Circuit Court for Montgomery County
Case No. 388040V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1002

September Term, 2019

FORT MYER CONSTRUCTION CORPORATION, ET AL.

v.

BANNEKER VENTURES LLC, ET AL.

Graeff,
Leahy,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: November 10, 2021

This is the second appeal involving the same parties and their disputes arising out of a construction project administered by the Montgomery County Department of Transportation ("MCDOT") to upgrade infrastructure over a stretch of Dale Drive in Silver Spring, Maryland (the "Project"). Appellee Banneker Ventures, LLC ("Banneker"), as general contractor on the Project, entered into a subcontract with appellant Fort Myer Construction Corporation ("Fort Myer") on August 16, 2012, in which Fort Myer agreed to perform much of the work on the Project.

Problems arose shortly following Fort Myer's commencement of work. Banneker complained that Fort Myer was behind schedule and sent two notices of default. The parties traded accusations blaming each other for delays and unforeseen site conditions. Representatives from Fort Myer and Banneker then agreed to meet on October 24, 2012. The parties' accounts of that meeting differed. According to Banneker, the parties discussed issues with Fort Myer's performance and agreed to consider a proposal to modify pricing on the Project but did not discuss modifying or rescinding the subcontract.

According to Fort Myer, Banneker agreed to pay Fort Myer for completed work. When Banneker did not pay Fort Myer's subsequent invoices, Fort Myer sued Banneker and its surety, Travelers Casualty and Surety Company of America ("Travelers"), for breach of contract and quantum meruit in the Circuit Court for Montgomery County. Fort Myer also asserted a claim against Travelers under the payment bond. Banneker then filed

a counterclaim against Fort Myer for breach of contract, and a cross claim against Fort Myer's surety, Western Surety Company ("WSC"),[1] under the performance bond.

The case proceeded to a bench trial. At the close of Fort Myer's case-in-chief, the court granted Banneker's motion for judgment on two of Fort Myer's three claims—breach of contract and the quantum meruit count.[2] The court also determined that Fort Myer breached the subcontract, even though Banneker had not presented any evidence on its counterclaim. The court then heard testimony on Banneker's damages. Following the close of evidence, the court granted judgment in Banneker and Travelers's favor and awarded damages in the amount of $1,754,441.19. Fort Myer appealed.

In the first appeal, we affirmed the court's grant of the motion for judgment to dismiss Fort Myer's complaint but vacated the court's judgment that Fort Myer materially breached the subcontract. We determined that the circuit court's factual finding that Fort Myer breached the subcontract was clearly erroneous because Fort Myer's October 24, 2012 letter stood uncontroverted as the only evidence of what occurred during that meeting, without countervailing evidence from Banneker. Accordingly, we remanded the case for a new trial on Banneker's counterclaim and cross-claim.

After a second bench trial, the circuit court granted judgment in favor of Banneker and awarded damages in the amount of $1,996,731.87, including $655,458.27 in attorney's

[1] Because WSC's liability is dependent entirely on the liability of Fort Myer, we adopt the nomenclature in Fort Myer's initial brief and refer to Fort Myer and WSC, collectively, as "Fort Myer."

[2] In a subsequent order, the court determined that its oral ruling also extinguished Fort Myer's payment bond claim.

fees. The court concluded, among other things, that Fort Myer materially breached the contract and rejected Fort Myer's argument that the parties mutually rescinded the subcontract. Regarding the subcontract's notice requirement, the court concluded that Banneker had the right, but not the obligation, to provide notice in the event of breach before reprocuring the subcontract. The court also determined that Banneker was entitled to recover excess completion costs that arose from Fort Myer's breach, including costs incurred from the default of an intermediary replacement subcontractor.

Fort Myer timely noted an appeal and presents the following questions for our review, which we have reordered:

1. "Was the lower court's determination that the parties did not mutually rescind the contract clearly erroneous?"

2. "Did the lower court err in its interpretation of the notice requirement set forth in the subcontract?"

3. "Did the lower court err in awarding damages against Fort Myer following reprocurement contractor's default?"

4. "Did the trial court abuse its discretion in refusing to grant Fort Myer's two motions for recusal?"

We affirm the judgment of the circuit court. First, we conclude that the trial court was not clearly erroneous in concluding that there was no mutual rescission of the subcontract. Second, we hold that trial court did not err in determining that Article XVII of the subcontract was not exclusive and did not prevent Banneker from exercising its common law remedies for breach of contract. Far from purporting to be exclusive, Article XVII expressly preserves Banneker's right to pursue alternative remedies provided under the contract or under the common law. Third, we conclude that the court did not err or

abuse its discretion in calculating the damages resulting from Fort Myer's breach. Finally, we hold that the judge did not abuse his discretion in denying Fort Myer's two motions to recuse because a reasonable member of the public, under these circumstances, would not doubt the judge's impartiality.

BACKGROUND

Much of the background to this appeal was set out in our unreported opinion, affirming, in part, and reversing, in part, the 2015 judgment of Circuit Court for Montgomery County in *Fort Myer Constr. Corp. v. Banneker Ventures, LLC* ("*Fort Myer I*"), No. 1916, September Term 2016 (filed October 10, 2017). Before we focus on testimony and evidence from the parties' second trial, we review the contours of the underlying contracts and initial disputes as summarized in our prior opinion:

A. The Project

1. The Prime Contract

> Banneker entered into the prime contract with the MCDOT, worth $4,258,602.19, on June 9, 2012. The prime contract was a "unit-price contract," which, according to the trial testimony of Pete Patel, Fort Myer's Senior Project Manager, is a contract "where the quantities are estimated . . . by the owner, and the unit price is the price [the contractor] will be compensated for." The prime contract had 139 line items of unit-priced work activities for which Banneker was responsible.
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> Relevant in this case, is the prime contract's price schedule for the following four units:
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> Item **No. 8008** (install 8-inch sewer) **$78,494.80**
> Item **No. 8012** (install 8-inch ductile iron) **$83,811.70**
> Item **No. 8017** (sewer to house connections) **$108,864.00**
> Item **No. 8022** (water to house connections, copper) **$46,162.96**
>
> On May 16, 2012, Banneker secured from Travelers a labor and

materials bond and a performance bond for the Project, both in the amount of $4,045,672.08.

2. The Subcontract

Under the subcontract with Banneker, Fort Myer agreed to perform 93 of the 139 unit items of the work for the Project. The total value of the subcontract was $2,305,000.00. On July 25, 2012, Fort Myer secured a bond from WSC for its work on the Project, in the amount of $2,305,000.00. The subcontract priced the above-mentioned units differently:

Item **No. 8008** (install 8-inch sewer) **$297,680.00**
Item **No. 8012** (install 8-inch ductile iron) **$101,150.00**
Item No. **8017** (sewer to house connections) **$243,072.00**
Item No. **8022**. (water to house connections, copper) **$97,352.00**

These four unit prices total $739,254.00, which is $421,920.81 more than the corresponding prices under the prime contract. According to the trial testimony of Chris Kerns, Esq., Senior General Counsel and Vice President for Fort Myer, his client was not aware of the pricing Banneker had agreed to under the prime agreement until the October 24, 2012 meeting between the parties.

In Article XVII under the heading "Failure to Prosecute, Etc.", the subcontract provided that in the event Fort Myer defaulted on its obligations, Banneker would have the right, after three days written notice, to perform the work itself and deduct the costs from what it owed Fort Myer, or to terminate Fort Myer.

Notably, the subcontract provided that Fort Myer had 365 calendar days, from August 13, 2012, to complete its work.

3. Problems on the Project

Problems started within several days of the 365 day relationship. Fort Myer began work on the Project on August 23, 2012. Four days later, Banneker began sending Fort Myer letters and emails, generally labeled as "notices of delay" or "notices of deficiency." According to the trial testimony of Mr. Kerns, Fort Myer immediately "ran into concrete slabs that had apparently been placed there by [Montgomery] County some years before that because the soil was so unstable that it couldn't support these utilities." Fort Myer also found "voids," which [it] then had to fill in before continuing work. Thus, according to Kerns, the discovery of rock and voids

delayed Fort Myer's performance on the Project.

On September 18, 2012, Billy Tose, Banneker's project manager, sent via email to Fort Myer's Senior Project Manager, Pete Patel, a "72 Hour Cure Notice," notifying Fort Myer of its "inability to furnish proper material submittals in a complete and timely manner." According to the notice, Montgomery County would not pay for any contract line item without approved submittals. The notice further stated that Fort Myer had three days to submit all line items, and that "[i]f Banneker d[id] not receive all these line items complete and in its entirety [sic], then Banneker reserve[d] the right to obtain the remaining submittals using its own personnel with all related costs being charged to [Fort Myer]." Three days elapsed, but Banneker did not call a default.

Meanwhile, Fort Myer was having problems with its own subcontractor, Anchor Construction Corporation ("Anchor"), as a result of the unstable site conditions. Fort Myer hired Anchor to perform the storm drain and sewer line work, but Anchor began work before an agreement was in place. Then, on September 24, 2012, Anchor's Senior Project Manager, Jack Burlbaugh, emailed Fort Myer a letter stating that Anchor would be unable to accept Fort Myer's offered contract on the Project without an understanding on covering rock extraction costs because Anchor encountered rock it would have to break and excavate while performing its work on the Project. Anchor informed Fort Myer that it would not work past Manhole #4 on the Project, which, according to Anchor's estimate, would give Fort Myer two weeks to find a replacement subcontractor.

On October 3, 2012, Mr. Tose sent an email to Manuel Fernandes, a Vice President and crew manager of Fort Myer, regarding the resolution of "field production issues," apparently concerned that the Project was falling behind schedule. He sent another letter and email to Mr. Fernandes eight days later, citing further concerns that the Project was behind schedule and requesting a meeting at Banneker's field office in Silver Spring on October 15, 2012.

The meeting took place as scheduled, but Banneker and Fort Myer were apparently unable to resolve their outstanding issues. That afternoon, Mr. Tose emailed Mr. Fernandes another "72 Hour Cure Notice," "to notify that [Fort Myer] has been hereby put on notice for [its] inability to maintain progress according to the project schedule sent to [Fort Myer] on September 13, 2012." The notice stated that, pursuant to the schedule, Fort Myer was to have completed installation of the new sewer system through Manhole #5, along with the attendant sewer house connections, by that point, but that Fort

Myer had only progressed to halfway between Manholes #3 and #4 and had connected no sewers to houses. The notice instructed that Fort Myer increase [its] daily production immediately, and provided 72 hours to furnish enough manpower and equipment to install:

> no less than one complete, new sewer house connection, and to install the remaining eleven (11) manholes in no more than two working days. If F[ort Myer] does not provide the necessary manpower and equipment to meet these benchmarks, then Banneker will supplement [Fort Myer]'s workforce at the cost of [Fort Myer] until the project is brought back on schedule. Banneker will also reserve the right to impose any and all corrective action should production again fall behind schedule at any later date.

The notice also stated that Fort Myer had not been providing the sediment and erosion control maintenance and reporting requirements of the subcontract and warned that "[i]f Banneker does not receive these reports at the end of the 72 hour period, then Banneker will take over the management of the sediment and erosion control measures of the contract away from F[ort Myer] and deduct the costs from the monthly invoices from F[ort Myer]."

On October 18, 2012, Mr. Patel responded with a four-page letter addressing the issues raised by Banneker in the notices. Mr. Patel's letter detailed the problems they had encountered concerning the unexpected concrete encountered underneath Dale Drive and an unexpected road collapse. The following is an excerpt:

> As you are aware, there have also been delays on this project that have affected the schedule, but the portion of the schedule that we have seen does not reflect those facts and appropriate delays. For example: F[ort Myer] and its subcontractor had estimated production based on the information provided in the contract drawings. During installation of the sewer main F[ort Myer] encountered hard rock (not identified on the boring logs), rather than the soil and fragmented rock that was reported. Subsequently, hoe-ramming and excavating hard rock has impacted our operations, for [sic] which F[ort Myer] has repeatedly informed Banneker. . . . F[ort Myer] advises that if the Owner, and/or Banneker does not timely provide directives and appropriate change orders to address the rock and our extra costs, that such will further and significantly delay this project.

> In addition, F[ort Myer] expected to reuse the soil that was on site, as the boring logs showed those materials to be suitable for reuse. However, as a result of differing site conditions, much of the on-site materials were deemed to be unsuitable, and therefore F[ort Myer] had to haul off and truck those materials away, dispose of the materials (with concurrent dumping fees), and to haul in and install CR-6 aggregate[.]
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> * * *
>
> Further, the project was subject to a road collapse, to which the owner responded and directed remedial operations, which alone took at least three additional calendar days. Again, the schedule does not reflect such delays.

> Mr. Patel also pointed out that the partial schedule Fort Myer received from Banneker on September 13, 2012, did not provide sufficient time to mobilize or for necessary submittals and approvals. In short, the partial schedule did not allow for enough time for Fort Myer to complete its work. On cross-examination, Mr. Patel admitted that Fort Myer was also behind on the schedule it had submitted, but that schedule was dated August 28, 2012. Mr. Patel complained that Banneker had never provided Fort Myer with Banneker's own Project schedule, despite several prior requests from Fort Myer, and therefore, Fort Myer was unable to determine whether it was actually behind in the overall Project schedule. The letter concluded by stating that Fort Myer was not behind schedule for the simple reason that Fort Myer had never received Banneker's schedule.
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> Despite these letters, Banneker did not supplement Fort Myer's workforce after 72 hours, as its October 15 letter threatened it would do.

Fort Myer I at 3-9 (cleaned up). A few days after Banneker's October 15 letter, Banneker noticed that Fort Myer was moving equipment from the job site and requested a meeting with Fort Myer.

4. Conflicting Accounts of the October 24 Meeting and Fallout[3]

On October 24, 2012, Mr. Tose and Mr. Omar Karim, Banneker's project manager and president, respectively, met with Mr. Fernandes, Mr. Kearns, and Mr. Caesar Casanova (a project manager for Fort Myer). The parties disagree about what took place during this meeting.

According to Mr. Tose's testimony at his March 17, 2015 deposition,[4] the "primary purpose of the meeting was to get a plan together on how we were going to pull this project back on track," because the Project was "significantly behind schedule, and we had come to . . . kind of a fork in the road with Fort Myer and [its] lack of everything; lack of production, lack of responsiveness, lack of commitment, to execute the project, per contract." Mr. Tose claimed that at the meeting they discussed Fort Myer's "lack of performance and how [its] lack of performance was impacting Banneker and [its] ability to execute the contract with the County." Banneker asked Fort Myer's representatives for "a plan, and, then, a commitment to that plan on how they intended to . . . fix their performance on the project." At the end of the meeting, the parties discussed "some adjustments to the schedule of values in the contract" for five minutes but the "rest of" the "90-minute meeting" was "solely focused on construction operations-related issues."

[3] Unless otherwise noted, all ensuing excerpts and references to testimony are from the second trial.

[4] Mr. Tose's deposition testimony was admitted at the second trial "for all purposes subject to the objections that were raised in the deposition" as Joint Exhibit 1.

According to Mr. Tose, neither he nor Mr. Karim informed Fort Myer that they could not proceed unless Fort Myer agreed to make changes to the schedule of values.

Like Mr. Tose, Mr. Karim testified at the second trial that the meeting's purpose was to "get some type of commitment from [Chris Kearns] to bring more equipment, bring more people, get things really going because the meetings with his field personnel weren't going anywhere." Mr. Karim reported that their requests were met with "excuses and blank faces and no commitment at all." Mr. Karim noted that the only agreement arising out of the meeting was an agreement that Fort Myer would consider a revised schedule of pricing offered by Banneker.

To the contrary, Fort Myer's representatives testified that the meeting was brief and focused on Banneker's efforts to pressure Fort Myer to agree to modify its pricing. Mr. Casanova testified that, as soon as the parties began discussing the Project, Banneker's representatives presented Fort Myer with a new spreadsheet of revised unit prices that differed significantly from Fort Myer's version and shifted higher prices "to items . . . at the end of the project." According to Mr. Casanova, Banneker's representatives told Fort Myer that they would have to "abide by those prices to move on," and that, if they did not, they "couldn't move on" with the Project. Fort Myer promised to "take another look at the prices and speak with the vice president and Mr. Chris Kerns" and then "formally respond back with a letter."

In turn, Mr. Kerns testified that Banneker began the meeting by admitting that it had "made a big mistake" and bid the job with lower unit pricing for certain units than is reflected in Fort Myer's subcontract, resulting in a shortfall on the first part of the Project.

To correct this shortfall, Banneker requested that Fort Myer "change its prices, because later on, at the end of the job, [Banneker will] make up for it." According to Mr. Kerns, Banneker gave Fort Myer an ultimatum, saying that Fort Myer had to change its prices, or "we can't continue." The difference between the original subcontract price and Banneker's proposed modification represented approximately "half a million dollars of shortfall." Because MCDOT could always add "another block or two" or terminate the contract for convenience, Fort Myer would undertake "a tremendous risk" by accepting these terms.

Mr. Kerns' understanding of the outcome of the meeting was that, if Fort Myer could not lower its prices, the parties would mutually terminate the agreement and "walk away." Indeed, he attested that Fort Myer considered Banneker's actions to be anticipatory repudiation. He further testified that Fort Myer's representatives expressed that the company could not change its prices and would respond to Banneker's request in writing.[5]

Later that day, Mr. Fernandes, on behalf of Fort Myer, sent Mr. Karim and Mr. Tose a letter, with the subject line: "Meeting and Discussions of October 24, 2012; Response to Proposal to Modify Contract Unit Prices; Notice of Termination of Operations." In the letter, dated October 24, 2012, Fort Myer asserted that Banneker had breached the subcontract and that it would halt work:

> This letter is in response to your disclosures and a proposal provided to us this morning requesting that Fort Myer . . . modify its contract unit prices in order, as you suggested, to be in line with prices apparently agreed upon in

[5] During the first trial, Mr. Kerns testified that the parties agreed to "terminate" and "just walk away." Fort Myer would receive payment "for our quantities to date" and would "continue helping [to assist Banneker] in recovering . . . additional costs for unforeseen site conditions" and "stop at a place that makes some sense" and ensure that there are no safety or maintenance traffic issues. *Fort Myer I* at 10-11.

> the prime contract between Banneker . . . and the Owner. Unfortunately, we cannot do so.
>
> * * *
>
> While Fort Myer generally desires to work with Banneker . . ., your sudden disclosure of this very significant issue poses enormous and overwhelming problems to the continuation of any further work on this project by Fort Myer and its subcontractors. We now realize that the work we have been completing, and are contemplating to continue, will result in major losses for Banneker over the next few months. In our meeting this morning, it was revealed that these losses are likely to be in the neighborhood of a half a million Dollars. You even admitted that, if Fort Myer could not so amend its prices, it would mean that "we cannot go forward together." It was clear from our discussions that Banneker has no current source of funds to pay for the differences between our current unit prices as discussed above.
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> We not only agree with you that we cannot go forward together following this disclosure, but have concluded that by providing further work for which payment cannot be funded, such will present unacceptable risks. We have also concluded that Fort Myer did not enter its subcontract based upon these premises; rather, Fort Myer had relied upon Banneker to have concluded at least similar, and likely higher prices for comparable units of this subcontractor in contract with the owner — or at least have an alternative source of funding. **As we view it, this situation is a breach by Banneker of its obligations to Fort Myer and its subcontractors.**
>
> As a result of these conclusions, we and our subcontractors will halt work and demobilize as quickly as possible. However, we will not leave the work or the worksite in a precipitous condition, and will attempt to stop in a fashion that will allow others to easily pick up where we have left off (i.e., we will stop pipe work at Manhole No. 4).
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> **In our meeting, you promised to deliver a check by Friday for overdue payments from August. We trust that this commitment will continue to be honored.**

(Emphasis added).

Banneker did not respond to the averments in the letter. Mr. Tose testified that he did not respond to Fort Myer's letter because "[t]here was no need." Banneker did

not deliver the check referenced in Fort Myer's letter. Mr. Tose asserted that the letter itself made no reference to a mutual agreement to rescind the contract.

Fort Myer performed no further work on the Project. The next day, Fort Myer told its subcontractor to halt work "due to unresolved issues between Fort Myer Construction Corporation and the project GC, Banneker Ventures." The record does not reflect that Banneker ever responded to Fort Myers' demobilization from the Project, or provided notice of any reprocurement costs, or made a claim against the WSC bond—until Banneker filed the counterclaim in the underlying case. According to Mr. Kerns, Banneker never told Fort Myer that it deemed Fort Myer to be in default.

5. Reprocurement and Continued Work on the Project

After Fort Myer's demobilization, Banneker notified the County in an email that "Anchor and Ft. Myer walked off the project." In that email, Banneker explained that Anchor had "been having difficulty meeting the project's schedule. Since [Fort Myer and Anchor] discovered unsuitable soil conditions a few weeks ago, both Ft. Myer and Anchor have informed us that this is causing them even further delays, which they are not able to sustain through the life of the project without losing significant sums of money."

Banneker then undertook the task of finding other subcontractor(s) to complete the work. Mr. Karim testified that they "got together and put together a game plan." Banneker initially targeted subcontractors "who gave [Banneker] numbers in [its] initial bid." Banneker started with the sewer contractors because that "was the first thing that needed to get done." Mr. Karim "pulled down a list of all the [Washington Suburban Sanitary Commission ("WSSC")] certified sewer contractors" and "contacted all of them." This

process took about six weeks. Mr. Karim also testified that Banneker contacted "hundreds" of other subcontractors, hoping that they "could find somebody who could just replace Fort Myer" and be "responsible for doing . . . the 93 scope items that we had Fort Myer under contract for." This effort was unsuccessful, and Banneker ultimately contracted with 21 different subcontractors and suppliers to complete Fort Myer's scope of work.

One of the replacement subcontractors was Creighton Construction ("Creighton"), a WSSC certified company. Creighton was hired to complete four line items, including water and sewer work. Banneker selected Creighton because it (1) was WSSC certified, (2) had available crews, (3) was well referenced, and (4) was bonded. Creighton, however, could not perform because, according to Mr. Tose, it "didn't have the resources to perform . . . a job like this." Creighton received payment for approximately $14,000 of work before Banneker terminated its subcontract.

On April 1, 2013, Banneker submitted a claim for $262,410.00 to Philadelphia Indemnity Insurance Company ("Philadelphia Indemnity"), Creighton's surety, based on Creighton's default. This claim settled for $170,000.00.

Mr. Karim testified that, after Creighton's default, Banneker had "Hybrid Construction come in and try to augment Creighton for a couple of weeks" before it was "finally able to bring on [Total Civil Construction and Engineering, LLC ("Total Civil")]." Total Civil ultimately completed the sewer work. In total, according to Fort Myer's expert, Banneker paid $45,000 more to complete these four line items than it would have paid Fort Myer had Fort Myer completed the work.

B. Proceedings through the First Trial

1. Initial Complaint

On March 5, 2014, Fort Myer filed a complaint against Banneker and Travelers in the Circuit Court for Montgomery County. Fort Myer's complaint alleged that Banneker "anticipatorily repudiated Fort Myer's contract" by demanding that Fort Myer change its unit prices to mirror the prices that Banneker had given to MCDOT. Fort Myer asserted three counts: (1) breach of contract against Banneker for $497,232.21, representing $266,732.21 for the work performed plus $230,500 in lost profits; (2) a claim for quantum meruit against Banneker in the amount of $266,732.21; and (3) a payment bond claim against Travelers for $266,732.21.

Travelers and Banneker both answered, denying liability. Banneker also filed a counterclaim against Fort Myer and a cross claim against WSC, Fort Myer's surety, on May 2, 2014. Banneker's counterclaim and crossclaim alleged, among other things: "Article III of the Subcontract . . . includes a broad indemnity provision that requires [Fort Myer] to compensate Banneker for all liability, costs, and expenses (including legal fees and expenses) caused by any delay, disruption, hindrance, obstruction, or interference arising from any act or neglect of [Fort Myer]"; "Article XVII of the Subcontract . . . provides that [Fort Myer] would not be entitled to any further payment from Banneker in the event that [Fort Myer] defaults on its Subcontract and that [Fort Myer] would be responsible to compensate Banneker for any excess amounts incurred in completing [Fort Myer]'s work." Banneker also alleged that WSC issued payment and performance bonds for Fort Myer's portion of the Project.

Turning to Fort Myer's performance on the Project, Banneker alleged that Fort Myer's performance was deficient; that Banneker notified Fort Myer of these deficiencies and then notified Fort Myer that it was in default after Fort Myer further delayed, provided deficient performance, and threatened to abandon the Project; and that Fort Myer abandoned the Project and "notified Banneker in writing that [Fort Myer] and its subcontractors would no longer work on the Project." According to Banneker, Fort Myer's abandonment and notice constituted an anticipatory repudiation of the subcontract. As a result of Fort Myer's alleged breach, Banneker incurred substantial additional costs to complete Fort Myer's subcontract obligations.

Banneker asserted two counts: (1) breach of contract against Fort Myer in the amount of $2,000,290.00 plus interest, costs, attorney's fees and other relief; and (2) a performance bond claim against Fort Myer and WSC for $2,000,290.00.

2. First Trial

A four-day bench trial started on July 20, 2015. After Fort Myer presented its case, but before Banneker presented any evidence on its counterclaim that Fort Myer breached the subcontract, Banneker moved for judgment under Maryland Rule 2-519.[6] The court

[6] Maryland Rule 2-519 provides that:

> (a) **Generally.** A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence. The moving party shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of an opposing party's case.

(Continued)

orally granted Banneker's motion on Fort Myer's Counts I (breach of subcontract) and II (quantum meruit).

The court ruled that the evidence presented by Fort Myer was not sufficient to show anticipatory repudiation. In particular, the judge did not credit Mr. Kerns's version of the October 24 meeting. The Judge did not read the October 24 letter as clearly confirming any anticipatory repudiation; and he found that Fort Myer's application of the doctrine of anticipatory repudiation to facts of this case was "an afterthought." Because the judge disbelieved Fort Myer's evidence, he found that there was "no obligation or need or requirement that [he] consider anything else." He also found that "Fort Myer had already made [its] decision before [it] went to the [October 24] meeting" due to problems with Anchor and concerns about losing money.

Accordingly, the court found that there was "a material breach by Fort Myer," but no breach by Banneker. Banneker's performance was therefore excused. The court further noted that Fort Myer could not recover damages as the party in breach of the contract.

The court also found against Fort Myer on its quantum meruit claim, explaining that "[i]f there is an express contract fully covering the subject matter of the parties' understanding, which [the court] f[ou]nd to be the case . . ., there can be no recovery in

(b) **Disposition.** When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence. When a motion for judgment is made under any other circumstances, the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made.

quantum meruit." Once the court determined liability on Banneker's breach of contract claim, Banneker proceeded with its case on reprocurement costs damages. After additional testimony and argument, the court stated that it was persuaded by Banneker's expert testimony on damages but requested further briefing on damages, as well as written closing arguments before issued a final decision.

The court issued its opinion on October 22, 2015. The court ruled against Fort Myer on the guaranty claim against Travelers—Count III of its complaint—because the court had ruled in favor of Banneker against Fort Myer, rendering it also proper to rule against Fort Myer in its claim against Banneker's surety. Regarding its interpretation of Article XVII of the Subcontract, the court found:

> During the July bench trial, the court interpreted the notice provision to give Banneker the right, but not the obligation, to provide Fort Myer with notice of its default. The provision is a not condition precedent [sic] and thus did not obligate Banneker to give such notice before Banneker could assert a cause of action. Fort Myer and Western Surety have not presented any arguments, at trial or in their post-hearing brief, to persuade the court otherwise. Accordingly, the court concludes that Banneker was not obligated to provide Fort Myer three-days written notice before Banneker could proceed with remedies.

After a lengthy recitation of the facts and the parties' contentions, the court then entered judgment against Fort Myer and WSC, in favor of Banneker, in the amount of $1,754,441.19, totaling Banneker's reprocurement costs, attorney's fees, and costs.

C. First Appeal

Fort Myer and WSC filed a notice of appeal on November 4, 2015. *Fort Myer I* at 25. They presented several issues for our review, including whether the trial court erred in its interpretation of the notice requirements contained in the subcontract and in awarding

Banneker reprocurement costs associated with a subsequent breaching subcontractor. We only addressed one issue as dispositive: "[w]hether the lower court's factual findings were clearly erroneous in light of uncontroverted evidence, which supported the testimony of Fort Myer's witnesses?" *Fort Myer I* at 2.

In affirming, in part, and reversing, in part, the judgment of the circuit court, we observed that the trial below "encompassed two sets of claims: (1) Fort Myer's claims against Banneker and its surety, alleging anticipatory repudiation, and (2) Banneker's counterclaims against Fort Myer, alleging material breach. *Fort Myer I* at 27. We affirmed the circuit court's decision that Fort Myer failed to demonstrate that Banneker breached the contract by anticipatory repudiation. *Id*. at 29.

We vacated the trial court's judgment that Fort Myer materially breached the subcontract. *Id*. at 34. We noted that "[t]o prevail on a claim for breach of contract, it is the plaintiff's burden—in this case, the counter-plaintiff [Banneker's] burden—to prove, by a preponderance of the evidence, that the defendant owed the plaintiff a contractual obligation and that the defendant breached that obligation." *Id*. at 30 (cleaned up). We pointed out that, in this case, the circuit court "granted judgment on [Banneker's] counter-claims before [its] case-in-chief or [] presentation of *any* evidence, [and] whatever evidence there was to preponderate over, was not presented in support of Banneker's claim." *Id*. (emphasis in original). Banneker, we held, still had the burden of persuading the court that Fort Myer breached the subcontract without justification. *Id*. at 33. "Further, because the trial never proceeded to [Banneker's] case-in-chief, [Fort Myer was] not afforded an opportunity to present a defense against the counterclaim or to present a justification for

its breach." *Id*. at 33-34. We therefore held that "[b]ecause [Banneker] did not present any evidence in support of [its] claim that Fort Myer breached, and Appellants had not yet defended against that claim, the circuit court clearly erred in finding Fort Myer in material breach of the subcontract." *Id*. at 34. We vacated the circuit court's judgment in favor of Banneker on its counterclaim and the corresponding damages award and remanded for a trial on those claims. *Id*.

D. Proceedings on Remand

1. Amended Answer

On February 22, 2018, Fort Myer filed an amended reply and answer to Banneker's counterclaim. In its amended answer, Fort Myer asserted the additional defense that Banneker's "claims are barred by mutual recession."

2. Motions for Recusal

Fort Myer and WSC's recusal motions are treated fully in the discussion but outlined here for context. On February 11, 2018, Fort Myer and WSC moved for Judge Ronald B. Rubin "to recuse himself from further matters in this case following remand of the case from the Court of Special Appeals" based on an appearance of bias or partiality. After briefing and a hearing, Judge Rubin concluded in a written order that recusal was not mandatory because he neither harbored bias against Fort Myer nor had extra-judicial knowledge of contested evidentiary facts and was not necessary because he could preside fairly over the second trial. On the first day of trial, Fort Myer and WSC renewed their motion and asserted that an error in Judge Rubin's written order "gave an appearance of bias and satisfie[d] the test for recusal." The court denied this motion as untimely.

3. Trial and Judgment

After the court denied Appellant's Motion to Recuse, a five-day bench trial commenced. Banneker presented evidence for three days, including testimony from Mr. Karim, Judith Ittig, and two expert witnesses, Michael Seminara and David Stryjewski. Fort Myer's defense, presented over two days, included testimony from Pradip Patel, Cesar Casanova, and Christopher Kerns, and expert testimony from James Kern.[7]

Michael Seminara, a licensed contractor and principal at the Seminara Consulting Group, LLC, a construction consulting firm, testified as an expert witness on behalf of Banneker. Mr. Seminara's testimony covered two areas: "the process and factors involved in managing the re[]procurement of a construction contract that has been abandoned or terminated prior to competition"; and "the reasonableness of the process Banneker undertook to re-procure and manage the construction work . . . after Fort Myer failed to complete the subcontract." According to Mr. Seminara, Banneker tried to mitigate costs by placing "an exorbitant amount of requests for bids." He opined that Banneker "did everything that an experienced surety completion consultant would have done in the sense that [Banneker] w[as] reasonable in [its] efforts[.]"

David Stryjewski, a certified public accountant at Matson, Driscoll & Damico LLP, testified as an expert "in the field of accounting for the construction industry, the accounting of costs incurred in the reprocurement and completion of re-procured construction contract work, and the financial measure of damages resulting from the

[7] We summarize the applicable testimony and evidence of the fact witnesses elsewhere in the opinion.

completion of an abandoned or a terminated contract." Mr. Stryjewski opined on the amount of Banneker's damages that resulted from Fort Myer's breach.

James Kern, a certified public accountant and partner at Gross, Mendelsohn & Associates, P.A., testified as an expert witness on behalf of Fort Myer in the fields of accounting and forensic accounting. Mr. Kern testified that, for the 8000 series, "Banneker's contract price to the County totaled $592,649.91," whereas the agreed upon price with Fort Myer totaled $1,110,935.50. Accordingly, Banneker contracted to pay Fort Myer $518,285.59 more than the County had contracted to pay Banneker for work on the 8000 series.

When Banneker entered into its subcontract with Creighton, the pricing for the 8000 series "four line items [8023, 8017, 8018, and 8019] totaled $276,610," whereas Fort Myer's pricing for the same line items totaled $695,808, a "differential of $419,198." According to Fort Myer's expert, Mr. Kern, "[i]f you adjust for the quantities and make the quantities the same as the quantities in the Creighton contract," Creighton's contract is approximately "$305,000 lower than [] Fort Myer's price for those four line items." Mr. Kern further accounted for a change order in the amount of $99,000, which ended up "increasing the Creighton contract price to $375,610 for those four line items." Accordingly, after accounting for the difference in the change order, Mr. Kern opined that the Creighton contract provided Banneker with a net savings of $206,000. On cross-examination, Mr. Kern noted that this "savings" assumed that "Creighton performed under the contract[]." However, Mr. Kern conceded that Creighton breached the contract.

At the close of trial, the court took the matter under advisement and requested that both parties submit post-trial briefs.

In his Memorandum and Order, filed July 18, 2019, Judge Rubin again entered judgment in favor of Banneker and awarded damages, this time in the amount of $1,341,273.60. Banneker was also awarded attorney's fees in the amount of $655,458.27.

The court denied Banneker's post-trial claims that Fort Myer was collaterally estopped from asserting affirmative defenses that Fort Myer pled in Fort Myer's February 22, 2018 amended reply. These affirmative defenses included Fort Myer's assertion that Banneker's claims were barred by accord and satisfaction, mutual rescission, and by Banneker's breach of contract. The court found that, "consistent with the Court of Special Appeals' mandate, [] the only essential issue that was actually litigated, and determined by a valid and final judgment, was Ft. Myer's claim that Banneker breached the contract by anticipatory repudiation." Fort Myer, therefore, was not precluded from asserting these affirmative defenses or offering evidence to support its claims. Likewise, the court found that the law of the case doctrine also did not apply to Fort Myer's affirmative defenses because the defenses were neither raised nor litigated until after the case was remanded.

Turning to the merits, the court began by ruling that Fort Myer breached the contract. The court determined that Banneker's presentation of new prices at the October 24 meeting was merely an "offer to modify the parties' agreement." The court noted that it disbelieved Fort Myer's testimony that Banneker refused to move forward with the Project unless Fort Myer agreed to revise its prices. The court found that, as the offeror, Banneker had the right to make a new offer, and Fort Myer, as offeree, was entitled to

accept or reject the offer, or make a counteroffer. Fort Myer chose to reject Banneker's offer and demobilize, which, the court found, was a material breach of contract.

Further, the court found that Banneker did not intend to rescind the contract, meaning that there was no mutual rescission. Banneker "never expressly stated that it would like to rescind the contract." Additionally, it did not matter that Banneker did not "send a reply to Ft. Myer's self-serving notice of termination letter," because "Banneker did not have an obligation to respond to the letter, and failure to reject Ft. Myer's repudiation does not constitute mutual rescission." Finally, the court determined that Banneker's variable responses to Fort Myer's and Creighton's demobilizations were due to the differing notice requirements in each party's bond. Accordingly, the fact that Banneker did not respond to Fort Myer's October 2012 letter and immediate demobilization did not indicate that there was a mutual rescission of the subcontract.

The court also concluded that the three-day notice provision in Article XVII of the subcontract between Banneker and Fort Myer gave Banneker "the right, but not the obligation to give three-days written notice to Ft. Myer" in the event of a breach of contract. The court explained that, under the objective theory of contracts, the plain language of the provision made it clear that "the provision is not a condition precedent, and did not require Banneker to give notice before it could move forward with the project and assert a cause of action."

Moving to the question of damages, the court concluded that Banneker was entitled to recover under Western Surety's bond and to recover reprocurement costs from Fort Myer. The court found that "Banneker's claims arose naturally and were reasonably within

the contemplation of the parties when the parties entered into the agreement." Judge Rubin specifically credited the testimony of Mr. Karim, Mr. Seminara, and Mr. Stryjewski, "all who opined that the additional costs incurred by Banneker were reasonable." The court explained:

> but for Ft. Myer's demobilization from the job, Banneker would not have incurred the excess completion costs, including the costs that arose from Creighton's breach. Banneker, as a result of Ft. Myer's inability to stay on schedule, and Ft. Myer's demobilization was eleven weeks behind schedule. Ft. Myer put Banneker in a position which necessitated decisive action to prevent further delay. This court finds that it was not unreasonable to have contracted with Creighton and Total Civil to complete the project. Creighton was a WSSC-approved subcontractor who represented that it had the resources and availability to perform the work, and provided competitive pricing and surety bonds. The fact that Banneker contracted with Creighton for less than Banneker had contracted with Ft. Myer further supports that Banneker's mitigation efforts were successful. Moreover, when Creighton failed to perform its contract, Banneker's reasonable mitigation efforts were successful as it obtained a bond from Creighton and recovered $170,000.00.

The court, however, did not award the full $1,535,463.00 that Banneker requested.[8] Banneker's damage calculation was reduced by: (1) $24,122.40 (missing payment to Peak, Inc.); (2) $13,211.40 (difference in the amount Fort Myer billed and the amount credited for work on an emergency road collapse); and (3) $156,856.00 (additional management

[8] Banneker's total damages calculation included $3,722,080 (payments made to subcontractors/suppliers), and $156,856.00, (additional cost of its general conditions) for a total of 3,878,936. Banneker claimed that it deducted from this sum $170,000 (the settlement payment received from Philadelphia Insurance Co.) and $2,149,576.00 (the revised Fort Myer contract based on final quantities). Although Banneker claimed the resulting calculation totalled $1,535,463, our calculations produce the number $1,559,360. Neither Fort Myer nor Banneker raised this discrepancy before the circuit court or on appeal.

and general condition costs that Banneker failed to prove were due to Fort Myer's breach). Consequently, the total amount of damages awarded was $1,341,273.60.

Regarding Banneker's alleged additional management costs and general conditions, the court determined that "Banneker could not demonstrate that [it] lost any business opportunities or that it paid additional sums for management following Ft. Myer's demobilization." Further, while, as the court noted, "Mr. Seminara testified that Banneker's alleged increase in general condition costs were . . . due solely to Ft. Myer's demobilization," Banneker was "seeking additional costs and additional time . . . during the same period of time against its claim against Ft. Myer." The court concluded that "Banneker's claims for excess general costs were disingenuous given that on one hand it attributes the excess costs to Ft. Myer's demobilization, whereas on the other hand, to the County, it attributes the delays to issues unrelated to Ft. Myer.

Finally, the court denied Banneker's claim for prejudgment interest at a rate of 6% and awarded Banneker $655,458.27 in attorney's fees and costs. Fort Myer's timely appeal followed on July 25, 2019.

We supplement these facts in our discussion of the issues.

STANDARD OF REVIEW

As directed by Maryland Rule 8-131(c), "[w]hen an action has been tried without a jury, [we] review the case on both the law and the evidence." We "will not set aside the judgment of the trial court on the evidence unless clearly erroneous" and "give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). A trial court's factual findings are not clearly erroneous if "any competent material

evidence exists in support of the trial court's factual findings[.]" *Yacko v. Mitchell*, 249 Md. App. 640, 677 (2021) (quoting *MAS Assocs., LLC v. Korotki*, 465 Md. 457, 474 (2019)).

"When weighing the credibility of witnesses and resolving conflicts in the evidence, 'the fact-finder has the discretion to decide which evidence to credit and which to reject."' *Qun Lin v. Cruz*, 247 Md. App. 606, 629 (2020) (quoting *Hollingsworth & Vose Co. v. Connor*, 136 Md. App. 91, 136 (2000)); *see also Reece v. State*, 220 Md. App. 309, 330 (2014) ("In Maryland, the appellate courts have made clear that the credibility of witnesses is a matter that falls squarely within the province of the jury."). Absent an abuse of discretion, "we may not substitute our judgment for that of the fact finder, even if we might have reached a different result[.]" *Gordon v. Gordon*, 174 Md. App. 583, 626 (2007) (quoting *Innerbichler v. Innerbichler*, 132 Md. App. 207, 230 (2000)).

DISCUSSION

I.

Mutual Rescission

A. Parties' Contentions

Fort Myer contends that the trial court's determination that the parties did not mutually rescind the contract at the October 24 meeting is clearly erroneous. Specifically, while recognizing the deference accorded to trial courts on matters of credibility, Fort Myer insists that Banneker acted consistently with an agreement to rescind the subcontract as memorialized in Fort Myer's October 24 letter. These acts and omissions include: neither responding to the October 24 letter confirming Fort Myer's demobilization from the

Project, nor sending a notice of default before seeking reprocurement costs; declining to assert a bond claim until filing its counterclaim; and instructing Fort Myer to "revise and resubmit" an invoice and a later offer to pay in April of 2015. Finally, Fort Myer points out the discrepancy in Banneker's responses to the demobilizations by Fort Myer and Creighton, suggesting that Banneker's response to Fort Myer evidenced an intention to mutually rescind the subcontract.

Further, Fort Myer argues that the circuit court's decision is clearly erroneous because the court ignored the "blatant inconsistencies and misrepresentations" of Banneker's witnesses. Fort Myer claims that "the court failed to address the lack of credibility of Mr. Karim, Banneker's President," who allegedly made misrepresentations to the County certifying the payment of subcontractors "so that Banneker would receive payment." According to Fort Myer, there are inconsistencies in Banneker's allegations of who was to blame for its losses. At trial, Banneker claimed Fort Myer was at fault, while in letters to the County, Banneker blamed Creighton.

To the contrary, Banneker asserts that the trial court's finding that there was no mutual rescission is not clearly erroneous because "[t]he evidence overwhelmingly demonstrated that there was no mutual rescission." Banneker also posits that it is "virtually impossible for a judge to be clearly erroneous in disbelieving testimony offered by a party who bears the burden of proof." Banneker notes that only one of the four witnesses who attended the October 24 meeting claimed that the parties had agreed to rescind the subcontract. Moreover, Banneker points out, rather than claim that the subcontract had

been rescinded, Fort Myer continued to enforce the subcontract, asserting a claim against Banneker's bond and, ultimately, filing a complaint for damages under the subcontract.

Banneker also asserts that the non-testimonial evidence cited by Fort Myer does not indicate mutual rescission, because "those documents are consistent with the trial court's finding." First, Banneker contends, its failure to respond to Fort Myer's October 24 letter was not an agreement to rescind the contract because Fort Myer's letter did not allege a rescission or ask for a response. Second, Banneker explains that it never sent a notice of default or sought, immediately, to collect on Fort Myer's bond because Fort Myer "had made clear that it would do no more work on the project" and the bond required no notice.

B. Analysis

It is well-settled that "a contract may be rescinded by mutual agreement of the parties." *Lemlich v. Bd. of Trs. of Harford Cmty. Coll.*, 282 Md. 495, 501-02 (1978). Parties may mutually rescind even if there is no provision in the contract permitting them to do so. *Maslow v. Vanguri*, 168 Md. App. 298, 325 (2006) (citing *Vincent v. Palmer*, 179 Md. 365, 371 (1941)). Still, "[e]qually well settled in this State is the principle that the validity of such an understanding to rescind is controlled by the same rules as in the case of other contracts." *Lemlich*, 282 Md. at 502. Hence, rescission of a contract by mutual agreement requires an "offer by one party and an unconditional acceptance of that precise offer by the other, prior to withdrawal by the offeror, before a binding agreement is born." *Id.* "Whether a default has occurred sufficient to operate as a discharge of a contract is a question of fact to be determined from the evidence as a whole in each particular case." *Vincent*, 179 Md. at 373. Consequently, we accord due deference to the

determination of the circuit court and will not set aside the judgment of the trial court on the evidence unless clearly erroneous. Md. Rule 8-131(c); *Glen Alden Corp. v. Duvall*, 240 Md. 405, 431 (1965) (noting that "whether [a party's action] amounted to a rescission in the correct legal sense of that word" is "a question of fact for the trial court").

The mutual assent "need not be express; it may be inferred from the conduct of the parties in the light of the surrounding circumstances." *Vincent*, 179 Md. at 372. "If either party expresses an intention to abandon the performance of a contract, and the other party fails to object, there may be circumstances justifying the inference that the other party has assented thereto." *Id.* Nonetheless, "failure to object to a repudiation of a contract is not in itself a manifestation of assent to its rescission." *Id.* Rather, "[t]o establish the rescission of a contract by implication, the acts relied upon must be unequivocal and inconsistent with the existence of the contract, and the evidence must be clear and convincing." *Id.* at 373.

In this case, we conclude that the trial judge was not clearly erroneous in concluding that there was no mutual rescission. We reject Fort Myer's claim that certain actions and inaction on the part of Banneker—such as attempting to renegotiate prices with Fort Myer, failing to respond to Fort Myer's letter confirming its demobilization, or failing to send a notice of default—constituted unequivocal indications of mutual rescission. Fort Myer bore the burden of proving mutual rescission by implication by clear and convincing evidence. *Vincent*, 179 Md. at 373. Fort Myer's contention that Banneker refused to move forward with the Project unless Fort Myer agreed to new prices could have supported its rescission by implication claim. *See Vincent*, 179 Md. at 373. The trial court, however,

disbelieved Ft. Myer's witnesses' testimony that Banneker representatives stated they would not move forward with the contract unless Ft. Myer agreed to revise its prices.

Both parties offered different versions of what took place at the October 24, 2012 meeting. The trial judge, weighing the testimony and evidence of surrounding circumstances, believed Banneker's version of events. In fact, the court found that Fort Myer "never intended to finish the project once it discovered the requirement to excavate rock." Evidence in the record supports the court's conclusions. For example, Mr. Karim and Mr. Tose testified that, although they did offer a revised pricing schedule, no other contract modifications were made, nor were any ultimatums given. Additionally, testimony and evidence regarding disputes between Fort Myer, Anchor, and Banneker indicated that Fort Myer was not expecting to excavate rock or pay extra to subcontractors to perform this work, and that this requirement created significant delays and extra costs for Fort Myer.

The evidence presented at trial was also sufficient to support the court's determination that, because Banneker did not intend to rescind the contract, there was no "meeting of the minds" sufficient for mutual rescission. *See Vincent*, 179 Md. at 372. For instance, the October 24 letter refers to modification and suggests that Fort Myer considered Banneker to be in breach of contract. Testimony from Mr. Karim, however, indicates that Banneker had a different view of the letter. He testified that he took the October 24 letter for "its face value" in that Fort Myer was "terminating [its] contract . . . with us." He disagreed with "how [Fort Myer] interpreted their [October 24] meeting,"

and concluded that, because Fort Myer had decided to demobilize, Banneker chose to view the matter as "over with."

Again, the trial judge credited Banneker's testimony and did not credit Fort Myer's testimony or what the court considered its "self-serving" claim that Banneker had refused to continue the Project unless Fort Myer agreed to new prices. The judge credited Banneker's view that the October 24 letter was Fort Myer's notification of termination and demobilization, rather than a record of an agreement to rescind the contract.

Certainly, "a breach of contract is not an offer to rescind." *Quillen v. Kelley*, 216 Md. 396, 410 (1958) (holding that a vendee's failure to make installment payments and a vendor's refusal to modify the contract did not constitute mutual rescission when there was no clear offer and acceptance to rescind the contract). By sending the October 24 letter and demobilizing, Fort Myer committed a material breach by refusing to carry out its obligations under the subcontract. *See Keystone Engineering Corp. v. Sutter*, 196 Md. 620, 628 (1951). Such a material breach can "discharge the other party from further duty under the contract." *Glen Alden Corp*., 240 Md. at 430. Here, the court found that, by not responding to the October 24 letter, moving forward with reprocurement efforts, and failing to make an immediate bond claim, Banneker did not accept an offer of mutual rescission; rather, Banneker acted to mitigate its damages. As the Court explained in *Glen Alden Corp. v. Duval*:

> When the injured party asserts his own freedom from the duty to perform further, he is merely trying to avoid further loss from the other's wrong—something that the law often requires of him whether he is willing or not. There are other methods by which he may reasonably endeavor to avoid or reduce injury; he may contract for some substitute material or service; he

> may ask the repudiator to repent and retract; he may demand replacement or the repair of defects; he may ask compensation for what he has done; he may demand his mon[e]y back or reconveyance of the property; and he may demand compensatory damages. In doing these things, he is trying to avoid harms and losses; he is not offering a 'rescission' or 'waiving' his rights or 'electing' a remedy.

240 Md. at 430-31 (cleaned up).

Finally, evidence in the record supports the trial court's conclusion that mutual rescission was not implied by Banneker's disparate handling of the demobilizations of Fort Myer and Creighton. Creighton's bond requires that the obligee, in this case Banneker, give reasonable notice to Philadelphia Indemnity of any default of the principal, Creighton. By contrast, Fort Myer's bond with WSC contained no such provision. Mr. Seminara testified that Banneker then had an "unlimited time for them to be guaranteeing the performance of Fort Myer[.]" The evidence and testimony support the trial court's conclusion that Banneker's different treatment of Creighton was due to different indemnity requirements in each subcontractor's bond rather than any agreement to rescind the subcontract with Fort Myer.

We conclude our analysis by holding that the trial court's determination that there was no mutual rescission by the parties was based on competent material evidence in the record and, therefore, was not clearly erroneous.

II.

Notice Requirements under Article XVII of the Subcontract

A. Parties' Contentions

Fort Myer contends that the trial court erred by interpreting Article XVII of the subcontract as giving Banneker "the right, but not the obligation, to give three-days written notice to Fort Myer." Fort Myer posits that Article XVII "required Banneker to give Fort Myer three days written notice once Banneker deemed Fort Myer to be in default of the subcontract, before Banneker could obtain the 'right' to seek reprocurement costs from Fort Myer." Fort Myer argues that the trial court's interpretation is contrary to the plain language of the subcontract and "eradicates a future subcontractor's right to challenge the general contractor's determination of default, or in the alternative, cure the default." Fort Myer urges that we strictly enforce the notice requirements in Article XVII, "[g]iven Maryland's strong policy in favor of notices expressly for the right to cure."

Banneker counters by claiming that "Fort Myer cannot escape liability based on lack of notice" for three primary reasons: (1) the "contract did not require notice after Fort Myer's repudiation"; (2) "by repudiating the contract, Fort Myer lost the right to invoke any notice provisions"; and (3) "even though notice was not required, Banneker repeatedly provided it. Banneker contends that, prior to the October 24, 2012 meeting, it had sent several cure notices to Fort Myer. Fort Myer had sufficient notice, Banneker contends, that Banneker considered Fort Myer to be in material breach of the subcontract and to allow Banneker to sue for breach.

In reply, Fort Myer asserts that Article XVII of the subcontract required Banneker, in order to preserve its rights and remedies of reprocurement and attorney's fees, to give Fort Myer 72-hours written-notice prior to termination of the subcontract. Contrary to Banneker's argument that other rights referenced in Article XVII are excluded from the notice requirement, Fort Myer asserts that the "exclusive means of reaching those remedies is by giving notice." Fort Myer also contends that "Banneker's assertion that prior letters suffice as notice would require this Court to make additional findings of fact not made by the trial court."

B. Analysis

We "subscribe to the objective theory of contract interpretation. Under this approach, the primary goal of contract interpretation is to ascertain the intent of the parties in entering the agreement and to interpret the contract in a manner consistent with that intent.'" *Credible Behav. Health, Inc. v. Johnson*, 466 Md. 380, 393 (2019) (cleaned up). This inquiry is based on "what a reasonable person in the position of the parties would have understood the language to mean." *Id.* "[T]he primary source for determining the intention of the parties is the language of the contract itself." *Cnty. Comm'rs for Carroll Cnty. v. Forty W. Builders, Inc.*, 178 Md. App. 328, 376 (2008) (quoting *8621 Ltd. P'ship v. LDG, Inc.*, 169 Md. App. 214, 226 (2006)). Where the language of the contract is unambiguous, a court "shall give effect to its plain meaning and there is no need for further construction by the court." *Wells v. Chevy Chase Bank, F.S.B.*, 363 Md. 232, 251 (2001). "We will not displace an objective reading of the contract with one party's subjective understanding." *Pinnacle Grp., LLC v. Kelly*, 235 Md. App. 436, 456 (2018) (citing *Auction & Estate*

Representatives, Inc. v. Ashton, 354 Md. 333, 341 (1999)). It follows that the interpretation of a written contract is "a question of law subject to *de novo* review." *Jocelyn P. v. Joshua P.*, 250 Md. App. 435, 250 A.3d 373, 390 (2021). Thus, we accord no deference to the circuit court's interpretation of the subcontract.

Article XVII of the subcontract, entitled "Failure to Prosecute, etc.," states, in relevant part:

> Should the Subcontractor at any time, whether before or after final payment, refuse or neglect to supply a sufficiency of skilled workers or materials of the proper quality and quantity, or fail in any respect to prosecute the Work with promptness and diligence, or cause by any act or omission the stoppage, impede, obstruct, hinder or delay of or interference with or damage to the work of Banneker or of any other contractors or subcontractors on the Project, or fail in the performance of any of the terms and provisions of this Agreement or of the other Contract Documents, . . . then in any of such events, each of which shall constitute a default hereunder on the Subcontractor's part, Banneker shall have the right, ***in addition to*** **any other rights and remedies provided by this Agreement and the other Contract Documents or by law, after three (3) days written notice to the Subcontractor** . . . (a) to perform and furnish through itself or through others any such labor or materials for the Work and to deduct the reasonable, necessary and actual cost thereof from any monies due or to become due to the Subcontractor under this Agreement and/or (b) to terminate the employment of the Subcontractor for all or any portion of the Work, enter upon the premises and take possession, for the purpose of completing the Work, of all project related materials. . . . In case of such termination of the employment of the Subcontractor, the Subcontractor shall not be entitled to receive any further payment under this Agreement until the Work shall be wholly completed[.][9]

[9] Article XVII continues: "[I]f the unpaid balance of the amount to be paid under this Agreement shall exceed the cost and expense incurred by Banneker in completing the Work, such excess shall be paid by Banneker to the Subcontractor; but if such cost and expense shall exceed such unpaid balance, then the Subcontractor and its surety, if any, shall pay the difference to Banneker. Such cost and expense shall include, not only the reasonable, necessary and actual cost of completing the Work to the satisfaction of Banneker and the Architect and of performing and furnishing all labor, services, materials,

(Continued)

(Emphasis added). Fort Myer posits that this provision required Banneker to provide notice before seeking its reprocurement costs.

In general, "unless a contract provision for termination for breach is in terms exclusive, it is a cumulative remedy and does not bar the ordinary remedy of termination for 'a breach which is material, or which goes to the root of the matter or essence of the contract.'" *Tricat Indus., Inc. v. Harper*, 131 Md. App. 89, 113 (2000) (cleaned up) (quoting *Foster-Porter Enters. v. De Mare*, 198 Md. 20, 36 (1951)).

In *Keystone Engineering Corp. v. Sutter*, a case factually similar to the present case, a general contractor engaged in building a school subcontracted with Keystone Engineering Corporation ("Keystone"). 196 Md. 620, 623 (1951). Keystone agreed "to be bound to the general contractor by all terms and conditions by which the general contractor was bound to the owner." *Id.* at 623-624. The contract governing the agreement between the general contractor and the owner contained a default provision permitting termination "*without prejudice to any other right or remedy*, and after giving the contractor *seven days written notice*." *Id.* at 624 (emphasis added).

After Keystone completed approximately 51% of the contracted work, it began to have difficulties with union picketers and claimed to be unable to proceed with its work.

equipment, and other items required therefore, but also all losses, damages, costs and expenses, (including reasonable legal fees and disbursements incurred in connection with reprocurement, in defending claims arising from such default and in seeking recovery of all such reasonable, necessary and actual cost and expense from the Subcontractor and/or its surety), and disbursements sustained, incurred or suffered by reason of or resulting from the Subcontractor's default[.]"

Id. at 624-625. To keep on schedule, the general contractor hired a replacement subcontractor on a temporary basis to do the electrical work. *Id.* at 625. Keystone wrote to the general contractor, accusing the general contractor of rendering it incapable of completing its work by placing obstacles in its path, and claiming to be "ready, willing and able to prosecute [its] work, and [having] the necessary material, manpower and tools to do so." *Id.* A few days later, the general contractor gave Keystone written notice that "unless Keystone had men at work [in seven days], its contract would be terminated and all payments would be handled in strict accordance with the general contract." *Id.* Despite the notice, Keystone did not have personnel at work within seven days, and "thereafter [the replacement subcontractor] went ahead with the contract and completed the electrical work." *Id.* at 626.

Keystone sued the general contractor for breach of contract, and the general contractor counterclaimed for the excess cost of completion over the contract price. *Id.* The general contractor moved for a directed verdict at the conclusion of testimony, which the circuit court granted. *Id.*

On appeal, Keystone contended, among other things, that the general contractor breached the contract and that the notice given to Keystone was "too late" and "not sufficient." *Id.* at 627. The Court concluded that "[t]here was no justification for the refusal of Keystone to work" and held that the "uncontradicted testimony . . . indicate[d] a breach of the contract by Keystone." *Id.* at 628. The Court then explained that "[w]hen a contractor on a building contract fails to perform, one of the remedies of the owner is to complete the contract, and charge the cost against the wrongdoer." *Id.* Although the Court

held that sufficient notice was provided, the general contractor's remedies "w[ere] not limited by the general contract which, in its designation of the method by which the contract might be terminated, states that this is 'without prejudice to any other right or remedy.'" *Id.*; *see also Foster-Porter Enters.*, 198 Md. at 36 (concluding that default provisions in securities instruments "ordinarily are cumulative, not exclusive" and that "[i]f plaintiff had committed a material breach of his contract, Foster-Porter could have terminated the contract without regard to" the notice requirement to specify the nature of default).

Like the contract in *Keystone*, Banneker's subcontract with Fort Myer addresses certain rights following notice and termination under Article XVII "*in addition to* any other rights and remedies provided by this Agreement and the other Contract Documents *or by law*." (Emphasis added). Far from purporting to be exclusive, Article XVII expressly preserves Banneker's right to pursue alternative remedies provided under the contract or the common law. Like the general contractor in *Keystone*, Banneker was entitled to complete the work under the subcontract itself and charge the excess cost against Fort Myer. We conclude that the plain language of Article XVII does not limit Banneker's right to terminate the notice requirements contained therein, and thus, the trial court was correct in determining that Banneker retained its common law right to terminate for a material breach.[10]

[10] Fort Myer contends that "Banneker relied on Article XVII to recover $655,458.27 in attorney's fees against Fort Myer." However, in this case, the trial court relied on multiple provisions of the subcontract and the performance bond in awarding attorney's fees to Banneker.

Before leaving this issue, we want to be clear that we agree with Fort Myer that the right to cure is a common and critical right in construction contracts. *See U.K. Const. & Mgmt., LLC v. Gore*, 199 Md. App. 81, 93 (2011) ("The right to cure is a fundamental contractor right." (citation omitted)); Philip L. Bruner & Patrick J. O'Connor, Jr., 5 Bruner & O'Connor Construction Law § 18:15 (database updated August 2021) ("The right of a breaching party to be given an opportunity to cure its own material breach is an ancient equitable principle[.]"). Here, we observe that Banneker provided multiple written "72 Hour Cure Notices" to Fort Myer, including notices issued on September 18 and October 15, 2012. In these notices, Banneker detailed its complaints, including Fort Myer's delayed performance, its improper material submittals, its inadequate progress, and inability to keep to Banneker's schedule. These notices, coupled with the meetings held on October 15 and 24, 2012, were more than sufficient to put Fort Myer on notice that Banneker considered Fort Myer to be in default. Accordingly, even if the three-day notice period contained in Article XVII was a condition precedent to terminating the subcontract and preserving Banneker's rights under Article XVII, any notice sent by Banneker following the October 24, 2012 meeting would have been duplicative of Banneker's previous communications with Fort Myer. *See B&P Enters. v. Overland Equip. Co.*, 133 Md. App. 583, 612 (2000) (instructing that when a party had "actual, ongoing knowledge" of the other party's complaints, then failure to strictly comply with the contractual notice requirement may be excused).

III.

Damages

A. Parties' Contentions

Fort Myer argues that the lower court erred in assessing damages against it arising out of Creighton's breach of contract. According to Fort Myer, when Creighton defaulted, Banneker failed to pursue the total amount of damages caused by Creighton, settled for a lower amount, and then claimed damages against Fort Myer for additional costs paid to a third subcontractor, Total Civil. Fort Myer avers that it is not liable for the difference between Total Civil's subcontract and Creighton's subcontract, because the additional costs contained in Total Civil's subcontract contract were caused by Creighton's breach, not Fort Myer's breach. Accordingly, Fort Myer posits, Banneker's claims should be rejected or, at a minimum, reduced.

Banneker responds that the "trial court properly awarded damages, including the costs of Banneker's unsuccessful mitigation attempt with Creighton" because Creighton was hired to perform four tasks that Fort Myer failed to complete. Banneker then had to fire Creighton and hire Total Civil to complete the four tasks for approximately $45,000 more than it would have cost had Fort Myer completed the work. Although Banneker concedes that it would have saved money if Creighton had succeeded, Creighton failed, leaving Banneker with no choice but to complete the work at extra cost with Total Civil. The law, Banneker contends, does not punish it for a reasonable but unsuccessful mitigation attempt, and Banneker is entitled to the cost of completion.

B. Analysis

We review a "trier of fact's computation of damages for clear error." *Spacesaver Sys., Inc. v. Adam*, 212 Md. App. 422, 436 (2013), *aff'd*, 440 Md. 1 (2014). Damages for breach of contract "seek to vindicate the promisee's expectation interest." *Hall v. Lovell Regency Homes Ltd. P'ship*, 121 Md. App. 1, 13 (1998) (citation omitted). In other words, "[d]amages for breach of a contract ordinarily are that sum which would place the plaintiff in as good a position as that in which the plaintiff would have been, had the contract been performed." *Beard v. S/E Joint Venture*, 321 Md. 126, 133 (1990).

Specific to the construction context, when a contractor or subcontractor fails to perform, one of the remedies of the non-breaching party is to "complete the contract, and charge the cost against the wrongdoer." *Keystone Eng'g Corp. v. Sutter*, 196 Md. 620, 628 (1951). The non-breaching party is then entitled to its expectation damages measured by the cost in excess of the contract price that was incurred by the non-breaching party in completing the work under the contract. *See Ray v. William G Eurice & Bros.*, 201 Md. 115, 129 (1952).[11]

To be recoverable, damages must be both foreseeable and reasonable. "[U]pon proof of liability, the non-breaching party may recover damages for 1) the losses

[11] Some federal cases involving government contracts offer a more specific test for determining the reasonableness of excess reprocurement costs. These cases hold that excess reprocurement costs will be imposed only when "(1) the reprocured supplies are the same as or similar to those involved in the termination; (2) the Government actually incurred excess costs; and (3) the Government acted reasonably to minimize the excess costs resulting from the default." *Cascade Pac. Int'l v. United States*, 773 F.2d 287, 294 (Fed. Cir. 1985); *see also Armour of America v. United States*, 96 Fed. Cl. 726, 759-765 (2010).

proximately caused by the breach, 2) that were reasonably foreseeable, and 3) that have been proven with reasonable certainty." *Hoang v. Hewitt Ave. Assocs., LLC*, 177 Md. App. 562, 594 (2007). "In this context, 'proximate cause' means losses that actually resulted from the breach." *Id.* Concerning reasonable foreseeability, we follow the two-part principle first established in the prominent nineteenth century English case, *Hadley v. Baxandale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854):

> [T]he damages for a breach of contract should be such as may fairly and reasonably be considered, either as arising naturally, i.e. according to the usual course of things from such breach of the contract itself; or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Lloyd v. Gen. Motors Corp., 397 Md. 108, 162 n.25 (2007) (quoting *Hadley*, 9 Ex. 341, 156 Eng. Rep. 145). In other words, a claimant may recover both general damages that arise "naturally" from the breach ***and*** consequential damages that, while not presumed to have been in the contemplation of the parties when the contract was made, are shown from the evidence to have been in the parties' contemplation. *Id.*

Damages must also be reasonably certain. "[R]easonable certainty" of contract damages "means the likelihood of the damages being incurred as a consequence of the breach, and their probable amount." *Hoang*, 177 Md. App. 562 at 595. Therefore, "losses that are speculative, hypothetical, remote, or contingent either in eventuality or amount will not qualify as 'reasonably certain'" and are not recoverable as contract damages. *Adcor Indus., Inc. v. Beretta U.S.A. Corp.*, 250 Md. App. 135, *cert. denied*, 475 Md. 678 (2021) (citation omitted).

The subcontract between Banneker and Fort Myer includes a broad indemnity clause:

> Should the progress of the work or the Project be delayed, disrupted, hindered, obstructed, or interfered with by any fault or neglect or act of failure to act of the Subcontractor or any of its officers, agents, servants, employees, subcontractors or suppliers so as to cause any additional cost, expense, liability or damage to Banneker . . . or any damages or additional costs or expenses for which Banneker or the Owner shall become liable, the Subcontractor and its surety shall and does hereby agree to compensate Banneker and the Owner for and indemnify them against all such costs, expenses, damages and liability, but only to the extent of their negligence and legal liability.

Additionally, Article XVII provides that, in the event of a termination due to the subcontractor's default, the subcontractor is not entitled to any further payment until the work under the contract is "wholly completed" to the satisfaction of Banneker. If the cost and expense paid by Banneker to complete the work "shall exceed such unpaid balance, then the Subcontractor and its surety, if any, shall pay the difference to Banneker." Article XVII defines "such cost and expense" to include:

> not only the reasonable, necessary and actual cost of completing the Work to the satisfaction of Banneker and the Architect and of performing and furnishing all labor, services, materials, equipment, and other items required therefore, but also all losses, damages, costs and expenses, (including reasonable legal fees and disbursements incurred in connection with reprocurement, in defending claims arising from such default and in seeking recovery of all such reasonable, necessary and actual cost and expense from the Subcontractor and/or its surety), and disbursements sustained, incurred or suffered by reason of or resulting from the Subcontractor's default.

Pursuant to the subcontract and Maryland law, the circuit court awarded Banneker its excess completion costs less credits. The court concluded that "Banneker's claims arose naturally and were reasonably within the contemplation of the parties when the parties

entered into the agreement." Fort Myer concedes that, provided the court's judgment is "affirmed on the legal issues," Fort Myer is liable to Banneker for damages. Fort Myer submits, however, that Banneker's claim against Fort Myer should be reduced by $322,887.00 for damages proximately caused by Creighton's default.

We have explained that the "mitigation of damages doctrine is '[t]he principle requiring a plaintiff, after an injury or breach of contract, to use ordinary care to alleviate the effects of the injury or breach. If the defendant can show that the plaintiff failed to mitigate damages, the plaintiff's recovery may be reduced[.]'" *Cave v. Elliott*, 190 Md. App. 65, 96 (2010) (quoting Black's Law Dictionary 1018 (7th ed. 1999)). The doctrine "serves to reduce the amount of damages to which a plaintiff might otherwise have been entitled had he or she used all reasonable efforts to minimize the loss he or she sustained as a result of a breach of duty by the defendant." *Hopkins v. Silber*, 141 Md. App. 319, 337 (2001) (quoting *Schlossberg v. Epstein*, 73 Md. App. 415, 421-22 (1988)). When the doctrine applies, "the burden is necessarily on the defendant to prove that the plaintiff failed to use 'all reasonable efforts to minimize the loss he or she sustained.'" *Cave*, 190 Md. App. at 96 (quoting *Schlossberg*, 73 Md. App. at 422).

As a corollary to the duty to mitigate, an injured party generally may recover for consequential damages incurred as a result of its reasonable efforts to mitigate, even if those efforts were unsuccessful. *See Sloane, Inc. v. Stanley G. House & Assocs.*, 311 Md. 36, 42 (1987) (setting forth the measure of damages under Maryland law) (citing Restatement (Second) of Contracts § 347 (1981)). The Restatement (Second) of Contracts clarifies that, subject to other limitations, an "injured party is entitled to recover for all loss

actually suffered. Items of loss other than loss in value of the other party's performance are often characterized as incidental or consequential. ***Incidental losses include costs incurred in a reasonable effort, whether successful or not, to avoid loss***[.]" Restatement (Second) of Contracts § 347, cmt. c (1981) (emphasis added); *see also id.* at § 350, cmt. h ("[C]osts incurred in a reasonable but unsuccessful effort to avoid loss are recoverable as incidental losses."). The Restatement's conclusion is mirrored by prominent secondary sources. For example, Corbin on Contracts summarizes: "Inasmuch as the law denies recovery for losses that can be avoided by reasonable effort and expense, justice requires that the risks incident to such effort should be carried by the party whose wrongful conduct makes them necessary. Therefore, special losses that a party incurs in a reasonable effort to avoid losses resulting from a breach are recoverable as damages." 11 Joseph M. Perillo, Corbin on Contracts § 57.16 (rev. ed. 2005).

Returning to the case on appeal, we conclude that the circuit court did not abuse its discretion in calculating the damages resulting from Fort Myer's breach, and the subsequent breach by Creighton, either pursuant to the terms of the subcontract or as consequential damages under Maryland law.

First, we conclude that the subcontract allowed Banneker to recover excess reasonable completion costs. Banneker may recover the losses proximately caused by the breach, that were reasonably foreseeable, and that have been proven with reasonable certainty. *Hoang*, 177 Md. App. at 594. To show that Fort Myer's actions were the proximate cause of Banneker's losses, Banneker only needed to show that it is more likely than not that the event was caused by Fort Myer's actions. *See MLT Enterprises, Inc. v.*

Miller, 115 Md. App. 661, 675 (1997) ("[A] single event is ordinarily the consequence of a number of causes."). The court credited Banneker's evidence that Fort Myer demobilized from the job, causing excess completion costs, including the costs that arose from Creighton's breach. Likewise, Banneker's losses, including the costs resulting from Banneker's breach were foreseeable. The subcontract expressly indemnifies Banneker for "additional cost, expense, liability or damage" and obligates Fort Myer to the "reasonable, necessary and actual cost of completing the Work." Based on the express language of the subcontract, the parties contemplated, in the event of breach, that Banneker would be entitled to damages for the actual cost of completing the work. Finally, Banneker's losses can be been proven with reasonable certainty because Banneker disbursed specific amounts to its replacement subcontractors in order to complete the contract.

Second, even if the subcontract did not expressly provide for recovery of Banneker's excess completion costs, Banneker may recover consequential damages incurred as a result of its reasonable efforts to mitigate. Specifically, the court determined that Banneker successfully mitigated its damages by, initially, contracting for less than it had contracted with Fort Myer, and, subsequently, recovering $170,000.00 from Creighton's surety after Creighton failed to perform. It is axiomatic that a damaged party may recover loss that it actually suffered. Consistent with this controlling principle of contract law, we conclude that the circuit court did not abuse its discretion in awarding costs that Banneker incurred in attempting to mitigate its damages.

Fort Myer avers, in essence, that it should both benefit from Banneker's effort to contract with Creighton and the potential savings that would have resulted had Creighton

completed its portion of the Project and then be absolved of any damages after Creighton's breach. However, any potential savings that would have resulted from Creighton's work were never realized because Creighton breached. Although Fort Myer complains that Banneker failed to aggressively pursue Creighton, the record supports the trial court's conclusion that Banneker's efforts to mitigate Creighton's breach and achieve a settlement were reasonable. Any loss incurred by Banneker to mitigate Fort Myer's breach is consistent with the loss actually suffered by Banneker. *Keystone Eng'g Corp.*, 196 Md. at 628.

We regard Fort Myer's reliance on *Burson v. Simard*, 424 Md. 318, 321 (2012), as misplaced. There, the respondent, Mr. Simard, entered into a contract to purchase real property, but subsequently defaulted on his contract. *Id.* at 321. The circuit court ordered that the property be resold at Simard's risk and expense. *Id*. at 322. Mr. Zimmerman subsequently purchased the property, but he too defaulted. *Id*. The circuit court again ordered that the property be resold, this time at the risk and expense of Zimmerman. *Id*. at 323.

The court referred the final sale for audit, pursuant to Maryland Rule 14-305(g) governing judicial sales of property, and the audit found that "Simard was liable for the difference between the price that he originally agreed to pay for the property ($192,000) and the price for which it ultimately sold ($130,000)." *Id*. The Court of Appeals, however, ultimately held that a defaulting purchaser could not be held liable for losses caused by the conduct of other persons beyond that purchaser's control. *Id.* at 330. The Court explained that neither expectation damages nor consequential damages were appropriate, because a

resale is a remedy chosen by the vendor with the approval of the court "for the purpose of defining and limiting consequential damages" and a "defaulting purchaser at a judicial sale is not a guarantor that all future sales contracts, entered by the trustees for that property, will be performed." *Id*. at 329-30.

Burson is not an analogous case to the one before us. First, the Court's holding was based on an interpretation of Maryland Rule 14-305(g) and concerned the remedy for breach of a land-purchase contract.[12] Second and relatedly, the "special circumstances" required the Court to interpret Rule 14-305 to prevent "wasteful litigation." *Id.* at 330-31. Third, the Court concluded that the result in *Burson* was "consistent with the parties' reasonable expectations." *Id.* at 331.

In contrast to the measure of damages under a land-purchase contract, here, Banneker's expectation damages are measured by the cost in excess of the contract price that it incurred in completing the work under the contract. *Keystone Eng'g Corp.*, 196 Md. at 628. The "special circumstances" inherent in Rule 14-305 are absent when both parties have the freedom to contract and can measure their expectations through the contract.

In sum, we hold that the trial court did not abuse its discretion because it measured Banneker's damages consistent with the terms of the subcontract and contract principles by awarding Banneker its actual and reasonable excess completion costs.

[12] The Court noted that that damages for breach of contract for a sale of land is measured by the difference between the contract price and the fair market value at the time of the breach, and that the injured vendor can introduce evidence of a resale of the property as an alternative means of establishing damages, as long as the seller shows that the sale was fairly made within a reasonable time after breach. *Id*. at 327-28.

IV.

Recusal

A. Background

On February 14, 2018, Fort Myer and WSC moved for Judge Rubin "to recuse himself from further matters in this case following remand of the case from the Court of Special Appeals." Appellants claimed that recusal in this case was appropriate because "an appearance of bias or partiality of the trial judge exists."

In support, Fort Myer raised two primary contentions. First, it claimed that recusal was appropriate because the trial judge did not follow the procedure he indicated he would follow at trial. While Judge Rubin stated at trial that he would conduct the trial in "the old-fashioned way," first hearing evidence from parties making claims for relief and second hearing counterclaims, Judge Rubin instead entered judgment without requiring Banneker to present any evidence or allowing Fort Myer to cross-examine Banneker's witnesses. Fort Myer insisted that "a reasonable person could interpret [from] the court's prior actions that the court had made up its mind on the parties dispute without hearing all of the evidence and the court could not decide the case based upon all of the evidence at the second trial."

Second, Fort Myer claimed that recusal was appropriate because the trial judge's disbelief of Fort Myer's witnesses gave the appearance that he could not be unbiased in the second trial. While Fort Myer conceded that a trial judge's disbelief of witness testimony would not normally warrant recusal, Fort Myer argued that Judge Rubin "so negatively adjudged Fort Myer's witnesses' credibility that it did not require Banneker to offer any

evidence before ruling in favor of Banneker's Counterclaim against Fort Myer." Because Judge Rubin had to "revisit the identical factual determinations that he so strenuously made" in the first trial, complained Fort Myer, a reasonable person could conclude that he could not view new evidence with an "impartial mind."

In its opposition before the trial court, Banneker responded that the conduct of the trial judge was not grounds for recusal because "the overall conduct of a trial is subject to the sound discretion of the trial judge," and the judge did in fact follow the "old-fashioned" procedure he set out at trial. Banneker also contended that a court's findings on witnesses' credibility are not grounds for recusal, because "an alleged bias must come from a source outside of the courtroom[.]" Finally, Banneker surmised, there were no grounds for recusal at all, because there was no actual bias shown, nor any violation of the Judicial Code of Conduct.

A hearing was held on Fort Myer's motion for recusal on March 8, 2018. After considering the parties' arguments, Judge Rubin took the matter under advisement. In an Order entered March 19, 2018, Judge Rubin denied the motion. Judge Rubin determined that he did not "harbor any actual bias or prejudice against Fort Myer," because he had no "extra-judicial knowledge of disputed evidentiary facts." He further determined that recusal was unnecessary to avoid the appearance of impropriety. Specifically, "Fort Myer's motion [wa]s grounded exclusively on this court's legal rulings and factual findings made at the first trial, which, ordinarily, do not call for recusal." The disbelief of witnesses, he explained, without more, does not require recusal. Judge Rubin concluded that he was "confident that [he could] preside fairly and impartially at any re-trial, without bias and

prejudice for or against, or sympathy for, any party," and that he could, if persuaded by additional evidence or argument, come to a different conclusion from that which he reached in the first trial.

On the first day of trial, Fort Myer renewed the motion to recuse claiming new grounds. This time, Fort Myer argued that the court's order denying its motion for recusal stated that the court's "factual finding that Fort Myer could not recover damages because it had materially breached the subcontract . . . was affirmed." To the contrary, the Court of Special Appeals "specifically reversed [the] [c]ourt's ruling that Fort Myer breached the contract." The court denied Fort Myer's motion as untimely.

B. Parties' Contentions

Before this Court, Fort Myer largely rehashes the arguments presented below, insisting that the trial court "abused [its] discretion in denying Fort Myer's two motions for recusal." According to Fort Myer, "Judge Rubin's complete disregard of Fort Myer's witnesses, without hearing any contrary testimony, created, at the very least, a question of partiality from the standpoint of an objective person." To Fort Myer, "the *strength* of the [court's] findings made following the first trial raised the appearance of a lack of impartiality regarding this judge's ability to remain open-minded about testimony in the second trial." Further, Judge Rubin mistakenly stated that this Court affirmed his determination that Fort Myer was in breach. Fort Myer contends that this raised questions about Judge Rubin's ability to review the evidence presented at the second trial with an open mind. Overall, "Judge Rubin's comments on the evidence, his disregard of the conduct and misrepresentations of Banneker, his unexplained disregard of the testimony of

Dr. Casanove, as well as expressing his view of the Court of Special Appeals decision, create the appearance, from an objective prospective, that Judge Rubin was pre-determined to reach the same result following the second trial[.]"

Banneker responds that Fort Myer mischaracterizes the trial court's rulings. According to Banneker, Judge Rubin "never made blanket credibility determinations against Fort Myer, nor did he credit everything Banneker['s] witnesses said." Even if Judge Rubin did make blanket credibility determinations, however, Banneker argues that this would not warrant his recusal.

Banneker also contends that "Fort Myer has failed to show any personal bias or appearance of impropriety." Banneker notes that Fort Myer has not argued that recusal is appropriate based on personal bias and prejudice and has focused on opinions that the Judge formed at the first trial. Without a reason to show bias, "rather than a garden-variety mistake of law that all judges make from time to time," Fort Myer cannot "overcome the 'strong presumption' that judges are impartial."

Regarding the second recusal motion, Banneker avers that Fort Myer waived its objection to Judge Rubin's misstatement in the order denying Fort Myer's initial recusal motion. Banneker posits that an argument for recusal is waived if it is not filed as soon as the basis for it becomes known and relevant. Overall, Banneker asserts that Fort Myer's arguments are "frivolous."

In reply, Fort Myer claims that Banneker did not address the "primary basis of Fort Myer's motion to recuse." "Fort Myer sought recusal because the manner in which Judge Rubin ruled against Fort Myer in the first trial would cause a reasonable person to question

Judge Rubin's impartiality." Fort Myer then asserts that it "did not waive the argument by raising it anew in the morning of trial."

C. Analysis

The Maryland Code of Judicial Conduct requires a judge to "comply with the law, including [the Maryland Code of Judicial Conduct]." Md. Rule 18-101.1. The Code provides that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." Md. Rule 18-101.2(a). In carrying out these duties, a judge must "uphold and apply the law and shall perform all duties of judicial office impartially and fairly," Md. Rule 18-102.2(a), and "perform the duties of judicial office, including administrative duties, without bias or prejudice," Md. Rule 18-102.3(a).

It is well-established that "the question of recusal, at least in Maryland, ordinarily is decided, in the first instance, by the judge whose recusal is sought." *Surratt v. Prince George's Cnty.*, 320 Md. 439, 464 (1990). Generally, "a judge is required to recuse . . . from a proceeding when a reasonable person with knowledge and understanding of all the relevant facts would question the judge's impartiality." *In re Russell*, 464 Md. 390, 402 (2019). We review a judge's decision on a motion for recusal for abuse of discretion. *Id.* at 403. The "exercise of that discretion will not be overturned except for abuse." *Chapman v. State*, 115 Md. App. 626, 632 (1997) (quoting *Jefferson-El v. State*, 330 Md. 99, 107 (1993)).

"[T]here is a strong presumption in Maryland, and elsewhere, that judges are impartial participants in the legal process, whose duty to preside when qualified is as strong

as their duty to refrain from presiding when not qualified." *Jefferson-El*, 330 Md. at 107 (citation omitted). Nonetheless, the Code of Judicial Conduct requires that a "judge disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including the following circumstances":

1) The judge has a personal bias or prejudice concerning a party or a party's attorney, or personal knowledge of facts that are in dispute in the proceeding.
2) The judge knows that the judge, the judge's spouse or domestic partner, an individual within the third degree of relationship to either of them, or the spouse or domestic partner of such an individual:
    (A) is a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
    (B) is acting as an attorney in the proceeding;
    (C) is an individual who has more than a de minimis interest that could be substantially affected by the proceeding; or
    (D) is likely to be a material witness in the proceeding.
3) The judge knows that he or she, individually or as a fiduciary, or any of the following individuals has a significant financial interest in the subject matter in controversy or in a party to the proceeding:
    (A) the judge's spouse or domestic partner;
    (B) an individual within the third degree of relationship to the judge; or
    (C) any other member of the judge's family residing in the judge's household.
4) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.
5) The judge:
    (A) served as an attorney in the matter in controversy, or was associated with an attorney who participated substantially as an attorney in the matter during such association;
    (B) served in governmental employment, and in such capacity participated personally and substantially as an attorney or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;
    (C) previously presided as a judge over the matter in another court; or

> (D) is a senior judge who is subject to disqualification under Rule 18-103.9.

Md. Rule 18-102.11(a).

Here, Fort Myer has not accused Judge Rubin of any behavior that contravenes the strictures of Maryland Rule 18-102.11(a). We recognize, however, that the list of circumstances identified under Rule 18-102.11(a) is not exhaustive. As the Code of Judicial Conduct prescribes, a judge "shall avoid conduct that would create in reasonable minds a perception of impropriety," and any indication that a judge's impartiality has been compromised could be a basis for recusal. Md. Rule 18-101.2(b); *see Surratt*, 320 Md. at 465. Fort Myer argues that a reasonable person could question Judge Rubin's impartiality based on his rulings and findings of fact made at the first trial, which it argues created an appearance of impropriety. In support of this argument, Fort Myer points to Judge Rubin's failure to require Banneker to present evidence that Fort Myer breached the subcontract and his credibility determinations against Fort Myer's witnesses.

The Court of Appeals set forth the test for disqualification based on an appearance of impropriety in *Boyd v. State*:

> [T]he test to be applied is an objective one which assumes that a reasonable person *knows and understands all the relevant facts*. We disagree with our dissenting colleague's statement that recusal based on an appearance of impropriety . . . requires us to judge the situation from the viewpoint of the reasonable person, and not from a purely legalistic perspective. Like all legal issues, judges determine appearance of impropriety—not by considering what a straw poll of the only partly informed man-in-the-street would show—but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge.

321 Md. 69, 86 (1990) (emphasis in original) (cleaned up) (quoting *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988)).

An appearance of impropriety will be found in cases in which the judicial process is unfair. *Jefferson-El*, 330 Md. at 107. For example, in *Jefferson-El*, a trial judge strongly criticized a jury's verdict acquitting a defendant, saying that he hoped they had a "very good reason" for their decision; expressing that he "hope[d] and pray[ed]" that they would think about what they had done; and telling them that their "verdict [was] an abomination" with "no relationship to reality [or] justice." *Id.* at 102. The same trial judge later presided over the same defendant's revocation proceedings. *Id.* at 103. The Court of Appeals concluded that a reasonable member of the community, "aware of the prohibition against a trial judge either praising or criticizing a jury's verdict, who witnessed this trial judge addressing the jury immediately after it had acquitted the [defendant], reasonably could conclude that he could not impartially preside over a subsequent trial involving that defendant." *Id.* at 109. The Court explained that "[w]hen such an inference is permissible, the administration of justice, as well as the [defendant's] right to a fair hearing is placed in jeopardy and, in fact, demands that the trial court recuse itself." *Id.* at 112.

The United States Supreme Court clarified in *Liteky v. United State*, that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion."[13] 510 U.S. 540, 555 (1994). In *Liteky*, three codefendants sought to recuse a judge based on his

[13] This case refers to 28 U.S.C. § 455(a), which requires "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

behavior toward a defendant in an earlier case who, like them, was charged in relation to protest actions at the Fort Benning Military Reservation. *Id.* at 542. They claimed that his recusal was required because the judge had "displayed 'impatience, disregard for the defense and animosity' toward Bourgeois [the defendant in the previous trial], Bourgeois' codefendants, and their beliefs." *Id.* at 542. The judge's actions at that trial included:

> stating at the outset of the trial that its purpose was to try a criminal case and not to provide a political forum; observing after Bourgeois' opening statement (which described the purpose of his protest) that the statement ought to have been directed toward the anticipated evidentiary showing; limiting defense counsel's cross-examination; questioning witnesses; periodically cautioning defense counsel to confine his questions to issues material to trial; similarly admonishing witnesses to keep answers responsive to actual questions directed to material issues; admonishing [one of the defendants] that closing argument was not a time for "making a speech" in a "political forum"; and giving [the defendant] what petitioners considered to be an excessive sentence.

Id. at 542.

Based on the above grounds, the Court held that recusal was not necessary. *Id.* at 556. The Court explained:

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.

Id. at 555. Such remarks can support such a challenge, the court qualified, if a judge's remarks derive from an extrajudicial source or show favoritism or antagonism, but

"expressions of impatience, dissatisfaction, annoyance, and even anger" on their own do not establish bias or partiality. *Id.* at 555-56.

Applying Maryland Rules 18-102.2, 18-102.11, and the foregoing principles established by our decisional law, we hold that Judge Rubin did not abuse his discretion in denying Fort Myer's two motions to recuse. As we further explain, neither Judge Rubin's error in the first trial nor his credibility determinations support a lack of impartiality or appearance of impropriety, and a reasonable member of the public, under the circumstances, would not doubt Judge Rubin's impartiality.

Concerning Judge Rubin's error in the first trial, Comment 3 to Maryland Rule 18-102.2 provides that "[w]hen applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule." In *Fort Myer I*, we held that Judge Rubin made a procedural error under Rule 2-519 in granting Banneker's motion for judgment before presenting any evidence at all in support of its claim that Fort Myer breached the contract. *Fort Myer I* at 25-27. There is no indication that this mistake was made in bad faith. Instead, a reasonable person fully aware of the facts would not think that the court's mistake of law showed a lack of impartiality.

When two opposing parties see the same event differently, as is often the case, the judge usually cannot resolve the case without deciding which party to believe. It is the very purpose of the trial judge, as fact finder, to make such credibility determinations. We accord the trial court's credibility determinations great deference, and we can find no basis here to support any allegation that Judge Rubin's credibility determinations demonstrated any deep-seated favoritism or antagonism against Fort Myer. Indeed, the record shows

that during the second trial, Judge Rubin did not credit the entirety of Banneker's witnesses' testimony. For example, Judge Rubin did not accept the entirety of Banneker's claim for damages and found portions of Banneker's testimony not credible. As Fort Myer admits, Judge Rubin's mere disbelief of Fort Myer's witnesses is not a basis for recusal. "The fact that a court rules in favor of one party over the other does not automatically mean that the judge is biased or prejudiced against the losing party." *Hill v. Hill*, 79 Md. App. 708, 716 (1989). "Further, a judge is not disqualified from hearing a case because he has expressed his opinion as to the case." *Id.* In contrast to *Jefferson-El*, Judge Rubin did not violate any prohibition or show any animosity toward Fort Myer or its witnesses.

Judge Rubin's credibility determinations and legal decisions were based on the evidence presented at trial without favor to either party. A reasonable person having all the facts would determine that Judge Rubin made a mere procedural error during the first trial that would have no impact on his ability to preside, without partiality or prejudice, over a later trial involving the same parties. His factual determinations, based on facts introduced at the trial, certainly did not demand his recusal. *Liteky*, 510 U.S. at 555-56.

Finally, we agree with Banneker that Fort Myer's second motion was not timely. In order to initiate the recusal procedure, "a party must file a timely motion." *Miller v. Kirkpatrick*, 377 Md. 335, 358 (2003). A timely motion is generally one that is "filed 'as soon as the basis for it becomes known and relevant.'" *Id.* (quoting *Surrat*, 320 Md. at 469). The incorrect statement by the court concerning our decision in the first appeal appeared in Judge Rubin's March 16, 2018 Memorandum and Order responding to Fort Myer's first Motion to Recuse. When Fort Myer's attorney raised the statement on the first

day of trial nearly a year later, he explained that he had waited to raise the issue because he "reviewed everything in preparation of this trial and saw it." He elaborated that he "could've done it back then but [he] didn't because we argued very hard in front of Your Honor" and didn't prevail, so he "didn't think it would be fruitful." Apart from the fact that, once again, Fort Myer's complaint is not grounds for recusal, we conclude that Judge Rubin did not abuse his discretion in determining that Fort Myer's second motion was untimely.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANTS.