Circuit Court for Carroll County
Case No. 06-C-14-66986

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0856

September Term, 2016

MICHAEL F. PETERSON, ET UX.

v.

SPRINGDALE LAND COMPANY LLC, ET AL.

Nazarian,
Reed,
Krauser, Peter B.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: September 19, 2018

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

Michael and Faith Peterson, the appellants, were found liable for breach of a 2006 Settlement and Mutual Release Agreement ("Settlement Agreement") which they entered into with appellees Springdale Land Company, LLC and Lovell Grass Fed Cattle Company, LLC ("the Lovells"), and Sharon Clinton ("Clinton") as the result of a water discharge dispute in 2005. On appeal, the appellants present four questions for our review, which we have re-phrased as follows:

1. Did the circuit court err in granting partial summary judgment as to liability in favor of the Lovells and Clinton?

2. Did the circuit court abuse its discretion by denying appellants' Motion to Compel Site Inspection and prohibiting the requested re-inspection of the Lovells' real property?

3. Did the circuit court abuse its discretion by striking the proffered affidavit and testimony of the appellants' expert and/or by not considering the expert's proffered affidavit and testimony in the determination to enter partial summary judgment in favor of the Lovells and Clinton?

4. Did the circuit court err in awarding the Lovells and Clinton their respective and requested litigation costs and expenses?

For the following reasons, we answer these questions in the negative and affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

A. 2006 Litigation and Settlement Agreement

Appellees Springdale Land Company, LLC and Lovell Grass Fed Cattle Company, LLC are owned and managed by John and Virginia Lovell ("the Lovells"). The Lovells operate an organic cattle farm on a single plot of land ("Springdale Property") located off

Bark Hill Road in Union Bridge, Maryland. Appellants Michael and Faith Peterson ("the Petersons") own and occupy the real property across Bark Hill Road from the appellees. The appellants' property is immediately adjacent to the real property owned by Sharon Clinton ("Clinton"). Both the Peterson and Clinton properties are located uphill from the Springdale Property. Water naturally flows from the appellants' property onto Clinton's property, where it is then directed under and across Bark Hill Road toward the Springdale Property by means of a culvert built and maintained by Carroll County.

In 2005, the appellees filed a lawsuit in Carroll County alleging that the appellants and Clinton were actively discharging water through a buried pipe in the direction of the Springdale Property in such quantities that it was causing significant erosive damage to a 1,700 foot long grassed waterway[1] on the Springdale Property.[2] The source of the water flow at issue was water that was being directed out of the appellants' basement via sump

[1] The appellees installed the waterway in 1996 in concert with the Carroll County Soil Conservation District and the United States Department of Agriculture to correct soil erosion.

[2] An engineer hired by the appellees in 2005 as an expert witness recalled making the following findings as to the extent of the damage:

> [T]he Grassed Waterway had been completely eroded and damaged by the constant flow of water from the [Peterson and Clinton] properties. The erosion was so severe that Mr. Lovell's farming equipment and cattle could no longer traverse the Grassed Waterway as designed. The erosion was on course to permanently destroy additional pasture land and make it nearly impossible to restore the waterway to its original . . . condition.

pump, drain pipe, and extension pipe to the front of the appellants' property and eventually onto the appellees' property.

In November 2006, the Lovells, the Petersons, and Clinton entered into a Settlement Agreement whereby the appellants agreed to disconnect their drain pipe and pay damages, in conjunction with Clinton, to the appellees. Paragraph 4 and 5 of the agreement, the appellants promised and agreed not to pipe or direct water onto the appellees' property:

> 4. The Petersons represent and warrant that they have disconnected the outside extension pipe previously connected to the drain pipe of the sump pump servicing the house on the Peterson Property.
> 5. The Petersons affirmatively covenant, promise, and agree not to pipe or direct water onto the Plaintiff's Property or the Clinton Property. The Petersons further affirmatively covenant, promise, and agree that they shall not reconnect the extension pipe or any similar extension pipe. The Clintons affirmatively covenant, promise, and agree not to pipe or direct water onto the Plaintiffs' Property or the Peterson Property. Nothing herein shall be construed to prohibit the natural flow of water from the Peterson Property or the Clinton Property to the Plaintiff's Property.

Following the settlement, the appellants removed the extension pipe connected to the sump pump system in their basement and redirected the water to the rear of their property to be drained into seepage pits. In turn, the appellees made repairs to the damaged grass waterway on the Springdale Property and installed a French drain throughout the length of the waterway to provide additional protection against erosion. The appellants maintain that the work they undertook in 2006 fully resolved the water issue that resulted in the prior litigation.

B. 2014 Complaint

In April 2014, the appellees claimed they "discovered and personally observed water once again being discharged from Appellant's property at what appeared to be the same constant rate and quantity of discharge as in 2005 and from what looked to be the same buried pipe." The appellees noted that the water being discharged from the appellants' property was causing the same erosive damage as that which occurred eight years prior. After receiving no response from the appellants to their cease and desist letter,[3] the appellees initiated the underlying litigation by filing a Complaint to Enforce Settlement Agreement against the appellants and Clinton on July 23, 2014.The Complaint also included claims of nuisance, trespass, and negligence. Along with the Complaint, the appellees filed a Motion for Temporary Restraining Order and Preliminary Injunction against the appellants and Clinton, enjoining both parties "from piping, channeling, and directing water onto the [appellees'] [p]roperty until a final determination has been made on the merits of [the appellees'] claims."[4]

[3] Appellants assert that they were never contacted by the appellees or their counsel.

[4] Clinton filed an Answer to the Appellees' Complaint, in which she denied all claims made against her. Shortly thereafter, Clinton filed a Cross-Claim against the Petersons that directly corresponds to the allegations asserted by the appellees. The Cross-Claim includes the following counts: contribution and/or indemnification; enforcement of Settlement Agreement, nuisance, trespass, negligence, and request for injunctive relief. The appellants filed Answers to both the Appellees' Complaint and Clinton's Cross-Claim, in which they denied the allegations asserted therein and identified various affirmative defenses.

The appellants acknowledged that water was discharged onto the appellees' property for a brief period of time between April 2014 and July 2014,[5] but denied that the temporary event constituted a breach of the Settlement Agreement. The following excerpt from an email sent on August 13, 2014, by the appellants' counsel to appellees' counsel for settlement purposes elaborates:

> At some point after the prior litigation was resolved, the Petersons were forced to address a water flow issue arising from their septic system. This initially involved the installation of a new pipe, but was subsequently resolved by the creation of a drainage pit around the septic system. Until sometime this Spring [*sic*], no water flowed from this septic system drainage pipe towards your clients' property. Instead, the water flow was halted via the drainage pit. For reasons unknown (likely higher than typical water runoff from the past season's snow and a rise in the local water table), there was a brief period in which water did apparently flow from the area of the septic system through the pipe in the front of the Peterson property. Once this water flow was noticed, the Petersons took immediate steps to remedy the issue and a new and enlarged septic drainage pit was installed. At the same time, the subject septic drainage pipe was removed.
>
> The Petersons assert that they were never contacted by your clients (or by your office) in regard to this brief septic drainage issue, but resolved the issue on their own initiative once they became aware of the issue. Under these circumstances, I do not see a viable basis for the Complaint to Enforce Settlement Agreement just filed. The source of the water is different. The means by which the water flow has been directed is different. The issue now complained of has been resolved and the pipe, which is different from the pipe in the initial litigation, has been removed. As a result, I would request that your clients dismiss their Complaint.

[5] In an affidavit signed September 23, 2014, Mr. Peterson asserted that he contracted Pine Ridge Property Maintenance, LLC to resolve the new water flow issue in July, and that "[a]t no time after July 21, 2014, and likely for some period before this date, did any water flow from [the Petersons'] Property towards the [Lovells'] Property."

The appellees did not dismiss their Complaint, but instead filed and were granted a Motion to Extend Temporary Restraining Order.

C. Site Inspection

The appellees and appellants both designated engineers as expert witnesses to support their conflicting positions as to the source of the 2014 water issue and the extent of the damage that the water caused to the Springdale Property. The appellees designated Mr. John Klein, the same environmental engineer who testified in the 2006 litigation, while the appellants retained Mr. David Bastian, a civil engineer.[6]

It is undisputed that on October 13, 2014, Mr. Klein and Mr. Bastian conducted a site inspection. However, the appellants offer an account as to what this inspection entailed and where it occurred that is inconsistent with the record. The appellants claim that on October 13, 2014, the parties and their respective expert witnesses and attorneys inspected the real properties at issue in this appeal. However, the record indicates that the site inspection was only of the Peterson Property, not the Springdale Property, and that it was conducted solely by Mr. Klein and Mr. Bastian.

Next, the appellants allege that the primary purpose of the October 13 site inspection was for Mr. Bastian to "view, inspect, and document the areas of damage to [the Petersons'] neighbors' properties as alleged in the subject Complaint and Cross-Claim." However, Mr. Peterson stated in an affidavit signed September 23, 2014, that Mr. Peterson and/or his

[6] Mr. Klein was designated as an expert witness in December 2014; Mr. Bastian was certified in January 2015.

counsel invited the appellees to inspect the *Peterson* Property "to confirm that the water issue complained of ha[d] been resolved and ha[d] been resolved for some time."

Following Clinton's deposition on April 14, 2015, the appellants contend that the appellees' counsel "represented that the areas of alleged damage to [the Springdale Property] was significantly more extensive than the area inspected initially . . . ."[7] On May 1, 2015, appellants' counsel emailed an informal request to appellees' counsel for a site re-inspection. In response, appellees' counsel asked that a formal written request be submitted, which was then served on May 13, 2015. The request asked for an inspection of the Springdale Property to occur on May 29, 2015. On May 26, 2015, the appellees submitted a letter opposing the request on the basis that it was presented outside the discovery period, which ended on May 22, 2015. As a result, the appellants filed a motion to compel the requested re-inspection, which was subsequently denied by the circuit court on June 18, 2016.

D. Partial Summary Judgment: Breach of Contract

On June 12, 2015, the appellants filed their respective Motions to Dismiss and/or for Summary Judgment as to the Appellees' Complaint and Clinton's Cross-Claim. The

[7] An email from appellants' counsel to appellees' counsel dated May 5, 2015, regarding a site inspection suggests otherwise:

> The request for an inspection is a direct result of the representations made after Ms. Clinton's deposition indicating that the original inspection would not have identified all, or even most, of the damaged portions of the grassed waterway. The inspection is being requested to determine if there is in fact damage to the grassed waterway. . . .

appellees and Clinton submitted their own cross-motions seeking entry of partial summary judgment in reply. The circuit court denied all parties' motions without holding a hearing.

After several months, on October 9, 2015, the appellees filed their Motion in Limine and Renewed Motion for Partial Summary Judgment as to Liability. In addition to summary judgment, the motion requested the court to issue an order precluding the appellants' designated expert from testifying at trial on the basis that he lacked reliable methodologies to offer any expert opinions in the case. The appellants moved to strike this request, arguing that the filing deadline for dispositive motions had passed four months prior, but were denied by the circuit court. Clinton did not file a Renewed Motion for Partial Summary Judgment.[8]

On January 15, 2016, the circuit court held a hearing on all pending motions, including: (1) [Appellees'] Motion In Limine (to preclude or limit the testimony at trial of the appellants' expert witness); (2) [Appellees'] Renewed Motion for Partial Summary Judgment as to Liability; (3) [Appellants'] Motion In Limine In Regard to Prior Litigation (to preclude or limit admissibility of evidence at trial relating to the 2006 Settlement Agreement); and (4) [Appellants'] Renewed Motion to Dismiss or for Summary Judgment. Based on findings the court made during the January 15 hearing, on February 3, 2016, the circuit court entered partial summary judgment as to liability in favor of the appellees,

[8] If any error was made by the circuit court, it was potentially that the court granted partial summary judgment to Clinton despite the fact that it had previously denied her request and that she did not file a renewed motion. Clinton asserts that she "tacitly orally renewed her motion when she argued that appellants breached the Settlement Agreement during the hearing on the renewed motion for summary judgment."

finding the appellants liable for breach of the Settlement Agreement pursuant to Count I of the Appellees' Complaint. The appellants filed a Motion to Reconsider the circuit court's entry of partial summary judgment on February 8, 2016. Attached to the motion was an affidavit signed by expert witness David Bastian dated January 21, 2016.

E. Litigation Costs

On February 16, 2016, the parties filed a Stipulation of Partial Resolution of Litigation with the court. The resolution provided that: (1) the appellants would pay the appellees $17,500.00 to resolve the appellees' damage claims; (2) the appellants could appeal the summary judgment ruling after the circuit court ruled on the Motions for Litigation Costs and Expenses that were to follow; and (3) the appellees would dismiss the remaining tort claims in their Complaint that were duplicative of Count I.

On February 24, 2016, the appellees filed both a Response and Opposition to the Appellants' Motion for Reconsideration of the entry of partial summary judgment as well as a Motion to Strike Contradictory Expert Affidavit. In the latter, the appellees asked the court to strike Mr. Bastian's January 21, 2016, affidavit on the basis that it was contradictory to his deposition testimony. Shortly thereafter, the appellees and Clinton each filed Motions for Litigation Costs pursuant to paragraph 15 of the Settlement Agreement.

After holding a motions hearing on May 13, 2016, the circuit court denied Appellants' Motion for Reconsideration, granted Appellees' Motion to Strike Contradictory Evidence, and held the Motions for Litigation Costs *sub curia*. On May 31, 2016, the circuit court entered a Memorandum Opinion and Order granting the appellees'

and Clinton's Motions for Litigation Costs and Expenses and entered judgment in favor of appellees in the amount of $96,653.04, and in favor of Clinton in the amount of $40,292.70.

DISCUSSION
I. SUMMARY JUDGMENT

A. Parties' Contentions

Appellants argue that the circuit court erred in grating summary judgment in favor of the appellees after finding that the language of the 2006 Settlement Agreement was clear and unambiguous. Appellant asserts that the agreement is ambiguous as to whether it prohibits appellants from piping or directing *any water* towards the Springdale Property or *the same water* that was discharged in 2005-2006. Specifically, appellant highlights that paragraph four[9] of the Settlement Agreement limits their liability specifically to the water directed or pumped by the previously removed sump pump. Appellant concludes that when paragraphs four and five[10]of the agreement are read together, "it would seem, to a reasonable person, that the settlement agreement was in fact intended to only address the cause and source of the water issue that arose in the Prior Litigation, which was the sump pump system water." Therefore, because the Settlement Agreement is not clear and unambiguous, appellant avers that as established by the Maryland Court of Appeals, parol

[9] Paragraph four reads: The Petersons represent and warrant that they have disconnected the outside extension pipe previously connected to the drain pipe of the sump pump servicing the house on the Peterson Property.

[10] Paragraph five reads: The Petersons affirmatively covenant, promise, and agree not to pipe or direct water onto the Plaintiffs' Property or the Clinton Property. The Petersons further affirmatively covenant, promise, and agree that they shall not reconnect the extension pipe or any other similar extension pipe.

evidence should have been admitted to elucidate the ambiguous language of the contract and determine the rights and intentions of the parties. *See Brendsel v. Winchester Constr. Co.*, 392 Md. 601, 624, 898 A. 2d 472 (2006).

Appellants also argue, among other things, that there were significant material facts in dispute that precluded the entry of partial summary judgment on contractual claims such as: their expert testimony, if admitted at trial, would have shown that the "cause of [Appellees'] alleged property damage is erosion and not any act or omission undertaken by the [Appellants]; the source of water at issue in the prior litigation is completely different than that in the current case; and that paragraph four, not five, of the Settlement Agreement, established the Petersons' liability.

Appellees contend that the 2006 Settlement Agreement clearly and unambiguously prohibits Appellants from piping or directing water onto Appellees' property. Appellees' Br. at 7. They contend that there is no language in paragraph five, or anywhere in the agreement that could be construed as limiting the applicability of the first sentence of paragraph 5 to any *particular* water, to the exclusion of all other water. Appellees further assert that no language supports appellants' argument that their liability for discharging water is limited only to water from their sump pump and therefore, because Maryland courts follow the law of objective interpretation of contracts, *Atlantic Contracting & Material Co., Inc. v. Ulico Cas. Co*., 380 Md. 285, 301, 844 A.2d 460, 469 (2004), the language in the Settlement Agreement should be given its clear and unambiguous meaning.

Additionally, appellants admitted to discharging water for several months during 2014. Per Maryland's "civil law" rule[11] regarding the rights and obligations of neighboring property owners concerning the natural flow of surface water, appellees argue that:

> This rule of the civil law is subject to the qualification that the upper owner has no right to increase materially the quantity or volume of water discharged on the lower land owner. The rule is also subject to the qualification that the upper owner has no right to discharge water into an artificial channel or in a different manner than the usual and ordinary natural course of drainage, or put upon the lower land water which would not have flowed there if the natural drainage conditions had not been disturbed.

Bieberman v. Funkhouse, 190 Md. 424, 429 (1948).

Appellees also note the "reasonableness of use" doctrine, which balances benefits and harms "to make sure that the owner of the servient estate is not unreasonably denied use of his property." *Mark Downs, Inc. v. McCormick Properties, Inc.*, 51 Md. App 171, 182 (1982) (internal citation omitted). When applied, the doctrine prevents a dominant landowner from:

> (1) increasing materially the quantity or volume of water discharged onto the lower land;
> (2) discharging water in an artificial channel or in a different manner than the usual and ordinary natural course of drainage;
> (3) putting upon the lower land water that would not have flowed there if the natural drainage conditions had not been disturbed;
> (4) causing dirt, debris, and pollutants to be discharged onto the lower land; or

[11] Maryland has adopted the rule of the civil law that the owner of land is entitled to have surface water flow naturally over the land of the lower land owner, and the lower owner cannot prevent escape of water from the higher land onto his land. *Bieberman v. Funkhouse*, 190Md. 424, 428 (1948).

(5) otherwise creating a health hazard.

Mark Downs, Inc., supra, 51 Md. App 171, 183-84 (1982).

Consequently, appellees conclude that because settled law establishes that an "upper land owner cannot, with impunity, artificially increase or concentrate the natural flow of" water and damage the lower owner as a result, *Battisto v. Perkins*, 210 Md. 542, 546 (1956), the circuit court was correct in granting appellees' Motion for Summary Judgment as a result of Appellants discharging water through a buried pipe, in violation of the Settlement Agreement.

B. Standard of Review

The Court of Appeals has explained that

> In reviewing the grant of summary judgment, [an appellate court] must consider the facts reflected in the pleadings, depositions, answers to interrogatories and affidavits in the light most favorable to the non-moving parties, the plaintiffs. Even if it appears that the relevant facts are undisputed, "if those facts are susceptible to inferences supporting the position of the party opposing summary judgment, then a grant of summary judgment is improper."

Ashton v. Brown, 339 Md. 70, 79 (1995) (quoting *Clea v. City of Baltimore*, 312 Md. 662, 677 (1988)). We view the facts in the light most favorable to the non-moving party and "ordinarily may uphold the grant of a summary judgment only on the grounds relied on by the trial court." *Brown*, 339 Md. at 80. "The standard of review for a grant of summary judgment is whether the trial court was legally correct." *Sadler v. Dimensions Healthcare Corp.*, 378 Md. 509, 533 (2003) (quoting *Goodwich v. Sinai Hosp. of Baltimore, Inc.*, 343 Md. 185, 204 (1996)).

C. Analysis

Appellants request this court to hold that the circuit court erred in granting the Appellees' Motion for Summary Judgment. Maryland Rule 2-501 establishes in relevant part that "the court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to summary judgement as a matter of law." MD. RULE 2-501(e). In light of these legal principles, this Court disagrees with appellants' claims that there were significant material facts in dispute that precluded the entry of partial summary judgment.

Appellants' chief argument is that the 2006 Settlement Agreement entered into with appellees contained ambiguous language regarding the appellants' liability in the 2014 water discharge event. Appellants maintain that paragraph four of the agreement limits their liability to the water discharged from the Appellants sump pump in 2005-2006, and that when read in conjunction with paragraph five, the Settlement agreement creates ambiguity. This court disagrees and finds that the agreement's language is clear and unambiguous, that paragraph five is the governing provision establishing the Appellants' liability, and even when read in conjunction with paragraph four, appellants' liability is the same.

Maryland follows the law of objective contract interpretation. *Sy-Lene of Washington, Inc. v. Starwood Urban Retail II, LLC, 376* Md. 157, 166 *(2003).* Under the objective test of contract interpretation, "the written language embodying the terms of an agreement will govern the rights and liabilities of the parties, irrespective of the intent of

the parties at the time they entered into the contract." *Sy-Lene, 376 Md. at 166* (internal citations omitted). A contract's unambiguous language will not give way to what the parties thought the contract meant or intended it to mean at the time of execution; rather, "if a written contract is susceptible of a clear, unambiguous and definite understanding ... its construction is for the court to determine." *Id.* (internal citations omitted). When the clear language of a contract is unambiguous, the court will give effect to its plain, ordinary, and usual meaning, taking into account the context in which it is used. *Langston v. Langston,* 366 Md. 490, 506 (2001).

The plain language of the Settlement Agreement clearly and unambiguously establishes that the appellants "agree not to pipe or direct water onto the Plaintiffs' Property or the Clinton Property"… "and that they shall not reconnect the extension pipe or any other similar extension pipe." Paragraph four's emphasis on the drain pipe of the sump pump in 2005-2006 does not eliminate paragraph five's functionality. Appellants admitted that water was directed from their property onto appellee Clintons' property and ultimately onto appellee Springdale's property in 2014.[12] Whether appellants took overt action to

[12] Peterson Deposition p. 39-41, 47:
Q: Okay. So in 2014 when the water starts coming out from the ground, did there come a point in time—you said from investigation you learned that there was a pipe that was funneling this water or focusing this water coming out at that point; is that fair?
A: Yes.
Q: Okay. What investigation did you do to determine that? Did you dig up the ground?
A: Yeah. I had to find where the water was coming from.
Q: And that exposed the pipe; is that fair?
A: Yes.

direct the water onto the appellees' property is not important. What matters is whether *any* water was directed from *any* pipe from appellants' property onto appellees' property, regardless of the existence of a sump pump. Because it is undisputed that water was directed onto appellees' property, this court sees no reason for providing contrary interpretation to the Settlement Agreement's clear language. As such, we find there to be no dispute of material fact as to the appellants' liability, nor any dispute that the agreement speaks *only* to the sump pump drain pipe and not to any pipe directing water onto the appellees' property.

II. DISCOVERY ORDER (SITE INSPECTION)

A. The Contentions of the Parties

Appellants contend that appellees used evasive discovery tactics[13] that "prevented appellants from ascertaining the complete and accurate nature and scope of the damage claims asserted against them, as well as hindered appellants' ability to engage in meaningful settlement discussions and to prepare an appropriate defense." As such, appellants argue that it was appellees' improper tactics that prohibited appellants from completing discovery.

[13] In appellants' Motion to Compel Site Inspection Request for An Expedited Ruling, appellants assert that their expert was "led to believe that the alleged damage was all visible from the area of the culvert that was included in the inspection." Appellants further argued that "[a]t the conclusion of Defendant Clinton's deposition on April 14, 2015, Plaintiffs' counsel, for the first time, represented that the areas of alleged damage to Plaintiffs' real property was significantly more extensive than the area inspected initially and that these additional areas of damage had not been included in the initial inspection.

On May 13, 2015, appellants filed a request for re-inspection[14] to appellees before close of discovery on May 22, 2015 with the date, May 29, 2015, listed for re-inspection with details of the nature and purpose of the inspection. Appellees' counsel responded with a letter to appellants' counsel on May 26, "identifying certain perceived deficiencies with the request as submitted."

Appellants argue that "Maryland Rule 2-422(a)(2) expressly provides for the inspection for real property such as requested by appellants:

> [T]o permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection, measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property…

Appellants further assert that they timely filed a motion compelling discovery, in accordance with Maryland Rule 2-432(b)(E), against appellees who failed to comply with a request for inspection. Thus, appellants contend that the circuit court abused its discretion when it refused to permit the re-inspection of the damaged real property at issue.

Appellees assert that this Court should not consider appellants' argument that the circuit court abused its discretion when it denied appellants' Motion to Compel Site Inspection. Appellees base their argument on the stipulation agreed to by all parties that, as a result of the Settlement Agreement, appellees agreed to dismiss, with prejudice, all of their claims against appellants, with the exception of Count I's Enforcement of the Settlement Agreement (breach of contract) claim. Appellees contend that "Appellants are

[14] Appellants conducted an initial inspection of the real property at issue on October 1, 2014.

not appealing Appellees' claim to damages arising out of their breach of the Settlement Agreement. That issue was settled with the parties' Stipulation dated February 9, 2016 and thus, having access to appellees' property to inspect and document the areas of damaged claimed by appellees is no longer useful or necessary. Appellants are no longer prejudiced by the Court's decision."

Appellees' further argue the appellants request to re-inspect the property was untimely because appellants requested an inspection after the close of discovery, and that the parties entered into the Settlement Agreement eight months after the circuit court denied appellants' Motion to Compel Site Inspection that Request for Entry onto Land was untimely, thereby eliminating any prejudice the appellants may have suffered as a result of the circuit court's ruling.

B. Standard of Review

An appellate court reviews the denial of discovery under the abuse of discretion standard. *Beyond System, Inc. v. Realtime Gaming Holding Co., LLC*, 338 Md. 1, 28 (2005). As the Court of Appeals noted in *In Re. Adoption/Guardianship No.* 3598:

> There is an abuse of discretion "where no reasonable person would take the view adopted by the [trial] court," *North v. North*, 102 Md.App. 1, 13, 648 A.2d 1025, 1031, (1994) (quoting *In Re Marriage of Morse*, 240 Ill.App.3d 296, 180 Ill.Dec. 563, 571, 607 N.E.2d 632, 640 (1993)) or when the court acts "without reference to any guiding rules or principles." *North*, 102 Md.App. at 13, 648 A.2d 1025 (quoting *Long John Silver's, Inc. v. Martinez*, 850 S.W.2d 773, 775 (Tex.App. 1993)). An abuse of discretion may also be found where the ruling under consideration is "clearly against the logic and effect of facts and inferences before the court," *Id.* (quoting *Shockley v. Williamson*, 594 N.E.2d 814, 815 (Ind.App. 1992)), or when the ruling is "violative of fact and

> logic," *Id.* (quoting *Young v. Jangula*, 176 Mich.App. 478, 440 N.W.2d 642, 643 (1989)).

347 Md. 295, 312 (1997).

C. Analysis

Appellants argue that the trial court abused its discretion when it did not permit the re-inspection of the appellees' property. We find that the court did not. Maryland Rule 2-422(c) states that:

> The party to whom a request is directed shall serve a written response within 30 days after service of the request or within 15 days after the date on which that party's initial pleading or motion is required, whichever is later.

Id. at §§ 2-422(c).

Appellants submitted an informal request for re-inspection on May 13, 2015, less than 10 days before the close of discovery on May 22, 2015. They proposed a date for the inspection of June 2, 2015, 11 days after the close of discovery. Appellees' counsel responded on May 26, 2015 that although the parties agreed to take expert depositions after the close of discovery, they did not agree to any other discovery past the deadline. Additionally, counsel for appellees stated that "it is unlikely that my client will allow me to consent [to extend the discovery deadline if even permitted]. As I have expressed to you before, after learning of your client's unreasonable position regarding settlement (i.e. that they claim there is no damage from the water and/or that it was caused by the cattle) my client has been given little incentive to be cooperative with your requests, particularly when it runs afoul of the Court's Scheduling Order." Appellants' untimely request would not have given appellees adequate time to respond per 4-22(c) nor the chance to do additional

discovery in response to appellants' expert, Mr. Bastian's, findings. It is within the court's discretion to issue sanctions for scheduling order violations. *Maddox v. Stone*, 174 Md. App. 489, 497, 508–09, 921 A.2d 912 (2007). Therefore, the circuit court did not abuse its discretion when it adhered to the scheduling order and denied appellants' Motion to Compel Site Inspection.

Furthermore, the appellants request for re-inspection pertained to the issue of the cause of the water discharge. However, causation and damages were no longer at issue because appellants already admitted that water from the pipe on their property led to the appellees' damages. Accordingly, re-inpection of the property was no longer necessary.

III. EXPERT TESTIMONY

A. The Contentions of the Parties

Appellants contend that the circuit court committed reversible error when it declined to consider their expert, Mr. David Bastian's, deposition testimony and affidavit. Appellants argue that their expert's affidavit provides information consistent with his deposition testimony and that Mr. Bastian's affidavit merely provides further support for the opinions and testimony previously provided and does not reflect any change in his opinions. They assert that the circuit court's failure to consider the expert testimony had a significant and detrimental effect on the appellants because it resulted in the circuit court granting both summary judgment and attorneys' fees. Appellants further assert that if Mr. Bastian's testimony had been allowed, it would have identified all the factual issues with

the arguments made by appellees that resulted in a judgment in the appellants' favor regarding the breach of Settlement Agreement and award of attorneys' fees.

Appellants reference Maryland Rule 5-702 which states that:

> "Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue…"

And *Langenfelder v. Thompson,* which held that:

> The opinion of an expert as to even the possibility of the cause of a certain condition may frequently be of aid… for when the facts tend to show…the cause of the condition, the assurance of an expert that the causal connection is scientifically possible may be helpful in determining what are reasonable inferences to be drawn from the facts.

179 Md. 502, 505, 20 A.2d 491 (1941) to conclude that their expert's testimony was central to their arguments presented in their opposition to the courts' grant of summary judgment and attorneys' fees.

Appellees assert that the circuit court did not abuse its discretion in striking the appellants' expert's affidavit because "Mr. Bastian's affidavit was essentially meaningless to the outcome and immaterial to the issue of liability." Appellees argue that appellants' affidavit was not offered in opposition to appellees' Renewed Motion for Partial Summary Judgment as to Liability. They further contend that appellants' expert affidavit was not offered until nine months after the close of discovery. Lastly, appellees maintain that appellants' expert affidavit consisted entirely of opinions that contradicted the expert's prior deposition testimony.

B. Standard of Review

"[T]he admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal." *Clemons v. State*, 392 Md. 339, 359 (2006) (internal quotations omitted). A trial court's determination regarding the admissibility or necessity of expert testimony will be reversed only if there is a clear abuse of discretion. *Bryant v. State*, 393 Md. 196, 203 (2006).

C. Analysis

Whether the circuit court erred in striking the Appellants' Expert's affidavit and testimony is governed by Maryland Rule 2-501(e). This rule provides that:

> A party may file a motion to strike an affidavit or other statement under oath to the extent that it contradicts any prior sworn statement of the person making the affidavit or statement. Prior sworn statements include (A) testimony at a prior hearing, (B) an answer to an interrogatory, and (C) deposition testimony that has not been corrected by changes made within the time allowed…

Id. at § 2-501(e).

Appellants' contention that their expert, Mr. Bastian's, affidavit was consistent with his deposition testimony is not supported by the record. A segment of Mr. Bastian's deposition held on Thursday, July 9, 2015[15] is as follows:

[15] Mr. Bastian's deposition was held after the close of discovery. The record indicates that the parties previously discussed conducting only expert depositions after the discovery deadline, not any other discovery.

Q: What sort of scientific analysis or tests or evaluation have you undertaken or performed to support your opinion?

A: The opinion would be based upon the photographs that I have seen.

Q: Based on photographs?

A: Hm-mmm.

Q: So you did not undertake any kind of scientific analysis or engineering analysis or perform any tests to support your opinion?

A: Correct.

Q: So just to clarify, you're not going to offer an opinion about whether or not the seepage pit that was installed was the proper method or an adequate method to control the water that was discharged earlier in the year?

A: I can make no quantitative judgment as to the capability of the seepage pit.

Q: Are there any other opinions that you intend to express at the trial that we have not covered here today that you're aware of?

A: That I'm aware of, no.

However, in his affidavit, Mr. Bastian reveals detailed explanations as to the inadequate amount of discharge needed to fill the trench, the slope of the grass waterway, and "the roughness coefficient needed to represent the roughness (drag) created by the rocks when plugged into [a] velocity formula—all of which Mr. Bastian omitted when he agreed to not having conducted any evaluations or scientific analyses at his deposition. Furthermore, Mr. Bastian testified:

Q: You agree that some of the water that came from the pipe on the Peterson property ultimately made its way onto the Plaintiffs' property?

A: Correct.

However in his affidavit, Mr. Bastian asserted that "[t]he cause and source of the water, and water flow, which Plaintiffs and Defendant Clinton allege has resulted in real property damage, is rainfall." Mr. Bastian continued that "The Peterson Defendants adhered to, and did not breach, any standard of care due to the fact that erosion is responsible for the Plaintiffs' alleged damage—not any act or omission by the Peterson Defendants. The Petersons were not directing water onto the Plaintiffs' property."

Appellants claimed that Mr. Bastian's affidavit did not contradict his prior deposition testimony, but merely clarified Mr. Bastian's previous testimony. We disagree. His admission that water came from the Peterson pipe onto the Appellees property cannot have happened without breaching the Settlement Agreement and contradicts the affidavit. Moreover, when asked if there were any other opinions he would like to provide at his deposition, Mr. Bastian responded in the negative and that everything had already been discussed.

Additionally, appellants' request for re-inspection was untimely and the affidavit was submitted months after the close of discovery[16] and therefore would not have given the appellees a chance to do additional discovery in response to Mr. Bastian's findings. It

[16] March 6, 2015 was the parties' original discovery deadline. The parties requested that the court extend the discovery deadline to May 22, 2015. Appellants filed Mr. Bastian's affidavit on January 21, 2016.

is within the court's discretion to issue sanctions for scheduling order violations. *Maddox v. Stone,* 174 Md.App. 489, 497, 508–09, 921 A.2d 912 (2007).

Finally, Mr. Bastian's deposition testimony and affidavit were properly declined because Mr. Bastian's testimony could not assist the trier of fact. Maryland Rule 5-702 provides that "Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." Mr. Bastian's testimony and affidavit spoke to the cause of the water discharge. Yet, the cause of the water discharge was no longer at issue because appellants had already admitted that water from the pipe on their property led to the appellees' damages and the circuit court had already granted appellees' Motion for Summary Judgment. Mr. Bastian's affidavit was attached to appellants' Motion for Reconsideration. Thus, appellants' argument that there were material facts in dispute as to their expert's opinion, was not timely raised prior to the circuit court's ruling on summary judgment. Furthermore, the parties agreed that all other claims to the litigation would be dropped, with the exception of the enforcement of the Settlement Agreement claim and litigation costs. Per the settlement agreement, the appellants' arguments are limited.

Accordingly, the circuit court did not err when it declined to consider the appellants' expert's contradictory affidavit and testimony.

IV. AWARD OF LITIGATION COSTS AND EXPENSES

A. The Contentions of the Parties

Appellants argue that paragraph 15 of the Settlement Agreement, regarding litigation costs and expenses, is ambiguous and therefore unenforceable. Appellants also

argue that they did not breach the Settlement Agreement in the first place, because this is a "new water issue" that needs to be addressed outside of the Settlement Agreement. They further assert that the award of litigation costs and expenses is unconscionable due to the uneven bargaining power between them, retired homeowners, and appellees, sophisticated owners of a cattle operation. Appellants go on to argue that because appellees Springdale/Lovell and appellee Clinton only succeeded on 1/5 and 1/6 of their claims, respectively, appellees should be awarded in proportion to their successful claims. Appellants reference *Ochse v. Henry*, 216 Md. App. 439, 458, 88 A.3d 773, 784 (2014), to further support their proportionality argument and assert that the appellees economic damages greatly exceeded the amount awarded.

Appellees argue that paragraph 15 is not ambiguous or unconscionable. They assert that paragraph 15 outlines a fee-shifting arrangement that the appellants agreed to in writing. Appellees assert that as a result of the circuit court's entry of summary judgment as to liability, the appellees were the prevailing parties in the litigation and were entitled to reimbursement pursuant to paragraph 15 of the Settlement Agreement. Appellees contend that appellants would not concede liability or agree to compensate appellee for damages, even after admitting to discharging water through a pipe onto appellees' property. It was appellants' own refusal to concede that increased litigation fees. Lastly, appellees assert that Appellants misinterpret *Osche v. Henry*, *2*16 Md. App. 439, 458, 88 A.3d 773, 784 (2014).

B. Standard of Review

This Court has outlined the standard of review that applies to issues of litigation costs and expenses as follows:

> "Maryland generally adheres to the common law, or American rule, that each party to a case is responsible for the fees of its own attorneys, regardless of the outcome." *Friolo v. Frankel,* 403 Md. 443, 456, 942 A.2d 1242 (2008) . . . Although the interpretation of a clause in a contract providing for attorney's fees is a question of law reviewed *de novo, Nova Research, Inc. v. Penske Truck Leasing Co.,* 405 Md. 435, 448, 952 A.2d 275 (2008), "the trial court's determination of the [r]easonableness of [attorney's] fees is a factual determination within the sound discretion of the court, and will not be overturned unless clearly erroneous." *Id.* n. 4; *accord Holzman v. Fiola Blum, Inc.,* 125 Md.App. 602, 637, 726 A.2d 818 (1999).

Royal Investment Group, LLC v. Wang, 183 Md,App. 406, 457 (2008).

C. **Analysis**

Appellees filed Motions for Litigation Costs and Expenses based on paragraph 15 of the Settlement Agreement. Appellees Springdale/Lovell sought litigation costs and expenses totaling $96, 653.04—$86, 417.09 of which was for attorney's fees and costs, $7,642.50 in expert fees, and $2,593.45 in deposition transcripts and costs. Appellee Clinton sought $40, 292.70—$32,253.40 of which was for attorney's fees and costs, $5,568.28 in expert fees, and $2,471.02 in deposition transcript costs. Appellees were awarded all amounts requested. Appellants ask this court to find that the Settlement Agreement, signed in 2006, was unconscionable and that the litigation costs and expenses awarded to Appellees were disproportionate to the damages sought and grossly inflated. This court disagrees.

To address Appellants' first argument that the fee shifting provision in the Settlement Agreement is ambiguous, this court finds that it is not. Paragraph 15 of the agreement reads in pertinent part:

> (15) In the event of a breach of this Agreement, any one or more of the non-breaching parties hereto may maintain an action for specific performance, breach of contract or for injunctive relief against the party or parties hereto who are alleged to have breached any of the covenants, promises, agreements, representations or warranties herein contained. *The prevailing party in any such action shall be entitled to reimbursement of their litigation costs and expenses including, attorneys' fees, experts' fees and court costs.* This Paragraph shall not be construed to limit in any manner whatsoever any other rights and remedies an aggrieved party may have by virtue of any breach of this Agreement.

(Emphasis added).

The provision clearly states that the prevailing party is entitled to reimbursement of their litigation costs and expenses. Merely stating that the provision is ambiguous, without more, is insufficient for this Court to find in favor of appellants.

Appellants next argue that they did not direct or pump water onto appellees' property and therefore, did not breach the Settlement Agreement; thus, appellees are not entitled to an award of litigation costs and expenses. As previously mentioned, appellants breached the Settlement Agreement when water from a pipe on their property discharged water onto appellees' property. No further discussion is needed to address this issue.

Appellants also argue that the award of litigation costs and expenses is unconscionable. A contract is defined as unconscionable when it contains "extreme unfairness." This unfairness is indicated by "(1) one party's lack of meaningful choice, and

(2) contractual terms that unreasonable favor the other party." *Walther v. Sovereign Bank*, 386 Md. 412, 426, 872 a.2d 735, 743 (2005).

Appellants assert that they "entered into the subject Settlement Agreement with the reasonable expectation that they were resolving an issue with their sump pump system as identified above." "It must be noted that the Settlement Agreement was prepared by Springdale and Lovell's attorneys and on behalf of the sophisticated parties that own and operate a large and profitable cattle operation. Appellants are retired homeowners who have the simple misfortune of living uphill of [Appellees] (that have the resources and experience to litigate the issues presented in this and prior litigation." "[I]t is abundantly clear that the bargaining power was so uneven and unequal so as to render the contract unconscionable and unenforceable…"

This court does not agree with the Appellants' unconscionability arguments. Appellants signed the agreement in October of 2006. They had nearly 10 years to argue that the agreement was unconscionable at the start of this litigation. Additionally, paragraphs 10 and 11 of the agreement state that:

> (10) *The Settling Parties acknowledge that they are represented by counsel, that they have read and fully understand this Agreement, and that they have entered into this Agreement freely and voluntarily.* The Settling Parties further acknowledge that the fact one or more of the Settling Parties may have drafted this Agreement shall not be used or construed against the drafting party, it being acknowledged that the initial drafting of this Agreement was merely an accommodation to the Settling Parties and that each of the Settling Parties participated in the drafting of this Agreement.

> (11) Each of the signatories for the settling parties warrants and represents that he or she has the full power and authority to enter into this Agreement….

(Emphasis added).

Appellants contractually agreed to the fee shifting provision within the Settlement Agreement when they signed it under the supervision of counsel. They have provided no proof that they lacked meaningful choice or that appellees had superior bargaining power. Accordingly, this Court finds that the Settlement Agreement was not unconscionable.

Lastly, appellants assert that "the litigation costs and expenses awarded to appellees are grossly inflated and inconsistent with the results obtained by [appellees]." Appellants ask this Court to adhere to a strict proportionality formula when awarding economic damages and litigation costs and expenses.

An award of litigation expenses is governed by Maryland Rule 2-703 and 2-705. Maryland Rule 2-703(f)(2) provides that if an award of litigation expenses is permitted, but not required, the court shall determine whether an award should be made. Where an award is required or should be made the court shall apply the following factors, listed in subsection (3) of the rule, to be considered with respect to claims for permissible fee shifting:

> (3) *Factors to Be Considered.*
> (A) the time and labor required;
> (B) the novelty and difficulty of the questions;
> (C) the skill required to perform the legal service properly;
> (D) whether acceptance of the case precluded other employment by the attorney;
> (E) the customary fee for similar legal services;
> (F) whether the fee is fixed or contingent;

> (G) any time limitations imposed by the client or the circumstances;
> (H) the amount involved and the results obtained;
> (I) the experience, reputation, and ability of the attorneys;
> (J) the undesirability of the case;
> (K) the nature and length of the professional relationship with the client; and
> (L) awards in similar cases.

Maryland Rule 2-705(e) and (f) state that:

> (e) Upon a jury verdict or, in an action tried by the court, a finding by the court in favor of a party entitled to attorneys' fees as a "prevailing party," the court shall determine the amount of an award in accordance with section (f) of this Rule.
>
> (f)(1) If the party seeking attorneys' fees prevailed with respect to a claim for which fee-shifting is permissible, the court shall consider the factors set forth in Rule 2-703 (f)(3) and the principal amount in dispute in the litigation, and may consider the agreement between party seeking the award and that party's attorneys and any other factor reasonably related to the fairness of an award.

Maryland's follows the "common core of facts" doctrine, which allows a court to "award a fully compensatory fee where an attorney may not have prevailed on each and every claim or defense but still has achieved excellent results." *Ochse v. Henry*, 216 Md. App. 439, 458, 88 A.3d 773, 784 (2014). "The doctrine removes the requirement of allocation and treats as one claims that are based on a common core of facts or related legal theories." *Id.* at 459, 88 A.3d at 785. This doctrine should be considered in addition to the totality of the circumstances when the prevailing party does not succeed on all asserted claims for relief. *Id*. at 460, 88 A.3d at 786.

This Court disagrees with appellants' arguments that appellees Springdale/Lovell and Clinton should receive 20% and 16.67% of the requested amount, respectively because

it is in proportion to the percentage of claims they prevailed on. Per the factors listed in Maryland Rule 2-703(f)(3), this Court finds the following:

A) Appellee Springdale/Lovell's counsel expended 329.05 hours and appellee Clinton's counsel expended 217.10 hours of services. Appellees' counsel made several attempts to resolve this issue with appellants prior to the full cost of litigation. However, appellants maintained that they did not breach the Settlement Agreement and delayed in responding to the appellees' letters;

B) The question at issue was not particularly novel or difficult because the parties litigated a similar claim in 2005. The principal question at issue was whether appellants were liable for water discharge they claimed derived from a different source than that at issue in 2005;

C) The skill required to perform the legal service properly "was that of a reasonably competent attorney with experience in litigation generally, and adjoining landowners' rights and responsibilities specifically, relating to water traveling from one property to another;"

D) Neither counsel for appellants nor appellees expressed that they were precluded from other employment due to their acceptance of this case;

E) Appellants did not challenge whether the litigation fees aligned with the customary fee for similar services;

F) The fees in this case were not fixed nor contingent, but hourly;

G) Neither client imposed time limitations on their counsel. Appellees did, however, initially seek a Temporary Restraining order against appellants;

H) Appellees Springdale/Lovell's damages totaled $17,200 and sought $96,653.04 in litigation costs. Appellee Clinton's damages totaled $300 and she sought $40,292.70 in litigation costs. Appellants argue that since appellees Springdale/Lovell only succeeded on one out of five of their claims, they should only receive 20% of the amount requested. Appellants continue that since appellee Clinton only succeeded on one out of six of her claims, she should only receive 16.67% of the amount requested. This court declines the appellants' suggestion that the appellees only be awarded based on the proportion of claims they succeeded on. The common core of facts doctrine allows the court to grant a full award to the prevailing party, even when that party does not succeed on all claims. Appellants' request does not comport with this doctrine. Additionally, appellees made multiple attempts to settle with appellants before costs further increased, however, appellants were unresponsive;

I) Counsel for the parties have over 15 years of experience within the legal field. Their experience, reputation, and ability have not been questioned;

J) and K) Neither the undesirability of the case nor the nature and length of the professional relationship with the client, were relevant factors

L) The circuit court had no information regarding the award in similar cases and did not consider this issue. This court also did not consider this issue.

Finally, we consider the reasonableness of litigation awards standard, as set forth in *Osche*, 216 Md. App. At 458, 88 A.3d at 784. In *Osche*, this Court stated that it is the Court's duty to determine the reasonableness of a party's request when "fashioning an award pursuant to a contract." *Id*. "The party requesting fees has the burden of providing

the court with the necessary information to determine the reasonableness of the request. The trial court's determination of the reasonableness of attorney's fees is a factual determination within the sound discretion of the court, and will not be overturned unless clearly erroneous." *Myers v. Kayhoe*, 391 Md. 188, 207, 892 A.2d 520, 532 (2006). We find that the circuit court reasonably found that the appellees provided the court with the necessary financial information to determine their requests and that they were entitled to litigation costs and expenses pursuant to paragraph 15 of the Settlement Agreement.

Considering all factors, this Court finds that appellees are entitled to the requested amount of litigation fees and expenses.

JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.