Circuit Court for Howard County
Case No. 13-C-15-106114

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1222

September Term, 2020

H&H ROCK, LLC, t/a H&H ROCK COMPANIES, et al.

v.

MORRIS & RITCHIE ASSOCIATES, INC.

Leahy,
Zic,
Sharer, J. Frederick,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: March 1, 2022

This appeal arises out of a contract dispute between appellant, Morris & Ritchie Associates ("MRA"), and appellees, H&H Rock, LLC t/a H&H Rock Companies ("H&H Rock"), Rock Realty, Inc. ("Rock Realty") (collectively, the "Rock Companies"), and Mark K. Levy, principal of the Rock Companies. Following a remand from this Court and a bench trial, the circuit court entered judgment in favor of MRA. The Rock Companies appealed that judgment and MRA filed a cross-appeal.

On appeal, the parties present multiple questions for our review, which we have rephrased slightly:

1. Did the trial court err in finding that the Rock Companies were precluded, on remand, from challenging the propriety of the claims in the First and Second Amended Complaints?

2. Did the trial court err in finding the Rock Companies jointly and severally liable as to Counts I and II of the Second Amended Complaint?

3. Did the trial court err in finding that Rock Realty was not jointly and severally liable on Count III of the Second Amended Complaint?

4. Did the trial court err in awarding attorney's fees to MRA or in the calculation of that award?

For the reasons set forth below, we affirm, in part, and remand for modification of the order awarding attorney's fees.

BACKGROUND

The background facts of this case were set forth in detail in this Court's previous unreported opinion, *Morris & Ritchie Assocs., Inc. v. H&H Rock, LLC*, No. 1824, September Term 2016 (filed January 30, 2018) ("*MRA I*"):

> MRA performed engineering and other services for appellees pursuant to three proposals accepted by Mr. Levy, a principle of H&H Rock

and Rock Realty. The first contract, (Proposal One - # 15129.02), which Mr. Levy accepted on June 23, 2006, provided that MRA would be paid a lump sum of $127,000.00, exclusive of any out-of-pocket expenses and "[a]ny hourly work included in this proposal and extra work, which [MRA was] requested to perform," which would be billed at the hourly rates provided in the proposal.

The second contract, (Proposal Two - # 15129.03), provided for Surveying, Land Planning and Civil Engineering Services related to a relocation of model homes for a lump sum fee of $114,100.00. Out-of-pocket expenses and "[a]ny hourly work included in this proposal and extra work, which [MRA was] requested to perform" would be billed at the hourly rates set forth in the proposal.

The third contract, (Proposal Three - #15129.04), submitted on June 28, 2007, for Sketch Plan Services, provided for a lump sum fee of $68,500.00, exclusive of out-of-pocket expenses. "Any hourly extra work" that MRA was requested to perform would be billed at the hourly rates provided.

Each of the proposals provided that billing would occur on a monthly basis, with payment due 30 days after invoicing. The proposals also incorporated MRA's General Provisions, which stated, in pertinent part, as follows:

> **8. PAYMENTS**
>
> Invoices will be submitted by MRA on a monthly basis as work proceeds. … Payments will be due and payable in full within thirty (30) days of the date of invoice, without retainage, and will not be contingent upon receipt of funds from third parties. In the event that the Client objects to all or any portion of any invoice, the Client shall notify MRA of the objection within fifteen (15) days from date of the invoice, given reasons for the objection, and pay that portion of the invoice not in dispute. If at any time, an invoice remains unpaid for a period in excess of thirty (30) days, a service charge of one and one half percent (1 1/2%) per month from the date of the invoice, an effective maximum rate of eighteen percent (18%) per annum, will be charged on past due accounts. If fees are not paid in full within thirty (30) days of the due date, MRA reserves the right to pursue all appropriate remedies, including stopping work and retaining all documents without recourse. In the event a lien or suit is filed or arbitration is sought to collect overdue payments under the

> Agreement, Client agrees to indemnify and hold harmless MRA from and against any and all reasonable fees, expenses, and costs incurred by MRA including but not limited to court costs, arbitrators and attorney's fees, and other claim-related expenses. In the event the Client fails to pay any invoice in full, MRA shall have the right to institute collection procedures. The Client shall be responsible for all costs of collection including litigation costs, reasonable attorney's fees not to exceed 30% of the amount due, and court costs.
>
> MRA sent invoices to the attention of Mr. Levy at the address associated with H&H Rock. Each invoice identified the proposal number for which the invoice was associated.
>
> At the time the complaint was filed, MRA alleged that two invoices submitted in 2010 for work performed pursuant to Proposal One, in the amount of $705.68, remained unpaid. Twenty invoices for work performed pursuant to Proposal Two, billed between 2007 and 2009, in the amount of $129,058.48, remained unpaid. With respect to Proposal Three, 29 invoices, billed between 2009 and 2014, in the amount of $208,440.38, remained unpaid. MRA completed the services associated with the Proposals in 2014.

Id. at 2-4 (footnotes omitted).

Procedural History: MRA I

On December 18, 2015, MRA filed a complaint against the Rock Companies in the Circuit Court for Howard County, alleging, *inter alia*, breach of contract for failure to make payment on 51 invoices, issued between 2007 and 2014, for civil engineering services provided pursuant to Contract .02, Contract .03 and Contract .04 (the "Contracts"). MRA alleged that the Rock Companies had agreed to pay all outstanding charges by December 31, 2010, and that the Rock Companies had defaulted on this agreement. MRA further

alleged that Mr. Levy subsequently acknowledged the debt to be due and promised payment "to induce MRA into continuing to provide the [s]ervices[.]"[1]

The court granted partial summary judgment in favor of the Rock Companies, finding that 46 of the 51 invoices were barred by the statute of limitations. The Rock Companies then tendered payment for the amount owed on the remaining five invoices and moved for summary judgment on the ground that MRA's remaining claims were moot.

Before the circuit court ruled on the second summary judgment motion, MRA filed a First Amended Complaint, reasserting its breach of contract claims and adding two new claims of detrimental reliance/promissory estoppel and fraud, and adding Mr. Levy as a defendant.

That same day, MRA filed its opposition to the motion for summary judgment. MRA asserted that the Rock Companies "acknowledged and promised to pay all outstanding debts" and presented affidavits, documents, and deposition testimony in support.

The Rock Companies moved to strike the First Amended Complaint, arguing that MRA was precluded from amending its complaint to add new claims in circumvention of the circuit court's summary judgment order. The trial court denied the Rock Companies'

[1] In the instant case, Contract .02 was submitted by MRA to Rock Realty, Inc., attention Mark L. Levy, who executed the contract as "President" purportedly on behalf of Rock Realty, Inc. Contract 0.3 was also submitted by MRA to Rock Realty Inc., attention Mark L. Levy, who executed the contract as "President" purportedly on behalf of Rock Realty, Inc. Contract .04 was submitted by MRA to H&H Rock Companies, attention Mark Levy, who executed this contract as "President" purportedly on behalf of H&H Rock Companies.

Motion to Strike. Mr. Levy moved to dismiss the First Amended Complaint, or in the alternative, for summary judgment. After a hearing on the motions for summary judgment, the court granted summary judgment in favor of the Rock Companies and Mr. Levy on all counts in the First Amended Complaint. MRA appealed this judgment.

First Appeal

In *MRA I*, MRA argued that the trial court had erred in entering partial summary judgment on limitations grounds because its claims did not accrue until the completion of its services in 2014. *MRA I*, slip op. at 32. In an unreported opinion, this Court affirmed the circuit court's grant of partial summary judgment in the May 4, 2016 order, holding that the limitations period on MRA's claims for breach of contract began to run on the date each invoice was due, not when the services were completed. *Id.* at 33. We held that the trial court properly granted partial summary judgment on limitations grounds as to MRA's claims for 46 of the 51 invoices because MRA had failed to argue in the initial summary judgment proceedings that the limitations period was tolled by an acknowledgement of the debt. *Id.* at 34-42.

With respect to the circuit court's full grant of summary judgment on the First Amended Complaint, we affirmed the circuit court's ruling as to MRA's claims for detrimental reliance and fraud. *Id.* at 53-56. As to the breach of contract claim in the First Amended Complaint, we held that the circuit court had erred in granting summary judgment because "[w]hether there was an acknowledgment(s) that tolled the statute of limitations on the invoices that have not been paid is a question for the trier of fact." *Id.* at 50. In making this determination, we noted:

> The parties do not address on appeal the propriety of realleging, in an amended complaint, claims on which summary judgment has already been granted. In the circuit court, however, the [Rock Companies] did move to strike the amended complaint. They asserted, among other things, that the court had already ruled in their favor on the claims that accrued prior to December 18, 2012, and MRA was "not entitled to circumvent the Court's adjudication of its claims by filing the First Amended Complaint, in which it completely disregards the Court's prior rulings." The circuit court denied that motion, and [the Rock Companies] do not challenge that ruling in their brief. Accordingly, the propriety of the amended complaint realleging claims that already had been ruled upon is not before us. Rather, the issue presented is whether the circuit court properly granted summary judgment on the amended complaint. *See Gonzales v. Boas*, 162 Md. App. 344, 355 ("[A]mended complaint supercedes the initial complaint," rendering the amended complaint the operative pleading in this case), *cert. denied*, 388, Md. 405 (2005).

Id. at 48. We further noted that the "procedural posture" of the case when the circuit court granted summary judgment on the First Amended Complaint was "significantly different." *Id.* We referenced the additional allegations in the First Amended Complaint and, contrasting the "lack of evidence produced during the initial motion[,]" noted affidavits and documents regarding whether there was an "acknowledgment of the debt that tolled the statute of limitations." *Id.* at 48-49. Accordingly, we remanded the case "for further proceedings on Count I of the First Amended Complaint." *Id.* at 56.

Proceedings on Remand

After remand, the Rock Companies filed a motion for reconsideration of the motion to strike and for summary judgment. The circuit court denied both motions, respectively.

On October 26, 2018, MRA filed a Second Amended Complaint, which divided its breach of contract claim into three counts predicated on the three Contracts. On July 8, 2019, the Rock Companies filed a motion for reconsideration of the motion for summary

judgment. Following the trial, the court denied the Rock Companies' motion for reconsideration.

During the two-day bench trial, MRA presented evidence largely unrebutted by the Rock Companies concerning the outstanding invoices, whether Mr. Levy acted on behalf of Rock Realty and H&H Rock, and the relationship between the Rock Companies. MRA presented evidence demonstrating that Mr. Levy had multiple discussions and exchanged various correspondence with MRA relating to the debt under the three Contracts. Specifically, between 2010 and 2013, Mr. Levy made various promises to pay the outstanding invoices, including a February 24, 2010 letter agreement, directed to H&H Rock Companies, which identified the three Contracts. The letter agreement provided that Mr. Levy "acknowledge[d] and agree[d] that the outstanding invoices and charges included in the … statement of account are fair and reasonable charges for the services satisfactor[ily] performed by MRA and … that H&H Rock owes all amounts as shown therein." Likewise, on April 18, 2013 and in May 2013, Mr. Levy and Frank Hertsch, MRA's president, discussed the outstanding invoices, first at a scheduled meeting and then at a chance encounter at an industry meeting in Las Vegas. In both instances, according to the trial testimony of MRA's witnesses, Mr. Levy assured Mr. Hertsch that MRA would be paid.

At the conclusion of MRA's case-in-chief, the Rock Companies moved for judgment. Specific to this appeal, the Rock Companies contended that judgment was appropriate because MRA could not circumvent the May 4, 2016 partial summary

judgment order by filing an amended complaint, and that the complaint identified the wrong entities. In its ruling from the bench, the court determined, in pertinent part:

> The [c]ourt is persuaded that the balance tips in favor of the law of the case precluding the [Rock Companies] from relying on the earlier summary judgment ruling and I point specifically to that quote from the Court of Special Appeals with respect to the propriety of challenging the amended complaint. I think that is preclusive here. . . . I think what happened was the [Rock Companies] essentially waived that argument by failing to raise it on - - on the appeal . . . . And failure to do so under the law of the case doctrine, I believe, rules that argument out at this time.

After this ruling, Thomas Gessner, the chief financial officer for H&H Rock and the only witness for the Rock Companies, testified to the relationship between H&H Rock and Rock Realty. According to Mr. Gessner, H&H Rock and Rock Realty were separate companies, sharing a common owner, Mr. Levy. The Rock Companies then rested.

Following requested post-trial briefing, the court issued a memorandum decision and order. In "[a]ddressing the primary issue[] raised by remand," the court found "that MRA indeed proved that [the Rock Companies]' acknowledgment of their debts was unqualified, clear and distinct, satisfying the requisite legal standard." The court referenced the 2010 letter agreement, the April 2013 meeting, and May 2013 encounter in Las Vegas to find that "Mr. Levy fended off MRA collecting payment by repeatedly acknowledging the debts, promising to pay what was owed." Regarding the relationship between the Rock Companies, the court found:

> H&H Rock and Rock Realty were not materially different entities, at least as conveyed to MRA by H&H Rock and Mr. Levy. [MRA] operated under the reasonable assumption that the two were essentially interchangeable, as one executive, Mr. Levy, represented both, and a 2007 letter announced that the companies had merged. Each of the invoices admitted in evidence was directed to H&H Rock Companies. No evidence indicates that Mr. Levy or

> his companies ever suggested these bills were misdirected. To the contrary, H&H Rock Companies proclaimed that Rock Realty and H&H Rock had been folded into H&H Rock Companies. When Mr. Levy executed the 2010 letter agreement, he did so on behalf of Rock Realty and H&H Rock Companies. And Mr. Levy continued to act on behalf of each of these entities in his dealings with MRA. Certainly, [the Rock Companies] did nothing to disabuse MRA of the notion that Mr. Levy acted on their behalf.
>
> Mr. Levy acted as an agent on behalf of Rock Realty and H&H Rock. With respect to the first two contracts, he, along with the 2007 letter, conveyed apparent authority that H&H Rock assumed the obligations of Rock Realty. As to the third contract, however, evidence did not establish that Rock Realty assumed the obligations and duties of H&H Rock. Rock Realty therefore cannot be held jointly and severally liable on the third contract.

The court entered judgment in favor of MRA in the amount of $1,283.43 on Count I (Contract .02); $153,463.81 on Count II (Contract .03); and $243,757.37 on Count III (Contract .04), plus pre-judgment interest, post-judgment interest, costs, and reasonable attorney's fees. MRA sought an application for attorney's fees, and the court granted attorney's fees at 30% of the judgment as to each count, and additional fees at the per diem rate of $0.11 on each count from July 16, 2020 through December 4, 2020. After the Rock Companies noted an appeal, MRA noted a cross-appeal.

DISCUSSION

I.

The Rock Companies' Challenge to the First and Second Amended Complaints

A. Parties' Contentions

The Rock Companies contend that the "trial court erred in failing to hold that [MRA] was precluded from circumventing the May 4, 2016 Order by filing the First and Second Amended Complaints" in two respects. First, the Rock Companies contend that the "trial

court erred in holding that the law of the case doctrine precluded [the Rock Companies] from challenging the propriety of [MRA]'s attempt[] to circumvent the May 4, 2016 Order by filing the First and Second Amended Complaints." According to the Rock Companies, "Maryland appellate courts have not expressly addressed the application of the Waiver Rule when an appellee declines to raise an issue on appeal." Relying on federal case law, the Rock Companies assert:

> Imposing an obligation to raise every conceivable alternative ground for affirmance places an appellee at a procedural disadvantage since the appellee will not have an opportunity to reply to any response set forth by the appellant. Moreover, requiring an appellee to raise every basis for affirmance defeats the purpose of the law of the case doctrine. Rather than facilitate judicial efficiency, addressing every possible contingency would overburden appellate courts with numerous tangential issues. As the Court held in *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735 (D.C. Cir. 1995), a degree of leniency should be used in applying the Waiver Rule to appellees.

Further, the Rock Companies assert that the law of the case doctrine is "inapplicable to issues that arise after a case is remanded by the appellate court." After the filing of the Second Amended Complaint, "the law of the case doctrine no longer precluded [the Rock Companies] from challenging the propriety of [MRA]'s attempt to circumvent this Court's prior Order."

Second, the Rock Companies contend that MRA was "not entitled to ignore a court's ruling and force another party to re-litigate claims by filing an amended complaint." According to the Rock Companies, the "trial court erred in permitting the trial to proceed and failing to grant [the Rock Companies]'s Motion for Judgment since [MRA]'s claims were moot as a result of the May 4, 2016 Order."

In opposition, MRA asserts that the "circuit court acted within its discretion in denying [the Rock Companies] many requests for reconsideration of its ruling on the motion to strike." According to MRA, the Rock Companies must not only establish that the court erred in applying the law of the case doctrine but also "show that it was not harmless[.]"

To MRA, the "circuit court acted well within its discretion in denying all of the [Rock Companies]' post-remand motions because, *inter alia*, the law of the case doctrine prevented it from reconsidering its ruling on the original Motion to Strike." Relying on *Fidelity-Baltimore Nat.'l Bank & Tr. Co. v. John Hancock Mut. Life Ins. Co.*, 217 Md. 367, 372 (1958), MRA asserts that "questions that were decided, as well as those that '***could*** have been raised and decided,' are 'not available to be raised in a subsequent appeal.'" Because the Rock Companies could have raised this issue without filing a cross-appeal and could have moved for a motion to reconsider or petitioned for further review before the Court of Appeals, "the law of the case . . . foreclosed [the Rock Companies]' right to further challenge the circuit court's denial of their Motion to Strike." MRA argues that a straight-forward application of Maryland law "requires" affirmance of the judgment and asserts that there is a "noticeable difference" in Maryland's law of the case doctrine and its federal counterpart.

Alternatively, MRA avers that the Rock Companies "cannot prevail in this appeal because they cannot demonstrate that the circuit court abused its discretion in denying the Motion to Strike or any of the various motions for reconsideration of the same." To MRA, reconsideration of the court's summary judgment order was "well within the circuit court's

discretion, but it was also consistent with Maryland law, which favors allowing amendments that result in resolution of claims on their merits, rather than on procedural technicalities."

Finally, in response to the Rock Companies' argument that the Second Amended Complaint revived their objection, MRA argues that the law of the case doctrine bars consideration of issues, not simply pleadings or motions.

B. Law of the Case

"Whether the law of the case doctrine should be applied in particular circumstances is a legal question; accordingly, we review a lower court's invocation of that doctrine without any special deference." *Baltimore Cnty. v. Fraternal Ord. of Police, Baltimore Cnty. Lodge No. 4*, 449 Md. 713, 731 (2016).

The Court of Appeals has explained that the law of the case doctrine is one of appellate procedure, and that, "[u]nder the doctrine, once an appellate court rules upon a question presented on appeal, litigants and lower courts become bound by the ruling, which is considered to be the law of the case." *Scott v. State*, 379 Md. 170, 183 (2004). "Not only are lower courts bound by the law of the case, but '[d]ecisions rendered by a prior appellate panel will generally govern the second appeal' at the same appellate level as well, unless the previous decision is incorrect because it is out of keeping with controlling principles announced by a higher court and following the decision would result in manifest injustice." *Id.* at 184 (quoting *Hawes v. Liberty Homes*, 100 Md. App. 222, 231 (1994)).

In Maryland, the law of the case doctrine "applies to both questions that were decided and questions that could have been raised and decided." *Holloway v. State*, 232

Md. App. 272, 282 (2017). In the leading case of *Fidelity-Baltimore National Bank & Trust Co. v. John Hancock Mutual Life Insurance Co.*, the Court instructed:

> It is the well-established law of this state that litigants cannot try their cases piecemeal. They cannot prosecute successive appeals in a case that raises the same questions that have been previously decided by this Court in a former appeal of that same case; and, furthermore, they cannot, on the subsequent appeal of the same case raise any question that could have been presented in the previous appeal on the then state of the record, as it existed in the court of original jurisdiction. If this were not so, any party to a suit could institute as many successive appeals as the fiction of his imagination could produce new reasons to assign as to why his side of the case should prevail, and the litigation would never terminate. Once this Court has ruled upon a question properly presented on an appeal, or, if the ruling be contrary to a question that could have been raised and argued in that appeal on the then state of the record, as aforesaid, such a ruling becomes the 'law of the case' and is binding on the litigants and courts alike, unless changed or modified after reargument, and neither the questions decided nor the ones that could have been raised and decided are available to be raised in a subsequent appeal.

Fidelity-Baltimore Nat. Bank & Tr. Co., 217 Md. at 371-72.

The Rock Companies' assertion that "Maryland courts have not expressly addressed the application of the Waiver Rule when an appellee declines to raise an issue on appeal[,]" lacks merit, as *John Hancock* is directly on point on this issue. There, an employee of John Hancock presented false insurance claims to the company on behalf of fictitious payees. *Id.* at 370. John Hancock issued checks for these claims, which were forwarded to the employee, who then forged the endorsements of the fictitious claimants on the back of each check, deposited the checks in several banks, and thereafter withdrew the money. *Id.* John Hancock learned of the fraud and eventually brought suit against the collecting banks for honoring the forged checks. *Id.* The trial court dismissed the complaint on the pleadings. On appeal, the Court of Appeals reversed, and held that the stipulation of facts by the

parties entitled John Hancock to summary judgment. *Id.* at 371. On remand, the trial court entered summary judgment in favor of John Hancock Mutual. *Id.*

On a second appeal, the collecting banks raised two questions: first, whether a collecting bank is liable to the drawer of a check issued to a fictitious payee if the drawer is unaware of the fictitious payee and the check bears a fraudulent endorsement; and second, whether the "imposter rule" barred John Hancock Mutual from recovery. *Id.* As to the first question, the Court of Appeals explained this question was raised in the first appeal and was specifically answered. As to the "imposter rule" defense, the court explained that although this issue was not raised in the previous appeal, there was "no doubt that it was available in that proceeding as a ground to sustain the demurrers, if it be available here to defeat the judgments obtained by the appellee." *Id.* As a result, the Court held that both issues had already been settled in *John Hancock*, the first appeal, under the law of the case doctrine. *Id.* at 372.

We have further clarified that "under the law of the case doctrine, litigants cannot raise new defenses once an appellate court has finally decided a case if these new defenses could have been raised based on the facts as they existed prior to the first appeal." *Schisler v. State*, 177 Md. App. 731, 745 (2007); *see also Davis Sand & Gravel Corp. v. Buckler*, 231 Md. 370, 373-74 (1963) (holding defendant that won at trial on issue of whether it had right to use easement, but then lost on appeal, could not on remand raise the issue of whether damages were proved at trial when this question could have been raised on a motion for reargument).

While the Rock Companies purport to rely on federal cases interpreting the law of the case doctrine, we have recently recognized the "noticeable difference" between our doctrine and the federal counterpart. *Holloway*, 232 Md. App. at 282. "In Maryland, the law of the case doctrine applies to both questions that were decided and questions that could have been raised and decided[,]" while "[u]nder federal law, the law-of-the-case doctrine only applies to issues the court actually decided." *Id.* (citation and internal quotation marks omitted).

Further, there was nothing precluding the Rock Companies from presenting the denial of their motion to strike as an alternative basis to affirm the court's judgment. We also recognize that "[w]here a party has an issue resolved adversely in the trial court, but … receives a wholly favorable judgment on another ground, that party may, as an appellee and without taking a cross-appeal, argue as a ground for affirmance the matter that was resolved against it at trial. This is merely an aspect of the principle that an appellate court may affirm a trial court's decision on any ground adequately shown by the record." *Offutt v. Montgomery Cnty. Bd. of Educ.*, 285 Md. 557, 564 n.4 (1979) (citations omitted).

We perceive no error in the circuit court's determination that the law of the case doctrine precluded the Rock Companies from relying on the May 4, 2016 order to challenge the propriety of the First and Second Amended Complaints. Contrary to the Rock Companies' suggestion, the May 4, 2016 partial summary judgment order was not the controlling or dispositive order in the case, as that order and the full summary judgment order, were reviewed in *MRA I*. This Court's decision that the Rock Companies had waived their challenge to the propriety of the First Amended Complaint by failing to raise that

issue on appeal constituted the law of the case. "Once an appellate court has answered a question of law in a given case, the issue is settled for all future proceedings." *Stokes v. Am. Airlines, Inc.*, 142 Md. App. 440, 446 (2002). The law of the case doctrine "prevents trial courts from dismissing appellate judgment and re-litigating matters already resolved by the appellate court" in a case involving the same parties and the same claims. *Id.* The law of the case doctrine precludes us from considering in this appeal the propriety of MRA's amendment of claims following entry of the May 4, 2016 order, as the Rock Companies could have, and should have, raised that issue in *MRA I*.

C. Mootness

The Rock Companies further assert that MRA's claims were moot because "[t]he May 4, 2016 Order remained the controlling dispositive ruling on [MRA]'s claims" and neither this Court nor the trial court were bound by this Court's opinion "without considering the propriety of the attempt[] to circumvent an order by filing an amended complaint."

A case is considered moot when "'past facts and occurrences have produced a situation in which, without any future action, any judgment or decree the court might enter would be without effect.'" *La Valle v. La Valle*, 432 Md. 343, 351 (2013) (quoting *Hayman v. St. Martin's Evangelical Lutheran Church*, 227 Md. 338, 343 (1962)). "The test for mootness is 'whether, when it is before the court, a case presents a controversy between the parties for which, by way of resolution, the court can fashion an effective remedy[.]'" *Hamot v. Telos Corp.*, 185 Md. App. 352, 360 (2009) (quoting *Adkins v. State*, 324 Md. 641, 646 (1991)).

While the Rock Companies argue that MRA's claims were moot due to the May 4, 2016 Order, the evidence submitted in opposition to summary judgment and at trial supports that the limitations period was tolled and would restart anew with each acknowledgment of the debt. The Court of Appeals has explained this principal on multiple occasions:

> The statute of limitations does not extinguish the debt; it bars the remedy only. Thus, Maryland law has long recognized that acknowledgement of a debt barred by limitations removes the bar to pursuing the remedy. An acknowledgement, sufficient to remove the bar of limitations, need not expressly admit the debt, it need only be consistent with the existence of the debt. Nor must it be an express promise to pay a debt; just as an express promise to pay a debt barred by limitations revives the remedy, "a mere acknowledgement of such a debt will remove the bar of the statute, because if the debtor acknowledges the debt it is implied that he promises to pay." An acknowledgement of a debt can occur prior to the running of limitations, in which event, rather than removing the bar of limitations, it both tolls the running of limitations and establishes the date of the acknowledgment as the date from which the statute will now run.

Jenkins v. Karlton, 329 Md. 510, 531 (1993) (citations omitted). Thus, the May 4, 2016 Order did not extinguish MRA's claims for the first 46 invoices; it simply operated to bar MRA's remedy for those claims. Once MRA established Mr. Levy's acknowledgement of the debt, the bar to MRA's remedy for its claims was removed. Accordingly, MRA's claims were not mooted by the May 4, 2016 Order.

II.

Joint and Several Liability

The Rock Companies challenge that they were joint and severally liable for Counts I and II, and MRA challenges the court's finding that Rock Realty was not liable on Count III.

The circuit court concluded that the 2010 Agreement constituted a modification of the interest rate as to Contracts .02 and .03 in exchange for assurances of payment. The court determined that the Rock Companies had failed to provide evidence showing that the parties had agreed to form a new contract with the intent to replace the existing one, sufficient to establish a novation.

With respect to Contracts .02 and .03, the court found that Mr. Levy had conveyed apparent authority that H&H Rock had assumed the obligations of Rock Realty. As to Contract .04, however, the court found that the evidence did not establish that Rock Realty had assumed the obligations and duties of H&H Rock, and therefore, Rock Realty was not jointly and severally liable on the third contract.

A. Parties' Contentions

The Rock Companies aver that the circuit court erred in holding that the Rock Companies were jointly and severally liable for Contracts .02 and .03. According to the Rock Companies, the "most reasonable interpretation of [the] 2010 Agreement that would allow the court to find a clear and unequivocal acknowledgment of the debt is that such Agreement constituted a novation." However, the Rock Companies argue that the 2010 Agreement did not meet the requirements for a novation. Further, the Rock Companies assert that the 2010 Agreement could not constitute an amendment because "Rock Realty did not execute the 2010 Agreement."

In response, MRA asserts that the Rock Companies are "jointly and severally liable under all three contracts." According to MRA, "due to Levy's own promises and actions, MRA reasonably believed that Levy was authorized to act and was acting on behalf of

Rock Realty when conducting business under the H&H Rock Companies trade name registered to H&H." In light of this conclusion, MRA argues that the court erred in "concluding Rock Realty was not liable on Count III." Finally, MRA surmises that the Rock Companies "have not demonstrated how the circuit court committed *reversible error* in deeming the 2010 Agreement an amendment" and, in any event, there is "ample evidence supporting the circuit court's conclusion — not challenged on appeal — that Mr. Levy acted on behalf of both H&H and Rock Realty in executing the 2010 Agreement and acknowledging [the Rock Companies]' liability for the Outstanding Invoices in 2013."

B. Analysis

The Court of Appeals summarized the characteristics of a novation in *I. W. Berman Properties v. Porter Brothers*:

> A 'novation' is a new contractual relation made with intent to extinguish a contract already in existence. It contains four essential requisites: (1) A previous valid obligation; (2) the agreement of all the parties to the new contract; (3) the validity of such new contract, and (4) the extinguishment of the old contract, by the substitution of the new one.
>
> For a novation to exist there must be (evidence of) an agreement among the parties to extinguish the old obligation(s) and substitute a new one for it.
>
> A novation is never presumed; the party asserting it must establish clearly and satisfactorily that there was an intention, concurred in by all the parties, that the existing obligation be discharged by the new obligation. . . .
>
> The intention to substitute a new agreement for a previous contract need not be expressed however, since facts and circumstances surrounding the transaction, as well as the subsequent conduct by the parties, may show such an acceptance as clearly as an express agreement; but such facts and circumstances, when shown, must be such to establish that the intention to work a novation is clearly implied.

276 Md. 1, 7-8 (1975) (cleaned up).

Unlike a novation, a contract modification occurs when the parties mutually consent to modifying certain terms of a contract. *See L & L Corp. v. Ammendale Normal Inst*., 248 Md. 380, 384 (1968). For example, parties may agree to change the terms of a contract "as a compromise of their differences." *Freeman v. Stanbern Const. Co*., 205 Md. 71, 78 (1954). In a case where "such differences arise out of a contract, a compromise of their differences and the mutual agreement of the parties to vary the terms of the contract and to enter into a new agreement embodying the compromise constitute sufficient consideration to support the new agreement." *Id*. (citing *Hercules Powder Co. v. Harry T. Campbell Sons Co*., 156 Md. 346, 362 (1929)).

The extent to which an entity may be jointly or severally liable to a third party often depends upon the actions of the entity's agent. Agency principles have been summarized on many occasions by our appellate Courts:

> In an agency relationship, one person, the principal, can be legally bound by actions taken by another person, the agent. An agency relationship is created when the principal confers actual authority on the agent. Actual authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account. Actual authority may be inferred from conduct, including acquiescence. In the absence of actual authority, a principal can be bound by the acts of a purported agent when that person has apparent authority to act on behalf of the principal. Apparent authority results from certain acts or manifestations by the alleged principal to a third party leading the third party to believe that an agent had authority to act. We have explained, however, that it is nearly axiomatic that one dealing with an agent must use reasonable diligence and prudence to ascertain whether the agent acts within the scope of his powers.

Dickerson v. Longoria, 414 Md. 419, 441-42 (2010) (cleaned up). In addition, an agency by estoppel may arise "where the principal, through words or conduct, represents that the

agent has authority to act and the third party *reasonably* relies on those representations." *Johns Hopkins Univ. v. Ritter*, 114 Md. App. 77, 96 (1996).

Here, the evidence supported the circuit court's findings regarding joint and several liability. First, there was ample support in the record for the circuit court's conclusion that Mr. Levy was conducting business with MRA on H&H's behalf. This evidence included the 2007 letter announcing the purported merger, the invoices directed to H&H Rock Companies, and Mr. Levy's execution of the 2010 letter agreement on behalf of H&H Rock.

Second, Mr. Levy acted as an agent on behalf of Rock Realty and H&H. As the court correctly concluded, the 2007 letter conveyed that H&H had assumed the obligations of Rock Realty. Whether, in fact, this statement was accurate was not dispositive for establishing H&H's liability. An agent need not have actual authority to bind an entity if the evidence shows that the agent had apparent authority and the third party had a basis for reasonably relying on the actions of the agent. *See Atl. Richfield Co. v. Sybert*, 51 Md. App. 74, 84 (1982) (explaining that apparent authority arises where a third party can prove that the agent's actions in entering an agreement gave rise to apparent authority to act on behalf of the principal and the third party's reliance on such actions was reasonable).

It also appears that Mr. Levy's actions, summarized above, evidenced an intent to affirm the Contracts and the obligations on behalf of H&H Rock. *See Smith v. Merritt Savings and Loan, Inc.*, 266 Md. 526, 536-40 (1972) (summarizing requirements for ratification of a contract). Although H&H Rock was not an original signatory to Contract .04, the evidence supported the circuit court's conclusion that the 2010 Letter Agreement

constituted a modification of the existing Contracts rather than a novation. As the circuit court noted, the 2010 Letter Agreement modified the terms of the Contracts because it "acknowledged the debt and gave H&H Rock Companies additional time to pay the outstanding invoices. It also reduced the interest rate charged under the invoices to eight percent on outstanding amounts due from the date of the letter."

Based upon our review of the record, we agree with the circuit court's determination that there was no "credible evidence" to support the Rock Companies' contention "that the 2010 letter agreement extinguished the prior existing agreements for all three contracts in their entirety and created a completely new and distinct obligation." The evidence supported the circuit court's conclusion that Mr. Levy, acting as an agent on behalf of H&H Rock, conveyed that H&H Rock had assumed the obligations of Rock Realty, including liability for Contracts .02 and .03. While Rock Realty remained liable as a signatory under Contracts .02 and .03, MRA presented no evidence demonstrating that Rock Realty had assumed the obligations of H&H Rock. Accordingly, we perceive no error in the circuit court's determination that Rock Realty remained liable as to Contracts .02 and .03, but that Rock Realty had not assumed joint and several liability for H&H Rock's obligations on Contract .04.

III.

Attorney's Fees

A. Parties' Contentions

The Rock Companies contend that "[t]he trial court also erred by awarding total attorney's fees in the amount of $127,690.17" for two primary reasons. "First, neither the

subject Contracts nor the General Provisions attached thereto provide that the 'amount due' included interest." According to the Rock Companies, "[l]ogic dictates the 'amount due' denotes the principal amount due." Otherwise, if daily interest were included, "such position would permit a greater award of attorney's fees predicated upon the mere passage of time, as opposed to the value of goods or service in dispute in the litigation or the work reasonably required by an attorney." Second, the Rock Parties contend that MRA's calculation is flawed because the parties' "course of performance establishes that [MRA] did not conceive of the 'amount due' as the aggregate of the principal amount due and accrued interest." According to the Rock Companies, with the exception of a statement prepared by MRA's counsel for trial, "the record is devoid of any evidence indicating that [the] parties conceived of 'amount due' as the aggregate of the principal amount due and accrued interest."

In opposition, MRA asserts that "[i]nterest was part of the amount due under the Contracts." According to MRA, the "circuit court confronted two, completely distinct questions: (a) determining the 'amount due' under the Contracts, and (b) determining whether MRA incurred reasonable fees in excess of that amount." MRA asserts that the language of the Contracts is unambiguous and that "[p]ayment of an invoice 'in full' requires payment of both the outstanding principal and interest." Turning to parol evidence, MRA contends that this Court is unable to consider parol evidence to "vary, alter, or contradict a contract that is complete and unambiguous," *Maslow v. Vanguri*, 168 Md. App. 298, 319 (2006) (citation and quotation marks omitted), and "even if this Court were to consider the parties' course of performance, it is of no help to [the Rock Companies]."

Finally, MRA asserts that "[t]here is nothing unjust about the fact that, as [the Rock Companies] failed to pay MRA, the contractual cap on reasonable attorneys' fees increased in proportion with the total amount due."

In reply, the Rock Companies contend that the General Provisions of the Contracts distinguish between "invoices" and "past due accounts."

B. Analysis

This Court reviews "a court's establishment of a 'reasonable' fee under an abuse of discretion standard." *Garcia v. Foulger Pratt Dev., Inc.*, 155 Md. App. 634, 671 (2003). It is clear that "[c]ontract clauses that provide for the award of attorney's fees generally are valid and enforceable in Maryland, subject to a trial court's examination of the prevailing party's fee request for reasonableness." *Nova Rsch., Inc. v. Penske Truck Leasing Co.*, 405 Md. 435, 447-48 (2008) (citation omitted). The interpretation of a written contract is reviewed *de novo*. *Id.* at 448.

In resolving the fee provisions in the Contracts, we recognize the oft-stated principal that "Maryland applies an objective interpretation of contracts":

> If a contract is unambiguous, the court must give effect to its plain meaning and not contemplate what the parties may have subjectively intended by certain terms at the time of formation. A contract is ambiguous if, when read by a reasonably prudent person, it is susceptible of more than one meaning. In interpreting a contract provision, we look to the entire language of the agreement, not merely a portion thereof. When interpreting a contract's terms, we consider the customary, ordinary and accepted meaning of the language used.

Id. (internal citations and quotation marks omitted).

Here, Section 8 of the General Provisions of the Contracts provides, in relevant part:

> If at any time, an invoice remains unpaid for a period in excess of thirty (30) days, a service charge of one and one half percent (1 1/2%) per month from the date of the invoice, an effective maximum rate of eighteen percent (18%) per annum, will be charged on past due accounts. If fees are not paid in full within thirty (30) days of the due date, MRA reserves the right to pursue all appropriate remedies, including stopping work and retaining all documents without recourse. In the event a lien or suit is filed or arbitration is sought to collect overdue payments under the Agreement, Client agrees to indemnify and hold harmless MRA from and against any and all reasonable fees, expenses, and costs incurred by MRA including but not limited to court costs, arbitrators and attorney's fees, and other claim-related expenses. In the event the Client fails to pay any invoice in full, MRA shall have the right to institute collection procedures. The Client shall be responsible for *all costs of collection including litigation costs, reasonable attorney's fees not to exceed 30% of the amount due, and court costs.*

(Emphasis added.)

In this case, the contract was not ambiguous. First, the phrase "amount due" is unqualified. Customary meaning of the term "amount due" includes applicable interest as well as the principal. *See Eidelman v. Walker & Dunlop, Inc*., 265 Md. 538, 545 (1972) ("Interest is recoverable as of right upon a contract to pay money upon a day certain."); *I.W. Berman Props.*, 276 Md. at 16 (same). Second, in the context of the language of Section 8 of the General Provisions of the Contracts, "amount due" appears after language regarding overdue invoices and the calculation of interest, suggesting that the amount due applied to all costs, including interest, incurred as a result MRA's efforts to collect unpaid invoices. *See, e.g., Weichert Co. of Maryland v. Faust*, 191 Md. App. 1, 7 (2010) ("When we interpret a contract, we must examine the contract as a whole, in order to determine the intention of the parties."). The clear language of the Contracts provided that interest accrued on past due invoices after a period of thirty days. The circuit court's determination,

therefore, that the "total amount due" for purposes of calculating reasonable attorney's fees included both the principal and interest, was not error.

C. Per Diem Interest

In its cross-appeal, MRA contends that the "circuit court mistakenly calculated the fee award for Counts II and III based on the lower per diem interest attributable to Count I." We agree that the court appears to have made a clerical error in its calculations.

On December 4, 2020, the circuit court granted MRA's application for an award of reasonable attorney's fees. In its order, the court calculated attorney's fees at a rate of 30 percent of the judgment amount plus pre- and post-judgment interest. The court then calculated the per diem interest rates applicable to each of the three counts of the Second Amended Complaint. Because it appears that court erroneously applied the per diem interest rate for Count I (Contract .02) to its calculation of per diem interest on the judgments for Count II (Contract .03) and Count III (Contract .04), we will remand the case to the circuit court to enter a revised order correcting the calculation of the per diem interest to be entered as to Counts II and III.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLANTS.