UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 64

September Term, 2016

CHOO WASHBURN

v.

LARRY WASHBURN

Arthur,
Reed,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: April 17, 2017

"[I]t's just a very sad situation."

Judge Bernard, concluding her ruling at the end of the bench trial, 6 January 2016.

At this moment, it is difficult to recall truer words spoken from the Bench. The record of this breach of contract suit brought by a wife against her husband reflects: (a) what seems to be an irredeemably deteriorated marriage, but one that neither spouse has sought yet to dissolve legally and resolve thereby matters of alimony, spousal support, property distribution, and the like, preferring instead to parry-and-thrust with each other in breach of contract suits, domestic violence proceedings, and other forms of related litigious activities; (b) insufficient (under the circumstances) income streams for either spouse, unpaid taxes, high debt amounts, and mortgaged real properties, thus rendering difficult in the extreme, among other consequences, either spouse obtaining continuing legal counsel or representation; (c) the negotiation and execution by the parties, without apparent benefit of counsel, of several written "agreements" intended to band-aid-over the deteriorating financial affairs of the marriage, each agreement flawed in major ways, including material ambiguities and unenforceable "penalty" provisions for breaches; and, (d) a fairly high level of suspicion and anger between the parties in their interactions, as found by the trial judge in the present case. We are confronted by unhelpful briefs, prepared and filed by the self-represented litigants, that pay little heed to many provisions of Md. Rule 8-504.[1]

[1] Rule 8-504. Contents of Brief.
(a) Contents. A brief shall . . . include . . .

Nonetheless, we shall strive to summarize the material aspects of this breach of contract litigation, as best as we can determine it from our review of the substantial record, and explain succinctly why we affirm the judgment of the trial court.

FACTUAL BACKGROUND

Appellant, Choo Washburn (age 66 at trial), and Appellee, Larry Washburn (age 67 at trial),[2] remained a married couple as of the trial of the present case on 6 January 2016. The parties (parents of two apparently emancipated children) began living separate and apart somewhere in the vicinity of 5 July 2012. Choo, perceiving the need to achieve some financial understandings between them as she was not employed and Larry was at the time employed in a relatively well-paying full-time job and receiving additionally a retirement annuity of some $7,200 a month from a prior federal job, instigated negotiations with Larry (each without apparent benefit of legal counsel) to reduce something to writing. The result of these negotiations was a sequence of written "agreements" signed by the parties:

> (1) A table of . . . citations of cases, constitutional provisions, statutes, ordinances, rules, and regulations . . . .
> (2) A *brief* statement of the case . . . .
> (3) A statement of the questions presented . . . *without unnecessary detail*.
> (4) A *clear concise* statement of the facts *material* to a determination of the questions presented . . . .
> (5) A *concise* statement of the applicable standard of review . . . .

(emphasis added).

[2] Meaning no disrespect, but rather to avoid confusion as we continue, we shall use the parties' first names.

Agreement of 5 July 2012 (2 pages) – the material features of which appear to be:[3]

- purports to oblige Larry to pay both parties' "monthly bills" (this obligation became a focal point of the present litigation), Choo's car loan and car insurance payments, the mortgages and home equity loan on the parties' two rental properties,[4] property reasonable maintenance costs, and utilities
- after Larry makes the above payments of "monthly bills," if there is any "surplus" income funds in Larry's hands, the "surplus" would be divided 70% to Larry and 30% to Choo
- the income from the rental of the two properties would be divided 50% to Larry and 50% to Choo[5]
- the parties agreed to seek a home equity loan, the proceeds of which would be used to pay-off or pay-down various credit card balances and loans of the parties

[3] Various of the Agreements refer to supposedly appended enumerating lists, but we could find no such attachments in the record.

[4] The parties own two single-family dwellings, one at 11532 Soward Drive, Wheaton, MD, and the other at 3521 Cummings Lane, Chevy Chase, MD.

[5] The Soward Drive property had a mortgage requiring monthly payments of between $1,600-1,700. The Cummings Avenue property mortgage required monthly payments of between $3,067-3,380, in addition to a monthly home equity loan payment of $404.30. The Soward Drive property was rented to third parties in 2015 for almost the whole year at $1,600 a month. The tenants left before the lease expired. Choo occupied the Cummings Avenue property, so there was no rental income attributable to it.

- Choo will dismiss a pending suit she initiated against Larry in the District Court of Maryland, sitting in Montgomery County (No. 0601-0004331-2012)

Agreement of 17 September 2012 (2 pages) – the key features being:

- all undertakings were conditioned on for "so long as the parties remain married"
- Larry, for so long as he has a full-time job, could live in the Soward Drive home and Choo in the Cummings Lane residence, with mutual access granted by each to the other
- fixing specific dollar amounts as penalties for non-compliance
- tweaking the apportionment of the anticipated home equity loan

Agreement of 21 September 2013 (2 pages) – the key provisions are:

- all undertakings conditioned on the parties being married
- introduces a potentially different concept than Larry paying Choo's "monthly bills" (as provided for in the 5 July 2012 Agreement) by providing that Larry shall pay Choo's "regular household bills (including doctors' bills, medicine, and any medical bills)," on penalty of $500 for each violation
- re-aligns again the application of the intended home equity loan proceeds
- perhaps contrary to, or conflicting with, provisions that the earlier Agreements were conditioned on the continuation of the parties' marriage,

states that the earlier Agreements are valid "as long as the two parties are alive"

Agreement of 8 October 2013 (1 page) – the key features of which are:

- reiterates the condition of "[a]s long as the parties are married"
- Larry will grant to Choo access to 3 credit cards currently in his name only
- Choo will dismiss "all court cases against Larry"

We shall refer occasionally to these agreements hereafter collectively as the "Agreements."

At the time of the execution of the 5 July 2012 Agreement, Larry was employed full-time (since 2011) with the American College of Radiology (ACR). Between his approximately $100,000/year salary from ACR and his monthly federal government pension of approximately $7,200 (annualized to $86,400), Larry was receiving a substantial level of income starting in 2012. With that, however, came significantly higher income tax bills, which remained unsatisfied as of the trial of this case. He lost his job with ACR sometime in 2014. Thereafter, he received: (1) some income ($800) while on "stand-by" between 29 October 2014 and 21 November 2014 for an entity known as Knowledge Consulting Group; (2) a single ten-hour consulting job in January-February 2016 for an entity known as Security Port; and, (3) from October to November 2015, he

worked part-time as an on-call field service technician for an entity known as NKB. As of the date of trial, Larry's sole income was his federal retirement annuity of $7,200/month.[6]

There is a long history in both the District Court of Maryland, sitting in Montgomery County,[7] and the Circuit Court for Montgomery County of the parties in direct litigation, virtually all of which was initiated by Choo. Some of these suits cast a larger shadow than others on the present litigation. We shall recount a few that appear to have influenced the trial judge in the present case.

In Case No. CV-387604 in the circuit court, Choo sued Larry for various alleged breaches of the Agreements. At a motions hearing on 17 July 2014, Judge Ronald B. Rubin narrowed the issues for possible trial by granting Larry's motion to dismiss those portions of Choo's complaint that sought monetary punitive damages for alleged breaches of any of the Agreements other than the 5 July 2012 Agreement. The basis of his dismissal (without leave to amend) seemed to be that the claims under the post-July 5 Agreements were unenforceable penalties.

Presaging more directly the circumstances of how, if at all, Choo could continue to initiate actions in the circuit court against Larry for alleged future breaches of the Agreements was Judge Louise G. Scrivener's (and the parties') putting on the record in

[6] At some point after he lost his job at ACR, Larry moved out of the Soward Drive property. He rented an apartment in Herndon, VA, with a monthly rent of $1,700.

[7] There was so much litigation in the District Court, initiated by Choo, that an order was entered forbidding her, without leave of court, from filing further suits against Larry.

CV-387604 on 17 September 2014 the terms of a settlement of the then-pending claims brought under the 5 July 2012 Agreement. The pertinent parts of that proceeding, that we could glean from this record, are:[8]

> [Choo's counsel][9]: . . . What we've agreed to do this morning is that the case will be dismissed without prejudice, subject to any future proceedings related to the claims brought in this case, will be adjudicated in the context of a family law, or matrimonial case under the family law article. In other words, there won't be a separate lawsuit for money, damages or anything else. If there's an issue that arises from the July 5th, 2012 agreement or any other agreements that has to be adjudicated then it will be in the context of a family law case.
>
> Nobody's waiving their rights under those agreements and, or, any statues or limitations that may apply. I have explained to Ms. Washburn that typically, normal contracts have a 3 years statute of limitations, so if there is a problem with the ongoing enforcement of an agreement, then something would have to be filed in a family law context, in court. And if somebody files for divorce, the look back period in the divorce case would also include claims related to these agreements and that would be a three year look back. So what we're doing is just transferring, really, enforcement of these agreements to a case that would be brought under the family law article, but this case is being dismissed without credit as subject to those conditions.
>
> Furthermore, the parties have agreed to that from today forward, that Ms. Washburn is going to handle the rental of either of their properties, one's in Chevy Chase, one's in Wheaton, whichever property she rents out, she will be responsible for handling all those aspects of that rental. She'll be able to retain the rental proceeds of whatever property she rents out, and once Mr. Washburn has resumed full-time employment, then they will revert back to

[8] We are unable to find in the record a complete transcription of the proceedings of 17 September 2014 before Judge Scrivener. Our recitation in this opinion regarding that proceeding comes from photocopied select pages from an apparent transcript, which the parties attached to pleadings or introduced in evidence. Trying to understand what happened from these bits and pieces amplifies the confusion and lack of reliability enshrouding much of the parties' arguments and assertions in their briefs.

[9] The same attorneys who represented the parties before Judge Scrivener represented them in the present litigation, but only quite late in the going, as we shall observe more specifically later.

> their July 5th, 2012 agreement, which sets forth how they are to allocate and divide out whatever resources they have.
>
> * * *
>
> [Choo's attorney]: [] [O]nce your husband is reemployed, we've agreed that in the month immediately following his resumption of employment, you and he will revert back to the September, excuse me, the July 5th, 2012, agreement. Okay.
>
> MS. WASHBURN: As long as he giving me [unintelligible] half of the rent.
>
> * * *
>
> THE COURT: [] Right, today we could have a trial and the issues that would be tried are whatever enforcement rights she's purs[ue]ing under the agreement of July 5th, 2012. Whatever enforcement rights she has up through today, going backwards, she's dismissing without prejudice, but the only way she could raise these existing claims is at the time of a final divorce. But if he violated the same agreement tomorrow, he went back to work, he was supposed to pay her something under this July 5th agreement and didn't, future enforcement could be done as a breach of contract.
>
> It's the existing rights, as of today, are not going to be brought up again in another case tomorrow. Only in connection with final divorce. But if there are ongoing enforcement issues of that agreement, she doesn't have to get a divorce to raise them. That reverts to future issues. Not existing issues.

As Choo's counsel continued to put on the record his client's understanding and agreement to the terms of the settlement, the following took place:

> [Choo's attorney]: All right, so, you understand we just went through the process of explaining it. Future enforcement, you're free to do that however you see fit, but you obviously have to account for Mr. Washburn finding a new job, whether it's this month, next month, whenever it is, you're going to go back to your July 5th agreement and if you have problems with it, you'll try to resolve them with him before you file a complaint with us. You understand?
>
> MS. WASHBURN: Yes.
>
> [Choo's attorney]: And now, in this period of time between now and him finding a job, whatever rental income there is from the Soward drive property, you're going to retain that rental income. And you'll be responsible at the end of whatever that lease term is to repay the tenant, but it can't be from the last month's rent. You understand that?
>
> MS. WASHBURN: Yes.

> [Choo's counsel]: Okay. Now, you and I talked about this, we talked about it outside, now spoken with the judge. Is there any question that you have any confusion about all that you're agreeing to? Are you confused about any of this?
> MS. WASHBURN: No.

When Larry's counsel interrogated his client regarding the settlement terms, the following transpired:

> [Larry's counsel]: And you're understanding that your wife is dismissing the claims without prejudice in the sense that she can bring up past violation of the [] July 5th, 2012 agreement in connection with a divorce only, and the rest of the claims that she brought in this case will never be brought up again?
> MR. WASHBURN: Yes.
> [Larry's counsel]: But if you violate that [] agreement, and I'm not saying that you ever have, but if [you] were in violation of the July 5th, 2012 agreement in the future, she could bring up a claim for your breach of that contract without necessarily initiat[ing] a divorce case. You understand that?
> MR. WASHBURN: Yes.
>
> * * *
>
> THE COURT: All right, Court will indicate that today's case is dismissed without prejudice subject to the terms of the agreement stated on the record in open Court.
>
> * * *
>
> [Choo's counsel]: State one last time for the record that the parties do believe they understand very clearly, that all of the terms and provisions of the July 5th, 2012 agreement are still in effect and still need to be followed, subject to the little change we made today.

Sowing additional seeds of confusion, in a related, but separate action, Judge Nelson W. Rupp, Jr. of the circuit court (on 9 September 2015 in DCA No. 9168) ruled, in Choo's appeal of the District Court's dismissal (with prejudice) of yet another suit against Larry, that it should have been dismissed without prejudice because, in his view, the settlement put on the record in CV-387604 on 17 September 2014 did not operate as *res judicata* as to Choo's surviving claims (whatever they may have been) in that case.

This brings us to the present litigation, a complaint filed by Choo (self-represented) on 15 April 2015 in the circuit court alleging essentially that Larry violated anew the 5 July 2012 Agreement after the 17 September 2014 settlement in CV-387604. Choo claimed that, through March 2015, Larry failed to pay her $45,137.83 due and owing under the July 5 Agreement. She attached an itemization of how she arrived at that amount, which included, among other things, her share of a tax refund, living expenses (further itemized as utilities bills, food, haircuts, credit card bills, cable TV bills, and an air emission test for her car). Also, she claimed penalty amounts under the post-July 5 Agreements, mortgage delinquency as to the Soward Drive property, and a demand for an estimated $35,000 share of Larry's pension income.

Larry, also self-represented, responded with a motion to dismiss, in which is found, among his grounds, an assertion that the 17 September 2014 settlement of CV-387604 amended the terms of the July 5 Agreement such that it "would not be in effect until such time as the [he] 'has resumed full time employment.'" Thus, until then, Choo was to receive and retain as her sole right to income under the Agreements the proceeds from the rental of the Soward Drive property (bearing in mind that Choo resided in the Cummings Lane home).

Larry's motion to dismiss was denied on or about 20 May 2015. After the filing of uncounted motions, petitions, and other papers, the case was set on 24 September 2015 for a one-day trial to be held on 4 November 2015. On 21 October 2015 (approximately two weeks before trial), Choo filed concurrently an Amended Bill of Complaint and her Pre-

Trial Statement. In her amended complaint, she amplified and expanded her claims to embrace further alleged violations of the post-July 5 Agreements, which, according to her calculations, resulted in "$50,000.00 in penalties" owed her by Larry (among a miscellany of other demands). Choo's Pre-Trial Statement calculated that, in addition to the penalties amount, she would prove that she was owed $75,000 in actual damages.

She followed these pleadings and papers with, on 4 November 2015 (the date set for trial), a motion to continue the trial because she wanted to engage a lawyer. Apparently the parties appeared in open court on 4 November 2015 because a lawyer for Larry filed his appearance that day "in open court." The trial date was re-set, by notice of 10 November 2015, to 6 January 2016.

In addition to filing an Answer on Larry's behalf, his attorney filed a Motion to Strike Amended Complaint, challenging Choo's ability to introduce claims posited on the post-July 5 Agreements. The motion asserted primarily that such claims were barred by the previous litigation between the same parties in the circuit court (CV-387604).[10] Larry's counsel filed also a Motion To Dismiss reiterating, among other grounds, the arguments advanced in the Motion To Strike, albeit stated more fulsomely.

Still without counsel on 24 November 2015, Choo petitioned the Court to appoint a "righteous" attorney for her, either on a pro bono basis or one willing to be satisfied with

[10] As referred to earlier in this opinion, Judge Rubin, in an order entered on 22 July 2014, dismissed (without leave to demand) Choo's claims for penalties under the Post-July 5 Agreements, but allowed her to proceed on her claims based on the July 5 Agreement.

a fee to be taken from any recovery she might receive in the action. She filed also an Opposition to the Motions To Dismiss/Strike.

Larry's pending motions were set for a hearing on 28 December 2015.[11] At that hearing, an attorney appeared on behalf of Choo, who, like Larry's counsel, had represented his client sporadically in some of the earlier litigation in the county courts. The hearing was presided over by Judge Joan E. Ryon.

There broke-out promptly at the hearing a debate between counsel (both of whom participated in achieving the settlement in CV-387604) as to the scope of the earlier settlement reached before Judge Scrivener. From our view of the confusion that plagues the transcript of the December 28 hearing, the focus of the debate appeared to be over whether Judge Rubin's dismissal, with prejudice, in CV-387604 of Choo's claims under the Post-July 5 Agreements: (1) estopped her in the present case from pursuing claims under the post-July 5 Agreements; or, (2) whether Choo could assert claims under the Post-July 5 Agreements only in a family action. Neither party mounted a significant challenge to the pending case going forward on Choo's claims, accruing since the 17 September 2014 settlement before Judge Scrivener, under the July 5 Agreement.

At the end of counsels' argument, Judge Ryon ruled as follows:

> I'm going to deny both motions.
>
> The claims that were dismissed by Judge Rubin were dismissed just as that, as claims. They, it isn't really clear what he based it on, from the context of the order, but in any event, I don't know that it could preclude a subsequent claim under the contract. If they're the same type of claims and the same type of provisions, and the law is as you say Judge Rubin found it

[11] There was also an unrelenting discovery battle ongoing, right to the date of trial.

> to be, the outcome will probably be the same. But I can't determine from what I have before me that that's the case, and those are factual disputes that she's entitled to at least present.
>
> The issue about things being brought prospectively, violations being brought prospectively in a Family Law case, and I did, when we were in chambers part of the reason I brought counsel back was to take advantage of your having a full transcript, so that I could actually read the whole thing. And it's a little bit muddled. It did appear in the beginning, when the agreement was being placed on the record, that everybody seemed to contemplate that any future violations even would have to be brought in a Family Law case.
>
> But then it seemed like there was a dispute about whether there was an agreement, and Judge Scrivener, and this would control, recited for the record her understanding of the agreement, and then both parties were voir dire'd again. And in her recitation at that point, she did indicate that prospective violations could be enforced as a breach of contract.
>
> Now whether she meant as a breach of contract claim in the context of a Family Law case, I don't know. She didn't say that. So it isn't enough for me to find that the plaintiff is barred from bringing this breach of contract action, instead of bringing a claim for violation or breach in the context of Family Law action. At the end of the day it really doesn't change the fact that you're trying the issue anyway. It certainly does alter where you're trying it, whether it's in a family court or in the civil court.
>
> But so I am going to deny both. I think everybody is clear, and it's being said here, so I'm going to put it in the order, that the issues at trial are limited to claims raised by the plaintiff, for violations of agreements that occurred on or after September 18th, 2014.
>
> She definitely is barred from litigating any issues that occurred prior to bringing, prior to that agreement being placed on the record before Judge Scrivener. And I think everybody agrees with that.[12]

The day of reckoning came on 6 January 2016. Judge Marielsa A. Bernard drew the unenviable task of presiding (without a jury), having received the court file only the

[12] The order memorializing Judge Ryon's denial of the motions was not signed until 11 January 2016, nor entered on the docket until 14 January 2016, both dates after the 6 January 2016 trial. It does appear from the record of the trial that the trial judge was aware, at least, of Judge Ryon's oral ruling.

afternoon before. Choo, Larry, and their attorneys were present. It did not take long before the parties had Judge Bernard mired in confusion, renewing[13] the argument over whether Choo's claims under the Post-July 5 Agreements were able to be litigated in the present case.[14]

Choo was called to testify by her attorney. It is clear from the record that Choo has some problems with nuances of the English language, but not so much as to keep her from communicating the essence of her views; however, it was clear equally that she and her counsel passed often like ships in the night during direct examination as he attempted to elicit from her an explanation of the bases for the claims in her updated Pre-Trial Statement for a total of $143,870.60 in damages.

A major thrust of Choo's initial direct testimony revolved around whether Larry, after losing in 2014 his employment with ACR, "had a full time job" thereafter. The significance of the answer to this question arises in part from a provision in the parties' 17 September 2012 Agreement where in "Paragraph #1," it provided that:

> #1. As long as the parties (Larry and Choo) are married, and *as long as Larry has a full time job*, from September 17th 2012, Larry and Choo live in the two parties' two houses (one in 3521 Cummings Lane, the two parties' marital home, and the other house, in 11532 Soward Drive) to work out the parties' marriage and to maintain both houses in a reasonable living condition. The two parties will have both house keys, and the parties will not accuse each other for anything because of house access. Any false

[13] In doing so for his part, Choo's counsel acknowledged implicitly that Larry's arguments as to why Choo could not proceed on the Post-July 5 Agreements could be raised anew at trial and might prevail.

[14] Everyone agreed that whatever claims under any of the Agreements that could be maintained were limited to events occurring on or after 18 September 2014.

> accusation of house access, such as Larry in Cummings Lane or Choo in Soward Drive house will be considered a violation and carry a $100 penalty.

(emphasis supplied). Thus, if Larry did not acquire a full-time job after he lost his employment at ACR, the above provision did not apply, and, by default, the parties' 5 July 2012 Agreement would govern how the parties were to treat their two properties, provided, however, that those understandings were amended by the parties' settlement agreement in CV-387604.

Choo testified that it was her belief, based on paperwork Larry provided to her, such as pay stubs, and things he said, that he was employed full-time for at least periods of 2014-15. After completing his direct examination of Choo as to her contention that Larry had full-time employment, Choo's counsel interrupted further direct testimony from Choo and, instead, called Larry as a witness regarding his post-ACR employment. Larry's testimony was essentially that any employment he had after losing his job at ACR was part-time or an offer for employment that was contingent on the occurrence of events that did not come to fruition.

Having heard from both sides on the full-time employment dispute, the trial judge found Larry's testimony to be more credible than Choo's testimony and exhibits. Accordingly, she found that Larry had not achieved full-time employment after 17 September 2014.

Choo resumed her direct testimony, the thrust of which was directed at attempting to itemize and justify, in terms of the Agreements, but mostly under Paragraph 1 of the July

5 Agreement,[15] what she claimed were her "unpaid household or living expenses," used by her and her counsel as perhaps a synonym for "monthly bills."

Using an outline she prepared for trial, Choo attempted to explain (often in digressive, confusing, or generic statements and responses) how she arrived at each month's deficit of her claimed monthly expenses; however, after a discourse between the judge and Choo's counsel, in which the judge pointed out a number of Choo's itemizations which she felt were not cognizable properly as "monthly bills," Choo's counsel, in an effort to contribute a coherent guiding principle for what Choo expected to receive from Larry, stated: ". . . what I believe Ms. Washburn was expecting to get out of this [] was the

[15] Paragraph 1 of the July 5 Agreement provided as follows:

> As long as the two parties (Larry and Choo) are married, after payment of monthly bills (including his $575 for rent) of Larry and payment of monthly bills of Choo, car and car insurance payments, and monthly payment of the two parties' rental property mortgage at 11532 Soward Drive, Wheaton, Maryland and bills for the home at 3521 Cummings lane (including the monthly mortgage and equity loan payments, utilities and other items for the reasonable maintenance of the home) from any annuity income and any taxable income earned by Larry for each month, any remaining amounts (surplus) will be split 70% to Larry and 30% to Choo.

Much of the controversy in the latter half of the trial focused on what were considered properly as the "monthly bills of Choo," a focus dictated by the trial judge before the lunch break. The judge seemed to consider "monthly bills" to equate with repeating monthly bills, rather than more episodic or discretionary expenses.

mortgages would be paid [by Larry][16] . . . if [there was] rental income,[17] [it] would be split [between Choo and Larry], and an additional $2,000 to cover expenses because [Choo was unemployed and had no income] . . . ."[18]

Choo testified that she applied for and began receiving food stamps in November 2015. Her electricity at Cummings Lane had been cut-off, as had been her cable and telephone service, assertedly because she was not receiving enough money from Larry to meet those expenses. Her heat and air conditioning equipment was inoperable, but Larry refused reportedly to agree to hire a contractor to fix the equipment. In cross-examination, Choo denied that Larry had given her, since 18 September 2014, $27,570.84 in checks and cash, not including his payments on the mortgages and home equity loan.[19]

Larry was the sole witness called in defense. He testified as to his employment history after he left federal employment, his current financial situation (including income,

[16] At the time of trial, Larry had brought current the mortgage on the Soward Drive property, but owed for November and December 2015 on the Cummings Lane dwelling.

[17] As noted, Choo had been living in the Cummings Lane property. She had been collecting and retaining the rent on the Soward Drive property until approximately 6 November 2015, when the tenants vacated before the rental term expired. There is no indication that Choo pursued those tenants for any unpaid, but due, rent, nor whether Choo attempted to re-let the house after the tenants vacated.

[18] Choo's counsel's later efforts to encapsulate a typical month's expenses floated at one point up to the amount of $2,100 and down to $1,800 at another.

[19] Larry's counsel's question assumed that this number included amounts representing prior mortgage payments made directly to Choo for her to send to the lenders, but which she had utilized for other purposes. According to Larry's version of events, he started paying the mortgages directly to the lenders after discovering Choo's diversion of the intended payments.

rent, and tax obligations), status of payments on the mortgages and home equity loan, his credit card debt, the back-and-forth over the rental of the parties' properties, and payments or goods in kind he gave to Choo since 18 September 2014.

After entertaining closing arguments, the trial judge tackled first her understanding of the effect of Judge Rubin's 17 July 2014 ruling in CV-387604 and the settlement reached before Judge Scrivener on 17 September 2014 in the same case:

> THE COURT: Okay. All right. I certainly understand the position that Mr. Washburn takes and as I said earlier, having read the transcript of the hearing before Judge Rubin and having read the transcript before Judge Scrivener, I mean Judge Scrivener acknowledged that she hadn't even read [the] July 5, 2012 agreement and apparent[ly] it was simply a consent that was put on the record before her.
>
> But towards the end, I think she makes it very clear that what's being dismissed are the existing claims and that what's being resolved were the existing claims at that point. And I think everybody, after page 18 in the transcript, goes on and acknowledges that she could bring an action and actually [Choo's attorney] answers when Ms. Washburn says, I want to just make sure if he breaches the [July 5] contract, then I can bring him to court.

Continuing, the court explained its determination of what "monthly bills" meant under the July 5 Agreement:

> So I don't necessarily think that that agreement doesn't exist anymore. I do think that the language, the payment of the monthly bills is not very clear, except that Mr. Washburn in his testimony today, he acknowledged that his understanding and, was that it would be the immediate bills. And I think that's a reasonable interpretation of what monthly bills would be. Monthly bills do not extend to the extreme that Ms. Washburn was asking for.[20]

[20] The judge iterated on a number of occasions previously that she found Choo not to be credible generally in her testimony.

Based on her assessment of the evidence, Judge Bernard calculated how much Choo was owed under Paragraph 1 of the July 5 Agreement for "monthly bills" and what credits were due Larry:

> All right. Well, I note that the monthly statements that he talks about where he lists the, the mortgage payments, but then per my calculations, the other monthly payments that he says, he has a Verizon cell, following for the defendant, which is different than what was set out in the 2012 statement, but he has [$] 55.74 for the Verizon, 109 for the Internet, 120 for the gas, 120 for the car, 130.99 for the electrical bill, 300 for the food, $30 for the prescription medication and I came out with $770.73 as being what would constitute monthly bills there.
>
> Now in the, what's Plaintiff's Exhibit No. 2, the monthly bills per my calculation came out to be, where did I do that, about $725. However, in November of 2014, he paid her $1,000. He said that that was the monthly expense. In the itemization line, he says November expenses, please give me an itemized list. He pays $1,000 in November of 2014.
>
> And then he gives her an additional $200, additional $200 expenses. I don't know whether he was given anything for that, whether there was a bill. I mean what's clear from looking at the evidence that's been produced and by the testimony of the parties, is that Ms. Washburn would ask him to make a payment, to give her money, and I did find Mr. Washburn credible when he testified that he would give her basically what she asked for and, and that it was only towards the end that he started realizing that he needed to account for any payment that he made other than a check payment because of the antagonism that started to grow between [the] parties.
>
> So there are actually four payments that were made in November and I'm going to use November 1, 2014, which would have been very close to the time of the agreement before Judge Scrivener as an example of what the normal monthly payment would have been. He has $50. Again, he says it's for cash expenditures; $32 for a medicine cream, which obviously that's not going to be a monthly expense; $200; 1,050; and then I think there's another bill for He Nata, which was $79. So that came out to $1,250, plus the 79, but I think really going with 1,200, that that would be a reasonable amount of monthly expenses. Now per my calculations of what he paid, he paid almost $4,000 in checks, $3,982.61.
>
> As I said, I did find him to be credible, more credible than I found Mrs. Washburn. So he testified that there were payments that he had made in cash, things, credit cards that, that he had paid, that he had bought things

> for her. So I'm going to give him a credit of $3,000, in addition to the $3,982.61.
>
> So going with the $1,200 that I'm finding to be the average [monthly] expenses, that comes out to $19,200 minus the $6,982.61 is $12,217.39. So I'm going to enter a judgment against him in that amount. And, you know, I would hope that these parties sell these properties and get on with their lives[.]

Judgment was entered, in favor of Choo, on 23 February 2016 in the amount of $12,217.39. Choo, in proper person, filed a timely appeal.

QUESTIONS PRESENTED

Choo frames, over ten pages in her brief, what she numbers as three questions presented. Stripping away the parts that appear to us to be argument and unnecessary detail, we understand her to ask:

I. Did Judge Bernard misconstrue in the present litigation the effect of Judge Rubin's 17 July 2014 order in CV-387604, the 17 September 2014 settlement agreement in the same case before Judge Scrivener, and Judge Ryon's oral ruling on 28 December 2015 denying Larry's Motion to Dismiss in the present case?[21]

II. Why did Judge Bernard fail to meet in chambers with the parties' attorneys to discuss the case?

III. Was her counsel at trial ineffective/negligent and afflicted with conflicts of interest?

[21] As noted earlier, Judge Ryon's order confirming her denial of Larry's Motion To Dismiss was not signed until 11 January 2016, nor entered on the docket until 14 January 2016. Thus, we understand Choo's contention as being that Judge Bernard acted at trial on 6 January 2016 contrary to what Judge Ryon stated in the transcript of her 28 December 2015 hearing on the Motion To Dismiss.

STANDARDS OF REVIEW

"We review the factual findings of the Circuit Court for clear error, observing due regard to the opportunity of the trial court to judge the credibility of the witnesses. If any competent material evidence exists in support of the trial court's factual findings, those findings cannot be held to be clearly erroneous." *Figgins v. Cochrane*, 403 Md. 392, 409, 942 A.2d 736, 746 (2008) (quotation marks and citations omitted). Pursuant to Maryland Rule 8-131(c), "[w]hen an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." "[W]here an order involves an interpretation and application of Maryland constitutional, statutory[,] or case law, our Court must determine whether the trial court's conclusions are 'legally correct' under a *de novo* [non-deferential] standard of review." *Schisler v. State*, 394 Md. 519, 535, 907 A.2d 175, 184 (2006).

ANALYSIS

I.

It is difficult to extract from her briefs the essence of Choo's "Argument" in support of her first question. Her complete "Argument" section in her initial brief is three pages long, has no headings identifying what parts of it address which of her "Questions Presented," and cites to no supporting case, rule, or other authorities for her multitudinous assertions. Throughout her lengthy factual recitation (27 pages), however, are found many

argumentative declarations and assertions. Her reply brief, albeit shorter and with headings (which do not correspond, however, to her "Questions Presented"), is not any more cohesive or organized.[22] As best we are able to discern her main complaints about Judge Bernard's performance, it is that her decisions and explanations therefor were in conflict with Judge Ryon's denial of Larry's Motion To Dismiss. Based on our reading of the transcript of the motion hearing before Judge Ryon and the trial transcript before Judge Bernard, there was no meaningful or clear conflict, nor, for that matter, would it make a difference to the outcome here were a conflict identified.

"The purpose of Rule 2-322(b)(2) (motion to dismiss for failure to state a claim upon which relief may be granted) is to have legal questions decided before trial of the action on the merits." *Porterfield v. Mascari II, Inc.*, 374 Md. 402, 430, 823 A.2d 590, 606 (2003).

> Considering a motion to dismiss a complaint for failure to state a claim upon which relief may be granted, a court must assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them, and order dismissal only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff, *i.e.*, the allegations do not state a cause of action for which relief may be granted.

RRC Ne., LLC v. BAA Maryland, Inc., 413 Md. 638, 643, 994 A.2d 430, 433 (2010) (citations omitted). In other words, a motion to dismiss for failure to state a claim will succeed only if, assuming the truth of the plaintiff's factual assertions, the plaintiff's legal

[22] Larry's brief was unhelpful equally.

claims fail nonetheless as a matter of law. *Porterfield*, 374 Md. at 413-14, 823 A.2d at 597. At a bench trial on the merits, however, the court serves, in part, as a fact finder, ascertaining objectively the veracity of factual claims without deference to any party. *Hollingsworth & Vose Co. v. Connor*, 136 Md. App. 91, 136, 764 A.2d 318, 342 (2000) ("Weighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder. In performing this role, the fact-finder has the discretion to decide which evidence to credit and which to reject." (citations omitted)). The trial court's legal reasoning incorporates and flows from a newly-established factual fountainhead, and, accordingly, its ensuing legal conclusions, therefore, are rendered anew.

Another principle operating under the surface of the question implicates what we believe to be issue preclusion or collateral estoppel principles. Summarizing the doctrine in 2015, this Court stated:

> Collateral estoppel has often been described as a doctrine absorbed within *res judicata;* the doctrines seem to be distinguished almost as often as they are confused. *Res judicata* holds parties to a claim that they have previously litigated, acting as an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Collateral estoppel, on the other hand, operates collaterally to preclude relitigation of *issues* that the same parties already had litigated[.] [W]here the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. To determine whether [a party] is collaterally estopped from bringing the claims it raises . . . , we view the current action against the backdrop of the prior one by asking four questions:
>
> i. Was there a final judgment on the merits in the prior litigation?

ii. Was the party against whom the plea is asserted a party or in privity with the party to the prior adjudication?
iii. Was the issue decided in the prior litigation identical with the issue presented in the subsequent litigation?
iv. Was the issue actually litigated essential to the judgment in the prior action?

GAB Enterprises, Inc. v. Rocky Gorge Dev., LLC, 221 Md. App. 171, 186–87, 108 A.3d 521, 530–31, *cert. denied sub nom. Rocky Gorge Dev. v. GAB Enterprises*, 442 Md. 745, 114 A.3d 711 (2015) (citations, quotation marks, and footnotes omitted).

Judge Ryon was equivocal about the effect of Judge Rubin's ruling at one point ("I don't know that [Judge Rubin's dismissal, with prejudice, of Choo's claims under the post-July 5 Agreements in CV-387604] could preclude a subsequent claim under the contract[s]."), but in the next breath, contemplated that the same result reached by Judge Rubin as to the legal unenforceability of the post-July 5 Agreements (containing numerous "penalty" provisions that were not justified as legitimate damages) could "probably be the same" in the present case. The impact of Judge Ryon's denial of Larry's Motion To Dismiss was simply to allow Choo to try "factual disputes," but in no way foreclosed Judge Bernard from considering anew the legal effect of Judge Rubin's ruling on the shape and scope of the claims available to be tried before her, as well as the effect of the settlement agreement put on the record in CV-387604 before Judge Scrivener.

Judge Bernard's ruling paralleled permissibly that of Judge Rubin because, on the issue of Choo's legal theory of recovery regarding her post-July 5 Agreements claims, the elements of collateral estoppel were fulfilled, thereby precluding the re-litigation of the enforceability of the so-called monetary penalty provisions. Judge Rubin's decision was a

final judgment because it was an "unqualified, final disposition of the matter in controversy" as to those caims. *Addison v. Lochearn Nursing Home, LLC*, 411 Md. 251, 262, 983 A.2d 138, 145 (2009) (quotation marks and citations omitted). The party to be estopped, Choo, is the same party as in the prior adjudication, and, accordingly, she had the opportunity to be heard on the issue in the prior litigation. The issue, the theory of recovery underlying Choo's claims for monetary penalties under the post-July 5 Agreements, is identical in both instances. Finally, the issue was essential to Judge Rubin's decision because he could not have determined that the post-5 July 2012 Agreements were unenforceable penalties without considering the theory of recovery regarding the post-5 July 2012 Agreements.

Choo's counsel at the trial before Judge Bernard did not marshal any law suggesting that Judge Rubin's ruling on that legal point was erroneous as a matter of law or ambiguous. Rather, Choo's attorney conceded implicitly that Judge Bernard might reach that same legal conclusion, which, it appears, she did. Of course, that does not mean that other breach of contract claims not seeking monetary penalties, but invoking other provisions of the post-July 5 Agreements, was intended to be foreclosed by Judge Rubin's ruling. Choo made no such claims, however, in her amended complaint here, that we could discern.

Determining the preclusive effects of the parties' settlement agreement in CV-387604 is less clear. It seems to us that that agreement could be read to require that any alleged breaches of the post-July 5 Agreements were to be litigated solely in the context of a family law case to be brought as a divorce or support action, but that alleged breaches of

the July 5 Agreement occurring after 17 September 2014 could be litigated in a civil contract action, such as the present case. Because the parties presented no legal analysis or authorities on this issue to Judge Bernard or us, we do not conclude that Judge Bernard was wrong, as a matter of law, to preclude Choo's claims under the post-July 5 Agreements from being considered in this action.

Accordingly, Judge Bernard was permitted to limit her disposition to the July 5 Agreement claims. Taking into account Judge Bernard's clear credibility determination as to the respective parties' testimonies, there was adequate evidence in the record to support her ultimate conclusion that Larry owed Choo $12,217.39, for which amount judgment was entered.

II.

We could not find in the transcript of the 6 January 2016 trial any request or demand by Choo or her attorney that Judge Bernard meet in chambers with the parties' counsel. Thus, there is no basis for Choo's appellate contention that the Judge abused her discretion in not calling sua sponte for such a meeting. The judge did urge counsel, on the record, to see if they could resolve the dispute during the course of a break in the trial, but that is no more (or less) than any trial judge might do, confronted by the proceedings that occurred to that point in this case. Moreover, we doubt whether a chambers conference (whether on or off the record) would have achieved a better outcome for Choo.

III.

We could find no objections or complaints put on the record at trial by Choo regarding the performance of her counsel. There were no post-trial motions filed by Choo. This appeal is not the proper venue for litigating Choo's post hoc displeasure with her trial attorney's performance. There are a number of other means and venues to try to flesh-out whether he was ineffective, professionally negligent, or acted under a conflict of interest.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. EACH PARTY TO BEAR HIS OR HER COSTS.