Circuit Court for Montgomery County
Case No. 169742FL

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1732

September Term, 2022

ALYONA V. KNIZHNIK

v.

IGOR Z. KNIZHNIK

Wells, C.J.,
Arthur,
Ripken,

JJ.

Opinion by Wells, C.J.

Filed: April 11, 2024

This appeal arises from a judgment of absolute divorce entered in the Circuit Court for Montgomery County, Maryland on grounds of appellee Igor Z. Knizhnik's ("Husband") adultery. The circuit court substantially based its division of marital property and alimony decisions upon a prenuptial agreement (the "Agreement") executed by the parties several days before they wed. Both Husband and the appellant, Alyona V. Knizhnik ("Wife"), timely appealed the divorce judgment and the circuit court's finding, after an evidentiary hearing, that the Agreement was valid. Wife raises twelve issues,[1] which we have rephrased and condensed into two questions:

[1] Wife phrased her questions presented as follows:

1. Whether the parties' Prenuptial Agreement is void as against public policy and whether it should have been stricken and/or declared unenforceable in whole or in part?

2. Whether the Circuit Court erred in disregarding Mrs. Knizhnik's breach of contract claim and whether it should have heard and adjudicated that claim?

3. Whether the Circuit Court should have declared a rescission of the Prenuptial Agreement?

4. Whether Mr. Knizhnik had waived his rights under the Prenuptial Agreement and was estopped from enforcing the Prenuptial Agreement?

5. Whether the Prenuptial Agreement was unenforceable?

6. Whether Maryland courts should adopt the "second look" approach to prenuptial agreement enforceability at the time of divorce?

7. Whether the Circuit Court should have considered whether the Prenuptial Agreement was fair, reasonable, and not unconscionable at the time of

1. Whether the circuit court erred in finding that the Agreement was valid and enforceable.

2. Whether the circuit court erred in its determination and division of marital property.

Husband, as cross-appellant, has posed two questions, which we have rephrased:[2]

1. Whether the circuit court erred in awarding alimony when the parties waived alimony in the Agreement, and the agreement contained a "no modification" provision.

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enforcement in light of changed circumstances and events during the marriage?

8. Whether the Circuit Court erred in awarding all interests in the 504 Lincoln Street and 322 Lincoln Avenue properties to Mr. Knizhnik, without making any award to Mrs. Knizhnik or fully relieving her of associated liabilities?

9. Whether the Circuit Court erred in finding that Mrs. Knizhnik had invested nothing in the 504 Lincoln Street and 322 Lincoln Avenue properties?

10. Whether the Circuit Court in equating "separate property" with "non-marital property"?

11. Whether the Circuit Court erred in finding the Prenuptial Agreement valid and enforceable at the time of execution in 2005?

12. Whether it was procedurally proper for the Circuit Court to hear Mr. Knizhnik on the Prenuptial Agreement?

[2] Husband phrased his questions presented as follows:

1. Did the chancellor err in awarding alimony when the parties waived alimony in their Prenuptial Agreement, and the agreement contained a "no modification" provision pursuant to MD. [FAM. LAW] CODE ANN., section 8-103 (c)(2)?

2. Did the chancellor err in failing to award attorney's fees to Appellee, as dictated by the parties' Prenuptial Agreement by mischaracterizing the application of Rules 2-701, et seq.?

2. Whether the circuit court erred in declining to award attorney's fees to Husband pursuant to the Agreement.

We affirm the circuit court with respect to the enforceability of the Agreement. We also affirm its denial of an award of attorney's fees to Husband. However, we vacate the circuit court's division of 504 Lincoln Street and 322 Lincoln Avenue and remand for the circuit court's consideration of what portion of the parties' equity in those properties was attributable to rental income belonging in part to Wife. We also vacate the circuit court's alimony award to Wife, and remand for reconsideration consistent with Maryland Code, Family Law Article ("FL") § 11-106(b).

FACTUAL AND PROCEDURAL BACKGROUND

Wife immigrated to the United States from Ukraine in 2000. She testified that, at the time of the parties' marriage, January 31, 2005, she had an authorization to work in the U.S. that was set to expire with a deportation[3] hearing scheduled for February 1, 2005.

On or around January 26 or 27, 2005, Wife and Husband executed a Prenuptial Agreement. The text of the Agreement provided, in relevant part:

> 4. WAIVER OF SUPPORT AND PROPERTY INTERESTS ON DIVORCE In the event of separation or divorce between the parties after the parties have been married for five years, if the cause of the separation or divorce is a voluntary separation by the parties, it is hereby agreed that Igor shall provide temporary support to Olena of $500.00 per month for three years. The payment by Igor is subject to his financial ability to meet this obligation and the financial need of Olena for the same.

[3] Wife notes that the word "deprivation" in lieu of "deportation" appears throughout the transcript of the November 19 and December 29, 2020 hearings.

> With the exception only of the previous paragraph, in the event of separation or divorce between the parties for any reason other than voluntary separation after five years of marriage, it is hereby agreed that each shall maintain and support himself or herself separately and independently from the other and each party shall have no rights as against the other by way of claims for support, alimony, attorney's fees, costs or division of property. Property held jointly with right of survivorship or tenants by the entirety shall be divided between the parties in proportion to the amount invested by each party in such property. Each party releases and discharges the other, absolutely and forever, for the rest of his or her life, from any and all claims and demands for alimony, support or maintenance of any kind, either *pendente lite*, rehabilitative, or permanent. The parties agree that the foregoing provisions regarding alimony are not subject to modification by any court.
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> * * *
>
> 13. ATTORNEYS' FEES If a party, by actions, proceeding, counterclaim, defense or otherwise, seeks to set aside this Agreement, or to declare any of its terms and conditions as invalid, void, against public policy for any reason, including, but not limited to, claims of incompetency, fraud, coercion, duress, undue influence or mistake in inducement, said party shall reimburse the other party and be liable for any and all such party's reasonable expenses, costs and attorneys' fees, provided and to the extent that such action, proceeding, counterclaim or defense results in a decision, judgment, decree or order dismissing or rejecting said claims.

Both parties signed the Agreement, and it was sealed by a notary public.

On January 26, 2005, Wife met with Sherri M. Stahl, Esq., an attorney with offices in Bethesda, Maryland, for a consultation before signing the Agreement. Stahl testified that she did not remember Wife; however, she generated a file in 2005, and testified to the substance of the materials in the client file she retained from the representation. Stahl did not speak Russian and communicated with Wife exclusively in English without interpretation.

Included in Stahl's file was a letter dated January 26, 2005, and addressed to Wife, which stated in relevant parts:

> The Agreement provides that you will have an interest in only your separate property, and property that you and Igor acquire during your marriage in your joint names with right of survivorship (if the property is the type that can be titled) or if it is property that is not ordinarily titled (like furniture) and is acquired for the use of both of you then it will be treated as joint property as well. . . .
>
> In the event of your separation or divorce . . . if the separation or divorce is caused by voluntary separation, then Igor will pay you $500 a month for three (3) years . . . Also, these payments are only made if the separation or divorce is voluntary. If Igor abandons you or commits adultery no payment is required under the Agreement. I advised you that this is not right and should be corrected. You informed me that you were satisfied with the $500 payment, that you were not concerned about divorce or separation and did not want to request that this provision be changed. . . .
>
> You represent in the Agreement that you have been represented by me, that you fully understand the Agreement and have been advised of your rights. . . .
>
> I have advised you that the Agreement prepared by Igor's attorney is one sided and provides you with no protection in the event at Igor's death and little protection in the event of a divorce. . . .
>
> The support obligation of $500 a month for three (3) years, is only for a voluntary separation and not if Igor abandons you or commits adultery. I advised you of the unfairness of this and encourage you to require this to be changed. You should also consider whether the $500 a month for three (3) years will be sufficient. . . .
>
> I have encouraged you to permit me to negotiate with Igor's attorney for a better Agreement. You advised me that you understood what I was explaining to you but that you intend to sign the Agreement as is. You advised me that you have lived with Igor for two (2) years, that you trust him and do not want to change the Agreement. I advised you that in Maryland you could do a Post Nuptial Agreement or amend the Prenuptial Agreement after you are married. Any amendment or revocation of the Agreement must be in writing and signed in front of a witness and notary public. I encouraged

> you to seriously consider amending the Agreement as it provides you no protection. I also encouraged you to do this in the event you and Igor decide to have children. . . .
>
> I understand from our meeting that despite my recommendations you intend to sign the Agreement as presented to you.

Stahl later testified that, in total, she spent 3.4 hours on her representation of Wife. Stahl did not recall reviewing any tax information, any discussion regarding Wife's immigration circumstances, who paid Wife's attorney's fees, or whether Wife indicated if she could understand the Agreement. On the day of Wife's meeting with Stahl (or the next day), the parties executed the Agreement. They married on January 31, 2005. Two children were born to the marriage, both on December 19, 2006.[4]

In or around 2020, the parties' marriage broke down. Wife testified at the divorce hearing that Husband admitted committing adultery to her upon "return[ing] from Ukraine with a woman" in May 2020. She also testified that Husband committed several acts of domestic abuse, including an incident in which he pushed her down a flight of stairs in September 2018, beating her over the head in September 2019, and attempted rape in January 2020. An additional incident, in which Husband broke down the door to the parties' bedroom and scratched Wife, occurred on August 20, 2020, and resulted in the granting of a protective order with a finding of abuse by Husband. Wife filed her initial Complaint for Divorce on July 20, 2020, and an Amended Complaint on August 1, 2022,

[4] Custody of the minor children was established pursuant to a Custody Order dated June 2, 2021; issues of custody and support of the minor children were not at issue at the August 31, 2022 divorce hearing, nor are they disputed in this appeal.

seeking, among other things, absolute divorce on grounds of constructive desertion, cruelty of treatment and excessively vicious conduct, or adultery. Her Amended Complaint also included a claim styled "BREACH OF CONTRACT – PRENUPTIAL AGREEMENT," and she also sought use and possession of the marital home, rehabilitative and permanent alimony and support, custody of the minor children, child support, a monetary award, and costs and attorney's fees.

The circuit court heard the parties' arguments and supporting testimony regarding validity of the Agreement in a two-day hearing on November 19 and December 29, 2020. Wife testified that, at the time of the parties' marriage, she did not understand anything in English, stating "I had just two words, yes and no." She denied that she understood the substance or contents of the Agreement and that she had merely sat through the hour that she met with Stahl "looking at [her] watch." She also denied having received Stahl's January 26, 2005 letter, stating that she had merely received "a package of documents" from Husband around that time, and that she was unsure whether those documents included Stahl's letter. Tatyana Pidgurskaya, who taught the parties' children at Shalom Russian School for approximately eight to nine years, and Tatyana Mullin, a friend of Wife's since 2000, also testified to Wife's limited English language abilities at the time she executed the Agreement.

The circuit court found Wife's explanation that she could not understand Stahl's advice not credible, and therefore found that she had competent and independent counsel representing her in deciding whether to sign the Agreement. It also found no evidence of

fraud or Husband's inadequate disclosure of assets that might suggest procedural overreaching and found that Wife was not subject to Husband's duress or undue influence. However, the court held that, while the provision waiving alimony did not violate public policy, it could not be read in such a way that one party could "frustrate that payment by committing wrongful acts, whether it be acts of cruelty or acts of adultery so that he could alleviate his requirements under the agreement."

The terms of the Agreement controlled the remaining disputed issues at the August 31, 2022 divorce hearing. There, the circuit court determined the marital status of, and distributed, various property. Of particular importance to this appeal were parcels of real property located at 504 Lincoln Street and 322 Lincoln Avenue, both in Rockville, Maryland. The circuit court ruled that the terms of the Agreement controlled division of interest in the properties according to the "amount invested" by each party in them. The source of "amounts invested" to purchase the parties' equity in the two properties was a matter of factual dispute. Husband presented evidence of his sole contribution of funds to the purchase of the property; Wife countered with evidence of her contribution to the upkeep of the property, suggesting that the circuit court should construe such as an investment in the property. The circuit court found that "the percentage of investment by [Husband] was 100 percent and was for monies earned by him"; accordingly, the court awarded Husband 100 percent of the marital interest in the properties.

The circuit court issued its Judgment of Absolute Divorce on November 29, 2022, awarding absolute divorce on grounds of adultery. It also denied Husband's request for

attorney's fees because he failed to plead for such relief consistent with Maryland Rule 2-705(b). Both parties timely filed notices of appeal.

We will supply additional facts as necessary to support our analysis.

DISCUSSION

I. The Circuit Court Did Not Err in Enforcing the Prenuptial Agreement.

Wife raises numerous points of error regarding the circuit court's determination that the Agreement was valid, which we consider in turn.

A. The Circuit Court Did Not Erroneously Find That the Prenuptial Agreement Was Not Void as Against Public Policy.

Wife contends that the agreement was void as against public policy because it grants an unfairly one-sided award to the party found at marital fault. She argued in the circuit court that enforcement of the Agreement, under the circumstances of a case in which she alleged adultery and domestic violence, would "impose[ ] a penalty on someone for claiming abuse," and that the Agreement was thus void as a matter of public policy.

First, it is true that the public policy of Maryland frowns upon adultery. *Lloyd v. Niceta*, 485 Md. 422, 439 (2023) (cleaned up). Maryland law permits fault divorce on grounds of adultery, and a finding of adultery may affect certain aspects of the divorce decree to the adulterous party's detriment; for instance, FL § 8-205(b)(4) permits that the monetary award may be adjusted to reflect to "the extent [adultery] contributed to the breakdown of a marriage." *Id.* It is also true that a domestic violence protective order was entered against Husband on August 27, 2020—including, Wife's counsel represented to the circuit court, a finding of abuse—and that Wife presented evidence to the circuit court

during the divorce proceeding of Husband's acts of domestic violence or abuse. Again, that type of marital fault may be relevant to property division and an award of alimony.

However, we are aware of no authority, and Wife points to none, holding that marital fault forecloses enforcement of a prenuptial agreement altogether. Wife's argument that a prenuptial agreement is rendered invalid on grounds of public policy upon the grant of a fault divorce would be a novelty in the law of Maryland. On the contrary, our Supreme Court has recognized that parties may provide for the contingency of marital fault in marital agreements, and that such provisions do not violate public policy. *Id.* That holding is plainly incongruous with Wife's argument that the circuit court should have struck the Agreement altogether due to allegations of marital fault. The circuit court therefore did not err on such grounds.

Second, Wife notes that the circuit court found that enforcement of provisions relating to alimony would have led to an absurd result, and reformed, based upon public policy considerations, the provision of the Agreement limiting alimony to $500.00 per month for three years only in case of divorce on grounds of voluntary separation. The circuit court stated in its opinion that conditioning a clause of the prenuptial agreement on the character of the divorce offended public policy, citing a Supreme Court of South Carolina case captioned *Towles v. Towles*, 256 S.C. 307, 182 S.E.2d 53 (1971). We note that this authority does not accurately reflect the public policy of Maryland, as discussed above, and has since been explicitly overruled in South Carolina. *Hardee v. Hardee*, 355 S.C. 382, 388 n.3 (2003) ("we take this opportunity to overrule *Towles* in light of its

outdated views concerning women"). To the extent that the circuit court reformed the Agreement on grounds of that public policy, it committed error; it would have only compounded that error by striking the *entire* Agreement on those grounds.

However, as we discuss at length below, the circuit court erred in interpretating the Agreement to limit alimony to $500.00 per month for three years due to a misinterpretation of the plain language of the Agreement. Because we vacate the judgment of the court with respect to that issue in any case, we need not consider further the court's error of law regarding public policy.

We therefore find that the circuit court did not err by declining to invalidate the Agreement on grounds of public policy and affirm as to this issue.

B. The Circuit Court Did Not Err by Failing to Consider Wife's Breach of Contract Claim Because Wife Waived the Issue by Failing to Raise It at the Evidentiary Hearing on the Agreement's Validity.

Wife argues that the circuit court erred in failing to consider her claim for breach of contract, pleaded as Count IV in her Amended Complaint, and in declaring at the divorce hearing that the issue was barred by collateral estoppel or *res judicata*. When Wife raised breach of contract at trial, her counsel presented it essentially as a method of reopening the issue of whether the Agreement should be enforced:

> And I note also again for the record that the issue of adultery as well so the issue of cruelty is relevant because we do not waive our position that [Husband] has materially breached the agreement to a point where . . . [t]he agreement is no longer enforceable.

The court declined to consider the issue:

> So I have indicated that if someone raised a defense to the enforceability of a prenup that you have to raise all grounds on previous occasions. The mere fact that you have another theory upon which the prenup is not valid, in my opinion, is waived. . . . But my opinion is that you had a full and fair opportunity to argue all grounds for which you believed that the prenup was not enforceable including breach. To now raise breach after having litigated for two days in front of Judge Lease, I think it's a little late. And I think that it is waived and that it is collateral estoppel or res judicata but I think it's more collateral estoppel. And therefore the law of the case is that this prenup is enforceable and that a breach is not relevant because it should have been argued. And my understanding was in fact argued by Judge Lease did not decide it on those grounds but if it was argued even though he did not decide it on those grounds it was your obligation to raise it in front of Judge Lease and ask him to decide it.
>
> That wasn't done and so therefore I'm not going to entertain a contract of argument with regards to breach and the enforceability of the prenup.

We agree that the trial court was not obligated to reconsider Wife's argument that the Agreement was invalid at that juncture.[5] The fact that Wife styled her plea for relief as a "breach of contract action" did not entitle her to a second hearing at trial on an issue—the validity of the agreement—that had already been fully adjudicated. We note that the relief sought in her initial complaint was identical with that which was available in a divorce action, and, while Wife sought a monetary award in her prayer for relief, she neither pleaded nor argued any contractual damages cognizable under Maryland's common law of

[5] The trial court was incorrect that "collateral estoppel or res judicata" barred consideration of the claim at the time of trial. These doctrines only apply to final judgments. *See, e.g.*, *Powell v. Breslin*, 430 Md. 52, 64 (2013) (*res judicata* requires final judgment on the merits in previous action); *Grady Mgmt., Inc. v. Epps*, 218 Md. App. 712, 737 (2014) (collateral estoppel requires final judgment on the merits in prior adjudication). However, since the circuit court did not exclusively rely upon the application of these doctrines, we do not find any error of law dispositive. We rather consider only whether the circuit court abused its discretion by declining to reconsider its ruling that the Agreement was valid at trial and, as discussed below, conclude that it did not.

contract. However, assuming for the sake of argument that Wife genuinely intended to litigate a breach of contract claim, the circuit court was within its discretion to require any issues of the Agreement's validity to be raised at the evidentiary hearing. It is clear to us—as it was to the circuit court—that her attempt to pursue a "breach of contract" action at the divorce hearing was simply a different stylization of her earlier attack on the Agreement's validity. There was no error in the circuit court's refusal to reopen the issue.

As such, we do not credit Wife's argument that she was denied adequate consideration of her breach of contract theory. We affirm as to this issue.

C. Wife Does Not Point to Specific Error in the Circuit Court's Ruling that the Agreement Was Valid.

Husband suggests several errors in the circuit court's holding that the Agreement was valid. However, we perceive Wife's arguments before us as essentially reiterating the same arguments that she advanced before the circuit court: (1) that Husband failed to adequately plead that the Agreement was valid, (2) that she was unable to understand the agreement, (3) that it was the product of duress or undue influence, and (4) that Husband obtained her assent through fraud. The crux of Wife's argument before the circuit court was that the Agreement was both procedurally and substantively unconscionable at the time it was executed. In his closing arguments at the December 29, 2020 hearing, Wife's counsel stated, "the point I'm making initially . . . is, I think, on a substantive unconscionability level. I think it's very clear that the agreement is substantively unconscionable."

We agree with Husband that the circuit court fully considered all the arguments Wife advanced. Indeed, the court provided extensive and reasoned discussion regarding the legal authority which Wife cited in her opening brief before this Court. Wife essentially seeks to relitigate the Agreement's validity but does not state *why* the circuit court's judgment constituted error. In short, we construe her argument as merely seeking another "bite at the apple" for a matter which has been fully litigated between the parties. The burden is upon Wife to establish the circuit court's error with particularity on appeal. *See Thomas v. City of Annapolis*, 113 Md. App. 440, 450 (1997) ("On appeal, it is the burden of the appellant to show judicial error." (citing *Bradley v. Hazard Technology Co.*, 340 Md. 202 (1995)). Without a specific claim of error, we will not disturb the circuit court's weighing of the evidence before it and decline to reopen the issue.

For the same reason, we do not credit Wife's argument that the circuit court should have ordered recission of the Agreement. We see nothing in the record to suggest that Wife sought the remedy of contractual rescission below. What is more, it would have been procedurally improper for the circuit court to consider the issue. In her Amended Complaint for Divorce, Wife suggested that "the Court should declare the Prenuptial Agreement unenforceable or rescinded," but did not seek the remedy of recission in her prayer for relief. Nor did she ever raise the issue before the circuit court. She extensively argued that the Agreement should be rendered *invalid*, but that is not synonymous with the remedy of contractual *recission*. We "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131.

If Wife wished to seek that remedy, she had a full and fair opportunity to litigate the validity of the Agreement before the circuit court on November 19 and December 29, 2020. We therefore decline to consider this issue further.

We therefore affirm the circuit court with respect to these issues.

D. Wife Waived her Arguments that Waiver and Estoppel Rendered the Prenuptial Agreement Invalid by Failing to Raise Those Arguments Before the Circuit Court.

Wife advances several additional claims of error in the circuit court's holding that the Agreement was valid. However, we find nothing in that record to suggest that Wife presented any argument or evidence to the circuit court in support her waiver or estoppel theories. Again, we will not consider an issue the appellant waived by failing to raise it below. Md. Rule 8-131. Because Wife failed to argue these issues before the court below, we accordingly decline to consider them. We affirm the circuit court as to these issues.

E. The Circuit Court Was Not Required to Adopt a "Second Look" Approach to Interpreting Prenuptial Agreements.

Wife draws our attention to the law of other states which have adopted a "second look" approach to the validity of prenuptial agreements. *See DeMatteo v. DeMatteo*, 436 Mass. 18 (2002); *Brooks v. Brooks*, 733 P.2d 1044 (Alaska 1987); *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990); *Rinvelt v. Rinvelt*, 475 N.W.2d 478, 482 (Mich. Ct. App. 1991); *Hardee v. Hardee*, 558 S.E.2d 264 (S.C. App. 2001). Under such an approach, the trial court inquires whether "the agreement has the same vitality at the time of the divorce that the parties intended at the time of its execution." *DeMatteo*, 436 Mass. at 37 (citing *MacFarlane v. Rich*, 132 N.H. 608, 616–17 (1989)). Wife urges us to adopt this doctrine,

and contends that, had the circuit court applied it, it would have found the Agreement unconscionable at the time of the divorce.

However, insofar as we may consider adopting this novel approach, we will decline to do so. Our Supreme Court has set forth its standard for unconscionability, as we apply it to prenuptial agreements:

> If a contract or term thereof is unconscionable *at the time the contract is made* a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

Williams v. Williams, 306 Md. 332, 338 (1986) (citing Restatement (Second) of Contracts, § 208) (emphasis supplied).

Binding precedent requires that we look to whether the agreement was unconscionable at the time it was made, not at the time of divorce. We are therefore without authority to adopt the persuasive authority Wife offered, as the circuit court was. We affirm as to this issue.

F. Wife Waived Her Procedural Objection to the Pre-Trial Hearing on the Prenuptial Agreement's Validity.

Wife also argues that the circuit court erred by "ramm[ing] through" an evidentiary hearing with inadequate time to prepare. There is no indication in the record that Wife objected to the form or timing of the hearing. On the contrary, at the outset of the hearing, Wife's counsel simply stated, "I think [Husband's counsel] has requested a validity hearing saying, well, there's an agreement that we need to establish the validity going on of this agreement that resolves certain pending issues." Husband's counsel agreed, noting that

they had jointly requested in a hearing before the Magistrate that an evidentiary hearing be set in as to the validity of the Agreement.

In addition, we conclude that Wife waived any argument that the Husband failed to adequately plead that the Agreement was valid. At the conclusion of the hearing, the court noted that there had not been a motion filed. The presiding judge said, "I'll just note that it was requested in the counterclaim and grant partial relief with respect to that would probably be the best way to do it, subject to the Court's—I might say subject to the Court's order and interpretation of the agreement." Wife did not object, nor did she file any objection in writing. In any case, we find nothing in the record suggesting that Wife lacked notice that Husband intended to place the validity of the Agreement at issue, nor that, insofar as she claimed to lack notice, that she properly raised that issue before the circuit court.

As such, Wife waived the issue of any procedural error by the circuit court in reviewing the validity of the Agreement. We affirm as to this issue.

II. The Circuit Court Erred in its Division of Marital Property.

A. The Circuit Court Failed to Credit Wife's Share of Rental Income from Jointly Titled Properties in Dividing the Parties' Interest in 504 Lincoln Street and 322 Lincoln Street.

Wife objects to the circuit court's granting the marital interest in two jointly titled parcels of real property, located at 504 Lincoln Street, Rockville, Maryland, and 322 Lincoln Street, Rockville, Maryland, solely to Husband. She advances several claims of error. *First*, Wife argues that the circuit court's property division was erroneous because it

was based upon a provision of the Agreement, Section 4, which was void as against public policy. *Second*, Wife argues that the properties were primarily rental properties, the mortgages of which were funded by rental income; thus, since this was not Husband's sole investment into the property, she contends that the circuit court should have found it joint property subject to equitable division. *Third*, Wife argues that the circuit court erred in failing to consider that she was an obligor on mortgages for the subject properties, and that this burden of debt was tantamount to an "investment" in the joint property. *Fourth*, Wife claims that the circuit court was without authority to direct her to sign over her interest in the subject properties. *Fifth*, Wife contends that income earned during the marriage was marital and joint property, and that, when invested into the subject properties, it rendered that interest in the properties also marital in character. *Sixth*, and finally, Wife argues that the circuit court erred in failing to consider her contributions to the marriage as a wife and homemaker, which she argues should have resulted in a greater share of marital property.

Wife's claims of error stem from the same wellspring: Section 4 of the Agreement. It states, in relevant part, "Property held jointly with right of survivorship or tenants by the entirety shall be divided between the parties in proportion to the amount invested by each party in such property." The court held that this provision was controlling with respect to its award of interest in the subject properties; because it found that Husband had contributed the entirety of the amounts invested in the properties, it granted them solely to Husband.

We now consider whether the circuit court erred in its award. *First*, as to Wife's argument that Section 4 was altogether void as against public policy, we considered that issue in Section IA of this opinion and concluded that Section 4 of the Agreement was not void. We therefore affirm the circuit court as to that claim of error.

Second, we perceive the crux of Wife's other claims of error to be that the circuit court erred in interpreting what qualifies as an "amount invested" in the subject properties. We review the circuit court's interpretation of contractual terms *de novo*. *Grant v. Kahn*, 198 Md. App. 421, 427–28 (2011) (quotation omitted). However, we substantially defer to the circuit court in its role as factfinder—here, regarding what amounts the parties in fact invested in the subject properties—absent indication of clear error. *See Scriber v. State*, 236 Md. App. 332, 345 (2018); *see also Lemley v. Lemley*, 109 Md. App. 620, 628 (1996) ("A finding of a trial court is not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion.").

Wife argued before the circuit court, and maintains on this appeal, that various sources of funds should be construed as "amounts invested" by her in the properties. She thus calls upon us to review the circuit court's interpretation of that contractual term, and "the terms of an agreement are construed consistent with their usual and ordinary meaning, unless it is apparent that the parties ascribed a special or technical meaning to the words." *Phoenix Servs. Ltd. P'ship v. Johns Hopkins Hosp.*, 167 Md. App. 327, 392 (2006) (citing *Fister v. Allstate Life Ins. Co.*, 366 Md. 201, 210 (2001)).

The circuit court considered, and rejected, Wife's arguments that rental income, the home loan for which Wife was an obligor, funds from jointly held accounts, and her services to the marriage constituted such contributions:

> The Court credits the testimony of the defendant that the monies used to purchase the properties, although they briefly passed through the joint account were his monies that he invested in these joint properties. The evidence has failed to demonstrate that the plaintiff invested in any of these properties jointly held. No evidence regarding any income or premarital monies.
>
> In support of this, furthermore, with regards to 504 Lincoln Avenue, and 322 Lincoln Street, which are titled jointly, the Court makes the same fine [*sic*] findings. The Court would note that Defendant's 5, 6, and 7 show the source of the funds from this account.
>
> The Court does not find that the plaintiff being obligated on the loan of a home in any way changes the prenuptial plain language. If he had died, she would have benefited from the title of the property, nothing required her to sign the note.
>
> Additionally, the Court is not persuaded that the fact that this was a rental property in some way provides that she invested into the property, and as such should be given a percentage.
>
> The Court also notes that repairs to any of the properties do not denote an increase in the value of the home, and therefore would not be an investment in the property. So, any payments from the joint accounts for repairs are not investments.
>
> The defendant has demonstrated that the percentage of investment by him was 100 percent and was for monies earned by him and invested in these two properties. Therefore, according to the prenuptial agreement, which requires division by investment, the Court determines the property to be the defendant's, these properties to be the defendant's property.

We cannot say that the circuit court erred in finding that Wife's mortgage obligation, repairs she conducted on the properties, or funds used to pay the mortgages passed through

the parties' joint bank account did not qualify as an "amount invested." Wife does not dispute that but argues that the circuit court should have inferred that her other proposed sources were "amounts invested." The circuit court's interpretation of "amounts invested" was entirely consistent with the usual and ordinary meaning of those words: an "amount" of money spent by one of the parties to purchase the interest in property. It was no error for the circuit court to decline to assign a special and more expansive definition of the term where it found no evidence to suggest that the parties intended such a definition at the time that they executed the Agreement. We do not doubt that Wife's contributions to maintaining the properties were valuable, but that does not render them an "amount." Wife presented no evidence that repairs were an "amount invested" in the contemplation of the parties at the time the executed the agreement. We therefore cannot say that the circuit court clearly erred in concluding that they were excluded from the definition of that term.

We also agree that any burden of debt that the parties bore with respect to the properties would be irrelevant to determining the amounts that they contributed to purchasing those properties; the marital property to be divided was the parties' equity in the properties, not the purchase money furnished by a lending institution. As we discuss below, the source of funds to make payments corresponding to equity in the property was relevant to determining the amounts invested, but the fact that Wife assumed debt burden did not itself transform the mortgage payments into an amount invested by her. Wife points to no evidence that might convince us that the circuit court erred in concluding that the

joint burden of debt independently transformed the character of the amounts invested in the property.

Wife notes that the lenders to whom she was obligated on the mortgage notes were not parties to the case and therefore could not be called upon to release her from her debt obligation. Specifically, the Judgment of Absolute Divorce provided as to the property located at 504 Lincoln Street, "The deed to Defendant shall set forth Defendant's express assumption of the mortgage which will release Plaintiff for any responsibility of any mortgage or lien on the property involving above-referenced lender and shall be signed and acknowledged by Defendant prior to recording," and, as to 322 Lincoln Avenue, "The Deed to Defendant shall set forth Defendant's express assumption of the above-referenced lender and shall be signed and acknowledged by Defendant prior to recording."

We note that Wife remains obligated on any debt associated with the properties, and the language of the Judgment of Absolute Divorce is not sufficient to shield Wife from a lender's efforts to collect debt from her despite no longer having any interest in the properties. However, because we determine below that she must have had *some* amount invested in the properties, we need not consider this issue further at this time, though we note for the circuit court's consideration upon remand that the debt obligation associated with the subject properties must be reconsidered along with the parties' relative share in the marital interest. We conclude that on remand, should Wife's interest in the properties by transferred to Husband, the circuit court must require Husband to refinance the mortgages to completely remove Wife from any liability should he default on the notes.

Wife also argues that the properties generated rental income that should be deemed marital property, rendering a portion of the parties' equity in them outside the scope of the Agreement's property division scheme. The court held that there was "[n]o evidence regarding any income" that Wife contributed to the properties, and points to evidence not in the record extract before us supporting its finding that Husband contributed all the amounts invested in the property.

It is clear from the undisputed facts in the record before the circuit court that at least *some* portion of the parties' equity in the properties were funded by income properly attributable to Wife. Husband stated in his testimony that 504 Lincoln Street generated $1,800 in monthly rental income at the time of the divorce hearing, and 322 Lincoln Avenue generated $2,100. Where property is jointly titled and owned as a joint tenancy by spouses—as was the case here—each of the two spouses is entitled to an equal share of income derived from the property. *Colburn v. Colburn*, 262 Md. 333, 337, 278 A.2d 1, 3 (1971) ("The rule that a wife is entitled to one-half of the income from property held by the entireties is firmly established.") It was also undisputed that at least some mortgage payments were made from Husband's personal bank account and the parties' joint account. Thus, it was undisputed in the record before the circuit court that at least *some* "amounts invested" to purchase the marital interest in the properties came from accounts which commingled Husband's income and rental income which was marital in character.

We conclude from the record that some portion of the parties' interest in the properties was attributable to Wife's income. It is not clear what portion of the property

corresponds to that amount, but there was no dispute that it was more than zero. We are convinced that no rational factfinder would have believed that "100%" of the interest in the properties was purchased by Husband's income alone, as the circuit court did here.

Because the record is insufficient for us to determine the correct amount, we remand to the circuit court for its reconsideration how the properties are properly to be divided. That analysis must, of course, be consistent with the controlling language in the Agreement; that is, the parties' interest should be divided "in proportion to the amount invested by each party" in the properties. We therefore vacate the circuit court's judgment to the extent that it ordered conveyance of Wife's interest to Husband.

B. Wife Waived Her Argument That "Separate" Property Differs from "Non-Marital" Property.

Wife argues that the circuit court erred by defining "separate" property, as it is used in the agreement, as coextensive with "non-marital" property for the purpose of Maryland law. However, there is nothing in the record before us from which we could conclude that Wife or her counsel suggested, at any point in the divorce proceeding, that Wife believed the "separate" property contemplated by the Agreement to be synonymous with "non-marital."

As such, we find no argument by Wife that, at the time of the Agreement's execution, the word "separate" bore some meaning that would have distinguished it from "non-marital." Having failed to argue the issue before the circuit court, Wife waived it for appeal.

III. The Circuit Court Erred in Its Alimony Award by Failing to Consider Mandatory Factors Pursuant to FL § 11-106(b).

Husband argues that the circuit court erred in its alimony award. He contends that, under the plain, unambiguous language of the Agreement, both parties waived any claim to alimony and agreed that no court could modify that provision. Therefore, the court erred in declining to enforce the no-alimony clause. Wife responds that the circuit court did not go far enough and, with the alimony waiver clause struck from the Agreement, should have proceeded to consider an award of alimony without reference to the Agreement at all.

We review the circuit court's interpretation of contractual provisions, including whether a contractual provision is ambiguous, *de novo*. *W. F. Gebhardt & Co. v. Am. Eur. Ins. Co.*, 250 Md. App. 652, 666 (2021). When we are called upon to interpret the language of a contract, the "contract's unambiguous language will not give way to what the parties thought the contract meant or intended it to mean at the time of execution; rather, 'if a written contract is susceptible of a clear, unambiguous and definite understanding . . . its construction is for the court to determine.'" *Sy-Lene of Washington, Inc. v. Starwood Urb. Retail II, LLC*, 376 Md. 157, 167 (2003) (quoting *Langston v. Langston*, 366 Md. 490, 507 (2001) (cleaned up). If the contractual language is unambiguous, we "will give effect to its plain, ordinary, and usual meaning, taking into account the context in which it is used." *Id.* However, the court's interpretation "should not reach an absurd or unreasonable result." *Springhill Lake Invs. Ltd. P'ship v. Prince George's Cnty.*, 114 Md. App. 420, 434 (1997).

The circuit court struck the alimony waiver clause as it would have allowed for an absurd result under which Husband could have unilaterally excused himself from his

obligation to perform. The no-alimony provision was conditioned upon the character of the divorce: if the divorce were for any reason other than a voluntary separation, Husband would not be required to pay any alimony. However, Husband's infidelity was the reason that the court granted a fault divorce. The court found, essentially, that allowing the no-alimony provision to stand would have permitted Husband to procure the circumstances that excused him from paying alimony, stating:

> But to me, this would—a reasonable interpretation of this provision would be that in the case of plaintiff is that if plaintiff was the cause for default divorce allegations. That is if she had committed or allegedly committed adultery or other fault terms, then she would not be entitled to that payment.
>
> However, the defendant can't frustrate that payment by committing wrongful acts, whether it be acts of cruelty or acts of adultery so that he could alleviate his requirements under the agreement. I think that would be an unreasonable interpretation of the agreement.
>
> The Court believes that it would—should be construed in a way that would prevent such an absurd result and potentially requiring that that provision be stricken, in the sense of the—that any reason for divorce that would entitle the plaintiff to the payment of the spousal support as provided in the agreement.

The court restated this finding in its November 14, 2022 oral opinion following the divorce hearing. At that point, the circuit court also struck language conditioning an award of $500.00 per month on the character of divorce being by voluntary separation on grounds of public policy, as discussed above.

In *Middlebrook Tech, LLC v. Moore*, we considered the effect of a conditional provision in a lease agreement, and we provided discussion instructive for this matter. *See generally* 157 Md. App. 40 (2004). In *Middlebrook Tech*, the plaintiff landlord sought to

recover rent from defendant Moore under a guaranty he executed on behalf of tenant Optim Electronics Corporation ("Optim"). *Id.* at 46–52. Moore offered as a defense that a clause located at Section 16, which allegedly provided that the lease would not renew if Optim "mad[e] an assignment of all or a substantial part of its property for the benefit of its creditors," had already caused the lease to terminate. *Id.* at 52. We were unconvinced that the lease allowed Moore and Optim to unilaterally trigger a condition excusing them from performance under the lease, stating:

> Only Moore, whose Guaranty covered the performance of Optim's obligations under the Lease, and who therefore was no more the intended beneficiary of section 16 than was Optim, sought to invoke section 16, and only in an effort to gain advantage by avoiding the promises he made in the Guaranty, by in effect saying "Gotcha—there was no Lease to guaranty!" We will not interpret section 16 of the Lease so as to produce such an obviously unfair, nonsensical, and unintended result.

Id. at 71. Crucially, we found that the clause under which Moore sought to be excused from performance was not for his or Optim's benefit at all, but for *Middlebrook Tech's* protection in the event of Optim's insolvency. *Id.* We therefore held that it would be absurd to adopt a reading of the lease under which Moore could trigger a condition exclusively for another party's benefit. *Id.*; *see also Cohen v. Afro–American Realty Co.*, 58 Misc. 199, 108 N.Y.S. 998 (1908) (because conditional limitation was wholly for benefit of landlord, tenant could not take advantage of it unless landlord signified intention to avail himself of the conditional limitation).

The circuit court reached a similar conclusion here. The circuit court, having considered both the plain language of the agreement and extensive evidence of what the

parties intended at the time of the Agreement's execution, found that an interpretation under which Husband could unilaterally excuse himself from paying alimony was unreasonable. Crucially, it interpreted the conditional language to protect the innocent party in a fault divorce: that is, if Husband were to seek alimony after committing adultery, it would have rendered alimony unavailable to *him*. We agree with the circuit court in its conclusion. The circuit court was entitled to find that the conditional alimony waiver provision was for the innocent party's benefit in case of the other's marital fault, and it would have been absurd to allow Husband to invoke the conditional language to unilaterally excuse himself from paying alimony.

We cannot conclude, as Husband urges, that striking the conditional waiver provision was fatally incongruous with awarding Husband property on the terms outlined by the Agreement. The division of property was governed under the Agreement with a clause providing that "[p]roperty held jointly with right of survivorship or tenants by the entirety shall be divided between the parties in proportion to the amount invested by each party in such property." Husband argues that, because that phrasing is situated in the paragraph with the conditional waiver provision, the circuit court produced an incongruous result by striking the waiver provision and not the property division clause. But even if Husband were correct, the fact that the circuit court erred in severing the property division clause would be irrelevant to our determination of whether it erred in striking the alimony waiver clause. That is an issue merely of severability of the property division clause, which neither party has challenged in this appeal. We therefore are not convinced that allowing

another, arguably related clause to stand somehow weighs against striking the alimony waiver clause.

We have also considered the effect of the sentence in Section 4 stating, "Each party releases and discharges the other, absolutely and forever, for the rest of his or her life, from any and all claims and demands for alimony, support or maintenance of any kind, either *pendente lite*, rehabilitative, or permanent." Husband characterizes this as "clear and unambiguous" indication that alimony was waived if the grounds for divorce were anything other than a voluntary separation. However, read in the context of the paragraph in which it appears, this clause is ambiguous: it could be read to waive alimony in *all* circumstances, or to be read in concert with the conditional waiver of alimony clause in the first sentence of the paragraph in which it appears—in which case this language merely states that a waiver that would be effective only where that condition was properly triggered.

We must consider that sentence with reference to the circuit court's fact-finding with respect to the parties' intentions at the time the Agreement was executed. In declining to enforce the conditional no-alimony clause found in the same paragraph, the circuit court found, essentially, that there was no meeting of the minds regarding what alimony was to be awarded under the circumstances of this case; that is, where the party seeking to bar an alimony award was also responsible for creating the circumstances leading to a breakdown of the marital relationship. We think, then, that the second waiver of alimony clause could not be severed from the conditional clause struck by the circuit court without leading to an absurd result. We do not credit that the parties contemplated both a conditional waiver of

alimony *and* a blanket waiver of alimony in all circumstances. It is well-established that, where a contractual provision is ambiguous—that is, capable of multiple permissible interpretation—we will seek to avoid reading it in such a way as to arrive at an absurd result. *See Born v. Hammond*, 218 Md. 184, 188 (1958) ("if a contract was susceptible of two constructions, one of which would produce an absurd result and the other of which would carry out the purpose of the agreement, the latter construction should be adopted" (citing *Gibbs v. Meredith*, 187 Md. 566 (1947))). We therefore do not adopt a reading of this provision such that alimony would be waived even despite the unenforceability of the conditional waiver provision. Such a result—that the parties adopted provisions waiving alimony in both *some* circumstances and in *all* circumstances—would be absurd.

Finally, Husband argues that the Agreement barred the circuit court from modifying the alimony waiver. It is true that a court may not modify alimony where the parties agree to "(1) an express waiver of alimony or spousal support; or (2) a provision that specifically states that the provisions with respect to alimony or spousal support are not subject to any court modification." Md. Code Ann., Fam. Law § 8-103 (West). We note, however, that we construe the word "modification" narrowly. For instance, in *Moore v. Jacobsen*, 373 Md. 185 (2003), the then-Court of Appeals (now the Supreme Court of Maryland) held that a clause preventing "modification" did not prevent a court from *terminating* alimony.

Here, the circuit court did not purport to modify alimony; it interpreted the Agreement to find that the contractual condition that could waive alimony never came into effect. The court did not change the alimony award to reflect other than what the parties

contemplated at the time of executing the Agreement, and we think that such would have been at the heart of a "modification" of alimony. Further, the court did not purport to reform the contract in such a way as to reflect the parties' actual agreement; rather, it simply determined what their meeting of the minds actually *was* with respect to an ambiguous provision. That is an act of contract *interpretation*, not *modification*. The court thus simply gave legal effect to the Agreement consistent with Maryland's body of contract law, which did not include giving effect to the alimony waiver clause, and therefore did not run afoul of the clause barring court modification of alimony.

We therefore find no error in the circuit court's refusal to enforce the alimony waiver provision. However, we agree with Wife that the circuit court erred in its ultimate award. As Wife noted, she "was entitled to alimony/spousal support of $500.00 per month **but only if** the divorce was based on voluntary separation and not on any other ground." (Emphasis in original). Having struck the waiver provision, the circuit court was correct to proceed to consider the provision, at page 5 of the Agreement, which reads:

> In the event of a separation or divorce between the parties after the parties have been married for five years, *if the cause of the separation or divorce is a voluntary separation by the parties*, it is hereby agreed that Igor shall provide temporary support to Olana of $500.00 per month for three years. (Emphasis supplied.)

The no-alimony provision, on the subsequent page, reads that it applies in any divorce "[w]ith the exception only of the previous paragraph, in the event of a separation or divorce between the parties for any reason other than a voluntary separation after five years of marriage[.]" The circuit court appears to have read this to render the $500.00 monthly

payment essentially as a default; that is, if the no-alimony provision was struck, the parties had agreed to no more than $500.00 per month. But that is not what the Agreement provides. It states that the parties agreed to $500.00 per month only "*if the cause of the separation or divorce is a voluntary separation by the parties*." With the no-alimony clause struck, and the cause of divorce being other than a voluntary separation, the Agreement was thus silent regarding the alimony to be awarded under the circumstances of this case.

As such, the Agreement did not bind the court to refuse to award alimony. The circuit court therefore should have applied controlling law for an award of alimony in the circumstances of a divorce in which the parties have not reached a valid agreement with respect to alimony; particularly, the consideration of the factors necessary for a fair and equitable award of alimony pursuant to FL § 11-106(b). We accordingly vacate the circuit court's judgment as to this issue, remand the matter to the circuit court for reconsideration of its alimony award consistent with the Family Law Article and other appropriate law.

IV. The Circuit Court Did Not Err by Declining to Grant Husband an Award of Attorney's Fees.

Husband contends that the circuit court erred in denying his motion for an award of attorney's fees. The circuit court held that, pursuant to Maryland Rule 2-705(b), a party seeking an award of attorney's fees arising from a provision permitting an award to the prevailing party in litigation arising out of a contract is required to set forth a claim for fees in the initial pleading. As Husband did not do so, he has waived his claim. Husband argues that Rule 2-705 does not apply because this was a divorce proceeding and not an action for breach of contract. He thus contends that the circuit court committed legal error, which we

review *de novo*. *See, e.g.*, *Hartford Fire Ins. Co. v. Est. of Sanders*, 232 Md. App. 24, 39 (2017).

Rule 2-705 provides:

> **(a) Scope of Rule.** This Rule applies to a claim for an award of attorneys' fees attributable to litigation in a circuit court pursuant to a contractual provision permitting an award of attorneys' fees to the prevailing party in litigation arising out of the contract. It does not apply to a claim for attorneys' fees allowed by contract as an element of damages for breach of the contract or to a claim for attorneys' fees authorized by statute or other law.
>
> **(b) Pleading.** A party who seeks attorneys' fees from another party pursuant to this Rule shall include a claim for such fees in the party's initial pleading or, if the grounds for such a claim arise after the initial pleading is filed, in an amended pleading filed promptly after the grounds for the claim arise.

Md. Rule 2-705. The language of the Agreement that Husband alleged entitled him to an award of fees reads:

> If a party, by actions, proceeding, counterclaim, defense or otherwise, seeks to set aside this Agreement, or to declare any of its terms and conditions as invalid, void, against public policy for any reason, including, but not limited to claims of incompetency, fraud, coercion, duress, undue influence or mistake in inducement, said party shall reimburse the other party and be liable for any and all such party's reasonable expenses, costs and attorney's fees, provided and to the extent that such action, proceeding, counterclaim or defense results in a decision, judgment, decree or order dismissing or rejecting said claims.

We agree with the circuit court that Husband's was the type of claim for attorney's fees within Rule 2-705's ambit. The phrase "provided and to the extent that such action, proceeding, counterclaim or defense results in a decision, judgment, decree or order dismissing or rejecting said claims" requires that the party defending the contract's validity receives a favorable disposition; that is, if the circuit court had ruled in a manner

unfavorable to Husband, he would have had no claim to attorney's fees. That is at the heart of the meaning of the word "prevail." The definition of "prevail" is includes "[t]o obtain the relief sought in an action; to win a lawsuit." *Prevail*, BLACK'S LAW DICTIONARY (11th ed. 2019). The circuit court was correct to find that Husband would only have been entitled to fees to the extent that he prevailed against Wife's challenge to the Agreement.

Therefore, the clause awarded attorney's fees to the "prevailing party in litigation arising out of the contract." Rule 2-705 applied by its own terms and required Husband to plead for it in his first responsive pleading, which he did not do. We perceive no error of law by the circuit court and affirm.

THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED IN PART AND VACATED IN PART. APPELLANT AND APPELLEE TO EVENLY SHARE THE COSTS.