Circuit Court for Montgomery County
Case No. 404769-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1882

September Term, 2015

ELIZABETH FERIA

v.

ALAN CORNFIELD

Eyler, Deborah S.,
Wright,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: November 8, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal comes before us from the grant of summary judgment in a civil action for damages in the Circuit Court for Montgomery County that was based solely on issue preclusion of the factual findings made during a prior unrelated custody hearing. Appellant, Elizabeth Feria ("Feria"), appeals from the entry of summary judgment against her, in favor of appellee, Alan Cornfield ("Cornfield"), arguing that collateral estoppel was not applicable and should not have been applied.

Feria presents for our review two questions, which for clarity we reduce to one and rephrase:[1]

Did the court err in granting summary judgment?

For the following reasons, we find that the circuit court did err in granting summary judgment and shall reverse.

FACTS and PROCEEDINGS

[1]Feria's questions presented *verbatim* are:

> 1. Did the Circuit Court err in granting summary judgment to Appellee on the grounds that issue preclusion prevented Appellant from relitigating an issue of material fact where the Circuit Court had found against Appellant on that issue in a separate custody case, even though Appellant had no right to appeal the decision in the custody case because she had prevailed on the pending motion?
>
> 2. Did the Circuit Court err in granting summary judgment to Appellee on the grounds that issue preclusion prevented Appellant from relitigating an issue of material fact where the Circuit Court had found against Appellant on that issue in a separate custody case, but that finding was not essential to the Circuit Court's ruling in the custody case?

Although this appeal stems from the entry of summary judgment in a non-domestic civil action for damages, the basis of the judgment below was founded on factual determinations made in a prior and separate custody case. Therefore, we provide the following relevant factual and procedural background from both the custody case and the instant civil action.

Feria and Cornfield are the parents of their minor child, C., who was born in August 2002. Feria had sole legal and physical custody of C. until September 24, 2014, when the court modified custody, awarding primary residential custody to Cornfield with joint legal custody to be shared between Cornfield and Feria, but giving tie-breaking authority to Cornfield.[2]

On October 3, 2014, C. was discovered by officials of his school to be in possession of a large sum of cash – $25,000 to $30,000. Unaware of the change in custody order, the school's principal called Feria, who arrived at the school and took possession of the money. The following week, C. again went to school with an additional large sum of cash. This time, the principal, having been made aware of the change in custody, notified Cornfield, who came to the school and retrieved the money, which he asserted was taken from his home safe.

[2] The underlying reasons for the requested custody modification, which resulted in the September 2014 award of C.'s residential custody to Cornfield, are found in greater detail in this Court's unreported opinion in *Cornfield v. Feria*, No. 1169, Sept. Term, 2015, 2017 WL 2778048 (Filed June 27, 2017).

Shortly after the two incidents at the school, C.'s Best Interest Attorney filed a motion requesting further modification of custody.[3] At a hearing on the motion, the parties called a total of six witnesses, including Dr. Paul C. Berman, C.'s therapist. At the close of the evidence, the court "found by a preponderance of the evidence that" the money "came from [Cornfield's] safe" and "was not [Feria's] money." The court further found that Feria "received that money knowing it wasn't hers and then … determined later where it came from."

Having made that finding, the custody court then explained its analysis and rationale, stating:

> Now what do I do with that? This little boy has lived with his mother for almost the first 12 years of his life. No one is disputing he loves his mother and his mother loves him. And that she does a lot of good motherly things. And she's got from where Judge Johnson ruled he gave her a significant amount of overnights.
>
> So he felt and he also gave her joint legal custody. So even that was a major change with this little boy age 12….
>
> And she had to play for better or worse a significant role in this little guy's life.
>
> * * *
>
> So I'm also, I am moved, by so in other words what I have is 12 years of the boy with his mother and now we've got a dramatic change basically a couple months ago at the most and he's adjusting to it. He's adjusting to it pretty well according to Dr. Berman, according to my notes when he, and he does a really nice job interviewing everybody and getting facts. I appreciate him being here.
>
> [H]e thought C[.] had improved. He was more verbal. He was willing to disagree with his mother. He was starting to gain some independence.

[3] The Best Interest Attorney was still C.'s attorney of record in the custody case.

And in fact an example of that he told his mother to give the money back and he was seeing he could influence his future. He said he had more friends at Mom's but he could get more at Dad's, a sign of strength.

I don't want to undo that….

* * *

But he's now 12. He's got to see what his mother for better or for worse.

* * *

It's a balancing. The boy needs his mother. He doesn't look at her all day long like the Dad does and say, you know, I don't trust this woman. I have all kinds of other problems with her. This is his Mom. He hugs her. He loves her. He kisses her. She makes meals for him when she's with him.

So children don't get fixated on the negatives with their parents unless they are getting punished.

* * *

So I don't condone her actions at all. I don't want anybody to misunderstand but I am trying to balance it that this little guy basically I think I would in effect be taking this child away from his mother….

* * *

And as he gets a little bit older into his teen years there might be a mixer at his high school and all the things, neat things that moms and dads do with their children. I think I would be choking that. I think I would be cutting it off and I got to balance it.

* * *

I think the best interest of this little boy is to keep the status quo that Judge Johnson had put in place.

The custody court subsequently issued a written order which stated:

THIS MATTER HAVING COME BEFORE THE COURT on the Best Interest Attorney's Emergency Motion to Temporarily Modify Access and for Clarification of Custody Order and the Order of this Court of October

> 23, 2014, and the Court having considered the testimony of the parties, their witnesses, documentary evidence, and the testimony of the expert called by the Best Interest Attorney, and having considered the arguments and having made oral findings on the record in this matter, it is by this Court, this 10th day of December, 2014,
>
> **ORDERED** that the Best Interest Attorney's Emergency Motion to Temporarily Modify is hereby denied.

On May 8, 2015, Cornfield filed in the circuit court a "Complaint for Unjust Enrichment, Monies Owed, Theft and Conversion." In the complaint, Cornfield requested damages on the following grounds:

- "Allowing [Feria] to retain the benefit of the funds [that C. took to his school] would be inequitable as [she] was not entitled to [the] funds."
- Feria "owes the funds to" Cornfield.
- "By taking possession of the money and dissipating the funds, [Feria] stole [Cornfield's] money."
- "The monies were in the possession of [Cornfield] as they were in his safe and he is entitled to possession of the monies."

Cornfield simultaneously filed a "Motion for Summary Judgment," in which he contended that "a court of competent jurisdiction has already determined that the money was [Cornfield's] property." Cornfield further contended that Feria "is bound by the prior decision and is estopped from arguing that the money was not [Cornfield's] and judgment may be entered against her." Feria subsequently filed a Response to the motion, in which she averred that "the money that [C.] took was [Feria's] money" and that C. "took the envelope containing the money from her purse and brought it to school with him."

The circuit court held a hearing on the motion for summary judgment, finding that:

> The fact at issue, the ownership of that money, has been adjudicated by this [c]ourt. It was adjudicated by [the court] in November. It was the exact same issue. It was presented to the [c]ourt. There was a final decision, and [the court] was pretty clear that [it] didn't believe [Feria's] version of where that money came from and who it belonged to.
>
> [Feria] was a party to the action, and she was represented by counsel, at the time, well known to the [c]ourt, with a stellar reputation as a Family Law attorney. He called witnesses. He cross-examined witnesses. There was a full hearing, and [the court] determined that that money belonged to [Cornfield], that she knew it, and that she retained it after being given it by the school.
>
> So, I don't think that, with respect to the ownership of the money, there is any genuine dispute at this point. I think issue preclusion applies.

The court subsequently issued a written order reflecting the oral ruling in which it concluded that "there is no genuine dispute as to any material fact," ordered that judgment be entered in favor of Cornfield, and awarded him compensatory damages in the amount of $23,500.

DISCUSSION

Standard of Review

It is well established that "[t]he purpose of the summary judgment procedure is not to try the case or to resolve factual disputes; rather it is to decide whether there is an issue of fact sufficiently material to be tried." *Gross v. Sussex Inc.*, 332 Md. 247, 255 (1993). Generally, "[w]hen reviewing a grant of summary judgment, we determine 'whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law.'" *Blackburn Ltd. P'ship v. Paul*, 438 Md. 100, 107 (2014) (quoting *Myers v. Kayhoe*, 391 Md. 188, 203 (2006)). When a party is contending that there is a dispute as to material fact, "[t]hose facts in dispute must be

presented in detail and with precision, general allegations are insufficient." *Clark v. O'Malley*, 434 Md. 171, 195 (2013) (internal quotation and citation omitted).

However, "[i]f the case presents a clear legal issue, which does not require the trial court to resolve motive, intent, credibility, or disputed facts and inferences, then the court may determine liability as a matter of law on a motion for summary judgment." *Fagerhus v. Host Marriott Corp.*, 143 Md. App. 525, 535 (2002). When a "circuit court's decision turns on a question of law, not a dispute of fact, an appellate court is to review whether the circuit court was legally correct in awarding summary judgment without according any special deference to the circuit court's conclusions." *Mathews v. Cassidy Turley Maryland, Inc.*, 435 Md. 584, 598 (2013) (citing *Ross v. Hous. Auth. of Baltimore City*, 430 Md. 648, 666–67 (2013)). In our review, we are "limited to examining the same information from the record and decide[] the same issues of law as the trial court." *Goldstein v. 91st St. Joint Venture*, 131 Md. App. 546, 560 (2000) (citing *Nationwide Mut. Ins. Co. v. Scherr*, 101 Md. App. 690, 695 (1994)).

When a motion for summary judgment "raise[s] the legal doctrine of collateral estoppel, and whether this doctrine should be applied [it] is ultimately a question of law for the court." *Shader v. Hampton Imp. Ass'n, Inc.*, 217 Md. App. 581, 605 (2014), *aff'd,* 443 Md. 148 (2015). As such, "an application of collateral estoppel 'is a legal conclusion that this Court reviews *de novo*.'" *Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. The Fund for Animals, Inc.*, 451 Md. 431, 451 (2017) (quoting *Garrity v. Md. State Bd. of Plumbing*, 447 Md. 359, 368 (2016)).

Applicability of Collateral Estoppel

Cornfield moved for summary judgment on the ground that "[s]ince the Court has previously determined that the monies were [his] property, there is no dispute as to any material fact." The circuit court, persuaded by Cornfield's argument, granted summary judgment on the sole basis that collateral estoppel applied to the factual finding of the custody court that the money in question belonged to Cornfield.

It is well established, that "[t]he doctrine of collateral estoppel provides that, '[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.'" *Garrity*, 447 Md. at 368 (quoting *Cosby v. Dep't of Human Res*., 425 Md. 629, 639 (2012)). In order to determine whether or not collateral estoppel applies to a particular case, "the probable fact-finding that undergirds the judgment used to estop must be scrutinized to determine if the issues raised in that proceeding were actually litigated, or facts necessary to resolve the pertinent issues were adjudicated in that action." *Shader v. Hampton Imp. Ass'n, Inc.*, 443 Md. 148, 162 (2015) (quoting *Colandrea v. Wilde Lake Cmty. Ass'n, Inc.*, 361 Md. 371, 391-92 (2000)).

We apply a four-part test, asking four questions to determine the applicability of collateral estoppel:

> 1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
>
> 2. Was there a final judgment on the merits?

> 3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
>
> 4. Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

Shader, 443 Md. at 162 (quoting *Burruss v. Bd. of Cty. Comm'rs of Frederick Cty.,* 427 Md. 231, 249–50 (2012)).

Feria contends that the court "erred in granting summary judgment…. because the court's ruling regarding the ownership of the [money] in the child custody matter did not preclude the court's consideration of the same factual issue in the damages case." (Boldface omitted). She claims that "[i]n order for the factual ruling in the custody case to be controlling in the damages case, it must have been a final appealable decision" and "essential to the court's ruling on the motion in the custody case." (Boldface omitted).

For support, Feria relies heavily on the Court of Appeals' analysis and holding in *Murray Int'l Freight Corp. v. Graham*, 315 Md. 543 (1989). We, too, address the applicability of the principles outlined in *Murray*. The pertinent excerpts highlighting the relevant facts and procedural history of *Murray*, as presented in the opinion, are as follows:

> Murray International was a trucking company operating out of Baltimore County. Graham was the owner-operator of a tractor; he hauled freight for Murray International…. Graham and Murray International at one point agreed that the latter would afford Graham coverage under its workers' compensation insurance policy. Murray International deducted from Graham's remuneration the premiums reflecting this coverage.
>
> On 24 September 1985, Graham was allegedly injured while hauling freight for Murray International. He claimed workers' compensation. In opposition to the claim, Murray International raised several issues, one of them being that of Graham's employment status. On 17 April 1986, after

> hearing, the [Workmen's Compensation] Commission passed an order finding that Graham "was an employee of Murray International Freight but ... that the claimant did not sustain an accidental injury arising out of and in the course of his employment...." Graham's claim was disallowed. Apparently, no one appealed.
>
> The scene [then] shift[ed] to the District Court of Maryland. There, Graham sued Murray International to recover the workers' compensation premiums the corporation had deducted from his pay. The theory of the action was that since Graham had been a corporate employee, the employer itself should have paid the premiums, and any agreement to the contrary was invalid. Conflicting evidence on the employment issue was presented, but Graham prevailed when the District Court held "the doctrine of collateral estoppel requires this court to leave the Commission's finding that the plaintiff, Thomas Graham, was an employee conclusive, unreviewable, and final."
>
> Murray International sought solace from the Circuit Court for Baltimore County, but in vain. That court agreed with the District Court: "Since the issue here is collateral estoppel, it was not necessary for the District Court ... to review the evidence before it." It affirmed.

315 Md. at 545-46 (footnote omitted).

In reversing the circuit court's judgment, *id.* at 553-54, the Court of Appeals explained that:

> As a matter of general policy, the law ordinarily precludes the relitigation of matters that have been fully and fairly litigated and finally decided between parties, by a tribunal of competent jurisdiction. This policy avoids the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibilities of inconsistent decisions.
>
> Thus, rules have developed to preserve the conclusive effect of judgments, except on appeal or other direct review. These rules, sometimes referred to under the rubric of "res judicata," include both claim preclusion and issue preclusion (sometimes here termed "collateral estoppel"). We deal here with the latter, which has been thus described: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is

conclusive in a subsequent action between the parties, whether on the same or a different claim." *Restatement (Second) of Judgments* § 27 (1982).

* * *

Assuming, without deciding, that a court may, in general, give collateral estoppel effect to a Commission decision, there are prerequisites to be met before that can be done in a particular case…. One of these is identity of parties. That is present here; Graham and Murray International were adversaries both before the Commission and in the subsequent District Court litigation. A second prerequisite is that the issue of fact or law actually be litigated. The parties are at considerable odds over whether much, if any, evidence about Graham's employment status was presented to the Commission. We cannot resolve the dispute because the record does not include the transcript of the Commission hearing. But the issue was certainly before the Commission. It was raised by Murray International and its insurer in the "Issues" form they presented to the Commission; it was expressly noted by the Commission in its order of 17 April 1986; and it was determined in that order. The *Restatement (Second)* teaches that "[w]hen an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated within the meaning of [§ 27]." Section 27 comment d. We shall assume that the issue of Graham's employment status was actually litigated before the Commission.

But this is as far as we can accompany Graham on the road to collateral estoppel. The employment issue was not "essential to the [Commission's] judgment." And what is even more important, Murray International could not have appealed from that "judgment." As we shall show, either factor alone precludes giving collateral estoppel effect to the Commission's order.

The Commission's "judgment" read:

> It is, therefore, this 17 day of April, 1986, by the Workers' Compensation Commission ORDERED that the claim filed herein by Thomas Edward Graham, claimant, against Murray International Freight, employer, and State Accident Fund, insurer, be and the same is hereby disallowed.

Patently, no determination that Graham was an employee of Murray International was essential to that "judgment." The Commission could have reached the same result without making any determination of Graham's

employment status. For example, it could have determined that Graham had suffered no accidental injury, or that there was no causal connection between the injury and Graham's disability, or that (assuming employment) the injury did not arise out of or in the course of that employment. The fact that it found in a preliminary portion of its order that Graham was an employee of Murray International makes no difference. We turn again to the *Restatement (Second)*, this time to § 27 comment h:

> If issues are determined but the judgment is not dependent on the determinations, relitigation of those issues in a subsequent action between the parties is not precluded. Such determinations have the characteristics of dicta, and may not ordinarily be the subject of an appeal by the party against whom they were made. In the circumstances, the interest in providing an opportunity for a considered determination, which if adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of relitigation.

* * *

Since the determination that Graham was an employee was not essential to the Commission's decision to deny his claim, the determination can have no preclusive effect in the litigation between Graham and Murray International. While this alone is sufficient to reverse the decision of the circuit court, we hold that the same result also is compelled by the fact that Murray International could not have appealed from the Commission's order.

As our earlier quotation from the *Restatement (Second)* § 27 comment h illustrates, "[i]f review is unavailable because the party who lost on the issue obtained a judgment in his favor, the general rule of § 27 is inapplicable by its own terms." *Restatement (Second)* § 28 comment a. Indeed, that ordinarily is true even if all of § 27's prerequisites for preclusion are met, but "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action...." *Restatement (Second)* § 28(1). The question then becomes whether Murray International could have appealed from the Commission's order.

We answered the question in *Paolino v. McCormick & Co.*, 314 Md. 575, 552 A.2d 868 (1989). There, Paolino (the employee) had sought to reopen an order of the Commission pursuant to Article 101, § 40(c). McCormick (the employer) argued that the petition was time-barred. The Commission determined that the claim was not time-barred, but, nevertheless, rejected it. *Paolino*, 314 Md. at 578, 552 A.2d at 869. We held

> that order was "wholly favorable to McCormick" and thus unappealable by McCormick, 314 Md. at 582-584, 552 A.2d at 871-872, for an order that is wholly in a party's favor ordinarily is not appealable by that party. *Paolino*, 314 Md. at 579-582, 552 A.2d at 869-871 and cases cited therein.
>
> For purposes of appealability, a final order or final action of the Commission is "'an order or award made by the Commission in the matter then before it, determining the issues of law and of fact necessary for a resolution of the problem presented in that particular proceeding and which grants or denies some benefit under the Act.'" *Paolino*, 314 Md. 583, 552 A.2d at 872 (quoting *Great American Ins. v. Havenner*, 33 Md.App. 326, 332, 364 A.2d 95, 99 (1976)) [emphasis in *Havenner*]. As we already have explained, determination of the employment issue was not necessary to a "resolution of the problem presented" by Graham's compensation claim. What is more, the Commission's order here, as in *Paolino*, denied the employee's claim altogether. It thus denied the employee any benefits under the Act and was, therefore, wholly in the employer's favor.
>
> Because the Commission's finding that Graham was employed by Murray International had no preclusive effect, we must reverse. The case must be returned to the District Court for a factual determination of the employment issue.

315 Md. at 547, 549-55 (internal citations, quotations, and footnotes omitted).

We find the analysis in *Murray* instructive and reach a similar conclusion. Patently, the determination that the money belonged to Cornfield was not essential to the court's order denying the Best Interest Attorney's motion. The court could have reached the same result without making any determination as to the ownership of the money. The fact that the court found, preliminarily, that the money belonged to Cornfield has no effect on the final custody judgment.

While this would be a sufficient ground on its own to reverse the decision of the circuit court, we hold that the same result also is compelled by the fact that Feria could not have appealed from the court's order denying the Best Interest Attorney's motion. The

court's order denied the Best Interest Attorney's request for modification of "access" altogether, and was, therefore, wholly in Feria's favor. It is well established that, "[t]he availability of appeal is limited to parties who are aggrieved by the final judgment." *Suter v. Stuckey*, 402 Md. 211, 224 (2007) (citing *Thompson v. State*, 395 Md. 240, 248–49 (2006)). This principle is rationalized on the understanding that "'a party cannot appeal from a judgment or order which is favorable to him, since he is not thereby aggrieved.'" *Thompson*, 395 Md. at 248–49 (quoting *Adm'r. Motor Vehicle Admin. v. Vogt,* 267 Md. 660, 664 (1973)). Accordingly, because Feria prevailed on the Best Interest Attorney's motion, she was not entitled to appeal a factual finding that was not basis of court's order in her favor.

Cornfield argues that "[i]t is clear from the transcript[] that the issue surrounding the money played a large role in the court's decision." We disagree. A "large role" does not mean that it was essential to the final judgment, as required under *Murray*.

As mentioned in his complaint, C.'s Best Interest Attorney "moved for a further modification of custody" as a result of C. taking large sums of cash to school on two occasions. The purpose of the motion was to modify the September 24, 2014 custody order,[4] not to determine whose money it was or who gets to keep it. We glean from the transcript extract of the custody court's ruling that the money issue was ancillary to the issue of custody and to the best interests of the child. The primary focus in every custody

[4] Neither the Best Interest Attorney's motion to modify custody, nor the custody court's final order denying that motion were included in the record or record extract. We infer the intent of the motion from the transcript excerpts and Cornfield's complaint.

determination or modification is what is or would be in the best interest of the child. *See Kowalczyk v. Bresler*, 231 Md. App. 203, 213 (2016) ("The best interests of the child is the paramount concern in the trial court's decision to modify custody." (citing *Wagner v. Wagner*, 109 Md. App. 1, 28–29 (1996))).

It is well established in Maryland that

> unless there is a material change, there can be no consideration given to a modification of custody. The threshold—but not paramount—issue is the existence of a material change. Once material change, if any, is established, the further relevance of that evidence depends upon how it relates to the best interest of the child; thereafter, the best interest of the child standard controls, *i.e.,* is paramount in the trial court's further determination as to whether to modify custody.

Wagner, 109 Md. App. at 29.

Although the ownership of the money was significant in the court's consideration of material change in circumstances, it is clear that that was only the first step in the court's extensive analysis. The transcript reflects that the court's decision took into account a number of considerations, beyond the ownership of the money, relating to the history of the custody dispute and the conduct of the parties before it made its final ruling on the motion. Notably, after it determined that the money did not belong to Feria, the custody court discussed at length Feria's character, C.'s conduct, and the relationship between the two. The court first addresses C.'s conduct and Feria's possible influence on his conduct by stating that:

> Yes, [Feria] puts [C.] in the middle…. [S]he gives [C.] a bad example but there's other problems with [C.].

> [C.] steals the money from his dad on two occasions. He knows it's not his. He's 12. He's not 3. And his parents have to deal with it…. But the parents really first of all have to deal with [C.] and let him, teach him it's right from wrong.
>
> And that it wasn't his regardless of where it came from it wasn't his. He had no right to it and it was not his money….

However, the transcript of the custody court's analysis and ruling also reflects that it was Feria's character that was the underlying factor of whether or not there was a material change in circumstances to warrant a change in custody. The court addressed the fact that:

> And one thing [Feria] should have learned, if nothing else, that she's being watched and it wouldn't take a whole lot more probably for a Court because you roll the dice who you are going to get would take your visitation, not only take away not make it supervised but make it unsupervised where you don't see your son.
>
> ***
>
> Because Courts are not, including myself tolerate [sic] bad example after bad example….

The court discussed what additional information might impact its decision, stating that:

> Now if [Feria] conspired with her son to break into the safe and steal it, it might be a different story but the facts [sic] here is that it was fortuitous that this money dropped in her lap. That there's no evidence that she put him up to taking it and there's no evidence that she even knew that he had taken it to school.

The court explained its rationale by stating, "[s]o I don't condone her actions at all. I don't want anybody to misunderstand but I am trying to balance it that this little guy basically I think I would in effect be taking this child away from his mother…."

The custody court's statements also implied a lack of preclusive effect to its determination that the money belonged to the father in two instances of the transcript of its analysis and ruling. First, the court notes that:

> Now if she gets prosecuted, if she gets convicted, that's another story. I don't know whether she will or not and I'm not suggesting she should.
>
> That's not for me to make that determination. I just call it by a preponderance of the evidence today that that wasn't her money and she received that money knowing it wasn't hers and then determined later where it came from.

Then, near the end of its analysis, the court stated, "[n]ow, I don't know whether she's going to come off her story. I'm not asking her to do it." These statements illustrate the court's understanding that its determination of the ownership of the money was not intended to have preclusive effect in future litigation, whether civil or criminal. Feria was not compelled to accept the custody court's finding of that fact and abandon her version of the events. Ownership of the money was but one factor in the court's extensive analysis and not essential to the final judgment.

Cornfield next contends that Feria's "reliance on *Murray* is misplaced[]" because the *Murray* Court "assumed that the employment issue had actually been litigated." In *Murray*, the record did not include the transcript of the hearing at which the Workmen's Compensation Commission determined Graham's employment status. 315 Md. at 549. Whereas here, as Cornfield avers, the record includes the transcript, which "makes clear, the issue surrounding the money was litigated."

Cornfield's challenge as to the applicability of *Murray* is without merit. *Murray* presented the same questions as does the present case – whether a finding was essential to

the final judgment and whether the final judgment was appealable. In *Murray*, the Court of Appeals found that the determination of Graham's employment was not essential to the Commission's denial of his claim and, further, that Murray could not have appealed the factual finding that Graham was an employee because it prevailed on the denial of the claim. 315 Md. at 552. Similarly, as we have discussed above, we find that the determination as to the ownership of the money was not essential to the final order denying the motion to modify custody and, because Feria prevailed on the outcome of the motion, she could not have appealed the order.

It is because of those findings, we hold that the fourth element of collateral estoppel has not been satisfied and, therefore, it does not apply to the factual determination of the ownership of the money. Accordingly, the circuit court's grant of summary judgment, based solely on its application of collateral estoppel, was legally incorrect.[5]

[5] We note that even if we determined that collateral estoppel was properly applied to the factual determination of the ownership of the money, we would nonetheless still find that the circuit court erred in granting summary judgment on that basis. Rule 2-501 expressly provides that judgment shall be entered "in favor of or against the moving party if the motion and response show that there is no genuine dispute as to *any material fact* **and** that the party in whose favor judgment is entered is entitled to judgment *as a matter of law*." Md. Rules 2-501(f) (emphasis added).

Despite its apparent blanket grant of summary judgment to all claims and awarding damages, the transcript of the hearing on summary judgment reflects that the court limited its application of collateral estoppel only to the ownership of the money. In its oral ruling, the court stated, "[s]o, I don't think that, with respect to the ownership of the money, there is any genuine dispute at this point. I think issue preclusion applies." The ownership of the money, however, was only one material fact in dispute. The court failed to address the essential elements of each of the four claims for unjust enrichment, monies owed, theft, and conversion in Cornfield's complaint.

Cornfield next contends that, "to the extent that [Feria] asserts that the judgment was not final because she could not have appealed, this argument was not timely raised and therefore, should not be considered." However, he provides no support for this single sentence assertion. We, therefore, decline to address it, but do note that Feria had in fact raised that argument in her motion for reconsideration.

Dispute of Material Fact

Having determined that the court was incorrect in granting summary judgment solely on the ground of collateral estoppel, we need not address Cornfield's final argument that "there are no factual disputes and [he] is entitled to judgment as a matter of law," because Feria "did not provide an affidavit or written statement under oath with her opposition." However, in the desire "to guide the trial court or to avoid the expense and

Generally, money is not subject to claims for conversion. *See Roman v. Sage Title Group, LLC*, 229 Md. App. 601, 609 (2016) (finding that "[t]he general rule is that monies are intangible and, therefore, not subject to a claim for conversion" because when the money is comingled with other funds, "the cash loses its specific identity[.]" (internal quotation and citation omitted)), *cert. granted sub nom*. *Sage Title Group v. Roman*, 451 Md. 578 (2017), and *aff'd*, 455 Md. 188 (2017), *reconsideration denied* (Sept. 21, 2017). Because of this, grant of summary judgment as to this claim would be legally incorrect, absent a specific determination that the money had not been comingled. As addressed in the transcript excerpts from the custody proceeding, Feria spent the money the school returned to her. The money can be presumed to no longer be in Feria's possession and to be comingled with funds belonging to the leasee and mortgagee, to whom payments were made.

Additionally, where claims involve *mens rea*, summary judgment is typically not appropriate. *See Eng'g Mgmt. Servs., Inc. v. Maryland State Highway Admin*., 375 Md. 211, 230 (2003) (determining that "[w]e consistently have held that 'summary judgment generally is inappropriate when matters—such as knowledge, intent or motive—that ordinarily are reserved for resolution by the fact-finder are essential elements of the plaintiff's case or defense.'" (quoting *Brown v. Dermer*, 357 Md. 344, 355 (2000))).

delay of another appeal[,]" Md. Rule 8-131(a), we will note that this argument lacks merit and fails to take into consideration the record.

Attached to his complaint, Cornfield provided transcript excerpts from the custody proceeding. Contained in the excerpts is part of Feria's testimony during the custody proceeding regarding the ownership of the money and her version of the events around the child taking the money. That testimony is consistent with the factual representations in her answer to the complaint and in her response to the motion for summary judgment. In her response, Feria outlined the material facts in dispute, detailing her version of the events, consistent with her prior testimony, and identified the parts of the record that supported her factual assertions by citing to the particular transcript pages of her prior testimony from the custody hearing.

In addressing the relevant provisions of Rule 2-501, the Court of Appeals has expounded on the purpose of the affidavit requirement, establishing that:

> An affidavit suffices in the summary judgment context to place before the court a fact that, *if* testified to by the affiant at trial, would be admissible, even though the affidavit itself generally is not admissible at trial. The court can reasonably assume that, if called as a witness at trial, the affiant would testify to the same facts as those set forth in the affidavit. Thus, the trial judge may consider the affidavit in the summary judgment context even though, at trial, the affidavit itself generally would be inadmissible and the affiant would have to testify.
>
> A transcript of former testimony possesses the same indicia of reliability as an affidavit in the summary judgment context. The transcript indicates the matters to which the witness, *if* called in the present case, would testify, because, like an affiant, the witness gave the former testimony under oath.

Imbraguglio v. Great Atl. & Pac. Tea Co., 358 Md. 194, 207 (2000). This explanation is also supported by the Rule's requirements for an affidavit offered in support or opposition of summary judgment, which provides that it "shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." Md. Rules 2-501(c).

In the instant case, Feria testified as to her version of the events regarding C. taking a large sum of money to school as well as to the amount and ownership of the money. Having already testified to those facts, it is evident that she would be competent to testify as to those matters again, if called to do so. It is for this reason, despite Feria's failure to provide the circuit court with the requisite affidavit or sworn written statement outlining a genuine dispute to the material fact of the ownership of the money, that her attachment of Cornfield's complaint with its exhibits containing the custody court testimony would be sufficient for a court to find that she demonstrated a dispute as to that material fact.

In conclusion, we find that the custody court's factual determinations as to the ownership of the money were not essential to the final custody order and, further, that because Feria prevailed on the Best Interest Attorney's motion, it was not an appealable final order for which collateral estoppel would apply. Accordingly, we hold that the circuit court was legally incorrect in granting summary judgment on the basis that collateral estoppel applied. Reversal of that order is warranted.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.
COSTS TO BE PAID BY APPELLEE.