Circuit Court for Anne Arundel County
Case No. C-02-CV-18-3183

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 720

September Term, 2021

JOHN HARRISON

v.

NILOS T. SAKELLARIOU

Wells, C.J.
Leahy,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: October 21, 2022

In 2007, appellant John J. Harrison executed a $40,000 promissory note (the "Note") under seal for the benefit of appellee Nilos Sakellariou. The Note included a confession of judgment provision for the full amount due, including accrued interest, charges, and attorney's fees plus court costs. Harrison never paid anything towards the Note.

On October 15, 2018, Sakellariou filed a complaint in the Circuit Court for Anne Arundel County against Harrison for confession of judgment and breach of contract on the Note. The circuit court entered a judgment by confession but later, on motion to vacate filed by Harrison, opened the judgment for an examination on the merits. The parties then presented testimony and documentary evidence. The court entered judgment for $108,633.52 plus $33,138.21 in attorney's fees, against Harrison in favor of Sakellariou. Finding that Harrison failed to make any payment on the Note, the court held that the Note was due within 60 days of transfer of the funds on December 3, 2007 at 12% interest with late payment penalties and an attorney's fee provision. The court rejected Harrison's defenses that he received no consideration for the Note or that attorney's fees were limited by a 15% cap in the confession of judgment provision of the Note.

Harrison appeals and presents five issues for our review, which we restate and consolidate as follows:[1]

[1] Harrison presents the following questions in his brief:

"A. Did the Trial Court Err by Concluding That Appellee Met His Burden of Proof That He Paid Consideration for the May 3, 2007 Promissory Note to Appellant in Light of All the Evidence Presented at Trial and the

(Continued)

I. Did the trial court plainly err in finding that Harrison received consideration for the Note?

II. Did the trial court err and/or abuse its discretion in excluding a composite exhibit containing documents regarding another investment, when proffered by Harrison, or in later admitting a single document from that composite, when proffered by Sakellariou?

III. Did the trial court err and/or abuse its discretion in regulating the timing and content of argument by counsel for Sakellariou regarding attorney's fees?

IV. Is Harrison entitled to reversal, a new trial, or sanctions based on legal argument made by counsel for Sakellariou regarding terms of the Note?

Discerning no error or abuse of discretion, we affirm the judgment of the circuit court.

Reasonable Factual Inferences and Legal Conclusions That Should Have Been Derived Therefrom?

B. Did the Trial Court Abuse Its Discretion by Denying Appellant's Motion to Enter Composite Rebuttal Exhibit into Evidence to Discredit Appellee's Testimony?

C. Did the Trial Court Abuse Its Discretion by Granting Appellee's Motion to Enter Excerpted Pages from the Same Composite Rebuttal Exhibit Denied Admission to Appellant?

D. Did the Trial Court Err in Allowing Appellee's Counsel to Argue on the Issue of Attorney's Fees After the Close of the Trial and Awarding Attorney's Fees in Excess of, and Not Consistent with, the Note Terms?

E. Is Appellant entitled to Sanctions, Reversal of the Judgment, and/or a New Trial Arising Out of Counsel for Appellee Knowingly and Intentionally Misleading the Trial Court on Matters of Law In Violation of Md. Rule 19-303.3 (Candor to the Tribunal) That Were Material to the Outcome of the Case and Consequentially Prejudiced Appellee?"

BACKGROUND

The Note and Confessed Judgment

On October 15, 2018, Sakellariou filed a complaint asserting counts for breach of contract and confession of judgment under the Note. Attached to the complaint with Sakellariou's authenticating affidavit, was a copy of the Note, payable to Sakellariou and signed by Harrison under seal. In pertinent part, the Note provided (with handwritten terms indicated in brackets and underlined):

> Upper Marlboro, Maryland $[40,000.00]
> Date: [05-03-2007]
>
> Promissory Note
>
> FOR VALUE RECEIVED, the undersigned [JOHN J. HARRISON], and all respective successors and assigns (jointly, severally and collectively, if more than one, the "Borrower"), promises to pay to the order of [Nilos Sakellariou] successors and assigns (the "Lender"), at the Lender's offices . . . the principal sum of [Forty Thousand and 00/100 – ($40,000.00)] (the "Loan"), or so much as may have been advanced to or for the account of the Borrower pursuant to the Loan Documents, defined below, together with interest thereon at the rate or rates hereafter specified until paid in full and any and all other sums which may be owing to the holder of this Promissory Note by the Borrower pursuant to this Promissory Note.

The Note established "a loan fee of [3] percent ([3] %) of the original loan balance amounting to $[1200.00]." Interest on the unpaid principal balance accrued "at a fixed annual rate of . . . [TWELVE] percent ([12]%)."

Payment of the loan was "due in full no later than [Sixty (60)] days from the date of this Promissory Note." The Note provided for "a late payment charge equal to five percent (5%) of the amount then due (including both principal and interest)." Upon any payment default, moreover, Sakellariou had the right to accelerate payment, increase the interest

rate, and obtain a confessed judgment that includes "ATTORNEY'S FEES EQUAL TO FIFTEEN PERCENT (15%) OF THE AMOUNT DUE, PLUS COURT COSTS, ALL WITHOUT PRIOR NOTICE OR OPPORTUNITY OF THE BORROWER FOR PRIOR HEARINGS."

A "Waiver of Protest" provision stated that "[t]he Borrower, and all parties to this Promissory Note, whether maker, endorser, or guarantor, waive presentment, notice of dishonor and protest." Beneath his signature under seal, Harrison wrote by hand, "THIS NOTE WILL BE CANCELLED UPON RECEIPT OF NOTE ASSIGNMENT ON 10913 BROOKWOOD DR. UPPER MARLBORO, MD 20772."

On November 2, 2018, the Circuit Court for Anne Arundel County entered a judgment by confession against Harrison, in the amount of $101,520.00, which included $2,400 in attorney's fees.[2] Harrison timely moved to vacate that judgment. At a hearing on April 15, 2019, the court opened the judgment and ordered the "[c]ase to be examined on its Merits."

[2] Maryland Rule 2-611 governs confessed judgments. A confessed judgment creditor must file a complaint attaching the debt instrument authorizing a confessed judgment, with an affidavit specifying pertinent information, including the amount due. Md. Rule 2-611(a). If the complaint "complies with the requirements of . . . this Rule" and "the pleadings and papers demonstrate a factual and legal basis for entitlement to a confessed judgment, the court shall direct the clerk to enter the judgment." Md. Rule 2-616(b). The clerk then notifies the defendant that a judgment has been entered. Md. Rule 2-611(c). The defendant may move to challenge that judgment, "stat[ing] the legal and factual basis for the defense to the claim." Md. Rule 2-611(d). "If the [circuit] court finds that there is a substantial and sufficient basis for an actual controversy as to the merits of the action, the court shall order the judgment by confession opened, modified, or vacated and permit the defendant to file a responsive pleading." Md. Rule 2-611(e).

Trial

The case was tried by the court on May 12 and 13, 2021. Sakellariou and Harrison testified about their course of dealing, called two other witnesses, and presented documentary evidence. The following account is derived from the evidence adduced at the trial.

While Sakellariou was working as "a stockbroker" at Merrill Lynch, one of his clients, Joel Rozner, introduced him to Harrison, a real estate broker whose investment pitches included seeking investors "to help sellers fix their properties up so they could sell it [sic] on market. In 2006 and 2007, Harrison proposed multiple investment opportunities to Sakellariou. By the summer of 2007, Sakellariou had made two investments, of $100,000 and $48,000, in a $3.2 million pooled property transaction that the parties referred to as "the Sasscer deal."

At the same time, Sakellariou declined Harrison's request for another $40,000 investment to renovate a "completely separate" property that had nothing "to do with Sasscer at all." When pitching that separate transaction, Harrison showed him the Note.

Public records show that on October 5, 2007, the Harrison Company, a Maryland corporation, was "forfeited" "for failure to file" its 2006 property return. According to Harrison, who was resident agent, the company "came back as John J. Harrison, trading as the Harrison Company." Harrison was the sole officer, director, and shareholder.

In November 2007, Harrison returned to Sakellariou, offering a three percent loan "discount" as "an extra kicker" on the previously proposed $40,000 deal. Sakellariou did

not anticipate that Harrison would be able to repay the loan within 60 days, given the time required for renovations, but instead, expected that payment at a later date would result in accrual of additional interest at a favorable rate, which would enhance his potential return. Based on those favorable terms and Harrison's reputation as a former president of the Maryland Realtors Association with whom people "could do business on a handshake," Sakellariou agreed.

On November 30, 2007, Harrison provided Sakellariou bank routing information, by faxing a voided blank check on an account of the Harrison Company. Reflecting a three percent plus $1,000 discount to be taken "up front," Harrison told Sakellariou to send $37,800, and Sakellariou noted that amount on the fax.

On December 3, 2007, Sakellariou wired $37,800 to the specified account of the Harrison Company. Copies of the wire transfer notice and Sakellariou's bank account statement confirm this transfer.

Sakellariou testified that "[w]hen Mr. Harrison solicited the loan from [him] in person, he did not leave the [N]ote," because Sakellariou "had not agreed to fund it." When Harrison called back and offered the "discount over the phone[,]" however, he "said he would . . . deliver the [N]ote to" Sakellariou. But Harrison did not do so until Sakellariou "call[ed] him and hound[ed] him, asking him to bring the [N]ote to" him.

The Note, which was drafted by Harrison, was delivered to Sakellariou's office "at the end of December or early January." Upon receipt of the Note, Sakellariou immediately called Harrison because the payee was still blank. Harrison explained that was intentional,

so that Sakellariou could assign the Note "to somebody else if [he] wished" and because Harrison could not recall how to spell Sakellariou's name. Sakellariou considered "the date of 5/3/2007" written on the Note to be "nothing unusual in our industry[,]" because he understood that date "wouldn't matter" given that "[i]t's when I exchange money for it and when he ultimately gives it to me" that would control.

Sakellariou never received any payment on the Note. Nor did he ever receive an assignment regarding the Brookwood Drive property.

Sakellariou testified that when he discussed the Note and "the sale status of Brookwood" with Harrison, he "was open and acknowledging of the amounts . . . sent to him and that he owed" the money to Sakellariou. But "he didn't have straight answers, just that, 'You'll have to wait a little bit longer.'" Harrison "usually had a pretty good sort of argument" that "lulled" Sakellariou "into waiting six, nine months." Then, when they "talked[ed] again," Harrison would "have another excuse."

After the Sasscer deal failed during the housing "market crash[,]" Sakellariou and others sued Harrison on those investments. During the course of that litigation, Sakellariou wrote his name in as the payee on the Note. A few months before the 12-year limitations period expired, Sakellariou filed this suit to recover under the Note, seeking principal, interest, late payment fees, and attorney's fees.

Challenging the confessed judgment, Harrison disputed Sakellariou's account of the terms and delivery of the Note. He alleged that the Note "was not funded," which "means no money was received on this Note because it was never done." Although Harrison

acknowledged Sakellariou's wire transfer of $37,800 on December 3, 2007, Harrison testified that was for another investment in the Sasscer deal and was made to The Harrison Company rather than to him personally. When asked how Sakellariou obtained the Note that he had personally signed and linked to the Brookwood Drive property, Harrison claimed that he did not know but speculated that Rozner may at some point have given the Note to Sakellariou.

On cross-examination, Harrison acknowledged that he litigated with another investor over a separate promissory note that also was linked to the Brookwood property and contained terms similar to the Note. Under that $51,150 note, payment had been due on August 21, 2007, shortly before Harrison again solicited Sakellariou in November.

Rozner, an attorney, formerly had a friendship and "long relationship with" Harrison. Rozner had worked as "a lobbyist to the Maryland Association of Realtors," and Harrison had been president. Rozner testified that he participated in several deals with Harrison. While doing so, Rozner introduced Harrison to his investment advisor, Sakellariou.

Rozner, who later felt guilty for involving Sakellariou in investing with Harrison, understood that the money went to Harrison personally, rather than to any "companies." Rozner denied that he ever had possession of the Note or delivered it to Sakellariou.

Attorney Glenn W. D. Golding represented Harrison and the Harrison Company in a 2012 negotiated settlement of claims made by Rozner based on the Sasscer deal. He testified that his firm represented both Harrison and the Harrison Company "as a unit,

together" and without conflict in the 2012 negotiated settlement but declined to represent Harrison regarding other claims.

At the conclusion of evidence and argument, the trial court found that Sakellariou was "extremely precise in his discussion of what happened[,]" whereas Harrison "repeatedly said, 'It's been 14 years ago, I can't remember.'" Concluding "that there was a note" rather than another investment on the Sasscer deal, the court found that Sakellariou "sent the amount requested by [Harrison] to the account requested by [Harrison] on December 3rd, 2007" in exchange for the Note, which is enforceable by Sakellariou, as payee and holder. The court concluded that it would enter judgment against Harrison in the amount of $108,633.52, representing unpaid principal, interest, and late payment fees.

During the hearing, the parties had agreed to address attorney's fees "by motion" after the testimony of their witnesses. The court rejected Harrison's claim that the 15% cap in the Note's confessed judgment provision applied even after the confessed judgment was vacated. Declining to award fees for trial time, the court otherwise credited the itemized fee claim and affidavit presented by counsel for Sakellariou and awarded attorney's fees and expenses in the amount of $33,138.21.

The court entered judgment in the total amount of $141,771.73 on May 20, 2021. Harrison noted this timely appeal. We provide additional facts as necessary in the discussion section.

STANDARD OF REVIEW

"Maryland Rule 8-131(c) governs appellate review of a circuit court's findings and judgment after a bench trial[.]" *Cherry v. Mayor of Balt. Cty.*, 475 Md. 565, 593 (2021). In pertinent part, the rule provides that "[w]hen an action has been tried without a jury, the appellate court will review the case on both the law and the evidence." Md. Rule 8-131(c).

This Court reviews the trial court's "legal conclusions without deference." *Cherry*, 475 Md. at 594. After "giv[ing] due regard to the opportunity of the trial court to judge the credibility of the witnesses[,]" we "will not set aside the judgment of the trial court on the evidence unless clearly erroneous[.]" Md. Rule 8-131(c).

When conducting clear error review, we "'consider the evidence in the light most favorable to the prevailing party and decide not whether the trial judge's conclusions of fact were correct, but only whether they were supported by a preponderance of the evidence[,]'" *id.* (quoting *Cty. of Bowie v. MIE Props., Inc.*, 398 Md. 657, 676 (2007)), and "'all favorable inferences fairly deducible from that evidence.'" *Id*. (quoting *Leavy v. Am. Fed. Sav. Bank*, 136 Md. App. 181, 200 (2000)). Assessing credibility, resolving conflicts in the evidence, and weighing the evidence are responsibilities of the trial court, sitting as a factfinder. *Leavy*, 136 Md. App. at 199-200. Only when there is no "'competent evidence to support the factual findings'" may "'those findings . . . be held to be clearly erroneous.'" *Cherry*, 475 Md. at 594 (quoting *Della Ratta v. Dyas*, 414 Md. 556, 565 (2010)). *See Velicky v. Copycat Bldg. LLC*, 476 Md. 435, 445 (2021).

DISCUSSION

I.

Consideration Challenge

A. Parties' Contentions

At trial, Harrison argued that the Note, "however it got into the possession of Mr. Sakellariou," was not supported by consideration. According to Harrison, Sakellariou transferred the $37,800 to the Harrison Company, rather than to him personally, in order to invest in the $3.2 million Sasscer property deal, not in exchange for the Note linked to the Brookwood Drive property. The trial court disagreed, finding that Harrison received the wired funds from Sakellariou in exchange for the Note.

Harrison now challenges that factual finding, arguing that Sakellariou did not meet his burden of proof. According to Harrison, Sakellariou did not "prove that he tendered the $40,000" to Harrison or "any other consideration." In reviewing the evidence presented, Harrison avers that Sakellariou failed to present "independent corroborating evidence, such as written communications, emails, or other records of sufficient weight" but only presented his "self-serving words."

Sakellariou counters that "the Note itself is prima facie proof that consideration was paid" and that presumption was "corroborated by" testimony and documentary evidence that Harrison failed to rebut. Among other things, Sakellariou contends that the "consideration or loan amount is corroborated by the fax he received from Harrison" and

that investments in another property required that funds be transferred "directly to Aim Holdings' rather than the Bank of America account under Harrison's control.

B. Consideration for the Promissory Note

The Note is a negotiable instrument under the Uniform Commercial Code, codified at Maryland Code (1975, 2013 Repl. Vol.), § 3-104 of the Commercial Law Article ("CL"), because it is signed by Harrison as the maker, includes an "unconditional promise . . . to pay a fixed amount of money," is "payable . . . at a definite time," and is "payable . . . to order." CL § 3-104(a). Harrison, as maker and obligor, may assert any defense that would be available to him if he "were enforcing a right to payment under a simple contract[,]" CL § 3-303(b), including that "the instrument is issued without consideration." CL § 3-305(a)(2). *See Venners v. Goldberg*, 133 Md. App. 428, 434 (2000).

"'Consideration' means any consideration sufficient to support a simple contract." CL § 3-303(b). When a promissory note includes a recital that it was made "for value received," that language constitutes "*prima facie* evidence" raising a presumption that the maker received consideration for it. *Venners*, 133 Md. App. at 441. Such an acknowledgement "may be rebutted by parol proof showing that there was no receipt." *Id.* at 442.

At trial, Harrison did not dispute that Sakellariou wired funds to the Harrison Company bank account that Harrison identified and controlled. Instead, Harrison alleged that: (1) Sakellariou wired the money in exchange for another investment in the Sasscer property deal that Sakellariou was precluded from relitigating, rather than the Brookwood

Drive property, and (2) that the funds were supposed to be wired to Harrison individually, rather than to his company.

Crediting Sakellariou's detailed account of this transaction, the trial court found that Sakellariou wired $37,800 to Harrison for the Brookwood Drive loan, in exchange for the Note promising repayment of $40,000 at 12% interest within 60 days. We conclude the evidence amply supports that determination.

Sakellariou testified and presented documentary corroboration that at the time he agreed to invest in the Sasscer property, Harrison solicited a "separate" $40,000 investment by showing him the Note. Although Sakellariou initially declined, Harrison later persuaded him to fund renovations on the Brookwood Drive property, by offering discounts and a high interest rate on the Note.

Sakellariou's documentary evidence supports his testimony that he loaned Harrison money in exchange for the Note. Harrison had previously given a different investor a similar promissory note tied to the Brookwood Drive property, with a payment date in August 2007. By October 2007, Harrison's eponymous company had been forfeited for nonpayment of taxes. In November, Harrison re-solicited Sakellariou, offering multiple discounts and faxing him a voided blank check from The Harrison Company account on November 30.

On that fax, Sakellariou noted "$37,800" reflecting Harrison's up-front incentives of 3% plus $1,000. Bank records show that on December 3, 2007, Sakellariou wired that amount to the bank account identified by Harrison. Harrison's handwritten addendum on

the Note stated that it would be cancelled upon delivery of a "note assignment" on the "Brookwood Drive" property.

Sakellariou also testified that he called Harrison to demand the promised Note, which was delivered to Sakellariou's office in late December or early January. During an immediately ensuing phone call, Harrison confirmed the negotiability of the Note, telling Sakellariou that he could make himself the payee or transfer it to someone else. Later, Sakellariou inserted his name as payee on the Note.

In addition, Sakellariou's testimony that the funds wired into The Harrison Company account were for a "completely separate" property than his two previous investments in the Sasscer deal was consistent with documentary evidence establishing important differences between those transactions. When Sakellariou made his investments in the Sasscer deal, he wired money to Aim Holdings I, LLC, then received written confirmation from E.J. Kila. In contrast, for this "separate deal," Sakellariou wired money as Harrison instructed, directly to a bank account of a company that Harrison controlled, and later received the Note from Harrison.

Sakellariou testified that he never received payment due under the Note. When he sued Harrison over his two Sasscer deal investments, he did not seek payment on this Note. After initially forbearing from enforcing the Note as an accommodation to Harrison, Sakellariou waited until a couple months before the 12-year limitations period for instruments under seal expired.

As the trial court recognized, Sakellariou's detailed testimony and documentation regarding this course of dealing was consistent with the "FOR VALUE RECEIVED" recital in the Note. Collectively, this evidence is consistent with Sakellariou's testimony that his wire transfer was for a "separate deal" than the Sasscer property**.**

The evidence is also sufficient to support the trial court's determination that Harrison received the money wired by Sakellariou to the Harrison Company bank account. Public records and Harrison's testimony establish that in October 2007, before Harrison resolicited Sakellariou in November, the Harrison Company was forfeited for nonpayment of taxes. Harrison admitted that at the time Sakellariou wired funds to its bank account on December 3, 2007, Harrison was the sole shareholder, officer, and resident agent of the Harrison Company, and that he controlled the bank account where Sakellariou's funds were deposited. Glenn Golding, Harrison's former counsel, also testified that for purposes of the legal work he subsequently performed in settling Rozner's claims against Harrison, he did not differentiate between Harrison and the company, treating them as "a unit, together."

As in *Venners*, 133 Md. App. at 442, the recital in the Note, "FOR VALUE RECEIVED," "constitutes *prima facie* proof that the Note was supported by consideration and that the consideration was in fact paid." Based on that language and the ample evidence corroborating that presumption, we hold that the trial court did not commit clear error in finding that the funds Sakellariou wired on December 3, 2007, established that Harrison received consideration for the Note.

II.

Evidentiary Challenges

Harrison next challenges two evidentiary rulings regarding documents proffered in support of his "lack of consideration" and "non-issuance" defenses. Specifically, Harrison contends that the trial court erred and abused its discretion by (1) denying his motion to enter a 62-page composite exhibit proffered during his examination of Sakellariou, and (2) later admitting a one-page letter excerpted from the same composite, when offered by counsel for Sakellariou. Before addressing the parties' contentions, we provide additional background from the record.

A. Background

As previously noted, Sakellariou testified that on December 3, 2007, he wired funds to Harrison in exchange for the Note that Harrison drafted and delivered to him. Harrison, when called to testify in Sakellariou's case-in-chief, disputed that he received the wire transfer as consideration for the Note and that he delivered the Note to Sakellariou. During cross-examination by his counsel, Harrison claimed that Sakellariou did not give him "any money in connection with the promissory note that is at issue in this case[.]" Instead, Harrison testified, the funds transferred to the Harrison Company were for "the Sasscer deal."

During an earlier, separate litigation, Sakellariou sued Harrison and the Harrison Company over funds "associated with the Sasscer deal." During that litigation, Harrison

received "documents . . . that represented the subpoenaed records from Merrill Lynch[,]" where Sakellariou had been "a stockbroker[.]"

In the trial underlying this appeal, Harrison's counsel, on cross-examination in Sakellariou's case-in-chief, asked him to "identify" documents that she had compiled into a 62-page composite exhibit, marked for identification as Defendant's Exhibit D. Counsel for Sakellariou objected, prompting the following colloquy:

> [SAKELLARIOU'S COUNSEL]: Your Honor, again, I'll just start the objections now, because we're, again, beyond . . . direct. Questioning would help, though.
>
> THE COURT: Why is this not beyond the scope?
>
> [HARRISON'S COUNSEL]: Because of what's in the document, Your Honor.
>
> THE COURT: Well, tell me what you're going to ask that is not beyond the scope.
>
> [HARRISON'S COUNSEL]: I'm going to ask him if he received documents in this case that included the same documents that are part of [Plaintiff's] Exhibit No. 2 and that also include notes, handwritten by [Sakellariou], that says, "December 3rd, 2017. $39,000 note."
>
> The issue in this case is whether or not the note in question of $40,000 was given to him at a time later and whether the wire that they're alleging is related to the note in this case –
>
> THE COURT: Wouldn't that be a question you'd ask him in your case? I mean, I asked if you wanted to just combine them, and you said, no, you wanted to cross now while it's fresh in your mind. It sounds like this is part of your direct.

Counsel for Harrison responded that she would "happily ask the questions later." Sakellariou's counsel responded that the documents had not been produced in discovery in this case because "they're unrelated." The court noted that it could switch to Harrison's

defense to allow his counsel to ask these questions to "be considerate of time." After resolving this logistical issue, a discussion proceeded on the discovery issue:

> THE COURT: Okay?
>
> So now we're in your case. And then he still has a discovery issue. So why don't we address that. . . .
>
> So he says they were not produced in discovery. Were they produced in discovery?
>
> [HARRISON'S COUNSEL]: They were not produced in discovery in this case. And if the Court prefers, I can put Mr. Sakellariou on as my next witness after this and put them in through him. I'm just asking my client if he received these documents. I haven't asked him to enter them into evidence yet. I simply asked him to look at them and address them for what's in them –
>
> THE COURT: So what you're saying, Counsel, is it would delay things further, but she could call your client to put the same documents in.
>
> [SAKELLARIOU'S COUNSEL]: These would still be documents relating to some other case that were not produced in discovery. That doesn't go away just by who is authenticating them.
>
> The other concern I have, Your Honor, is – yeah, we get it. This gentleman got screwed out of $150,000 in the Sasscer deal. But that's not before you. What is [before you] is a $40,000 note, Plaintiff's Exhibit 1. We have done everything we can to stay true to one note. But we keep hearing that this case has something to do with Sasscer as if, like, with some vengeance thing. . . .
>
> It's not.
>
> THE COURT: Well, as I understand it . . . she wants to prove that this amount of money was a Sasscer investment. So . . . that goes to the question of whether there was consideration. Because if it was . . . linked to a different note . . . then at this time wouldn't be consideration for this; correct? Isn't that really the only issue here?
>
> [SAKELLARIOU'S COUNSEL]: We have to jump really far to get there, but I guess if that's the nature of the defense, then you would think that this would be the exact type of discovery that would be produced in a case saying:

You owe me everything on this note. Why are you sitting on these things that you've clearly had since 2014 and now trying to use them at trial for stuff that nobody's ever seen before?

THE COURT: Okay. So tell the Court exactly what it is you want to . . . go in that was not produced.

[HARRISON'S COUNSEL]: Our contention would be there's a document here that has handwriting – it's on Merrill Lynch's letterhead. It's at a time when – well, I won't go into all the details, but Mr. Sakellariou's name is on here, his name, his address, and there's handwritten notes. And one note says, "October 11th, 2006, $100,000." And the other one says, "December 3rd, 2007, $39,000."

What's at issue in this case is the claim that the money that was tendered to the Harrison Company on December 3rd, 2007, was in relation to a $40,000 note. His own handwriting says a $39,000 note. And if you do the math on the 3 percent credit that he testified he was taking off, this is almost exactly $38,800. It's actually . . . $37,830. But if you believe him, my client said –

THE COURT: Wait. What is the document that has that number in it? Is it just a note? . . . .

[HARRISON'S COUNSEL]: It is some note with Merrill Lynch written on it. This was obtained from Merrill Lynch after he was not there anymore. It's got his name on the top of it, and it's got his handwritten note about loans. And the point that we're making is, as we've been contending from the beginning, he may have given Mr. Harrison or his company money.

But when he sits here and testifies, "Oh, and he just said take another thousand off. It's not in the note. Don't worry about that. I didn't even get the note until afterwards," our position is that $37,800 was for something else. There's no mention in this packet – and this is something the Plaintiff had, because his attorney subpoenaed it on his behalf. So they don't not know about it. It's just that –

THE COURT: Hold on. Hold on.

[HARRISON'S COUNSEL]: -- the issue is he's testifying extraordinarily about how –

> THE COURT: So you're not showing the Court that there is evidence that was – this payment was for something else? You're testifying that there's an absence of evidence that it was this?
>
> [HARRISON'S COUNSEL]: I'm saying that he doesn't even put $40,000. He puts $39,000. And if you do the math on that, that would explain that 3 percent rule he had.
>
> THE COURT: But why would that negate the fact that it could have been for this note?
>
> [HARRISON'S COUNSEL]: Because there's nothing else in here that even talks about this note. It's all Sasscer.
>
> THE COURT: So you're talking about the absence of something. . .
> I'm not . . . going to allow it, based on his discovery objection.

Counsel for Harrison continued to question her client, eliciting his testimony that when his friend Rozner first introduced Sakellariou as his investment advisor, they only "talked about" the Sasscer deal, and "Nilos purchased a position on the Sasscer property." Harrison denied that he gave the Note to Sakellariou, denied receiving "money wired to [his] personal account[,]" and testified that he had no "other dealings with Mr. Sakellariou other than relating to monies having to do with this Sasscer note[.]"

On re-direct, counsel for Sakellariou asked Harrison about the December 3 wire transfer, eliciting his testimony that he "was directed" to instruct Sakellariou to send funds to the Harrison Company account "for Sasscer for purchasing the note." When counsel asked Harrison to confirm that "not a single document supports that," Harrison responded, "Only the documents that he received, a sample document, by – for 100,000 that came from either Ed Kila or Rich Boornestein, showing where the money was received." Counsel asked for any other documentation to support his claim, including whether "there's

records out there that show the transfers of money[.]" Harrison responded that "the records we had, we tried to get, . . . are past the statute of limitations, so we were unable to get them."

In questioning whether Harrison had proffered evidence to support his defense that the December 3 wire transfer was for the Sasscer deal, counsel for Sakellariou asked Harrison whether "there's some type of a document that associates – references a $3.2 million Sasscer note." Harrison answered: "I think one was found, and I think a sample one was found. And I think it's in the documents that Nilos presented under the Sasscer case." Harrison believed that the note "came from Ed Kila," and "basically says that you have a position and that you've been assigned a position in that note."

After more rounds of redirect and recross, Sakellariou rested his case. When counsel for Harrison recalled Sakellariou in Harrison's case, she immediately asked him to review the previously excluded composite exhibit containing documents produced in the prior litigation regarding the Sasscer deal. The court explained that even though composite exhibit was "not admitted into evidence in this case" that counsel could utilize the documents to refresh Sakellariou's recollection.

Counsel for Harrison then elicited Sakellariou's testimony that he made handwritten notes, both on October 11, 2006, about his $100,000 investment in the Sasscer deal, and on "December 3, 2007," about "the 39,000 or $40,000 note, which is different than the other one." In the course of that questioning, counsel for Harrison pointed out that this document was "page 1 of . . . Plaintiff's Exhibit 2."

Counsel for Harrison then asked Sakellariou to "look through" the full composite exhibit for a "reference" to "a $40,000 note." The court reminded counsel that "[o]nce he refreshed his memory, [Sakellariou] remembered that he wrote that" note regarding $39,000 "and said it was the wrong number."

During cross-examination, counsel for Sakellariou asked his client to review a one-page October 11, 2006, letter from "Aim Holdings, LLC" that was part of the composite exhibit, prompting another evidentiary objection by Harrison:

> [HARRISON'S COUNSEL]: Objection, Your Honor. All of a sudden now the documents that I –
>
> THE COURT: What is this document?
>
> [SAKELLARIOU]: Oh, wow.
>
> [HARRISON'S COUNSEL]: -- kept asking questions about –
>
> THE COURT: Is this in evidence, Counsel?
>
> [SAKELLARIOU'S COUNSEL]: This document is about to be, Your Honor, this one page.
>
> THE COURT: Just one page?
>
> [HARRISON'S COUNSEL]: He just objected to me trying to . . . put it in.
>
> [SAKELLARIOU'S COUNSEL]: I've never seen it before, but I'd be happy to authenticate it and move this one in.
>
> THE COURT: All right. It's just one page? That's fine.

Counsel then elicited Sakellariou's testimony that "Aim Holdings was a company" that was "run by Ed Kila," who "confirmed . . . an investment into the Sasscer deal." Dated October 11, 2006, the proffered letter from E.J. Kila to Sakellariou "confirms that [he] sent $100,000 investment into the Sasscer deal" and that he was instructed to wire his money

"directly to Aim, not to Mr. Harrison."[3] Counsel proffered that he had never seen the document, which showed that his client's prior wire transfers "were investments for positions in the Sasscer deal and that this promissory note is something different." Counsel for Sakellariou argued that this document, "which was produced today, is the exact type of documentation that one might receive when they purchase a position. And this was, in fact, issued to Mr. Sakellariou in response to the position that he purchased in that Sasscer deal." The trial court allowed the exhibit for the "rebuttal purpose" "to the argument that the money was paid for Sasscer because the documentation pertaining to Sasscer is not payable to Harrison, it's payable to Aim."

Counsel for Harrison responded that she also "wanted to put" the entire composite document into evidence so that she "could ask questions of the witness." The court then pointed out that counsel had "wanted to introduce this whole thing, . . . an inch and a half thick, to prove there's nothing in there about documentation" for the Note, whereas "he's

[3] The admitted letter, dated October 11, 2007, from E.J. Kila to Sakellariou, states in pertinent part:

> AIM Holdings I, LLC is providing funds toward [the Sasscer] note on a drawl [sic] basis. Since RX Solutions International, Inc. wishes to borrow One Hundred Thousand Dollars ($100,000.00) and you wish to provide that amount less five points, AIM Holdings I, LLC will earmark this money as part of the $3,200,00.00 . . . Note and . . . will treat it as a draw on the Note to RX Solutions International, Inc. by that same $100,000.00 (One Hundred Thousand Dollars) subject to receipt of your wire being sent to AIM Firm, LLC (wiring instructions enclosed in the email) of Ninety Five Thousand Dollars ($95,000.00).

only putting in" the letter about his wire transfer to Aim. Harrison's counsel reiterated that she was "not objecting to him putting it in," but instead to "taking it out of context."

The court then ruled, "Well, if there's a specific thing that addresses this case in there that you want to put in, we can do that. But we're not going to put in an inch and a half of documents to prove a negative." In response, counsel for Harrison stated that she "would be happy to do that." When the letter was admitted over defense objection, counsel for Harrison again interjected, "I wanted the whole packet in, Your Honor." The court repeated that "if there's a specific document that relates to this deal –," and counsel replied, "I just am objecting on the record that it should all come in, because I think it's relevant to my client's case."

B. Parties' Contentions

With respect to the composite exhibit, Harrison contends that, having "been disclosed in [his] Pre-trial Statement as potentially being produced at trial," these documents were relevant and admissible to impeach Sakellariou's claim that he wired the $37,800 in exchange for a "separate deal," rather than for the Sasscer deal. Specifically, Harrison claims these documents show "that Sakellariou had kept notes and documents involving other, unrelated financial matters" that he "later attributed (unsuccessfully) to Harrison and The Harrison Company (in the Sasscer case)," which contradicted Sakellariou's "claim that he paid consideration for the Note." "This same packet of documents," Harrison points out, "contained several of the critical evidence [sic] that

comprised [Sakellariou's] Exhibit 2 (evidence of the purported funding by wire transfer on December 3, 2007)."

With respect to the letter, Harrison contends that the trial court abused its discretion in admitting that document because it was taken "out of context . . . in a manner that was prejudicial and objected to for that reason." In Harrison's view, moreover, Sakellariou's successful argument that the entire composite exhibit should not be admitted undermined his subsequent argument that the letter was relevant and admissible.

Sakellariou responds that the trial court did not abuse its discretion when it denied Harrison's request to admit the entire "composite rebuttal exhibit[,]" both because he "failed to produce the exhibit in discovery" and because "the majority of the documents . . . were completely irrelevant to the case or any material issues before the Court." Sakellariou also points out that after initially excluding the entire exhibit "based on his discovery objection[,]" the court stated that "if there's a specific thing that addresses this case in there that you want to put in, we can do that[,]" but Harrison failed to identify or proffer any specific documents from the composite.

As for the admitted letter confirming Sakellariou's $100,000 "position" in the Sasscer deal, Sakellariou argues that the trial court did not err or abuse its discretion because that document supported Sakellariou's testimony that the funds he wired on December 3, 2007, were for the Note, not for the Sasscer deal. In Sakellariou's view, "[t]he letter was highly relevant to the case" because it "refut[ed] Harrison's contention that

Harrison served as the financial intermediary for investments involving Sakellariou and the Sasscer property."

C. Review of Evidentiary Rulings

The Court of Appeals has explained the standard of review concerning the admissibility of evidence in *Perry v. Asphalt & Concrete Services, Inc.*:

> Our standard of review on the admissibility of evidence depends on whether the ruling under review was based on a discretionary weighing of relevance in relation to other factors or on a pure conclusion of law. Generally, whether a particular item of evidence should be admitted or excluded is committed to the considerable and sound discretion of the trial court and reviewed under an abuse of discretion standard. However, we determine whether evidence is relevant as a matter of law. The de novo standard of review applies when the trial judge's ruling involves a legal question. Although trial judges have wide discretion in weighing relevancy in light of unfairness or efficiency considerations, trial judges do not have discretion to admit irrelevant evidence.

447 Md. 31, 48 (2016) (cleaned up).

In ruling on a relevance objection, courts recognize that evidence is "relevant" and admissible when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. When a timely objection is made, evidence that is not relevant is inadmissible. *See* Md. Rule 5-402. Even if relevant, evidence may be excluded in the court's discretion "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative

evidence." Md. Rule 5-403. *See Hendrix v. Burns*, 205 Md. App. 1, 29 (2012) (explaining the "threshold issue" of relevancy).

A party that has propounded requests for production of documents "may move for sanctions under Rule 2-433(a)[.]" A "court, if it finds a failure of discovery, may enter such orders in regard to the failure as are just, including. . . [a]n order . . . prohibiting that party from introducing designated matters in evidence[.]" Md. Rule 2-433(a)(2).

In exercising discretion regarding discovery sanctions, a court considers certain factors identified in *Taliaferro v. State*, 295 Md. 376 (1983). These "include: whether a violation was technical or substantial; the timing of the ultimate disclosure; the reason, if any, for the violation; the degree of prejudice to the parties offering or opposing the evidence; and whether a postponement would suffice to cure any prejudice and was otherwise desirable." *Id.* at 390-91. Generally,

> "[t]rial judges are vested with great discretion in applying sanctions for discovery failures," *Rodriguez v. Clarke*, 400 Md. 39, 56 (2007), and our review is "quite narrow," *Sindler v. Litman*, 166 Md. App. 90, 123 (2005) ("[A]ppellate courts are reluctant to second-guess the decision of a trial judge to impose sanctions for a failure of discovery."). "When a court exercises its discretion by balancing and weighing the rights, interests, and reasons of the parties, the court is not required to discuss each factor considered," *Hossainkhail v. Gebrehiwot*, 143 Md. App. 716, 725 (2002), and is "not required to set out in detail each and every step of his [or her] thought process," *Thomas v. City of Annapolis*, 113 Md. App. 440, 450 (1997).

Kadish v. Kadish, 254 Md. App. 467, 494 (2022).

Nevertheless, "discovery sanctions are not to operate as a windfall, but instead are intended to relieve the surprise or prejudice a party suffers when his opponent fails to abide

by the discovery rules." *Id.* (quoting *Watson v. Timberlake*, 251 Md. App. 420, 437, *cert. denied*, 476 Md. 281 (2021)).

D. Challenged Evidentiary Rulings

The trial court initially excluded the full composite exhibit as a discovery sanction. The Court also concluded that the exhibit, which was "an inch and a half thick," was not relevant to "prove there's nothing in there about documentation." The court amended that ruling when counsel for Sakellariou discovered that one of the undisclosed documents in the composite exhibit proffered by Harrison constituted relevant evidence rebutting Harrison's claim that his December 3 wire transfer was for the Sasscer deal. After admitting the October 11, 2007, letter confirming Sakellariou's $100,000 investment in the Sasscer deal, the court also allowed counsel for Harrison to proffer any specific documents from the composite exhibit that she contended were relevant to "this case."

Because the trial court excluded the composite exhibit "on discovery grounds," without referring to any of the *Taliaferro* factors, by name or substance, this record does not show that the trial court considered the *Taliaferro* factors. Yet that discovery ruling ultimately did not prejudice Harrison, because the court subsequently changed its ruling. First, the court allowed Harrison to question Sakellariou about the documents in the composite exhibit. Next, the court ruled that it would admit any "specific" documents from the composite exhibit that the parties identified as relevant to "this case[.]"

Counsel for Harrison specifically agreed that the Kila letter should be admitted. Instead of asking the court to admit other documents from the composite, she insisted that

the entire composite exhibit be admitted to establish a "negative" proposition, *i.e.*, that there was no evidence in Merrill Lynch's records that Sakellariou made the transfer on December 3, 2007, for the Note.

We are not persuaded that, absent any further proffers of relevance regarding individual documents, the court erred or abused its discretion by refusing to admit the exhibit as a whole. Because only relevant evidence is admissible, *see* Md. Rule 5-402, and even relevant evidence may be excluded in the exercise of the court's discretion, *see* Md. Rule 5-403, the court required Harrison to proffer sufficient information for it to decide whether the probative value of the proffered documents was "substantially outweighed by the danger of . . . confusion of the issues, . . . or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403. As detailed in our review of the record, the court consistently expressed concerns about both the marginal relevance of evidence proffered to prove a "negative" and about undue delay or waste of time in considering such a large number of documents.

By contrast, Sakellariou had proffered that the Kila letter of October 11, 2006, was relevant to rebut Harrison's testimony that Sakellariou wired his $37,800 for the Sasscer property to The Harrison Company, which then sent those funds to Kila. The court did not err or abuse its discretion in admitting this letter as material, relevant, and non-cumulative evidence because it showed that, in contrast to his December 3, 2007, wire transfer to The Harrison Company, when Sakellariou sent funds he was investing in the Sasscer deal, he wired money directly to Aim Holdings, per written direction from E.J. Kila.

We agree that the court did not err in finding that letter was relevant to show that Sakellariou was not investing in the Sasscer deal when he wired funds to the Harrison Company. Specifically, that letter tended to make it significantly less likely that Sakellariou's December 3 wire transfer to Harrison's company was another investment in the Sasscer deal. Because Harrison did not avail himself of the opportunity to identify specific documents within the exhibit that he considered relevant, we cannot say that the court abused its discretion in admitting only this letter rather from the full composite exhibit.

III.

Attorney's Fees Challenge

A. Parties' Contentions

Harrison next contends that "the trial court erred in allowing [Sakellariou's] counsel to argue on the issue of attorney's fees after the close of the trial and awarding attorney's fees in excess of and not consistent with the Note terms." According to Harrison, his counsel merely stipulated to "agree to" attorney's fees "later." Moreover, Harrison urges that "the portion of the judgment for attorney's fees should have been capped at 15%" under the confessed judgment provision of the Note, rather than awarded under paragraph 14 of the Note dealing with indemnification against claims involving a third party.

Sakellariou counters that after vacating the confessed judgment, the court correctly awarded fees under the indemnification provision of the Note. Because "[c]ounsel for both parties agreed to stipulate to the amount of attorneys' fees accumulated by Sakellariou[,]"

continues Sakellariou, "the parties were bound" by that agreement. He continues that, "[b]y its express terms," the portion of the Note "capping attorneys' fees at 15% only applied to a Confession of Judgment," and, once the confessed judgment was vacated, the cap was no longer applicable, but rather the indemnity clause controlled.

B. The Parties' Stipulation

First, we resolve the parties' dispute over what counsel stipulated with respect to attorney's fees. During Sakellariou's direct examination, his counsel advised the court that he "could get" evidence regarding attorney's fees "in through my client's testimony because it's a contract, or we could all just agree to save that for the end," to avoid "go[ing] into the time estimate for" other witnesses who were scheduled to testify after the lunch recess.

Counsel for Harrison responded that her client's "position" was that "if the Court is going to find in favor of [Sakellariou], then the document speaks for itself with regard to attorney's fees" so that "the only question is: what are they?" Counsel then stated that she "would argue for a motion about it" because she questioned whether "we would have to put that evidence in *per se*." When the court asked counsel for Harrison whether she would "just stipulate to what the attorney's fees are[,]" however, she replied that she was "not in a position to do that."

After the lunch recess and testimony from Golding, Sakellariou returned to the stand for cross-examination. By that time, counsel for Sakellariou informed the court, "we had an agreement attorney's fees would be handled later on." The court asked defense counsel

whether she was "in agreement to stipulate the amount of attorney's fees later?" Defense counsel answered: "Yeah. We can agree to that later."

We do not read this exchange as a defense concession to either an award of attorney's fees or to the amount of such fees. Instead, we understand counsel for Harrison to have stipulated that the parties would address attorney's fees "by motion" later in the trial. Based on our review of the full transcript, the parties agreed to postpone evidence and argument about attorney's fees until after all the witnesses testified.

Ultimately, that is what happened. Counsel for Sakellariou pointed to the fee summary affidavit setting forth in "painstaking detail every single thing we did on this case including expenses." In particular, counsel explained that he "had to track down all of the different stories that Mr. Harrison came up with to try to say why . . . he had defenses." On this record, the trial court did not err or abuse its discretion in allowing Sakellariou's counsel to argue on the issue of attorney's fees after the close of the trial.

C. Confessed Judgment Cap

Next, we turn to Harrison's contention that the trial court erred in ruling that Sakellariou's recovery of attorney's fees is not governed by the confessed judgment provision in the Note, which caps fees at 15%,[4] but instead by the uncapped

[4] In pertinent part, the Note provides:

> 6.3 Confession of Judgment. THE BORROWER AUTHORIZES ANY ATTOURNEY [sic] . . . TO APPEAR ON BEHALF OF THE BORROWER . . . , AND TO CONFESS JUDGMENT AGAINST THE BORROWER IN FAVOR OF THE HOLDER OF THIS

(Continued)

indemnification provision in paragraph 14, which requires Harrison to hold Sakellariou "harmless from any loss," including "attorneys' fees." Sakellariou counters that "[b]y its express terms," the cap on attorney's fees applies only to a judgment entered by confession.

We agree that once the confessed judgment was vacated, the 15% attorney's fee cap in paragraph 6.3 no longer applied. This reflects the plain language of the parties' contract, which authorizes a confessed judgment in the "full amount due" on the Note "plus attorneys' fees equal to fifteen percent (15%) of the amount due." (Capitalization omitted). *See generally Bainbridge St. Elmo Bethesda Apts., LLC v. White Flint Express Realty Grp. Ltd. P'ship, LLLP (Bainbridge)*, 454 Md. 475, 485-86 (2017). (requiring courts to give contract language its ordinary and usual meaning, giving effect to the entire agreement).

Reflecting that a confessed judgment, by its nature, involves abbreviated litigation, the parties' agreement on a liquidated amount of attorney's fees for securing such a confessed judgment applies only to that judgment. Once the judgment was opened, triggering protracted litigation, the parties did not restrict the amount of attorney's fees recoverable under the Note.

> PROMISSORY NOTE IN THE FULL AMOUNT DUE ON THIS PRDOMISSORY [sic] NOTE (INCLUDING PRINCIPAL, ACCRUED INTEREST AND ANY AND ALL CHARGES, FEES AND COSTS) PLUS ATTORNEYS' FEES EQUAL TO FIFTEEN PERCENT (15%) OF THE AMOUNT DUE, PLUS COURT COSTS, ALL WITHOUT PRIOR NOTICE OR OPPORTUNITY OF THE BORROWER FOR PRIOR HEARINGS.

D. First-Party Indemnification

We review the interpretation of a contract *de novo*, "apply[ing] the objective interpretation of contracts." *Bainbridge*, 454 Md. at 477. When determining "the meaning of a contract, we consider 'the customary, ordinary, and accepted meaning of the language used'" and "interpret the language of the contract in context, looking at 'the entire language of the agreement, not merely a portion thereof.'" *Id. Cf. Credible Behav. Health, Inc. v. Johnson*, 466 Md. 380, 393-94 (2019) (applying the objective theory of contract interpretation to a promissory note).

Parties to a contract may allocate the costs of litigation to enforce that agreement. *Bainbridge*, 454 Md. at 477-78. When asked to determine whether a particular "'contract covers only fee costs incurred in third party litigation or also covers fee costs incurred in litigation between the parties themselves[,]'" courts apply these same "basic contract interpretation principles[.]" *Id.* at 487-88 (quoting Dan B. Dobbs, *Law of Remedies* § 3:10(3) n.5 (2d ed. 1993)). Because "such an agreement invokes an exception to the American Rule, under which parties ordinarily bear their own counsel fees, the agreement must be based upon express terms and cannot be found by implication or inference." *Id.* at 488.

Quoting *Nova Research, Inc. v. Penske Truck Leasing Co.*, 454 Md. 435, 449 (2008), the Court in *Bainbridge* emphasized that "'[t]he scope of indemnification is a matter of contract interpretation, and as such may or may not include attorneys' fees in first party enforcement actions, in addition to the standard allowance of attorney's fees in

defense of suits by third parties.'" 454 Md. at 487-88. Because "attorney's fees provisions 'must be strictly construed to avoid inferring duties that the parties did not intend to create[,]'" the Court was mindful that "the agreement must be based upon express terms and cannot be found by implication or inference." *Id*. at 478-88 (quoting Robert L. Rossi, *Attorneys' Fees* § 9:18 (3d ed. 2002). Cum. Supp. 2007)).

In *Bainbridge*, the Court of Appeals rejected a claim similar to Harrison's, that the indemnity agreement in question did "not authorize an award of attorney's fees in first-party actions and support[ed] an award to attorney's fees only for third-party actions." *Id*. at 484. That provision, in Article 19 of a construction contract between the Petitioner and Respondent, stated that "'Bainbridge hereby indemnifies, and agrees to defend and hold harmless White Flint . . . from any and all claims, demands, debts, actions, causes of action, suits, obligations, losses, costs, expenses, fees, and liabilities (including attorney's fees, disbursements, and litigation costs) arising from or in connection with Bainbridge's breach of any terms of this Agreement[.]'" *Id*. at 480. The Court held that this language "provides expressly for the payment of 'attorney's fees'" because "it ties payment of those fees expressly to an action for 'breach' of the contract" and separately "confirms the intent of the parties to cover first-party counsel fees by referring to 'rent loss,' a first-party loss arising from a breach of the Agreement." *Id*. at 489. The Court concluded that "the parties designed Article 19 to ensure that White Flint would be made whole if Bainbridge breached the agreement, which supports first-party fee shifting." *Id*. at 493.

As persuasive precedent for its ruling, the Court in *Bainbridge* cited *Balcor Real Estate Holdings, Inc. v. Walentas-Phoenix Corp.*, 73 F.3d 150, 153 (7th Cir. 1996), interpreting another indemnification clause as a first-party, fee-shifting agreement based on language similar to paragraph 14 of the Promissory Note signed by Harrison in this case. *See Bainbridge*, 454 Md. at 489. The provision in that case required the indemnitor (Walentas) to hold the indemnitee (Balcor) "'harmless from and against any . . . expenses (including, without limitation, attorneys' fees and expenses incurred by [the indemnitee] as a direct or indirect result of . . . any breach or default by [the indemnitor] under any of the covenants or agreement under this Agreement[.]'" *Balcor*, 73 F.3d at 153. Because "Balcor incurred attorneys' fees as a result of Walentas's default[,]" the Seventh Circuit held that "Walentas must compensate (= indemnify, hold harmless) Balcor for its outlay, so that Balcor will be in as good a position as it would have been, had Walentas performed as required." *Id*.

Applying the foregoing precedent to the attorney's fee issue before us, we conclude that the trial court did not err in awarding attorney's fees under paragraph 14 of the Note, which provides:

> 14. As additional consideration for the Lender granting this loan to the Borrower, the Borrower represents and warrants that it has no claims, action, cause of action, defenses, counterclaims or setoff of any kind or nature which exist as of the date of this Promissory Note and which the Borrower now or hereafter may assert against the Lender, then by executing this Promissory Note, the Borrower forever waives and releases the Lender . . . from any liability, suite [sic], damage, claim, loss or expense of any kind whatsoever or howsoever arising that the Borrower ever had, or now has or may have, against the Lender. . . . The borrower agrees to indemnify and hold the Lender . . . and/or assigns (collectively, the "Indemnified Parties") harmless

> from any loss, damage, judgment, liability or expense (including but not limited to attorneys' fees), suffered by or rendered against the Indemnified Parties (or any one of them) on account of anything arising out of the obligations of the Borrower to the Lender or any documents related thereto. This covenant . . . is contractual and not a mere recital[.]

Here, as in *Bainbridge* and *Balcor*, the operative language in the Note constitutes an enforceable first-party, fee-shifting agreement. After identifying Harrison as the "Borrower" and Sakellariou as the "Lender[,]" the Note states, even more clearly than the first-party provisions in those two cases, that the indemnification agreement constitutes "additional consideration for the Lender granting this loan to the Borrower." Paragraph 14 identifies the "Indemnified Parties" as "the Lender and its sole officers, attorneys, agents, employees, successors and/or assigns." As the Borrower, Harrison expressly "agree[d] to indemnify and hold the Lender . . . harmless from any loss, . . . or expense (including, but not limited to, attorneys' fees), *suffered by . . . the Indemnified Parties (or any one of them) on account of anything arising out of the obligations of the Borrower to the Lender or any document related thereto*." (Emphasis added).

"Our plain language interpretation" of the Note "is sufficient to entitle" Sakellariou to attorney's fees, *see Bainbridge*, 454 Md. at 490, because Harrison's obligation to indemnify expressly covers litigation by Sakellariou to enforce the Note. Here, the first-party, fee-shifting indemnification in Paragraph 14 was identified as a material part of the Note-for-cash consideration exchanged by the parties. Such an indemnity provision, "where first-party protection is critical[,]" is common when, as here, "the 'sole purpose of the arrangement was to secure credit[.]'" *Id.* at 492 (quoting *Nova Rsch.*, 405 Md. at 450).

Consequently, the trial court did not err in construing the Note to require Harrison to pay attorney's fees under Paragraph 14.

Nor did the court abuse its discretion in determining the amount of the fee award. After crediting the affidavit, fee petition, and argument presented by counsel for Sakellariou, the court exercised its discretion to reimburse him for pre-trial litigation fees and expenses.[5] Although that amount was significantly more than the capped 15% confessed judgment fees, the total reflects the increased expenses that Sakellariou incurred to obtain a judgment in this contested litigation. Because Harrison agreed to hold Sakellariou "harmless from any . . . loss . . . or expense (including but not limited to attorneys' fees) . . . on account of anything arising out of the obligations of [Harrison, as] the Borrower to [Sakellariou, as] the Lender[,]" the trial court did not err in ruling that Harrison "must compensate (= indemnify, hold harmless)" for his "outlay, so that [he] will be in as good a position as [he] would have been, had [Harrison] performed as [the Note] required." *Balcor*, 73 F.3d at 153.

[5] We note that the court did not award any fees for the costs incurred by Sakellariou during trial to litigate Harrison's obligation to indemnify him. *See generally Bainbridge*, 454 Md. at 486 (distinguishing recovery of attorney's fees incurred in litigating liability claims, from fees "incurred in establishing the existence of an obligation to indemnify, since such expenses are not by their nature a part of the claim indemnified against," but instead, "are costs incurred in suing for breach of contract, to wit, the failure to indemnify" (quoting *Peter Fabrics, Inc. v. S.S. Hermes*, 765 F.2d 326, 316 (2d Cir. 1985)).

IV.

Challenge to Legal Argument by Sakellariou's Counsel

In his final assignment of error, Harrison contends that "counsel for [Sakellariou] knowingly and intentionally misle[d] the trial court on matters of law in violation of Md. Rule 19-303.3 (Candor to the Tribunal) that were material to the outcome of the case and consequentially prejudiced" him. In Harrison's view, counsel misstated the law governing the Note in a manner inconsistent with CL § 3-113(b), thereby warranting sanctions and a new trial. Specifically, Harrison cites counsel's argument that "[w]e don't care about the date of the instrument" because it "can be antedated or postdated" and that "[i]n the case of an instrument that has a date but has been unissued, the date is when it first comes in possession of the holder."

Sakellariou rejects the allegation that his counsel knowingly and "falsely misstate[d] or mis[led] the trial court on Maryland law" because under applicable commercial paper principles, "the fact that the Note is dated May 3, 2007 is inconsequential in this case as the Note was not, as of that date, issued." Pointing out that CL § 3-113(a) "makes it abundantly clear that an instrument may be antedated[,]" he contends that when his attorney argued that "[i]n the case of an instrument that has a date but has been unissued, the date [is when] it first comes in possession of the holder[,]" he "simply parroted the law as written" and "mirrored" the "fact pattern" in CL § 3-113(b), stating that "'[i]f an instrument is undated, its date is the date of issue ***or, in the case of an unissued instrument, the date it first comes into possession of a holder.'"*** (Emphasis added by Sakellariou.).

Harrison does not supply citation to the record to show that he alleged that Sakellariou's counsel "knowingly and intentionally" misstated the law before the trial court, and our review of the record does not reveal that it was raised prior to this appeal. Because Harrison's counsel raises this issue for the first time on appeal, it is waived. Maryland Rule 8-131(a) provides that "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense or delay of another appeal." We address the issue nevertheless because we are not persuaded that counsel for Sakellariou violated his duty of candor to the court. Instead, we understand that by arguing that "[i]n the case of an instrument that has a date but has been unissued," as the Note was when delivered, counsel was attempting to explain why even though the Note was dated May 3, 2007, and payable within 60 days, it was given in exchange for the funds that Sakellariou did not wire until December 3, 2007.

The legal argument challenged by Harrison addressed Sakellariou's enforcement of the Note generally, and Harrison's lack of consideration and issuance defenses specifically. "An instrument may be antedated or postdated." CL § 3-113(a). When there is a date on the instrument, "[t]he date stated determines the time of payment if the instrument is payable at a fixed period after date." CL § 3-113(a). But "[i]f an instrument is undated, its date is the date of its issue, or, in the case of an unissued instrument, the date it first comes into possession of a holder." CL § 3-113(b). An instrument is "issued" upon its

"first delivery . . . by the maker . . . for the purpose of giving rights on the instrument to any person." CL § 3-105(a). Although "[a]n unissued instrument, or an unissued incomplete instrument that is completed, is binding on the maker[,]" CL § 3-105(b), defenses of "nonissuance, conditional issuance or issuance for a special purpose" are available to the maker. CL § 3-105 cmt. 2.

We agree with Harrison in one respect: Sakellariou's interpretation of § 3-113(b) does not hold up under closer inspection. Under § 3-113(b), "[i]f an instrument is undated, its date is the date of its issue, or, in the case of an unissued instrument, the date it first comes into possession of a holder." Sakellariou essentially read § 3-113(b) as being comprised of two independent clauses, one dealing with the payment date of undated instruments and the other dealing with the payment date of unissued instruments, whether dated or undated. We disagree. The introductory clause of § 3-113(b) applies to the entire provision, as made clear by the language that "[i]f an instrument is undated, *its* date" is either the date of its issue or, if unissued, the date it first comes into the possession of the holder. § 3-113(b) (Emphasis added). The use of the singular "it" refers back to the introductory clause's subject, the undated instrument, and applies throughout § 3-113(b). *See, e.g.*, *Payne v. State*, 243 Md. App. 465, 487 (2019) (holding that "use of 'a' throughout th[e] statute qualified each reference in the singular."). Accordingly, the clause "in the case of an unissued instrument," was intended to apply only to undated *and* unissued instruments, not dated but unissued instruments as Sakellariou asserted.

That said, we do not agree with Harrison that Sakellariou's argument was based on any *intentional* misstatement of the law. Ultimately, Sakellariou simply read the statute incorrectly; that is hardly an extraordinary occurrence and certainly not a basis for sanctions. Sakellariou testified that, based on his experience in selling securities, the date on the Note did not "matter" because, whether antedated or postdated or undated, the Note was still enforceable by its holder against Harrison, based on the date it was funded and delivered. He explained that "[n]otes are written all the time, and then they're traded after that date." In light of that testimony and the corroborating documentary evidence, counsel's argument attempted to explain why the date on the Note did not support Harrison's lack of consideration and non-issuance defenses. As counsel for Sakellariou asserted, the fact that before being issued (i.e., delivered by Harrison to Sakellariou after he wired funds), the Note was either antedated or undated, would not necessarily defeat the right of Sakellariou, as holder, to enforce it.

When read in context, counsel's argument sought to explain why Harrison did not have a lack of consideration or a non-issuance defense. Although ultimately an incorrect interpretation of the statute and perhaps not the clearest iteration of Sakellariou's position that the Note was issued by Harrison in consideration for the funds that Sakellariou wired on December 3, 2007, we are not persuaded that this was "[l]egal argument based on a *knowingly false* representation of law[.]" Md. Rule 19-303.3 cmt. 4 (Emphasis added).

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.