

Circuit Court for Anne Arundel County  
Case No. C-02-CV-16-001333

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 2808

September Term, 2018

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ANDREW PETER ZESINGER

v.

LAW OFFICES OF G. RUSSELL  
DONALDSON, P.A., ET AL.

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Fader, C.J.,  
Shaw Geter,  
Wright, Alexander, Jr.,  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Shaw Geter, J.

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Filed: August 13, 2020

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal arises out of an employment contract dispute between Andrew Peter Zesinger (“Zesinger”), appellant, and the Law Offices of G. Russell Donaldson, P.A. (“the Law Firm”), G. Russell Donaldson (“Donaldson”), individually, and Legends Title Group, L.L.C. (“the Title Company”), appellees. On April 16, 2018, Zesinger filed a complaint against appellees in the Circuit Court for Anne Arundel County alleging breach of contract against the Law Firm and Donaldson; intentional interference with contractual relationship against Donaldson; unjust enrichment against the Law Firm, Donaldson, and the Title Company; and, conversion against the Law Firm and Donaldson. Appellant also requested an accounting. Donaldson and the Law Firm filed a counter-complaint against Zesinger asserting claims for breach of contract and negligence.<sup>1</sup>

The parties filed motions for summary judgment as to the complaint and counter-complaint. As to the counter-complaint, after a hearing on April 17, 2017, the circuit court granted summary judgment in favor of Zesinger on the negligence claim and denied summary judgment on the breach of contract claim.

As to Zesinger’s complaint, after a hearing on June 19, 2017, the court granted summary judgment in favor of Donaldson and the Title Company on the breach of contract claim, leaving the Law Firm as the sole defendant with respect to that claim. The court granted summary judgment in favor of Donaldson on the claim for intentional interference with contractual relationship and in favor of Donaldson and the Law Firm on the claim for conversion. As to the claim for unjust enrichment, the court granted summary judgment

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<sup>1</sup> Neither party provided a copy of the counter-complaint in the Record Extract or Appendix.

in favor of Donaldson, but denied summary judgment as to the Law Firm and the Title Company. Lastly, the court denied summary judgment with respect to the request for an accounting.

A bench trial was held from October 17 through October 19, 2018. The court considered Zesinger's claim for breach of contract against the Law Firm, his claim for unjust enrichment against the Law Firm and the Title Company, and his request for an accounting. Donaldson and the Law Firm did not present any evidence in support of their counter-claim for breach of contract against Zesinger. Nor did they offer any proof of damages in support of their counter-claim for negligence. The court entered judgment in favor of the Title Company and the Law Firm on the claim for unjust enrichment. The court determined that there was no breach of contract and that Zesinger was not entitled to damages or an accounting. The court dismissed the counter-claim because no evidence was presented by the counter-plaintiffs. This timely appeal followed.

Zesinger, through counsel, filed his initial brief on November 16, 2019. Thereafter, his attorney withdrew his appearance. On February 3, 2020, Zesinger filed a revised brief setting forth only a single issue for our review: whether the circuit court erred in denying his request for an accounting.<sup>2</sup> For the reasons set forth below, we shall affirm.

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<sup>2</sup>Zesinger set forth the question presented as follows:

Was the trial court's denial of Appellant's request for an accounting, not as a matter of law or failure to plead the necessary elements to establish entitlement to an accounting, but as a matter of fact or equity based upon Appellee's failure to prove with specificity the amount of damages sustained, erroneous on its face since the purpose of an accounting is to determine the

## **FACTUAL AND PROCEDURAL BACKGROUND**

Zesinger was a Florida lawyer who met Donaldson in August 2009. At that time, Donaldson wanted to expand the business presence of his law firm and title company in Florida. Initially, Zesinger agreed to work for Donaldson without a formal employment agreement. Zesinger was treated as an independent contractor and the Law Firm issued him a 1099 form. Zesinger testified that Donaldson paid his taxes for 2009 and 2010 and also paid penalties that were incurred because the taxes were not paid quarterly.

### **A. Employment Contract**

On December 28, 2012, Zesinger entered into a four-year employment contract with the Law Firm pursuant to which he became “Florida General Counsel.” The contract provided that for the first twelve-month period, Zesinger would be an at-will employee. Thereafter, the Firm could terminate Zesinger’s employment only “for good cause,” which included, among other things, when “Attorney shall have acted in such a manner so as to harm or diminish the Firm’s business, good will, or reputation.” The contract specifically provided that “[o]nce compensation shall become in any form salaried all compensation to Attorney shall be deemed W-2 Compensation whether or not such compensation is derived from salary or commissions.” Zesinger’s annual base salary of \$60,000 was to be paid in 26 “weekly increments on Friday of each pay period . . . consistent with the compensation schedule for all employees.” In addition to his annual base salary, the Law Firm agreed to

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precise amount of damages in the face of incomplete underlying data upon which to make such a computation?

cover Zesinger's income tax liability for tax year 2012, and to pay him "30% of net revenues to the Firm per closed and funded transaction" for title work. Net revenues were defined "as income to the Firms [sic] Operating Account after deducting all expenses and pass-through costs per file." The contract provided:

This compensation shall be paid on an annual basis but shall begin only after the Firm has generated gross revenues from Florida in the equal amount to the actual salaries and expenses covered by the Firm. For example: Total Florida revenues are \$175,000.00 and total expenses are \$120,000.00 then the profit revenue to company will [sic] \$55,000.00. Out of that figure if \$40,000.00 was generated from title then Attorney shall be paid 30% of the \$40,000.00.

The Law Firm and Zesinger also agreed that revenue generated from short sale transactions "shall be allocated in the same fashion and percentage as described" in the contract provision governing title work. Compensation for legal fees and real estate commissions was also addressed by the contract, as follows:

The Firm agrees that Attorney shall receive 50% of the net profit of all legal fees and real estate commissions generated per file. This compensation shall be paid on a per cases basis on each file after the Firm has generated gross revenues from Florida in the equal amount to the actual salaries and expenses covered by the Firm. For example: Total Florida revenues are \$120,000.00 and total salaries and expenses are \$120,000.00. For every case thereafter in that calendar year Attorney shall be paid 50% of the net legal fees or commission compensation on every file.

The contract addressed certain benefits and expenses as follows:

W-2 Compensation Component #3 – Employee Benefits, Perks and Employer Expenses:

The Firm offers Attorney the following employee benefits and perks and employer expenses paid on Attorney's behalf:

- (1) The Firm pays, as required by law, FICA, Medicare, State and Federal unemployment insurance, and workers compensation insurance.

(2) The Firm does not pay health insurance premiums, via a group health plan. The Attorney pays for his or her own policy.

(3) The Firm purchases legal malpractice insurance.

(4) The Firm pays the Client Protection Fund and AGC assessment.

(5) The Firm pays dues for Attorneys to join up to two bar associations.

(6) The Firm pays for continuing legal education program for Attorney, if approved by the Firm.

(7) The Firm hosts an annual Firm dinner for employees.

(8) The Firm will reimburse expenses or advance funds to Attorney for all reasonable travel, entertainment and miscellaneous expenses incurred in connection with the performance of his duties under this Agreement, provided that the Attorney properly provides a written accounting of such expenses to the Firm within thirty (30) days of having the expense, and in accordance with the Firm's practice. Such reimbursements or advances will be made in accordance with policies and procedures of the Firm in effect from time to time relating to reimbursement of or advances to Firm employees. Such travel expenses does not include the day to day traveling to meet with clients or for court appearances or other day to day work.

Termination was also specifically addressed in the contract as follows:

Early Termination and End of Employment Agreement Period: If Attorney is terminated after vesting for any reason by the Firm prior to the end of the employment agreement period,<sup>[3]</sup> except for terminations "for cause" Attorney shall be given a severance package based on his prior year Annual compensation at the time of termination based on the following formula in a lump sum on or before the 4<sup>th</sup> Friday from the day of termination:

(1) For service more than 1 year, but less than 2 years – Three (3) weeks of salary and fifty (50) percent of Attorney's usual compensation earned for all Florida files in process at the time of termination.

(2) For service more than 2 years, but less than 3 years – Six (6) weeks of salary, and fifty (50) percent of Attorney's usual compensation earned for all Florida files in process at the time of termination.

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<sup>3</sup> Pursuant to the contract, "vesting" occurred after Zesinger completed the first twelve months of employment.

(3) For service more than 3 years, but less than 4 years – Twelve (12) weeks of salary, and fifty (50) percent of Attorney’s usual compensation earned for all Florida files in process at the time of termination.

(4) For service more than 4 years – Twenty-Four (24) weeks of salary, and fifty (50) percent of Attorney’s usual compensation earned for all Florida files in process at the time of termination.

If not terminated “for cause” . . . Attorney shall also be entitled to Business Generated Compensation up to twelve months after termination and shall be paid in one lump sum on or before the 15th day of the 13th month from the date of termination. An Accounting shall be provided with the final check dispersal.

### **B. Termination of Employment Contract**

Zesinger worked for the Law Firm until April 3, 2015, when Donaldson sent him a letter terminating his employment for cause. In the eight-page letter, Donaldson wrote, among other things, that Zesinger had failed to develop business relationships in Florida, that there were no permanent title clients, that there were “many unhappy legal clients,” that Zesinger had failed to retain any client, that numerous complaints had been made about Zesinger, that Zesinger had two arrests and, that each time Zesinger “or the firm is searched these arrest records and mug shots appear.” Donaldson referenced Zesinger’s “overuse of data” for his company phone which resulted in a charge of \$4,830 that Donaldson “had to bear[.]” He also referenced an occasion where Zesinger attended a mediation dressed in an unprofessional manner, “as if [he was] going to Saturday brunch[.]” Donaldson asserted that Zesinger failed to login to “Amicus Attorney,” the firm’s client management software, and failed to keep “any billable hours for any clients.” He also maintained that Zesinger opened a bank account from which he took client funds for his personal use and failed to provide the bank statements. According to Donaldson, in the years 2014 and 2015, the

Law Firm suffered a net loss of \$21,360.82 for the Florida office, while Zesinger had received “substantially all if not all of what” he was claiming was due to him.

### **C. Zesinger’s Complaint**

About a year after his termination from employment, Zesinger filed a complaint against Donaldson, the Law Firm,<sup>4</sup> and the Title Company. In Count I, Zesinger asserted a claim for breach of contract against Donaldson, the Law Firm, and the Title Company. He asserted that he “diligently performed his contractual duties,” “appropriately handled billing, fees, and escrow monies,” “competently represented” the Law Firm’s clients in Florida, and that the Florida office “was profitable every year from 2012 through and including 2015.”

Zesinger alleged that for tax year 2012, and each year thereafter, Donaldson instructed the Law Firm’s “accountants and office staff to issue 1099 forms concerning [him] to the Internal Revenue Service, which forms stated that all monies paid to Zesinger during the tax years in question were income.” Zesinger argued that this information was false “because a substantial portion of the money paid” to him constituted reimbursement for expenses and not income. This had the effect of increasing his tax liability. Zesinger claimed that the Law Firm was contractually obligated to issue a W-2 form and withhold money from his paycheck to be paid to the Internal Revenue Service (“IRS”), and he

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<sup>4</sup> Zesinger noted in his Complaint that the Law Firm was “not in good standing, having forfeited its charter in 2010.” No issue of the Law Firm’s existence as a corporate entity or its ability to defend the lawsuit or file its counter-complaint were raised below. We take judicial notice of the fact that the Law Firm filed Articles of Revival with the State Department of Assessments and Taxation nine days after the Complaint was filed.



challenged the Law Firm’s treatment of him as an independent contractor rather than an employee.

In addition, Zesinger alleged that “much of the salary reported” was not “paid in a timely fashion” and, as a result, he was unable to pay his income taxes and fell “behind in the payment of his federal tax liability.” According to Zesinger, the Law Firm “was delinquent in the payment of [his] salary, the reimbursement for expenses paid by [him], and the payment of 50% of all legal fees as provided in the contract.” As a result, he was “unable to pay his federal taxes since 2010.” He maintained that the “money to pay [his] taxes would have been available from the cash [he] remitted to the Firm,” and that Donaldson had promised that this situation would be resolved when the Law Firm concluded certain class action law suits.

Zesinger further alleged that after the Law Firm terminated his employment, it took no steps to find a Florida attorney to replace him in pending cases. After his termination, Zesinger continued to work on the Law Firm’s Florida cases and, therefore, was “entitled to receive his salary from April 2015 through December 28, 2016.” In addition, Zesinger alleged that he was entitled to a share of certain money set aside for attorney’s fees in a medical malpractice case that had been settled by Donaldson.

Count II of the Complaint set forth a claim for intentional interference with contractual relations by Donaldson for causing the Law Firm to breach the employment contract. Count III of the Complaint asserted a claim for unjust enrichment against Donaldson, the Law Firm, and the Title Company. Zesinger stated that this count was included in the Complaint “[i]n the alternative,” in the event that the court concluded that

there was no contract between him and the Law Firm, “or that the contract was procured by fraud[.]” Count IV of the Complaint alleged conversion against Donaldson and the Law Firm. That claim was based on Zesinger’s assertion that Donaldson settled a medical malpractice case in which he and Donaldson were co-counsel, without his “permission, agreement, or participation.” Zesinger alleged that he was entitled to a portion of the attorney’s fees.

Count V of the Complaint set forth a request for an accounting. Zesinger requested the court to “order the preparation of an accounting, to be paid for by the defendants, to provide an accurate assessment of the damages due” to him. He claimed that the allegations included in his Complaint “essentially involve a fiduciary relationship,” and that he had “not been paid the base salary due him, the legal fees due him, [or] the reimbursements due him for expenses he fronted on behalf of clients he brought to the Firm.” He asserted that there was a large quantity of records to be reviewed and that the “size of the undertaking is such that any remedy at law is difficult, inadequate and incomplete, without taking far too much of the court’s time.” He alleged that the “substantial difference” between the Maryland office records and the Florida office records “cannot be reconciled without an accounting by a trained professional accountant, utilizing records of both” offices.

As we have already noted, the parties filed motions for summary judgment as to the complaint and counter-complaint. As a result of the trial court’s rulings, the parties proceeded to trial on Zesinger’s claims for breach of contract against the Law Firm, unjust enrichment against the Law Firm and the Title Company, the request for an accounting,

the counter-complaint for breach of contract against Zesinger, and the issue of damages with respect to the counter-complaint for negligence against Zesinger.

#### **D. Trial**

A three-day bench trial was held from October 17 through 19, 2018. Zesinger was the only witness to testify. Prior to entering the employment contract, Zesinger worked as an independent contractor for the Law Firm, but Donaldson paid his taxes and penalties that were assessed for failure to pay the taxes on a quarterly basis. After signing the employment contract, Zesinger first realized that the Law Firm was treating him as an independent contractor in 2014, when he received a 1099 form for work performed in 2013. He claimed he used “colorful” language in asking someone at the Law Firm “what in the world is going on.” The only evidence admitted at trial, however, showed that the Law Firm mailed a 1099 form to Zesinger’s home address and sent him a copy of the form via email. No other evidence was provided to demonstrate that Zesinger made the Law Firm aware of his objection to being treated as an independent contractor after the employment contract was signed.

Zesinger maintained that the Law Firm did not pay him the full amount of his compensation for 2013, 2014, and part of 2015, and that he worked about 10 hours per week after the employment contract was terminated, but was not paid for that time. He stated that a large portion of the money he received from the Law Firm was reimbursement for expenses and costs. In support of that contention, Zesinger introduced his 1099 forms for tax years 2013 and 2014, a “Bank Deposit Summary” he claimed was prepared by his personal accountant, and a number of bank statements for his personal checking account.

Zesinger testified that he had “submitted all of [his] expense reports previously to Mr. Donaldson[,]” but he failed to provide any of those expense reports at trial. He was only able to point to two entries on his bank statements that constituted expenses. One was a fax fee in the amount of \$55.19, that was incurred on December 19, 2012, and the other was a charge of \$5.50 for parking that was incurred on December 20, 2012. With regard to work performed after the termination of the employment contract, Zesinger testified that he took a personal loan to cover the costs and expenses of the pending cases, that he did not tell Donaldson about the loan, and that he used a portion of the loan to cover his personal expenses. When asked what compensation he was claiming for the work he did after he was terminated, Zesinger testified that he would leave that determination to the trial court’s discretion “based on testimony.”

Zesinger also argued that he incurred overdraft fees as a result of the Law Firm’s failure to pay him what he was owed. Zesinger, who used his personal checking account as the operating account for the Florida office of the Law Firm, testified that he incurred “thousands of dollars of overdraft fees” as a result of the failure of the Law Firm to pay him in a timely manner or at all. He claimed that Donaldson reimbursed him for some, but not all of those charges. He acknowledged that in 2015, Donaldson sent him \$20,000 or \$30,000. He also acknowledged that he went over his allowed use of data on his work cell phone, thereby incurring a charge of \$4,000 for one 60-day period.

Zesinger asserted that the Law Firm failed to pay him what he was owed under certain revenue-sharing provisions of the employment contract. He claimed that he should have been paid 30 percent of the net revenues of the Law Firm per closed and funded

transactions for 2013 and 2014. Zesinger relied on Donaldson to notify him when the costs had been covered, but Donaldson would “mask or manipulate bank numbers to show low profit” with respect to title work. Zesinger asserted that Donaldson had “refused to, I guess, respond to discovery where we requested documents to have the lineated profits for title.” Zesinger also asserted that the Law Firm failed to compensate him for his work on a medical malpractice case. He asserted that Donaldson, who had been admitted in the malpractice case *pro hac vice*, settled the matter for \$60,000, but failed to pay him.

In addition to the claims related to his compensation, Zesinger argued that he was not terminated for cause under the terms of the employment contract and that his termination was retaliatory. Yet, he acknowledged his arrest record, that his mugshots were available online and did not help the reputation of the Law Firm, that clients had made complaints about him, and that he had incurred the charge of more than \$4,000 for excess data usage on his work cell phone.

Zesinger also testified that he had not filed tax returns for 2010 through 2015.

Following that testimony, the trial judge stated:

Just out of curiosity, if an attorney fails to file tax returns for at least six years and partner finds out about it, or other clients find about [sic] it or if Bar Counsel finds out about it, do you believe that would harm or diminish the firm’s business goodwill or reputation? You ponder that during lunch. And after lunch, I am going to encourage counsel, once again, to talk about this case.

After the lunch break, the trial judge advised the parties that he had an obligation to report Zesinger to Bar Counsel in the State of Florida for failure to file taxes. The judge stated that he had informed the parties during the break that he would continue to hear the

case, but that “it may not go especially well for” Zesinger. Counsel for Zesinger requested a mistrial, which the court denied.

At the close of Zesinger’s case, appellees moved for judgment pursuant to Maryland Rule 2-519.<sup>5</sup> They argued that Zesinger had been terminated for cause and, even if he had not been, he acknowledged receiving \$20,000 to \$30,000 after the contract was terminated, which was more than he was entitled to receive under the liquidated damages provision of the employment contract. Appellees also argued that the claim for unjust enrichment was improper because the parties did not dispute the existence of the employment contract. Lastly, appellees argued that there was no evidence that the Title Company was a party to the employment contract, that it had been unjustly enriched, or that it owed any compensation or other damages to Zesinger.

The trial court granted judgment in favor of the Title Company on all counts and in favor of the Law Firm on the claim for unjust enrichment. The only remaining claims were Zesinger’s breach of contract claim against the Law Firm and his request for an accounting from the Law Firm. As for the counter-complaint, appellees did not present any evidence in support of their counter-claim for breach of contract, and failed to present any evidence to establish damages in support of their counter-claim for negligence. After resting without presenting any evidence, the Law Firm renewed its motion for judgment. The court

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<sup>5</sup> Maryland Rule 2-519 provides, in part, that “[a] party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party[.]”

dismissed the counter-claims based on the failure of the counter-plaintiffs to present any evidence.

As to the breach of contract claim and the request for an accounting, Zesinger opposed the entry of judgment on the ground that there was evidence that some of his compensation was actually reimbursement for expenditures. He argued that evidence about the nature of the payments made to him was in the possession of the Law Firm and, therefore, he was entitled to an accounting. Counsel for Zesinger argued:

They are declining to put on evidence. They failed to produce those documents during the course of the case and during the course of discovery, those documents have not been available, therefore, to the Plaintiff, and for that reason, the Court ought to grant the accounting so that we can be as clear as we can be about what the purpose was of the payments that were made that were not specifically identified as belonging to any particular category. And particularly, they were not identified as payroll amounts.

So, based on this occurrence, [Zesinger] is renewing, is pressing its request for an accounting so that we can lay to rest any doubts about of [sic] those payments.

The trial court found that there was no breach of contract and denied Zesinger's request for an accounting. In reaching those decisions, the court found that that there was "absolutely no doubt that there was a contract." It determined that Zesinger had a "very inaccurate memory," that he had "motives not to tell the truth," and that his testimony was not credible. In addition, the documents Zesinger produced, some of which he disavowed, did not support his claim. The court found, among other things, that there was no documentary proof that Zesinger objected to being treated as an independent contractor after the employment contract was signed, that he failed "to produce any document sufficient to satisfy the [c]ourt that [he] had expenses, which should have been paid for by

the firm[.]” and that over a two year period the income listed on his 1099 forms totaled \$120,000, the amount he was supposed to receive under the terms of the contract. The court also found that even if there was a breach of contract, Zesinger failed to establish that he was entitled to either damages or an accounting. Further, absent a breach, Zesinger would have been entitled to six weeks of pay, but by his own testimony, he received more than that when he was paid between \$25,000 and \$30,000.

We shall include additional facts as necessary in our discussion of the issues presented.

### **STANDARD OF REVIEW**

As this case was tried without a jury, we “will review the case on both the law and the evidence.” Md. Rule 8-131(c). We “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.” *Id.* We must consider evidence that is produced at the trial “in a light most favorable to the prevailing party[.]” *Estate of Zimmerman v. Blatter*, 458 Md. 698, 717–18 (2018)(quoting *Bottini v. Dep’t of Fin.*, 450 Md. 177, 187 (2016)). “The clearly erroneous standard does not apply to the circuit court’s legal conclusions, however, to which we accord no deference and which we review to determine whether they are legally correct.” *Turner v. Bouchard*, 202 Md. App. 428, 442 (2011) (quoting *Cattail Assocs. v. Sass*, 170 Md. App. 474, 486 (2006). *Accord Kunda v. Morse*, 229 Md. App. 295, 303 (2016) (we review the trial court’s application of the law to the facts under a *de novo* standard of review).

### **DISCUSSION**



We shall begin, as a preliminary matter, by clarifying the parties and the issue before us. On November 16, 2019, Zesinger’s attorney filed a notice of appeal and a brief on Zesinger’s behalf. Two issues were raised in that brief. The first was that the trial court erred in finding that Zesinger’s testimony was not credible. The second was that the trial court erred in denying Zesinger’s motion for mistrial based on the trial court’s statements that it had a duty to report Zesinger’s failure to file tax returns to the appropriate officials of the Florida Bar. The brief did not comply with Maryland Rules and, by order dated December 6, 2019, we directed Zesinger to file a corrected brief and record extract. Shortly thereafter, we granted Zesinger’s counsel leave to withdraw his appearance.

On February 3, 2020, Zesinger, proceeding in proper person, filed the revised brief and record extract that is before us. Zesinger did not adopt or incorporate in any way the issues raised in the brief filed by his attorney. Instead, he raised the new issue of whether the trial court erred in denying his request for an accounting. As Zesinger did not adopt, incorporate, or in any way mention or refer to the issues presented in the initial brief filed on his behalf, and instead specifically raised a new issue in his revised brief, we consider the issues raised in the initial brief to be waived. *See* Md. Rule 8-504(a)(3) (brief shall include “[a] statement of the questions presented, separately numbered, indicating the legal propositions involved and the questions of fact at issue expressed in the terms and circumstances of the case without unnecessary detail.”); Md. Rule 8-504(a)(6) (brief shall include “[a]rgument in support of the party’s position on each issue.”); *Foster v. State*, 305 Md. 306, 315 (1986) (failure to make an argument in appellant’s brief constitutes a waiver or abandonment); *Health Servs. Cost Review Comm’n v. Lutheran Hosp. of Md., Inc.*, 298

Md. 651, 664 (1984) (“[A] question not presented or argued in an appellant’s brief is waived or abandoned and is, therefore, not properly preserved for review.”); *Ricker v. Abrams*, 263 Md. 509, 516 (1971) (appellant’s failure to make an argument in brief or at oral argument constitutes a waiver of the argument). Even if the two issues presented in the initial brief were properly before us, for the reasons set forth below, reversal would not be required.

We further note that Zesinger does not challenge on appeal the trial court’s grant of summary judgment or the trial court’s rulings on the motions for judgment that he failed to prove a breach of contract or unjust enrichment by a preponderance of the evidence. As a result, the Law Firm is the sole appellee before us, and the sole issue presented for our consideration is whether the trial court erred in denying Zesinger’s request for an accounting.

#### **A. Accounting**

Zesinger argues that he was entitled to an accounting because there was a fiduciary relationship between the parties and because the Law Firm was required to pay him money based upon the facts and records known and kept exclusively by it. We disagree and explain.

Zesinger did not argue below that he was entitled to an accounting because there was a fiduciary duty between him and appellees. As a result, that argument is not properly before us. Md. Rule 8-131((a) (“Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raise in or decided by the trial court[.]”).

With regard to his argument that the Law Firm was required to pay him money, in Maryland, “[t]he general rule is that a suit in equity for an accounting may be maintained when the remedies at law are inadequate.” *P.V. Properties, Inc. v. Rock Creek Village Associates Ltd. P’ship*, 77 Md. App. 77, 89 (1988) (citing *Nagel v. Todd*, 185 Md. 512 (1946)). In such cases, “[a]n accounting may be had where one party is under an obligation to pay money to another based upon facts and records which are known and kept exclusively by the party to whom the obligation is owed, or where there is a confidential or fiduciary relation between the parties, and a duty rests upon the defendant to render an account.” *Id.* “[T]he burden of proof is on the party seeking the remedy, who must establish, by a preponderance of the evidence, that he or she has the right to an accounting.” *Golub v. Cohen*, 138 Md. App. 508, 520 (quoting 1 Am.Jur.2d *Accounts and Accounting*, §66), *cert. denied*, 365 Md. 474 (2001). We have recognized that although an equitable claim for an accounting “once served a necessary discovery function, that function has been superseded by modern rules of discovery.” *Alternatives Unlimited, Inc. v. New Baltimore City Bd. of School Com’rs*, 155 Md. App. 415, 510 (2004).

In the case at hand, adequate remedies at law existed and Zesinger was free to use the discovery process to obtain information pertaining to revenues and to establish the damages he allegedly suffered as a result of the Law Firm’s failure to pay him in accordance with the terms of the employment contract. In fact, Zesinger was given access to the information he seeks. At trial, he acknowledged that his attorney spent several hours at the Law Firm reviewing relevant records and accounts. Zesinger was free to have those

documents reviewed by an accountant and to call an accountant to testify as an expert at trial, but he did not.

Although adequate remedies were available at law, Zesinger could not avail himself of them because he failed to establish a breach of contract or unjust enrichment by a preponderance of the evidence. Remarkably, he does not challenge those rulings on appeal. Having failed to meet his burden of proof, there is no basis for Zesinger's assertion that he is entitled to an accounting as a remedy.

### **B. Arguments in Zesinger's Initial Brief**

As we have already noted, Zesinger's attorney filed a notice of appeal and a brief on his behalf, but because it did not comply with the Maryland Rules, we ordered that a corrected brief and record extract be filed. Zesinger, in proper person, filed a revised brief and record extract that made no mention of the two issues raised in the initial brief. As a result, those issues are not before us. Even if they were, Zesinger would not prevail.

#### **1. Credibility**

The first issue raised in the initial brief was that the trial court erred in finding that Zesinger's testimony was not credible. That contention is without merit. As we have already stated, when an action has been tried without a jury, we will not set aside the trial court's factual finding unless it is clearly erroneous and we give due regard to the trial court's ability to assess the credibility of witnesses. Md. Rule 8-131(c); *Washington v. State*, 191 Md. App. 48, 78 (2010). As we explained in *Morris v. State*, 153 Md. App. 480 (2003):

The most basic rule of appellate review of fact-finding is that of extending great deference to the fact finder, be it judge or jury. Appellate judges do not see or hear the witnesses or have the benefit of any sort of non-verbal communication. They are relatively far less able to assess credibility than are the fact finders on the scene. Appellate judges, moreover, are not immersed in the local context and do not get the sometimes inexpressible “feel” of the case. They are relatively far less able to weigh the evidence than are the fact finders on the scene. The basic rule of fact-finding review, therefore, is that the appellate court will defer to the fact-finding of trial judge or jury whenever there is some competent evidence which, if believed and given maximum weight, could support such findings of fact. That is the prime directive.

*Id.* at 489.

In light of this standard of review, we cannot say that the trial court’s finding that Zesinger’s testimony was not credible was clearly erroneous. In making that finding, the trial judge considered, among other things, that Zesinger’s memory was inaccurate; that he had a motive not to tell the truth; that his testimony was inconsistent and not supported by other evidence; that his testimony differed from testimony he gave in a deposition; that he repeatedly stated that he had records, but failed to produce them; that he received money to pay his taxes but used it for personal expenses; that he hid his car so it would not be repossessed; that he received between \$25,000 and \$30,000 from the Law Firm with no true explanation of what that payment was for; and that he overstated his professional experience. Because there was ample evidence to support the trial judge’s finding that Zesinger’s testimony was not credible, we defer to that finding. Thus, even assuming that this issue was properly before us, Zesinger would not prevail.

## **2. Motion for Mistrial**

The second issue raised in Zesinger’s initial brief was that the trial court erred in denying his motion for mistrial. Again, even if this issue was properly before us, reversal would not be required. ““A trial judge is given broad discretion in determining whether a motion for mistrial should be granted.”” *Owens-Illinois v. Gianotti*, 148 Md. App. 457, 476 (2002)(citing *Vandegrift v. State*, 82 Md. App. 617, 635 (1990)); *see also Medical Mut. Liab. Ins. Soc’y of Maryland v. Evans*, 330 Md. 1, 19 (1993) (“Whether to order a mistrial rests in the discretion of the trial judge, and appellate review of the denial of the motion is limited to whether there has been an abuse of discretion.”). “The declaration of a mistrial is an extraordinary act which should only be granted if necessary to serve the ends of justice.” *Brown v. Contemporary Ob/Gyn Assocs.*, 143 Md. App. 199, 237 (2002) (internal quotations and citations omitted).

Some background is necessary to place the motion for mistrial in context. Zesinger’s request for a mistrial was made after he admitted that he failed to file tax returns for 2010 through 2015, and used money that he received from the Law Firm for his taxes to pay other personal expenses. The trial judge expressed concern about that testimony stating, in part, as follows:

THE COURT: Just out of curiosity, if an attorney fails to file tax returns for at least six years and partner finds out about it, or other clients find [sic] about it or if Bar Counsel finds out about it, do you believe that would harm or diminish the firm’s business goodwill or reputation? You ponder that during lunch. After lunch, I am going to encourage counsel, once again to talk about this case. [Counsel for Mr. Zesinger], —

[COUNSEL FOR ZESINGER]: Yes, Your Honor.

THE COURT: —you should seriously encourage your client to think about [sic] [defense counsel] is willing to offer him anything. I am trying to be as

kind as I can at this point. But I will say that even with the minimal cross examination that has been offered, while the burden may be met for the case to go forward, the Court may be I [sic] a position to rule based upon major discrepancies and what may be perceived as an incredible lack of credibility from the witness.

I am telling you all you might want to consider based upon what I just heard further discussion if anything is offered, you might want to consider taking it. Because I find it hard to believe knowing the number of attorneys that I know who have actually gone to jail for failure to file their taxes, that such of [sic] action may not harm or diminish the firm's business goodwill or reputation by employee.

After these statements, the court stood in recess. When the trial reconvened, the trial judge announced on the record that he had met with the parties and counsel during the recess. The judge described what occurred as follows:

THE COURT: The Court informed the parties that the Court believed that there was a matter of which will require the Court to report Mr. Zesinger to Bar Counsel. The Court heard testimony that he had failed to file taxes in 2010, '11, '12, '13, '14 and '15 and he had filed minimum returns in '16 and '17.

The Court also heard testimony that he had received money from his employer to pay taxes and the Court also has reviewed all of his financials for at least the years 2013 and '14 and notice that he is spending between \$6,000, \$7,000, \$8,000 per year on personal matters.

The Court informed counsel in chambers. The Court believed there was an obligation to notify Bar Counsel in the State of Florida. Regardless of what the parties do in the case, the Court is putting on the record that I will be performing that action.

I have no other alternative. I will also tell you that Judge Morris<sup>[6]</sup> who was sitting with me made the exact same comment to me that she was, quite frankly, shocked when she heard that and did not realize that the taxes had not been filed for those years.

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<sup>6</sup> Judge Morris was a new judge who sat in on a portion of the trial proceedings as part of her orientation.

And she heard the same comment I did, which is he had received money to pay taxes and he had chosen to spend it on other matters.

I strongly encourage counsel to consider resolving the matter. But my ethical obligation remains the same regardless.

I also indicated I would continue to hear the case, but I indicated to the parties that at this point while we were still on the Plaintiff's case, if there are no other witnesses, it may not go especially well for the Plaintiff.

Both parties agreed that the trial judge's statement of what had occurred was accurate. Counsel for Zesinger then advised the court that over the break, his client had contacted his accountant, who informed them that a 2012 tax return had been filed. The accountant contacted the IRS about other tax returns, but the agency was not able "at such short notice to perform the kind of investigation that would satisfy the rest of us with respect to the outstanding issues here." Counsel for Zesinger advised the court that he believed his client was mistaken, but with the exception of 2012, he was not "sure which of those years he has filed and which he hasn't [filed]." The court replied, "I will point out again, counsel, that mistaken testimony may affect credibility." At that point, counsel for Zesinger requested a mistrial stating, "I don't see how this trial can possibly move forward under these circumstances."

The court denied the motion for mistrial. The judge stated that he would consider the case "fairly." Counsel for Zesinger asked if the judge would "delay notification until such time as we know more facts." The judge responded:

**THE COURT:** The time and the place is today and tomorrow. If he takes the stand and he has sufficient information to convince me that I misheard or he was mistaken, I won't do anything. If on the other hand, he can't convince me, then I am going to have to do what I am going to have to do.



I am trying to let you know that what I heard is something that I may need to report him for. Now, if he is mistaken and he testified under oath he has filed the 2012 and talked to his CPA, find. It is what it is.

But, again, . . . I am trying to let Mr. Zesinger know that if he willfully failed to file his tax returns in those years, he may have a problem and the Court may have to report it to Bar Counsel.

I am not going to delay it, I am not going to wait for a status report. It will be up to Florida to decide what to do. But I have never had a situation where someone was on the stand and admitted I was given money by my employer to pay my taxes as a 1099 employee, in addition to the 1099 compensation, I got, and I decided to spend it on my own personal affairs. That raises an issue in my mind. So, put him on the stand.

[COUNSEL FOR ZESINGER]: Well, may I examine him on this point?

THE COURT: You can advise him of his rights. If he willfully failed to file tax returns, he may face criminal prosecution by the Federal Government. I am told Florida has no State income tax. You can advise him of his rights. I would not compel him to testify if you had advised him and if he takes the Fifth. But as a civil case, an adverse inference will be drawn . . . .

If you want to advise him of his rights, you can. He is to be back on the witness stand, counsel can continue to cross examine him, and on redirect, you will have an opportunity to clear anything up if, in fact, I heard it wrong. But what I heard and what Judge Morris heard was exactly the same.

[COUNSEL FOR ZESINGER]: I am not suggesting that the Court heard wrong.

THE COURT: Then you will have a chance on cross examination – redirect to clear it up.

Zesinger was cross-examined about a number of issues including, among other things, his contractual obligation to advance the good will and promote the reputation of the Law Firm. When Zesinger was asked if he promoted Donaldson’s reputation even though he maintained that Donaldson had “lied to the IRS,” Zesinger stated:

That's an assumption, that's for them to determine. I filed 39/49 misclassification documents with the IRS in 2013, '14, I did file my tax returns in 2011 and 2012, I want to clarify the record and apologize to this Court.

I was misspoken [sic], I was confused. I sincerely apologize. I had no ill will or bad intentions. I know it was a misstatement, but I have since confirmed that those issues were – the tax returns were filed with the IRS. And I sincerely apologize to this Court.

And those being 2012 in particular I think was the one I had issue [sic]. And then I filed misclassification documents 2013 – for 2013 and 2014. Whether he lied to the IRS, I'm not going to – that's not for me to say.

I'm not here to disparage him. I'm just here to say that when he provides me with numbers as it pertains to revenue or doesn't pay my taxes, I just say that. I'm not going to say as much as – that's not for me to determine. I'm not the IRS.

On redirect examination, Zesinger testified that he filed a tax return for 2012, and that his accountant confirmed that he had filed forms with the IRS to assert that Zesinger's 2013 and 2014 income had been misclassified.

Ultimately, the trial court determined that Zesinger's testimony was not “credible in any aspect.” In support of that finding, the court noted that Zesinger had an “inaccurate memory,” “motives not to tell the truth,” “extremely inconsistent” testimony that was not supported by other evidence, and inconsistent testimony that was contradicted by other evidence including his prior deposition testimony. The court also pointed to some of Zesinger's behavior, which the court found to be “incredible and in some ways reprehensible,” including efforts to hide his car in order to prevent it from being repossessed, using money that was meant to pay his taxes for personal expenses, and certain actions relating to his handling of a medical malpractice case. In addition, the court

felt that Zesinger “overstated” his credentials and “tried to mislead the Court in terms of who [he] work[ed] for and what [his] experience was.” The court concluded:

I am just not convinced in any way shape or form that you are credible, that there was a breach of contract and even if there was a breach of contract, that you are entitled to damages.

The Court will therefore grant judgment for the Defendant on all remaining counts.

The trial judge clarified that his decision in the case was “based upon [Zesinger’s] lack of credibility.” The judge addressed again the issue of reporting to Florida authorities Zesinger’s failure to file tax returns. The judge gave Zesinger 30 days to provide a statement from his accountant certifying under oath that appropriate taxes or documents for extensions have been filed or that he was working with the IRS to address his tax obligations for the years in question. The judge stated, “[i]f, in fact, it is proven to me that he has taken proper steps to address his tax matters, I will leave it as it is. If it is not proven to me, then I must take action.”

As we have already noted, the trial judge, as the finder of fact, was tasked with determining Zesinger’s credibility. Our review of what transpired at trial reveals that the trial court’s conclusion, that Zesinger was not a credible witness, was well supported by the evidence. Zesinger’s request for a mistrial was based on his dissatisfaction with the court’s statements that his testimony lacked credibility. That is not the type of extraordinary act that will justify the grant of a mistrial. Moreover, with regard to Zesinger’s testimony about his failure to file certain tax returns, the judge clearly kept open the possibility that Zesinger’s accountant might be able to establish that the tax matters had been addressed

appropriately. Thus, even if this issue was properly before us, we would conclude that the trial court did not abuse its discretion in denying Zesinger's motion for mistrial.

**JUDGMENTS OF THE CIRCUIT COURT  
FOR ANNE ARUNDEL COUNTY  
AFFIRMED; COSTS TO BE PAID BY  
APPELLANT.**