UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2263

September Term, 2007

FERNANDO CRISTANCHO

v.

Def

Eyler, Deborah S.,
Zarnoch,
Matricciani,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: October 27, 2008

12C0300002976

The parties and significant people in this appeal are 1) Fernando Cristancho ("Fernando"), the appellant; 2) Def ("Def"), the appellee; and 3) triplets M-1, M-2, and F, born to Def in November 2001. Fernando is the biological father of the triplets, who were conceived by *in vitro* fertilization using eggs from an anonymous donor. Although she gave birth to the triplets, Def is not their biological mother.

The parties have been in litigation in the Circuit Court for Harford County since late 2003. This appeal is from the court's decision, after a five-day merits hearing, to deny Fernando's motion to change custody. Fernando had asserted that, because he is the biological father of the children, and Def is not their biological mother, the issues of custody and visitation must be determined by application of the parent versus third party "unfitness or exceptional circumstances" standard. *See, e.g., Janice M. v. Margaret K.*, 404 Md. 661, 685-86 (2008); *McDermott v. Dougherty*, 385 Md. 320, 375 (2005). Without deciding the applicable legal standard,[1] the court ruled that, even under the standard presenting the greater burden on Def, Fernando was unfit and therefore could not be

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[1] In custody disputes between two biological parents, courts apply the "best interest of the child" standard. Because each biological parent is presumed fit and endowed with a fundamental right to raise the child, the parents stand on an equal footing, leaving the child's best interest as the sole consideration for the court. *McDermott*, *supra*, 385 Md. at 353. By contrast, between a biological parent and a third party, the third party must first prove, by a preponderance of the evidence, that the biological parent is unfit or that exceptional circumstances exist. *In re: Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 498-99 (2007). Only after satisfying that threshold determination does the court apply the best interest of the child standard. *Koshko v. Haining*, 398 Md. 404, 419 (2007); *McDermott*, *supra*, 385 Md. at 374-75.

granted custody under the mandate of Md. Code (1984, 2006 Repl. Vol.), section 9-101 of the Family Law Article ("FL").[2] Specifically, the court found as a fact that Fernando had sexually abused M-1 and M-2, and that it could *not* find "no likelihood of any further abuse." On that basis, and treating Def as a third party, the court granted her custody and granted Fernando supervised visitation.

On appeal, Fernando raises two issues:

> I. Did the trial court err in ruling that Def is the *de facto* parent of the triplets?
>
> II. Was the trial court's finding that he sexually abused two of the children clearly erroneous?

For the following reasons, we shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

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[2]Md. Code (1984, 2006 Repl. Vol.), section 9-101 of the Family Law Article, captioned "Rejection of custody or visitation if abuse likely," states in full:

> Determine if abuse or neglect is likely
>
> (a) In any custody or visitation proceeding, if the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court shall determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party.
>
> Deny custody or visitation if abuse likely
>
> (b) Unless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child.

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Fernando was born in Colombia, South America. He studied theology at the University of Havana, and then entered a Catholic seminary. He was ordained a priest in 1985. He served several years as a priest in Colombia, and then in 1994 moved to the United States, serving as assistant priest at Good Shepherd Catholic Church in Alexandria, Virginia. After about three years, he left Good Shepherd amid accusations that he had disbursed church funds for personal expenses to a woman parishioner with whom he allegedly had an affair. Subsequently, he attended Loyola College and around 1999 or 2000 became an assistant priest at St. Ignatius Church in Forest Hill, Maryland. He lived full time at the church. While stationed at St. Ignatius, he occasionally held Spanish language services at St. Francis de Sales in Abingdon. In January 2002, he was naturalized as a United States citizen. At the time of trial, in mid-2007, Fernando was 51 years old.

Def was born in Cuba, emigrating with her parents to the United States in 1970. In 1997, after living in Florida and New York, she moved to Maryland. For many years, she had worked first in New York and then in Maryland for [redacted]. At the time of trial, she held the position "Senior Coordinator Merchandising Clerk for Customer Service" at [redacted]. She was then 56 years old.

The parties met through Fernando's sister, who worked at [redacted] with Def. Def attended some of the services Fernando led at St. Francis and got to know him. In 2000, Fernando's sister moved in with Def for about a year, rent free. Def, Fernando, and Fernando's sister became friends.

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Fernando wanted to have children, even though as a Catholic priest he had taken a vow of celibacy. He invited Def to a Red Lobster restaurant and asked whether she would agree to bear his children. At the time, Def was 50 years old and childless. At first she had misgivings, but ultimately she agreed to Fernando's plan to travel to Colombia to undergo *in vitro* fertilization, using Fernando's sperm and eggs from an anonymous donor.[3] Def and Fernando were never involved sexually or romantically. They have never been married to each other, have never executed a formal or written surrogacy agreement, and no money was exchanged between them.[4]

In two separate trips in early 2001, Fernando and Def went to Colombia and the *in vitro* fertilization process was carried out successfully. They returned to the United States, and the pregnancy—with triplets—continued. In August 2001, Def moved out of her apartment and into the master bedroom of a house Fernando and his mother had purchased in Bel Air. Fernando continued to work as a priest at St. Ignatius. He did not tell anyone at the church about the pregnancy.

The triplets were born prematurely on November [ ], 2001, at Georgetown University Hospital, after 36 weeks of gestation. The boys stayed in a neonatal intensive care unit the first two weeks, while [ ] remained in intensive care about four weeks. Ultimately all

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[3]It is unclear from the record whether Def was physically capable of conceiving a child.

[4]At various times, Def and Fernando exchanged money for housing and living expenses. In the context above, we mean that the parties did not exchange money as consideration for a surrogacy agreement.

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three children were healthy enough to be discharged and were taken to Fernando's house in Bel Air to stay with Def . Def paid the hospital bills through her health insurance policy.

Although he lived at St. Ignatius, Fernando visited the house in Bel Air daily and stayed overnight on his days off. His mother, sister, sister-in-law, and three nieces also were living there, along with Def 's mother. On December 12, 2001, Father Kenneth Farabaugh, the pastor at St. Ignatius, died in an automobile accident, leaving Fernando as acting administrator. At around the same time, Fernando asked that Def 's mother leave the house, a request that led to a series of increasingly acrimonious disputes between the parties.

In late June or early July 2002, Church officials learned about the triplets and demanded that Fernando leave his position. He left St. Ignatius and moved into the Bel Air house. By then, his sister-in-law and nieces had left and only his mother, sister, and Def remained there with the triplets. Eventually, Fernando's sister also moved out. Meanwhile, Fernando held a number of jobs, all briefly. At the time of trial, he was working a late-night shift at a Wal-Mart stocking shelves, earning roughly $10 per hour.

In the months after Def gave birth, the friction between the parties intensified. After he was fired from St. Ignatius, Fernando asked Def to leave the Bel Air house, but she refused. The conflict between them escalated.

On October 9, 2003, Fernando filed a complaint for immediate custody, child support, and other relief. In that pleading, and in many others filed thereafter, he referred to himself

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and Def as the triplets' natural parents. Privately, he took the position that Def was merely a "surrogate" and not the mother of the children.

On November 17, 2003, Fernando called the police and accused Def of domestic violence. The police responded and told her to leave. She complied and called an acquaintance, A-1 ("A-1"), who agreed to let Def stay in her home. The children remained in Fernando's house.

The same night, Def told A-1 that she was concerned about the children because of what she regarded as an inappropriate relationship between Fernando and a young male pupil, who (Def alleged) would stay for hours at a time in a locked room with Fernando, ostensibly for Spanish lessons. A-1 demanded, as a condition of allowing Def to stay at her house, that she notify the police immediately. A-1 drove Def to the Bel Air precinct where she filed a report. Def recognized one of the officers there as one who had just recently responded to the domestic violence call at Fernando's house. She persuaded the officer to accompany them back to Fernando's house to retrieve her purse. Def then went to A-1's house, where she lived for about six months until she was able to rent her own apartment in Bel Air. For several months, Def was unable to retrieve any other personal property from Fernando's house.

On December 9, 2003, the parties agreed to a temporary consent order establishing primary physical custody with Fernando and permitting visitation with Def. The exchanges of the children usually were witnessed by friends of each parent and were fraught with

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tension. The parties were ordered to submit to psychological examinations and to participate in a custody evaluation by the Harford County Office of Family Services.

On February 4, 2004, Fernando filed a motion to modify visitation, which Def opposed. The report of the court-appointed custody evaluator was issued April 8, 2004, and review hearings were held on April 29 and May 12, 2004. Ultimately, on May 13, 2005, the parties entered into a final consent order that, *inter alia*, granted them shared physical and legal custody.

In late 2005, events allegedly occurred that led to a Department of Social Services ("DSS") investigation of Fernando for sexual abuse of his children. According to Def, while the children were at her apartment, she saw M-1 touching his penis as he sat on the sofa in the living room. When she told him to "leave that alone," the boy responded, "Mommy, Daddy tells me to play with my pee pee so it could get big, and then he puts it in his mouth."

Def claimed she was so disturbed by what M-1 said that she couldn't sleep that night; she did not notify the police immediately, however. Two nights later, A-1 called, as she routinely did, and Def told her about the incident from two nights before. As a result of this conversation, the next day, November 12, 2005,[5] Def called Dr. Lazar, the children's pediatrician, and informed her about the incident with M-1. Dr. Lazar allegedly told Def to consult a counseling clinic, but that otherwise she shouldn't tell anyone "because

[5]The circuit court gave the date as November 10, 2005. The discrepancy is not material.

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[she] wouldn't be believed" in light of the child's tender age. Dr. Lazar's contemporaneous notes document the telephone conversation. Dr. Lazar did not notify the police or Child Protective Services ("CPS") about Def 's allegations.[6] Def did not follow the recommendation to take the children to counseling.

On March 8, 2006, Fernando filed a motion to modify custody so that he would have sole legal custody and primary physical custody. About a month later, on the Tuesday before Easter, the children were being babysat by A-2, who is A-1 's mother. (From the time when Def got her own apartment, A-2 babysat regularly for the children while Def was at work.) A-2 saw M-1 sitting on the toilet "playing with himself, and he did have an erection." She told him to stop, and to wash his hands. M-1 replied, "Ms. A-2, I do not have to do what you tell me to do. I do what Daddy tells me to do. . . . Daddy does this to me. . . . Daddy puts his penis in my mouth."

A-2 immediately called Def to notify her, but Def replied that she had already known about the abuse since November 2005. When asked what she had done about the abuse, Def replied that she had called Dr. Lazar, but that Dr. Lazar told her that nothing could be done until the children were six years old.

A-2 was shocked and disturbed after this incident. The next day she met with her pastor, Monsignor Jim Barker, who promptly called an official with the Archdiocese of

[6]It appears that Dr. Lazar did not comply with the duty to notify set forth in FL section 5-704 ("Reporting of abuse or neglect—By health practitioner, police officer, educator or human service worker.").

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Baltimore, Father Patrick Carrion. At Father Carrion's urging, A-2 notified the Bel Air Police Department. As a direct result, DSS was notified, and CPS commenced an investigation on April 12, 2006.

Noel Francis, a licensed clinical social worker with CPS, investigated the abuse allegations. Of the three children, she interviewed only M-1. The interview with M-1 revealed that Fernando had touched the boy's penis, that Fernando had asked him to touch his father's penis, and that his father's penis was "round," "hair[y]" and "soft." M-1 also told Francis that his father put his mouth on M-1 's penis "lots" of times while they were in the bathroom, and that M-1 had seen Fernando do likewise to M-2.

A different CPS employee, Ms. Daniel,[7] interviewed M-2 and F. M-2 told Daniel that Fernando touched his penis "just one time" "to make it grow." F "denied any sexual abuse by her father," according to the report Francis ultimately filed on August 23, 2006.[8]

Francis spoke by phone with Dr. Lazar and confirmed that Def had reported sexual abuse in late 2005 but that Dr. Lazar had not reported it to the authorities. Dr. Lazar

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[7]In some parts of the transcript, her name is stated "Ms. Daniels." The record does not reflect Ms. Daniel's full name or job title, but refers to her as "from the Harford County Child Advocacy."

[8]The record is unclear about whether Francis interviewed the other children on subsequent dates. During cross-examination, Francis stated that she conducted "one home visit with the mother present."

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allegedly told Francis that she had advised Def "it need not be reported because they wouldn't believe her."

Francis also interviewed A-2 A-1 and her husband; the grandmother and mother of the young male pupil Def was suspicions about; and Trooper Hollister of the Bel Air Police Department.[9] She spoke by phone with Robert Schwenk, the President of the Parish Council at Good Shepherd Church in Alexandria. Schwenk told Francis that Fernando had been dismissed from Good Shepherd because of "sexual misconduct with a young [woman] and that there were photographs." Francis ultimately spoke with Mark Herman, counsel for Father Mealey, a Diocesan official in northern Virginia. Herman told Francis that the sexual misconduct did not involve a minor.

Fernando vehemently denied ever abusing any of the children in any way. He insisted that Def was using allegations of sexual abuse in a strategic effort to alienate the children from him and gain custody.

On April 11, 2006, Def answered Fernando's motion to modify custody. On April 20, 2006, after she alleged sexual abuse, the court modified the consent order by granting physical and legal custody of the triplets to Def and temporarily suspending visitation between Fernando and the children. The court ordered facilitated and supervised visitation for Fernando beginning June 6, 2006.

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[9]Trooper Hollister contacted Fernando on April 12, 2006. Fernando initially declined to be interviewed without his attorney present. Trooper Hollister questioned Fernando about the abuse allegations two days later with an attorney present.

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On August 20, 2006, the DSS made a finding against Fernando of "indicated" child sexual abuse of M-1 and M-2, and that sexual abuse of F had been "ruled out." *See* FL §§ 5-701(m) ("indicated" defined), 5-701(w) ("ruled out"), 5-701(x) ("sexual abuse"); COMAR 07.02.07.02. Fernando initially sought to challenge that decision, *see* FL § 5-706.1, but then withdrew his appeal. The modified consent order remained in effect and Fernando continued to have facilitated and supervised visitation with the children, under a series of visitation orders.

On March 9, 2007, Fernando filed an amended complaint seeking a declaration of parentage, immediate custody of the triplets, and "other appropriate relief." He alleged for the first time that Def was a non-parent third party, having been only a gestational carrier of an anonymous donor's fertilized eggs, and that she therefore "lack[ed] standing to petition for custodial or visitation rights to [his] minor children."

Def answered the complaint and the matter progressed to an evidentiary hearing that began August 28, 2007, and continued through September 4, 2007. At the request of the presiding judge, counsel submitted post-trial memoranda of law.

On October 31, 2007, the court issued a 26-page opinion making findings of fact and conclusions of law. The court found, as a matter of fact, that Fernando had sexually abused M-1 and M-2. The court did *not* find, pursuant to FL section 9-101, that there was no likelihood of further abuse by Fernando. The court ruled that "Def has to be considered as a third party seeking custody as a *de facto* parent" under this Court's subsequently

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overruled decision in *Janice M. v. Margaret K.*, 171 Md. App. 528 (2006), *rev'd*, 404 Md. 661 (2008). The court then applied the third party custody standard of *McDermott*, *supra*, 385 Md. 320, and ruled that Def had met her burden to prove Fernando's parental unfitness. Because the court determined that Def had overcome the presumption of custody in favor of Fernando, it proceeded to apply the best interest of the child standard and decided to award custody to Def. That same day, the court issued a judgment granting Def sole legal and physical custody of the children and granting Fernando facilitated and supervised visitation.

Fernando filed a timely notice of appeal to this Court. We shall include additional facts as necessary to our discussion of the issues.

DISCUSSION

I.

In his opinion, the trial judge discussed and analyzed all the pertinent Maryland cases, including *Janice M. v. Margaret K.*, *supra*, 171 Md. App. 528, in which this Court held that in certain circumstances a person otherwise not a parent could be a *de facto* parent. After the trial court's decision in the case at bar, the Court of Appeals reversed our decision in *Janice M.*, holding that Maryland has never and does not now recognize *de facto* parenthood. 404 Md. 661.

In this Court's *Janice M.* opinion, we applied a bifurcated standard to questions of custody and visitation involving a contest between a legal parent and a *de facto* parent. We held that the best interest of the child standard applies in such cases when visitation is at

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issue but that, when custody is at issue, the *de facto* parent must satisfy the threshold burden of providing either that the biological (or legal) parent is unfit or that exceptional circumstances exist, *i.e.*, that the third party test applies for custody determinations. 171 Md. at 540-42. In reversing, the Court of Appeals held that, in third-party cases, the unfitness or exceptional circumstances test applies to *both* visitation *and* custody determinations.

Because this is a custody case, the trial court applied the third party test. In other words, even though it relied upon a subsequently overruled case, the trial court applied the correct test in making its decision. Therefore, any error in finding that Def was a *de facto* parent of the triplets was harmless, as Fernando himself concedes in his brief.

II.

Fernando's sole argument in favor of reversal of the judgment is that the trial court's factual finding that he sexually abused M-1 and M-2 was in several respects clearly erroneous. He does not contest that the threshold factual finding of sexual abuse would support the court's further finding that he is an unfit parent; and that furthermore, if the finding of sexual abuse was not clearly erroneous, then Def, as an assumed third party, would have overcome the presumption that custody with the natural parent is in the children's best interest.

Because the proceeding below was a bench trial, we apply the standard of review in Rule 8-131(c). We defer to the factual findings of the circuit court unless they are clearly erroneous. *Karen P. v. Christopher J.B.*, 163 Md. App. 250, 264 (2005). Moreover, we do

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not interfere with the circuit court's credibility determinations or its weighing of the evidence. *Id.*; *Davis v. Davis*, 280 Md. 119, 124 (1977) (construing former Rules 886 and 1086, the predecessors to Rule 8-131). The trier of fact is free to credit all, part, or none of a witness's testimony. *Loyola Fed. Sav. Bank v. Hill*, 114 Md. App. 289, 306-07 (1997). We review the circuit court's legal conclusions without deference. *Elderkin v. Carroll*, 403 Md. 343, 353 (2008); *Helinski v. Harford Mem'l Hosp.*, 376 Md. 606, 614 (2003); *Hill v. Hill*, 118 Md. App. 36, 40 (1997).

The trial judge carefully weighed the testimony and evidence adduced at trial and found that "there is absolutely no doubt in my mind that there are reasonable grounds by a clear preponderance of the evidence to believe that M-1 and M-2 have been abused by Fernando. Likewise, I cannot in good conscience find by a preponderance of the evidence that there is no likelihood that such abuse will not happen in the future."

The trial judge then applied FL section 9-101 to deny custody to Fernando. Plainly, if there is substantial evidence in the record to support the trial judge's findings, his application of the statute correctly mandates the ruling below. *See, e.g., YIVO Inst. for Jewish Research v. Zaleski*, 386 Md. 654, 663 (2005) ("If there is any competent material evidence to support the factual findings of the trial court, those findings cannot be held to be clearly erroneous."); *Solomon v. Solomon*, 383 Md. 176, 202 (2004) (same); *L.W. Wolfe Enters., Inc. v. Md. Nat'l Golf, L.P.*, 165 Md. App. 339, 343 (2005) (same).

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Fernando attempts to cast doubt on the trial court's factual findings in several respects. The most notable contentions are that at one point in A-1 's testimony, Def made hand signals to her; that Def 's testimony that Dr. Lazar told her not to bother reporting the alleged sexual abuse was contradicted by Dr. Lazar's contemporaneous notes, and that Def 's testimony in this regard was "figuratively and literally, unbelievable"; and that "the [t]rial [c]ourt did not significantly question [Def 's] motivation for making the allegations of sexual abuse in light of the timeline of events."

Although we do not countenance a party signaling a witness during testimony, the fact remains that Fernando's counsel failed to object at that time[10] and failed to argue that the witness's testimony should be excluded under Rule 2-517(c). Therefore, this issue is not preserved for review. Md. Rule 8-131(a). Even if we were to address the issue on its merits, in light of the ample evidence supporting the trial court's findings, we would conclude that any conceivable error would have been harmless. *Flores v. Bell*, 398 Md. 27, 33-34 (2007) (explaining that the appellant bears the burden to show that error caused "substantial prejudice"); *Crane v. Dunn*, 382 Md. 83, 91-92 (2004) (same); *Flanagan v. Flanagan*, ___ Md. App. ___, No. 395, Sept. Term 2007 (filed September 10, 2008), slip op. at 19-21.

Fernando's arguments impugning Def 's testimony and her motivations must fail because they amount, in essence, to an attempt to reargue the facts of this case. Under the

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[10]The trial judge *sua sponte* admonished Def against attempting to signal the witness, addressing Def 's counsel directly: "[Y]ou might want to tell your client not to give signals to the witness."

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correct standard of appellate review of the trial court's factual findings, it is immaterial whether we would have judged the credibility of witnesses or weighed the evidence and its permissible inferences differently so as to arrive at a different conclusion than the trial court. Md. Rule 8-131(c).

Fernando's argument that Def 's testimony was "unbelievable" must fail because we do not sit as a trial court and will not substitute our judgment for that of the trial judge. The trial judge stated explicitly that he found "the testimony of Def and Mrs. A-2 to be totally credible." Likewise, the trial court "reject[ed] Fernando's contention that the abuse report was done by Def in response to his request for custody." As the trial judge pointed out, "Def herself was not the catalyst" for the report, rather A-2 pressed the issue soon after M-1 told her about the abuse during a "chance encounter." Furthermore, there was evidence supporting the trial court's conclusion that Def 's testimony could be reconciled with Dr. Lazar's notes. Those notes, which had been entered into evidence through the CPS report, stated that Def had been advised to notify CPS "PRN."[11]

Moreover, as the trial judge stated, the adjudication by DSS that Fernando had been found an "indicated" sex abuser was not contested and therefore also was properly considered by the trial court. Finally, we agree with the trial judge that, given his factual findings by a preponderance of the evidence that Fernando had sexually abused M-1

[11]PRN is a Latin abbreviation meaning "*pro re nata*" (as needed).

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and M-2 and that there was *not* "no likelihood that such abuse w[ould] not happen in the future," FL section 9-101 mandated the denial of custody to Fernando.

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