UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0999

September Term, 2013

EASTERN SHORE TITLE COMPANY

v.

STEVEN J. OCHSE, ET UX.

Leahy,
**Hotten,
Eyler, James R.,
(Retired, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: December 31, 2015

**Michele D. Hotten, J., participated in the hearing of this case while still an active member of this Court but did not participate in either the preparation or adoption of this opinion.

In 2001, Appellees/Cross-Appellants Steven J. Ochse and Shari S. Ochse ("the Ochses") purchased 2890 Mowbray Creek Road in Federalsburg, Maryland, from William O. Henry and Jessie B. Henry ("the Henrys"), who are not parties to the instant litigation. Before purchasing the property, the Ochses obtained title insurance from Chicago Title Insurance Company ("Chicago Title"),[1] and Appellant/Cross-Appellee Eastern Shore Title Company ("ESTC"), an agent of Chicago Title, conducted the title examination and prepared the deed.

When remodeling their property in 2005, the Ochses realized that their deed implied the existence of a right-of-way over their driveway. As a result, in 2007, the Ochses sued the Henrys for reformation of their deed and breach of contract ("the Henry litigation"). In 2008, during the initial stages of the Henry litigation, the Ochses discovered a deed from 1919 that conveyed a 30-foot wide strip of their property in a fee simple determinable interest to Dorchester County. The 1919 deed was not included in ESTC's title examination. This discovery thus prompted the Ochses to become embroiled in the underlying lawsuit, this time against ESTC and Chicago Title, in the Circuit Court for Talbot County, for negligent misrepresentation, breach of contract, and negligence stemming from the improper preparation of their deed and failure to discover the 1919 deed.

[1] Chicago Title was formerly a party to this appeal as an Appellant/Cross-Appellee, but on March 28, 2014, the Ochses and Chicago Title filed a Notice of Dismissal of Appeals. Only ESTC remains an Appellant/Cross-Appellee. Because Chicago Title is not a party to this appeal, we only discuss the proceedings relating to Chicago Title to the extent that it provides a helpful background.

After a bench trial, the circuit court found in favor of the Ochses and against ESTC on the breach of contract and negligence claims. The court awarded the Ochses damages equaling the amount of attorney's fees that they had incurred in the Henry litigation; however, the court thereafter granted ESTC's motion to alter and amend the judgment and ordered that the judgment against ESTC be reduced by the amount of attorney's fees to be paid by the Henrys in the Henry litigation. In its timely appeal,[2] ESTC raises two questions for our review:

> I. "Did the circuit court for Talbot County err when it concluded that the Ochses' claims against ESTC were not barred by the statute of limitations?"
>
> II. "Did the circuit court for Talbot County err when it concluded that the Ochses' met their burden of proving that ESTC deviated from the standard of care and breached its contract with the Ochses?"

In their timely cross-appeal,[3] the Ochses raise three additional questions for our review, which we have rephrased and subdivided as follows:

> I. Did the circuit court have the post-trial authority to credit ESTC with payments made to the Ochses by a third party in an unrelated case when ESTC did not file pleadings seeking affirmative relief in the form of credits, offsets, payments or the like?
>
> II. Did the circuit court have the post-trial authority to credit ESTC with payments made to the Ochses by a third party in an unrelated case when ESTC was adjudicated negligent and the payments made by the third-party were pursuant to an attorneys' fee provision in an

[2] The circuit court partly granted ESTC's timely Motion to Alter/Amend Judgment in an order entered on June 28, 2013, and, within 30 days, ESTC filed its Notice of Appeal on July 25, 2013. *See* Md. Rule 8-202(c).

[3] The Ochses filed a Notice of Appeal on August 2, 2013, which is within ten days of the filing of ESTC's Notice of Appeal. *See* Md. Rule 8-202(e).

unrelated residential real estate contract between only the Ochses and the third party?

III. Did the circuit court correctly compute the damages?

IV. Did the circuit court err in entering a final judgment that made the final amount of damages to be owed by ESTC contingent on an anticipated decision in a separate case tried in another circuit court subject to an ongoing appeal?

As to ESTC's appeal, we affirm the judgments of the circuit court. We conclude that the circuit court did not err in concluding that the Ochses did not have notice of their claims against ESTC until 2008 and, therefore, the statute of limitations does not bar the Ochses' breach of contract and negligence claims. We further conclude that the circuit court did not err in finding that ESTC breached the standard of care for title examination. As to the cross-appeal, however, we remand for the circuit court to render two findings regarding damages: (1) a determination of whether ETSC's wrongful conduct proximately caused the Ochses to engage in litigation with the Henrys; and (2) a clarification of whether the damages stem from negligence or breach of contract, and if the damages stem from negligence, the court must invoke the collateral source rule and permit recovery by the Ochses from ESTC.

BACKGROUND

The Ochses' case against ESTC and Chicago Title proceeded to a four-day bench trial before the Circuit Court for Talbot County beginning on July 9, 2012. The testimony and documents entered into evidence at trial reflect as follows.

A. Chain of Title to 2890 Mowbray Creek Road[4]

Tracing the chain of title to the Ochses' property back to the early 1900s, we begin with Henry B. Messenger+[5] who acquired approximately 150 acres of land in Dorchester County via three separate deeds recorded on October 29, 1902, November 21, 1914, and March 17, 1916, respectively. In 1919, Messenger conveyed a strip of land "thirty feet wide its entire length" in a fee simple determinable interest to the County Commissioners of Dorchester County for the purpose of making a new county road.[6] The deed for this conveyance—which is the deed at the heart of the instant litigation—was recorded on May 27, 1919 ("1919 deed"), yet as we shall see, it was not discovered by the parties on appeal until 2008.

Between 1921 and 1923, Messenger recorded various documents relating to his property, including two mortgages, a conveyance, a right-of-way to a telephone company, and a contract for the sale of timber. In 1926, Messenger defaulted on his mortgage payments, and the bank foreclosed on his property. This foreclosure ultimately resulted in the property being sold, in part, to a third party, with the remainder being sold back to Messenger. Messenger was thereafter delinquent in paying taxes, and by a deed dated

[4] There are a considerable number of recorded documents contained in this chain of title; therefore, we will briefly summarize them and detail only the recordings particularly relevant to this litigation.

[5] "Messenger," as used hereinafter, refers to Henry B. Messenger and/or his family.

[6] The County never constructed this road. Moreover, we note that the parties in this litigation appear to have been uncertain of the exact location of the land conveyed by the 1919 deed on the Ochses' property.

November 23, 1929, a tax sale of the Messenger property occurred. The following year, the property sold in the tax sale was conveyed back to Messenger by a deed dated June 17, 1930; notably, and for reasons that are unclear, this deed was not recorded until May 16, 1949.

Meanwhile, from 1929 to 1966, Messenger recorded several mortgages, a right-of-way easement, an oil and gas lease, and conveyances to other landowners. Of particular relevance to this litigation was Messenger's 1966 conveyance of two parcels to the Mayor and Council of Federalsburg for its conservation efforts along Marshyhope Creek, which adjoined his property. This deed, dated August 30, 1966, references two plats that depict a roadway labeled as "county road" within the vicinity of the Messenger property ("1966 plats"). In 1972, Messenger conveyed approximately 35 acres to R.T.R., Inc.

The Henrys acquired the 35-acre property from R.T.R., Inc. by a deed dated March 18, 1987. About eleven years later, pursuant to a confirmatory easement and maintenance agreement dated February 2, 1998, the Mayor and Council of Federalsburg—which had acquired property from Messenger in 1966—conveyed an easement to the Henrys permitting them to use and maintain the docking facilities along Marshyhope Creek[7]. This agreement references a plat (significant in the instant litigation) recorded earlier in 1998 ("1998 plat") depicting a road labeled as "driveway" traversing the Henrys' property. The Henrys then subdivided their property to create a sellable improved 4.791-

[7] This confirmatory easement states that Messenger's conveyance to the Mayor and Council of Federalsburg occurred on August 30, 1968; however, the deed for this conveyance exhibits the date of August 30, 1966.

acre parcel—now known as 2890 Mowbray Creek Road, Federalsburg, Maryland. The subdivided lot included the area depicted as a driveway on the 1998 plat. The Henrys retained the remaining balance of their property. Dorchester County approved this subdivision on July 22, 1998.

B. The Ochses Purchase 2890 Mowbray Creek Road

The Henrys listed 2890 Mowbray Creek Road, and on September 27, 2001, the Ochses entered into a contract of sale for purchase of the property for $325,000.00. The contract provided that "[t]itle to the Property . . . shall be good and merchantable, free of liens and encumbrances except as specified herein" and that the prevailing party to any litigation between the parties would be entitled to reasonable attorney's fees. In conjunction with the purchase, the Ochses obtained title insurance from Chicago Title in the amount of $325,000.00. The Ochses also hired ESTC, an agent of Chicago Title, which thereafter performed the title search for the Ochses, prepared a "title insurance binder" containing the results of the search, drafted the deed, and participated in the Ochses' real estate closing.

On December 14, 2001, the Henrys deeded the property in fee simple to the Ochses as tenants by entireties. Notably, the deed indicated that the property was

> SUBJECT, HOWEVER, to the rights of others legally entitled to the use of a 'Driveway', for purposes of ingress, egress and regress over Lot 1, as said 'Driveway' is more fully designated and located on the above referenced Plat recorded in Plat Liber No. 46, folio 108B.

According to the Ochses' testimony at trial, when they asked what this language meant during their real estate closing, Veronica Wainright, the general manager at ESTC, advised

that the language referred to a utility easement, although Ms. Wainright testified that she did not make this suggestion. Mr. Ochse maintained at trial that no one ever told them there might be a right-of-way on the property.

C. Questions About the Driveway Language

The Ochses testified that in 2005, they planned to landscape across their existing stone driveway, but when they showed their deed to their general contractor, he expressed concern about the driveway language, calling it "curious." Mrs. Ochse testified that she called ESTC to inquire about this language the next day. Scott Huber returned her call, and according to Mrs. Ochse, Mr. Huber stated that ESTC had conducted another search, but could not identify who, if anyone, possessed a right-of-way across the driveway. He surmised that the Henrys might possess it. Mr. Ochse testified that after these communications yielded no results, he contacted Philip Dietz, an attorney who is the president and one of the shareholders/original incorporators of ESTC. According to Mr. Ochse, it was agreed that Mr. Dietz would prepare a release of the potential right-of-way to be presented to the Henrys. However, the Henrys refused to sign the release.

After ESTC was unable to answer the Ochses' questions regarding the driveway language, Mrs. Ochse wrote a letter, dated March 10, 2006, to Chicago Title about the "undisclosed right-of-way," stating:

> The right-of-way is shown in the Deed as a subject, however to, but the Deed was not reviewed with us as to the legal description or anything the property was subject to. My husband and I signed the principal residence affidavit, however, that was the extent of our exposure to the Deed. . . . Had we been made aware of this right of way, settlement would have halted and some sort of resolution or deal with the seller would have needed to take place for us to continue with the purchase of this property.

> It is obvious to me that either the Eastern Shore Title Company Title Examiner did not pick up on the right-of-way in their research and did not notice it in the legal description of the property or their Settlement Coordinator failed to notice that while the exception was mentioned in the legal description, the easement itself was not listed as an exception in my Owners Policy.
>
> * * *
>
> Kindly initiate a claim on our part against Eastern Shore Title Company and advise me as to the progress as soon as possible. . . .

Two weeks later, Chicago Title denied Mrs. Ochse's claim in a letter dated March 24, 2006, referring to a provision in Ochses' policy that excepted from coverage "easements . . . and other limitations which may be shown on the following plats . . . Plat Liber No., 46, folio 108B [the 1998 plat]."

Mr. Ochse testified that they then retained Bruce Armistead, an attorney, around March or April of 2006. Mr. Armistead testified at trial that he proceeded to discuss the matter with Mr. Dietz, who indicated that there was nothing more to be done about the matter beyond obtaining a release from the Henrys. On May 19, 2006, Mr. Armistead then wrote a letter to the Henrys, stating that the records did not reflect an existence of a right-of-way and requesting that the Henrys consider executing the release. The Henrys still refused. After this unsuccessful attempt, there was an exchange of several letters between Mr. Armistead and Mr. Dietz in early June 2006 that discussed the continued issue regarding the driveway language. The letters reflected that although Mr. Dietz offered to assist the Ochses to a reasonable degree (excluding legal representation), he maintained that ESTC was not liable for the potential cloud of title, which he claimed was created by implication of the 1998 plat's depiction of the driveway. Mr. Armistead testified that he

never conducted a title search, but his staff did review relevant documents, and he requested another title company to review the deeds of surrounding properties for right-of-way language.

Still attempting to obtain a release, Mr. Armistead wrote two additional letters to Mr. Henry dated October 17, 2006 and November 8, 2006, respectively. Mr. Armistead testified that during one of his ensuing conversations with Mr. Henry, Mr. Henry indicated that he had spoken to Anne Ogletree, an attorney, about the right-of-way situation. Around December 2006 or January 2007, Mr. Armistead spoke Ms. Ogletree, and she suggested that a road might exist on the property and that she intended to investigate further. Mr. Armistead sent Ms. Ogletree a follow-up letter on January 5, 2007,[8] inquiring whether her investigation unearthed any information about the road. According to Mr. Armistead, Ms. Ogletree never responded with additional information.

Mr. Armistead then relayed Ms. Ogletree's suggestion to Mr. Ochse, who testified that he thought that perhaps Mowbray Creek Road, a road ending in Caroline County, extended into his property. He contacted Dorchester County to see if it had Mowbray Creek Road listed on its records. The Dorchester County Department for Public Works responded to this inquiry via letter, stating that "it has been determined that Dorchester County is not, nor has ever been responsible for the maintenance of Mowbray Creek Road," and attached a list of the roads for which Dorchester County was responsible. At that point,

[8] The letter in evidence bears a typed date of August 9, 2010 as well as a handwritten date of January 5, 2007. Mr. Armistead clarified that the 2010 date was the print date and the 2007 date was the original date of the actual letter.

Mr. Armistead was not aware of anything else that could be done to inquire further into the driveway language.

D. The Ochses Sue the Henrys, and the 1919 Deed Is Discovered

On December 11, 2007, the Ochses filed a complaint against the Henrys in the Circuit Court for Dorchester County, seeking reformation of their deed, declaratory and injunctive relief, and damages for breach of contract, breach of special warranties, and fraud in the inducement based on the driveway language in their deed. Pivotally, a few months later, John Billmyre, an attorney representing the Henrys, mailed a letter dated February 22, 2008, to the Ochses' counsel that enclosed the 1919 deed—the deed documenting Dorchester County's ownership of the 30-foot wide strip of land. Consequently, the Ochses filed an amended complaint on April 11, 2008 that added Dorchester County as an interested-party defendant. The Henrys then filed a counterclaim, demanding judgment against the Ochses for attorney's fees pursuant to the attorney's fees provision in the contract for sale.[9]

On August 4, 2008, Dorchester County filed a motion for summary judgment. The circuit court granted this motion on October 29, 2008, finding, as a matter of law, that the County owned the 30-foot wide strip on the Ochses' property in fee simple. After holding a two-day bench trial, the court determined that the parties' contract for sale merged into the deed and that the Henrys did not breach the special warranties of title. Accordingly, on

[9] A few weeks later, Mr. Billmyre wrote a letter to the Ochses' counsel, stating that the Ochses' remedy in light of the discovery of the 1919 deed was to petition the Commissioners of Dorchester County for a conveyance of the 30-foot strip and that no judgment against the Henrys could result in the Ochses' acquiring title to the strip.

September 18, 2009, the court entered judgment in favor of the Henrys and awarded $100,020.00 in attorney's fees pursuant to the contract's attorney's fees provision, which the court found did not merge into the deed. The Ochses appealed.

On March 3, 2010, the Ochses, represented by Thomas Valkenet—an attorney retained by Chicago Title to represent the Ochses against Dorchester County, but not against the Henrys[10]—filed a petition for abandonment of the 30-foot wide strip with the County Council for Dorchester County. The parties agreed to pursue this remedy and stay the appeal after engaging in mediation with this Court. Thereafter, Dorchester County executed a quitclaim deed on August 30th, granting the 30-foot strip in fee simple to the Ochses. In September 2010, Dorchester County was dismissed from the appeal, and Mr. Valkenet withdrew from the case.

Following these events, in a reported opinion, we reversed the circuit court's judgment in favor of the Henrys based on our conclusion that there was a mutual mistake between the parties and, accordingly, the contract for sale did not merge into the deed and could have been sued upon for breach. *Ochse v. Henry*, 202 Md. App. 521, 543 (2011), *cert. denied*, 425 Md. 396 (2012). Because Dorchester County had, at that point, conveyed the 30-foot strip to the Ochses, thereby perfecting their title, we remanded for a

[10] Chicago Title advised the Ochses in a letter dated October 27, 2009, that Dorchester County's ownership of the driveway was a matter covered under their Policy and agreed to retain an attorney—later determined to be Mr. Valkenet—to perfect and restore the Ochses' ownership of the driveway. The scope of this representation would not, however, cover any additional litigation against the Henrys, including appeals. Chicago Title also refused to reimburse the Ochses for the attorney's fees incurred during the Henry litigation, because the litigation against the Henrys was prompted by the 1998 plat's implication of a driveway on the property or by the Ochses' own choice.

determination of attorney's fees only. *Id.* at 544. On remand, the circuit court entered an award of attorney's fees in favor of the Ochses in the amount of $215,710.60, an amount considerably lower than the original request of $333,354.00 and the $355,731.78 the Ochses requested in a supplemental motion. The Ochses appealed again, challenging the amount of attorney's fees awarded. *Ochse v. Henry*, 216 Md. App. 439, 449, *cert. denied*, 439 Md. 331 (2014).

In another reported opinion, we concluded that although the circuit court did not abuse its discretion in its approach to the attorney's fees, we identified two inconsistencies in the court's order that need to be addressed on remand: (1) the order appeared to ignore the Ochses' supplemental motion that included the fees incurred while petitioning the Court of Appeals; and (2) there was an error in the calculation. *Ochse II*, 216 Md. App. at 470-71. At the time this appeal was filed, the circuit court had not yet held a remand hearing.

E. The Ochses Sue Chicago Title and ESTC in the Instant Litigation

Meanwhile, during the pendency of the Ochses' ***first*** appeal in the Henry litigation, the Ochses also filed a complaint against Chicago Title and ESTC in the Circuit Court for Talbot County on June 25, 2010, alleging (1) breach of contract and seeking declaratory relief as to Chicago Title and (2) breach of contract, negligence, and negligent misrepresentation as to ESTC. They also sought indemnity and contribution from both defendants. On July 29, 2011, the Ochses filed their First Amended Complaint that extended the negligence and negligent misrepresentation claims to Chicago Title. The court later denied ESTC's motions for summary judgment on November 14, 2011 and

April 30, 2012, respectively, in which ESTC asserted, *inter alia*, that it was entitled to judgment as a matter of law because the Ochses' claims are barred by the statute of limitations and because ESTC did not breach the applicable standard of care.

The case proceeded to a four-day bench trial beginning on July 9, 2012. When Chicago Title and ESTC moved for judgment at the close of the Ochses' case, the court granted the motion as to the negligent misrepresentation claim because it was barred by the statute of limitations,[11] but denied the motion as to the negligence and breach of contract claims, stating:

> I don't think any reasonably prudent person, and I consider these people to be actually more than that, is on notice by that letter to Anne Ogletree or anything that happened after that. I suppose the notice is that they would be asking, and I think Mr. Armistead did continue to look at that issue, but I really think that came up in early 2008, not with that letter at all.

At the close of all evidence, the court held the matter *sub curia*.

On June 12, 2013, the circuit court issued a memorandum opinion and judgment ruling in favor of the Ochses on all remaining counts: breach of contract against Chicago Title, breach of contract against ESTC, and negligence against ESTC. As to Chicago Title, the court found that Chicago Title breached its contract with the Ochses when it refused to defend the Ochses' title in the Henry litigation, at the very least, when the Henrys filed a counterclaim and when Dorchester County filed a motion for summary judgment.[12] The

[11] The court also granted ESTC's motion for judgment as to the claim for contribution and indemnification because these claims are not causes of action.

[12] The court did not, however, grant the requested declaratory relief, as a declaratory judgment would not afford the Ochses with the relief sought: attorney's fees related to the breach of contract for failure to defend.

court ultimately assessed $215,710.60 against Chicago Title, which valued the amount of attorney's fees awarded to the Ochses in the Henry litigation, and the attorney's fees incurred by the Ochses in the instant litigation, which the court found valued as $256,237.35. Adding these amounts together, the total judgment against Chicago Title was $471,947.95.

As to ESTC, first regarding the statute of limitations, the court found that "[i]t was not until early 2008 that the Ochses became aware of the title problems related to the 2001 deed. The specific defect relates to a 1919 deed that is in the chain of title of the Ochses' deed and grants a 30' wide road through the property." The court also found that after Mr. Ochse contacted Dorchester County, which denied ownership of such a road, "there was nothing further that the Ochses were required to do at that point." The court ultimately concluded that "the Ochses had no way of knowing and did not know of Dorchester County's fee simple interest in their property until February, 2008. Accordingly, the filing of suit on June 25, 2010 was well within the limitations period."

Regarding the negligence claim,[13] the court found the trial testimony of Mr. Armistead—who was qualified as an expert in real estate legal matters, including title searches and title insurance—to be "highly credible" and highlighted Mr. Armistead's

[13] At trial, ESTC argued that this claim was barred by *Columbia Town Center Title Co. v. 100 Investment Ltd. Partnership*, 203 Md. App. 61 (2012), which held that a title company, as opposed to the title insurer, does not owe a duty to the purchaser. During the pendency of this case, the Court of Appeals reversed and held that a title company does owe a duty of care, in tort, when conducting a title search. *100 Investment Ltd. P'ship v. Columbia Town Ctr. Title Co.*, 430 Md. 197 (2013). Accordingly, the circuit court rejected this argument.

testimony that "the 1966 plat is in the Ochse chain of title and describes a county road. It was critical, in this instance, for the title searcher to review the grantor/grantee index and locate the deed to Dorchester County, recorded on May 27, 1919." The court reached the following conclusion as to negligence based on the evidence presented:

> ESTC failed to exercise [its] duty [to the Ochses as customers] by reporting the title inaccurately and incompletely, significantly damaging the Ochses. In this instance, the title examination should have revealed the 1919 deed . . . . ESTC claims that it searched the title back 71 years, and that the requisite industry standard is 60 years. Against that argument are the facts. The deed that was the "starting point" for the title examination was purportedly a 1930 deed that was not recorded until 1949; there is a 1966 plat in the chain of title that shows the deeded roadway; and the title examiner, an attorney, researched several deeds back to 1902 that are in the Ochses' chain of title but failed to discover the 1919 deed . . . .

Therefore, the court concluded that ESTC breached the standard of care in its title examination. As to the breach of contract claim, the court found:

> ESTC's contractual obligation to the Ochses was, it is claimed, to prepare the title search and the title insurance binder ". . . to permit them to make an informed decision whether to proceed with the purchase." The Ochses were the customers, and they dealt directly with ESTC. Additionally, the Ochses claim that the contract between ESTC and Chicago Title was meant to benefit the Ochses, as "third party beneficiaries." While the primary beneficiary of ESTC's title search and title insurance binder may have been Chicago Title, the ultimate insurer of the title, both Chicago Title and ESTC had contractual obligations to the Ochses. ESTC was responsible for, and had a duty to, accurately and completely report the state of the title in the property the Ochses were undertaking to purchase.

(Footnote omitted).[14]

[14] We note, as did the circuit court, that the Court of Appeals in *100 Investment Ltd. Partnership* did not address a title company's *contractual* obligations. The Court has stated, however, that liability for an erroneous title examination is "'ordinarily enforced by an action . . . for negligence in the discharge of his professional duties, in reality rests upon his employment by the client, and is contractual in its nature.'" (continued…)

Regarding damages, the court concluded that the Ochses did not prove the requested $100,000.00 in non-economic damages for stress and other maladies, as such "damages would be wildly speculative and not consistent with the purely financial issues of this case." The court did, however, award economic damages. Acknowledging that the Henry case was on appeal, the court ordered ESTC to pay $215,710.60, amounting the attorney's fees awarded in the Henry litigation. The court docketed this judgment.

On June 18, 2013, ESTC and Chicago Title each filed motions to alter or amend judgment and a motion to stay enforcement, seeking a clarification that the damages would be reduced by any recovery made by the Ochses in the Henry litigation. To their motions to alter or amend, they attached a motion to record satisfaction of money judgment filed by the Henrys in the Henry litigation on June 13, documenting that the Henrys had paid $218,901.89 to the Ochses.[15] On June 28, 2013, the court granted the motions to alter or amend:

> Assuming the motion is approved by the Circuit Court for Dorchester County in the Henry litigation, the judgments in the instant litigation will be reduced [or otherwise satisfied] against Chicago Title and ESTC by $215.710.60. While presently the "satisfaction" would satisfy the judgment amount against ESTC as of the judgment date, i.e. June 12, 2013, that is subject to change due to the ongoing appeal by plaintiffs of the "attorney's fees" award in the Henry litigation. The Henrys understand, and defendants in the instant case should also, that "…any additional fees assessed pursuant to the August 8, 2012 appeal would constitute a supplemental judgment."

Corcoran v. Abstract & Title Co. of Md., 217 Md. 633, 637 (1958) (quoting *Watson v. Calvert Bldg. & Loan Ass'n*, 91 Md. 25, 33 (1900)).

[15] According to the Maryland Judiciary Case Search, the Circuit Court for Dorchester County denied this motion on July 30, 2013.

(Footnote and internal citation omitted). The court also entered an order stating that the judgment entered against ESTC "shall be reduced by any recovery made by Plaintiffs in [the Henry litigation]." The docketed judgment against ESTC was not amended. Following this order, the parties filed a barrage of pleadings relating to the Ochses' attempts to enforce the June 12, 2013, judgments. The court entered an order on October 22, 2013, staying enforcement of the judgments until resolution of the instant appeal.

We will discuss additional facts as necessary and relevant to our discussion below.

DISCUSSION

Final Judgment

In their cross-appeal, the Ochses assert that the circuit court's June 25, 2013, order—granting, in part, ESTC's and Chicago Title's motions to amend—destroyed the court's June 13, 2013 order status as a final judgment. We address this contention at this juncture, because if the judgment is not final, this Court does not have jurisdiction and must dismiss this appeal.

Maryland Code (1973, 2013 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP") § 12-301 authorizes appeals from "a final judgment entered in a civil or criminal case by a circuit court." Maryland Rule 2-602 explains when judgments are not final:

> (a) [A]n order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action (whether raised by original claim, counterclaim, cross-claim, or third-party claim), or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action:
>
> (1) is not a final judgment;

> (2) does not terminate the action as to any of the claims or any of the parties; and
> (3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties.

Interpreting this Rule, the Court of Appeals has explained that "[t]o have the attribute of finality, the ruling must be so final as either to determine *and conclude* the rights involved or to deny the appellant the means of further prosecuting or defending his or her rights and interests in the subject matter of the proceeding." *Rohrbeck v. Rohrbeck*, 318 Md. 28, 41 (1989) (emphasis in original) (citations omitted). To that end,

> [t]o be final and conclusive in that sense, the ruling must necessarily be unqualified and complete, except as to something that would be regarded as collateral to the proceeding. It must leave nothing more to be done in order to effectuate the court's disposition of the matter. In the first instance, that becomes a question of the court's intention: did the court intend its ruling to be the final, conclusive, ultimate disposition of the matter?

Id. at 41. The determination of whether the order was "unqualified" prompts a determination of "whether there was 'any contemplation that a further order [was to] be issued or that anything more [was to] be done.'" *Id.* at 41-42 (quoting *Walbert v. Walbert*, 310 Md. 657, 661 (1987)).

In the instant case, the circuit court adjudicated all claims against all the parties in the litigation and ordered/indexed a definite amount of damages. The court's June 25, 2013, order reduced the indexed award of damages by an amount contingent on the outcome of the appeal on remand in the Henry litigation. We are persuaded that the circuit court intended this order to be final, stating that "the Court's June 12, 2013 Judgment is altered and amended to clarify that the judgment against Chicago Title Insurance Company **shall be reduced** by any recovery made by Plaintiffs in *Steven J. Ochse, et al. v. William*

O. Henry, et al., Civil No. 15490, Circuit Court for Dorchester County." (Emphasis added) The court made a similar statement with regard to ESTC. These findings set this case apart from those cases, some cited by Appellees, in which the court determined liability but failed to make a determination as to damages. *See, e.g., Shenasky v. Gunter*, 339 Md. 636, 638 (1995) ("In an action for money damages, an order which decides that there is liability, or which resolves some liability issues in favor of a party seeking damages, but fails to make a determination with regard to the amount of damages, does not dispose of an entire claim and cannot be made final and appealable under Rule 602(b)."); *Cnty. Comm'rs for St. Mary's Cnty. v. Lacer*, 393 Md. 415, 426-27 (2006); *Huber v. Nationwide Mut. Ins. Co.*, 347 Md. 415, 422 (1997). Moreover, although the final amount of damages was made contingent on the outcome of the Henry litigation, the parties have no further opportunity to litigate their claims. Following resolution of the Henry case, the only remaining task is for the clerk of the court to index the altered judgment. Therefore, we conclude that the judgment is final.

ESTC's Appeal

I.

Statute of Limitations

ESTC first contends that the circuit court erred in concluding that the statute of limitations did not bar the Ochses' breach of contract and negligence claims. Specifically, ESTC argues that the Ochses were put on inquiry notice of their causes of action by (1) their apprehension regarding the driveway language in their deed in early 2006 or, alternatively, (2) by Ms. Ogletree's suggestion to Mr. Armistead that a road possibly

existed on the Ochse property in early 2007. The Ochses counter that ESTC's inclusion of the ambiguous driveway language in their deed was an error separate and distinct from ESTC's failure to identify the 1919 deed, and that court properly found that they engaged in a reasonable inquiry with the County following Ms. Ogletree's "uninformed and undocumented speculation."

Generally, "[a] civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced." CJP § 5-101. Statutes of limitation, such as CJP § 5-101, are "designed to (1) provide adequate time for diligent plaintiffs to file suit, (2) grant repose to defendants when plaintiffs have tarried for an unreasonable period of time, and (3) serve society by promoting judicial economy." *Pennwalt Corp. v. Nasios*, 314 Md. 433, 437-38 (1988) (citing *Pierce v. Johns-Manville Sales Corp.*, 296 Md. 656, 665 (1983)). Because the legislature did not define the term "accrue,"[16] "the question of accrual is left to judicial determination." *Hecht v. Resolution Trust Corp.*, 333 Md. 324, 333 (1994) (citations omitted).

Historically, Maryland courts adhered to the general rule "that a cause of action accrued on the date the wrong was committed." *Id.* at 334 (citing *Waldman v. Rohrbaugh*, 241 Md. 137, 139 (1966); *Hahn v. Claybrook*, 130 Md. 179, 182 (1917)). The harsh reality of this rule soon became apparent, as it did not "differentiate between the plaintiff who was

[16] The Court of Appeals identified two exceptions where the legislature has defined the term: "Sections 5-108 (actions arising out of injury to person or property occurring after improvement to realty) and 5-203 (ignorance of cause of action induced by fraud)[.]" *Hecht*, 333 Md. at 333 n.8.

'blamelessly ignorant' of his potential claim and the plaintiff who had 'slumbered on his rights[.]'" *Id.* (citing *Harig v. Johns-Manville Prods.*, 284 Md. 70, 83 (1978)). To respond to this inherent unfairness, the Court of Appeals adopted an exception now known as the "discovery rule." *Pennwalt Corp.*, 314 Md. at 438-48. This rule "tolls the accrual of the limitations period until the time the plaintiff discovers, or through the exercise of due diligence, should have discovered, the injury." *Frederick Rd. Ltd. P'ship v. Brown & Sturm*, 360 Md. 76, 95-96 (2000). Although originally an exception, the Court of Appeals expanded the discovery rule's application to all civil cases in *Poffenberger v. Risser*, 290 Md. 631 (1981), by establishing that the discovery rule requires actual, not constructive, notice:

> Actual notice may be either express or implied. . . . Express notice embraces not only knowledge, but also that which is communicated by direct information, either written or oral, from those who are cognizant of the fact communicated. **Implied notice, which is equally actual notice, arises where the party to be charged is shown to have had knowledge of such facts and circumstances as would lead him, by the exercise of due diligence, to a knowledge of the principal [sic] fact.**

Id. at 636-37 (emphasis added) (quoting *Baltimore v. Whittington*, 78 Md. 231, 235-36 (1893)). "In other words, a purchaser cannot fail to investigate when the propriety of the investigation is naturally suggested by circumstances known to him; and if he neglects to make such inquiry, he will be held guilty of bad faith and must suffer from his neglect." *Id.* at 637-38 (citations omitted).

There is no allegation that the Ochses had express notice. Thus, turning to implied inquiry notice, the Court of Appeals has explained that "limitations begin to run when a plaintiff gains knowledge sufficient to prompt a reasonable person to inquire further. . . .

[T]he beginning of limitations is not postponed." *Pennwalt Corp.*, 314 Md. at 447-48 (citing *O'Hara v. Kovens*, 305 Md. 280, 288-89 (1986)); *accord Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435, 452 (2000) ("From that date [when the plaintiff should have known of the injury] forward, a claimant will be charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation, regardless of whether the investigation has been conducted or was successful."). Stated differently, "a plaintiff is only on inquiry notice, and thus the statute of limitations will begin to run, when the plaintiff has 'knowledge of circumstances which would cause a reasonable person in the position of the plaintiff[] to undertake an investigation which, if pursued with reasonable diligence, would have led to knowledge of the alleged [tort].'" *Pennwalt Corp.*, 314 Md. at 448-49 (alterations in original) (quoting *O'Hara*, 305 Md. at 302); *see also Georgia-Pac. Corp. v. Benjamin*, 394 Md. 59, 90 (2006) (framing the question as whether "after a reasonable investigation of facts, a reasonably diligent inquiry would have disclosed whether there is a causal connection between the injury and the wrongdoing" (citation omitted)).

The Court of Appeals has recognized that the determination of when a plaintiff was on notice is usually a question for the trier of fact, *O'Hara*, 305 Md. at 294, because the issue of notice "requires the balancing of factual issues and the assessment of the credibility or believability of the evidence[.]" *Frederick Rd. Ltd. P'ship*, 360 Md. at 96; *see also Rounds v. Maryland-Nat. Capital Park & Planning Comm'n*, 441 Md. 621, 658 (2015) ('[W]here it is unclear from the facts and allegations on the face of the Amended Complaint *what* Petitioners knew and *when* they knew it, the question of accrual rests on a

determination of fact. This is a question appropriate for the fact finder, not the appellate court." (citing *Litz v. Maryland Dep't of Env't*, 434 Md. 623, 641 (2013))); *New England Mut. Life Ins. Co. v. Swain,* 100 Md. 558, 574 (1905) ("[W]hether or not the plaintiff's failure to discover his cause of action was due to failure on his part to use due diligence . . . is ordinarily a question of fact for the jury." (citations omitted)). Therefore, although we must determine whether the court's interpretation and application of Maryland law was "legally correct" under a non-deferential standard of review, *Walter v. Gunter*, 367 Md. 386, 392 (2002), we review the court's factual findings for clear error. Md. Rule 8-131(c).

A. Inquiry Notice in 2006?

ESTC first asserts that the Ochses acquired knowledge sufficient to put them on implied inquiry notice in early 2006 when they began questioning the driveway language in their deed—that the Ochses' fee simple interest was subject "to the rights of others legally entitled to the use of a 'Driveway', for purposes of ingress, egress and regress." According to ESTC, a "reasonable investigation" at that time would have been to conduct an independent title search, which, in turn, would have unearthed the 1919 deed. By not doing so, ESTC contends that the Ochses were not reasonably diligent and should be charged with inquiry notice as of early 2006.

The issue here is whether the Ochses' knowledge of the ambiguous driveway language in their deed would have prompted an investigation that, if pursued with reasonable diligence, would have revealed ESTC's breach of contract and negligence. The record reflects that although the driveway language prompted an investigation, that reasonably diligent investigation did not, in fact, reveal ESTC's breach of contract and

negligence based on the failure to locate the 1919 deed. The evidence adduced at trial demonstrated that after the Ochses detected a possible issue with the driveway language in 2006, they contacted ESTC; ESTC reviewed the chain of title again and could not identify the existence of a right-of-way; Mr. Dietz prepared a release to be presented to the Henrys to discharge any extant rights to the property; and the Ochses retained Mr. Armistead as an attorney who helped look into the issue. That the Ochses did not independently conduct a title examination, especially after ESTC essentially confirmed its prior title search, does not alone render their investigation unreasonable or demonstrate a lack of due diligence. The Ochses are charged with notice of only those facts that would be disclosed by a *reasonably diligent* investigation, not a perfect one. *See Pennwalt Corp.*, 314 Md. at 448-49. Here, the facts reflect, and the circuit court found, that the Ochses engaged in a reasonably diligent inquiry, and that inquiry would not have and did not reveal their breach of contract and negligence claims based on the 1919 deed. This is not a case in which plaintiffs slumbered on their rights.

ESTC further argues, however, that the statute of limitations is not tolled merely because the Ochses did not have knowledge of **all** the facts underlying their potential cause of action, analogizing the instant case to *Sisters of Mercy v. Gaudreau, Inc*., 47 Md. App. 372 (1980). The Sisters of Mercy moved into a retirement home constructed by Gaudreau, Inc. in 1974 and noticed water leakage and structural cracks; however, they were not aware of the source of or responsibility for the leak. *Id.* at 374. The Sisters sought legal assistance in 1979, five years after first noticing the leak. *Id.* at 374, 378. This Court held that the Sisters "knew or should have known that the roof should not have leaked whenever it

rained" and that "[b]y the exercise of reasonable diligence, they could have ascertained the cause and the responsibility long before they did so and long before the Statute of Limitations had run its course." *Id.* at 379. Therefore, we concluded that the Sisters "slept on their rights until the opportunity to bring a suit for breach of duty had expired." *Id.*

The instant case is distinguishable from *Sisters of Mercy*. Not only is it apparent from the record that the Ochses did not "sleep on their rights" or fail to use any due diligence, the Ochses also were not on notice of a blatant injury like a leaking roof. In 2006, they were concerned with ambiguous references to "the use of a driveway" in their deed. ESTC, after its agent urged the Ochses at closing that the language referred only to a utility easement, now urges that this language "clearly" put the Ochses on notice of a potential claim against ESTC relative to the inclusion of the right-of-way language in the deed. It is undisputed that the driveway language provided inquiry notice of the Ochses' *negligent misrepresentation* claim, and the circuit court's grant of ESTC's motion for judgment on this claim is not challenged on appeal. But the driveway language did not put the Ochses on notice of their negligence and breach of contract claims based on ESTC's failure to locate the 1919 deed, because a reasonably diligent investigation prompted by the driveway language would not, and indeed did not, disclose the 1919 deed.

B. Inquiry Notice in Late 2006 or Early 2007?

ESTC alternatively argues that the Ochses were put on inquiry notice by Ms. Ogletree's suggestion in late 2006 or early 2007 that a road possibly existed on the Ochses' property. ESTC, again, argues that the Ochses should have engaged in a title search at that time. The circuit court did not find that

> any reasonably prudent person . . . [would be] on notice by that letter to Anne Ogletree or anything that happened after that. I suppose the notice is that they would be asking, and I think Mr. Armistead did continue to look at that issue, but I really think that came up in early 2008, not with that letter at all."

Indeed, following this suggestion, Mr. Ochse contacted Dorchester County to see if the County had any record of Mowbray Creek Road extending beyond Caroline County and into their property over the Dorchester County line, and the County responded that it did not and attached a list of all the roads maintained. Although ESTC argues that Mr. Ochse asked the wrong question, we emphasize, again, that Mr. Ochse, as a layperson, was not charged with conducting a perfect investigation—he was charged with what a reasonably diligent one would reveal. In its opinion, the court stated that after Mr. Ochse placed an inquiry with Dorchester County, "Mr. Armistead testified, and the Court concludes, that there was nothing further that the Ochses were required to do at that point."

In sum, it is the fact-finder's role, not the role of this Court, to assess the credibility of the witnesses and weigh the evidence presented. Accordingly, we do not find clear error in the circuit court's conclusion that the Ochses were not on inquiry notice of the 1919 deed in either 2006 or late 2007/early 2008 and, accordingly, their breach of contract and negligence claims are not barred by the statute of limitations.[17]

[17] In light of this conclusion, we need not address the Ochses' argument that the "continuing relationship" theory is applicable in this case.

II.

Breach of the Standard of Care

ESTC next argues that the Ochses failed "to prove, with expert testimony, that ESTC failed to act as a reasonable and prudent title examiner" because (1) Mr. Armistead, the Ochses' expert, testified that the year at which a title examiner begins an examination is a "judgment," and an examiner cannot be liable for making an improper judgment; and (2) Mr. Armistead's testimony that he would have engaged in the title search differently does not establish a breach in the standard of care.

"In a negligence case, there are four elements that the plaintiff must prove to prevail: 'a duty owed to him [or her] . . . , a breach of that duty, a legally cognizable causal relationship between the breach of duty and the harm suffered, and damages.'" *Schultz v. Bank of Am.*, 413 Md. 15, 27-28 (2010) (quoting *Jacques v. First Nat'l Bank*, 307 Md. 527, 531 (1986)). Specifically regarding title examination, it is established that "[o]ne who undertakes to examine a title for compensation is bound to exercise a reasonable degree of skill and diligence in the conduct of the transaction." *Lewis v. Long & Foster Real Estate, Inc.*, 85 Md. App. 754, 764, *cert. denied*, 323 Md. 34 (1991). "The duty is to employ reasonable care. The duty is not to act as guarantor." *100 Inv. Ltd. P'ship*, 430 Md. at 225 (citing *Bank of California, N.A. v. First Am. Title Ins. Co.*, 826 P.2d 1126, 1129 n.5 (Alaska 1992)). ESTC maintains that the Ochses were required to present expert testimony to establish a title examiner's standard of care. Expert testimony is generally necessary to establish the standard of care in a negligence action against a professional, unless that negligence would be obvious to the average layperson. *Schultz*, 413 Md. at 28-29. We do

not believe that negligence in a title examination would be obvious to the average layperson as to remove the need for expert testimony.

To this end, the Ochses called Mr. Armistead to testify, and the circuit court admitted Mr. Armistead as an expert in real estate legal matters, including title searches and title insurance. When asked about a title searcher's responsibility generally, Mr. Armistead opined that "the title searcher or title abstractor's responsibility is to identify everything that is discovered in the records that might be relevant to the title in question, such that it can either be noted or resolved." He explained further that a "title searcher goes through the indices, in particular, the grantor index, for the purpose of verifying what may have transpired with respect to the title to a particular parcel, during the period of ownership by each person in the chain of title" and that these indices are "critical."[18]

Reviewing the documents in the Ochses' chain of title, Mr. Armistead testified that the 1966 plat's reflection of a "county road" within the vicinity of the Ochse property "would suggest that either the county had a right-of-way through the Ochse property or as we subsequently learned, owned the roadway." According to Mr. Armistead, "[i]f the examiner or title searcher came across [the 1966] plat and had reason to believe [] the county road was in the area of the Ochse property, it would have suggested that further investigation might be necessary." He stated that the "*norm* would be to undertake such further research as would be necessary to resolve the question." (Emphasis added).

[18] We note that ESTC did not call its expert and offered no countervailing expert testimony on this point at trial.

Regarding a proper starting point, Mr. Armistead opined that the norm is "to search a title back to a point of at least 60 years *or further, if necessary, to reach a point where you have a definitive starting point as a basis for the title*." (Emphasis added). He determined that in the instant case, "a proper starting point for the search would have been approximately 1902, when a deed conveyed the parent tract to Mr. Messenger." Mr. Armistead testified that because the 1930 tax deed that ESTC's title examiner selected as his starting point was not an arm's length transaction, he "would not have accepted that as an appropriate starting point." During cross-examination, Mr. Armistead did testify that he "was not even [t]here to say that the title searcher was mistaken." His testimony was that he "would have made a different judgment."

ESTC first claims that Mr. Armistead's testimony regarding where to begin a title examination failed to establish breach of the standard of care, because a "judgment call" cannot establish breach, analogizing to cases establishing that an attorney's judgment in trial strategy cannot provide a basis for liability. Although we do not view legal malpractice (involving licensed professionals) and title examination negligence cases to be akin, we need not even reach that point of analysis, because ESTC's title examiner testified that although his search spanned from June 1930 to December 2001, he also reviewed deeds dated 1902, 1914, and 1916. Regarding the grantor-grantee index, a tool he called "essential," ESTC's title examiner further admitted that if he had reviewed the index, he would have seen the 1919 deed's conveyance to Dorchester County. The circuit court recognized these facts in its opinion, finding that the title examiner "researched several deeds back to 1902 that are in the Ochses' chain of title but failed to discover the 1919

deed that includes the 30' strip in favor of Dorchester County." *See Corcoran v. Abstract & Title Co. of Md., supra,* 217 Md. at 638 ("We think it may fairly be contended that the entry in the grantor index was enough to put a reasonably skillful and diligent abstracter upon notice of the deed, and that it was his duty to exhaust the means at hand to locate it."); *Ryan v. Brady*, 34 Md. App. 41, 54 (1976) ("[I]t is established law in Maryland that a title examiner is charged with notice of whatever appears in the land records in the chain of title to the property involved." (citations omitted)).

In any event, ESTC's examiner acknowledged that the 1930 tax sale deed with which he began his examination was actually recorded in 1949. When asked whether this delay raised any concern about relying on that deed as the examination's starting point, he responded that "it's a puzzle, I don't know." When asked "this is your job as a title searcher, to lay these issues to rest isn't it?", he replied, "[i]t is." The circuit court took this testimony into consideration in rendering its decision, stating that "[t]he deed that was the 'starting point' for the title examination was purportedly a 1930 deed that was not recorded until 1949." The court considered these facts in concluding that ESTC's examiner breached the standard of care. Because it is within the fact-finder's province to assess credibility of witnesses and to weigh the evidence, we do not perceive clear error.[19]

[19] ESTC's second argument is equally unavailing. ESTC argues that Mr. Armistead's testimony that he would have investigated further upon reviewing the 1966 plat also did not establish a breach in the standard of care. ESTC's title examiner testified that he reviewed the 1966 plats depicting a county road, but did not think it was pertinent or relevant to the property with which he was concerned and that he did not inquire further. The examiner claimed that this conveyance occurred beyond the scope of the time period that he was covering, although he admitted that he looked the 1902 deed but could not remember why he did so. Yet Ms. Wainright, ESTC's general manager, (continued…)

Based on the record presented, we conclude that the circuit court was not clearly erroneous in finding that ESTC breached the standard of care as established by Mr. Armistead's expert testimony.

The Ochses' Cross-Appeal

I.

Pleading

The Ochses contend that ESTC failed to plead in its answer the defenses of accord and satisfaction, payment, release, or waiver, and as a result, the circuit court erred in granting such unplead relief by reducing the amount of damages owed by ESTC by the amount paid or to be paid by the Henrys. We disagree.

Under Maryland Rule 2-323(a), "[e]very defense of law or fact to a claim for relief in a complaint, counterclaim, cross-claim, or third-party claim shall be asserted in an answer, except as provided by Rule 2-322." Section (g) of that Rule provides:

> [A] a party *shall* set forth by separate defenses: (1) accord and satisfaction, (2) merger of a claim by arbitration into an award, (3) assumption of risk, (4) collateral estoppel as a defense to a claim, (5) contributory negligence, (6) duress, (7) estoppel, (8) fraud, (9) illegality, (10) laches, (11) payment, (12) release, (13) res judicata, (14) statute of frauds, (15) statute of limitations, (16) ultra vires, (17) usury, (18) waiver, (19) privilege, and (20) total or partial charitable immunity.

testified that it is the title searcher's job to answer questions about possible defects and problems, and that it would be important for a purchaser to know of a road or right-of-way on his or her property. When ESTC's title examiner was asked about his review of the 1998 plat depicting the driveway, he responded that an implication of the right-of-way by the driveway is "perhaps" a question that had to be resolved. He admitted that nothing prevented him from answering the question, but stated that no one asked him to address it either.

> In addition, a party *may* include by separate defense any other matter constituting an avoidance or affirmative defense on legal or equitable grounds. . . .

(Emphasis added). In *Ben Lewis Plumbing, Heating & Air Conditioning, Inc. v. Liberty Mutual Insurance Co.*, the Court of Appeals held that the defenses specifically enumerated in section (g) must be set forth separately, but that all other non-enumerated defenses "may" and are not required to be plead separately. 354 Md. 452, 464-65 (1999). "The plain language of section (g) evidences the intent that the class of affirmative defenses that are to be set forth separately in an answer not be open ended." *Id.* at 465. The Court recognized the inconsistency of the permissive language in section (g) as compared to section (a), which requires all defenses to be asserted. *Id.* at 466. The Court declined to resolve that inconsistency, however, because the defendant in that case plead a general denial, holding that the defendant therefore did not waive the defense of negligent misrepresentation by not specifically pleading it in his answer. *Id.* at 467.

Here, ESTC also plead a general denial in its answer, and none of the affirmative defenses set forth in subsection (g) are applicable in this case. The only possible affirmative defense is payment. "A payment made by a tortfeasor or by a person acting for him to a person whom he has injured is credited against his tort liability, as are payments made by another who is, or believes he is, subject to the same tort liability." *Restatement (Second) of Torts* § 920A (1979). In the instant case, however, the payment was made by a third party (the Henrys), not by ESTC or by a person acting for it. Therefore, the defense of payment in response to a claim for money was not available to ESTC. Moreover, even if we were to conclude that the existence of a collateral source or "double recovery"

constitutes an affirmative defense, ESTC did not waive that defense by failing to specifically plead it in its answer, because such a defense "may" be pleaded. Therefore, ESTC did not waive its argument that double recovery is impermissible.

II.

The Doctrines of Collateral Litigation and Collateral Source

The Ochses argue that the collateral source rule prevents ESTC from avoiding paying the amount of damages awarded. Specifically, the Ochses contend that its real estate contract with the Henrys, which permitted the prevailing part to receive attorney's fees following litigation, was entered into for their sole benefit, and that the Henrys' payment, if any, of those fees under that contract cannot serve to reduce or offset the damages owed by ESTC. ESTC counters that the collateral source rule does not permit "double recovery" in this case, and even if it did, the circuit court erred by awarding the attorney's fees in violation of the collateral litigation rule, because the Henry litigation was not related to any act or omission by ESTC. We agree, in part, with both parties, and remand for further determinations by the circuit court. We explain.

A. Collateral Litigation

Under the "American Rule," a prevailing party in a lawsuit is prohibited from recovering attorney's fees as an element of damages unless (1) "parties to a contract have an agreement to that effect"; (2) "there is a statute which allows the imposition of such fees"; or (3) "the wrongful conduct of a defendant forces a plaintiff into litigation with a third party." *St. Luke Evangelical Lutheran Church, Inc. v. Smith*, 318 Md. 337, 345-46 (1990) (internal citations omitted). Here, the Ochses claimed entitlement to attorney's fees

as damages under the third exception, asserting that ESTC's wrongful conduct forced them to engage in litigation with the Henrys.[20]

This method of obtaining attorney's fees as damages is called the "collateral litigation doctrine." As first explained by the Court of Appeals in *McGaw v. Acker, Merrall & Condit Co.*,

> The general rule is that costs and expenses of litigation, other than the usual and ordinary court costs, are not recoverable in an action for damages, nor are such costs even recoverable in a subsequent action; but, where the wrongful acts of the defendant have involved the plaintiff in litigation with others, or placed him in such relations with others as make it *necessary* to incur expense to protect his interest, such costs and expense should be treated as the legal consequences of the original wrongful act.

111 Md. 153, 160 (1909) (emphasis added); *accord Bahena v. Foster*, 164 Md. App. 275, 289 (2005). In *McGaw*, the Court permitted an award of attorney's fees and costs from a prior litigation because the defendant's wrongful acts required the plaintiff to incur fees involved in securing a new lease; in other words, "the necessary expenses it incurred to regain the possession is an element of the injury." *McGaw*, 111 Md. at 161; *see generally Montgomery Village Assocs. v. Mark*, 95 Md. App. 337 (1993) (applying the collateral litigation rule when the defendants wrongfully failed to perform under a repurchase agreement, which caused plaintiff to incur attorney's fees when filing for bankruptcy and

[20] The Ochses pleaded in their complaint that "[a]s a direct and proximate result of [ESTC's] . . . breaches of duty, the Ochses have suffered and continue to suffer significant losses and damages, including, but not limited to, having incurred considerable legal expenses associated with the formidable efforts undertaken by them to clear and defend title to their property."

restoring his credit); *Cohen v. Am. Home Assur. Co*., 255 Md. 334 (1969) (applying the collateral litigation rule when the defendant wrongfully failed to defend insurance claims).

In order for the collateral litigation doctrine to permit recovery, the expenses must have been reasonably incurred from the proximate result of the complained-of injury. *Fowler v. Benton*, 245 Md. 540, 550 (1967) ("In order that expenses of so-called 'collateral litigation' be allowed as damages to a plaintiff, '(s)uch expenses must be the natural and proximate consequence of the injury complained of, and must have been incurred necessarily and in good faith, and the amount thereof must be reasonable.'" (citing 25 C.J.S. Damages § 50)).

Here, the circuit court entered judgment in the amount of $214,710.60 in economic damages against ESTC—the entire amount of damages owed from the Henry litigation—for both the negligence and breach of contract counts. However, the court did not make any finding on the record that ESTC's wrongful conduct caused the Ochses to initiate litigation against the Henrys, and if that conduct did proximately cause that litigation, to what extent that litigation related to the injury caused by ESTC. Indeed, ESTC argues that as soon as the Ochses discovered the 1919 deed, their only recourse to rectify their injury (namely, cloud on their title) was to sue Dorchester County, the owner of the disputed strip, and that additional litigation against the Henrys was no longer necessary.[21] Moreover, ESTC continues, once Dorchester County deeded the 30-foot strip to the Ochses, the error

[21] Mr. Billmyre, the attorney for the Henrys, wrote the Ochses' attorney a letter asserting that the action was being prosecuted in bad faith, because "[n]o judgment against the Henrys can result in the Ochses' obtaining title to the driveway" and the remedy would be a petition to close the county road.

committed by ESTC was fully cured, and any additional litigation against the Henrys at that time was unnecessary. Because the determination of cause is a factual question, we remand to the circuit court for that determination.

B. Collateral Source Rule

The Ochses further argue that the circuit court erred in reducing the amount of damages owed by ESTC by the amount of damages to be paid by the Henrys in the Henry litigation. They maintain that the "collateral source" doctrine prevents consideration of payment of damages by a third party (the Henrys).

"The collateral source rule permits an injured person to recover the full amount of his or her provable damages, 'regardless of the amount of compensation which the person has received for his injuries from sources unrelated to the tortfeasor.'" *Haischer v. CSX Transp., Inc.*, 381 Md. 119, 132 (2004) (quoting *Motor Vehicle Admin. v. Seidel*, 326 Md. 237, 253 (1992)). The Court of Appeals has favorably cited *The Restatement (Second) of Torts*, § 920A(2), comment b (1977) for the scope of the application of this rule:

> Payments made or benefits conferred by other sources are known as collateral-source benefits. They do not have the effect of reducing the recovery against the defendant. The injured party's net loss may have been reduced correspondingly, and to the extent that the defendant is required to pay the total amount there may be a double compensation for a part of the plaintiff's injury. But it is the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor. **If the plaintiff was himself responsible for the benefit, as by maintaining his own insurance or by making advantageous employment arrangements, the law allows him to keep it for himself. If the benefit was a gift to the plaintiff from a third party or established for him by law, he should not be deprived of the advantage that it confers.** The law

> does not differentiate between the nature of the benefits, so long as they did not come from the defendant or a person acting for him.

Seidel Chevrolet, Inc., 326 Md. at 254 (emphasis added).

ESTC argues that when the "independent source" that already paid the damages is also a wrongdoer, then the "collateral source" rule does not apply.[22] ESTC relies on *Bell v. Allstate Insurance Co.*, 265 Md. 727 (1972) for this proposition. In that case, two boys were injured in a car accident, and the father, on behalf of his two sons, filed a lawsuit against the operator and owner of the vehicle for damages. *Id.* at 728-29. Pursuant to a consent judgment, the owner of the vehicle satisfied the judgment against it. *Id.* at 729. The father also sued his insurer, Allstate, for failing to provide medical payments as provided in their contract and for negligence and breach of contract. *Id.* Allstate thereafter provided the medical payments owed, and filed a motion for summary judgment as to the remaining counts, which the circuit court granted. *Id.* On appeal, the Court of Appeals began by reiterating the established principle that "[n]othing can be clearer than that there may be only one satisfaction for a single harm, no matter how many tortfeasors are involved, and regardless of whether they acted jointly or independently." *Id.* at 729-30 (citing *Grantham v. Bd. of Cnty. Comm'rs for Prince George's Cnty.*, 251 Md. 28, 31 (1968) *overruled by Welsh v. Gerber Products, Inc.*, 315 Md. 510 (1989)). The Court explained that the father's claim against Allstate was that its failure to make a prompt payment caused physical therapy to cease, and that this damage—the likelihood of permanent injury—was

[22] ESTC also argues that Maryland Lawyers' Rules of Professional Conduct 1.5, which sets forth the factors to be determined in considering the reasonableness of a fee, bars double recovery. The provision, however, does not state this contention.

taken into account when the owner of the vehicle entered into the consent judgment. *Id.* at 730. Therefore, because the owner of the vehicle satisfied the damages relating to the same injury, the Court affirmed the grant of summary judgment in Allstate's favor. *Id.* at 731.

Unlike that case, the Henrys and ESTC are not joint tortfeasors that contributed to a single harm. Here, the Henrys were adjudicated liable for attorney's fees only due to the mutual mistake in the language of the deed; the Henrys were not found liable for any tort claim.[23] There was no finding of fraud or intentional ill will on behalf of the Henrys that imputed some kind of wrongdoing in the breach beyond simply failing to know about the 1919 deed and thus failing to provide marketable title. Moreover, we cannot state with certainty that the harm alleged in the Henry litigation and the harm alleged in the ESTC litigation were the same. Given the quitclaim deed executed by Dorchester County, thereby clearing the Ochses' title, the "harm" in this case was really the alleged necessity of engaging in the Henry litigation in the first instance. Indeed, it is likely that had the Ochses known of the 1919 deed before the Henry litigation, the Ochses would have sued Dorchester County and ESTC and Chicago Title instead.

Because the Henrys and ESTC are not joint tortfeasors, we turn to the question of whether the court properly declined to apply the collateral source doctrine in this case. Here, the Ochses entered into the contract of sale with the Henrys and negotiated for and/or agreed to a clause permitting attorney's fees solely for their own benefit. Because the Ochses ultimately prevailed in their lawsuit against the Henrys, the Ochses were entitled

[23] The circuit court found, and we affirmed, that the Henrys did not commit fraud in the inducement. *See Ochse v. Henry*, 202 Md. App. 521, 541 (2011).

to reasonable attorney's fees pursuant to their contract. ESTC, an adjudicated tortfeasor, sought to avoid payment of the attorney's fees incurred in the Henry litigation on the ground that the Henrys will (or have) paid those fees already. We agree with the Ochses that ESTC should not be permitted to receive the benefit of that contract and be excused from owing any damages, even though those damages supposedly resulted from ESTC's negligent conduct. This would permit a windfall to ESTC by letting it escape responsibility for its actions. Indeed, the basis for the collateral source rule is to preclude such a result on putative grounds, even though the plaintiff may receive more than full compensation.[24]

We recognize, however, that the damages awarded (and ultimately reduced) were for ESTC's negligence *and* breach of contract. This is problematic, because the collateral source rule has, at least in Maryland, generally only been applied in tort cases. *Dennison v. Head Constr. Co.*, 54 Md. App. 310, 319 (1983). In *Dennison v. Head Constr. Co.*, we reviewed the rationale behind the hesitancy to apply the rule in contract cases, stating that

> [t]he collateral source rule provides in general that compensation received from a third party will not diminish recovery against a wrongdoer. Because its purpose is punitive, this doctrine has generally been applied only to tort cases. Although the wronged party may be overcompensated, the collateral source rule requires that a wrongdoer pay for the full extent of the damages he has caused.

54 Md. App. at 321-22 (quoting *Hubbard Broad., Inc. v. Loescher,* 291 N.W.2d 216 (Minn. 1980)). We explained: "[t]he collateral source rule is punitive; contractual damages are

[24] ESTC argues that the purpose of the collateral source rule, particularly relying on subrogation, is that the wrongdoer ultimately be responsible for the damaged caused, not that the victim be entitled to double recovery. We agree, but do not see how this helps ESTC's position.

compensatory. The collateral source rule, if applied to an action based on breach of contract, would violate the contractual damage rule that no one shall profit more from the breach of an obligation than from its full performance." *Id.* at 322 (quoting *Patent Scaffolding Co. v. William Simpson Constr. Co.*, 256 Cal. App.2d 506, 511 (1967)). Another jurisdiction has further explained that in contrast to a contractual case, a "'tortfeasor's responsibility [is] to compensate for all harm that he causes, not confined to the net loss that the injured party receives.'" *Bramalea California, Inc. v. Reliable Interiors, Inc.*, 119 Cal. App. 4th 468, 472-73 (2004) (alteration in original) (quoting *Plut v. Fireman's Fund Ins. Co.*, 85 Cal. App. 4th 98, 108 (2000)). Here, as noted, the court made no distinction between the negligence claim and the breach of contract claim in awarding damages. Although it seems obvious to this Court that it was the adjudicated negligent conduct (failure to find 1919 deed) that resulted in a breach of the contract, and, therefore, the damages ultimately stemmed from the negligent act, we nevertheless remand for the circuit court to clarify to which claims the damages are applicable.

In sum, we remand to the circuit court for two determinations. First, the court must render a factual finding regarding whether ESTC's wrongful conduct proximately caused the Ochses' necessary obligation to engage in litigation with the Henrys to protect their interests. Second, the court must clarify whether the damages in the amount of attorney's fees from the Henry litigation are for ESTC's negligence or breach of contract. To the extent that the damages resulted from ESTC's negligent failure to locate the 1919 dead, we hold that the collateral source rule precludes consideration of the Henrys' payment of those fees pursuant to the real estate contract entered into by the Ochses for their own benefit.

IV.

Calculation

Last, the Ochses also contend that the court was required to make its independent computations based on the invoices presented at trial and should not have simply adopted the circuit court's determination of reasonable attorney's fees in the Henry litigation. However, the Ochses fail to cite any authority that the circuit court erred in doing so or that it was required to do otherwise. Indeed, our review of an award of attorney's fees is reviewed under an abuse of discretion standard. *See Henriquez v. Henriquez*, 185 Md. App. 465, 475 (2009). We do not observe any abuse of discretion in the court's reliance of the attorney's fees determination in the Henry litigation. In our view, it would seem inconsistent or unfair for ESTC to pay more or less than the attorney's fees actually awarded in the Henry litigation.

JUDGMENTS OF THE CIRCUIT COURT FOR TALBOT COUNTY AFFIRMED; REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; CHICAGO TITLE INSURANCE COMPANY DISMISSED.

COSTS TO BE DIVIDED BETWEEN APPELLANT EASTERN SHORE TITLE COMPANY AND APPELLEES STEVEN J. OCHSE AND SHARI S. OCHSE.