UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0376

September Term, 2014

BAINBRIDGE ST. ELMO BETHESDA APARTMENTS, LLC.

v.

WHITE FLINT EXPRESS REALTY GROUP LIMITED PARTNERSHIP, LLLP.

Eyler, Deborah S.,
Reed,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: April 5, 2016

*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.

The present appeal is a pitched dispute over attorneys' fees arising out of a complex commercial matter in the Circuit Court for Montgomery County. Appellant, Bainbridge St. Elmo Bethesda Apartments, LLC, and appellee, White Flint Express Realty Group Limited Partnership, LLLP, have employed nearly every weapon in their litigative arsenal to this point. Though the parties have reached a settlement on appellee's claims, the matter remains anything but settled.

We are asked to review the trial court's grant of appellee's petition for attorneys' fees. Appellant poses two questions for our consideration, which we have rephrased slightly for clarity:[1]

> I. Whether the circuit court erred where it held that the indemnity clause in the parties' easement agreement entitled appellee to recover attorneys' fees;
>
> II. Whether the circuit court abused its discretion where it awarded appellee $3,520,256.59 in attorneys' fees.

We answer these questions in the negative. Accordingly, we affirm the judgment of the circuit court and shall explain.

FACTUAL AND PROCEDURAL BACKGROUND

The present dispute is a by-product of the rapid growth the Washington, D.C. metropolitan area has experienced during the better part of the last ten years. Bethesda, just

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[1] Appellant originally presented the following two questions in its brief:

> I. Did the Circuit Court err in holding that the indemnity clause in the Easement Agreement entitled WF to recover attorneys' fees in this first-party case?
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> II. Did the Circuit Court err in finding that attorneys' fees in the amount of $3,520,256.59 were reasonable and necessary in this case?

over the Maryland-District of Columbia border in Montgomery County, is no stranger to this development. Appellant, Bainbridge St. Elmo Bethesda Apartments, LLC ("Bainbridge"), sought to take advantage of the area's new economic opportunities, namely in the area of luxury housing.

Bainbridge is an entity formed by the Bainbridge Companies, and owns the property immediately adjacent to 4904 and 4909 Fairmont Avenue (the "Fairmont Properties"). The Fairmont Properties are two one-story concrete buildings owned by appellee, White Flint Express Realty Group Limited Partnership, LLLP ("White Flint"). At the time the instant litigation commenced, the properties were leased to a restaurant and a children's dance studio.

Bainbridge was formed to manage the construction and operation of a new 17-floor luxury high-rise apartment building, originally named "The Monty" and now known as the "Bainbridge Bethesda" (the "Project"), on the lot next to the Fairmont Properties.

Bainbridge's proposed construction plan for the Project required the excavation of a 50-foot-deep hole on its property. To secure the excavation, Bainbridge proposed the use of a "sheeting and shoring system" to prevent soils and sub-surface structures from moving toward or into the excavation area. This plan required that Bainbridge install a system of steel cables and beams, including under the Fairmont Properties, to secure the foundation excavation. In addition to the sheeting and shoring system, Bainbridge sought to extend scaffolding and swing a crane over the Fairmont Properties. Accordingly, in order to proceed with the project, Bainbridge sought White Flint's grant of several easements for access to the space "under, over, across and on" the Fairmont Properties.

After several months of negotiation, the parties reached an agreement as to the easements. The parties entered into a Crane Swing, Tie-Back and Swing Scaffold Easement Agreement (the "Agreement") on September 7, 2011. Bainbridge agreed to pay White Flint a sum of $425,000.00 as consideration for White Flint entering into the Agreement and granting Bainbridge the requested easements.

In exchange, Bainbridge made several assurances to White Flint. Section 3 of the Agreement provided that White Flint would grant an easement to Bainbridge to install the steel beams and cables.[2] The grant of that easement, however, was subject to the agreed-

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[2] Section 3 of the Agreement provides:

> 3. Tie-Backs and Bracket Piles. White Flint hereby grants to Bainbridge a non-exclusive easement under, over, across and on the White Flint Property, for the purpose of installing and maintaining tie-backs and bracket piles that will be utilized to temporarily support the excavation for the Project and to physically support the improvements on the White Flint Property; **provided, that,** such tie-backs and bracket piles shall be of such nature, installed at such locations an in all other respects shall be in accordance with those certain plans and specifications listed in **Exhibit "D"** attached hereto (the "**Plans**"). The tiebacks and bracket piles can be removed at any time during a future excavation of the White Flint Property, but Bainbridge shall at no time have any obligation to remove the tie-backs and bracket piles from within the White Flint Property. White Flint shall incur no cost or liability in connection with the installation of the tiebacks and bracket piles. The foregoing tieback and bracket pile rights and easements shall survive any termination of this Agreement and thereafter continue uninterrupted for such purposes for so long as said tiebacks and/or bracket piles remain within the White Flint Property.

(Emphasis in original).

upon installation methods in the exhibits to the contract, *i.e.*, that the vertical steel beams would be placed into pre-drilled holes and not pile-driven. Section 7 of the Agreement provided that Bainbridge would ensure that all excavation and foundation work conformed to applicable professional standards of care while minimizing the inconvenience to White Flint; would protect all individuals in and around the Properties; and would not undermine the improvements on the Fairmont Properties.[3] In Section 9 of the Agreement, Bainbridge agreed to permit White Flint to engage consultants and inspectors to monitor the progress

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[3] Section 7 of the Agreement provides:

> 7. Standard of Care. Bainbridge shall cause its employees, agents and contractors to (i) protect, support, and maintain, without interruption, all utilities which are now provided to the White Flint Property, (ii) perform all tie-back and bracket pile work and exercise the crane swing and swing scaffold easement rights and perform all other work relating to the Project (collectively, the "**Work**") in a good, safe, and workmanlike manner, in accordance with the standards of the trade and in such a manner as to minimize interruption of activities conducted on the White Flint Property; (iii) undertake no activity that could undermine the structural integrity of the improvements located on the White Flint Property; (iv) use commercially reasonable efforts to minimize any inconvenience to White Flint during performance of the Work, and to protect all people (including, without limitation, tenants, invitees, guests, employees, agents, contractors and any other person who is in or around the White Flint Property) and all improvements within the White Flint Property from injury or damage in connection with Bainbridge's performance of the Work and Bainbridge's overall construction of the Project; and (v) proceed with reasonable diligence to complete the Work.

(Emphasis in original).

of the Project, and further agreed it would reimburse White Flint for any such consulting fees incurred.[4] Similarly, Sections 17(a) and (b) of the Agreement required Bainbridge to

[4] Section 9 of the Agreement provides in relevant part:

> (a) Bainbridge acknowledges and agrees that White Flint shall be entitled to engage consultants (including, without limitation an architect, structural engineer, and safety engineer) to monitor performance of the Work by Bainbridge, and identify any perceived deficiencies that could result either in injury to people occupying or visiting any part of the White Flint Property, or in damage to the White Flint Property. With respect to any deficiency identified by a White Flint consultant that Bainbridge determines will cost $25,000 or less to cure, Bainbridge agrees to promptly address such condition and to take appropriate precautionary or remedial action. With respect to any deficiency identified by a White Flint consultant that Bainbridge determines will cost more than $25,000 to cure (a "**Major Deficiency**"), Bainbridge shall have the right to have its own consultant review and assess the perceived Major Deficiency and advise Bainbridge as to whether it agrees or disagrees with White Flint's consultant; provided, however, that until such time that the perceived Major Deficiency then identified by White Flint's consultant is cured or otherwise addressed in accordance with the terms of this Agreement, Bainbridge shall suspend construction of that portion of the Project to which the perceived Major Deficiency pertains. If Bainbridge's consultant does not agree with White Flint's consultant as to a perceived Major Deficiency, then Bainbridge and White Flint shall work together in good faith to find a mutually acceptable resolution, however if such a resolution is not agreed upon within sixty (60) days following Bainbridge's delivery of notice to White Flint of its disagreement with White Flint's consultant, then the parties shall subject their dispute to Arbitration conducted in accordance with the construction industry rules of the American Arbitration Association, as then in effect. . . .

(continued…)

reimburse White Flint for costs related to the negotiating and monitoring compliance of the Agreement.[5] Section 16 of the Agreement required Bainbridge to repair any damage it

> (b) Bainbridge agrees to reimburse White Flint for all of its consultant's costs incurred in connection with the Work, in accordance with the terms of Paragraph 17 hereof. To facilitate such reimbursement, Bainbridge agrees that such costs may be paid from the Escrow (defined in Paragraph 17).

(Emphasis in original).

[5] Sub-paragraphs (a) & (b) of section 17 of the Agreement provide:

> 17. Reimbursement by Bainbridge[].
>
> (a) Bainbridge shall reimburse White Flint for (i) its reasonable attorney's fees incurred in connection with the review, negotiation and monitoring of this Agreement, and (ii) reasonable and customary fees incurred from third party consultants and inspectors retained by White Flint in connection with its review of the Plans and inspection of the Work and Bainbridge's construction of the Project (including, without limitation, consultation on Project construction safety issues) (the reimbursable costs and expenses described in (i) and (ii) above being referred to collectively herein as the "**Reimbursement Costs**"). The foregoing reimbursement obligation shall survive the termination of this Agreement.

(continued…)

caused to the Fairmont Properties, and if it failed to repair the damage, White Flint had the right to make its own repairs and seek reimbursement from Bainbridge.[6]

> (b) In order to secure the foregoing reimbursement obligation, upon the full execution of this Agreement, Bainbridge shall deposit $50,000 into an IOLTA non-interest-bearing escrow account (the "**Escrow**") with . . . White Flint's counsel (the "**Escrow Agent**"); provided, however, that the actual amount to be deposited by Bainbridge into escrow shall be the difference between the amount currently held by Escrow Agent on behalf of Bainbridge and the required initial aggregate escrow amount hereunder (for example, if Escrow Agent is holding $20,000 in escrow on the date this Agreement is fully executed, then Bainbridge shall be required to deposit an additional $30,000 with Escrow Agent). Bainbridge agrees to restore the balance of the Escrow to $30,000 within five (5) business days after receipt from Escrow Agent of written notice that the Escrow has a balance of $10,000 or less; provided, that, thirty (30) days after receiving a copy of a final certificate of occupancy for the Project, the Escrow Agent shall disburse to Bainbridge the undisbursed balance of the Escrow and the Escrow shall terminate.

(Emphasis in original).

[6] Section 16 of the Agreement provides:

> 16. Construction Requirements.
>
> (a) Bainbridge agrees to construct the Project in accordance with the Staging Plans and the terms and conditions set forth on [the Project Construction Terms and Conditions Exhibit] attached hereto and made a part hereof.
>
> (b) Upon completion of the Work, Bainbridge shall restore, as nearly as reasonably possible, to the physical condition thereof that existed immediately prior to the commencement of the Work, any portions of the White Flint Property affected by the Work.

(continued…)

Most relevant to the present appeal is section 19 of the Agreement, the indemnification clause of the contract. That section provided:

> Indemnity. Bainbridge hereby indemnifies and agrees to defend and hold harmless White Flint and its officers, directors, shareholders, members, managers, employees, invitees, and guests, and White Flint's consulting architect . . . and its officers, directors[,] employees, and sub-consultants from any and all claims, demands, debts, actions, causes of action, suits, obligations, losses, costs, expenses, fees, and liabilities (*including reasonable attorney's fees*, disbursements, and litigation costs) arising from or in connection with Bainbridge's breach of any terms of this agreement or injuries to persons or property resulting from the Work, or the activities of Bainbridge or its employees, agents, contractors, or affiliates conducted on or about the White Flint

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> (c) Bainbridge agrees to repair and restore, at its own expense and as promptly as reasonably possible, any damage to the White Flint Property and any improvements thereon caused by and resulting from the performance of the Work or from any actions of Bainbridge, its agents, employees and contractors, so as to return the physical condition thereof to at least that which existed immediately prior to the occurrence of such damage.
>
> (d) Bainbridge shall have five (5) days following written notice thereof from White Flint to cure any failure to adhere to or perform in accordance with the terms and conditions set forth in this Paragraph 16. If Bainbridge fails to cure any such breach within said 5-day period, then White Flint shall have the right (but not the obligation) to rectify such failure or perform or cause to be performed such repair or replacement work, as the case may be, on behalf of Bainbridge and Bainbridge shall reimburse White Flint for all actual costs incurred to do so within ten (10) days following written demand from White Flint.
>
> (e) The obligations of Bainbridge described in sub-Paragraphs (b) through (d) above shall survive the termination of this Agreement.

> Property, including without limitation, for any rent loss directly attributable to any damage to the White Flint Property caused by the construction of the Project, however Bainbridge shall not be liable for matters resulting from the negligence or intentional misconduct of White Flint, its agents, employees, or contractors. The indemnification obligations set forth herein shall survive the termination of this Agreement indefinitely.

(Emphasis added).

Construction on the project did not go as planned. According to White Flint, Bainbridge and its contractors did not properly drill the holes for the steel beams, resulting in soil loss beneath the Fairmont Properties. In addition, pile-drivers were used instead of drills to install the steel beams, in contravention of the express language of the Agreement. The use of the pile-driver caused the buildings to shake with such force that additional damage and soil movement was detected underneath the buildings. The end result of Bainbridge's construction activity was that the Fairmont Properties sank downward and moved laterally, causing damage to the buildings. One of the tenants, the owner of the children's dance studio, reported that she had noticed numerous cracks in her studio and that she feared a roof collapse on her students. She further reported that numerous parents stated they would cease bringing their children to classes until she received assurances from Montgomery County of the building's safety.

As the situation only grew dire, Bainbridge hired a well-regarded structural engineer, Allyn Kilsheimer, to assess the situation. On February 27, 2012, Mr. Kilsheimer recommended to Bainbridge that, out of a "philosophy of abundant caution," the Fairmont Properties should be evacuated. On March 7, 2012, Montgomery County's Department of Permitting Services issued a stop-work order and required that Bainbridge cease all

excavation and construction work on the Project, except for any necessary work to reinforce the excavation. White Flint, however, had determined on February 27, 2012, that Bainbridge was in breach of section 7 of the Agreement—a breach White Flint considered to be a material breach—and notified Bainbridge that it was terminating the Agreement.

Bainbridge regarded White Flint's termination of the Agreement as "entirely inappropriate." In a March 14, 2012, letter, Bainbridge contended it had "observed and honored each of its obligations" and, as a result, White Flint's termination of the contract was in and of itself a material breach.

On April 24, 2012, White Flint filed a complaint for declaratory relief. In that complaint, White Flint sought a declaration that Bainbridge's obligations under sections 16, 17, and 19 of the Agreement survived termination and that Bainbridge was bound to comply with those obligations. Fierce litigation ensued and, after several amendments to the complaint to add claims and extensive motions practice, the circuit court entered a declaratory judgment finding that Bainbridge's obligations did in fact survive termination; that Bainbridge was in material breach of the Agreement; that White Flint was justified in terminating the Agreement; and that Bainbridge had ongoing duties to White Flint that it continued to deny improperly. The circuit court also determined that White Flint was entitled to attorneys' fees under section 19 of the Agreement.

Bainbridge and White Flint came to a settlement agreement on the eve of trial that resolved all outstanding issues of liability and damages, save for the award of attorneys' fees and litigation costs. The settlement was announced at a December 5, 2013, hearing

and the circuit court scheduled a further hearing on White Flint's fee petition. White Flint submitted its petition on January 17, 2014.

Already accustomed to fierce litigation, the parties continued their battle, this time fighting over White Flint's fee petition. On March 26, 2014, the circuit court held a hearing on the fee petition and less than two weeks later, on April 7, 2014, issued an opinion granting White Flint its fees and costs. The opinion awarded White Flint $3,520,256.59 in attorneys' fees, and $411,391.88 in litigation costs and expenses, for a total of $3,931,648.47. In granting the award to White Flint, the court made a number of findings contrary to what Bainbridge asserted in its arguments to reduce the fee award. First, the court found that counsel for White Flint did not "block bill," which otherwise would have been grounds for a substantial award reduction. Additionally, the court determined that Maryland case law does not place great emphasis on the degree of a party's success when determining a fee award. Moreover, the court found that White Flint was forced to engage in "extensive, hard fought litigation," which Bainbridge argued was a product of White Flint's litigation tactics.

On May 6, 2014, Bainbridge timely noted its appeal of circuit court's award of attorneys' fees. It did not appeal the other rulings in White Flint's favor or the award of litigation costs.

DISCUSSION

(i) Permissibility of Attorneys' Fees under Section 19 of the Agreement

A. Parties' Contentions

Bainbridge argues that Section 19 of the Agreement does not support an award of attorneys' fees. It explains that, per Maryland law and the majority of U.S. jurisdictions, an indemnification clause such as the one in the Agreement must explicitly state that indemnification for attorneys' fees will extend to first-party claims. In support of this proposition, Bainbridge cites to the Court of Appeals' decision in *Nova Research, Inc. v. Penske Truck Leasing Co.*, 405 Md. 435 (2008). Bainbridge argues that Section 19 contains no such express indemnification for attorney's fees arising from a first-party enforcement action. Accordingly, White Flint should not have recovered attorneys' fees based on Section 19.

White Flint vehemently disagrees with Bainbridge's interpretation of the Agreement and applicable law. White Flint explains that the underlying purpose of the Agreement was so that it would not suffer losses or injuries if Bainbridge failed to meet its obligations under the contract. To that end, the purpose of Section 19 was to indemnify White Flint completely from Bainbridge's potential breach of its representations, warranties, or obligations. White Flint further contends that, consistent with this purpose, Section 19 contained express language permitting attorneys' fees incurred due to Bainbridge's breach of its obligations. It additionally argues that Section 19 satisfies the requirement under Maryland law that the parties to a contract expressly state their fee-shifting intent. White Flint points to other provisions of the Agreement that allow for fees arising from third-party claims in order to underscore that Section 19 is intended for first-party claims; to interpret it otherwise would render Section 19 surplusage in contravention of principles of contract interpretation.

B. Standard of Review

The ultimate dispute between the parties is whether the Agreement's indemnity provision allows White Flint to recover attorneys' fees for first-party claims in addition to third-party claims. This requires us to review the circuit court's application of Maryland case law in its determination that a fee award under Section 19 was permissible. Unlike the factual determinations of a circuit court, we do not defer to its legal determinations. *Thomas v. Capital Med. Mgmt. Assocs., LLC*, 189 Md. App. 439, 453 (2009). Those legal determinations of the circuit court based on Maryland statutory and case law are reviewed *de novo* for legal correctness. *See id.* at 454. The interpretation of written contractual terms is one such question of law we review *de novo*. *Nova Research*, 405 Md. at 448.

C. Analysis

Maryland courts apply an objective interpretation of contracts. *Id.* If the terms of a contract are unambiguous, the plain meaning of the agreement will prevail and the court will not consider the parties' subjective intent at the time of formation. *Id.* If a reasonably prudent person finds that the contract is susceptible of more than one meaning, the court will determine the contract is ambiguous. *Id.* The terms of the contract are interpreted in context, each of them interpreted together with the contract's other provisions. *Atlantic Contracting & Material Co., Inc. v. Ulico Cas. Co.*, 380 Md. 285, 301 (2004); *Jones v. Hubbard*, 356 Md. 513, 534–35 (1999). We give the terms of the contract their customary, ordinary, and accepted meaning. *See Atlantic*, 380 Md. at 301.

The parties are primarily concerned with the applicability of the *Nova Research* decision. In that case, the Court of Appeals was asked whether the indemnification

provision of a commercial vehicle lease contract allowed for the recovery of attorneys' fees in a first-party action. *Nova Research*, 405 Md. at 439. The indemnification provisions of the contract in question required the vehicle's lessee to indemnify the lessor for any losses in excess of the lessor-provided insurance limits,[7] and also for any losses arising from the lessee's failure to comply with the contract's terms.[8] *Id.* at 440–41. The Court held that the indemnification provisions in that contract did not support the recovery of attorneys' fees in a first-party action to enforce the indemnification provisions absent express language providing for such recovery. *Id.* at 458.

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[7] The indemnification provision for liability insurance stated:

> "Customer[, Nova Research,] shall indemnify, and hold harmless, Penske, its partners, and their respective agents, servants and employees, from and against all loss, liability and expense as a result of bodily injury, death or property damage caused by or arising out of the ownership, maintenance, use or operation of Vehicle, but, if 'Penske Provides L[iability] P[rotection]' is initialed or is otherwise applicable, and Customer is in compliance with its obligations to Penske under this Agreement, Customer's indemnification and hold harmless obligation here under shall be in excess of the liability protection expressly required to be provided by Penske under this Agreement."

Nova Research, 405 Md. at 440–41.

[8] The indemnification provision for failure of compliance stated:

> "Customer shall: (A) indemnify, and hold harmless Penske, its partners, and their respective agents, servants and employees, from and against all loss, liability and expense caused or arising out of Customer's failure to comply with the terms of this Agreement."

Id. at 441.

The Court reasoned that to imply a fee-shifting provision for first-party actions where the contract did not expressly provide one would "swallow" the American Rule that parties are to bear their own costs. *Id.* at 451–52. Typically, attorneys' fees are recoverable in *third-party* indemnification claims because an indemnitor has agreed to reimburse an indemnitee for all costs incurred defending an agreed-upon class of claims. *Id.* at 453–54 (citing *Peter Fabrics, Inc. v. S.S. Hermes*, 75 F.2d 306 (2d Cir. 1985)). The determination of an obligation to indemnify, which is often a first-party claim, is, however, in the nature of contract litigation—an action outside the realm of third-party claims. *See id.* at 454. This distinction was the driving force behind the Court's holding. The Court could not reconcile an implied fee-shifting provision with the American Rule and several of its prior holdings on indemnification actions. *Id.* at 458. Accordingly, the Court held that attorney's fees in a first-party action establishing the right to indemnity would be available *only* where the contract expressly provided for such fees. *Id.*

The Court was able to reach this conclusion without undermining its prior decisions in *Jones v. Calvin B. Taylor Banking Co.*, 253 Md. 430, 441 (1969) and *Atlantic*, *supra*, 380 Md. at 316–17. In *Jones*, the Court, citing with approval *Chesapeake & Ohio Canal Co. v. County Commissioners of Allegany County*, 57 Md. 201 (1881), affirmed the principle that attorneys' fees are available to an indemnitee forced to defend against a third-party claim. *Atlantic*, however, allowed for the recovery of attorneys' fees in a first-party action to *enforce* an indemnity agreement. *Atlantic*, 380 Md. at 317. Atlantic Contracting and Material Company was a subcontractor for an infrastructure project in North Carolina. *Id.* at 293. Ulico Casualty Company had secured Atlantic's performance by bond issue and

Atlantic had agreed to indemnify Ulico in exchange for the bond obligation. *Id.* at 293–94. Atlantic defaulted on obligations it incurred during the course of the project, and a claim was made on the performance bond issued by Ulico. *Id.* at 294–95. Ulico was forced to pay on the bond, and filed a complaint against Atlantic to recover the amount it paid to Atlantic's creditor and, among other costs, the attorneys' fees it had incurred to recover under the indemnification agreement. *Id.* at 296, 298. The Court affirmed the grant of attorneys' fees because indemnification agreements in surety arrangements are interpreted to allow for fees incurred in enforcing the agreement. *See id.* at 316–17.

There are two primary grounds on which the present case is distinguishable from *Nova Research*. These grounds shall serve as the basis for our holding that the circuit court properly determined that White Flint was entitled to attorneys' fees under Section 19 of the Agreement. First, unlike *Nova Research*, the contract litigation in the present case was for enforcement of the Agreement, not the determination of a right to indemnity. The complaint for declaratory relief prayed that the circuit court declare that certain provisions survived termination of the Agreement, and also that the court declare what those surviving responsibilities were. White Flint did *not* ask that the court determine and declare that it was owed first-party indemnification. It asked that the court declare Bainbridge was obligated to abide by certain surviving terms of the Agreement, which is far more in the nature of an enforcement action like the one in *Atlantic* than an "action establishing the right to indemnify." *Nova Research*, 405 Md. at 458. *See* BLACK'S LAW DICTIONARY — (9th ed. 2009) (defining "enforce" as a verb meaning "to compel obedience to.").

Second, and more importantly, Section 19 of the Agreement contains the type of express first party attorneys' fees language that the commercial vehicle lease contract in *Nova Research* lacked. Specifically, Section 19 provides that

> Bainbridge hereby indemnifies and agrees to defend and hold harmless White Flint . . . from any and all claims, demands, debts, actions, causes of action, suits, obligations, losses, costs, expenses, fees, and liabilities (*including reasonable attorney's fees*, disbursements, and litigation costs) arising from or in connection with Bainbridge's breach of any terms of this agreement[.]

(emphasis added). The Court of Appeals explained in *Nova Research* that "[a]lthough some courts have interpreted a contract provision to include first party attorney's fees incurred in enforcement actions, the vast majority of the contracts involved in those cases explicitly allowed for the recovery of attorney's fees by express inclusion of the phrase 'attorney's fees' in the respective indemnity provisions." 405 Md. at 457 (footnote omitted). In *Nova Research*, it was because the indemnity agreement neither contained the express phrase "attorneys' fees" nor indemnified against losses incurred "in the enforcement of the agreement" that the Court of Appeals refused to "imply the recovery of attorney's fees accrued in a first party action establishing the right to indemnify." *Id.* at 458. In the present case, although Section 19 does not, as in *Atlantic*, indemnify against losses incurred "in the enforcement of the agreement," which would have been independently sufficient to entitle White Flint to first party attorneys' fees, *see Nova Research*, 405 Md. at 458, it does expressly provide for indemnification from "reasonable attorney's fees . . . arising from or in connection with Bainbridge's breach of any terms of this agreement." We hold that this language is sufficient to entitle White Flint to first party attorneys' fees.

This position finds support in a decision by one of our sister state appellate courts in Illinois, on facts virtually identical to the present case. In *Water Tower Realty Co. v. Fordham 25 E. Superior, L.L.C.*, 936 N.E.2d 1127 (Ill. App. Ct. 2010) ("*Water Tower Realty*"), Fordham 25 E. Superior ("Fordham") sought to construct a building on property it owned. *Id.* at 1128. In order to proceed with the project, Fordham had to obtain the consent of its neighbor, Water Tower Realty Co. ("Water Tower"). *Id.* Fordham sent a letter to Water Tower and stated it would indemnify the latter for any losses it may suffer as a result of the construction. *Id.* The indemnification provision in the letter provided as follows:

> To the fullest extent permitted by law, we agree to indemnify, defend and hold you [. . .] harmless from and against any and all loss, liability, claims, injury damage and expense arising out of the Work and shall defend any suit or action brought against you or any of the indemnified part[ie]s, based on any such alleged injury or damage, and shall pay all damages, costs and expenses, including reasonable attorneys' fees, connected therewith or resulting therefrom or incurred by you in enforcing the terms hereof.

Id. at 1129 (omissions and alterations in original). Five years after construction on the Fordham building ended, Water Tower filed a complaint for breach of the indemnity agreement. *Id.* Fordham sought to dismiss the complaint, contending that the indemnification provision covered only third-party claims. *Id.* The trial court granted the motion, and after Fordham sought to amend its complaint, that court dismissed the amended complaint as time-barred. *Id.* at 1130. The appellate court found the complaint was not time-barred and also considered the scope of the indemnification provision. *Id.* at 1133. That court determined the provision was broad enough to entail first-party and third-

party claims. *Id.* at 1133–34. In particular, the court explained that the language "we agree to indemnify . . . you from and against any and all loss . . . arising out of the Work" encompassed first-party claims, and that the second clause "and [Fordham] shall defend any suit or action brought against you" included a conjunctive "and" that added third party claims to the scope of the indemnification provision. *Id.*

Much like the provision in *Water Tower Realty*, Section 19 of the Agreement possesses similarly broad language—"Bainbridge hereby indemnifies . . . White Flint . . . from *any and all* claims . . . *arising from or in connection* with Bainbridge's breach of any terms of this Agreement or injuries to persons or property *resulting from the Work* . . . ." (emphasis added). Given the analogous factual nature of the present case to *Water Tower Realty* and the exceedingly similar language of the two indemnification provisions, we think that attorneys' fees should be made available in first party actions involving a construction consent agreement, *i.e.*, where a passive property owner consents to construction on a lot adjacent to or neighboring the lot he owns. The risk exposure of the passive owner can be as great as or greater than that of third parties.

We think the parties did expressly provide for attorneys' fees to be recovered in a first party indemnification action. Attorneys' fees are discussed as recoverable in Section 19, and the ability for White Flint to recover its fees fits the purpose of the contract, which is to protect it from harm caused to its property by Bainbridge. We hold that the grant of fees was proper, and that our holding today does not offend *Nova Research* and other Court of Appeals decisions.

(ii) Reasonableness and Necessity of Attorneys' Fees Award

A. Parties' Contentions

Bainbridge argues that the fee award granted to White Flint is neither reasonable nor necessary. It contends that the trial court failed to adhere to applicable legal standards for the determination of fee awards. Bainbridge further argues that the award was unjustifiably large in light of the record, particularly where, as Bainbridge argues, White Flint unnecessarily prolonged and escalated the litigation in this case.

As in all other aspects of this case, White Flint vigorously challenges Bainbridge's assertions regarding the reasonableness and necessity of the fee award, suggesting that Bainbridge has "rewrit[ten] history." White Flint argues that the wide scope of litigation in this case was due to Bainbridge's refusal to admit liability, the fierce litigation of all issues in the case, and accusations of bad faith conduct with regard to the termination of the Agreement. Furthermore, White Flint explains that the evidence it provided of its fees was detailed and thoroughly reviewed by its officers and expert witness, and the trial court properly granted the award based on applicable standards.

B. Standard of Review

The trial court's grant of an award of attorneys' fees is reviewed for an abuse of discretion. *Monmouth Meadows Homeowners Ass'n, Inc. v. Hamilton*, 416 Md. 325, 332–33 (2010) (citation omitted). We will find an abuse of discretion where the decision under review is one "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *North v. North*, 102 Md. App. 1, 14 (1992).

C. Analysis

An award of attorneys' fees in a contractual fee-shifting case is subject to a two-step analysis. An award-seeker must first prove its entitlement to a fee award by a preponderance of the evidence. *See Diamond Point Plaza Ltd. P'ship v. Wells Fargo Bank, N.A.*, 400 Md. 718, 761 (2007); *see also Maxima Corp. v. 6933 Arlington Development Ltd. P'ship*, 100 Md. App. 441, 453 (1994). Then, the trial court must assess the reasonableness of the fee award according to the standards of Rule 1.5(a) of the Maryland Lawyers' Rules of Professional Conduct. *Maxima Corp.*, 100 Md. App. at 454–55.

In *Monmouth Meadows*, the Court of Appeals rejected the "lodestar" approach[9] to calculating attorneys' fees in cases that did not involve a fee-shifting statute. *Monmouth*

[9] The lodestar approach to calculating attorneys' fees is typically employed in the context of fee-shifting statutes. The U.S. Supreme Court has enumerated twelve factors that may be used in lodestar analyses in federal court cases, and the Court of Appeals has employed those factors in previous cases. *See Monmouth Meadows*, 416 Md. at 333–34 (citing *Manor Country Cluv v. Flaa*, 387 Md. 297, 313 (2005)). The Supreme Court-approved factors are:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Monmouth Meadows, 416 Md. at 334 (citing *Blanchard v. Bergeron*, 489 U.S. 87, 91 n.5 (1989)).

Meadows, 416 Md. at 334–35. In rejecting the lodestar approach for assessing contract-based fee awards, such as in the present case, the Court suggested that the factors in Rule 1.5(a) of the Maryland Lawyers' Rules of Professional Conduct offered a preferable approach for assessing the reasonableness of a fee award. *See id.* at 336–37. Those eight Rule 1.5(a) factors are:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment of the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.

Bainbridge contends that the trial court failed to assess carefully three of the eight factors: the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly (first factor); the amount involved and the results obtained, *i.e.*, the petitioning party's relative degree of success (fourth factor); and whether the fee is fixed or contingent (eighth factor).

We detect no error in the trial court's assessment of the time and labor spent by White Flint to litigate this matter. As White Flint aptly states, Bainbridge "litigat[ed] the case to the hilt." The circuit court proceedings and, indeed, this appeal have been

characterized by ferocious advocacy and multitudinous documents. Moreover, this was not a relatively straight-forward case of contract interpretation. To prove adequately the damage Bainbridge caused to White Flint's properties, it was necessary that White Flint mount a "complex, expert-heavy engineering defense." Bainbridge, as a sophisticated business party, attacked this defense from all angles, thereby necessitating the amount of hours White Flint spent in this matter. And Bainbridge never sought to admit liability in this case, choosing instead to "t[ake] responsibility."

Given this background, we think that the trial court recognized that the number of hours White Flint has expended in this matter was eminently reasonable, and that the corresponding award reflected that analysis. We have affirmed awards of attorneys' fees where the amount of the award was greater than the damages award. *See, e.g.*, *Royal Inv. Grp. LLC v. Wang*, 183 Md. App. 406, 456–59 (2008) (affirming fee award of $179,907.60 where damages award was for $45,600 in heated real property dispute that had been litigated for two years and had begun two years before the commencement of litigation); *Weichert Co. of Md., Inc. v. Faust*, 191 Md. App. 1, 4, 20–21 (2010) (affirming fee award of $946,014.50 where damages award was for $116,000 in a breach of fiduciary duties matter that lasted three years). Furthermore, in a recent declaratory judgment case where our sister appellate court in Connecticut determined the indemnification provision of the parties' contract allowed for first-party claims arising from a breach of a restrictive covenant, that court affirmed a comparably large fee award. *See Heyman Assocs. No. 5, L.P. v. FelCor TRS Guarantor, L.P.*, 102 A.3d 387, 395–96, 410, 417 (Conn. App. Ct. 2014) (affirming award of $1.5 million in a case where the appellees claimed more than

4,000 hours were expended on the declaratory judgment action). Moreover, as in the *Wang* and *Weichert* cases, the trial court here issued a thorough, twenty-page opinion detailing its review of the substantial evidence submitted. *See, e.g.*, *Wang*, 183 Md. App. at 459 ("The trial court, *in a lengthy, detailed, written opinion*, discussed the hours reasonably expended by Mr. Wang's counsel." (emphasis added)); *Weichert*, 191 Md. App. at 20 ("[T]he trial court dedicated *nearly thirty pages of its 'Memorandum Attorneys' Fees Opinion'* to analyzing the evidence in painstaking detail. The trial court's review here was equal to that upheld in *Wang*[.]"); *but see Maxima Corp*. 100 Md. App. at 455, 458 (remanding case for further proceedings on appellant's attorneys' fees petition and for the trial court to make factual findings after those proceedings). As we have said, the parties here have been engaged in full-tilt litigation for more than two years, and the trial court discussed that in detail in its comprehensive opinion. We think the trial court properly assessed the evidence of the time and labor White Flint's counsel expended on this case.

We discern no additional error relative to the trial court's assessment of the fourth factor, the amount in controversy and the results obtained. Viewed objectively, White Flint's settlement recovery of 96% of the compensatory damages a jury could have awarded is a smashing success. A recovery of 60–70% of White Flint's estimated compensatory damages would have been considered a success, making the result actually achieved that much more impressive. Indeed, we recently recognized that, where multiple claims are involved, such a result is "what matters." *See Ochse v. Henry*, 216 Md. App. 439, 462 (2014), *cert. denied*, 439 Md. 331 (2014). Furthermore, where all the claims in a lawsuit are derived from the same "common core of facts" and a plaintiff has obtained

"excellent results," that plaintiff's attorney is entitled to a fully compensatory fee. *See id.* at 459.

The principle underlying the common core of facts doctrine was explained by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The Supreme Court explained that multiple claims arising from the same set of facts will necessarily require the litigating attorney to spend time on the litigation as a whole, making difficult the precise allocation of time expended on a claim-by-claim basis. *See Ochse*, 216 Md. App. at 461–62 (citing *Hensley*, 461 U.S. at 434–35). Accordingly, because a trial court is to view the litigation *in toto*, the court should evaluate the relief obtained in comparison to the hours "reasonably expended on the litigation." *Ochse*, 216 Md. App. at 462 (citing *Hensley*, 461 U.S. at 435).

By all accounts, White Flint's result in this litigation was an excellent result and its attorneys should be entitled to a fully compensatory fee. We also do not credit Bainbridge's argument that White Flint's claims of fraud, misrepresentation, trespass, and nuisance were "abandoned," and, therefore, should not be part of the award granted. White Flint did not move for summary judgment on its fraud and misrepresentation claims, and the trial court, in fact, *entered* partial summary judgment on White Flint's claims of trespass and nuisance against Bainbridge "to the extent that the construction of the sheeting and shoring system caused some damage" to the Properties. These claims survived summary judgment nearly in full. Moreover, reviewing the allegations in the Sixth Amended Complaint, these "abandoned" claims are factually related to the remainder of the claims, as they arise from Bainbridge's breach of the Agreement. Bainbridge cannot convincingly assert that those

claims must be considered separately as there are no facts distinct from those facts underlying the declaratory relief.

Moreover, White Flint's success is not limited to just its monetary recovery. It also received declaratory relief that will protect it from third-party claims arising out of Bainbridge's activities, as well as reciprocal easements and nuisance protection covenants under the Agreement. When the declaratory relief is considered along with the monetary recovery, White Flint is the clear victor in this litigation and the fee award must be proportional to that degree of victory.

Finally, we detect no error in the trial court's consideration of the nature of the fee arrangement. Although this factor asks the court to consider whether the fee was fixed or contingent, ultimately, the factor examines whether the agreed-upon fee is reasonable. *See Friolo v. Frankel*, 373 Md. 501, 522 n.2 (2003) (citing *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974) and summarizing the factor: "fee agreed to by client is helpful in demonstrating attorney's fees expectations, litigant should not be awarded fee greater than that he is contractually bound to pay."). The trial court considered several aspects of the fees charged by White Flint's counsel—the hourly rates, the assignment of work, and the applicable client discount—to determine the award's reasonableness. The trial court carefully reviewed the parties' opposing affidavits from their fee experts and considered both the qualifications of the experts and the substance of the affidavits. The trial court also appropriately evaluated the hourly fee arrangement in light of its own experience in handling complex commercial litigation such as the present case. In addition, the court properly considered the discount that White Flint received from

its counsel. The trial court's consideration of the fee arrangement was considered and thoughtful. It was not slapdash as Bainbridge would have this Court believe.

Bainbridge also attacks the trial court's analysis of the evidence White Flint submitted, claiming that the court failed to use proper legal standards to evaluate the evidence. In particular, Bainbridge argues that the trial court did not consider the applicable standards regarding block-billed time entries on legal services invoices. We do not think the trial court failed to apply the proper standard, however, especially considering that we have previously explained that Maryland courts have not outright denied a fee award simply because block billing existed. *See Weichert*, 191 Md. App. at 19 & n.14 (explaining that block billing arises because "it is not always efficient or reasonable to label each iota of time with the particular claim and fact it addresses" and that the forces of "the attorney's own client, the discovery process, the court's discretion to discount fee awards, and—in some cases—the prospect of recovering fees" would prevent unscrupulous billing practices). Indeed, the bills presented to this Court by White Flint's counsel are thorough. Though there are instances of multiple entries within single line items in the invoices, the entries are frequently related to the same task. In light of the volume of litigation in this case, we think that the invoices submitted by White Flint's counsel provided a more than reasonable amount of detail regarding counsel's work. We agree with the trial court's assessment of the invoices, and given our deferential posture of the trial court, we accept that court's findings based on its careful review of the many invoices submitted in evidence. Neither we nor the Court of Appeals have ever regarded block billing for

complex litigation as a cardinal sin, and we are not inclined to start now.[10] *See Diamond Point*, 400 Md. at 761 ("[W]here the fee request is based primarily on time spent . . . the best evidence ordinarily would be a clear delineation in the attorneys' billings of the time spent and expenses incurred with respect to the particular claims upon which the fee request is based. Because such a precise delineation may not always be practicable, however, we do not regard it as a *sine qua non* of the right to recover, for to conclude otherwise would, in many cases, deny *all* recovery where *some* recovery is clearly warranted." (emphasis in original)); *see also Weichert*, 191 Md. App. at 19; *Long v. Burson*, 182 Md. App. 1, 26 (2008) ("The sufficiency of the evidence presented as to attorneys' fees must be more than simply the number of hours worked, but less than a line by line analysis of services rendered.").

We hold that the trial court followed all applicable standards and exercised its discretion to grant an attorneys' fees award commensurate with the effort expended by White Flint in this heated litigation.

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

[10] Bainbridge also points to the new Md. Rule 2-704(e) as support for its position against block billing. Rule 2-704(e)(4) is inapplicable here, however, for a number of reasons. First, the present case was initiated more than a year-and-a-half before this rule came into effect, and nothing in the rule indicates it has retrospective effect. Second, as explained in the committee note under subsection (e), the rule is primarily intended for cases involving smaller consumer transaction involving a fees claim of the lesser of 15% of the amount due or $4,500. The amounts in this case are several orders of magnitude larger than that considered by the rule.