UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1512

SEPTEMBER TERM, 2001

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SHANGRI-LA LIMITED PARTNERSHIP, et al.

v.

BEVARD FARM CORPORATION

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Hollander,
Eyler, James R.,
Krauser
JJ.

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Opinion by Hollander, J.

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Filed: October 22, 2003

13C0044704

This matter is rooted in a ten-year lease agreement dated April 17, 1997 (the "Lease"), executed by the tenant, Shangri-La Limited Partnership ("Shangri-La"),[1] appellant, and the landlord, Bevard Farm Corporation ("Bevard"), appellee. Pradip Ghosh, Ph.D., and his wife, Kumkum Ghosh, appellants, executed a Guaranty of Lease on April 17, 1997. The Lease pertains to property located at 10215 Guilford Road in the Columbia Junction Shopping Center in Howard County, and consists of approximately 6400 square feet. Appellants used the premises for a branch location of Children's Manor Montessori School, which opened on or about December 1, 1997.

Pursuant to § 4.1 of the Lease, Shangri-La paid an annual rent of $96,000 in the first year. During each successive year, based on a formula in the Lease, Shangri-La's annual rent was subject to an increase. Article V of the Lease is titled "Taxes," and § 5.1 defines "Real Estate Taxes." Under § 5.2 of the Lease, a triple net commercial lease, Shangri-La was obligated to pay, as "Additional Rent," "all Real Estate Taxes attributable to the Premises...." The real estate taxes are central to the parties' dispute.

The instant appeal arises from two separate law suits filed by Bevard in the District Court for Howard County, which were

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[1] The Lease refers to Shangri-La Limited Partnership as "a Maryland Corporation." The Corporations & Associations Article of the Maryland Code defines a limited partnership and a corporation as different business entities. *Compare* C.A. § 1-101(n) (defining "Maryland Corporation") *with* C.A. § 9A-101(h) (defining "Limited Partnership"). However, the disposition of the case does not turn on whether Shangri-La is a corporation or a limited partnership.

consolidated below. Bevard filed its first suit on March 9, 2000, in the District Court, seeking to recover from appellant $1184.55 in rent, consisting of unpaid real estate taxes for the tax year 1999/2000. Appellee also demanded possession of the premises, pursuant to Md. Code (1974, 1996 Repl. Vol.) § 8-401 of the Real Property Article ("R.P.") ("Case I"). Bevard filed a second suit on September 14, 2000, in the District Court ("Case II"), seeking to recover $8870.98 in rent, based on unpaid real estate taxes allegedly due and owing from appellants for the tax year 2000/2001. Appellee also sought possession of the premises. Both complaints were titled: "Failure To Pay Rent - Landlord's Complaint For Repossession Of Rented Property Under Real Property 8 § 401."

As to Case I, on April 3, 2000, the District Court for Howard County (Axel, J.) entered judgment in favor of Bevard in the amount of $1192.14. Thereafter, on April 7, 2000, appellants filed a Notice of Appeal to the Circuit Court for Howard County, which led to the transfer of Case I to the circuit court. On October 5, 2000, after appellants requested a jury trial in Case II, that case was also transferred to the circuit court. Then, by Order of March 8, 2001, the circuit court consolidated Case I and Case II.[2] A

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[2] Appellants filed a Counterclaim for Declaratory Relief on July 13, 2001, which Bevard moved to strike. Bevard claimed the counterclaim was untimely, because it was filed approximately two weeks prior to trial, and almost one month after the close of discovery. By Order dated July 26, 2001, the court granted appellee's motion to strike the counterclaim.

consolidated jury trial was held and, on July 30, 2001, the jury determined that appellants breached the Lease.[3] The jury awarded Bevard $10,713.83 in damages.

Following the verdict, Bevard orally requested the court to award possession of the premises. Pursuant to the court's directive, on August 6, 2001, Bevard filed a Motion for Order of Possession of the Premises, pursuant to R.P. § 8-401. Then, on August 8, 2001, a "Notice of Recorded Judgment" was filed in the circuit court, reflecting entry of a judgment in the amount of $10,713.83 in favor of Bevard. Thereafter, on September 7, 2001, while Bevard's motion for possession was pending, appellants noted an appeal to this Court.

On September 24, 2001, counsel for both sides submitted legal memoranda in regard to appellee's motion for possession. By Order docketed October 15, 2001, the court granted Bevard's motion.

Subsequently, on October 22, 2001, appellants moved for judgment notwithstanding the verdict or, alternatively, for a new trial or to alter, amend or revise the judgment, and to stay execution of the judgment. In the interim, on October 23, 2001,

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[3] Because the amount in controversy in Case I was less than $2500, appellants were entitled to a trial *de novo* as the appeal in Case I. *See* Maryland Code (2002 Repl. Vol.), Courts and Judicial Proceedings Article, § 12-401(f) (providing that, where the amount in controversy in the District Court exceeds $2500, an appeal from the District Court "shall be heard on the record made in the District Court. In every other case ... an appeal shall be tried *de novo*.").

Bevard filed a Petition For Warrant of Restitution, which appellants answered on October 29, 2001. They opposed the Petition, in light of their pending revisory motion. Then, on February 13, 2002, the circuit court denied appellants' post-trial motions.

On appeal, appellants present several issues for our review, which we have rephrased:

> I. Did the trial court err or abuse its discretion by granting appellee's motion to strike appellants' Counterclaim for Declaratory Relief and by failing to hold a hearing prior to granting the motion?
>
> II. Did the trial court err or abuse its discretion in failing to instruct the jury in accordance with the joint jury instructions submitted to the court?
>
> I. "Did the Jury fail to follow instructions of the Court related to the laws of contract and evaluate the facts?"
>
> II. Did the trial court err in failing to consider the law related to mutual mistake of fact?
>
> III. Did the court err or abuse its discretion in granting appellee's motion for possession of the premises?

On appeal, appellee asks:

> Should the Appeal be dismissed, as, pursuant to Md. Code Ann. § 12-302(a) of the Cts. & Jud. Proc. Art. ("C.J."), appellants failed to file their appeal in the proper court?

For the reasons discussed below, we have no jurisdiction to hear this appeal.

## I. FACTUAL SUMMARY

The Lease was executed on April 17, 1997. James R. Moxley,

III signed the Lease on behalf of Bevard, in his capacity as Vice President and director. Dr. Ghosh signed the Lease on behalf of Shangri-La, in his capacity as "President." Although Ms. Ghosh did not sign the Lease, both she and Dr. Ghosh signed a "Guaranty of Lease," by which they

> unconditionally, jointly and severally, and absolutely guarantee[d] ... unto Landlord, its successors and assigns; (a) the full, prompt, and complete payment by Tenant of the rent and all other amounts payable by Tenant during the term of this Lease, and (b) the prompt, faithful and complete performance and observance by Tenant of all of the terms, covenants, and conditions of the Lease on the Tenant's part.

Under § 5.2 of the Lease, Shangri-La was required to pay, as "additional rent," "all Real Estate Taxes attributable to the Premises." According to appellants, the Premises included only the 6400 square foot building within which the Montessori school was located. In contrast, appellee claimed that the rental obligation applied to the parking lots surrounding the building, as well as the roadways entering and exiting the shopping center.

Because the Lease is the operative legal document and is central to the dispute in this case, we pause to review several key provisions.

Article I is entitled "**Premises**." Section 1.1 defines the Premises as "the area of ground that is shown crosshatched on the site plan marked Exhibit A-1 attached hereto and made part hereof, together with the improvements thereon (the "Premises")...."

Article IV, entitled "**Rental**," provides, in part:

**SECTION 4.1. Rentals Payable.** The annual rent to be paid pursuant to this Lease shall be payable in twelve (12) continuous equal monthly installments, in advance, on the first day of each and every month.... The amount of annual rent to be paid by Tenant shall be:

(1) For the first year of the initial term of this Lease, the sum of Ninety-six Thousand Dollars ($96,000.00) per year... and

(2) During each Lease Year subsequent to the First Lease Year of the Term, Minimum Rent shall be adjusted so that the amount of Minimum Rent for the Lease Year in question shall be the amount of Minimum Rent for the immediately preceding Lease year multiplied by 103%.

**SECTION 4.2. Payment of Additional Rent.** In addition to the foregoing Minimum Rent, all other payments to be made by Tenant to Landlord shall be deemed to be and shall become additional rent (herein "Additional Rent") hereunder whether or not the same be designated as such; and shall be due and payable on demand or together with the next succeeding installment of rent, whichever shall occur, together with interest thereon at the default rate (as hereinafter defined) if not paid when the same is due; and Landlord shall have the same remedies for failure to pay the same as for nonpayment of rent....

Article V, entitled "**Taxes**," states, in pertinent part:

**SECTION 5.1. Real Estate Taxes Defined.** The term "Real Estate Taxes" means all real estate taxes, assessments (including without limitation, all assessments for schools, public improvements, or benefits, and Metropolitan Area Charges), water, sewer, or other rents, and other governmental impositions and charges of every kind and nature whatsoever, whether general or special, foreseen or unforeseen (including all interest and penalties thereon unless the same result from Landlord's negligence), which at any time during the Term may be levied, assessed, imposed, become due and payable or liens upon, or arise in connection with the use, occupancy or possession of the Center.... ... A tax bill or copy thereof submitted by Landlord to Tenant shall be conclusive evidence of the amount of the Real Estate Taxes or installment thereof....

The term "improvements" means all buildings, structures of any description or type, utilities, paved areas, curbs, drains, etc., within the center which would be considered separate and apart from the land of the Center.

**SECTION 5.2. Tenant to Pay Proportionate Share of Taxes.** Commencing upon the Rent Commencement Date and continuing thereafter throughout the Term, Tenant shall pay in each Tax Year (as hereinafter defined) during the Term, as Additional Rent, all Real Estate Taxes attributable to the Premises, all buildings and other improvements situated thereon, including, without limitation, the Improvements (as hereinafter defined) and all of Tenant's trade fixtures and personal property located therein (herein "Tenant's Property"). Within thirty (30) days after Landlord sends the tax bill to the Tenant, Tenant shall deliver to Landlord a receipt from Howard County showing proof of payment by tenant.

Article VIII pertains to "Repairs and Alterations." Section 8.1 is entitled "**Repairs to be made by Tenant.**" Section 8.1(a) provides, in pertinent part: "(a) The Tenant shall, through the term and at its expense ... promptly make any and all repairs, ordinary or extraordinary, foreseen or unforeseen, to the Improvements, Tenant's Property, and the Premises...."

Article XI is entitled "**Parking**." Section 11.1 states that "a portion of the parking area shall be used in common with the adjacent McDonald's restaurant."

Article XV is captioned "**Defaults**." Section 15.1 defines an event of default to include "(a) The failure of Tenant to pay any Minimum Rent, Additional Rent or other sum of money when same is due." Section 15.2, pertaining to the Landlord's remedies upon default, states, in part:

> **15.2. Remedies.** Upon the occurrence and continuance of an Event of Default, Landlord, without notice to Tenant in any instance (except where expressly provided for below) may (a) perform, on behalf, and at the expense of Tenant, any obligation of Tenant under this Lease which Tenant has failed to perform and the cost thereof together with interest thereon at the default rate the date of such expenditures shall be deemed Additional Rent and shall be payable to Tenant to landlord upon demand, (b) with or without terminating this Lease and the tenancy created hereby (any such termination to be effective upon the giving of notice of such election to Tenant) renter the Premises, by summary proceedings or otherwise, and remove Tenant and all other persons and property from The Premises....

The evidence adduced at trial indicated that Shangri-La paid the real estate taxes in full for both the 1997/1998 and 1998/1999 tax years, in the approximate amounts of $2600 and $7300, respectively. Regarding the 1998/1999 bill, however, Dr. Ghosh testified that he withheld payment of the bill until November 1999, because he questioned what he considered a dramatic increase from the prior year. He testified that, following his return from an overseas trip in January 1999, he "start[ed] handling the situation" and corresponded with various agents of Bevard. Dr. Ghosh wrote to Jim Schulte, an officer of Bevard, in January 1999, requesting, *inter alia*, that Bevard appeal the 1998/1999 tax assessment to the State. Bevard declined to do so, claiming that an appeal would prove detrimental with respect to future tax assessments.

Edward Plitt, III, Bevard's comptroller, explained Bevard's decision. He testified that "the evidence that we would have had

to take to the assessor would have proved that the value is a lot greater than the assessment so it would have been moot." Thus, Bevard wrote to appellants on January 6, 1999, explaining its refusal to appeal the tax assessment. Dr. Ghosh persisted. He wrote to Schulte, in a letter dated January 12, 1999, disputing Bevard's position. Bevard responded on January 13, 1999, reiterating its reason for not appealing the 1998/1999 tax assessment.

Appellants subsequently challenged appellee's failure to apportion the real property tax obligation. By letter dated March 9, 1999, to Schulte, Dr. Ghosh stated: "Taxes must be a proportionate share. I am not about to pay for property used by other tenants, for example McDonald and road used by others." Nevertheless, in November 1999, Dr. Ghosh paid the bill, in full, to avoid being placed in default.

The 1999/2000 real estate tax bill was due in July 1999. As indicated on the bill, the amount of the 1999/2000 tax obligation was approximately $8300. Bevard sent appellants a letter dated January 14, 2000, reminding them of their liability for the real estate taxes under § 5.2 of the Lease. In the letter, Bevard agreed to reduce the amount of appellants' tax liability with respect to the area of the parking lot used by McDonald's customers.

Dr. Ghosh responded in a letter of January 18, 2000,

reiterating his objection to Bevard's failure to appeal the 1998/1999 tax assessment. Further, he contested the method by which Shangri-La's share of the real estate tax obligation was calculated. Appellants maintained that they were liable only for the taxes with respect to the building and the land on which it is situated. The letter stated, in pertinent part:

> Pursuant to the lease, my share of tax liability is to be computed based upon the area of land used by the center which includes the 6400 square feet building and 8400 square feet of paved area. I can not be held liable for tax liability on the properties used by McDonalds and access road for the entire shopping center. I disputed this issue before the payment of the 1998 tax bill but I was told that if I did not pay the tax bill, I will be in default and risk losing the center. Under such a threat, I paid the 1998 tax bill. Now a refund is due to us for overcharging on the tax payment.

After applying their numerical computation, appellants determined that the appropriate sum of taxes owed by Shangri-La for the 1999/2000 tax year amounted to $6127.50, and they enclosed, with the letter, a check in that amount. Shangri-La also renewed its request that Bevard file an appeal contesting the tax assessment for 1999/2000.

As we noted, Bevard filed Case I on March 9, 2000, for both monetary damages and possession of the premises arising from appellants' failure to pay its 1999/2000 tax bill. By letter dated March 29, 2000, Dr. Ghosh maintained that Shangri-La was only liable for real estate taxes in connection with the building and the land it occupied. Referring to § 5.2 and § 1.1 of the Lease,

Dr. Ghosh stated: "Based on a strict interpretation of the lease, the leased property is only the 6400 square feet building, defined in the lease and exhibit A-1 as the Premises and 'improvements,' 'which would be considered separate and apart from the land of the center[.]'"

Moreover, Dr. Ghosh concluded that, for the 1997/1998, 1998/1999, and 1999/2000 tax years, Shangri-La had actually overpaid its share of the real estate taxes by $9578.42. Accordingly, Dr. Ghosh demanded a refund in that amount. He explained in his testimony:

> ... I determined that the first year, the tax that I paid $2,683.61, it was an overpayment because that was charged on the - on the land because the building was still being constructed in July of 1997. In 1998/'99, I estimated that I overpaid by $3,285.00. In 19 - for the year 1999 and 2000 tax year, I paid $3,609 in overpayment. The total overpayment of [sic] almost $9,000.00. So at this time[,] I did not owe them any money. They actually owed me money....

Based on appellants' belief that Shangri-La had overpaid the prior years' real estate taxes, appellants refused to pay the real estate taxes allegedly due for 2000/2001. In turn, that led appellee to file Case II on September 14, 2000. As we noted, that case was transferred for trial to the circuit court upon appellants' prayer for a jury trial.

After Case II was filed, Dr. Ghosh expressed his position once again, by letter to Bevard of September 26, 2000. He stated:

> I am surprised to see that you have filed [suit] again with the District Court for the payment of taxes when you

> know that similar issue [sic] is under appeal in the Circuit Court for Howard County. Your calculation of the proportionate share of taxes is wrong again. According to my estimation (Please refer to my letter of March 29, 2000 to Mr. Schulte), I have made a total overpayment of $9,578.42. This overpayment covers this years [sic] real estate taxes. I can tell you that, I will fight your interpretation of the lease vigorously and that you will be liable for all legal expenses.

The circuit court consolidated Case I, which was an appeal, and Case II, which had not yet been tried. Both cases were presented to the jury.

In order to determine the terms of the parties' Lease agreement, the jury was required to consider two conflicting copies of the Lease, one submitted by Bevard and one by Shangri-La. The two copies were identical in content, except that Shangri-La's copy included markings on Exhibit A-1 and signatures on Exhibits A and A-1, while Bevard's copy did not.

As previously indicated, § 1.1 of the Lease defined the Premises as "the area of ground that is shown *crosshatched* on the site plan marked <u>Exhibit A-1</u> attached hereto and made a part hereof, together with the improvements thereon." (Italics added). Pursuant to § 1.1 of the Lease, Exhibit A-1 was central to the determination of the boundary of the Premises. That, in turn, was integral under § 5.2 of the Lease in regard to the determination of the proportionate share of real estate taxes owed by Shangri-La. Shangri-La's copy of Exhibit A-1 was crosshatched only on the building, while Bevard's copy of Exhibit A-1 failed to reflect any

crosshatching. Moreover, Shangri-La's copy of Exhibit A-1 contained the initials of agents from both Shangri-La and Bevard, while Bevard's copy contained no initials.

Moxley, Vice President of Bevard, testified that the purpose of initialing the pages of the Lease is to identify all of the pages, "so that everyone will know forever that those pages that have initials are the pages that were part of the original agreement." In his testimony, Moxley addressed the lack of initials and crosshatching on Exhibit A-1 of Bevard's copy of the Lease:

> [BEVARD'S ATTORNEY]: Do you know why your initials [appear on the pages of Shangri-La's copy of Exhibit A-1] and do not appear on the corresponding pages of [Bevard's] Exhibit A-1?
>
> [MR. MOXLEY]: Those - the only explanation is that the page - the pages were missed.
>
> [BEVARD'S ATTORNEY]: What do you mean by missed?
>
> [MR. MOXLEY]: When you're - when you're signing 20, 30 pages, sometimes the - you - you just flip up the corner and - and initial it. Sometimes you miss some.
>
> [BEVARD'S ATTORNEY]: Now, on [Shangri-La's] copy of A1, you said there's the crosshatching.
>
> [MR. MOXLEY]: Yes.
>
> [BEVARD'S ATTORNEY]: Did you graph that crosshatching on that - that copy of Exhibit A1?
>
> [MR. MOXLEY]: No.
>
> [BEVARD'S ATTORNEY]: To your knowledge, did anyone from Bevard Farms graph that crosshatching on that document?
>
> [MR. MOXLEY]: No, I don't believe anyone did.

> [BEVARD'S ATTORNEY]: To your knowledge, was that crosshatching on that document at the time it was originally signed?
>
> [MR. MOXLEY]: It was not.

Appellants contended, however, that Shangri-La's version of the Lease, limiting the Premises to the building, was accurate. Dr. Ghosh testified that two copies of the Lease were executed, and the crosshatching was added to both copies at the time of signing. Moreover, he claimed that the parties initialed each page of both sets of documents when the Lease was executed.

Nevertheless, the jury heard evidence at trial suggesting that the crosshatching was added by Dr. Ghosh *after* the Lease was signed. The following colloquy, on cross-examination of Dr. Ghosh, is relevant:

> [BEVARD'S ATTORNEY]: Now, the - the crosshatching on [Shangri-La's] Exhibit A1 is in blue, is it not?
>
> [DR. GHOSH]: Yes, it is.
>
> [BEVARD'S ATTORNEY]: And that's what you said you did on the day that the - the lease was signed?
>
> [DR. GHOSH]: That - that's right.
>
> [BEVARD'S ATTORNEY]: Okay. There's also some highlighting on this particular page. Can you tell us when that was done?
>
> [DR. GHOSH]: It was done at the same time.
>
> * * *
>
> [BEVARD'S ATTORNEY]: You did the highlighting and the crosshatching at the same time?
>
> [DR. GHOSH]: Uh-huh.

[BEVARD'S ATTORNEY]: In the presence of these same people?

[DR. GHOSH]: That's right.

[BEVARD'S ATTORNEY]: At the time you signed the lease?

[DR. GHOSH]: That's right.

[BEVARD'S ATTORNEY]: Are you certain about that?

[DR. GHOSH]: I'm very certain about it.

[BEVARD'S ATTORNEY]: Did you recall a previous trial on this issue?[4]

[DR. GHOSH]: Yes, I do.

[BEVARD'S ATTORNEY]: At that trial, did you introduce that document that's now -

[DR. GHOSH]: No.

[BEVARD'S ATTORNEY]: - Defendant's -

[DR. GHOSH]: I - I did not.

[BEVARD'S ATTORNEY]: - Exhibit 1?

[DR. GHOSH]: Did not.

[BEVARD'S ATTORNEY]: Did you distribute that document to anyone at the time of that trial?

[DR. GHOSH]: No, I did not distribute [it].

* * *

[BEVARD'S ATTORNEY]: And it's your testimony that the blue crosshatching and the highlighting appeared on it at the time you showed it -

[DR. GHOSH]: Oh yes.

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[4] It appears that the reference to the "previous trial" pertains to the trial of Case I.

[BEVARD'S ATTORNEY]: - to Mr. Plitt?

[BEVARD'S ATTORNEY]: Have you added anything to this document marked Defense Exhibit 1 since the time that it was originally signed?

[DR. GHOSH]: Have I added anything?

[BEVARD'S ATTORNEY]: Yes.

[DR. GHOSH]: No.

Plitt testified as to the inaccuracy of appellants' copy of the Lease. The following exchange is pertinent:

[BEVARD'S ATTORNEY]: Draw your attention to Exhibit A1 on this document.

* * *

[BEVARD'S ATTORNEY]: Prior to [May 2001,] when had you last seen that particular page?

[MR. PLITT]: I saw it at the District Court case [i.e., Case I].

[BEVARD'S ATTORNEY]: And under what circumstances was it that you saw this document?

[MR. PLITT]: Dr. Ghosh had the document in his hand and he was having a discussion with Judge Axel about the crosshatching and the fact that it hadn't been crosshatched.

[BEVARD'S ATTORNEY]: And this case was over real estate taxes?

[MR. PLITT]: Yes, it was.

[BEVARD'S ATTORNEY]: And you saw that document?

[MR. PLITT]: Yes, I did.

[BEVARD'S ATTORNEY]: And what was the condition of the document at that time?

[MR. PLITT]: It - it was not crosshatched.

> [BEVARD'S ATTORNEY]: So at the time of the District Court case [i.e., Case I] there was no crosshatching on Exhibit A1 of Defendant's Exhibit 1?
>
> [MR. PLITT]: Correct. The document was not crosshatched, however it was highlighted. There's yellow highlighting around where the building is. That was there because Judge Axel commented on that. . . .
>
> * * *
>
> [BEVARD'S ATTORNEY]: When was it that this occurred? What date?
>
> [MR. PLITT]: I think it was April 3rd of 2000.

In instructing the jury, the court stated the following with regard to the rules of contract interpretation:

> A contract is to be interpreted so as to give effect to the parties' intentions at the time the contract was made. Usually, these intentions are shown by the words and terms used in the contract. These words and terms are to be given there [sic] ordinary meaning unless such meaning will have an unreasonable result. Each sentence of the contract should be interpreted in view of the other sentences of the contract. Those words and terms of the contract, which have a technical meaning or are used in the trade or by custom to mean something different from the meaning of [sic] words or terms have in ordinary usage, should be given the technical trade or custom meaning if the contract was made in view of this technical meaning, trade or custom usage and the technical meaning or trade or custom usage was either generally used or was actually known to the parties. If when the contract was made, one party knew or should have known that the other party interpreted the contract in a certain way and did not object to that interpretation, the contract is to be interpreted in that way.

Shangri-La did not object to any of the jury instructions. Thereafter, the jury found that appellants had breached the Lease by failing to pay the real estate taxes attributable to the leased premises for the 1999/2000 and 2000/2001 tax years. It awarded

damages to appellee in the amount of $10,713.83.

We shall include additional facts in our discussion.

## II. DISCUSSION

### A. The Contentions

Appellants contend that the trial court abused its discretion in refusing to grant a hearing on their motion for declaratory judgment. They assert that "a declaratory judgment would have terminated the controversy" between the parties as to issues that had already been "raised directly or indirectly by Bevard's Complaint." Appellee counters that it was entirely within the court's discretion, pursuant to Md. Rule 2-331(d), to strike appellants' counterclaims without holding a hearing, since appellants failed to request one.

Appellants also contend that the court erroneously failed to provide the jury with the appropriate instructions regarding the construction and interpretation of the Lease. According to appellants, "rent," pursuant to R.P. § 8-401, includes only a payment that is "for the tenant's use, possession and enjoyment of the land," which is "'susceptible to definite ascertainment in amount.'" (Citing *University Plaza Shopping Ctr. V. Garcia*, 279 Md. 61, 67 (1977).

Appellee notes that, when asked by the court if they had any exceptions to the court's given jury instructions, appellants

failed to object or indicate any exceptions. For this reason, Bevard asserts that appellants have waived their right to appeal the court's instructions. In the alternative, Bevard urges us to affirm the court's instructions on the basis that appellants "have not met their burden of showing that both prejudice and error" resulted. Moreover, appellee contends: "Real estate taxes are definitely ascertainable...."

Appellants also argue that the jury "failed to follow instructions of the court related to the laws of contract." According to appellants, in light of Bevard's "four different types of calculations of taxes" introduced at trial, their failure "to perform the accurate payment of taxes was not wilful, and was relatively unimportant and was [a] mutual mistake of fact. Thus they [i.e., the jurors] did not follow the Maryland law related to breach of contract or breach of lease." In a related argument, appellants insist that the judgment should be reversed because: "Calculation of proportionate share of taxes by the two parties created this dispute and deficiency in the payment of tax as demanded by Landlord did not constitute a default or breach in lease." In contrast, appellee urges us to recognize that the "jury's findings of fact are not an issue for appeal."

Further, appellants argue that the circuit court erred in granting possession of the premises to appellee. According to appellants, the court's decision is "inconsistent with the Maryland

law." In support of this contention, appellants cite R.P. § 8-402.1 for the proposition that a judgment of possession of the premises required "not just a finding of a substantial breach, but also that the breach warrants an eviction." In response to this contention, appellee argues that the "argument is moot because appellants have voluntarily left the premises." Alternatively, Bevard notes that R.P. § 8-402.1 "does not apply to the current case as both of the consolidated claims were § 8-401 actions."

**B. Jurisdiction of the Appeal**

The jury trial in the circuit court involved two cases, both of which began in the District Court. Case I involved an appeal following the District Court's entry of judgment against appellants in regard to the 1999/2000 real estate taxes; Case II was transferred to the circuit court for a jury trial in regard to appellee's claim against appellants for the 2000/2001 real estate taxes. In the circuit court's exercise of its appellate jurisdiction (Case I) and in the circuit court's exercise of original jurisdiction as to the jury trial (Case II), the circuit court consolidated Case I and Case II for trial. Thereafter, the jury reached one verdict, resolving both cases with respect to the issue of real estate taxes and rent.

Bevard contends that appellants have no automatic right to appeal to this court in regard to Case I, "one of the two underlying District Court cases which was consolidated."

Therefore, based on Maryland Code (1974, 1998 Repl. Vol., 1999 Supp.), § 12-302(a) and § 12-305 of the Courts & Judicial Proceedings Article ("C.J."), Bevard insists that the entire appeal must be dismissed.

In response, appellants assert that their "appeal was filed in the proper court." They contend that Case I was heard *de novo* in the circuit court, and thus the circuit court "did not review this case as an Appellate Court." Appellants cite no legal authority to support their contention.

We disagree with appellants. Moreover, although we disagree with Bevard that the entire appeal must be dismissed for the reasons advanced by Bevard, we conclude that we have no jurisdiction as to the entire appeal.

As to Case I, the circuit court acted in an appellate capacity in regard to appellant's appeal from a decision of the District Court. Therefore, "[o]ne level of appellate review has already been provided in this case." *State v. Monroe*, 82 Md. App. 65, 70, *cert. denied*, 320 Md. 16 (1990). And, we are unaware of any authority that "permits a second appeal as of right from the circuit court review of a final decision of the District Court." *Id.* Rather, "the sole additional avenue of review" available to appellants as to Case I is by certiorari to the Court of Appeals. *Id.* We explain.

Under C.J. § 12-301, this Court has exclusive initial

appellate jurisdiction over a final judgment of a circuit court acting in its capacity as a trial court of original jurisdiction. However, this "broad grant of the right to appeal" is limited by C.J. § 12-302(a). *Gisriel v. Ocean City Elections Board,* 345 Md. 477, 486 (1997). C.J. § 12-302(a) provides:

> Unless a right to appeal is expressly granted by law, § 12-301 does not permit an appeal from a final judgment of a [circuit] court entered or made in the exercise of appellate jurisdiction in reviewing the decision of the District Court, an administrative agency, or a local legislative body.

R.P. § 8-401, entitled "**Failure to Pay Rent**," under which Bevard filed suit, is also pertinent. According to subsection (f), entitled "*Appeal*": "The tenant or landlord may *appeal* from the judgment of the District Court to the circuit court for any county . . . within 4 days from the rendition of the judgment."

Further, Subtitle 4 of Title 12 of the Courts and Judicial Proceedings Article, entitled "*Review of Decisions of District Court*," is pertinent. C.J. § 12-401, entitled "**Right of appeal generally**," provides that a "party in a civil case may appeal from a final judgment entered in the District Court." C.J. § 12-403 is entitled "**Court to which appeal taken**" and subsection (a), entitled "*Counties*," relates to appeals from decisions of the county circuit courts. It provides: "An appeal from the District Court sitting in one of the counties shall be taken to the circuit court for the county in which judgment was entered."

We must also consider C.J. § 12-305, which provides, in pertinent part: "The Court of Appeals shall require by writ of certiorari that a decision be certified to it for review and determination in any case in which a circuit court has rendered a final judgment on appeal from the District Court...." C.J. § 12-307 provides, in pertinent part: "The Court of Appeals has ... jurisdiction to review a case or proceeding decided by a circuit court, in accordance with § 12-305...."

*Gisriel*, *supra*, 345 Md. 477, is instructive. There, the Court of Appeals discussed "the historical background of [C.J.] § 12-302(a)'s limitation on the right of appeal." *Id.* at 486. Tracing the history of the statutory limitation on the right of appeal, the *Gisriel* Court noted that in 1973, the appeal statutes were recodified by the General Assembly through the enactment of the Courts and Judicial Proceedings Article. The Court recognized that C.J. § 12-301 generally provided for "the right of appeal ... 'from a final judgment by a court in the exercise of original, special, limited, statutory jurisdiction' unless expressly denied by law." *Id.* at 489 (citation omitted). Of particular significance, however, the Court cautioned that the Legislature's enactment of C.J. § 12-302(a) "makes [C.J.] § 12-301 inapplicable to appeals from final judgments of circuit courts reviewing decisions of the District Court, administrative agencies or local legislative bodies." *Id.* at 489. Indeed, the Court stated that, pursuant to

C.J. §§ 12-305 and 13-307(2), "judgments of the circuit courts reviewing decisions of the District Court are generally subject to further discretionary appellate review by petitions for writs of certiorari filed in the Court of Appeals." *Id.*

Appellants have already had one appeal as to Case I, which was conducted simultaneously with the trial of Case II. Therefore, any further appellate review is by way of certiorari to the Court of Appeals, which appellants never sought. Therefore, we agree with Bevard that we have no jurisdiction as to the appeal of Case I. *See Young v. Anne Arundel County*, 146 Md. App. 526, 556 (2002); *Levitz Furniture Corp. v. Prince George's County*, 72 Md. App. 103, 108 (1987).

Nevertheless, appellee has not provided us with any authority to support its assertion that, if appellants have no right to appeal Case I, then they also have no right of appeal as to Case II. *Levitz* is instructive.

*Levitz* involved the consolidation of two actions, one seeking judicial review of the findings of the Prince George's County Human Rights Commission and the other an enforcement action brought by the Human Rights Commission. Judge Bloom, writing for this Court, concluded that the case involved the trial court's exercise of both appellate and original jurisdiction, and that this Court only had jurisdiction to review the enforcement action, because it arose from the lower court's exercise of original jurisdiction. *Levitz*,

72 Md. App. at 108. The *Levitz* Court stated:

> Although § 12-302(a) enables [the] County to deny its citizens the right to enlist our review of the circuit court's exercise of appellate jurisdiction, that statute does not enable the county to preclude our review of the lower court's exercise of original jurisdiction. Levitz is entitled to appeal the circuit court's judgment because it was rendered in an equity proceeding filed by the appellees in that court. *See* Md. Cts. & Jud. Proc. Code Ann. § 12-301 (1984 Repl. Vol.).

*Id.*; *see Young*, 146 Md. App. at 563. Accordingly, the *Levitz* Court dismissed the portion of the case involving an appeal from the circuit court's exercise of appellate jurisdiction, but proceeded to consider the appeal involving the circuit court's exercise of original jurisdiction. *Levitz*, 72 Md. App. at 110-118.

*Yarema v. Exxon Corp.*, 305 Md. 219 (1986), also provides guidance. There, the Court recognized that, "unless the trial court clearly intends that a joint judgment be entered disposing of all cases simultaneously," *id.* at 236, consolidated cases are generally not treated as one case for the purpose of Rule 2-602. "[I]nstead, each one of the cases is to be treated as a separate action." *Id.* at 236.

In *Young*, 146 Md. App. 526, we considered both *Levitz* and *Yarema* and determined that C.J. § 12-302(a) prohibited our review of the portion of the case that involved the circuit court's appellate review of a decision of an administrative agency. However, we also determined that we were entitled to review that portion of the case involving the circuit court's decision as to a

declaratory judgment action, which was rendered by the circuit court in the exercise of its original jurisdiction. *Id.* at 564.

Accordingly, contrary to Bevard's position, we conclude that appellants had a right of appeal as to Case II; C.J. § 12-302(a) would not preclude review of a timely appeal from a final judgment pertaining to Case II, because there the circuit court exercised its original jurisdiction.

In regard to Case II, we next consider, *nostra sponte*, whether appellants filed a timely appeal from a final judgment. *See Newman v. Reilly*, 314 Md. 364, 387-88 (1988) (holding that timeliness of filing of a notice of appeal is a jurisdictional issue); *Young, supra*, 146 Md. App. at 556 (stating that "an appellate court has the 'authority' to raise on its own the issue of failure to exhaust statutory administrative remedies) (citing *Moose v. Fraternal Order of Police, Montgomery County*, 369 Md. 476, 488 (2002)); *Stuples v. Baltimore City Police Dep't.*, 119 Md. App. 221, 241 (1998) ("Even absent any motion by the appellee, an appellate court may, *sua sponte*, raise the issue of non-finality and non-appealability at any time.") We conclude that the appeal was filed prior to the entry of a final judgment and was thus premature. Moreover, we are of the view that the premature appeal cannot be saved based on the provisions of Maryland Rule 8-602(d) or 8-602(e)(1). Nor was the filing of the premature appeal cured by the filing of a timely appeal after the entry of a final judgment. Therefore, we must dismiss the appeal. We explain.

Generally, in accordance with C.J. § 12-301 and Maryland Rule 2-601, an appeal must be taken from a final judgment entered in the trial court in order for an appellate court to obtain jurisdiction. *See O'Brien v. O'Brien*, 367 Md. 547, 554 (2002); *Taha v. Southern Mgt. Corp.*, 367 Md. 564, 567 (2002); *Philip Morris, Inc. v. Angeletti*, 358 Md. 689, 713 (2000); *Estep v. Georgetown Leather Design*, 320 Md. 277, 282 (1990); *City of District Heights v. Denny*, 123 Md. App. 508, 518 (1998). In *Jenkins v. Jenkins*, 112 Md. App. 390, 399 (1996), *cert. denied*, 344 Md. 718 (1997), we said: "The longstanding rule in this State deems the existence of a final judgment as a jurisdictional fact prerequisite to the viability of an appeal." Moreover, absent a final judgment, we ordinarily may not reach the merits of an appeal. *O'Brien*, 367 Md. at 554.

The Court of Appeals explained in *Taha*, 367 Md. at 567-68, that a final judgment is one that "terminates the case in the trial court, and for which the court has entered a judgment on the docket." *See Claibourne v. Willis*, 347 Md. 684, 691 (1997); *Board of Liquor License Comm'rs for Baltimore City v. Fells Point Café Inc.*, 344 Md. 120, 127-28 (1996); *Davis v. Davis*, 335 Md. 699, 710 (1994). In order "[t]o qualify as a final judgment, 'The judgment [of the lower court] must settle the rights of the parties, thereby concluding the cause of action....'" *Shofer v. Stuart Hack Co.*, 107 Md. App. 585, 592 (1996) (citation omitted).

Maryland Rule 8-202 is entitled "**Notice of Appeal - Times for Filing**." Subsection (a) provides, in pertinent part: "(a) **Generally**. Except as otherwise provided ... the notice of appeal

shall be filed within 30 days after entry of the judgment or order from which the appeal is taken." *See Stephenson v. Goins*, 99 Md. App. 220, 222 (1994). Furthermore, Subsection (f) defines "entry" of judgment as "the day when the clerk of the lower court first makes a record in writing of the ... order ... on a docket ... according to the practice of that court...." *See Stephenson*, 99 Md. App. at 222.

This case requires us to consider the elements of a final judgment. As we explained in *Carr v. Lee*, 135 Md. App. 213, 222 (2000):

> A final judgment has three necessary attributes: (1) it must be intended by the court as an unqualified, final disposition of the matter in controversy, (2) unless the court properly acts pursuant to Md. Rule 2-602(b), it must adjudicate or complete the adjudication of all claims against all parties, and (3) the clerk must make a proper record of it in accordance with Md. Rule 2-601.

*See also Jones v. Hubbard*, 356 Md. 513, 524 (1999).

Maryland Rule 2-601 is pertinent. It provides, in part:

> a) **Prompt entry - Separate document.** Each judgment shall be set forth on a separate document. Upon a verdict of a jury or a decision by the court allowing recovery only of costs or a specified amount of money or denying all relief, the clerk shall forthwith prepare, sign, and enter the judgment, unless the court orders otherwise. Upon a verdict of a jury or a decision by the court granting other relief, the court shall promptly review the form of the judgment presented and, if approved, sign it, and the clerk shall forthwith enter the judgment as approved and signed. A judgment is effective only when so set forth and when entered as provided in section (b) of this Rule. Unless the court orders otherwise, entry of the judgment shall not be delayed pending determination of the amount of costs.
>
> (b) **Method of entry - Date of judgment.** The clerk shall enter a judgment by making a record of it in writing on the file jacket, or on a docket within the file, or in a

> docket book, according to the practice of each court, and shall record the actual date of the entry. That date shall be the date of the judgment.

The requirements of Rule 2-601 were satisfied in this case as to the matter of monetary damages. The jury rendered a verdict on July 30, 2001, awarding Bevard damages in the amount of $10,713.83. A Notice of Recorded Judgment was docketed on August 8, 2001, reflecting that verdict. On September 7, 2001, within 30 days of the entry of the money judgment, appellants noted their appeal.

Nevertheless, we are of the view that the other two elements of a final judgment were not satisfied when appellants noted their appeal on September 7, 2001. As we stated in *Carr*, 135 Md. App. at 222, a judgment is not final unless it adjudicates all claims against all parties. *See* Md. Rule 2-602(b). We determined in *Carr* that no final judgment existed because the circuit court "not only contemplated that a written order would be executed, and expressly indicated that its decision was not final, [but it also] had not actually decided all matters to be adjudicated"; claims were left open for adjudication at later proceedings and no certification discretion had been exercised by the circuit court. *Id.* at 223.

Bevard made claims for both rent and possession of the Premises. The jury verdict only resolved the monetary claims, but did not address Bevard's claim for possession of the Premises. Thus, all of the claims were not yet adjudicated at the time of the August 8, 2001 entry of judgment. To the contrary, at the time of the appeal, Bevard's claim for possession was pending. The record unequivocally demonstrates that the trial court did not regard the

disposition of the issue as to rent as the resolution of all issues in the case. It directed appellee to submit a motion for possession, which Bevard did on August 6, 2001.

Then, on September 7, 2001, the court directed the parties to submit further memoranda addressing the procedural history of the case, the appropriate law on the issue of possession, the applicable law as to the issue of redemption of the premises, and the definition of "rent" as it applied in the case. On the same date, September 7, 2001, appellants noted this appeal. Then, on September 24, 2001, counsel for both sides submitted legal memoranda in regard to appellee's motion.

By Order docketed October 15, 2001, the circuit court granted Bevard's motion for possession of the Premises. In its Order, the trial court expressly alerted appellants to its belief that appellants had prematurely filed their appeal on September 7, 2001, because the motion in regard to possession of the Premises was still pending at the time the appeal was noted. The court stated: "Before the Court rendered its ruling as to possession of the Premises, [appellants] filed a notice of appeal on September 7, 2001. Pursuant to Maryland Rule 2-602, the Court did not dispose of the entire action and therefore, [appellants'] appeal appears premature." Among other things, the court's assertion in the Order supports our view that the circuit court recognized that the disposition as to the issue of rent did not serve as an "unqualified, final disposition of the matter in controversy." *Carr*, 135 Md. App. at 222.

The text of the August 8, 2001 docket entry further supports our view that the court did not regard the jury's verdict as to rent conclusive of all the issues in the case. It states:

> 0034000 Judgment entered
>
> 0035000 Notice of Recorded Judgment
> 8/8/01 copies mailed
>
> 0036000 *Note - case not closed due to mtn. pending*

(Emphasis added).

In our view, the case below was not resolved, at the earliest, until at least October 15, 2001, when the court granted Bevard's motion for possession. Yet, despite the fact that appellants were on notice as to the prematurity issue, and could have taken steps to protect their appeal, they failed to do so by filing a second notice of appeal after the issue of possession was resolved.

On October 22, 2001, appellants moved for a new trial or a JNOV. Because that motion was filed within ten days, appellants' time to appeal was stayed until the court resolved the motion. *See* Md. Rule 8-202(c). On February 13, 2002, the court denied appellants' post-trial motions. On that date, judgment became final. Therefore, although appellants prematurely noted their appeal on September 7, 2001, they had 30 days from February 13, 2002, to note an appeal. This they failed to do.

We must next consider whether the appeal is saved by any of the provisions under Maryland law designed to allow for appellate review of premature appeals. These savings provisions are found in Maryland Rule 8-602(d) and 8-602(e)(1). *See Carr*, 135 Md. App. at

224. "If neither of the savings provisions applies, 'the final judgment rule and the requirement of a timely notice of appeal continue to dictate dismissal of a premature appeal.'" *Id.* (quoting *Jenkins*, 112 Md. App. at 411). In our view, neither of these savings provisions applies.

Maryland Rule 8-602(d) provides:

> (d) **Judgment entered after notice filed.**
>
> A notice of appeal filed after the announcement or signing by the trial court of a ruling, decision, order or judgment but before entry of the ruling, decision, order, or judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.

The problem here is that the judgment of August 8, 2001, did not resolve all of the issues between the parties. When the judgment was docketed, the court had not yet disposed of appellee's request for possession of the premises. Once the court ruled on that issue, and denied appellant's post-trial motions, no notice of appeal was filed by appellants.

*Jenkins v. Jenkins*, 112 Md. App. 390, 424 (1996), provides guidance. There, the husband brought an action seeking a declaratory judgment relating to the wife's entitlement to his federal pension. *Id.* at 395. After a hearing on October 3, 1995, the judge determined that the husband's position was correct. Pursuant to a written opinion entered October 27, 1995, the court announced its decision and directed counsel to prepare "an appropriate declaratory judgment." *Id.* at 397. On November 8, 1995, the husband noted his appeal. Then, on January 23, 1996, the

wife's counsel submitted a proposed order, which the court signed on January 31, 1996, and docketed on February 9, 1996.

At the outset, the *Jenkins* Court determined that the judgment was not final until the court issued the declaratory judgment on February 9, 1996. Therefore, it said that the appeal was filed prematurely. *Id.* at 399, 408. The Court then looked to the savings provisions of Rules 8-602(d) and 8-602(e)(1)(D). It recognized that Rule 8-602(d) "applies only to a notice of appeal filed 'after an order that would be appealable' but before the order is placed on the docket." *Id.* at 411. Accordingly, the Court stated that only the period between the signing of the judgment on January 31, 1996, and the entry on the docket on February 9, 1996, was within the purview of the rule. *Id.* Because the appellant noted his appeal on November 8, 1995, and failed to file a precautionary appeal between January 31 and February 9, 1996, we determined that Rule 8-602(d) was ineffective in saving the appeal. The Court said: "[I]n order to benefit from Md. Rule 8-202(d), a notice of appeal must be filed between the announcement of a decision, order, or ruling intended to be the final, unqualified disposition of the case and a docket entry correctly indicating that final judgment has been entered. *Id.* at 423.

*Carr*, 135 Md. App. 213, is also helpful. We explained in that case that Rule 8-602(d) is "a timing rule," which "treats a notice of appeal as having been filed the same day as the docket entry of the decision, *assuming a notice of appeal is filed after the decision but before the docket entry.*" *Id.* at 226 (emphasis

added).

Here, the jury returned a verdict on July 30, 2001, and the judgment was docketed on August 8, 2001. Appellants then noted an appeal on September 7, 2001. Thus, this is not a case in which the appellants filed the notice of appeal *after* an oral ruling disposing of *all* issues, but *before* the ruling was docketed. Rather, the appeal was filed 30 days *after* the docket entry. Because Rule 8-602(d) "operate[s] only on a ruling, decision, order, or judgment that would constitute a final judgment when entered," *Byrum v. Horning*, 360 Md. 23, 27, n.1 (2000), Rule 8-602(d) has no application here.

A premature appeal may also be saved under Md. Rule 8-602(e)(1). It states, in pertinent part:

> e) **Entry of judgment not directed under Rule 2-602.** 1) If the appellate court determines that *the order from which the appeal is taken was not a final judgment when the notice of appeal was filed* but that the lower court had discretion to direct the entry of a final judgment pursuant to Rule 2-602(b), the appellate court may, as it finds appropriate, (A) dismiss the appeal, (B) remand the case for the lower court to decide whether to direct the entry of a final judgment, (C) enter a final judgment on its own initiative, or (D) if a final judgment was entered by the lower court after the notice of appeal was filed, treat the notice of appeal as if filed on the same day as, but after, the entry of the judgment.

(Emphasis added).

As we see it, Rule 8-206(e)(1) does not enable us to save appellants' appeal. Again, *Jenkins*, 112 Md. App. 390, is instructive. After determining that Rule 8-602(d) did not apply to save that appeal, we looked to Rule 8-602(e)(1). We concluded that its meaning was "clear and unambiguous." *Id.* at 424. Writing for

the Court, Judge Harrell explained, *id.*:

> In anticipation of the suggestion that we should forgo the plain meaning of Md. Rule 8-602(e)(1)(D), we have analyzed the history of how and why the Rule was adopted. Subsection (D) was first proposed in the 16 November 1987 letter from the Rules Committee Chair to the Court of Appeals sent three days before Md. Rule 8-602 was adopted. In his letter, the Chair stated that the additional language, i.e. subsection (D), was intended to cover the problem of a notice of appeal being both to early and too late.

In this case, the trial court did not exercise its discretion under Rule 2-602(b) to certify the appeal as to the rent claim.[5] "'Rule 2-602(b) permits a circuit court to finalize for appeal an

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[5] Maryland Rule 2-602, commonly referred to as the certification provision, provides:

> (a) **Generally.** Except as provided in section (b) of this Rule, an order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action .... , or that adjudicates less than an entire claim.... :
>
> (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 of all the claims by and against all of the parties.

Subsection (b), however, provides an exception to the general provision of Rule 8-602(a). It states, in pertinent part:

> (b) **When allowed.** If the court expressly determines in a written order that there is no just reason for delay, it may direct in the order the entry of a final judgment:
>
> (1) as to one or more but fewer than all of the claims or parties....

order or decision that adjudicates fewer than all of the claims in an action or the rights and liabilities of all the parties.'" *Universal Underwriters Ins. Co. v. Lowe*, 135 Md. App. 122, 134 (2000) (citation omitted).

Moreover, it is not clear that the circuit court had the discretion to direct the entry of a final judgment pursuant to Rule 2-602(b), after the money judgment was entered on August 8, 2002. In order for a trial court to have the discretion to certify an appeal under 2-602(b), the claim from which an appeal is taken must be separate and distinct from any claims remaining for adjudication. "Rule 2-602(b) may not be used to certify as final only part of a [single] claim." *G-C Partnership v. Schaefer*, 358 Md. 458, 488 (2000); *see Universal Underwriters Ins. Co.*, 135 Md. App. at 135.

*Tyrone R. v. Danielle R.*, 129 Md. App. 260, 270 (1999), *aff'd on different grounds, sub. nom., Langston v. Riffe*, 359 Md. 396 (2000), is helpful to our analysis. There, of its own accord, this Court addressed the jurisdictional issue of whether a timely appeal was filed. 129 Md. App. at 269. The appellee had filed a paternity action in circuit court. The court declared the appellant to be the father of the appellee's child and ordered him to pay child support. 129 Md. App. at 266-67. Almost nine years later, the appellee and the Talbot County Bureau of Support Enforcement (the "Bureau") filed a petition for an increase in child support. *Id.* at 267. Appellant responded and requested that the court order appellee and her child to submit to blood or

genetic testing to verify paternity. Appellant further requested that the court set aside the prior paternity judgment if the testing confirmed that appellant was not the father of the child.

The lower court denied the appellant's request to set aside the prior paternity judgment. *Id.* at 269. Thereafter, on September 16, 1998, the court issued an "Order of Finality," purporting to certify for appeal, under Rule 2-602(b), the appellant's challenge to the paternity judgment, although the child support claim was still pending. *Id.* The father noted his appeal on the same day. Then, on November 6, 1998, the circuit court granted the request for an increase in child support. *Id.*

On appeal, we determined that a final, appealable judgment was not entered until November 6, 1998, when the child support issue was resolved. *Id.* at 270. Thus, the Court concluded that the appeal was noted prematurely. *Id.* The Court also determined that the trial court's attempt at certification was ineffective, because the court did not make an express finding that there was "no just reason for delay." *See* Md. Rule 2-602(b). Because the thirty-day period in which to note an appeal from the proper entry of a final judgment had expired, the Court looked to the savings provision of Maryland Rule 8-602(e)(1)(D). *Id.* at 270-71.

In holding Rule 8-602(e)(1)(D) effective in saving the premature appeal, the Court discussed the attributes of a "separate claim" for the purposes of certification under Rule 2-602(b). According to the Court, to be considered "separate," the claim must 1) be "based on a set of operative facts discrete from the facts

relevant to the claim [remaining for adjudication]," 2) request an entirely distinct form of relief, and 3) have separate enforcement capability. *Id.* at 271. There must, moreover, be "no danger of multiple piecemeal appeals from the judgment below." *Id.*

The Court concluded that the circuit court had discretion under Rule 2-602(b) to enter a final judgment with respect to the father's challenge to the paternity declaration, and that his motion to set aside the paternity judgment was a separate claim for purposes of certification under Rule 2-612. *Id.* at 271. Therefore, we invoked our discretion under Rule 8-602(e) "to treat the notice of appeal as if it had been filed on the same day as, but after, the entry of a final judgment on November 6, 1998." *Id.*

In the case *sub judice*, appellee filed two separate lawsuits entitled "Failure to Pay Rent - Landlord's Complaint for Repossession of Rented Property under Real Property 8 § 401," claiming breach of the Lease. Appellee sought damages and possession of the premises, because the Lease provided for both compensatory damages and possession of the Premises upon breach. In particular § 15.2 of the Lease provides for remedies in the event of default by the tenant, including Bevard's right, "with or without terminating this Lease and the tenancy created hereby ... [to] reenter the Premises, by summary proceedings or otherwise, and remove Tenant and all other persons and property from The Premises...." Section 15.3 states, in pertinent part: "If this lease is terminated by Landlord pursuant to Section 15.2, Tenant nevertheless shall remain liable for any rent and damages which may

be due or sustained prior to such termination and all reasonable costs, fees and expenses incurred by Landlord in pursuit of its remedies hereunder, or in renting the Premises to others...."

Significantly, Bevard's claims for rent and possession were based on the same underlying, operative facts as to the breach; the breach occurred when Shangri-La failed to pay all the real estate taxes for the Premises. Moreover, if appellants did not owe rent, it follows that Bevard would not have been entitled to possession of the Premises on that basis. Therefore, we do not perceive that the claims were separate for purposes of certification under Rule 2-602. In our view, the allowance of certification in the present case would clearly lead to the "multiple, piecemeal appeals."

*G-C Partnership*, 358 Md. 458, provides guidance. *G-C Partnership* involved an action for breach of a guaranty agreement. The guaranty also obligated the guarantors to pay counsel fees upon breach. *G-C Partnership*, 358 Md. at 486. On cross-motions for summary judgment, the trial court determined that the guarantors were in breach of the guaranty agreement but that the appellants were only entitled to limited damages. The appellants appealed from that judgment. When appellants noted their appeal, their claim for counsel fees had not yet been resolved. Months after the order for appeal had been entered, the circuit court decided the issue of counsel fees. Following that hearing, the circuit court filed and docketed a written order of judgment "'for damages plus $167,514 for attorney's fees[.]'" *Id.* at 487 (citation omitted in *G-C P'ship*). Unlike the appellants here, the appellants in *G-C*

noted a second, "'precautionary'" appeal, so that even if their first appeal was too early, they would not be too late. *Id.* at 487 (citation omitted in *G-C P'ship*).

On appeal to this Court, the appellees moved to dismiss the first appeal, claiming it was not taken from a final judgment, because the issue of attorneys' fees had not yet been decided. We held that, even if the appeal had been filed prematurely, any defect could be cured by directing the entry of a final judgment in the exercise of discretion under Maryland Rule 8-602(e)(1)(C). *Id.* at 487-88. In determining that Rule 8-602(e)(1)(C) was applicable, we stated that the trial court had discretion to direct the entry of final judgment from the judgment of damages, as the claim for attorneys' fees was a separate and distinct claim from the claim for damages. *Id.* at 487-88. Therefore, we denied the appellees' motion to dismiss, and proceeded to consider the merits of the appeal.

The Court of Appeals disagreed with our view and dismissed the appeal. It determined that "the circuit court did not have discretion to direct the entry of a final judgment pursuant to Rule 2-602(b) ...," *id.* at 488, because the claim for counsel fees was not a distinct claim from the claim for compensatory damages under the guaranty agreement. The Court stated that "the counsel fees that were awardable pursuant to the contract form part of the claim for breach of contract, but they had not been determined when the ... appeal was noted." *Id.* at 488. Because the claims were part of a single contract action, the Court dismissed the appeal. *Id.*

In this same way, Bevard's claims for rent and possession arise from the same contract -- the Lease. Based on the standards of *G-C Partnership* and *Tyrone R.*, we conclude that, with regard to the money damages, the trial court "did not have discretion to direct the entry of final judgment pursuant to Rule 2-602(b)." *Id.*

In the case *sub judice*, appellee's rent claim is monetary in nature, while its possession claim arises in equity. Nevertheless, we have held that cases are not necessarily certifiable under Rule 2-602(b) merely because one claim is equitable and another is monetary. *Eubanks v. First Mount Vernon Industrial Loan Assoc., Inc.*, 125 Md. App. 642 (1999), involved equitable claims for possession, forcible entry and detainer, as well as a monetary claim for damages. There, the appellant received a loan from the appellee, secured by a deed of trust on property owned by the appellant. *Id.* at 647. When appellant defaulted on the loan, the parties entered into a forbearance agreement by which the appellant delivered into escrow the deed to the property, in lieu of forbearance. *Id.* When the appellant breached the agreement, the deed was delivered to the appellee, who recorded it. Nevertheless, the appellant remained in possession of the property. *Id.* at 648.

The appellee subsequently filed suit seeking possession of the premises and to eject appellant. *Id.* Thereafter, pursuant to a motion filed by the appellee, the court ordered the appellant to pay $1500 per month into an escrow account for her continued use and occupancy of the property, to continue throughout the pendency of the litigation. *Id.* at 648. The court certified its order as

to rent payments as final, under Rule 2-602(b). *Id.* at 649.

The *Eubanks* Court concluded that, under C.J. § 12-303(1), it had jurisdiction as to the court's order; C.J. § 12-303(a) "grants to an aggrieved litigant the right to take an immediate appeal from an interlocutory order that is injunctive in nature and decides on an interim basis the right to possession or the income from property."[6] *Id.* at 650. Of significance, however, we determined that, because the issue on appeal was limited to the court's interlocutory order regarding the rent escrow, "the circuit court lacked authority to certify its judgment as final for purposes of appeal" and we lacked jurisdiction. *Id.* at 649.

The Court of Appeals's decision in *Washington Suburban Sanitary Comms'n v. Frankel*, 302 Md. 301 (1985), *aff'd sub. nom.*, *Washington Suburban Sanitary Comms'n v. CAE-Link Corp.*, 330 Md. 115 (1992), *cert. denied*, 510 U.S. 907 (1993), is also pertinent. There, a servient part of a parent tract of land, subject to a restrictive covenant as to its use, was acquired and put to a use that violated the covenant. *Id.* at 302. After acquiring the land in question, the appellee sought a declaratory judgment that the appellees, owners of the dominant lands, were not entitled to compensation as a result of the appellant's improper use. *Id.* at 305. The appellees filed counterclaims, seeking both a declaration that they were entitled to compensation and a monetary judgment in

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[6] C.J. § 12-303(1) is inapplicable to the case *sub judice*, as the $10,173.83 judgment against appellants was not an interlocutory order.

the amount of the compensation to which they were entitled. *Id.*

The circuit court determined that appellant was obligated to pay compensation, but did not specify as to which of the appellees or the amount of compensation. Thereafter, the court certified its order, pursuant to the predecessor statute to Md. Rule 2-602(b), on the theory that its ruling was dispositive of appellant's claim for a declaratory judgment. *Id.* at 306. We reached the merits of the appellant's appeal to this Court, vacated the court's judgment, and remanded, *inter alia*, for further proceedings as to the appropriate amount of compensation. *Id.* at 306-07.

The Court of Appeals declined to reach the merits of the appeal, holding that there was "no appealable judgment." *Id.* at 302. The *Frankel* Court concluded that the court's attempted certification "did not make the ruling on [the appellant's] requested declaratory judgment a final judgment on an entire claim." *Id.* at 307. The Court determined that, although equitable and monetary in nature, the appellant's "claim for declaratory judgment and the requests of [the appellees] for monetary judgments for just compensation are one and the same claim" for purposes of Rule 2-602(b). *Id.* at 307-08.

Based on the above-discussed cases, we are satisfied that Bevard's claim for possession of the premises was part of its claim for breach of lease. To be sure, appellee's rights to rent and possession arise from the language of a single contract between the parties. Indeed, in their opposition to appellants' motion to amend their counterclaim, Bevard acknowledged that, if appellants

"owe no obligation under the subject lease," then Bevard "is not entitled to summary ejectment." Furthermore, as previously stated, in both Case I and Case II, appellee brought suit under R.P. § 8-401, entitled "**Failure to Pay Rent**." R.P. § 8-401(a) is entitled "**Right to Possession**," and provides: "Whenever the tenant or tenants fail to pay the rent when due and payable, it shall be lawful for the landlord to have again and repossess the premises." Additionally, R.P. § 8-401(b)(1) provides, in pertinent part:

> Whenever any landlord shall desire to repossess any premises to which the landlord is entitled under the provisions of subsection (a) of this section, the landlord or the landlord's duly qualified agent ... shall file the landlord's written complaint ... [r]equesting to repossess the premises and, if requested by the landlord, a judgment for the amount of rent due, costs, and any late fees.

Thus, pursuant to the plain language of the statute, appellee's claims for rent and possession were part of its assertion of a single legal right under R.P. § 8-401.

As the Court of Appeals recognized in *East v. Gichrist*, 293 Md. 453, 459 (1982): "'It is sufficient to recognize that a complaint asserting only one legal right, *even if seeking multiple remedies for the alleged violation of that right*, states a single claim for relief." (Citing *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 743, n.4 (1976)); *see Huber v. Nationwide Mutual Ins. Co.*, 347 Md. 415, 421 (1997) (concluding that "even if the remedies requested under different legal theories are not . . . identical, if they are based on the same facts or circumstances, the difference in remedies does not automatically give rise to

different claims"). Pursuant to the principles of the foregoing cases, the savings provision of Maryland Rule 8-602(e)(1) cannot be invoked to save appellants' premature appeal.

We acknowledge that "dismissing this appeal is a harsh measure and essentially leaves [appellants] without an avenue of redress for the trial court's alleged error." *Jenkins*, 112 Md. App. at 408; *see Carr*, 135 Md. App. at 229. But, as we said in *Carr*, 125 Md. App. at 228-29:

> We may not confer appellate jurisdiction on our own initiative. *See Jenkins*, 112 Md. App. at 408. Thus, in accordance with Md. Rule 8-602(a)(3), we dismiss this appeal because it was not filed within the time prescribed by Rule 8-202, and does not fit within any of the applicable savings provisions. While this may be a harsh measure, "the results, however seemingly inequitable, are necessary (perhaps quixotically) to promote the judicial system's interest in finality of judgment and confidence in the judicial disposition of disputes." *Jenkins*, 112 Md. App. at 408-09.

**APPEAL DISMISSED; COSTS TO BE PAID BY APPELLANTS.**