UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0857

September Term, 2014

EDWIN B. GLESNER, JR., et ux.

v.

TODD A. BAER, et al.

Meredith,
Kehoe,
Hotten,

JJ.

Opinion by Hotten, J.

Filed: November 13, 2015

Appellants/third-party defendants, Edwin Glesner ("Mr. Glesner") and Rebecca Glesner ("Ms. Glesner"), appealed the decision of the Circuit Court for Washington County, awarding $136,715.66 in attorneys' fees to third-party plaintiff, USA Cartage, LLC. ("USA Cartage"), expended for challenging an easement over its property that was previously granted to original plaintiff, Todd A. Baer ("Mr. Baer"). Appellants filed a motion to vacate or modify the judgment of the court regarding the award of attorneys' fees, which was subsequently denied. This appeal followed. Appellants present six questions for our review:

1. May [a]ppellee's claim for attorney[s'] fees be presented in a third-party claim?

2. Did the [circuit] court err in awarding attorney[s'] fees to [a]ppellee?

3. Is [a]ppellee's recovery of attorney[s'] fees precluded by the negligence of its subrogee?

4. Did [a]ppellants warrant more than they intended to convey?

5. Did the [circuit] court err in enforcing the warranty of title with respect to an easement of record actually disclosed to the grantee?

6. Did the [circuit] court err in admitting testimony of excluded witness offered in rebuttal in support of [a]ppellee's claim of attorney[s'] fees?

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

FACTUAL AND PROCEDURAL BACKGROUND

In 1984, appellants purchased 5.26 acres of real property located in Washington County, Maryland. Appellants subsequently subdivided the lot, conveying one parcel to M.K.S. Development ("M.K.S."), which is now owned by Mr. Baer ("Baer parcel"). The

deed conveying the parcel to M.K.S. granted an easement over an adjacent parcel. The deed defined the easement as follows:

> [A] non-exclusive right-of-way 25 feet in width, leading from the existing entrance from Governor Lane Boulevard, shown on the Plat of the above-referenced property, . . . to the property hereby conveyed.

In April 1995, appellants sold the adjacent parcel to Ralph Richmond ("Mr. Richmond") of USA Cartage ("Cartage parcel"). However, the deed did not reference the easement previously granted to the Baer parcel in the deed to M.K.S.

Following a dispute between the parties regarding Mr. Baer's use of the easement, on August 4, 2008, Mr. Baer filed a complaint against USA Cartage, seeking a declaratory judgment concerning the existence of an easement over the Cartage parcel. In response, USA Cartage filed an answer, *inter alia*, denying liability and subsequently notified appellants of Mr. Baer's complaint in order to defend title. However, appellants neglected to defend USA Cartage's title.

On September 19, 2008, USA Cartage filed a third-party complaint against appellants. In its complaint, USA Cartage asserted that appellants breached the covenant of special warranty conveyed with the title to the parcel of land and sought relief on two grounds: 1) damages according to the difference between the value of the land without the easement and its current, lesser value with the located easement; and 2) indemnity for its attorneys' fees because USA Cartage, rather than appellants, defended the initial claim to its title regarding the easement.

Thereafter, a series of court proceedings in this Court and the Court of Appeals ensued.[1] On June 18, 2013, the circuit court held, *inter alia*, that Mr. Baer possessed an easement over the Cartage parcel and enjoined USA Cartage from interfering with the right-of-way. USA Cartage's third-party claim against appellants remained. On November 5, 2013 and January 24, 2014, the circuit court held hearings and considered evidence and testimony from the parties and several witnesses regarding the third-party claim.

The court issued a decision on April 23, 2014, concluding that the easement constituted a breach of the covenant of warranty, despite USA Cartage's failure to sufficiently establish the damages sought for the diminished value arising from the easement. The circuit court further held that because USA Cartage received a covenant, provided notice to appellants, and was defeated by a paramount title holder (Mr. Baer), USA Cartage was entitled to attorneys' fees. The court awarded nominal damages of $1.00 to USA Cartage for breach of the covenant of special warranty and diminution in value of

[1] In *USA Cartage v. Baer*, 202 Md. App. 138 (2011), we considered USA Cartage's appeal of the circuit court's decision, which concluded that Mr. Baer had an easement over a portion of the Cartage parcel, established a precise location for the right-of-way, and enjoined USA Cartage from interfering with Mr. Baer's use of the easement. We affirmed the circuit court's ruling that the easement was not void as a matter of law, but vacated the judgment and remanded to the circuit court for further consideration of USA Cartage's contention that it had extinguished the easement through adverse possession. In *USA Cartage v. Baer*, 429 Md. 199 (2012), the Court of Appeals granted certiorari to consider the proper application of the recording statute and the appropriate standard of locating the subject easement, and subsequently affirmed the decision of this Court.

the USA parcel by the easement and $136,715.66 in attorneys' fees expended in challenging the easement.

On May 5, 2014, appellants filed a motion to vacate or modify the judgment of the circuit court, alleging negligence of title examination and preparation of deed by agents of USA Cartage's subrogee and that the awarded attorneys' fees were unreasonable and not supported by sufficient evidence. USA Cartage filed an opposition in response. On June 4, 2014, the circuit court denied appellants' motion, which prompted appellants' notice of appeal to this Court. Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues presented.

STANDARD OF REVIEW

Before settling an award of attorneys' fees, "courts must routinely undertake an inquiry into the reasonableness of any proposed fee[.]" *Monmouth Meadows Homeowners Ass'n v. Hamilton*, 416 Md. 325, 333 (2010). The Court of Appeals in *CR-RSC Tower I, LLC. v. RSC Tower I, LLC*., 429 Md. 387, 465 (2012), articulated the standard for determining the reasonableness of an attorneys' fee award as follows:

> When a contract provides for attorneys' fees in the event of litigation, Maryland Lawyers' Rule of Professional Conduct 1.5 is 'the foundation for analysis of what constitutes a reasonable fee.' Additionally, the [circuit] court has discretion to consider 'any other factor reasonably related to a fair award of attorneys' fees[,]' and the [circuit] court need not 'explicitly comment on or make findings with respect to each factor' nor 'hold an evidentiary hearing to determine a proper fee award [.]'

(internal citations and citation omitted) (footnotes omitted).

Additionally, "[w]e review a [circuit] court's award of attorneys' fees under an abuse of discretion standard." *Monmouth Meadows Homeowners Ass'n., Inc. v. Hamilton*, 416 Md. 325, 332 (2010). Thus, a "[circuit] court's determination of the reasonableness of attorney[s'] fees is a factual determination within the sound discretion of the court, and will not be overturned unless clearly erroneous." *Myers v. Kayhoe*, 391 Md. 188, 207 (2006).

DISCUSSION

I. Third-Party Claim for Attorneys' Fees

Appellants aver that all or part of what was initially claimed by Mr. Baer against USA Cartage must form the basis of USA Cartage's third-party claim against them. Thus, because Mr. Baer withdrew his monetary claim and pursued only declaratory relief, "there is nothing in [Mr. Baer's] judgment against USA [Cartage] . . . upon which a third-party claim by USA [Cartage] for money damages against [appellants] may be premised."

In contrast, USA Cartage asserts that it was within the trial judge's discretion to hear the third-party claim and that USA Cartage's claim against appellants was proper because it "arose out of the same related group of facts" as those in Mr. Baer's claim against USA Cartage. We agree.

Third party claims are governed by Maryland Rule 2-332(a), which provides, in pertinent part:

> (a) **Defendant's claim against third party**. A defendant, as a third-party plaintiff, may cause a summons and complaint, together with a copy of all pleadings, scheduling notices, court orders, and other papers previously filed in the action, to be served upon a person not a party to the action who is or may be liable to the defendant for all or part of a plaintiff's claim against the defendant. A person so served becomes a third-party defendant.

In articulating the purpose of third-party practice, the Court of Appeals in *White v. Land Homes Corp*., 251 Md. 603 (1968), held that "[t]he third-party practice was designed primarily to avoid a separate trial involving a repetition of testimony and to ensure more consistent judgments on related claims." *Id*. at 606 (footnote omitted); *see Moreland v. Aetna U.S. Healthcare, Inc*., 152 Md. App. 288, 303 (2003) (reemphasizing that the purpose of third-party practice rules is "to facilitate the attainment of a just, speedy and inexpensive determination of all disputes between the same parties[]").

Relatedness of the claims is a prerequisite to a third-party claim. "The claim against the third-party defendant must be that of the original defendant[,] but it must be based upon the plaintiff's claim against the original defendant." *White*, 251 Md. at 609 (citations omitted). The Court further opined:

> [T]his means that a third-party claim will lie in any case where it can be alleged that the third-party defendant is necessarily answerable to the original defendant should judgment be entered against him. . . . Thus impleader is authorized to bring in a third party who would necessarily be liable over to the defendant for all or any part of the plaintiff's recovery, whether by way of indemnity, subrogation, contribution, express or implied warranty, or otherwise.

Id. (citing Barron and Holtzoff, Federal Practice and Procedure (1960) Vol. 1 A, s 426 at 664-69).

Accordingly, "Maryland Rule 315 [predecessor to the current Md. Rule 2-332] [is] predicated on the concept of a 'claim', which has been defined as a 'group or aggregate of operative facts giving ground or occasion for judicial action,' as distinguished from the narrow concept of a 'cause of action.'" *Id*. at 610-11 (footnote and citation omitted); *see*

also Roebuck v. Steuart, 76 Md. App. 298, 321 (1988) (holding that although asserted third-party claims were not contingent upon the plaintiffs' claims, they arose out of the same related group of complex facts).

Maryland courts also adhere to a more liberal interpretation of third-party practice, similar to that advanced in federal cases under Federal Rule 14.[2] For example, the Court in *White* stated:

> [F]ederal courts have been quite liberal in holding a third-party claim sufficient if it alleges facts under which the third-party defendant is or may be liable to the original defendant for all or part of the plaintiff's claim in order to avoid circuity of action. . . .
>
> We are inclined to follow the rule of the federal cases, and to regard as sufficient any third-party claim which sets out facts under which, if proved, the third-party defendant is, or may be liable for all or part of the plaintiff's claim.

White, 251 Md. at 611 (internal quotations omitted and citations omitted).

Against these standards, we conclude that the court did not err in permitting USA Cartage's third-party claim for attorneys' fees. The breach of warranty issue arose out of the same challenge which USA Cartage had to defend, because the issue regarding attorney fees was directly tied to appellants' failure to defend the title. Thus, appellants as third-party defendants, were answerable to Mr. Baer. *See White*, 251 Md. at 608 (concluding that third-party defendants, Land Homes Corp., was answerable to appellants/third-party

[2] Federal Rule 14 is the federal counterpart to Md. Rule 2-332, which are substantively the same.

plaintiffs because third-party defendants breached a covenant of general warranty conveyed to appellants).

Moreover, "the allowance of a third-party claim rests in the sound discretion of the [circuit] court." *Id*. at 606 (citing *Gorn v. Kolker*, 213 Md. 551, 554-555 (1957); *see also Nw. Nat'l Ins. Co. v. Rosoff, Ltd*., 195 Md. 421, 433-34 (1950) (stating that "[t]he rule for making third parties was designed to facilitate trials, and was intended to be administered in the discretion of those judges who would preside over those trials[]"). Absent action by a lower court that is "clearly arbitrary or has no sound basis in law or in reason," the judgment of the circuit court will not be reversed. *See White*, 251 Md. at 607 (citing *Nw. Nat'l Ins.*, 195 Md. at 434).

In addressing the propriety of the attorneys' fees award, the court concluded:

> These [attorney] fees, supported by affidavit, amount to $136,715.66. This is the amount [appellants] owe USA Cartage for breaching the covenant of special warranty, and for not defending against [Mr.] Baer's claim.
>
> Although a defendant's claim against a third[-]party is limited to all or a part of the original claim under Maryland Rule 2-332, [Mr.] Baer's initial complaint sought the damages necessary to permit the third[-]party complaint. *See USA Cartage Leasing, LLC v. Baer*, 202 Md. App. 138, 156 (2011) ("The second count of [Mr.] Baer's complaint . . . sought an injunction . . . as well as damages of $250,000"). Furthermore, 'it is generally held that the allowance of a third-party claim rests in the sound discretion of the [circuit] court.' *White v. Land Homes Corp*., 251 Md. 603, 606 (1968). Here, using its discretion, this [c]ourt permitted the third[-]party complaint.
>
> Although USA Cartage did not meet its burden of proof for damages sought for the diminished value from the easement, the easement clearly constitutes a breach of the covenant of warranty. Further, because USA Cartage received a covenant of special warranty, provided notice to [appellants], and was defeated by a paramount title holder, USA Cartage is entitled to attorney[s'] fees.

The circuit court's decision to permit the third-party claim was appropriate. We also reject appellants' argument that USA Cartage asserts "a wholly different wrong, premised on a distinct theory of law, and sounding in contract, 'for wrongs committed independently by them'" . . . which "USA [Cartage] cannot do in a third-party claim." *See White*, 251 Md. 603, 607 (stating that the fact that the original plaintiff's claim involved a contract does not preclude the original defendant from filing a third-party complaint in tort).

II. Contractual Attorneys' Fees[3]

Appellants contend that the circuit court failed to perform the required analysis in awarding attorneys' fees to USA Cartage. "Specifically, the [c]ourt failed to adjust the award to reflect the factors it was required to consider under Rule 1.5 of the Maryland Rules of Professional Conduct, and in particular, the amount involved and the results obtained." In response, USA Cartage counters that the circuit court did not abuse its discretion and that the amount was not clearly erroneous. We agree.

"[T]he question of attorneys' fees is a factual matter which lies within the 'sound discretion of the trial judge' and will not be overturned unless clearly erroneous." *Long v. Burson*, 182 Md. App. 1, 25 (2008) (citing *Maxima Corp. v. 6933 Arlington Develop. Ltd. P'ship*, 100 Md. App. 441, 452 (1994)); *see also Myers v. Kayhoe*, 391 Md. 188, 207 (2006) (holding that the amount of fees awarded to the prevailing party is "within the sound discretion of the [circuit] court[]"). "Maryland follows the American rule of attorneys'

[3] Appellants' second and fourth issues on appeal have been consolidated under this section.

fees, which 'stands as a barrier to the recovery, as consequential damages, of foreseeable counsel fees incurred in enforcing remedies for' breach of contract." *Long*, Md. App. at 25-26 (citing *B & P Enter. v. Overland Equip. Co*., 133 Md. App. 583, 620–21 (2000) (internal quotation omitted).

"When attorneys' fees are based on a contractual right, the paying party is entitled to have the amount of fees and expenses proven by competent evidence and with the certainty ordinarily applicable for proof of contractual damages." *Long*, 182 Md. App. at 26 (citing *Maxima*, 100 Md. App. at 452–53. As such, "[t]he burden of proof lies upon the party seeking fees." *Id*. (citing Maxima, 100 Md. App. at 453–54). *See also Bankers & Shippers Ins. Co. v Electro Enter. Inc*., 287 Md. 641, 661-62 (1980) (reversing the circuit court's award of thirty percent of total attorneys' fees sought for parties' failure to meet burden of proof).

"The sufficiency of the evidence presented [regarding] attorneys' fees must be more than simply the number of hours worked, but less than a line by line analysis of services rendered." *Long*, 182 Md. App. at 26. This Court further concluded:

> A fee is not justified by a mere compilation of hours multiplied by fixed hourly rates or bills issued to the client; [ ] *a request for fees must specify the services performed, by whom they were performed, the time expended thereon, and the hourly rates charged*; [ ] it is incumbent upon the party seeking recovery to present detailed records that contain the relevant facts and computations undergirding the computation of charges; [ ] without such records, the reasonableness, *vel non*, of the fees can be determined only by conjecture or opinion of the attorney seeking the fees and would therefore not be supported by competent evidence.

Id. (emphasis in original).

Once this evidence is established, the circuit court must then "evaluate the reasonableness of the fee request," which includes consideration of the criteria outlined in Maryland Rule of Professional Conduct 1.5. *See Long*, 182 Md. App. at 26; *see also Maxima*, 100 Md. App. at 454 (stating that "Maryland courts consider a variety of factors, including, but not limited to, those delineated in Md. Rule 1.5[]"). Rule 1.5(a) of the Maryland Rules of Professional Conduct, provides, in pertinent part:

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment of the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

See Md. Rule 16-812.

We conclude that the evidence offered by USA Cartage met the burden required for an award of attorneys' fees. "Third-Party Plaintiff's Exhibit 11" contains records indicating, at length, the services performed, the billable hours expended on the service, the initials of the attorneys who worked on the matter, and the hourly rate charged for attorneys' fees, during the relevant time period. *Cf. B & P Enterprises. v. Overland Equip. Co*., 133 Md. App. 583, 628 (2000) (concluding that appellee failed to offer proof regarding the type of services rendered or to the necessity of those services in litigation when a bill for trial counsel's services "simply listed the attorneys' total number of hours[]"); *Long*, 182 Md. App. at 29 (stating that appellees failed to meet their burden of production on the issue of attorneys' fees, in part, because appellees "merely presented a compilation of hours multiplied by hourly fixed rates[]").

Additionally, these records were supplemented with a "Bill and Payment Report," which included a line-by-line breakdown of invoice totals in connection with the services performed.

We also conclude that the award of attorneys' fees was reasonable under Rule 1.5 of the Maryland Rules of Professional Conduct because USA Cartage was entitled to indemnification for the expenditure of attorneys' fees as a result of appellants' breach of covenant. Md. Code (2010 Repl. Vol.), § 2-106 of Real Property ("Real Prop."), provides:

> A covenant by a grantor in a deed 'that he will warrant specially the property hereby granted' has the same effect as if the grantor had covenanted that he will warrant forever and defend the property to the grantee against any lawful claim and demand of the grantor and every person claiming or to claim by, through, or under him.

Similarly, the Court of Appeals in *Crisfield v. Storr*, 36 Md. 129 (1872) held:

> It is the duty of the covenantor and those bound by the covenant, upon receiving notice, to defend the covenantee's title, and upon their refusal or neglect to do so, it is clear that the latter would have the right to employ counsel for that purpose, and to recover, in an action on the covenant, such reasonable fees as they had been compelled to pay.

Id. at 151; *accord Jarrett v. Scofield*, 200 Md. 641, 646 (1952); *see also Bankers & Shippers Ins.*, 287 Md. at 661 (holding that the circuit court erred in limiting damages to fees incurred in defending a declaratory judgment action because appellant breached its contractual obligation to provide a defense in the underlying tort suits and was liable for the resulting damages, which included the attorneys' fees and expenses incurred in defending the same).

Appellants conveyed a covenant of special warranty to USA Cartage pursuant to Real Prop., § 2-106 and thus, were required to defend USA Cartage's title against competing claims. The deed stated the following:

> AND the *Grantors herein do covenant that they will warrant specially the property herein intended to be conveyed and that they will execute such further assurances of the same as may be requisite*.

(emphasis added).

To recover attorneys' fees for breach of warranty, the convenantee must give notice to covenantor to defend title and the convenantee must have unsuccessfully defended the claim against its title. *See Jarrett*, 200 Md. at 646. These facts are not in dispute. USA Cartage gave appellants timely notice to defend (which appellants failed to pursue) and was subsequently unsuccessful in its own defense. In light of these facts, we conclude that

the amount awarded in attorneys' fees relative to USA Cartage's defense of title were reasonable.

Thus, we reject appellants' contention that the fees awarded were disproportionate with the result. *See Maxima*, 100 Md. App. at 458 (concluding that "the law is clear that the [circuit] court's evaluation of a claim for attorneys' fees must be based on a record that includes information that sufficiently and competently supports the court's findings"); *accord Bankers & Shippers Ins.,* 287 Md. at 661-62. We also agree with the court's decision to credit the testimony of counsel for USA Cartage, G. Randall Whittenberger ("Mr. Whittenberger"), regarding the reasonableness of the amount awarded in attorneys' fees.[4]

Similarly, regarding the covenant of warranty language in the deed, appellant further avers:

> Because appellants specially warranted only the interest which they intended to convey, they are not liable to [USA Cartage] for conveying title subject to an easement which appellants previously granted to M[.]K[.]S.

We disagree. As an initial matter, we remain cognizant that a covenant of a special warranty by grantor to grantee imposes a duty upon grantor to defend title against competing claims. *See* Md. Code, Real Prop., § 2-106. *See also Miller v. Bay City Prop.*

[4] The circuit court stated:

> At trial, G. Randall Whittenberger, attorney for USA Cartage, testified that his fees were supported by admitted invoice exhibits, and were a fair and reasonable amount to charge for the matters relating to the prior case and not the instant case.

Owners Ass'n, Inc., 393 Md. 620, 640 (2006) (reemphasizing a grantor's duty to defend grantee's title under a covenant of special warranty); *Wempe v. Schoentag*, 163 Md. 647 (1933) (holding that a covenant of special warranty makes it grantor's duty to defend title against claims, which he may have previously created).

Moreover, we adhere to well-settled Maryland law regarding contract interpretation. "In construing the language of a deed, the basic principles of contract interpretation apply." *Gunby v. Olde Severna Park Improvement Ass'n*, Inc., 174 Md. App. 189, 242 (citing *Miller v. Kirkpatrick*, 377 Md. 335, 351 (2003)). "These principles require consideration of 'the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution.'" *Gunby*, 174 Md. App. at 242 (quoting *Chevy Chase Land Co. v. U.S.*, 355 Md. 110, 123 (1999) (citations omitted). "Ordinarily, the construction of a deed is a question of law for the court, and is subject to *de novo* review." *Id*. (citing *Calvert Joint Venture # 140 v. Snider*, 373 Md. 18, 38 (2003).

As we explained in *Gunby*, *supra*:

> Under the principles of contract interpretation, the court gives effect to the intention of the parties, gleaned from the text of the entire instrument, unless that would violate a principle of law. The intention of the grantor is a question of fact, and the surrounding circumstances . . . must be analyzed in order to truly understand an unexpressed intention. . . . The true test of what was meant by the language of the deed is what a reasonable person in the position of the parties would have thought it meant.

Id. at 242-43 (internal quotations and citations omitted). Accordingly, "[i]n 'interpreting a deed whose language is clear and unambiguous on its face, the plain meaning of the words used shall govern without the assistance of extrinsic evidence.'" *Id*. at 243 (quoting *Drolsum v. Horne*, 114 Md. App. 704, 709 (1997)). "We also consider the language of the

deed 'in light of the facts and circumstances of the transaction at issue as well as the governing law at the time of conveyance.'" *Id*. (quoting *Chevy Chase Land Co. v. U.S*., 355 Md. 110, 123 (1999).

In contrast, "language in a deed is considered ambiguous . . .'if, when read by a reasonably prudent person, it is susceptible of more than one meaning.'" *Gunby*, 174 Md. App. at 243 (quoting *Calomiris v. Woods*, 353 Md. 425, 436 (1999). However, the determination of ambiguity is also a question of law, subject to *de novo* review. *Gunby*, 174 Md. App. at 243. Thus, "when the words in a deed 'are susceptible of more than one construction,' the deed is 'construed against the grantor and in favor of the grantee[.]'" *Id*. (quoting *Morrison v. Brashear,* 38 Md. App. 693, 698 (1978)).

The parties' dispute over whether the language "intend to convey," specially warranted title subject to an easement. Similarly, we acknowledge that the language used in the deed is ambiguous and thus, susceptible to more than one meaning. Taking guidance from our holding in *Gunby*, we construe the language in the deed against appellants (grantors) and in favor of USA Cartage (grantee), and adopt its interpretation of the language in the deed.[5] *See Olde Severna Park Improvement Ass'n*, *Inc. v. Barry*, 188 Md. App. 582, 628 (2009) (construing ambiguities in deed against grantor and in favor of

[5] The circuit court reached a similar conclusion. In rejecting the same argument appellants now raise on appeal, the court concluded:

> The clause in question mentions a covenant of special warranty to run with the property intended to be granted. The [c]ourt will give the clause its reasonable effect, and hold that a special warranty was covenanted from [appellants] to USA Cartage.

grantee-appellee). *Contra Morrison v. Brashear*, 38 Md. App. 693, 698 (1978) (concluding that the language in the deed was intended by all parties and construing ambiguity in favor of grantor). Thus, appellants were required to defend USA Cartage's title under the covenant and subsequently breached the same when they failed to do so. In light of the foregoing, we decline to address appellants' further arguments.

III. Preclusion of Recovery by USA

Appellants aver that the negligence of USA Cartage's subrogee, Fidelity[6] ("subrogee"), who paid all of the attorneys' fees under a subrogation agreement between USA Cartage and Miles & Stockbridge, P.C. ("subrogee's agent"), precludes recovery by USA. Appellants further contend:

> The [circuit] court's opinion failed to address or apply the defense asserted that recovery by the title insurer, as subrogee, is precluded by the negligence of its title insurance agent, Miles & Stockbridge, in searching the title to the property and undertaking to prepare a deed for [a]ppellants[,] which failed to provide an exception for the easement in the conveyance or the warranty of title.

In response, USA Cartage contends that appellants' argument regarding the negligence of subrogee's agent "has no relevance to the breach of warranty suit brought by [USA Cartage] against [appellants]" and furthermore, "the deed was properly prepared by the settlement attorney to match the contract description."[7]

[6] Formerly Chicago Title Insurance Company.

[7] USA Cartage urges this Court to note that appellants rely upon insurance documents that were not admitted into evidence and barred by Maryland Rule 5-411. Addressing this argument requires a determination of whether subrogee's (continued…)

"Subrogation is founded upon the equitable powers of the court."[8] *Bachmann v. Glazer & Glazer, Inc*., 316 Md. 405, 412 (1989). "[Subrogation] is intended to provide relief against loss and damage to a meritorious creditor who has paid the debt of another." *Id*. (citing *Milholland v. Tiffany,* 64 Md. 455, 460 (1886)). "The rationale underlying the doctrine of subrogation is to prevent the party primarily liable on the debt from being unjustly enriched when someone pays his debt." *Id*. (citations omitted).

We also acknowledge that the right of subrogation may bar recovery when the party asserting the right was inexcusably negligent. *See Maryland Title & Escrow Corp. v. Kosisky*, 245 Md. 13, 22 (1966) (stating that "[t]he fact that the loss of one who seeks to be made whole by subrogation arose from his own negligence may be fatal to his claim[]"). However, appellants' argument under the doctrine of subrogation is unpersuasive. As previously held, USA Cartage was entitled to recovery resulting from appellants' breach of covenant. Thus, any alleged negligence of subrogee's agent is immaterial to the breach of warranty issue and the court did not err by not addressing appellants' arguments.

agent is a real party in interest subject to Md. Rule 5-411 and whether the Collateral Source Rule applies to the case at bar. However, these issues are not properly before this Court.

[8] Maryland recognizes three distinct categories of subrogation: legal subrogation, conventional subrogation, and statutory subrogation. *See Bachmann v. Glazer & Glazer, Inc*., 316 Md. 405, 413 (1989).

IV. Disclosure of the Easement

Appellants contend that the circuit court erred in enforcing the warrant of title with respect to an easement because "[a]t the time the deed from [a]ppellants to [USA Cartage] was executed and delivered, Mr. Richmond was aware of the existence of a right-of-way, its use having been observed by [him], and disclosed to [him] by Mr. Glesner in the course of their purchase negotiations." We disagree.

We first observe that *Dillow* is not controlling on the issue of knowledge, as argued in appellants' brief. The Court of Appeals in *Magraw v. Dillow*, 341 Md. 492, 509 (1996), acknowledged that a grantee's "knowledge of an encumbrance is sufficient to indicate that the encumbrance was not intended by the parties to be covered by the covenant." However, the Court did not invalidate the long-established standard that a grantee's knowledge of an easement is irrelevant. *See id*., n. 18 (stating that knowledge is irrelevant). Instead, the issue regarding whether prior knowledge extinguished a covenant remained undetermined. *See id*. (stating that "Maryland law is unclear on what is potentially a seventh factor: if the covenantee's knowledge of an encumbrance is sufficient to indicate that the encumbrance was not intended by the parties to be covered by the covenant").

Moreover, the opinion of *Dillow v. Magraw*, 102 Md. App. 343, 373 n.18 (1994), cited by the circuit court in support of its decision, remains authoritative. In *Dillow*, we held that "actual or constructive knowledge . . . of the existence of an encumbrance will not defeat [a] claim for breach of the covenant." *Id*. We also noted:

> Even though the grantee has knowledge of the existence of encumbrances at the time of delivery of the deed to him containing a covenant against encumbrances, *he is still entitled to the full benefit of the covenant*. . . .

Id. (emphasis added) (citing Eli Frank, *Title to Real and Leasehold Estates and Liens,* at p. 98 (1912); *Bryant v. Wilson,* 71 Md. 440, 442 (1889); *accord Marathon Builders, Inc. v. Polinger*, 263 Md. 410, 416 (1971). Accordingly, we conclude that the circuit court did not err in enforcing the warranty of title.

V. Mr. Whittenberger's Testimony

Appellants challenge the admission of the testimony of Mr. Whittenberger regarding the reasonableness of attorneys' fee, asserting that he was an excluded witness during the November 2013 hearing and his rebuttal testimony during the January 2014 hearing went beyond the scope of appellants' trial defense. We disagree.

Appellants cite *Parlett Ford, Inc. v. Sosslau*, 19 Md. App. 320, 329 (1973) for the proposition that where a court grants a motion to exclude counsel of record as a witness, counsel's testimony may be impermissible. However, appellants' reliance on *Parlett* is misplaced. Although this Court disapproved of the manner in which appellee's counsel used co-counsel as a witness in *Parlett*, we overruled appellant's motion to bar such use and concluded that "the use of co-counsel as a witness inflicted no inherent damage upon appellant." *Id*. at 328-29. Appellants fail to acknowledge that similar to our holding in *Parlett*, the use of Mr. Whittenberger as a witness inflicted no inherent damage upon appellant, primarily because it only supplemented the evidence regarding attorneys' fees that was already before the court.

It is unclear whether the court, in fact, granted appellants' motion to exclude Mr. Whittenberger as a witness. Instead, the record demonstrates that Mr. Whittenberger only elected to not testify during the November 2013 hearing. The transcript states:

> [APPELLANTS' COUNSEL]: We would move for the rule in case Mr. Whittenberger elects to testify.
>
> THE COURT: Alright.
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> [APPELLANTS' COUNSEL]: We would move to exclude witnesses.
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> THE COURT: Well, that means you're either going to be excluded or not going to be permitted to testify. Ordinarily, if counsel shows the attorney[s'] fees to their client, perhaps, Mr. Richmond. You know, "Are these what we did?" And I mean there's a way around it, I guess.
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> * * *
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> THE COURT: I don't want to exclude you, Mr. Whittenberger. So, in that case you probably shouldn't be a witness. If it turns out to be a problem, I guess I need to know about that now. You don't have an associate here who [ ] would call you as a witness.
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> * * *
>
> [MR. WHITTENBERGER]: No, I can . . . I can show these to the . . . to the client.

Nonetheless, when this issue was revisited during the January 2014 hearing, the circuit court provided Mr. Whittenberger with the option to testify, over objection by appellants' counsel. The transcript states:

> THE COURT: Yeah. Well, you know, I'm . . . I agree with you, Mr. Whittenberger, that your testimony wouldn't be required. There is an objection and that objection is preserving the record on this ruling. I've been wrong before. If you want to, ah, take the chance that the affidavit [regarding attorneys' fees] is sufficient, I agree with you on that. If you'd rather make

> a better record and testify, I'd allow that, as well. So, I leave it up to your discretion, sir.
>
> [MR. WHITTENBERGER]: Well, your Honor, I'll present the affidavit and then take the stand.

We perceive no abuse of discretion in the circuit court's allowance of Mr. Whittenberger's testimony regarding the reasonableness of the attorneys' fees. *See Bd. of Trustees, Cmty. Coll. of Baltimore Cnty. v. Patient First Corp*., 219 Md. App. 69, 90 (holding that the circuit court did not abuse its discretion in allowing testimony from appellee's counsel regarding reasonableness of attorneys' fees); *see also Zachair Ltd. v. Driggs*, 135 Md. App. 403, 438–39 (2000) (holding that counsel may offer lay opinion on the reasonableness of fees).

Moreover, Mr. Whittenberger's rebuttal testimony was not beyond scope of appellants' defense at trial. In *Fairfax Sav. F.S.B. v. Ellerin*, 94 Md. App. 685 (1993), this Court articulated the standard for determining what evidence may be used as rebuttal evidence. We opined:

> When the defendant has concluded his testimony, the plaintiff, in those cases where the burden of proof rests on him[,] and where[,] in chief[,] he has accordingly gone into his whole case, is entitled to introduce what is called rebutting evidence–that is to say, evidence in regard to such new points and questions as were first opened by the defendant's evidence. The rule is that the plaintiff will be required to go fully into his own case-in-chief on those issues as to which he holds the substantial affirmative . . . he will ordinarily be limited to what is strictly rebutting evidence. Still, it is not always easy to draw the line between what is rebutting evidence and what is evidence properly adducible in chief. The subject is one[,] which is addressed to the sound discretion of the [c]ourt; and the appellate [c]ourt will not reverse for an error on this point, unless the ruling of the [c]ourt below was both manifestly wrong and substantially injurious. Indeed, as a general rule, in such cases no appeal will lie.

Id. 697-98 (citing *Jones v. State*, 132 Md. 142, 148-49 (1918); *accord State v. Hepple*, 279 Md. 265, 270 (1977).

Even assuming that the testimony of Mr. Whittenberger was erroneously characterized as rebuttal evidence or otherwise improperly admitted, it was of no consequence to the circuit court's final judgment. The court had all evidence before it to make a determination regarding the breach of warranty issue and attorneys' fees. Mr. Whittenberger's rebuttal testimony only reiterated the same.

Appellants cite *Hepple*, for the proposition that a circuit court's broad discretion does not cure an error in its determination of what constitutes rebuttal evidence. Appellants' reliance on *Hepple* is also misplaced. In *Hepple*, 279 Md. 265, two witnesses testified in rebuttal on behalf of the State, one against each defendant. *Id*. at 268-69. In both instances, the Court of Appeals concluded that the lower court erred in admitting the testimonies as rebuttal evidence, which was not cured by the court's discretion to do so. *Id*. at 272-73. In defendant Hepple's case, the Court determined that the rebuttal testimony by the State's witness did not explain, reply to, or contradict the testimony of the defense's only witness. *Id*. at 272.

Similarly, in defendant Jones' case, the Court determined that the rebuttal testimony by another State witness intended to restore the credibility of a prior State witness was improper because the testimony only amounted to a "tendency to restore the credibility" of the witness that "cannot justify the admission of additional testimony[,] which is cumulative and which could have been offered in chief." *Id*.

Accordingly, the Court concluded that admitting the testimony as rebuttal evidence in that case was "manifestly wrong," because upon review of the record, the Court could not "declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *Id*. at 273. Here, contrary to the Court's holding in *Hepple* regarding the rebuttal testimony against defendant Hepple, Mr. Whittenberger's testimony did "explain, reply to, or contradict" the arguments asserted by appellants. Additionally, the Court's holding regarding the rebuttal testimony against defendant Jones is inapposite to the instant case because Mr. Whittenberger's testimony was not offered to restore credibility.

Thus, Mr. Whittenberger's rebuttal testimony was not "manifestly wrong," nor did it rise to the level of influence on the outcome of the case as contemplated in *Hepple*. Accordingly, the circuit court did not err in allowing Mr. Whittenberger's rebuttal testimony.

JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY IS AFFIRMED. COSTS TO BE PAID BY APPELLANTS.