *Slack v. Truitt*, 368 Md. 2, 7-8 (2002)). Because there was no attestation clause in that case, there was no presumption of due execution. *Id.* at 157-59.

The Estate attempts to distinguish *Groat*, arguing that the attestation clause contained in the Castruccio Codicil renders it presumptively valid. In *Castruccio II*, *supra*, as mentioned before, this Court addressed the validity of the underlying Will itself, "a six-page will that had consecutive pagination, consecutive paragraph-numbering, uniform font and typeface[,]" but the pages of which may or may not have been attached to one another by a staple at the time of signing. 230 Md. App. at 122. We held that the Will was valid, and, in doing so, we addressed the effect of an attestation clause. *Id.* at 130-32, 144.

We stated that a presumption of due execution attaches to a will containing the signature of a testator and an attestation clause containing the signatures of the witnesses. *Id.* at 131 (citations omitted). We defined attestation as follows:

> "Attestation," as required by [ET] section 4–102, is at issue in this case. Attestation is "'the act of witnesses in seeing that those things exist and are done which the statute requires.'" *Slack*, 368 Md. at 12, 791 A.2d 129 (quoting *Van Meter* [*v. Van Meter*], 183 Md. [614,] 619, 39 A.2d 752 [(1944)]). It begins with the testator asking the witnesses, either by words or deeds, to sign the will. *Greenhawk v. Quimby*, 170 Md. 280, 287–88, 184 A. 485 (1936). Witnesses need not know the document is a will as long as they see the testator sign it (*Casson v. Swogell*, 304 Md. 641, 654, 500 A.2d 1031 (1985)), nor must they observe the testator signing it as long as he or she

> acknowledges the signature or informs the witnesses that the document is a will. *Van Meter*, 183 Md. at 617, 39 A.2d 752. **The witnesses must, however, sign the will in the testator's presence, i.e., within the testator's unobstructed range of vision**." *Groat*, 213 Md. App. at 161-62, 73 A.3d 374.

Id. at 132 (emphasis added). Thus, even with an attestation clause, the witnesses must still sign the will in the testator's presence. Here, it is undisputed that witnesses did not sign in Dr. Castruccio's presence.

Applying our holding in *Groat*, we determine that the Codicil was not properly executed. Mr. Greiber testified that he and Darlene Barclay were not in the presence of Dr. Castruccio when they signed the Codicil as witnesses. Thus, ET § 4-102(3)'s requirement that the witnesses sign in the presence as the testator was clearly not fulfilled here. Despite the Estate's contention that the Codicil's attestation clause gives the Codicil a presumption of due execution, the presumption was clearly rebutted when both Mr. Greiber and Darlene Barclay testified that they did not sign the Codicil as witnesses in the presence of Dr. Castruccio.[16]

[16] As mentioned previously, the Estate cites to a Restatement example excusing harmless error, for support:

> 4. *Attestation defect—witness signed outside testator's presence*. G was ill in bed and unable to come to his attorney's office. G's attorney, who had drafted G's will in accordance with G's directions, arranged to go to G's house to conduct the execution ceremony. As G's attorney looked on, G signed the will. G's attorney had expected two neighbors to attend and act as attesting witnesses, but the neighbors never showed up. G's attorney then signed the will as one of the attesting witnesses, took the will back to her office and showed the document to one of her law partners, informing the partner that the document was G's will and that G had requested that the law partner witness the will as an attesting witness. The law partner then

B. Mr. Greiber's Removal?

Our conclusion that the Codicil was not duly executed does not, however, end the inquiry. We are not called upon to determine the validity of the Codicil—the issue on appeal is whether Mr. Greiber's submission of the Codicil to the Register of Wills would mandate his removal.

ET § 6-306 lists the grounds for removal of a personal representative and provides:

> (a) *Cause for removal.* — **A personal representative shall be removed from office upon a finding by the court that he:**
>
> **(1) Misrepresented material facts in the proceedings leading to his appointment**;
>
> (2) Willfully disregarded an order of the court;
>
> (3) Is unable or incapable, with or without his own fault, to discharge his duties and powers effectively;
>
> (4) Has mismanaged property;
>
> (5) Has failed to maintain on file with the register a currently effective designation of an appropriate local agent for service of process as described in § 5-105(c)(6) of this article; or
>
> (6) Has failed, without reasonable excuse, to perform a material duty pertaining to the office.

> telephoned G and inquired as to whether the instrument presented was his will. After G verified that it was, the law partner, in the presence of the drafting attorney, signed the document as an attesting witness. The drafting attorney's law partner testified that he knew G's voice. The failure of the drafting attorney's law partner to sign in the presence of the testator . . . is a harmless error that may be excused because the evidence establishes by clear and convincing evidence that G adopted the document as his will.

Restatement (Third) of Property (Wills & Don. Trans.) § 3.3 (1999). We recognize that this hypothetical is directly analogous to the factual situation at hand, but the Restatement's position on this issue is not the law in Maryland. Indeed, it runs directly counter to *Groat.* 213 Md. App. at 161-62.

(Italics in original; bold emphasis added).[17] *Richards v. Richards*, a case dealing with a personal representative's mismanagement of estate assets, instructed that, "[w]here any of the above causes for removal are found [referring to ET § 6-306(a)], after notice and hearing as provided in the statute, removal is mandatory." 27 Md. App. 1, 15 (1975); *see also Ayers v. Liller*, 65 Md. App. 178, 182 (1985) (citing *Smith v. Waller*, 225 Md. 94 (1961)) ("a personal representative may be removed for conduct amounting to fraud, bad faith, collusion or breach of trust."). In this case only ET § 6-306(a)(1) is possibly applicable, and so we must consider whether submission of the improperly executed Codicil amounted to "[m]isrepresent[ation of] material facts in the proceedings leading to [Mr. Greiber's] appointment."

In *Schlossberg v. Schlossberg*, the testator's nephew submitted a will and codicil and filed a petition for administrative probate. 275 Md. 600, 602-03 (1975). In so doing, he affirmed under penalties of perjury that there was no other will. *Id.* at 603, 626. He was thereupon appointed personal representative of his aunt's estate, because he was named in the testator's will as her executor. *Id.* at 602-03. Two months later, the nephew submitted a second codicil to the Register of Wills, requesting judicial probate, and claimed that his deceased aunt had requested the delay in submission of the second codicil. *Id.* at

[17] In turn, ET § 6-404 provides:

> The appointment of a special administrator terminates upon the appointment of a personal representative or in the manner prescribed in Subtitle 3 of this title. The powers of a special administrator may be suspended or terminated in the same manner as prescribed in Subtitle 3 of this title for the suspension and termination of the powers, or the removal, of a personal representative.

603-04.

In its review of the case, the Court of Appeals stated that the nephew's actions in not immediately submitting the second codicil constituted purposeful concealment. *Id.* at 619. The Court stated that

> [w]hether the petitioner's misstatement was innocent or deliberate the probate and grant of letters issued upon such misstatement may be revoked. **Indeed, where an Orphans' Court grants letters of administration in ignorance of the existence of a paper purporting to be a will which is subsequently filed, that court should, on discovering the mistake, revoke the letters as 'improvidently granted.'**
>
> * * *
>
> Although the Orphans' Court of Montgomery County made no finding, as specified in Art. 93, s 5-304(b)(3) that there was 'fraud, material mistake or substantial irregularity' in the appointment of the appellant at the time administrative probate was granted, **it is clear, as a matter of law, and implicit in the conclusion reached, that the appellant's confessed conduct, as disclosed when he petitioned for judicial probate, constituted a fraud upon the Register of Wills, which went to the very heart of the probate of the original will together with the first codicil, as well as appellant's appointment as personal representative.**
>
> Had the existence of the second codicil, then in the possession of the appellant, been made know[n] to the Register he undoubtedly would not have submitted the first of the two instruments to administrative probate, for 'to probate' by its very definition means to prove before the proper judicial officer all the documents comprising the last will and testament of the decedent and in this situation the petition for administrative probate would not have been complete. As was stated in *Syfer v. Dolby*, 182 Md. 139, 149, 32 A.2d 529, 534 (1943) "(a) codicil is a part of the will, the codicil, or codicils, if more than one, and the original will, making but one testament, as much as if written on the same paper."

Id. at 624-25 (emphasis added) (some internal citations omitted).

In *Lutz v. Mahan*, an intestate man died, and George Lutz (his younger son) and

John McGraw (a man associated with the administration at George's request) were granted letters of administration within a week of the man's death. 80 Md. 233, 30 A. 645, 645 (1894). During the register's examination before letters were granted, the deputy register asked whether George was the only son of the deceased, and Mr. McGraw answered—without knowledge of George's elder brother—in the affirmative. *Id.* George, however, knew of the existence of his older brother, and he was in the same room as Mr. McGraw when Mr. McGraw responded. *Id.* at 646.

In affirming the Orphans' Court's revocation of the letters of administration after the existence of the older brother came to light, the Court of Appeals stated that "[t]here was undue haste in obtaining the letters of administration." *Id.* at 645-646. The Court concluded:

> **Under the law, [George] had no superior right to his elder brother, and could not have obtained the administration if the facts had been truly stated to the register of wills. If any of the other members of the family had been present (as they had a right to be), this misstatement would have been corrected, and the letters would not have been issued. George certainly knew that he was not the only son of his father, but yet he permit[ted] the statement to be made in his presence without contradiction. . . . [The letters of administration] were obtained by means of an untrue statement about an essential fact.** Whether the deception was the result of carelessness or mistake or was intentionally practiced, the result is the same. The grant of letters stands condemned as improperly made. The deception operated as a fraud on the register of wills, and caused him to render an erroneous judgment. That judgment ought surely to be set aside. It is due to the integrity of legal proceedings that a determination grounded on a falsehood should not be allowed to stand.

Id. at 646 (emphasis added).

At the outset, we note that the Will, not the Codicil, provides for Mr. Greiber to

serve as personal representative. Thus, the submission of the Codicil to probate was not the event "leading to his appointment." ET § 6-306(a)(1). Therefore, Mr. Greiber's actions do not squarely fall under the provisions of the removal statute.[18]

Second, we do not conclude that this was a "misstatement." Although the Codicil was improperly executed, we do not impart upon a custodian of a will a duty to inform the register of wills as to potential legal theories of invalidity. ET § 4-202 provides:

> After the death of a testator, a person having custody of his will shall deliver the instrument to the register for the county in which administration should be had pursuant to § 5-103 of this article. The custodian may inform an interested person of the contents of the will. **A custodian who willfully fails or refuses to deliver a will to the register after being informed of the death of the testator is liable to a person aggrieved for the damages sustained by reason of the failure or refusal.**

(Emphasis added). This provision does not require a custodian or potential representative inform the register of wills that a testamentary instrument might be invalid. Indeed, we have not found a provision in the Estates and Trusts article mandating judicial probate where there are legal questions regarding the execution of a document, contrary to Mrs. Castruccio's contention.

Further, we believe Mrs. Castruccio's reliance on *Schlossberg* and *Lutz* is misplaced, and we find those cases distinguishable. The fraud that the personal representatives in *Schlossberg* and in *Lutz* permitted is simply not present in Mr. Greiber's

[18] We do acknowledge that *Schlossberg* stated that a will and any codicils are "'one testament[,]'" 275 Md. at 625 (citing *Syfer*, 182 Md. at 149), but, in that case, the personal representative *failed* to submit a second testamentary document to probate at the same time as the Will and first codicil, as opposed to the present case.

presentation of the Codicil in this case. In *Schlossberg*, the problem was that the nephew *did not* submit a testamentary instrument to probate and obfuscated its existence. 275 Md. 603-04. We do not think that a failure to inform the register of wills of a potential execution defect rises to the same level as the conduct in *Schlossberg*.

In *Lutz*, George Lutz was in the room when his future co-administrator incorrectly responded that George was the only son of the decedent. 30 A. at 645-46. George had actual knowledge that he had siblings, yet he still allowed that answer to stand. *Id.* at 646. Under the law at that time, George's elder brother could also have been appointed administrator. *Id.* Thus, his misstatement by omission actually led to his appointment. *Id.* In the present case, the Codicil's execution defect has nothing to do with Mr. Greiber's appointment.

Finally, we fail to discern any prejudice in the submission of the Codicil to probate. Mrs. Castruccio testified that she had no objection to the Codicil, and that she was "[v]ery satisfied with it." No one is disputing the substance or effect of the Codicil itself, *i.e.*, whether Mr. Stinchcomb should receive the money. Thus, in the present circumstance, where Mr. Greiber did not "[m]isrepresent[] material facts in the proceedings leading to his appointment," ET § 6-306(a)(1), and there is no prejudice resulting from the submission of the Codicil to probate, we conclude that the circuit court correctly granted the Estate's motion for summary judgment because Mrs. Castruccio stated no grounds that would

justify the removal of Mr. Greiber as personal representative of the estate.[19]

III.

The Estate's Appeal

A. Messrs. Frank and Jarashow's Participation and Relief in the Post-Judgment Proceedings

We now address the Estate's appeal regarding sanctions. The Estate first argues that the failure of Messrs. Frank and Jarashow to file their own post-judgment motions within ten days of the entry of the January 9, 2015 circuit court order granting sanctions, after they had been found jointly and severally liable for attorney's fees, prohibits them from participating in the post-judgment proceedings or obtaining relief.

Mr. Jarashow argues that the circuit court properly exercised its broad revisory authority after the judgment, with or without the joinder of Mr. Jarashow and Mr. Frank. Mr. Frank argues that the plain language of Maryland Rule 2-534 allows the circuit court to alter or amend a judgment "on motion of any party." Mr. Frank further contends that Mrs. Castruccio's motion to alter or amend sought reversal of the sanctions against both her and her counsel. Mr. Frank further maintains that the sanctions order made them parties to the case and that, because of this, they should have been permitted to argue at the hearing on the motion to alter or amend.

[19] We further note that Mrs. Castruccio never responded to the Estate's motion for summary judgment.

Additionally, although we do not decide on this ground, we observe that, as the Estate points out, there is a decent estoppel or waiver argument in favor of the Estate, given that Mrs. Castruccio withdrew her original removal petition—potentially with prejudice—on July 11, 2013, and the putative grounds for removal occurred before July 11, 2013.

An appellate court reviews the grant or denial of a motion to alter or amend under an abuse of discretion standard, but the trial court has no discretion to apply inappropriate legal standards. *Miller v. Mathias*, 428 Md. 419, 438 (2012) (citations omitted).

We start with the text of Maryland Rule 2-534, which provides, in pertinent part:

> In an action decided by the court, *on motion of any party* filed within ten days after entry of judgment, the court may open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment, or may enter a new judgment. . . .

(Emphasis added). In turn, Maryland Rule 2-535 provides, in pertinent part:

> (a) **Generally.** *On motion of any party* filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534. A motion filed after the announcement or signing by the trial court of a judgment or the return of a verdict but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.
> (b) **Fraud, Mistake, Irregularity.** On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity.
> (c) **Newly-Discovered Evidence.** On motion of any party filed within 30 days after entry of judgment, the court may grant a new trial on the ground of newly-discovered evidence that could not have been discovered by due diligence in time to move for a new trial pursuant to Rule 2-533. . . .

(Bold lettering in original; italics emphasis added).

These rules, and three cases, *Mona v. Mona Elec. Grp., Inc.*, 176 Md. App. 672 (2007), *Waters v. Whiting*, 113 Md. App. 464 (1997), and *Newman v. Reilly*, 314 Md. 364 (1988), inform our conclusion that it was not error for the court to allow Messrs. Frank or Jarashow to participate and obtain relief in the post-judgment proceedings. In *Mona*, Mark

Mona received a verdict based on unjust enrichment against Mona Electric Group, Inc. ("MEG"), and MEG timely filed—within ten days—a motion for a judgment notwithstanding the verdict ("JNOV"). *Id.* at 691-92, 712. During the JNOV hearing, the circuit court *sua sponte* raised the issue of unclean hands. *Id.* at 708-09. After argument, the circuit court granted the JNOV in part, reasoning that Mark Mona could not come to a court in equity with unclean hands. *Id.* at 709-10.

On appeal, this Court stated that, under Maryland Rule 2-535(a) and Maryland Code (1973, 2006 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP"), § 6-408, "a circuit court has broad power to revise its judgment before it is enrolled, that is, within 30 days after entry. Indeed, during that period of broad revisory power, the court may *sua sponte* revise its judgment." *Id.* at 711 (citations omitted). This Court reasoned that, if the trial court had the power to act pursuant to Rule 2-535(a) upon the motion of a party, it also "had the power to *sua sponte* revise its judgment to strike an award of damages that, in the court's estimation, Mark obtained with 'unclean hands.' . . . And, if that were the situation, it matters not whether MEG preserved the issue for purposes of a JNOV motion." *Id.* We also stated the effect of the ten-day JNOV motion:

> In this case, however, MEG filed a timely ten-day postjudgment motion (the motion for JNOV), which had the effect of suspending the 30-day period in which the judgment would have become enrolled, and in which an appeal, if any, would have to be noted. *Tierco Maryland, Inc. v. Williams*, 381 Md. 378, 393, 849 A.2d 504 (2004); see also *Shabazz v. Bob Evans Farms, Inc.*, 163 Md. App. 602, 619 n.2, 881 A.2d 1212 (2005). **As a consequence, the judgment did not become enrolled 30 days after its entry. Rather, it only became enrolled 30 days after the court ruled on the JNOV motion. During the interim, the trial court retained its broad**

> **revisory power over the judgment, under CJ[P] section 6-408 and Rule 2-535(a).** It was not operating under the limited authority to revise set forth in Rule 2-535(b).

Id. at 712 (emphasis added).

In *Waters*, the Whitings sued Mary Waters and the Stevensons for several torts. 113 Md. App. at 466. On November 9, 1995, the Whitings obtained a judgment against Waters and the Stevensons, and, on November 20, the Stevensons timely filed a motion for JNOV. *Id.* at 467. Waters then filed a motion for JNOV on November 22, outside the period for filing a ten-day motion. *Id.* She then filed a notice of appeal on December 8 and subsequently withdrew her post-judgment motion. *Id.* In April, the circuit court granted the Stevensons' motion for JNOV, and, in May, the Whitings filed a notice of appeal. *Id.* On appeal, this Court stated that it read Maryland Rule 8-202—providing that a notice of appeal must be filed within 30 days—"to provide that the timely filing of a post judgment motion pursuant to Rules 2-532, 2-533, or 2-534 by any single party in a multi-party case extends the time for noting an appeal for all parties." *Id.* at 470. Thus, the filing of a ten-day post-judgment motion by one party extends the time for *all parties* to file appeals.

Finally, in *Newman*, the circuit court entered judgment against Newman and later entered sanctions against Newman *and* his attorney, Zerivitz. 314 Md. at 373-74. Thus, a money judgment was entered against both Newman and Zerivitz. *Id.* at 375-76. Zerivitz then filed a notice of appeal on behalf of his Newman, signing it as "'Attorney for Plaintiff.'" *Id.* at 376.

On appeal, one question before the Court of Appeals was whether the notice of

appeal filed for Newman and signed by Zerivitz, was also effective to note an appeal for Zerivitz. *Id.* at 366. The Court stated:

> After sanctions were imposed against both, Zerivitz as well as Reilly had a right to appeal as a "party." No substantial reason appeared at the time the order for appeal was filed, and none has appeared since, to indicate that Zerivitz waived his right of appeal or to indicate that the use of the singular in referring to the plaintiff and to the judgment was a deliberate limitation. . . . Where, as here, there is a commonality of interest between Reilly and Zerivitz, and the imprecision in drafting the order for appeal caused no prejudice to Dr. Newman, we hold that the timely order for appeal brought up for review the judgment against Zerivitz as well as that against Reilly.

Id. at 388. Thus, a notice of appeal prepared and signed by a sanctioned attorney for his client is also effective to note an appeal in his own stead. *Id.*

Based on the plain language of Maryland Rule 2-534 and our synthesis of these three cases, we conclude that Mrs. Castruccio's timely ten-day motion to alter or amend allowed Messrs. Jarashow and Frank to join Mrs. Castruccio's motion at a later date. Maryland Rule 2-534 states in part that "**on motion of any party** filed within ten days after entry of judgment, the court . . . may amend its findings or its statement of reasons for the decision, may enter new findings or new reasons, [and] **may amend the judgment** . . . ." (Emphasis supplied). Mrs. Castruccio filed the motion timely, and Messrs. Frank and Jarashow later joined it.

Further, when Mrs. Castruccio filed her motion, it stayed the enrollment of the judgment, which caused the circuit court at that point to retain its broad revisory power over the judgment. *See Mona*, 176 Md. App. at 712. Additionally, a timely ten-day motion filed by one party extends the time period to file a ten-day motion for other parties until

the circuit court rules upon the motion. *See Waters*, 113 Md. App. at 470 (in the context of ten-day motions and notices of appeal). Finally, Mrs. Castruccio's timely ten-day motion to alter or amend was e-filed and bears the electronic signatures of Mr. Frank and Mr. Jarashow, bringing this case almost squarely within the ambit of *Newman*, 314 Md. at 387. As such, it was not error for the circuit court to allow Mr. Jarashow and Mr. Frank to participate in the argument on the motion or to grant the requested relief as to Mr. Frank or Mr. Jarashow.

B. The Circuit Court's Amended Sanctions Judgment

Finally, we arrive at the Estate's substantive argument concerning the sanctions. We affirm the circuit court, which ultimately did the right thing for the wrong reason.

The Estate argues that the circuit court erred in reversing its sanctions order. The Estate contends that the circuit court's consideration of penalties in the other contempt case constituted an abuse of discretion because it relied on material outside the record, namely, the fact that attorney's fees would be awarded in the contempt proceeding, in doing so.

Mrs. Castruccio argues that, before imposing sanctions under Maryland Rule 1-341, a court must find that a party took action in bad faith or without substantial justification. She maintains that, because the circuit court expressly struck its factual findings concerning the sanctions, it is impossible for there to be fees in this case. She contends that the standard of review in this area is abuse of discretion—a very forgiving standard—because the issue is not whether this Court would have made the same decision. She maintains that the circuit court did not abuse its discretion in this case.

Mr. Jarashow argues that the circuit court properly reversed its judgment as to sanctions because the circuit court did not make the proper factual findings of bad faith and/or lack of substantial justification before entering its award. Further, Mr. Jarashow notes that the January 9, 2015 hearing, from which the sanctions originated, had no argument concerning sanctions. Mr. Jarashow further maintains that the argument below concerning removal of Mr. Greiber was not made in bad faith or without a substantial justification because Mrs. Castruccio presented a colorable claim. Mr. Frank echoes these arguments and further contends that the Estate ignores the standard of review, abuse of discretion, in its argument.

To impose sanctions, the circuit court must make two separate findings, as follows, and the standard for review of these decisions is two-fold. *Barnes v. Rosenthal Toyota, Inc.*, 126 Md. App. 97, 104-05 (1999) (quoting *Inlet Associates v. Harrison Inn Inlet, Inc.*, 324 Md. 254, 267-68 (1991). The circuit court's specific factual findings as to whether a party or attorney performed an action in bad faith or substantial justification is subject to a review for clear error. *Id.* The circuit court's determination that a wrongdoing actually warrants the imposition of sanctions is then reviewed for abuse of discretion. *Id.*

Maryland Rule 1-341(a), which governs sanctions generally, provides:

> (a) **Remedial Authority of Court.** In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification, the court, on motion by an adverse party, may require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorneys' fees, incurred by the adverse party in opposing it.

Meanwhile, Maryland Rule 6-141, governing sanctions in probate proceedings, provides:

> If the court finds that the conduct of any person in maintaining or defending any proceeding was in bad faith or without substantial justification, the court may require the offending person or the attorney advising the conduct or both of them to pay to any other person and, when appropriate, to the estate the costs of the proceeding and the reasonable expenses, including reasonable attorney's fees, incurred by the person or estate in opposing it.

In Maryland, attorney's fees "are rarely awarded by the court and . . . only in special circumstances." *Hess v. Chalmers*, 33 Md. App. 541, 544 (1976) (citations omitted). Sanctions in the form of attorney's fees are "an extraordinary remedy, intended to reach only intentional misconduct." *Talley v. Talley*, 317 Md. 428, 438 (1989).

To impose sanctions pursuant to Maryland Rule 1-341, the circuit court is required to make "an explicit finding that a claim or defense was 'in bad faith or without substantial justification.'" *Zdravkovich v. Bell Atl.-Tricon Leasing, Corp.*, 323 Md. 200, 210 (1991) (quoting Maryland Rule 1-341). The record must demonstrate that the trial court made a finding of bad faith or a lack of substantial justification, as well as the basis for the trial court's finding. *Inlet Associates*, 324 Md. at 269 (quoting *Zdravkovich*, 323 Md. at 210). "Unless such a finding is made, counsel fees may not be awarded[.]" *Hess*, 33 Md. App. at 545.

Here, the January 9, 2015 circuit order granting summary judgment included the following findings:

> (6) That, under Maryland Rules 6-141 and 1-341, both the initiation and maintenance of this emergency removal proceeding before the Orphans' Court for Anne Arundel County and the initiation, maintenance, and pursuit

> of this removal proceeding before this Court were in bad faith and without substantial justification;
> (7) That Sadie M. Castruccio and each of her attorneys of record are jointly and severally liable to the Estate under Maryland Rules 6-141 and 1-341 for the reasonable attorneys' fees and costs actually incurred by the Estate to defend Mr. Greiber in this frivolous removal proceeding in both the Orphans' Court and this Court[.]

Other than the summary conclusion that the pursuit of removal was "in bad faith and without substantial justification," there is no explicit finding of bad faith or lack of substantial justification, nor is there any statement on the "basis" for such a finding. *See Inlet Associates*, 324 Md. at 269. Nor was there any factual finding in the circuit court's oral opinion from the bench.

Even if the circuit court had made express factual findings, the May 7, 2015 order granting in part and denying in part the motion to alter or amend the judgment explicitly "eliminate[ed] the findings upon which such award of sanctions was based."[20] Thus, even if the original factual finding of bad faith sufficed to award sanctions, which it did not, the circuit court explicitly struck these findings. In these circumstances, we are unable to say that it was clear error for the circuit court to not make a finding of bad faith or a lack of substantial justification. *See Bricker v. Warch*, 152 Md. App. 119, 137 (2003) ("Although it is not uncommon for a fact-finding judge to be clearly erroneous when he is affirmatively **PERSUADED** of something, it is, as in this case, almost impossible for a judge to be clearly erroneous when he is simply **NOT PERSUADED** of something." (emphasis in

[20] The Estate seems to dispute this point, but it provides no factual basis for this dispute.

original)).

We find additional support in the fact that the removal petition does present a colorable basis for removal, as demonstrated by the fact that this present opinion contains tens of pages devoted to discussing this argument. The arguments made in the removal proceedings, although ultimately unsuccessful, were not frivolous. *See Black v. Fox Hills N. Cmty. Ass'n, Inc.*, 90 Md. App. 75, 84 (1992) (Maryland Rule 1-341 is not automatically applicable "simply because a complaint failed to state a cause of action. Nor does it apply because a party 'misconceived the legal basis upon which he sought to prevail[.]'" (quoting *Hess*, 33 Md. App. at 545).

The Estate cites *Fletcher v. Flournoy*, 198 Md. 53 (1951), for the proposition that it was error for the circuit court to venture outside the record in its decision to reverse the sanctions, namely the fact that there would be a money award in the related contempt case.

The Estate is correct that *Fletcher* stands for this proposition:

> 'The general rule undoubtedly is that a court will not travel outside the record of the case before it in order to take notice of the proceedings in another case, even between the same parties and in the same court, unless the proceedings are put in evidence; and the rule is sometimes enforced with considerable strictness. * * * But in exceptional cases, as high authority shows, the dictates of logic will yield to the demands of justice, and the courts, in order to reach a just result, will make use of established and uncontroverted facts not formally of record in the pending litigation.'

198 Md. at 60-61 (alteration in *Fletcher*) (quoting *Morse v. Lewis*, 54 F.2d 1027, 1029 (4th Cir. 1932)). Thus, the Estate is correct that the circuit court should not have relied on the fact that there would probably be money awarded in the contempt proceeding as a

justification for striking the attorney's fees in this case—but that determination is not dispositive here. As we have explained, there were no explicit findings of fact in its original grant to justify sanctions. Thus, even if the circuit court should not have relied on facts outside the record in considering whether to grant the motion to alter or amend, we cannot say that it was error for the circuit court to not award fees, especially in a situation in which it did not explicitly state the required factual basis upon which it was granting attorney's fees originally. For these reasons, we hold the circuit court did not err or abuse its discretion in granting the motion to alter or amend with respect to the attorney's fees.

JUDGMENTS AFFIRMED.

COSTS SPLIT, HALF TO THE ESTATE OF PETER A. CASTRUCCIO AND HALF TO SADIE M. CASTRUCCIO.