Circuit Court for Prince George's County
Case No. CAL17-16401

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 861

September Term, 2021

MARCUS MCKAY, *ET AL.*

v.

KAREN ANN STUTZMAN, *ET AL.*

Reed,
Zic,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: January 11, 2023

* At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

This case returns to us following a remand to the Circuit Court for Prince George's County. In this second appeal, Marcus McKay and Ahmad Mines (collectively, "Appellants") challenge the court's declaratory judgment in favor of Karen Stutzman and her husband, A. Blair Stutzman (collectively, "Appellees" or "the Stutzmans"), declaring, *inter alia*, that Appellees own a two-thirds membership interest in Metropolitan Medicinals, LLC ("Metropolitan"), while Appellants jointly own the remaining one-third. Appellants present four issues for our review, which we have consolidated and rephrased as follows:[1]

> 1. Did the court violate our mandate by finding that the parties had initially agreed that Mr. Stutzman would own two-thirds of Metropolitan and by entering a declaratory judgment consistent therewith?

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[1] In their initial brief, Appellants presented the following issues:

> I. Whether the court's . . . determination that the [Mrs. Stutzman] owned sixty-six percent of the business was clearly erroneous and/or an abuse of discretion;
>
> II. Whether the Prince George's County Circuit Court properly determined that appellants breached the contract;
>
> III. Whether the Prince George's County Circuit Court's determination that appellants are not entitled to rescission is clearly erroneous;
>
> IV. Whether the Prince George's County Circuit Court's determination on remand that [Mrs. Stutzman] owned sixty-six percent of the business violated the opinion of the Court of Special Appeals.

(Some capitalization omitted; punctuation added).

2. Did the court err by ruling that Appellants—rather than Appellees—breached the parties' contract and therefore abuse its discretion by denying Appellants' motion for rescission?

For the following reasons, we answer both questions in the negative and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We begin with the following recitation of the facts as set forth by Judge (now Chief Judge) Wells in our previous unreported opinion, *Metropolitan Medicinals, et al. v. Stutzman, et al.*, No. 3038, Sept. Term 2018 (filed October 6, 2020) ("*Metropolitan*"):[2]

> In 2014, the Maryland General Assembly established the Natalie M. LaPrade Maryland Medical Cannabis Commission ("the Commission"), an independent agency which would operate within the Department of Health and Mental Hygiene. Md. Code Health-General ("HG") § 12-3302 (1982, 2019 Repl. Vol.). The Legislature charged the Commission with pre-approving and licensing medical cannabis growers, processors, and dispensaries. HG § 12-3306. The Commission's purpose is to implement rules, regulations, policies, and procedures to ensure that the distribution of medicinal marijuana is conducted in a safe and secure manner. To that end, the General Assembly mandated that the Commission "[e]stablish an application review process for granting dispensary licenses in which applications are reviewed, evaluated, and ranked based on criteria established" thereby. HG § 13-3307(c)(1). The application process established by the Commission consists of two stages. The "Stage One" application principally elicits information from which the Commission can assess the viability of applicants' proposed business models. The Commission began accepting Stage One applications on September 28, 2015, with a November 6, 2015, deadline for any such submissions. Should an individual or entity receive Stage One pre-approval, the Commission

[2] "An unreported opinion of either [appellate] Court may be cited in either Court for any purpose other than as precedent within the rule of stare decisis or as persuasive authority." Md. Rule 1-104(b).

requires that he, she, or it submit a supplemental "Stage Two" application, the approval of which was required prior to the Commission's awarding a Medical Cannabis Dispensary License ("a license").

Mr. Stutzman was among those interested in obtaining a license. In anticipation of pursuing such a license, Mr. Stutzman contacted his physician, Dr. Sakiliba Mines, in September 2015. In that communication, he expressed an intent to open and operate a medical marijuana business and requested that Dr. Mines refer him to potential partners and/or investors. Dr. Mines forwarded Mr. Stutzman's e-mail to her son, [Mr. Mines,] who, on October 6th, invited Mr. Stutzman to meet with him to discuss a possible partnership. Mr. Stutzman agreed.

The meeting, held on October 9th, was attended by Mr. Stutzman, Mr. Mines, and Mr. McKay, whom Mr. Mines introduced as his "business associate." During that meeting, Mr. Stutzman solicited Mr. Mines's and Mr. McKay's assistance in preparing fifteen Stage One applications for medical cannabis dispensary licenses in various Maryland districts. Mr. Stutzman agreed to pay $15,000 in filing fees for the Stage One applications and, if any were pre-approved, an additional $4,000 for the Stage Two application filing fee. He further agreed that, if awarded pre-approval, he would invest as much as $250,000 in the dispensary.

The parties dispute the remaining terms of their initial agreement. According to Mr. Stutzman, in consideration for their securing Stage One approval, Mr. Stutzman offered Mr. Mines and Mr. McKay one-third of any net profits he derived from the venture, to be split evenly between them. Mr. Stutzman denied, however, having offered Mr. Mines or Mr. McKay any equity or voting rights in the company. Mr. Stutzman testified that he had told Mr. Mines and Mr. McKay that if a Stage One application was approved, he intended to sell half of the company's equity to a person or business entity licensed to grow, process, and dispense medicinal marijuana. Finally, according to Mr. Stutzman, Mr. Mines and Mr. McKay each agreed to invest up to $40,000 in Metropolitan. Mr. Mines and Mr. McKay, on the other hand, denied having committed to contribute a specific amount of startup capital to the venture, and claimed that Mr. Stutzman had offered—and that they had accepted—a one-third equity interest *each* in Metropolitan.

Following that initial meeting, Mr. Mines and Mr. McKay assembled a team of individuals to aid them in completing the Stage One applications ("the Application Team"). . . . . During the ensuing weeks, Mr. Mines, Mr. McKay, and the Application Team completed the applications. In so doing, they used a cloud computing application called "Google Docs," which permitted each of the contributors to simultaneously view, edit, and update the applications in real time. Mr. Mines paid the Application Team a total of approximately $4,000 to compensate them for their time and efforts. Mr. McKay, in turn, paid approximately $1,000 to have the applications printed, bound, and delivered to the Commission.

In order to allay any concerns that he would not honor his agreement with Mr. Mines and Mr. McKay, Mr. Stutzman authorized Mr. McKay to file articles of organization for Metropolitan with the State Department of Assessments and Taxation, and to identify himself as Metropolitan's resident agent. In those articles of organization, which Mr. McKay filed on October 19, 2015, he named himself both Metropolitan's sole "authorized person" and its lone "resident agent."

On November 3rd, Mr. Stutzman sent Mr. Mines an e-mail in which he requested that Mr. Mines name Mrs. Stutzman as a co-owner on the applications. Mr. Mines responded: "Adding [Mrs. Stutzman] as an owner presents a conflict o[f] interest being that [Mr. McKay], yourself, and I have an agreement to share ownership. If we put [Mrs. Stutzman] on the actual application[s] then we would have to remove you and add her to the contract." Mr. Stutzman agreed to a novation whereby Mrs. Stutzman would assume his ownership interest in Metropolitan. Though named as a co-owner, Mrs. Stutzman delegated decision-making authority to her husband. The completed applications, submitted on or around November 6th, named Mr. McKay Metropolitan's "contact person" and identified Mrs. Stutzman and him as its co-owners.

Three days after the applications were submitted, Aaron Fuccello, an attorney hired and paid by Mr. Mines, purportedly on behalf of Metropolitan, sent Mr. McKay, Mr. Mines, and Mrs. Stutzman a draft operating agreement. According to the terms of that proposed agreement, Mr. McKay, Mr. Mines, and Mrs. Stutzman were Metropolitan's three member-managers, each of whom owned a one-third membership interest thereof. Though the operating agreement was sent to the parties, they did not sign it. The Stutzmans had no

further substantive conversations with Mr. Mines or Mr. McKay until December 9, 2016, when the Commission apprised Mr. McKay that Metropolitan was one of 102 applicants to have been pre-approved for a dispensary license.

On or around December 27th, the Stutzmans paid the Commission a $4,000 Stage Two licensing fee on behalf of Metropolitan. Three days later, Mr. Mines and Mr. Stutzman began exchanging e-mails in which they discussed the potential terms of an operating agreement. During that exchange, Mr. Mines claimed that Mr. McKay's and his contributions to Metropolitan entitled them to at least $60,000 in "sweat equity." Mr. Mines further indicated that neither Mr. McKay nor he would contribute startup capital to Metropolitan and claimed that they had initially agreed that Mr. Stutzman and they would each own one-third of the company. Finally, Mr. Mines proposed a set rate of return on the Stutzmans' capital contribution and Mr. McKay's and his "sweat equity," writing: "You should be receiving an accelerated rate of return split at . . . 25[%], . . . 25[%], . . . 50 [%] until your loan of 140k is repaid[,] then reverting back to a 33.3[%] split as previously discussed with the initial 40k going to application fee and 3% for PPE." Mr. Stutzman responded, in pertinent part: "[I]f you guys want to go down this road its [sic] ok with me. I will not and cannot give you your money. . . . . You guys are going to have to come up with 20k each so you have some skin in the game so to speak." He further proclaimed, "I am keeping voting rights. That would be a deal breaker for us[.] [W]e will lose this appl[ication] and business over that." Following this exchange with Mr. Mines, Mr. Stutzman purported to expel him from Metropolitan. Mr. McKay, however, refused to assent to Mr. Mines's ouster.

On May 8, 2017, the Stutzmans' attorney placed Mr. McKay on notice of his duty, as Metropolitan's resident agent, to maintain company documents and communications in anticipation of litigation. In a response sent on May 11th, Mr. McKay offered to return the Stutzmans' contributions to Metropolitan plus interest at the applicable legal rate of six percent. That same day, the Stutzmans' attorney replied to Mr. McKay's offer, instructing him on how to transmit the funds, and apprising him that the return of his client's investment would not dissuade him from pursuing legal action. It was not, however, until October 3, 2017, that Mr. McKay and Mr. Mines tendered to the Stutzmans a certified check in the amount of $20,912.27, accompanied by a letter purporting to rescind the parties' agreement. In a

> letter dated October 17, 2017, the Stutzmans, through counsel, refused rescission and returned the certified check.
>
> In their Stage [T]wo application to the commission, submitted after the initiation of the litigation at issue, Mr. McKay was named the president and 66.67% owner of Metropolitan, while Mr. Mines was named Metropolitan's vice-president and 33.33% owner. Mrs. Stutzman, on the other hand, was identified as a former partner whose ownership interest had never vested.

Metropolitan, slip op. at 2-8 (footnotes omitted).

On October 26, 2017, Appellees filed an amended complaint against Appellants, alleging, *inter alia*, breach of contract, fraud, and unjust enrichment, and seeking declaratory judgments that:

> (a) [Appellees] are 100% shareowners of Metropolitan;
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> (b) [Appellants] have breached the initial agreement to operate Metropolitan by failing to provide [Appellees] access to the Company and to communications with the Commission;
>
> (c) order[] [Appellants] to sign all necessary paperwork to permit . . . Karen Stutzman to serve as additional "Authorized Contact" with the Commission[;]
>
> (d) order[] [Mr.] McKay to amend the Articles of Organization to include . . . Karen Stutzman as a co-managing member with the Maryland State Department of Assessments and Taxation . . . ;
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> (e) order[] [Appellants] to provide [Appellees] with all operational and managerial information previously provided by the Commission or obtained by the Company from any source; and
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> (f) order[] [Appellants] to cease and desist from submitting any paperwork on behalf of the Company without [Appellees'] consent.

(Reformatted). On December 11, 2017, Appellants counterclaimed for, *inter alia*, breach of contract and rescission of the parties' agreement, alleging that, although they had fulfilled and continued to fulfill their contractual obligations, Appellees had "materially breached the agreement by refusing to contribute the necessary funds to get Metropolitan operational."

After a three-day bench trial, the circuit court entered judgment in favor of Appellees and against Appellants on their respective breach of contract claims, and therefore declined to rescind the parties' contract. In its order, the court found that Mr. Stutzman, Mr. Mines, and Mr. McKay had agreed "to form a partnership with the purpose of operating a medical marijuana dispensary." The court further found that the terms of that initial agreement had provided that Mr. Stutzman "would have two-thirds ownership of the partnership," Appellants "would jointly have one-third ownership," and that Mr. Stutzman would contribute up to $250,000 in startup capital. Accordingly, the court declared: "Karen Stutzman and Blair Stutzman own two-thirds of Metropolitan Medicinals, LLC, and Ahmad Mines and Marcus McKay jointly own one-third of Metropolitan Medicinals, LLC." The court also declared, *inter alia*, "Karen Stutzman is a co-managing member of Metropolitan Medicinals, LLC," and ordered Appellees to reimburse Appellants for expenditures that they had made on Metropolitan's behalf.

In *Metropolitan*, Appellants challenged the declaratory judgment that Appellees own two-thirds of Metropolitan, contending both that the court's underlying factual

findings were clearly erroneous and that its ultimate decision constituted an abuse of discretion. They also asserted that the court had erroneously ruled that Appellees had not breached the parties' contract, and therefore abused its discretion by refusing to rescind the agreement.[3]

With respect to Appellants' contention that "there was no evidentiary basis whatsoever" that the parties had agreed that Appellants would *jointly* own one-third of Metropolitan, we acknowledged that excerpts of Mr. Stutzman's trial testimony—when viewed in isolation—could be read to support the court's factual finding. *Metropolitan*, slip op. at 8. Ultimately, however, we held:

> On this record, Mr. Stutzman's prior inconsistent statements, coupled with his internally inconsistent and self-contradictory testimony, preclude us from holding that his testimony constituted credible evidence from which the court could have reasonably inferred that per the terms of the parties' oral contract, Mr. Mines and Mr. McKay were entitled to a *joint* one-third of Metropolitan's equity or Mr. Stutzman's net profits.

Metropolitan, slip op. at 11 (emphasis retained).

We then addressed Appellants' alternative assertion that, even if its factual findings were supported by competent evidence, the court had abused its discretion by ruling that

[3] Appellants also unsuccessfully challenged the circuit court's denial of their motion for summary judgment. That appellate contention is not, however, relevant to our resolution of the instant appeal.

Mrs. Stutzman owned a two-thirds equity interest in Metropolitan.[4] As Appellants had failed to present particularized argument in support of that claim, we deemed it waived. *See, e.g., Klauenberg v. State*, 355 Md. 528, 552 (1999) ("[A]rguments not presented in a brief or not presented with particularity will not be considered on appeal.").

Next, we proceeded to Appellants' assertion that the court had abused its discretion in ruling that Mrs. Stutzman had not breached the parties' contract, and therefore abused its discretion by denying their rescission request. While we acknowledged that the record contained substantial evidence to support the court's finding that Appellants had breached the parties' contract, we held that "the court's factual findings and legal conclusions in this case were so summarily articulated as to prevent us from adequately assessing the cogency of its conclusions or the reasonableness of its remedy." *Metropolitan*, slip op. at 14. Accordingly, we remanded the case to the circuit court "for a more comprehensive articulation of the findings and reasoning underlying its ruling on this issue." *Id*., slip op. at 14.

[4] The court did not, in fact, make any such ruling. Rather, it declared that the Stutzmans *collectively* owned a two-thirds membership interest in Metropolitan. That declaration is curious considering the court having dismissed Mr. Stutzman as a party to the case for lack of standing. As neither party raises this issue on appeal, however, we decline to address it.

After dispensing with Appellants' challenge to the denial of a summary judgment motion not here relevant, we ordered:

> JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS THAT THE COURT PROVIDE A MORE DETAILED ARTICULATION OF ITS FACTUAL FINDINGS AND REASONING UPON WHICH IT RELIED IN RULING THAT APPELLANTS BREACHED THE PARTIES' CONTRACT. COSTS TO BE PAID 50% BY APPELLANTS AND 50% BY APPELLEES.

Id., slip op. at 17.

On August 8, 2021, the circuit court entered an order, in which it articulated the following factual findings:[5]

> The [c]ourt believes that Mr. Stutzman did not know or misunderstood the meaning of terms such as "principal," which Mr. Mines used to describe h[im], Mr. Mines, and Mr. McKay. It is this [c]ourt's observation that Mr. Stutzman was a simple man of modest education. He spent his career as a steamfitter and refrigerator mechanic. The meaning of his written communication is not always clear. Mr. Mines described Mr. Stutzman's emails as "incoherent." The [c]ourt does find, however, that Mr. Stutzman does have common sense. The [c]ourt does not believe that he agreed to give Mr. Mines and Mr. McKay two-thirds ownership of a company where he put up all of the money in exchange for them handling the paperwork.
>
> The court's belief that Mr. Stutzman did not agree to give Messrs[.] Mines[] and McKay two-thirds of the company is further evidenced by his refusal to sign the proposed operating agreement and his rejection of the [d]efendants' claim to two-thirds of the business. Mr. Stutzman's emails to

[5] The record does not reflect that the court received additional evidence on remand. Rather it appears to have accepted our invitation to "limit its consideration to the evidence presented at trial." *Id.*, slip op. at 17.

> Mr. Mines supports the conclusion that he would only agree to increase their share if they put up cash as well. The court views the emails as poorly communicated attempts by Mr. Stutzman to resolve the differences between the parties in order to keep the business on track to licensing and operation.
>
> Messrs[.] . . . Mines[] and . . . McKay deny that they entered such an agreement with Mr. Stutzman. Having had the opportunity to observe the witnesses and their manner of testifying, the court did not find Mr. Mines to be very credible. The court finds that Mr. McKay was being loyal to his friend who brought him the deal. The court finds that Messrs[.] . . . Mines, and . . . McKay breached their agreement with Mr. Stutzman when, in the company's Stage Two application, they claimed complete ownership of the company and represented that Mrs. Stutzman was a dormant silent partner whose ownership interest never vested. Defendants further represented that Mrs. Stutzman had contributed $19,000 of $250,000 pledged but had breached their contract. These representations were false.

The court then issued the following declarations and orders, which were identical to those the court had originally entered:

> **DECLARED** that Karen Stutzman and Blair Stutzman own two-thirds of Metropolitan Medicinals, LLC, and Ahmad Mines and Marcus McKay jointly own one-third of Metropolitan Medicinals, LLC; and it is further
>
> **DECLARED** that Karen Stutzman is a co-managing member of Metropolitan Medicinals, LLC; and it is further
>
> **DECLARED** that Blair Stutzman agreed to provide funding for the startup of the partnership up to $250,000; and it is
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> **ORDERED** that Defendants amend the articles of organization to reflect the parties' respective ownership share in the partnership and to file such papers with the State Department of Assessments and Taxation; and it is further
>
> **ORDERED** that Defendants execute all documents necessary to permit Plaintiff Karen Stutzman to serve as an "authorized contact" of

Metropolitan Medicinals, LLC and/or Metropolitan, LLC (District 25) with the Maryland Medical Cannabis Commission; and it is further

ORDERED that Defendants submit to Plaintiffs all records of Metropolitan Medicinals LLC and/or Metropolitan, LLC (District 25) in their possession; and it is further

ORDERED that Defendants submit to Plaintiffs an accounting of all income and expenditures of Metropolitan Medicinals LLC and/or Metropolitan, LLC (District 25) dating from December 19, 2016 to the present; and it is further

ORDERED that Plaintiffs reimburse Defendants for all expenditures made on behalf of Metropolitan Medicinals, LLC as of May 3, 2018 up to $81,627, and it is further

ORDERED that this case is **CLOSED STATISTICALLY**.

(Emphasis retained).

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

DISCUSSION

I.

The Parties' Contentions

Appellants contend that the circuit court failed to follow our holding that the record lacked substantial evidence to support its finding that Mr. Stutzman "would have two-thirds ownership of the partnership and that [Mr.] Mines and [Mr.] McKay would jointly have one-third ownership of the partnership." By reiterating that factual finding on remand and entering declaratory judgments consistent therewith, Appellants assert, the court violated Maryland Rule 8-606(e)'s requirement that it abide by our mandate.

Appellees respond that the court's "two-third finding is consistent with [our] original opinion and mandate"—specifically our instruction that the court more comprehensively articulate the factual findings and legal reasoning on which it relied (capitalization omitted). They also assert that Appellants' "overly broad reading of this Court's first opinion and mandate" would render that prior opinion internally inconsistent.

Appellate Dispositions

Maryland Rule 8-606 provides, in pertinent part:

> (a) **To Evidence Order of the Court.** Any disposition of an appeal, including a voluntary dismissal, shall be evidenced by the mandate of the Court, which shall be certified by the Clerk under the seal of the Court and shall constitute the judgment of the Court.
>
> * * *
>
> (e) **Effect of Mandate.** Upon receipt of the mandate, the clerk of the lower court shall enter it promptly on the docket and *the lower court shall proceed in accordance with its terms*.

(Emphasis added).

Maryland Rule 8-604(a) lists the various dispositions available to an appellate court, and states:

> (a) **Generally.** As to each party to an appeal, the Court shall dispose of an appeal in one of the following ways:
>
> (1) dismiss the appeal pursuant to Rule 8-602;
>
> (2) affirm the judgment;
>
> (3) vacate or reverse the judgment;

(4) modify the judgment;

(5) remand the action to a lower court in accordance with section (d) of this Rule; or

(6) an appropriate combination of the above.

"A reversal is defined as the annulling or setting aside by an appellate court of a decision of a lower court[.]" *Carpenter Realty Corp. v. Imbesi*, 369 Md. 549, 562 (2002) (quotation marks and citation omitted). "'[T]he effect of a general and unqualified reversal of a judgment, order or decree is to nullify it completely and to leave the case standing as if such judgment, order or decree had never been rendered, except as restricted by the opinion of the appellate court.'" *Id.* (quoting *Balducci v. Eberly*, 304 Md. 664, 670 (1985)). In other words, an unqualified reversal places the parties in the same positions they had occupied prior to the judgment having been entered.

If an appellate court "concludes that error affects a severable portion of an action, the Court, as to that severable part, may reverse . . . or remand the action to a lower court for further proceedings and, as to the other parts, affirm the judgment." Md. Rule 8-604(b). *See also Hoffman v. Stamper*, 385 Md. 1, 47 (2005) ("Maryland Rule § 8-604(b) permits an appellate court, if it concludes that error affects a severable part of the action, to reverse or modify the judg[]ment as to that severable part of the action, remand that part for further proceedings, and affirm other parts of the judg[]ment."). Issues are severable when the resolution of one does not depend on the determination of the other(s). *See Edmison v.*

Clarke, 61 S.W.3d 302, 309 (Mo. App. 2001) ("Ultimately, if the two issues are severable, then the court's reversal on one issue does not disturb the [other] issue. Conversely, if the issues are not severable, then a reversal as to one issue entails reopening the second issue.").

Maryland Rule 8-604(d)(1) authorizes appellate courts to issue limited remands, and provides:

> (1) *Generally*. If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. *The order of remand and the opinion upon which the order is based are conclusive as to the points decided*. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.

(Emphasis added). *See also Tu v. State*, 336 Md. 406, 416 (1994) ("When a case is appealed and remanded, the decision of the appellate court establishes the law of the case, which *must* be followed by the trial court on remand." (Quotation marks and citation omitted; emphasis retained)). "[T]he intent of this rule and the Maryland case law reviewing this rule do not provide a party with the opportunity to get a 'second bite at the apple' in the same case, but instead, the rule attempts to permit a court to cure some judicial error that resulted in unfairness to a party." *Southern v. State*, 371 Md. 93, 112 (2002).

"What remains within the power of decision of the trial court after remand depends . . . on the scope of the mandate." *Tu*, 336 Md. at 417 (cleaned up). When a mandate is

ambiguous, however, "one must look to the opinion and other surrounding circumstances to determine the intent of the court.'" *MAS Associates, LLC v. Korotki*, 475 Md. 325, 366 (2021) (quoting *Carpenter Realty Corp.*, 369 Md. at 561-62). *See also Harrison v. Harrison*, 109 Md. App. 652, 665 ("[W]hen it is apparent from the opinion itself that a simplified 'order' or mandate . . . is ambiguous, then the opinion may be referred to and considered an integral part of that mandate."), *cert. denied*, 343 Md. 564 (1996).

A limited remand is warranted where, as here, "the appellate court would otherwise be unable to decide the case because of an absence of findings of fact[.]" *Southern*, 371 Md. at 111 (quotation marks and citation omitted). Generally, on limited remand, "the responsibility of the lower court is to review the evidence and make necessary findings and conclusions, rather than to receive more evidence." *Southern*, 371 Md. at 111 (quotation marks and citations omitted). Whether a circuit court has exceeded the scope of remand is a question of law which we review *de novo*. *See United States v. Pileggi*, 703 F.3d 675, 679 (4th Cir. 2013) ("'We review de novo the district court's interpretation of the mandate.'" (Quoting *United States v. Susi*, 674 F.3d 278, 283 (4th Cir. 2012))); *Cardiac Pacemakers, Inc. v. St. Jude Med., Inc.*, 576 F.3d 1348, 1355 (Fed. Cir. 2009) ("We review the interpretation of our own mandates *de novo*."). *See also Tate v. State*, 459 Md. 587, 608 (2018) ("[A] Circuit Court's application of the Maryland Rules is reviewed *de novo*.").

Analysis

In *Metropolitan*, we remanded the case with instructions that the circuit court "provide a more detailed articulation of its factual findings and the reasoning upon which it relied in ruling that [A]ppellants [had] breached the parties' contract." *Metropolitan*, slip op. at 17 (capitalization omitted). Our mandate did not, however, either direct the court to articulate the credibility determinations underlying its findings as to the terms of the parties' initial agreement or prescribe a contrary declaratory judgment (e.g., one stating that the Stutzmans owned a collective one-third membership interest in Metropolitan, while Messrs. Mines and McKay each owned an independent one-third). In fact, the mandate did not so much as mention the circuit court's findings with respect to the parties' initial agreement or the court's ensuing determination as to the parties' respective membership interests. Based on the foregoing, we conclude that the mandate in *Metropolitan* was ambiguous, and will therefore "look to the opinion and other surrounding circumstances[.]" *MAS Associates, LLC*, 475 Md. at 366 (quotation marks and citation omitted).

When addressing the merits of Appellants' assertion that "'there was no evidentiary basis whatsoever' for the court's finding that the Stutzmans owned two-thirds of Metropolitan," *Metropolitan*, slip op. at 8, we observed that the following testimony of Mr. Stutzman "may have supported a reasonable inference that, in consideration for their completing the Stage One applications, Mr. Mines and Mr. McKay would jointly own one-third of Metropolitan":

> I explained to them that I would give them one third of my profits, no equity, no voting rights, no nothing and if we got first stage application [approval], that I would take that . . . second stage application and partner up with someone that got a growing [Marijuana Infused Products] in a dispensary and I would sell the equity to them and I had half of the money or so, we didn't know what it would cost and we would partner up and [the third-party investor] would run it, even if I gave them 51 percent or more of the business and I would give them one third of all of my profits.

Id., slip op. at 9. That evidence was, we noted, supported by Mr. Stutzman's subsequent testimony that the prospective investor to whom he had referred was a hypothetical third-party—and *not* Appellants. *Id.* We also observed that, on cross-examination, Mr. Stutzman testified that the parties had agreed that he would give one-third of Metropolitan to both Mr. Mines and Mr. McKay—rather than one-third to each of them. *Id.*, slip op. at 10. Considered in isolation, we reasoned, this testimony "lent itself to an inference that [Mr. Stutzman] had offered—and that Mr. Mines and Mr. McKay had accepted—a collective one-third membership interest in Metropolitan." *Id.* We recognized, however, that this evidence was undermined by both Mr. Stutzman's contradictory testimony and his prior inconsistent statements. *Id.*, slip op. at 10. Accordingly, we concluded:

> On this record, Mr. Stutzman's prior inconsistent statements, coupled with his internally inconsistent and self-contradictory testimony, precludes us from holding that his testimony constituted credible evidence from which the court could have reasonably inferred, that per the terms of the parties' oral contract, Mr. Mines and Mr. McKay were entitled to a *joint* one-third of Metropolitan's equity or Mr. Stutzman's net profits.

Id. (emphasis retained).

In so holding, we did not—indeed, we could not—assess witness credibility, resolve conflicting evidence, or otherwise make any independent factual findings. *See Bereano v. State Ethics Comm'n*, 403 Md. 716, 742 (2008) ("A reviewing court may not make its own findings of fact[.]"); *Rothe v. State*, 242 Md. App. 272, 283 (2019) ("From time immemorial, the assessment of testimonial credibility has always been the fundamental responsibility of the factfinder, jury or trial judge, as a matter of fact. It is not and never was the function of appellate review, as a matter of law."); *Hartford Fire Ins. Co. v. Estate of Sanders*, 232 Md. App. 24, 39 (2017) ("Appellate courts do not make factual findings or substitute the factual findings they would rather the trial court have made for the non-clearly erroneous factual findings that were made.").

Absent an antecedent finding as to the terms of Messrs. Mines's, McKay's, and Stutzman's initial agreement, we were likewise unable to arrive at a legal conclusion as to the parties' respective membership interests in Metropolitan. Accordingly, we merely held that *on the record then before us*—a record utterly devoid of credibility determinations and evaluations of conflicting evidence—Mr. Stutzman's prior inconsistent statements and self-contradictory testimony "*preclude[d] us from holding* that . . . per the terms of the parties' oral contract, Mr. Mines and Mr. McKay were entitled to a joint one-third of Metropolitan's equity or Mr. Stutzman's net profits." *Metropolitan*, slip op. at 11 (emphasis added).

To have held, as Appellants claim, that Appellees "were not entitled to 66%" of Metropolitan as a matter of law would have invaded the exclusive province of the trial court and contravened long-standing precedent permitting the trier of fact to "'believe part of a particular witness's testimony but disbelieve other parts.'" *Qun Lin v. Cruz*, 247 Md. App. 606, 629 (2020) (quoting *Hollingsworth & Vose Co. v. Connor*, 136 Md. App. 91, 136 (2000)). *See also Omayaka v. Omayake*, 417 Md. 643, 659 (2011) ("In its assessment of the credibility of witnesses, the Circuit Court was entitled to accept—or reject—*all*, *part*, or *none* of the testimony of any witness, whether that testimony was or was not contradicted or corroborated by any other evidence."); *Abrishamian v. Barbely*, 188 Md. App. 334, 347-48 (2009) ("[T]he trier of fact may accredit or disregard any evidence introduced, and a reviewing court may not decide how much weight should have been given to each item of evidence." (Footnote and citation omitted)), *cert. denied*, 412 Md. 255 (2010).

Appellants' interpretation is further undermined by the second section of our *Metropolitan* opinion, wherein we held that Appellants had waived review of their claim "the circuit court abused its discretion in ruling that Mrs. Stutzman owned two-thirds of Metropolitan." *Metropolitan*, slip op. at 12. Had we held that Appellees were not legally entitled to a two-thirds membership interest in Metropolitan, we need not have addressed Appellants' alternative argument.

While the record in *Metropolitan* did not contain credibility determinations sufficient to support Appellees' iteration of the parties' initial accord, the record now before us includes detailed assessments of the witnesses' credibility, to which we must, and do, defer. Those determinations, coupled with the initial record, suffice to warrant an affirmance. We will, therefore, affirm the circuit court's declaratory judgment with respect to the parties' respective ownership interests.

II.

Appellants also assert that Appellees materially breached the parties' contract by both refusing to recognize Mr. Mines as a Metropolitan member and failing to fulfill their capital contributions. Because Appellees' purported breach preceded the submission of the Stage Two application, Appellants assert that they were relieved of their obligations under the contract before they claimed exclusive ownership of Metropolitan.

Appellees respond that "Appellants' claims rely on factual determinations the fact-finder declined to make below." "Reversal on this basis would," Appellees maintain, conflict with the court's finding that they had fulfilled their initial capital commitment.

"Generally, a breach of contract is defined as a 'failure, without legal excuse, to perform any promise that forms the whole or part of a contract.'" *Kunda v. Morse*, 229 Md. App. 295, 304 (2016) (quoting *Weaver v. ZeniMax Media, Inc.*, 175 Md. App. 16, 51, *cert. denied*, 401 Md. 174 (2007)). "Whether a party to a contract breached the terms of the contract is generally a question of fact because it is for the fact finder to decide between

conflicting evidence regarding the party's conduct with respect to the contract." *Weaver*, 175 Md. App. at 49. The disputed terms of an oral contract are also questions of fact, which we review for clear error. *See Globe Home Improvement Co. v. McCarty*, 204 Md. 513, 517 (1954) ("[T]he existence and terms of an oral contract, when disputed, are for the trier of facts to determine.").

When one party breaches a contract, the other may pursue one of the following alternative courses of action: "(1) he can reaffirm the existence of the contract and seek specific performance when appropriate or claim damages for its breach, or (2) he can repudiate the contract altogether and request rescission." *Lazorcak v. Feuerstein*, 273 Md. 69, 74-75 (1974). To warrant rescission, the breach at issue must have been material. "A breach is material when it is such that further performance of the contract would be different in substance from that which was contracted for." *Barufaldi v. Ocean City Chamber of Commerce, Inc.*, 196 Md. App. 1, 23 (2010), *aff'd, Ocean City, Md., Chamber of Commerce, Inc. v. Barufaldi*, 434 Md. 381 (2013) (quotation marks and citation omitted). *See also Traylor v. Grafton*, 273 Md. 649, 687 (1975). Ordinarily, "'[w]hether a given breach is material . . . is a question of fact.'" *Id.* (quoting *Speed v. Bailey*, 153 Md. 655, 661-62 (1927)). *See also Weichart v. Faust*, 419 Md. 306, 316 n.1 (2011) ("The materiality of a breach of contract is a factual inquiry."); *Weaver*, 175 Md. App. at 52 ("Even if a breach is assumed, materiality is generally a question of fact."). Accordingly, we will generally affirm a court's findings with respect to a material breach unless those

findings are clearly erroneous. "A factual finding is clearly erroneous if there is no competent and material evidence in the record to support it." *Hoang v. Hewitt Ave. Assocs., LLC*, 177 Md. App. 562, 576 (2007).

On remand, the circuit court found that Appellants had breached their agreement with Appellees "when, in the company's Stage Two application, they claimed complete ownership of the company and represented that Mrs. Stutzman was a dormant silent partner whose ownership interest never vested."[6] The court did not construe Mr. Stutzman's reluctance to recognize Mr. Mines as a member or to make further capital contributions until the parties' agreement was reduced to writing as repudiations of the parties' agreement. Rather, it interpreted Mr. Stutzman's e-mails as "poorly communicated attempts . . . to resolve the differences between the parties in order to keep the business on track to licensing and operation."

Viewing the entire record in the light most favorable to Appellees, we shall affirm those findings. *See L & P Converters, Inc. v. Alling & Cory Co.*, 100 Md. App. 563, 569 (1994) ("In determining whether the trial court was clearly erroneous, an appellate court considers the evidence produced at trial in a light most favorable to the prevailing party.").

[6] Although the court identified this as the act whereby Appellants breached the parties' contract, we may, of course, affirm "'on any ground adequately shown by the record, whether or not relied upon by the trial court.'" *City of Frederick v. Pickett*, 392 Md. 411, 424 (2006) (quoting *Berman v. Karvounis*, 308 Md. 259, 263 (1987)).

On December 27, 2016, Mrs. Stutzman issued a check in the amount of $4,000 to the Commission for Metropolitan's Stage Two filing fee. The following day, Mr. Mines sent an e-mail to Mr. Stutzman and Mr. McKay, proposing the following:

> [T]he first $40k net profit per year should be saved for license renewal.
>
> * * *
>
> [W]e should plan on paying $120k back to [Mr. Stutzman] after his $200k contribution[.] [W]ith that being said[,] I am proposing a 30% [Mr. McKay], 30% [Mr. Mines], 40% [Mr. Stutzman] net profit split until the $120k is paid back then reverting back to the 33.33% profit split. I am also proposing a 3% net profit allocation for future property, plant, and equipment needs.[7]

Mr. Stutzman objected to Mr. Mines's proposal, writing:

> If what you are saying is you and [Mr. McKay] want 40k each for writing the app[lication,] [t]hat is not going to work at all. I have about a year and half of my time in this and 60 to 75k [I']m not counting. We can only get paid for the cash each of us put in. I already have 18k in app[lications] and second fee. If you guys want to give up 15% each of your percentage[,] your deal might work with me[.]

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[7] In an affidavit filed with the circuit court, Mr. Stutzman expressly averred that Mr. Mines, Mr. McKay, and he had initially agreed to the following allocation of profits:

> [O]ur full financial investment in the Company would be paid back on an expedited, and priority basis over an eighteen (18) month period. After that debt was satisfied and the following year's Application Fee set aside, any profit after all expenses and debts were met would be shared equally in thirds between [Appellees], McKay and Mines.

Assuming that Mr. Stutzman's averment is accurate, Mr. Mines's subsequent rejection of those terms would constitute an anticipatory repudiation, which would have suspended Appellees' obligation to perform.

Mr. Stutzman also expressed an expectation that his capital contribution would be repaid within a year and a half and advised Mr. Mines: "I have a lawyer righting [sic] up my contract for you two to sign. When he gets done[,] we will sit down and hammer this out." In a reply e-mail, Mr. Mines attempted to justify limiting the reimbursement of Appellees' $200,000 capital contribution to $120,000, writing, in part:

> If you would have paid someone to write the business plan it would have cost more than 80k, and to get the material business support needed to get you to this point would be more than 150k. I think a more than reasonable buy in for your share in the business is 80k which I think is low based on the cost to get the application written, get medical director, pharmacist, attorney, and successful business people together. What you are suggesting by wanting all of your money is that you don't put any value on our contribution. If you would have done it by yourself and paid someone you would not be getting that investment money back. The accelerated rate of return in my opinion is very reasonable and we don't know how business will be[.] [S]o you may get your money in a year and a half maybe longer. You knew we had no money to invest and at every point it was suggested we made it clear we were depending on you.

Mr. Stutzman again opposed Mr. Mines's $80,000 valuation of the services that Appellants purportedly had rendered. Mr. Mines, however, insisted that Mr. McKay and he were entitled to "sweat equity," writing:

> After speaking with [Mr. McKay,] the valuation of doing the application, getting his wife to risk her federal license, and assembling the team should be valued at a minimum of 60k; down from 80k initially proposed. You should be receiving an accelerated rate of return split at . . . 25[%], . . . 25[%], . . . 50 [%] until your loan of 140k is repaid [,] then reverting back to a 33.3 split . . . with the initial 40k going to application fee and 3% for PPE.

Dissatisfied with the reduced valuation of Appellants' "sweat equity," Mr. Stutzman offered the following counterproposal: "[I]f [you] guys want 80k I would give [you] that if [Mr. McKay] will transfer the lic[ense] and you guys don[']t have to worry about it. Or [I] can take 70% and you two split 30%[.]" When Mr. Mines did not accept his alternative counteroffers, Mr. Stutzman refused to make any further capital contributions to Metropolitan unless and until the parties executed a written contract, writing:

> I think I have 3 year[s] and a lot of money in research. I did help with the appl[ications], I have been here the whole time. So if you guys want to go down this road its ok with me. I will not and can not give you money. If you guys want this[,] we will have to wait till [sic] I get every penny I put in and you guys put in. After we get our investment back and the company is doing ok I don[']t care how much you take as long as the co. is ok. You guys are going to have to come up with 20k each so you have some skin in the game so to speak. I need you to come up with my figure for helping on the appl[ication] too. And I will get a price together for my other and we can go from there. I want to say this[:] I fe[e]l you two or who ever[] dreamed this up. You should have d[one] this months ago[.] [Y]ou are now putting this whole thing in jeopardy now[.] We going [sic] to take weeks to do this if not longer. I am not coming out of pocket anymore till [sic] we get this and all the other thing[s] on paper and signed. I feel you waited till [sic] see if we got one to start demanding money but make no mistake 50% of zero is zero. I was really hoping we wouldn't go here. Money isn't everything.

In his penultimate e-mail to Mr. Stutzman, Mr. Mines stated that he did not intend to invest capital in Metropolitan and declared that if Mr. Stutzman failed to contribute additional capital to Metropolitan, he would "lose [his] stake in the business."

On January 12, 2017, Mr. Mines sent a final email to Mr. Stutzman and Mr. McKay bearing the subject line "RECONCILIATION," wherein he wrote:

> I hope this email finds you all well, since last group emailed everyone there has been what can be described as a falling out. I assure you Blair that no one is trying to cut you out of this enterprise[.] [W]e were all essential in getting us to this point. The contract proposal that I previously emailed to you was discussed and I believe to be reasonable; that's why we are having contract negotiations to come to point of agreement. I believe that the best person to do contract negotiations are attorneys; that's why suggested that you seek counsel. We have planned meeting tomorrow and I will be there, [Mr. McKay] has suggested 1400 meeting amongst the group which will be attending.

Mr. Mines, Mr. McKay, and Mr. Stutzman met the following day. According to Mr. Stutzman, at that meeting, Mr. Mines became intoxicated and belligerent. When the meeting had adjourned, Mr. Stutzman testified, Mr. Mines screamed at and attempted to initiate an altercation with him. Thereafter, Appellants ceased communicating with Appellees. Mr. Stutzman, however, sent Mr. McKay several e-mails during the weeks following the January 13th meeting, which evidence his intent to make Metropolitan operational. In the last such e-mail, sent on February 5, 2017, Mr. Stutzman wrote, in part:

> I feel I need to try one more time to try and come to some agreement. If we can not [sic] get though [sic] an agreement to start the business[,] how do we get a license from the state[?] I do not understand how we can just let this get destroyed because you all will not talk with me or my attorney[.] All we have asked for is paperwork I have asked and asked you for and you have told me time and time again you will get them to me and now seem to not only refuse to give them to me your partner and the person that started this whole thing and have put out all the cash 19k[.] Why? We do not have time for any of this[.] All this started after I paid the last $4,000.00 dollars[.] [Mr. Mines] started talking sweat equity which I agreed with as long as we all get it? But all this has been started really since we got the second application. I have been cut out. You both know I want to help with the [second] stage just as I did the first one. And have worked just as much as you t[wo] to get us to this point. Which [Mr. Mines] said he does not agree with and started all of this[.]

> He told me you and he did all this to this point did nothing basically in that email in Dec[.] I can only tell you I want to straighten this out asap and that's all I have been doing . . . since about Dec. 28 or 29th[.]

After referring to his prior purportedly futile attempts both to meet with Appellants to execute an operating agreement and to take further measures to establish a cannabis dispensary, Mr. Stutzman's email concluded:

> I am willing and have been to sit down and hammer this agreement out and move on[.] Live and let live. Start an amazing [d]ispinsary [sic] where we can help the patients and grow this industry[.] We can fix this maybe at this point but I am afraid as I have told you and your dad [the Commission] is not going to put up with this[.] I have been in this industry for years and am going to continue in this industry with or without [Metropolitan] [g]oing forward. But I would rather go forward with [Metropolitan.] Please call me or get your lawyer to call me or my lawyer if it means enough to you to move forward. Because neither one of us do not believe will get the application in their name and even if we did the law suits put on you or you put on me will again not allow [Metropolitan] to survive. If this goes on[,] I don't think we will open [Metropolitan,] which would be terrible as close as we are[.] Please let's get this fixed?

Read in their entirety and viewed in the light most favorable to Appellees, Mr. Stutzman's emails do not evidence "a definite, specific, positive, and unconditional repudiation of the contract." *C.W. Blomquist and Co., Inc. v. Capital Area Realty Investors Corp.*, 270 Md. 486, 494 (1973). The record does not, moreover, definitively reflect that the parties' oral operating agreement specified precisely when and how Appellees would distribute funds to Metropolitan. Nor does it appear that Appellants apprised Appellees of the $81,627 in expenses they purportedly incurred on Metropolitan's behalf, much less that they sought reimbursement of those funds. In fact, by failing to notify Appellees of the

expenses they incurred on Metropolitan's behalf, Appellants frustrated Appellees' ability to fulfill their contractual obligation, thereby violating the implied duty of good faith and fair dealings implicit in the parties' contract. *See Blondell v. Littlepage*, 413 Md. 96, 114 (2010) ("'[T]he implied duty of good faith and fair dealing recognized in Maryland requires that one party to a contract not frustrate the other party's performance[.]'" (Quoting *Eastern Shore Markets, Inc. v. J.D. Associates, Ltd*., 213 F.3d 175, 182-84 (4th Cir. 2000)). *See also Clancy v. King*, 405 Md. 541, 565-66 (2008) ("Even if the contract did not contain this general good faith term, Maryland contract law implies such an obligation.").

Even if the circuit court had clearly erred in finding that Appellees had not breached the parties' agreement, which it did not, we would hold that it properly denied them the "extraordinary remedy" of rescission. *Bartlett v. Department of Transp.*, 40 Md. App. 47, 50 (1978). "Its use rests largely within the discretion of the trial judge and should not be granted unless it would be equitable and just under all the circumstances." *Id. See also Suburban Garden Farm Homes Corp. v. Adams*, 171 Md. 212, 218 (1937).

To rescind a materially breached contract, an aggrieved party must "show that he tendered to defendant all consideration and benefits received under the contract immediately after notice of the ground for rescission." *Finch v. Hughes Aircraft Co.*, 57 Md. App. 190, 244 (1984). *See also Lazorcak*, 273 Md. at 75-76. "'This effort to resume the *status quo* is required as, if a party who knows the facts which would justify rescission, does any act which recognizes the continued validity of the contract or indicates that he

still feels bound under it, he will be held to have waived his right to rescind.'" *Finch*, 57 Md. App. at 244 (quoting *Lazorcak*, 273 Md. at 76). Finally, rescission is generally reserved for cases in which the injury caused by the breach "is irreparable, or if the damages that might be awarded would be impossible or difficult to determine or inadequate, the injured party may invoke the aid of equity to obtain a rescission." *Vincent v. Palmer*, 179 Md. 365, 373 (1941).

Appellees purportedly breached the parties' contract in January 2017—days after they had tendered the $4,000 Stage Two application filing fee. Mr. McKay first offered to tender back Appellees' $19,000 capital contribution (plus 6% interest) on May 11, 2017. They did not, however, issue a certified check in that amount until October 3, 2017—approximately nine months following Appellants' purported breach and nearly three months after they had filed suit. By thus failing to rescind the parties' agreement promptly upon discovering Appellees' purported breach, Appellants waived the remedy of rescission. *See, e.g.*, *Ryan v. Brady*, 34 Md. App. 41, 50-51 (1976) (holding that a purchaser of real property waived his right to rescind a land sales contract where he sued for rescission between seven and nine months after learning that the seller's broker had misrepresented the property's western boundary and, after learning of that misrepresentation, the purchaser incurred expenses in repairing and improving the property).

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.