Circuit Court for Baltimore County
Case No. 03-C-18-001054

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1312

September Term, 2021

DANIEL MACDONALD

v.

AUTOFLEX INC., ET AL.

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

JJ.

Opinion by Arthur, J.

Filed: June 12, 2023

*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.

** At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

This appeal arises from an action by a sales representative against the company for which he worked and against the company's owner. The sales representative alleged that the defendants had failed to pay the commissions owed to him. Finding that the company and its owner repeatedly obstructed discovery requests, the Circuit Court for Baltimore County issued an order deeming the defendants in default on the issue of liability. The court conducted a bench trial on the issue of damages, i.e., to determine the amount of commissions owed.

After the trial and a series of post-trial motions, the court ordered the defendants to pay some but not all of the damages sought. The court awarded $6,623.00 for compensation earned before the sale representative stopped working for the company, plus enhanced damages of $13,246.00 under the Maryland Wage Payment and Collection Law. The court awarded $33,714.00 for commissions from some transactions, but declined to award enhanced damages for those commissions. The court declined to award damages for commissions from other transactions, finding that the sales representative presented inadequate proof of the amount of commissions owed. Finally, the court awarded $33,985.32 under a contractual provision requiring the reimbursement of attorneys' fees to the prevailing party in litigation arising out of the contract.

The sales representative appealed, arguing that the court should have ordered the defendants to pay additional damages. The company and its owner also appealed, asking this Court to set aside the damage awards and the award of attorneys' fees.

For the reasons set forth in this opinion, the judgment will be affirmed in part and vacated in part. We will remand this case to the circuit court for the purpose of

reevaluating the issue of enhanced damages (plus attorneys' fees) under the Maryland Wage Payment and Collection Law. Otherwise, the judgment will be affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

A. Daniel MacDonald's Work for AutoFlex, Inc.

Luis MacDonald is the owner of AutoFlex, Inc. AutoFlex is in the business of arranging the leasing of fleets of automobiles to agencies of the federal government. AutoFlex specializes in providing alternative-fuel vehicles, including electric vehicles, to its customers.

In a typical transaction of this type, a government agency will request proposals from businesses, specifying the number and type of vehicles needed. AutoFlex and other businesses will submit proposals stating, among other things, the price at which the business can provide the vehicles to the agency. If the agency accepts the proposal, the business becomes obligated to provide the vehicles for a particular contract period, often along with maintenance and repair services. Typically, these contracts last for one "base year," after which the agency can extend the contract for one or more "option years." At the end of the contract period, AutoFlex has an opportunity to make additional profits by paying off the remaining balance on the vehicle leases and selling the used vehicles.

Daniel MacDonald, the son of Luis MacDonald, began working for AutoFlex in 2005. His work responsibilities increased over time, as he gained knowledge of the federal government procurement process. Among other things, he worked on drafting and submitting proposals for contracts between AutoFlex and government agencies. He

also served as the primary point of contact for administering certain contracts.[1]

B. Sales Agent Agreement

On July 31, 2015, Daniel and AutoFlex executed a contract titled "Sales Agent Agreement." Luis signed the agreement in his capacity as president of AutoFlex.

In the agreement, AutoFlex appointed Daniel as its "sales representative," with the authority to solicit orders on behalf of AutoFlex. His primary duties were to "promote" and to "maximize the sales" of AutoFlex's products and services, and to "provide reasonable 'after sale' support" to customers. The agreement described Daniel as an "independent contractor" for AutoFlex.

Under the agreement, Daniel was entitled to commissions on "all orders, modifications[,] and renewals" solicited by him from within the continental United States and accepted by AutoFlex. The agreement set forth a "draw against commission structure" for the payment of compensation. Under this structure, Daniel would earn a monthly "draw" of $3,000.00, "supplemented by" certain commission payments. Whenever he earned commissions greater than $3,000.00 for a "monthly sales cycle[,]" he would receive "additional commission payments" exceeding the monthly draw.

The agreement set forth two rates of commissions: a 38 percent commission on "net sales from 'in house deals'" and a 45 percent commission on "net sales from [r]epresentative sourced opportunities." The agreement described "'[s]ourced' opportunities" as "those opportunities first identified in writing" by the representative.

[1] Because Daniel and Luis MacDonald have the same last name, we shall, for ease of reference, use only their first names in this opinion. We intend no disrespect.

The agreement described "'[i]n house deals'" as transactions "first identified by [AutoFlex]" and for which the representative "completed all or part of the proposal writing, contract administration, project management, and ongoing customer service for a specific period of performance."

With respect to the calculation of commissions, the agreement stated: "Net proceeds are those amounts received by the seller after all direct costs and expenses are deducted from the gross proceeds." It further stated: "Commissions shall be computed on the net amount billed by [AutoFlex] to the customer."

The agreement authorized either party to terminate the agreement for cause if the other party breached a material obligation and failed to cure the breach within 30 days after receiving written notice of the breach. Upon termination of the agreement, Daniel would be entitled to any unpaid commissions that he had already earned.

The agreement included a provision requiring the reimbursement of attorneys' fees and expenses to the "prevailing party in any legal action brought by one party against the other and arising out of" the agreement.

C. Disputes Leading to Termination of the Agreement

The present litigation concerns the commissions owed to Daniel with respect to contracts between AutoFlex and three government agencies: the Naval Criminal Investigative Service (NCIS), the Pentagon Motor Pool, and the Naval Facilities Engineering Systems Command Southwest (NAVFAC Southwest).

In early 2014, AutoFlex entered into a contract for the lease of 138 vehicles for use by the NCIS. The period of performance included: a base year beginning in March

2014; a first option year beginning in March 2015; and a second option year beginning in March 2016.

Also in early 2014, AutoFlex entered into a contract for the lease of 90 vehicles for use by the Pentagon Motor Pool. The period of performance included: a base year beginning in August 2014; a first option year beginning in August 2015; and a second option year beginning in August 2016. The Pentagon Motor Pool later ordered an eight-month extension for 55 vehicles, beginning in August 2017.

In the fall of 2016, while the Sales Agent Agreement was in effect, AutoFlex received an award for a contract to provide 205 electric vehicles to NAVFAC Southwest. Before the performance period began, a dispute arose over the commissions owed for that contract. Daniel asserted that he had first identified the opportunity to pursue that contract and thus that he was entitled to 45 percent of the net proceeds. Luis disagreed, asserting that the applicable rate of commissions was 38 percent.

On October 18, 2016, Daniel sent an email to Luis concerning their dispute. He asserted that AutoFlex had breached the agreement by refusing to acknowledge that he was entitled to 45 percent of the net proceeds from the NAVFAC Southwest contract. He also asserted that, at the time, AutoFlex had failed to pay $13,344.00 of commissions owed for his work on other contracts. Invoking the termination provisions of the agreement, he demanded that AutoFlex cure these two issues within the next 30 days.

In a reply dated October 21, 2016, Luis denied that AutoFlex had breached its obligations. He asserted that AutoFlex had determined that Daniel's "role as an online technical writer/contract administrator" for the NAVFAC Southwest contract "did not

qualify [him] for a 45% commission compensation." He asserted that AutoFlex had not breached its obligation to pay commissions due at that time because Daniel had authority to make payments to himself from the company's bank accounts and had simply failed to pay himself.

Around the time of that email exchange, Daniel ended his sales-related activities for AutoFlex. During the six months that followed, he continued to assist with the administration of some AutoFlex contracts. AutoFlex proceeded to perform the NAVFAC Southwest contract without Daniel's involvement.

D. Action Against AutoFlex and Luis

On January 31, 2018, Daniel filed a complaint in the Circuit Court for Baltimore County against AutoFlex and Luis.[2] In the complaint, Daniel alleged that the defendants refused to pay all commissions owed to him upon his departure from AutoFlex.

Count I of the complaint alleged that AutoFlex and Luis violated the Maryland Wage Payment and Collection Law, Md. Code (1991, 2016 Repl. Vol.), §§ 3-501 to 3-509 of the Labor and Employment Article ("LE"). Under that Act, an employee may bring an action against an employer to recover unpaid wages. LE § 3-507.2(a). If the court finds that an employer withheld wages in violation of the Act and "not as a result of a bona fide dispute," the court may award up to three times the amount of the unpaid wages, plus reasonable attorneys' fees. LE § 3-507.2(b). Daniel alleged that there was "no bona fide dispute as to the wages owed" to him. From both defendants, he sought to

[2] Before trial, Daniel filed an amended complaint, which included minor revisions to the wording of the requests for damages.

recover unpaid wages of "at least" $200,000.00, plus enhanced damages and attorneys' fees under LE § 3-507.2(b).

Count II of the complaint alleged that AutoFlex and Luis violated the Fair Labor Standards Act, 29 U.S.C. §§ 201 to 219, by failing to pay Daniel in accordance with his pay schedule.

Count III raised a claim for breach of contract against AutoFlex alone. Daniel alleged that AutoFlex breached the Sales Agent Agreement by refusing to pay commissions owed to him. He demanded a judgment against AutoFlex in the amount of $200,000.00, plus attorneys' fees.

E. Discovery Motions Concerning Production of Documents

In May 2018, Daniel served requests for production of documents on the defendants under Md. Rule 2-422. Generally, he requested copies of contracts for which he was seeking to recover commissions and documents showing income that AutoFlex received for those contracts.

In November 2018, Daniel moved to compel discovery. He asserted that the defendants had failed to serve a written response to his requests for production of documents, even though several months had passed since the deadline for their response. He further asserted that the defendants had produced only selected pages from selected documents.

After filing of the motion to compel discovery, the defendants served an untimely written response to the request for production of documents. The defendants also filed a response in opposition to the motion to compel. The court denied the motion to compel,

without addressing the merits of the motion or response. In its order, the court stated that the contents of the motion did not comply with Md. Rule 2-432(b), which generally requires "[a] motion for an order compelling discovery" to "set forth: the question, interrogatory, or request; and the answer or objection; and the reasons why discovery should be compelled."

In December 2018, Daniel renewed his motion to compel discovery. He asserted that, although the defendants had belatedly produced some documents at issue in his previous motion, the defendants had continued to "intentionally remov[e]" pages from bank statements, thereby omitting information about payments received by AutoFlex. He further complained that the defendants failed to produce a copy of a financing agreement for the NAVFAC Southwest contract.

Opposing the renewed motion to compel, the defendants insisted that they had "fully complied with their obligations" because they had provided copies of all bank records "in their possession" at that time. The defendants suggested that Daniel should obtain complete copies of AutoFlex's bank records by "initiat[ing] a records deposition" or by "issu[ing] a subpoena" to the bank. In addition, the defendants asserted that details of the financing agreement for the NAVFAC Southwest contract were "not discoverable" because the financing agreement was "subject to a non-disclosure agreement." Despite that assertion, the defendants did not seek or obtain a protective order to preclude discovery regarding the financing agreement.[3]

[3] The opposition was ill-founded. "It is not ground for objection" to a discovery request "that the information sought is already known to or otherwise obtainable by the

After a hearing in January 2019, the court granted the renewed motion to compel discovery. The court ordered the defendants to serve a "supplemental response" to the requests for production of documents within 15 days. One month later, the defendants filed a certificate stating that they had served a copy of their supplemental response.

During the summer of 2019, the court granted the defendants' unopposed motion for a continuance based on personal matters unrelated to the litigation. Shortly thereafter, a second attorney entered his appearance for the defendants.

Several months later, in February 2020, Daniel moved for discovery sanctions under Md. Rule 2-433. He alleged that the defendants had failed to comply with the February 2019 order granting the renewed motion to compel. He asserted that the defendants still refused to produce many of the documents requested, including complete bank records, contract documents, and the financing agreement for the NAVFAC Southwest contract. He asked the court to enter a judgment by default as a sanction for the defendants' failures to comply with their discovery obligations.

Along with the motion for sanctions, Daniel filed a separate motion in limine,

party seeking discovery." Md. Rule 2-402(a). Maryland Rule 2-422 expressly authorizes requests for the production of documents "within the possession, custody, or control of another party[.]" *Pleasant v. Pleasant*, 97 Md. App. 711, 732 (1993). Under this Rule, "[w]here documents are within the control of the party upon whom a request for production of documents has been made, *that party* must obtain and produce those documents." *Id.* at 733 (emphasis in original). "Although a [discovering] party may choose to depose the non-party holder of documents rather than utilize a request for production of documents, that option is not one that may be forced upon the party seeking discovery." *Id.* Finally, a failure of discovery "may not be excused on the ground that the discovery sought is objectionable unless a protective order has been obtained[.]" Md. Rule 2-432(a).

asking the court to preclude the defendants from presenting any evidence at trial on the issue of damages. In addition, he asked the court to require the defendants to pay attorneys' fees that he incurred in attempting to obtain the requested documents.

The defendants opposed the motion for sanctions. The court scheduled a motions hearing at Daniel's request and sent a hearing notice to the attorney of record for the defendants.

Meanwhile, the defendants' second attorney, Jonathan Silverman, had been the subject of disciplinary proceedings brought by the Attorney Grievance Commission. The disciplinary proceedings concerned allegations of professional misconduct unrelated to his representation of AutoFlex and Luis. In May 2020, Mr. Silverman agreed to the entry of a consent order suspending him indefinitely from the practice of law in Maryland, effective June 22, 2020. Despite his suspension, Mr. Silverman did not withdraw his appearance as counsel for the defendants.

On July 6, 2020, the circuit court held the scheduled hearing on the motion for discovery sanctions. Neither the defendants' attorney nor Luis appeared for the hearing. The court noted that it was aware that Mr. Silverman had been suspended from the practice of law. After taking a brief recess to confirm the date of the suspension, the court permitted counsel for Daniel to make arguments in support of the motion for sanctions. At the end of the hearing, the court granted the motion. The court found that the defendants' "longstanding" and "severe" noncompliance with their discovery obligations reflected an "intentional effort" to "evade discovery" on "critical issues in the case."

On July 9, 2020, the court entered an "order of default on the issue of liability" against AutoFlex and Luis. The court reserved its decision on the request to preclude the defendants from introducing evidence to challenge the amount of damages claimed. Finally, the court ordered the defendants to pay $5,487.00 for attorneys' fees incurred by Daniel in pursuit of documents withheld by the defendants.

The court sent notice of its order of default not only to the defendants' attorney but also to Luis personally. Following the procedure that applies when a court enters an order of default because of a defendant's failure to file a timely pleading, the court expressly permitted the defendants to move to vacate the order of default within 30 days.

Luis moved to extend the time period for moving to vacate the order of default. The court granted his motion. Afterwards, a third attorney entered an appearance as counsel for the defendants. Through counsel, the defendants moved to vacate the order of default.

On August 25, 2020, the court conducted the first of four hearings to consider the motion to vacate the order of default. The court asked Daniel's counsel to identify each category of documents that the defendants still had not produced. The court issued an interim discovery order directing counsel for the parties to make all good faith efforts to resolve their dispute over the production of documents from those categories.

At three subsequent hearings, counsel for the defendants informed the court of his efforts to obtain and produce the requested documents. Counsel for Daniel provided lists of documents that still had not been produced, such as complete bank statements, copies of AutoFlex's contracts with customers, the financing agreement for the NAVFAC

Southwest contract, and records showing the disposition of the proceeds for the sale of vehicles at the end of the contract terms. At the end of the final hearing, the court concluded that the defendants' disclosures remained substantially incomplete. The court found that their "failure to produce these documents or redacting them without explanation" was "willful" and that this failure impaired Daniel's "ability to present a case on liability[.]"

For the reasons stated at the hearing, the court declined to vacate the order of default as to the liability of AutoFlex. The court reserved its ruling on whether to vacate the order of default as to Luis, pending the presentation of evidence at trial concerning his personal liability for compensation owed by AutoFlex. The court denied without prejudice the request to preclude the defendants from presenting evidence at trial concerning the amount of damages.

F. Trial on Damages

The court conducted a two-day bench trial on the issues of damages and the personal liability of Luis in October 2020. The evidence included documentary exhibits and testimony from Daniel and Luis.

Daniel testified about his work in connection with three AutoFlex contracts: the NCIS contract, the Pentagon Motor Pool contract, and the NAVFAC Southwest contract. He offered copies of emails in support of his claim that he first identified the opportunities for those contracts.

Daniel testified about his discussions with Luis during the summer of 2015 concerning the terms of the Sales Agent Agreement. Daniel said that the contracts he had

previously solicited for AutoFlex were "grandfathered . . . into th[e] agreement," with the expectation that he would receive commissions when customers extended or renewed those contracts. He testified that, after his agreement took effect, he began receiving commissions equal to 45 percent of the monthly net proceeds from the NCIS contract and the Pentagon Motor Pool contract.

Daniel described his efforts, from July 2015 through September 2016, to write the proposal for and to plan for administration of the NAVFAC Southwest contract. After AutoFlex received the award for the contract, Luis refused to acknowledge that AutoFlex would pay commissions at the rate of 45 percent. In October 2016, Daniel sent what he described as a "cure notice" email. In reply, Luis refused to change his decisions.

Daniel testified that he stopped working "full-time" for AutoFlex in October 2016 and turned over his work product related to the NAVFAC Southwest contract. He testified that he continued to provide "ongoing customer service and support" with the administration of other AutoFlex contracts, including the NCIS contract and the Pentagon Motor Pool contract, until April 2017.

At trial, a small part of Daniel's claims concerned compensation earned before October 2016. Most of the commissions that he sought were calculated on proceeds received by AutoFlex after he left his position. Attempting to prove the amount of net proceeds, he largely relied on information produced by the defendants during discovery. He acknowledged that these disclosures remained incomplete. He provided a summary of documents that he had requested but had never received from the defendants.

Daniel sought commissions on the net proceeds from the second option year of the

NCIS contract and from the final extension of the Pentagon Motor Pool contract. He proposed to calculate the profits from those two transactions using a monthly "markup" of $20 per vehicle which, he testified, AutoFlex expected to receive under the lease structures for those contracts.

Daniel also sought commissions on the net proceeds from the seven-month base period and first option year of the NAVFAC Southwest contract. His calculations largely relied on figures from AutoFlex's bank statements. This method called for subtracting the "outgoing" payments made to the financing entity each month from the "incoming" payments received each month from the customer. During cross-examination, he admitted that it was "reasonable to assume" that AutoFlex incurred various costs associated with performing the NAVFAC Southwest contract, such as the costs of delivering the vehicles. He said that he lacked knowledge of the amounts of those actual costs because the defendants had failed to disclose the information.

Daniel also sought commissions on the net proceeds from the sales of vehicles at the end of the three contracts. He introduced a deposition excerpt in which Luis admitted that AutoFlex earned approximately $33,000.00 from the sale of vehicles at the end of the NCIS contract. Daniel lacked documentation or other evidence disclosing the net proceeds from the sales of vehicles at the end of the Pentagon Motor Pool contract or the NAVFAC Southwest contract. He offered his own "estimate[s]" of the expected profit from those vehicle sales, based on his work on the earlier phases of those contracts. He also pointed to bank records showing deposits that he "believe[d]" to be the payments received by AutoFlex for the sale of those vehicles.

At the end of his case-in-chief, Daniel renewed his request to preclude the defendants from contesting the amount of damages. The court decided to address the issue on a question-by-question basis. The court said that it would sustain objections if the defendants offered information based on documents that had not been disclosed. For example, the court precluded Luis from testifying about the "profit margin" that AutoFlex earned from the contracts in question.

In his testimony, Luis denied that Daniel was the "source" of any of the three contracts in question. Luis claimed that the NCIS contract, the Pentagon Motor Pool contract, and the NAVFAC Southwest contract each arose from his own discussions with military officials. He also claimed that he himself did "at least 50 percent" of the proposal writing work for those contracts. He testified that he allowed his son Daniel to write paychecks from the company's accounts even though "never made any sales" for AutoFlex.

In his testimony, Luis said that he believed that Daniel had been "paid as agreed" and that AutoFlex did not owe any money to him. Luis testified that, under his interpretation of the agreement, Daniel would be entitled to commissions only if he performed "contract administration" services and "services in support of the customer" throughout the contract period. Luis also testified that Daniel stopped performing any "servicing work" for any AutoFlex contracts after October 2016 and did "none" of the work of performing AutoFlex's obligations under the NAVFAC Southwest contract. Luis said that he believed that Daniel left AutoFlex only because a lender withdrew an offer to provide financing for the NAVFAC Southwest contract. Luis said that, for

several months, AutoFlex came "very close to losing that contract," but that he was able to "scramble to save the deal" by finding a different financing source.

Luis disputed the claim that, under the agreement, Daniel was entitled to receive commissions from the net proceeds from the sale of vehicles at the end of the contract. He stated that Daniel had never received commissions for those vehicle sale proceeds in the past.

In closing arguments, Daniel asked the court to award a total of $807,591.23 for unpaid compensation, plus enhanced damages under the Maryland Wage Payment Collection Law. He noted that the defendants had not disputed his claim for compensation earned before October 2016. He argued that, although there may have been some disagreement about the rate of commissions, there was no dispute that AutoFlex should have paid commissions at the rate of at least 38 percent. He requested reimbursement for his attorneys' fees under the terms of the contract and under the federal and Maryland wage claim statutes.

In closing, the defendants argued that there was a "legitimate dispute" over whether Daniel was the "source" of the three AutoFlex contracts and whether he "ever did the service" on those contracts. The defendants disputed whether, under the agreement, Daniel was entitled to commissions on the profits from the sales of vehicles at the end of contracts. The defendants argued that Daniel's proposed calculations of the net proceeds were unduly speculative. The defendants also disputed whether Daniel was an "employee" within the meaning of the Maryland Wage Payment and Collection Law. Finally, the defendants disputed whether Luis could be held personally liable under that

statute.

G. Initial Judgment of the Circuit Court

On July 6, 2021, the circuit court entered judgment in Daniel's favor in the total amount of $40,445.00 for unpaid compensation, plus $30,061.82 in attorneys' fees. The order imposed liability solely on AutoFlex and imposed no personal liability on Luis. The court issued a written opinion setting forth the reasons for its decision to award "some, but not all of the requested damages."

The court began by explaining that it had previously determined that AutoFlex was in default on the issue of liability, as a sanction for discovery failures. The court stated that it would "not address in detail the work Daniel performed," but instead would evaluate the evidence "only for the sufficiency of proof of damages." The court found that Daniel's testimony regarding his work related to the NCIS, Pentagon Motor Pool, and NAVFAC Southwest contracts was "sufficient to permit the conclusion that all claimed extensions and compensable elements were 'from representative sourced opportunities[.]'" Accordingly, the court found that the "applicable commission rate is 45% of the net proceeds of those contracts."

The court recognized that the defendants' "conduct in failing to comply with discovery requests impaired Daniel's ability to introduce proof of damages, specifically the amount of 'net sales' received by AutoFlex" from the three contracts at issue. The court observed that, "despite the lack of discovery," he still had the "burden to prove damages with 'reasonable certainty,' beyond speculation or conjecture." The court explained that, although he need not achieve "mathematical precision in fixing the exact

amount" of damages, he was still required to establish "some foundation enabling the fact finder to make a fair and reasonable estimate of the amount" of damages.

The court first addressed Daniel's claim for "past draws and commissions" earned before he left his position in October 2016. The court credited his testimony that AutoFlex failed to pay $6,623.00 of compensation from that period. The court noted that the defendants offered "little or no contradiction" of this claim.

The court granted Daniel's claim for commissions from the second option year of the NCIS contract. The court credited his testimony that "AutoFlex applied a $20 per month, per vehicle profit 'mark-up' on this contract." The court accepted his calculations that the net proceeds from that transaction were "$33,600" and that his unpaid commissions, at the rate of 45 percent, were "15,012."

The court employed "the same $20 per month, per vehicle profit 'mark-up'" to calculate the net proceeds from the final extension of the Pentagon Motor Pool contract. The court accepted Daniel's calculations that the net proceeds from that contract were "$8,800" and that his unpaid commissions, at the rate of 45 percent, were "3,960."

The court granted Daniel's claim for commissions from the sale of vehicles at the end of the term of the NCIS contract. Relying on deposition testimony from Luis, the court found that AutoFlex received $33,000.00 from sale of the vehicles from the NCIS contract. The court found that Daniel was entitled to 45 percent of that amount, resulting in commissions of $14,850.00.

The court denied the claim for commissions from the sale of vehicles at the end of the Pentagon Motor Pool contract. The court explained that, in his testimony, Daniel

acknowledged that he lacked documentation of the proceeds from those vehicle sales. The court said that he had attempted to "estimate[e]" the expected profit and had pointed to a deposit that he "believed to be . . . potentially" attributable to those sales. The court found this evidence to be inadequate as proof of the net proceeds.

The court denied the claims for commissions on the net proceeds from the NAVFAC Southwest contract. The court wrote that Daniel had "little knowledge" of "the costs of this contract and any net proceeds it may have generated[.]" The court emphasized that Daniel "did not know the cost of the following items which would reduce profit on the contract: the vehicles themselves, the financing, maintenance, roadside assistance, license, tags and titling, and delivery fees." The court found that Daniel's "estimates of the net proceeds" from this contract were "based on speculation and are not grounded on documentary evidence or personal knowledge." Finding the "proof on this claim to be insufficient," the court "decline[d] to award damages for this claim."

After addressing the count for breach of contract (by AutoFlex alone), the court addressed the count against both AutoFlex and Luis for violations of the Maryland Wage Payment and Collection Law. Under that statute, the court may award up to three times the amount of unpaid wages, plus reasonable attorneys' fees, if the court finds that an employer withheld wages in violation of the statute and "not as a result of a bona fide dispute[.]" LE § 3-507.2(b). The court declined to award enhanced damages or attorneys' fees under this provision. The court reasoned:

> As explained above, the precise amount of commissions owed to [Daniel], even now, remains difficult to determine with any degree of exactitude. For this reason, the court finds that there was a bona fide dispute as to the amount of commissions to be paid to [Daniel], precluding the recovery of treble damages and attorneys' fees under this count.

The court denied any relief under the remaining count, for alleged violations of the federal Fair Labor Standards Act. Citing 29 U.S.C. § 213(a)(1), the court observed that the requirements of that Act "do not apply to 'any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman.'" The court found that Daniel's work for AutoFlex fell "substantially within this exception" to the Act.

The court found that Daniel "ha[d] not met his burden of proof" on the issue of Luis's personal liability under the Maryland Wage Payment and Collection Law or the Fair Labor Standards Act. The court vacated the order of default against Luis and granted judgment in his favor as to both counts against him.

The court determined that Daniel was entitled to be reimbursed for his attorneys' fees under the terms of the Sales Agent Agreement. The court relied on an affidavit in which his counsel affirmed that he incurred a total of $35,598.92 in attorneys' fees and related expenses as of the last day of trial. Counsel affirmed that the defendants had previously paid $5,487.00, in compliance with the earlier order imposing discovery sanctions. The court ordered the defendants to pay the remaining amount of $30,061.82.

H. Post-Judgment Motions and Revisions

Within 10 days after the entry of judgment, Daniel moved to alter or amend the judgment under Md. Rule 2-534. He asked the court, in addition to entering judgment

against AutoFlex for breach of contract, to enter judgment against both AutoFlex and Luis personally for violations of the Maryland Wage Payment and Collection Law. He further asked the court to reconsider its decisions not to award any damages for commissions related to the NAVFAC Southwest contract. In addition, he asked the court to reconsider its refusal to award enhanced damages and attorneys' fees under the Maryland Wage Payment and Collection Law.

The defendants filed their own timely motion to alter or amend the judgment. They asked the court to eliminate or reduce the damage awards and to reconsider the award of attorneys' fees.

On September 28, 2021, the circuit court delivered an oral opinion to address the motions to alter or amend the judgment. The court revised its judgment in some respects and otherwise denied the requests for reconsideration.

First, the court said that its written opinion was "not entirely clear" on the disposition of Count I, which alleged violations of the Maryland Wage Payment and Collection Law. The court explained that it had intended to enter a judgment against AutoFlex as to that count in addition to Count III, which alleged breach of contract.

Next, the court revised part of its decision on enhanced damages under the Maryland Wage Payment and Collection Law. The court noted that Daniel presented "uncontradicted" evidence that he was entitled to $6,623.00 of compensation earned before he left his position. The court found that "there was no bona fide dispute as to the payment of this sum." On that basis, the court increased that damage award to $19,869.00, a total amount equal to three times the unpaid wage, under LE § 3-507.2(b).

The court reconsidered Luis's personal liability. The court found that the evidence established that he satisfied the definition of an "employer" under the Maryland Wage Payment and Collection Law. On that basis, the court said that it would reinstate the order deeming him in default as to liability. The court entered its judgment jointly and severally against both AutoFlex and Luis.

In addition, the court agreed with one observation made by the defendants, concerning a "mathematical error" in part of the damage calculations. The court reduced the damages for commissions owed for the NCIS contract option year by $108.00.

On September 30, 2021, the court entered an amended judgment in accordance with its oral opinion. Within 30 days after the entry of the amended judgment, Daniel filed a notice of appeal.

Meanwhile, the defendants filed a motion to alter or amend the amended judgment. The defendants again asked the court to reconsider awards of damages and attorneys' fees. After a hearing, the court denied their motion. The court further ruled that it would increase the amount of attorneys' fees awarded to include the additional fees incurred in litigating the post-judgment motions. Otherwise, the court made no changes to the earlier rulings.

On December 8, 2021, the court entered a second amended judgment. In accordance with its revisions, the court entered judgment in favor of Daniel for damages and enhanced damages in the amount of $53,583.00, plus attorneys' fees of $33,985.32.

Within 30 days after the court entered its revised judgment, the defendants filed a

notice of appeal.[4]

ISSUES PRESENTED

This appeal and cross-appeal involve an array of challenges to rulings on interrelated issues. The resolution of some of these challenges may affect the analysis of other challenges. Accordingly, this opinion will address some of the issues raised in the cross-appeal before addressing the issues raised in the primary appeal.

This discussion will begin by addressing the defendants' challenges to the determination of liability and to the amount of damages. Their appellate brief includes the following contentions:

I. The circuit court erred when granting the appellant's default on July 9, 2020.

II. The circuit court erred when finding that the appellees violated Maryland Wage Payment and Collection Act (Count I of the complaint and amended complaint).

III. The circuit court erred or at least abused its discretion when awarding appellant damages, as appellant's proof was too speculative.

[4] Although the parties noted their appeals during different periods, both notices of appeal were timely. When the court granted the post-judgment motions and revised its earlier judgment, the amended judgment, entered on December 8, 2021, became the new final judgment in the action. *See Ireton v. Chambers*, 229 Md. App. 149, 153 (2016) (citing *Gluckstern v. Sutton*, 319 Md. 634, 651 (1990)). Daniel filed his notice of appeal within 30 days after entry of the amended judgment. Because the defendants filed a timely motion to alter or amend the amended judgment, the deadline for filing a notice of appeal was 30 days after the entry of the order disposing of their motion. *See* Md. Rule 8-202(c). Thus, the defendants' notice of appeal was timely under Md. Rule 8-202(c). Under that same Rule, Daniel's otherwise timely notice of appeal is treated as if it were filed on the same day as, but after, the entry of the order disposing of the defendants' motion to alter or amend the amended judgment. *See Edsall v. Anne Arundel County*, 332 Md. 502, 506-08 (1993).

For the reasons discussed below, we will uphold the determinations that AutoFlex is liable for breach of contract and that AutoFlex and Luis are liable for violation of the Maryland Wage Payment and Collection Law. We will uphold the awards of damages in the amount of $33,714.00, representing certain commissions earned in relation to the NCIS contract and the Pentagon Motor Pool contract.

Next, this opinion will address Daniel's challenges to the court's refusal to award some of the compensatory damages and enhanced damages sought. In his brief, he presents the following two questions, which we have renumbered:

> IV. Did the Circuit Court err in not granting any commission for the NAVFAC SW contract work, when the employer failed to keep records of wages owed and refused to produce documents that would determine commission amounts, and the Circuit Court then determined there was not sufficient specificity in the employee's commission calculations?
>
> V. Did the Circuit Court err in finding that there was a bona fide dispute as to the fact that commissions were owed, that would prevent the Court from trebling damages, when the Circuit Court based the presence of a dispute on the employer's refusal to maintain and produce wage documents and the employee's challenges in proving the amount of wages owed?

As discussed below, we will uphold the court's decision to award no damages for commissions related to the NAVFAC Southwest contract. We conclude, however, that the court erred when evaluating whether the defendants withheld $33,714.00 of commissions "not as a result of a bona fide dispute" within the meaning of the Maryland Wage Payment and Collection Law. We will vacate the judgment to the extent that the court denied Daniel's request for enhanced damages on those commissions, plus reasonable attorneys' fees, under LE § 3-507.2(b).

Finally, this opinion will address the defendants' challenge to the awards of attorneys' fees and related expenses. The final contention raised by the defendants, which we have renumbered, is:

> VI. The circuit court abused its discretion when awarding appellant attorney fees.

As discussed below, we will uphold the orders requiring the defendants to pay attorneys' fees and related expenses incurred by Daniel.

In light of these determinations, the judgment will be affirmed, except as it concerns enhanced damages and attorneys' fees under the Maryland Wage Payment and Collection Law, with respect to $33,714.00 of unpaid commissions. On remand, the circuit court must reevaluate those aspects of its judgment. All other decisions to award (or not to award) damages and other relief will stand.[5]

DISCUSSION

I. Order of Default as Sanction for Discovery Failures

In their cross-appeal, the defendants contend that the circuit court erred when it granted Daniel's motion for discovery sanctions and determined that the defendants were in default as to liability. The defendants argue that this order of default "never should have been entered" against them.

Chapter 400 of Title 2 of the Maryland Rules governs discovery in civil cases. These rules "are not designed or intended to 'stimulate the ingenuity of lawyers and

[5] Nothing in this opinion should be construed to address the merits of a potential claim under Md. Rule 2-706.

judges to make the pursuit of discovery an obstacle race.'" *Ehrlich v. Grove*, 396 Md. 550, 560 (2007) (quoting *Barnes v. Lednum*, 197 Md. 398, 406-07 (1951)). "The fundamental objective of discovery is to advance 'the sound and expeditious administration of justice' by 'eliminat[ing], as far as possible, the necessity of any party to litigation going to trial in a confused or muddled state of mind, concerning the facts that gave rise to the litigation.'" *Rodriguez v. Clarke*, 400 Md. 39, 57 (2007) (quoting *Baltimore Transit Co. v. Mezzanotti*, 227 Md. 8, 13 (1961)). The discovery scheme "requir[es], in the first instance, broad and comprehensive disclosures, in response to requests in the forms prescribed, . . . provid[es] a mechanism for addressing disputes concerning the necessity of complying with a disclosure request and the adequacy of any challenged disclosure, and . . . prescrib[es] sanctions to be imposed when a party fails to comply, either by not responding at all or responding inadequately." *Food Lion v. McNeill*, 393 Md. 715, 733-34 (2006) (citations omitted).

Under Maryland Rule 2-433, a discovering party may move for sanctions if that party has obtained an order compelling discovery and if the opposing party fails to obey that order. If the court "finds a failure of discovery," the court "may enter such orders in regard to the failure as are just[.]" Md. Rule 2-433(a). Potential sanctions include: "(1) [a]n order that the matters sought to be discovered, or any other designated facts shall be taken to be established for the purpose of the action in accordance with the claim of the party obtaining the order; (2) [a]n order refusing to allow the failing party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; or (3) [a]n order . . . entering a judgment by default that

includes a determination as to liability and all relief sought by the moving party against the failing party[.]" Md. Rule 2-433(a).

In the present case, Daniel originally served requests for production of documents in May 2018. Several months later, he moved to compel a written response to those requests. The court initially denied his motion, concluding that it did not comply with the requirements of Md. Rule 2-432. He then renewed his motion to compel. He asserted that, although the defendants had belatedly served a written response, their document disclosures remained incomplete. In February 2019, the court granted the renewed motion to compel and directed the defendants to serve a supplemental response within 15 days.

Daniel moved for discovery sanctions in February 2020. He asserted that the defendants had failed to comply with the order granting the renewed motion to compel one year earlier. He also asserted that the defendants had still refused to produce many of the documents at issue in the motion to compel. He asked the court to enter a default judgment against the defendants under Md. Rule 2-433(a)(3).

The defendants filed no response in opposition to the motion for sanctions. Neither the defendants' attorney nor Luis appeared at the scheduled hearing on the motion. After permitting counsel for Daniel to make arguments, the court granted his motion. The court found that the defendants had failed to comply with their discovery obligations, and that their failure was "longstanding" and "severe." The court said that their conduct reflected "an intentional effort . . . to evade discovery on important critical issues in the case[,]" and "[i]n particular," discovery that was "necessary" for "the proof

of damages[.]" The court said that this "intentional effort justifies the most severe sanction" of a default judgment.

Afterwards, the court entered the "order of default on the issue of liability" against AutoFlex and Luis. In its order, the court stated that the defendants had "intentionally obstructed" reasonable discovery efforts for more than one year and that their conduct had "materially impaired [Daniel's] ability to prepare and present his claims[.]" The court determined that "no lesser sanction than a default on the issue of liability" was appropriate "at th[at] time."

In their cross-appeal, the defendants now seek reversal of the order of default. This Court's "'review of the trial court's resolution of a discovery dispute is quite narrow; appellate courts are reluctant to second-guess the decision of a trial judge to impose sanctions for a failure of discovery.'" *Rose v. Rose*, 236 Md. App. 117, 131 (2018) (quoting *Sindler v. Litman*, 166 Md. App. 90, 123 (2005)). When reviewing discovery sanctions, "we are bound to the [trial] court's factual findings unless we find them to be 'clearly erroneous.'" *Klupt v. Krongard*, 126 Md. App. 179, 192 (1999) (quoting Md. Rule 8-131(c)). Generally, "the resolution of discovery disputes and the imposition of discovery sanctions are within the circuit court's sound discretion," and those decisions are "reviewed by [an appellate court] only for abuse of discretion." *Maryland Board of Physicians v. Geier*, 451 Md. 526, 544 (2017). A decision to impose the "'ultimate penalty of . . . entering a default judgment . . . cannot be disturbed on appeal without a clear showing that [the trial court's] discretion was abused.'" *Sindler v. Litman*, 166 Md. App. at 123 (quoting *Mason v. Wolfing*, 265 Md. 234, 236 (1972)).

In their appellate brief, the defendants offer little analysis of the circuit court's rationale for imposing discovery sanctions. They offer no direct critique of the court's finding that they failed to comply with discovery requests for a prolonged time. Nor do they appear to dispute that the pattern of discovery failures, as found by the court, was substantial enough to justify the sanction of a default on liability. In some parts of their brief, however, the defendants attempt to minimize their failures of discovery.[6]

To the extent that the defendants might dispute the findings and conclusions made when the court granted the motion for sanctions, their arguments are not properly preserved. The defendants did not file a response in opposition to the motion for sanctions, nor did they appear at the hearing requested by the opposing party. Because the defendants did not oppose the motion in the first instance, they cannot be heard to complain about the decision to grant the unopposed motion. *See Attorney Grievance Comm'n of Maryland v. McCarthy*, 473 Md. 462, 483 (2021) (holding that party failed to preserve appellate challenge to propriety of grant of motion for discovery sanctions by failing to file a response in opposition to the motion for sanctions).

Despite their failure to oppose the motion for sanctions, the defendants contend that the circuit court abused its discretion when it granted the motion. They argue that,

[6] The defendants insist that, at least by the time of trial, they produced all documents "truly needed" to determine the amount of any damages. This argument contradicts their position at trial and in their appellate brief, where they maintain that the evidence presented—the very documents that they had produced—was insufficient to prove the amount of damages. It is difficult to imagine how the defendants' disclosures might possibly be adequate for discovery purposes if, as the defendants claim, those same disclosures were inadequate as proof of damages at trial.

when their attorney failed to file a response and failed to appear for the motions hearing, the court should not have ruled on the motion. They assert that, at the time of the motions hearing, the court "knew" that their attorney of record, Mr. Silverman, had been "disbarred" for what they call "mental health reasons." They argue that it was "evident" that the defendants themselves had "no knowledge" of the motion or hearing because, they say, their attorney "did not communicate" with them. In their view, the decision to grant the motion for sanctions was "not fair or reasonable."

The defendants' argument has at least several defects. First, their argument charges the court with knowledge of information that was not available at the time of the ruling. During the hearing, the judge stated that he was aware that Mr. Silverman had been suspended. The judge noted that the "timing" of the suspension was "important[.]" After a brief recess, the judge confirmed that Mr. Silverman had been suspended by a consent order that took effect on June 22, 2020. The court had issued the hearing notice four days before the suspension took effect, and the motion itself had been pending for four months prior to the suspension.

Nothing in the record indicates that the court knew or should have known the reasons that may have led to Mr. Silverman's suspension. Even if the court had obtained a copy of the suspension order, the order itself includes no details about the purported "mental health" issues that, according to the defendants, may have affected Mr. Silverman. The suspension order simply required Mr. Silverman to refrain from seeking reinstatement until he is "deemed fit to practice law by a medical provider[.]"

The defendants purport to rely on a petition filed in the disciplinary proceedings,

which mentions medical records "indicat[ing]" that Mr. Silverman was suffering from certain conditions at the time of alleged professional misconduct. Nothing indicates that the court possessed this document at the time of the hearing. Even if the court had obtained a copy of the petition, it provides no clear indication of the duration or severity of the attorney's symptoms. Thus, the court would have had no reason to conclude that the attorney's condition rendered him incapable of communicating with his clients throughout the four-month period after the filing of the motion for sanctions.

The defendants suggest that, instead of ruling on the motion, the court should have ordered a continuance. The court has power "on its own initiative" to order a continuance of any proceeding "as justice may require." Md. Rule 2-508(a). Because the decision of whether to grant a continuance "lies within the sound discretion of the trial judge[,]" the decision will not be disturbed "[a]bsent an abuse of that discretion[.]" *Touzeau v. Deffinbaugh*, 394 Md. 654, 669 (2006). An abuse of discretion exists where the decision is "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Id.* (quoting *Jenkins v. City of College Park*, 379 Md. 142, 165 (2003)). In our assessment, the court did not act unreasonably when it chose not to order a continuance on its own initiative.

The court properly understood that it was required to ensure fairness to all parties. The court noted that the moving party, Daniel, had "waited a long time . . . for [his] day in [c]ourt" on the discovery failures. Through his motion to compel, his renewed motion to compel, and his motion for sanctions, Daniel sought redress for a continuing refusal to comply with document requests first made more than two years before the hearing. He

had done everything that the Rules required him to do in order to obtain a decision on his motion. *See* Md. Rule 2-311(b) (providing that "[i]f a party fails to file a response" to a written motion within the prescribed time period, "the court may proceed to rule on the motion"). Moreover, he was entitled to obtain a resolution of outstanding discovery matters with enough time to prepare his case for the scheduled trial. *See Fisher v. McCrary Crescent City, LLC*, 186 Md. App. 86, 128-29 (2009). The court expressed due concern about the recent suspension of the defendants' attorney, but decided that, "out of fairness to" Daniel, it would consider his motion.

During the hearing, the court considered the possibility that the defendants might not have received actual communications from their attorney about the motion for sanctions. For that reason, the court tailored its order to minimize the potential for unfair prejudice to the defendants. The court issued notice of its order of default not only to the defendants' attorney but also to Luis personally. The order expressly permitted the defendants to move to vacate the order of default within 30 days after entry of the order. The court included this provision even though nothing in Md. Rule 2-433 requires the court to give the defaulting party another opportunity to set aside the order of default. The order further provided that, if the defendants filed a timely motion to vacate the order of default, the court would grant a request for a hearing on their motion. Ordinarily, the court is not required to hold a hearing on a motion to reconsider an earlier ruling. *See Lowman v. Consol. Rail Corp.*, 68 Md. App. 64, 75 (1986).

On this record, we see nothing resembling an abuse of discretion. To the contrary, the record reflects the conscientious exercise of discretion. The court granted the

unopposed motion for sanctions because the motion was ripe for decision and Daniel demonstrated that he was entitled to the relief sought. In fairness to the defendants (who might not have received actual notice from their attorney), the court granted the motion in a way that would afford them another opportunity to demonstrate that the sanction of default might not be warranted.

After issuing the order of default, the court continued to ensure fairness to the defendants. In the 30-day period after entry of the order of default, the court granted the defendants' motion for an extension of time, giving them an additional nine days in which to move to vacate the order of default. The defendants retained new counsel and moved to vacate the order of default before that deadline. They did not file the memorandum in support of their motion until five days after the extended deadline (and just three days before the scheduled hearing on their motion).

By the time of the first hearing on the motion to vacate the order of default, fewer than six weeks remained before the scheduled trial date. At three subsequent hearings, the court assessed whether the defendants had sufficiently complied with their discovery obligations to merit vacating the order of default. The court ultimately found that, despite the efforts made by the defendants' third attorney, the defendants had still failed to produce many of the documents requested (including complete bank statements and contracts with AutoFlex's customers). Finding that the defendants' "failure to produce documents or redacting them without explanation" was "wilful," and that these failures caused prejudice to Daniel, the court declined to vacate the order of default. As we see it, the court reasonably determined that the defendants' efforts to cure some of the

underlying discovery violations during the month before trial were "too little, too late." *Fisher v. McCrary Crescent City, LLC*, 186 Md. App. at 128.

In their appellate brief, the defendants dispute one factual finding from the order granting the motion for sanctions. They point out that the order of default states that they "failed to file a supplemental response" to the request for production of documents as required by the February 2019 order granting the renewed motion to compel. The record shows that, in March 2019, their first attorney filed a certificate stating that he had served a copy of their supplemental response on the defendants. The defendants point to an unsigned, five-page document, titled "Supplemental Response to Plaintiff's Request for Production of Documents," which they say is the response served by their first attorney.

This document was not part of the record when the circuit court granted the motion for sanctions. The defendants first presented this document to the court as an exhibit to a memorandum in support of their motion to vacate the order of default. Accordingly, the document offers no basis to conclude the court erred or abused its discretion in the initial decision to grant the motion for sanctions. *See Attorney Grievance Comm'n of Maryland v. McCarthy*, 473 Md. at 483. Moreover, the motion was not accompanied by an affidavit from their first attorney, affirming that he sent the document in March 2019. The court could not properly consider the factual assertions made by the third attorney about what the first attorney actually sent. *See Scully v. Tauber*, 138 Md. App. 423, 431 (2001) (citing Md. Rule 2-311(d)).

The opposing party, Daniel, disputed the defendants' assertion that their first attorney served the supplemental response in March 2019. When the defendants

presented this document as an exhibit to their motion to vacate the order of default, counsel for Daniel stated that she had never received the document in question. According to counsel, she received a cover letter, a certificate regarding discovery, and about 10 pages of supplemental disclosures from the defendants' first attorney. The defendants offer no reason, and we see none, why the circuit court was required to resolve this factual dispute in their favor. *See Lone v. Montgomery County*, 85 Md. App. 477, 486 (1991) (reasoning that the circuit court, as the fact-finder, may "assign[] little weight" to a party's "unsupported explanation" for a discovery failure).

In any event, the defendants' failure to serve a supplemental response in March 2019 was only one ground for imposing the sanction of default. During the first hearing on the motion to vacate the order of default, the court said that it would "accept" the "disparity" between what the defendants claimed to have sent and what opposing counsel claimed to have received. The court said that it did not have any "reason to disbelieve[]" that the defendants' first attorney had sent "something," but that it "simply didn't find its way" to opposing counsel. The court went on to explain that its remaining "concern[]" was that the defendants' document disclosures remained "incomplete" and still "need[ed] to be completed." The court emphasized that "entire categories of documents" still had not been produced. The court then issued an interim discovery order listing the categories of documents that the defendants still had failed to produce.

During the three hearings that followed, the court focused on the remaining categories of documents that, as of the month before trial, still had not been produced. The court made it clear that the defendants' failure to serve a supplemental response in

March 2019 (a matter in dispute) was one of several discovery failures that supported the sanction of default. The initial decision to impose sanctions and the refusal to vacate the order of default rested on the defendants' ongoing pattern of incomplete disclosures and the resulting prejudice to Daniel's ability to prepare and present his case. As the court explained in its opinion, the court imposed sanctions "for what the court found to be continuous and deliberate refusals to produce properly requested discovery."

In our assessment, the court's choice of focus was proper. *See Valentine-Bowers v. Retina Grp. of Washington, P.C.*, 217 Md. App. 366, 379-80 (2014) (concluding that trial court properly granted motion for sanctions after examining "the entire course of discovery" and considering "the overall impact of . . . multiple breaches"). The court found that the defendants had engaged in a pattern of withholding or redacting documents and found that, as of a few weeks before trial, their production of documents remained incomplete. Because the court found "repeated violations" of the defendants' disclosure obligations and found that they failed to take advantage of "numerous opportunities" to produce the requested documents, the sanction of default as to liability was entirely appropriate. *See Fraidin v. Stutz*, 68 Md. App. 693, 702 (1986).

In sum, the circuit court did not abuse its discretion when it issued the order of default as a sanction for the defendants' discovery failures or when it denied the motion to vacate the order of default.

II. Liability Under the Wage Payment and Collection Law

In addition to challenging the order of default as to liability, the defendants contest their liability under Count I of the amended complaint. They argue that the court erred in

"finding" that they violated the Maryland Wage Payment and Collection Law.

As Daniel points out, this argument rests on a faulty premise: the defendants are disputing a finding that the court never made. The court never made any "finding" that the defendants violated the Maryland Wage Payment and Collection Law, because the court already had determined that they were in default as to liability.

When the court grants a motion for discovery sanctions, the court may issue "a judgment by default that *includes a determination as to liability* and all relief sought by the moving party against the falling party if the court is satisfied that it has personal jurisdiction over that party." Md. Rule 2-433(a)(3) (emphasis added). The court may then hold a bench trial or jury trial "[i]f, in order to enable the court to enter default judgment, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any matter[.]" *Id.* (emphasis added).

Under this Rule, an order of default as to liability "does not carry with it a judgment as to damages[,]" but the order establishes "'the non-defaulting party's right to recover'" from the defaulting party. *Fisher v. McCrary Crescent City, LLC*, 186 Md. App. 86, 134 (2009) (quoting *Greer v. Inman*, 79 Md. App. 350, 357 (2009)). An order of default operates as "'an admission by the defaulting party of its liability for the causes of action set out in the complaint.'" *Maryland Bd. of Physicians v. Geier*, 241 Md. App. 429, 485 (2019) (emphasis omitted) (quoting *Pacific Mortg. & Inv. Grp., Ltd. v. Horn*, 100 Md. App. 311, 332 (1994)). "'The general rule . . . is that, although the defaulting party may not introduce evidence to defeat [the] opponents' right to recover at the

hearing to establish damages, [the defaulting party] is entitled to present evidence in mitigation of damages and cross examine witnesses.'" *Fisher v. McCrary Crescent City, LLC*, 186 Md. App. at 134 (quoting *Greer v. Inman*, 79 Md. App. at 357).

As discussed previously, three months before trial, the court granted the motion for discovery sanctions and determined that the defendants were in default "on the issue of liability[.]" The order directed the parties to appear for trial "on the sole issue of damages[.]" The court ultimately declined to vacate the order of default.

In their appellate brief, the defendants argue that the evidence established that Daniel was an "independent contractor," rather than an "employee" of AutoFlex. They allude to a multi-factor test used to distinguish between an employee and an independent contractor. They argue that the court should have found that Daniel was an independent contractor of AutoFlex and that, for that reason, he was not entitled to relief under the Maryland Wage Payment and Collection Law.

This argument disputing the issue of liability is exactly the type of argument resolved by the order of default. The order of default included a determination of liability for the counts set forth in the amended complaint. That determination establishes their liability for Count I, which alleged that AutoFlex and Luis violated the Maryland Wage Payment and Collection Law by "fail[ing] or refus[ing] to pay commissions owed" to Daniel for his work as an "employee or contractor or AutoFlex[.]" Once the court made this determination of liability under Md. Rule 2-433(a)(3), Daniel had no additional burden to prove the defendants' liability at trial. Specifically, he had no obligation to prove that his work satisfied the legal test to establish that he was an "employee" of

AutoFlex.[7]

In its written opinion, the court did "not address in detail the work Daniel performed" for AutoFlex, and the court "examine[d] [his] claims only for the sufficiency of proof of damages." Accordingly, the court made no findings about whether an employment relationship existed. On appeal, this Court has no findings to review. We can review only the order establishing that the defendants were in default as to liability as a sanction for their discovery failures. In Part I of this opinion, we upheld the order establishing that the defendants were in default as to liability. This order fully disposes of additional arguments about the potential merits of a determination of liability for violation of the Maryland Wage Payment and Collection Law.

Even if the defendants could properly dispute their liability, despite the order of default, their arguments about the statute reflect some basic misunderstandings. Generally, in addition to a cause of action for breach of contract, "Maryland allows employees to recover wages withheld unlawfully from them by their employers under two statutes[.]" *Cunningham v. Feinberg*, 441 Md. 310, 322 (2015) (citing *Peters v. Early Healthcare Giver, Inc.*, 439 Md. 646, 652-53 (2014)). The Maryland Wage and

[7] The court did require Daniel to present proof related to Luis's personal liability as an "employer" under the Maryland Wage Payment and Collection Law. This statute authorizes an action against an "employer" to recover unpaid wages. LE § 3-507.2(a). The owner of a business is not necessarily an "employer" within the meaning of the statute and cannot be held personally liable for unpaid wages owed by the business unless the owner has sufficient interest in and control over the payment of wages. *See generally Pinnacle Group, LLC v. Kelly*, 235 Md. App. 436, 471-73 (2018). The court ultimately found that Daniel met his burden of proof on this issue. The defendants have not challenged that finding on appeal.

Hour Law (MWHL) is codified at Subtitle 4 of Title 3 of Labor and Employment Article. The MWHL requires, among other things, "that employers pay the applicable minimum wage to their employees and . . . that they pay an overtime wage of at least 1.5 times the usual hourly wage for each hour over 40 that the employee works during one workweek." *Friolo v. Frankel*, 373 Md. 501, 513 (2003) (citations omitted).

The MWPCL is codified at Subtitle 5 of Title 3 of Labor and Employment Article. The MWPCL "does not concern the amount of wages payable but rather the duty to pay whatever wages are due on a regular basis and to pay all that is due following termination of the employment." *Friolo v. Frankel*, 373 Md. at 513.

Count I of the amended complaint raised a claim against AutoFlex and Luis under the MWPCL, alleging that the defendants failed to pay commissions owed to Daniel. Count I quoted the language of LE § 3-507.2, which authorizes an employee to bring an action against an employer to recover unpaid wages, enhanced damages, and attorneys' fees. This count did not mention the MWHL, nor did it cite any provisions of that statute.

Even though Daniel brought a claim under the MWPCL, the defendants purport to rely on provisions of the MWHL, which is a separate statute. The defendants cite LE § 3-403, which defines the scope of the MWHL. It provides that "[t]his subtitle[,]" i.e., Subtitle 4, "does not apply to an individual who . . . is employed as an outside salesman" or "is compensated on a commission basis[.]" LE § 3-403(4)-(5).

By its express terms, however, LE § 3-403(4)-(5) concerns the scope of the MWHL, in Subtitle 4. This provision does nothing to limit the scope of the MWPCL, in Subtitle 5. Transporting these limitations to the MWPCL would contradict the language

of the MWPCL, which expressly governs the payment of "a commission[.]" LE § 501(c)(2). "Commissions are clearly within the scope of the [MWPCL], and a cause [of action] may arise under the [MWPCL] for an employer's failure to pay commissions earned during employment yet not payable until after resignation." *Medex v. McCabe*, 372 Md. 28, 35 (2002) (citing *Admiral Mortg., Inc. v. Cooper*, 357 Md. 533, 540 (2000)).

The defendants go on to make an irrelevant argument to the effect that Daniel received total compensation greater than the minimum wage required by the MWHL. They seem not to understand that Daniel has never alleged any violation of the minimum wage requirements of the MWHL. He raised a claim for unpaid wages in violation of the MWPCL under LE § 3-507.2.

Although most of the defendants' arguments about the MWPCL are misdirected, it is true that the MWPCL governs the payment of wages by an "employer" to an "employee." In an action under the MWPCL, the claimant ordinarily must prove the existence of an employer-employee relationship. *See Baltimore Harbor Charters, Ltd. v. Ayd*, 365 Md. 366, 384 (2001). Several factors are relevant to a determination of whether the claimant is an employee covered by the MWPCL. *See id.* at 392. If the defendants had not been in default as to liability, Daniel might have offered evidence concerning those factors, and the circuit court might have determined whether he qualified as an "employee" within the meaning of the MWPCL. It would be unreasonable to penalize him for failing to prove something that he had no obligation to prove because the defendants were in default as to liability.

In short, the order of default as to liability forecloses the defendants' challenge to

their liability for violation of the Maryland Wage Payment and Collection Law. Just as the order of default prohibited them from contesting their liability at trial, the affirmance of the order of default prohibits them from doing so on appeal.

III. Commissions for the NCIS and Pentagon Motor Pool Contracts

Next, the defendants challenge the damages awarded for unpaid commissions in the total amount of $33,714.00. The defendants say that the "proof" presented by Daniel was "too speculative" to support those damage awards.[8]

Although the defendants attempt to characterize this argument as a challenge to the amount of damages, their brief includes no discussion of the circuit court's method of determining damages. The court found that, under the terms of the Sales Agent Agreement, Daniel was entitled to 45 percent of the net proceeds from all transactions at issue. The court credited his calculations of the net proceeds from the second option year of the NCIS contract ($33,120.00), the final extension of the Pentagon Motor Pool contract ($8,800.00), and the sale of vehicles at the end of the NCIS contract ($33,000.00). The court ordered the defendants to pay 45 percent of each of those amounts.

The defendants provide no analysis of the court's findings of the amount of net proceeds from these transactions or the evidence supporting those findings. To the extent

[8] In introducing their arguments about damages, the defendants claim that Daniel received compensation totaling $76,451.00 after the agreement took effect. This claim is not based on the evidence admitted at trial but on an affidavit supporting their motion to vacate the order of default. The defendants fail to explain how those amounts of compensation might relate to the amount of commissions owed to Daniel for his work on the contracts in question.

that the defendants are disputing the issue of "damages," their arguments do not concern the calculation of net proceeds. Rather, they contend that, under the terms of the agreement, Daniel was not entitled to commissions, in any amount, from these transactions, let alone commissions at the rate of 45 percent. According to the defendants, these transactions fall outside the scope of the Sales Agent Agreement.

In response, Daniel argues that the defendants' arguments about these transactions concern questions of liability, which had been resolved by the order of default. We do not necessarily agree. An order of default "'constitutes an admission by the defaulting party of its liability *for the causes of action set out in the complaint*.'" *Maryland Board of Physicians v. Geier*, 241 Md. App. 429, 485 (2019) (emphasis in original) (quoting *Pacific Mortg. & Inv. Grp., Ltd. v. Horn*, 100 Md. App. 311, 332 (1994)). The amended complaint included broad allegations that the defendants failed to pay commissions owed to Daniel, but it included no allegations about commissions from particular contracts.[9]

The defendants challenge the court's determinations that Daniel was entitled to commissions of: $14,904.00 for the second option year of the NCIS contract; $3,960.00 for the final extension of the Pentagon Motor Pool contract; and $14,850.00 for the sale of vehicles at the end of the NCIS contract. They make different arguments about these

[9] A party moving for discovery sanctions may request "[a]n order that the matters sought to be discovered, or any other designated facts shall be taken to be established for the purpose of the action in accordance with the claim of the party obtaining the order[.]" Md. Rule 2-433(a)(1). In his motion for sanctions, Daniel did not request this type of order. He asked for an order of default as to liability, and the court granted that request. He also asked to preclude the defendants from contesting the amount of damages claimed, and the court denied that request.

three transactions. We will consider these arguments in turn.

Second Option Year of NCIS Contract

The defendants contend that Daniel was not entitled to any commissions from the net proceeds from the second option year of the NCIS contract. The defendants observe that AutoFlex entered into the NCIS contract in January 2014. The Sales Agent Agreement (effective July 31, 2015) was not in effect during the base year or at the beginning of the first option year, but it was in effect at the beginning of the second option year.

The defendants argue that, even if Daniel solicited the order for the second option year of the NCIS contract, he should not be entitled to commissions from that transaction. They surmise that his work to solicit this transaction must have involved nothing more than "mak[ing] a phone call" to inquire whether NCIS wanted to exercise the second option year. They argue that this hypothetical phone call "did not create a new sale" and was "nothing more than a clerical and administrative act."

This argument fails to address the actual terms of the Sales Agent Agreement. The agreement did not require Daniel to generate "new sales" to earn commissions. It states: "The Commission shall apply to all orders, modifications and renewals, solicited by representative from the [continental United States] that have been accepted by Company." This language is not limited to the customer's initial "order[]." Instead, it includes "modifications" or "renewals" after an initial order, provided that Daniel "solicited" the modification or renewal from the continental United States and that AutoFlex "accepted" the modification or renewal.

An agreement to extend the contract term to include an additional 12 months and to increase the contract price is at least a "modification" of a contract. In fact, the contract documents explicitly designate the exercise of the first option year of the NCIS contract as a "modification." The Sales Agent Agreement does not require any particular amount of labor to trigger commissions for a transaction. Thus, the hypothetical assertion that Daniel solicited the second option year of the NCIS contract with a single phone call is no basis to deny him commissions for soliciting that contract modification.

The defendants also argue that the NCIS contract was not a "representative sourced opportunity" within the meaning of the Sales Agent Agreement. As explained previously, the agreement states that Daniel would earn a "38% commission on net sales from 'in house deals'" and a "45% commission on net sales from Representative sourced opportunities." It further states: "'Sourced' opportunities include those opportunities first identified in writing by Representative." It continues: "'In House deals' may be those identified by the company, but for which Representative completed all or part of the proposal writing, contract administration, project management, and ongoing customer service for a specific period of performance."

The defendants argue that the NCIS contract cannot be a "representative sourced opportunity" because it predated the Sales Agent Agreement. The agreement itself, however, includes no provision stating that all contracts predating the agreement must be considered "in house deals." The agreement does not say whether the term "representative sourced opportunity" might include an opportunity "first identified in writing by" Daniel before the agreement took effect.

At trial, Daniel testified that he first identified the opportunities for the NCIS contract (as well as the Pentagon Motor Pool contract and the NAVFAC Southwest contract). He introduced a copy of an email dated November 5, 2013, which, he said, was the first identification of the opportunity for the NCIS contract.

Without objection, Daniel testified about his negotiations with Luis concerning the terms of the Sales Agent Agreement. According to Daniel, the parties entered into their agreement with the intention that he would earn commissions for extensions of contracts that he previously solicited. He stated: "There were a number of contracts that I had identified . . . and captured the award on behalf of [AutoFlex], and I was the primary point of contact for those contracts at the time." He testified that this category of contracts included the NCIS contract and the Pentagon Motor Pool contract. He said that the parties "grandfathered those contracts" into the agreement, "so that [he] would be compensated . . . for efforts working on those contracts when they renewed." He further testified that, after the agreement took effect, he began receiving commissions of 45 percent of the monthly net proceeds from the NCIS contract and the Pentagon Motor Pool contract.

During questioning by the defendants, Daniel added: "The way this agreement was created in the first place was to reward me for my efforts in originating in the first place[.]" He stated that, upon the "renewals" of the NCIS contract and the Pentagon Motor Pool contract, "it was agreed upon . . . verbally and followed through by payments" after the agreement took effect, that he would receive 45 percent of the monthly net proceeds from those contracts.

In its written opinion, the circuit court concluded that the agreement, "as written, is ambiguous as to the compensation to be paid to Daniel for his work." The court said that, "[f]or that reason," the court had "admitted parol evidence for the purpose of interpreting the intentions of the parties under the Agreement." The court found that Daniel's "testimony as to his involvement" in the three contracts at issue "was sufficient to support the conclusion that all claimed contract extensions and compensable elements were 'from representative sourced opportunities' and that the applicable commission rate is 45% of the net proceeds of those contracts."

The court's conclusion is supported by Daniel's testimony that the parties intended that their agreement would compensate him with commissions upon the renewal of contracts that he had previously solicited for AutoFlex. This conclusion has additional support in his testimony that, once the agreement took effect, he began receiving 45 percent of the monthly net proceeds from contracts that he previously solicited for AutoFlex. The defendants did not object to the admission of the evidence about the parties' intentions or course of conduct, nor did they seek to limit the admissibility of that evidence. Instead, the defendants disputed the accuracy of this testimony, through Luis's testimony that he was the original source for the three contracts in question and that he simply acquiesced in allowing Daniel to write checks to himself from AutoFlex's bank accounts. The court ultimately credited Daniel's testimony on these issues.

Because the defendants made no objection to Daniel's testimony at trial, they cannot be heard to complain that the court credited his testimony. *See Patriot Constr., LLC v. VK Elec. Servs., LLC*, 257 Md. App. 245, 267-68 (2023) (holding that appellant

failed to preserve argument that court should not have considered certain parol evidence about witnesses' understanding of the scope of a contact by failing to object to the admission of the evidence). Because the court received conflicting evidence on this issue, the court was not clearly erroneous in crediting Daniel's testimony. *See Campusano v. Lusitano Constr. LLC*, 208 Md. App. 29, 41 (2012). Consequently, there is no basis to disturb the conclusion that the NCIS contract was a "representative sourced opportunity" within the meaning of the Sales Agent Agreement.

Sale of Vehicles at End of NCIS Contract

The defendants also contend that Daniel was not entitled to any commissions from the net proceeds received for the sale of vehicles at the end of the NCIS contract. The defendants argue that the Sales Agent Agreement does not extend to commissions on the sale of vehicles at the end of the contract with a customer.

On this point, Daniel testified that "a couple of different factors" are included "in calculating net proceeds . . . for a contract." He said that this calculation includes "the margin . . . obtained" by AutoFlex "each month on a monthly lease payment, and then the proceeds received when those vehicles were sold at the end of the lease."

During his testimony, Luis said that the agreement "absolutely" did not require AutoFlex to pay commissions on the sales of vehicles at the end of a contract term. He testified that Daniel had never received commissions from AutoFlex on vehicle sales. According to Luis, a sales representative does not earn commissions on those sales because it is impossible to know whether the company might incur a loss, as when the amount owed for the balances of the leases exceeds the fair market value of the used

vehicles.

In its written opinion, the court relied on "parol evidence" to support its conclusion that net proceeds from a contract include the sale of vehicles at the end of a contract. Specifically, the court credited Daniel's testimony that the proceeds from sales of vehicles at the end of a contract term "are to be included in the determination of [the] 'net proceeds' from any given contract."

On appeal, the defendants argue that this interpretation contradicts the language of the Sales Agent Agreement. The defendants highlight one sentence from the agreement, which states: "Commissions shall be computed on the net amount billed by [AutoFlex] to the customer."[10] According to the defendants, at the end of a contract with a customer, AutoFlex enters into a separate contract to sell the used vehicles to a third-party buyer. The defendants argue that any amounts that AutoFlex receives from a third-party buyer are not amounts "billed . . . to the customer." The defendants argue that the court could not properly rely on parol evidence to resolve this question of interpretation, because, in their view, the relevant terms were "plainly stated in the contract."

In our assessment, the defendants cannot complain that the court resorted to the testimony of the parties to address this issue of interpretation. The defendants did not object to the admission of Daniel's testimony about his understanding of the meaning of the term "net proceeds" in the contract. Because the defendants made no objection to this

[10] The agreement also includes a broader statement: "Net proceeds are those amounts received by the seller after all direct costs and expenses are deducted from the gross proceeds." This statement focuses on the "amounts received" by AutoFlex, rather than the "amount billed . . . to the customer."

testimony at trial, they cannot be heard to complain that the court credited his testimony. *See Patriot Constr., LLC v. VK Elec. Servs., LLC*, 257 Md. App. 245, 267-68 (2023). Moreover, it would be unfair to allow the defendants to complain about the court's reliance on the parol evidence offered by Daniel after the defendants themselves offered unrestricted parol evidence on the same issue.

Extension of Pentagon Motor Pool Contract

The defendants contend that Daniel was not entitled to commissions for the final extension of the Pentagon Motor Pool contract. They observe that, by Daniel's own account, he stopped providing services to AutoFlex in May 2017 at the latest. The final extension of the Pentagon Motor Pool contract did not begin until August 2017 at the earliest, several months after he stopped working for AutoFlex. The defendants argue that he is not entitled to any commissions on that contract extension because the customer ordered it after he left his position.

This argument is substantially different from the one that the defendants made to the circuit court. At trial, the defendants appeared to argue that Daniel was not entitled to commissions for any extensions after the initial base period. During closing arguments, counsel for the defendants asserted that, when a salesperson "go[es] out and get[s] a new customer for a business[,]" such as new customer for "life insurance," the salesperson does not receive a "residual every year for the rest of time[.]"

In response, the court said: "Whether it happens in life insurance or any other contract, this contract . . . specifically includes renewals." The court called attention to the provision stating that the sales representative is entitled to commissions on "orders,

modifications and renewals[.]" The court said that it did not "make any difference" whether other types of salespersons might earn commissions on renewals, because the agreement in question grants commissions on renewals. Counsel replied: "Yeah, that's true." The court then asked counsel whether he was still "arguing that [the agreement] doesn't apply to renewals[.]" Counsel acknowledged that the contract includes "language that could be interpreted" to include commissions on renewals.

Ordinarily, this court will not consider an issue "unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). The argument made by the defendants at trial was that, after the sales representative makes an initial sale, the sales representative should not receive commissions on later extensions or renewals. The circuit court rejected this argument, and even counsel for the defendants appeared to concede that the agreement contemplates commissions on renewals.

The argument raised on appeal concerns a different matter: the effect of termination of the agreement. The defendants now argue that the agreement does not require the payment of commissions on renewals or extensions ordered by a customer *after* termination of the agreement. Because these two arguments "are by no means the same[,]" the defendants' "appellate argument is not preserved for our review." *James B. Nutter & Co. v. Black*, 225 Md. App. 1, 26 (2015). The trial court was "'not required to imagine all reasonable offshoots of the argument actually presented'" about commissions on renewals. *Id.* at 27 (quoting *Starr v. State*, 405 Md. 293, 298-99 (2008)).

The defendants did not make their argument about the effect of termination of the agreement until after trial. In their motion to alter or amend the judgment, the defendants

asked the court to set aside the damage award representing commissions from the extension of the Pentagon Motor Pool contract. They presented, nearly verbatim, the same argument that they are making on appeal. The circuit court denied their motion to alter or amend, without expressly addressing their argument.

Because the defendants first raised this argument in their motion to alter or amend the judgment, the relevant standard of review is whether the court abused its discretion in declining to reconsider its judgment. *See, e.g., Nesbitt v. Mid-Atlantic Builders of Davenport, Inc.*, 255 Md. App. 580, 594 (2022). "[A] motion to alter or amend under Rule 2-534 is not an occasion for a party to make arguments that it neglected to make initially." *Morton v. Schlotzhauer*, 449 Md. 217, 232 n.10 (2016). "A circuit court does not abuse its discretion when it declines to entertain a legal argument made for the first time in a motion for reconsideration that could have, and should have, been made earlier, and consequently was waived." *Id.* Because the defendants had the opportunity to make their argument about the effect of the termination of the agreement at trial, the court did not abuse its discretion in declining to entertain that argument when they first raised it in their post-judgment motion.

IV. Denial of Commissions for the NAVFAC Southwest Contract

Now, this discussion turns to the primary appeal by Daniel. In his appeal, he contends that the circuit court erred when it denied his claim for commissions on the net proceeds from the NAVFAC Southwest contract. He asks this Court to set aside the court's factual findings and to require the court to award damages of $724,846.21, the full amount that he requested at trial for his work on that contract.

As Daniel recognizes, appellate review of a trial court's factual findings is limited and deferential. Maryland Rule 8-131(c) provides: "When an action has been tried without a jury, the appellate court . . . will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses."

"'[U]nder the clearly erroneous standard, this Court does not sit as a second trial court, reviewing all the facts to determine whether an appellant has proven his case.'" *Thomas v. Capital Med. Mgmt. Assocs., LLC*, 189 Md. App. 439, 453 (2009) (quoting *Goss v. C.A.N. Wildlife Trust, Inc.*, 157 Md. App. 447, 456 (2004)) (further quotation marks omitted). When reviewing a determination of damages, this Court "'must consider evidence produced at the trial in a light most favorable'" to the court's findings and "'if substantial evidence was presented to support the trial court's determination, it is not clearly erroneous and cannot be disturbed.'" *Spacesaver Sys., Inc. v. Adam*, 212 Md. App. 422, 449 (2013) (quoting *Clickner v. Magothy River Ass'n*, 424 Md. 253, 266 (2012)). It is "particularly" difficult to establish that a trial court was clearly erroneous in cases where the trial court simply "is *not* persuaded of something" based on the evidence offered by an appellant. *Bontempo v. Lare*, 217 Md. App. 81, 137 (2014) (emphasis in original) (citing *Omayaka v. Omayaka*, 417 Md. 643, 658-59 (2011)), *aff'd*, 444 Md. 344 (2015).

On appeal, Daniel calls attention to the circuit court's description of the principles governing its evaluation of the proof of damages. The court wrote:

In order to recover more than nominal damages, he must show that he has

> suffered measurable damages as a result. His ability to prove those damages has been hampered by AutoFlex'[s] willful failure to produce properly requested discovery, much of which concerned banking information and contract costs, receipts and disbursements. This information is directly related to a determination of 'net proceeds' of a contract for which Daniel may be entitled to commissions. On one hand, despite the lack of discovery, it remains the Plaintiff's burden to prove damages with 'reasonable certainty,' beyond speculation or conjecture. *Della Ratta, Inc. v. Am. Better Cmty. Developers, Inc.*, 38 Md. App. 119, 143 ([1977]).
>
> On the other hand,
>
> > "[M]ere difficulty in ascertaining the amount of damages is not fatal," and "mathematical precision in fixing the exact amount is not required. . . . But, "[t]he evidence must . . . lay some foundation enabling the fact finder to make a fair and reasonable estimate of the amount of the damage."
>
> *Thomas v. Capital Med. Mgmt. Associates, LLC*, 189 Md. App. 439, 464-66 (2009), citing *Della Ratta, supra*, 38 Md. App. at 143. (Plaintiff medical billing service's proof of damages held sufficient in claim for lost profits upon showing of anticipated profit on defendant's actual collections).
>
> The court will apply these principles in an evaluation [sic] the Plaintiff's proof of damages.

Later, the circuit court addressed Daniel's proposed calculations of the commissions owed for his work on the NAVAC Southwest contract. His calculations largely relied on figures from AutoFlex's bank statements. His method called for subtracting the "outgoing" payments made to the financing entity each month from the "incoming" payments received each month from NAVFAC Southwest. He also pointed to bank records showing a payment received from the financing entity, which he "believed" to be AutoFlex's share of the profits from the sale of the vehicles at the end of that contract. He claimed that these calculations were consistent with his own estimates

of the expected profit when he developed the proposals for the contract. According to Daniel, the NAVFAC Southwest contract generated net proceeds of $1,610,769.40.

The court was not persuaded that Daniel had offered adequate proof of the amount of net proceeds from those transactions. The court wrote:

> As to the costs of this contract and any net proceeds it may have generated, the Plaintiff had little knowledge. He testified that he did not know the cost of the following items which would reduce profit on the contract: the vehicles themselves, the financing, maintenance, roadside assistance, license, tags and titling, and delivery fees. Plaintiff's estimates of the net proceeds from the NAVFAC contract are based on speculation and are not grounded on documentary evidence or personal knowledge. The court finds the Plaintiff's proof on this claim to be insufficient and declines to award damages for this claim.

In his appeal, Daniel argues that the court "set too high a standard of proof" when it evaluated the evidence of damages. He argues that the court "did not give proper weight" to the fact that the defendants withheld documents with information concerning the net proceeds from the contracts in question. Citing *David Sloane, Inc. v. Stanley G. House and Assocs., Inc.*, 311 Md. 36 (1987), he argues that Maryland law makes "modifications" to the requirement of reasonable certainty in cases where a defendant "intentionally withheld documents" or otherwise "refused to provide discovery." He asserts that the court "should have taken . . . into consideration" what he calls these "modifications of certainty on damages calculations set forth in *David Sloane*" when evaluating the evidence.

This argument reflects a misreading of the Court's opinion in *David Sloane*. That opinion does not establish a lower standard of proof of damages for cases in which a defendant withheld information during discovery. The "reasonable certainty" standard

described by the circuit court is, in all important respects, no different from the standard discussed in the *David Sloane* opinion and others.

In *David Sloane, Inc. v. Stanley G. House & Assocs., Inc.*, 311 Md. at 40-42, the Court described the requirement of "reasonable certainty" in the context of reviewing determination of damages representing lost profits. The Court explained that "the certainty rule"—a former requirement that a plaintiff prove damages with certainty—"has been modified into one of 'reasonable certainty.'" *Id.* at 40-41. The Court recounted the "[m]odifications" to the former "certainty rule," as enumerated in a prior opinion:

> (a) [I]f the fact of damage is proven with certainty, the extent or the amount thereof may be left to reasonable inference; (b) where a defendant's wrong has caused the difficulty of proving damage, he cannot complain of the resulting uncertainty; (c) mere difficulty in ascertaining the amount of damage is not fatal; (d) mathematical precision in fixing the exact amount is not required; (e) it is sufficient if the best evidence of the damage which is available is produced; and (f) the plaintiff is entitled to recover the value of his contract as measured by the value of his profits.

Id. at 41 (quoting *M & R Contractors & Builders, Inc. v. Michael*, 215 Md. 340, 349 (1958)).

The two sources cited by the circuit court here describe the same standard set forth in the *David Sloane* opinion. In fact, the above quotation includes language that is identical to the language from those two sources. *See Thomas v. Capital Med. Mgmt. Assocs., LLC*, 189 Md. App. 439, 465 (2009) (quoting *David Sloane, Inc. v. Stanley G. House & Assocs., Inc.*, 311 Md. at 41); *Della Ratta, Inc. v. American Better Cmty. Devs., Inc.*, 38 Md. App. 119, 139 (1977) (quoting *M & R Contractors & Builders, Inc. v. Michael*, 215 Md. at 349). It is unreasonable to suggest that the circuit court identified a

standard for proving damages that is meaningfully different from the standard set forth in *David Sloane* and other opinions.

Ordinarily, this Court "'presume[s] judges to know the law and apply it, even in the absence of a verbal indication of having considered it.'" *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 426 (2007) (quoting *Wagner v. Wagner*, 109 Md. App. 1, 50 (1996)). This presumption governs our review "[a]bsent an indication from the record that the trial judge misapplied or misstated the applicable legal principles[.]" *Cobrand v. Adventist Healthcare, Inc.*, 149 Md. App. 431, 445 (2003). The circuit court made no such misstatement when describing the applicable principles. The court's opinion is more than adequate to demonstrate that the court identified the correct standard for proof of damages: reasonable certainty.

Daniel purports to rely on the following language, which the court did not specifically include in its opinion: "'if the fact of damage is proven with certainty, the extent or the amount thereof may be left to reasonable inference[.]'" *David Sloane, Inc. v. Stanley G. House & Assocs., Inc.*, 311 Md. at 41 (quoting *M & R Contractors & Builders, Inc. v. Michael*, 215 Md. at 349). This supposed omission is of no consequence, because trial courts are not required "'to spell out in words every thought and step of logic.'" *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. at 426 (quoting *Beales v. State*, 329 Md. 263, 273 (1993)). In any event, the court recognized that it could award damages where there was "some foundation enabling the fact finder to make a fair and reasonable estimate of the amount of the damage." We see no significant difference between the proposition quoted by the court and the alternative formulation quoted by

Daniel.

We have no doubt that the court understood that it could draw "reasonable inference[s]" as part of its fact-finding. Not only did the court expressly recognize that it could use a "fair and reasonable estimate" of the amount of damages, but the court made some generous inferences in Daniel's favor when it determined some of the commissions owed. The court credited his testimony that AutoFlex expected to earn a "$20 per month, per vehicle profit 'mark-up,'" during the initial periods of the NCIS contract. The court accepted his proposal to use that figure to determine the net proceeds not only from the second option year of the NCIS contract, but also from the final extension of the Pentagon Motor Pool contract. In doing so, the court necessarily relied on inferences drawn from the evidence rather than demanding strict proof of the exact amounts of net proceeds.[11] As the trier of fact, the circuit court found that those proposed inferences were reasonable; the court found that other inferences that he proposed with respect to the NAVFAC Southwest contract were too speculative. We see no clear error in the court's evaluation of the evidence.

Daniel places special emphasis on two other propositions: "'where a defendant's

[11] In addition, the court assigned some weight to the defendants' failure to produce documents when it determined the commissions owed for the sale of vehicles at the end of the NCIS contract. The court relied on Luis's deposition testimony that AutoFlex earned "approximately" $33,000.00 from the sale of those vehicles. The court explained that, although Luis mentioned that AutoFlex incurred "additional costs which reduce the profit from the vehicle resale on this contract[,]" the defendants failed to produce documents showing those costs. Noting that the defendants had the "ability to produce such information" and that they "failed to do so," the court found the net proceeds from the sale of vehicles at the end of the NCIS contract were $33,000.00.

wrong has caused the difficulty of proving damage, he cannot complain of the resulting uncertainty'"; and "'it is sufficient if the best evidence of the damage which is available is produced[.]'" *David Sloane, Inc. v. Stanley G. House & Assocs., Inc.*, 311 Md. at 41 (quoting *M & R Contractors & Builders, Inc.*, 215 Md. at 349). According to Daniel, the Court has altered the standard of proof where a defendant withheld information during discovery. He argues that, in "a situation in which a party refused to produce the discovery needed to satisfy the proof of damages, the party with the burden of proof need only use the documents that were in fact provided."

This argument fails to interpret the quoted language in its proper context. Contrary to Daniel's suggestion, neither the *David Sloane* opinion nor *M & R Contractors* address circumstances in which a defendant refused to produce information in discovery. Rather, those two opinions address the proof needed to recover damages representing the "lost profits" resulting from a breach of contract. *David Sloane, Inc. v. Stanley G. House & Assocs., Inc.*, 311 Md. at 42; *M & R Contractors & Builders, Inc.*, 215 Md. at 345-46. Historically, many courts held that unrealized profits were "inherently uncertain" and thus were "*per se* not a proper element of damages for breach of contract." *M & R Contractors & Builders, Inc.*, 215 Md. at 349 (quotation marks omitted). Over time, courts accepted various "modifications . . . aimed at avoiding the harsh requirements of the 'certainty' rule" and allowing recovery of lost profits damages. *M & R Contractors & Builders, Inc.*, 215 Md. at 349 (citing Charles T. McCormick, *Handbook on the Law of Damages* § 27 (1935)). The quoted statements from *David Sloane* should be understood in that context. The opinion does not stand for the

proposition that a defendant's discovery violations relieve the plaintiff of the burden of proving damages with "reasonable certainty."

In addition, Daniel contends that the standard for proving damages for "wage claim[s]" is "different" from the standard applicable to other types of claims. According to Daniel, the applicable standard is "'reasonable inference' rather than 'reasonable certainty.'"

This argument relies primarily on *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680 (1945). In that case, employees at a manufacturing plant sued to recover unpaid overtime compensation under the federal Fair Labor Standards Act. *Id.* at 684. The employees alleged that their employer improperly computed the number of compensable hours worked. *Id.* The Sixth Circuit reversed a monetary judgment in favor the employees, concluding that it was insufficient for the employees "merely to offer an estimated average of overtime worked." *Id.* at 686. The Supreme Court concluded that the Sixth Circuit "imposed upon the employees an improper standard of proof" with "the practical effect of impairing many of the benefits of the Fair Labor Standards Act." *Id.*

The Supreme Court reasoned that, when an employee brings an action for unpaid minimum wages or unpaid overtime compensation under the Fair Labor Standards Act, "[d]ue regard must be given to the fact that it is the employer who has the duty under § 11(c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed." *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. at 687. The Court stated that, "where the employer's

records are inaccurate or inadequate[,]" a court should not "penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work." *Id.* The Court continued:

> In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Anderson v. Mt. Clemens Pottery Co., 328 U.S. at 687-88.

Daniel asserts that the defendants failed to "perform basic bookkeeping to be able to determine the net profits on contracts" for which he was entitled to commissions. He notes that the Maryland Wage and Hour Law (LE § 3-424) and regulations implementing the Fair Labor Standards Act (29 C.F.R. §§ 516.2 and 516.3) require employers to keep various employment records.[12] He argues that, under "the standard of the Supreme Court in *Anderson*," the circuit court "should have found" the evidence offered "to be sufficient" to determine the amount of commissions owed.

The present case does not involve a claim for unpaid minimum wages or overtime

[12] Of the record-keeping provisions cited by Daniel, only one arguably concerns the information needed to calculate the commissions owed here. Federal regulations require employers, "[w]ith respect to each employee in a bona fide executive, administrative, or professional capacity . . ., or in outside sales," to keep records of "the basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment[.]" 29 C.F.R. § 516.3. The other two provisions cited by Daniel (29 C.F.R. § 516.2 and LE § 3-424) concern records on matters such as the hours worked, pay rate, and compensation paid.

compensation like the one analyzed in *Anderson*. Daniel did not bring any claim for unpaid minimum wages or overtime wages under the Maryland Wage and Hour Law. His pleadings included one alternative count under the federal Fair Labor Standards Act, but the circuit court granted judgment in favor of the defendants on that count, concluding that the statute was inapplicable.

The remaining claims were for violation of the Maryland Wage Payment and Collection Law (as well as a claim for breach of contract). Daniel cites no authority holding that the framework set forth in *Anderson* extends to other compensation claims under the Maryland Wage Payment and Collection Law (or a similar statute), where the amount of unpaid compensation does not depend on the number of hours worked. As worded, this framework addresses situations in which the employee "produces sufficient evidence to show the amount and extent" of the work performed. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. at 687. This framework then requires the employer "to come forward with evidence of the precise amount of work performed[.]" *Id.* It is not obvious whether or how this framework might operate where the amount of compensation owed is not a function of the number of hours worked.

The argument for an extension of the framework set forth in *Anderson* to claims for unpaid commissions under the Maryland Wage Payment and Collection Law appears to be a novel one. This argument, however, was not presented to the circuit court. At trial, Daniel did not ask the court to use any lower or different standard of proof to evaluate his claim under the Maryland Wage Payment and Collection Law. Even in his post-judgment motion, where he asked the court to reevaluate the commissions owed for

his work on the NAVFAC Southwest, he did not cite the *Anderson* opinion or otherwise ask the court to use its burden-shifting framework. The appellate argument that the circuit court erred by failing to use the framework set forth in *Anderson* is not properly preserved. *See, e.g.*, *Burnett v. Spencer*, 230 Md. App. 24, 36 (2016) (citing Md. Rule 8-131(a)); *In re Dustin T.*, 93 Md. App. 726, 737 (1992)).

Even if the circuit court had been required to use the framework stated in *Anderson*, we see little likelihood that this framework would have affected the court's ultimate conclusion. Under that framework, an employee must produce evidence sufficient for the finder of fact to determine the amount of compensation owed "as a matter of just and reasonable inference . . . even though the result be only approximate." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. at 687-88. Here, the circuit court recognized that it could award damages based on "a fair and reasonable estimate" of the amount of commissions owed. The court concluded that "the estimates of the net proceeds for the NAVFAC contract" offered by Daniel were "insufficient" to meet this standard. The court here did not erroneously conclude, as the Sixth Circuit had in the *Anderson* case, that an employee could never rely on an "estimate" of the unpaid compensation. The court simply found that Daniel's estimates of the net proceeds from the NAVFAC Southwest contract were not sufficiently reliable for the court to credit.

As explained above, absent clear error, this Court is bound to uphold the court's evaluation of the evidence. *See* Md. Rule 8-131(a). In his brief, Daniel disputes much of the court's assessment of the evidence. In particular, he disputes the court's statement that he "did not know the cost of the following items which would reduce profit on the

[NAVFAC Southwest] contract: the vehicles themselves, the financing, maintenance, roadside assistance, license, tags and titling, and delivery fees." He asserts that all of those costs were "sufficiently accounted for because those costs were grouped together in AutoFlex's financing to an entity known as Mike Albert Ltd."[13] According to his brief, the outgoing amounts "paid to Mike Albert Ltd. contained all these costs." He argues that the cost of each item was not relevant because he provided proof of the total of all relevant costs.

In support of this view of the evidence, Daniel cites a portion of his testimony concerning his estimate of the net proceeds from the NAVFAC Southwest contract. He testified that his estimate was based on "review of the bank statements showing money coming in, being paid by the government, and the money going out to Mike Albert Leasing." Daniel said that, to determine the net proceeds, he subtracted the monthly "lease payment[s]" made to Mike Albert Leasing from the gross amounts received. In this testimony, he did not say that these lease payments included all costs associated with the performance of the contract.

As a supplement to his testimony, Daniel introduced an exhibit (Plaintiff's Exhibit 26) summarizing his calculations of the net proceeds from each contract. This exhibit included a spreadsheet listing each incoming "NAVFAC Monthly Payment" alongside outgoing payments for "Mike Albert Debt Service." This exhibit listed the outgoing payments as "Lease Payment[s] to Mike Albert Leasing." This exhibit did not specify

[13] At various times in the proceedings, the parties identified the financing entity as either "Mike Albert Leasing, LLC" or "Mike Albert, Ltd."

what expenses might be included in this "Debt Service" or "Lease Payment." Using these numbers, Daniel estimated that AutoFlex earned "Gross Profit" of $404,926.96 for the base period and $397,699.92 for the first option year, for a total of $802,626.88.[14]

During cross-examination, counsel for the defendants questioned Daniel about his estimates of the net proceeds from the NAVFAC Southwest contract. The following exchange occurred:

> [COUNSEL FOR THE DEFENDANTS:] I'm going to round this . . . and call it $800,000[.] [O]n that number, do you have any idea what the cost of the vehicles was? Yes or no?
>
> [DANIEL:] At this time? . . . No, no. At one point I structured this deal, I knew exactly what those costs were. At this exact moment I do not.
>
> [DEFENDANTS' ATTORNEY:] Okay. And . . . did you know what the cost of financing was on that?
>
> [DANIEL:] No.
>
> * * *
>
> [DEFENDANTS' ATTORNEY:] All right. Is there usually a cost for maintenance, a line item for maintenance in these contracts?
>
> [DANIEL:] Often.
>
> [DEFENDANTS' ATTORNEY:] And . . . let's take off some of the other costs. Roadside assistance, is that a cost?
>
> [DANIEL:] Could be.
>
> [DEFENDANTS' ATTORNEY:] Are license plates and tagging and titling costs?

[14] According to Daniel's calculations, AutoFlex earned a profit of "$229" per vehicle for each month of the NAVFAC Southwest Contract. By comparison, he estimated that AutoFlex earned a profit of $20 per vehicle for each month of the NCIS contract and the Pentagon Motor Pool contract.

> [DANIEL:] Sometimes the government does their own title and tagging, so sometimes it's possible.
>
> [DEFENDANTS' ATTORNEY:] And is there a delivery charge and delivery fee?

At this point, Daniel's counsel objected, arguing that the questions concerned information that the defendants had failed to provide during discovery. The court overruled the objection, reasoning that the defendants' attorney was "not asking for specific amounts" but "simply whether these categories of costs [were] included" in Daniel's estimates of the net proceeds. After a few additional questions about additional costs, the line of questioning concluded:

> [DEFENDANTS' ATTORNEY:] All right. . . . [W]hat I would like to do is go from gross to net, all right? So if we have gross of roughly $800,000, can you tell me some of the items that would be subtracted from that to get to the net?
>
> [DANIEL:] Are you asking me hypothetically?
>
> [DEFENDANTS' ATTORNEY:] Well, . . . I'll ask you in this contract do you know, and then hypothetically?
>
> [DANIEL:] There were various costs associated with delivering the vehicles for that particular contract, I do not know what those ended up being. And there were, it's reasonable to assume there are some costs, I have no clue what those are.
>
> [DEFENDANTS' ATTORNEY:] And so were those costs subtracted from your thought of $404,926 being a commission?[15]
>
> [DANIEL:] No.

[15] The attorney misdescribed the number in question. The number "404,926.96" was Daniel's estimate of the net proceeds from the base period of the NAVFAC Southwest contract, not the commissions derived from those net proceeds.

This portion of Daniel's testimony was the basis for the court's finding that he "did not know the cost of . . . the vehicles themselves, the financing, maintenance, roadside assistance, license, tags and titling, [or] delivery fees" for the NAVFAC Southwest contract. In his testimony, Daniel did not mention that these costs were included in the monthly payments to Mike Albert Leasing. He appeared to say the opposite: that those costs had not been subtracted from the gross proceeds in his calculations and that he had "no clue" what those costs might be.[16]

In his appellate brief, Daniel points to what he calls a "critical piece of supporting documentation." He cites an exhibit indicating that, when he was working in 2016 to write the proposal for the NAVFAC Southwest contract, he obtained a quote from a vehicle dealer for a "fixed-cost lease package," which, he says, "bundled the costs of the vehicles, maintenance, roadside assistance, title, tagging, and delivery fees." He also points to language within the "Commercial Master Lease Agreement" between AutoFlex and Mike Albert, Ltd., and an amendment to that agreement.[17] He argues that these documents prove that AutoFlex used a "bundled financing arrangement," in which the monthly lease payments to Mike Albert, Ltd., covered all relevant costs of the NAVFAC

[16] Daniel gave similar testimony during direct examination. After questioning about his calculations of the net proceeds from the NAVFAC Southwest contract, counsel for Daniel asked: "Was there any[ ]way to make any determination as to any costs of those contracts?" Daniel answered: "No. None of that information was provided."

[17] Throughout discovery, the defendants had refused to produce documents related to this financing agreement. According to the trial transcript, the defendants produced copies of these documents shortly before trial.

Southwest contract.

Although the court received these documents in evidence, neither Daniel himself nor his counsel claimed at trial that these documents had the significance that he ascribes to these documents on appeal. If Daniel knew, as he now claims, that AutoFlex's "standard procedure" was to bundle all relevant costs "into a fixed-cost lease package," then he could have given testimony to that effect during his case-in-chief and in responses to cross-examination. Similarly, his trial counsel was free to argue that the documents in evidence supported a conclusion that the monthly lease payments included all relevant costs. Daniel's testimony caused the court to conclude that his estimates of the net proceeds from the NAVFAC Southwest contract did not account for those costs. The court's interpretation of the testimony was not clearly erroneous.

Daniel's brief also makes a confusing assertion that his "Trial Exhibit 10 provides the exact costs of the NAVFAC contract." That exhibit cited consists of 48 pages of various emails and email attachments sent between January 2016 and September 2016. His brief fails to explain what those "exact costs" were or where those "exact costs" might be found within those pages. Consequently, he has failed to demonstrate any error in the court's failure to use that exhibit to ascertain the costs.

Daniel points to his testimony that he worked for many months developing the "pricing models" and writing the proposals for the NAVFAC Southwest contract. He claims that, through his work, he gained "direct knowledge" of the costs of the NAVFAC Southwest contract. At trial, however, the court received undisputed evidence that the preliminary work performed by Daniel in 2016 did not correspond to the actual costs for

the NAVFAC Southwest contract. Luis testified, without contradiction, that the original lender selected by Daniel withdrew as a financing source. Afterwards, Luis obtained financing under different terms from an entity known as "Mike Albert Leasing, LLC" or "Mike Albert, Ltd." Thus, the costs that Daniel may have anticipated when drafting the technical proposal for the NAVFAC Southwest contract in 2016 do not necessarily reflect the actual costs later incurred by AutoFlex. The court was not clearly erroneous when it stated that Daniel had "little knowledge" of the "costs of this contract and any net proceeds it may have generated[.]"

In sum, Daniel has not established that the circuit court employed an incorrect standard of proof when it declined to award damages for his work on the NAVFAC Southwest contract. The circuit court was not required to find that the evidence that he offered was adequate to prove that the defendants owed commissions in the amount of $724,846.21 for his work on the NAVFAC Southwest contract.

V. Enhanced Damages under the Wage Payment Statute

As a separate issue, Daniel contends that the court erred when it failed to find that the defendants withheld commissions "not as a result of a bona fide dispute." On that basis, the court declined to award enhanced damages under the Maryland Wage Payment and Collection Law, with respect to most of the unpaid commissions. He asks this Court to require the circuit court to award three times the amount of all unpaid commissions under LE § 3-507.2.

As used in the Maryland Wage Payment and Collection Law (MWCPL), the term "'[w]age' means all compensation that is due to an employee for employment." LE § 3-

501(c)(1). This definition "includes . . . a commission[.]" LE § 3-501(c)(2). The MWPCL requires employers to "set regular pay periods" (LE § 3-502(a)(1)(i)), and to "pay each employee at least once in every 2 weeks of twice in each month[.]" LE § 3-502(a)(1)(ii). The MWPCL requires payment of "all wages due for work that the employee performed before the termination of employment, on or before the day on which the employee would have been paid the wages if the employment had not been terminated." LE § 3-505(a). Together, these provisions require employers to "pay whatever wages are due on a regular basis and to pay all that is due following termination of the employment." *Friolo v. Frankel*, 373 Md. 501, 513 (2003). These provisions extend to "commissions earned during employment yet not payable until after resignation." *Medex v. McCabe*, 372 Md. 28, 35 (2002) (citing *Admiral Mortg., Inc. v. Cooper*, 357 Md. 533, 540 (2000)).

The MWPCL "provides the employee with a private right of action to collect unpaid wages[.]" *Marshall v. Safeway, Inc.*, 437 Md. 542, 557 (2014). The statute provides, in pertinent part: "if an employer fails to pay an employee in accordance with § 3-502 or § 3-505 of this subtitle, after 2 weeks have elapsed from the date on which the employer is required to have paid the wages, the employee may bring an action against the employer to recover the unpaid wages." LE § 3-507.2(a). The statute authorizes additional remedies if the employee proves that the employer withheld wages "not as a result of a bona fide dispute[.]" It provides: "If, in an action under [LE § 3-507.2(a)], a court finds that an employer withheld the wage of an employee in violation of this subtitle and not as a result of a bona fide dispute, the court may award the employee an

amount not exceeding 3 times the wage, and reasonable counsel fees and other costs." LE § 3-507.2(b).

The remedies created by LE § 3-507.2 were "designed as 'a vehicle for employees to collect, and an incentive for employers to pay,'" all wages in full. *Ocean City, Maryland Chamber of Commerce, Inc. v. Barufaldi*, 434 Md. 381, 393 (2013) (quoting *Medex v. McCabe*, 372 Md. at 39). The fee-shifting provision was "designed to ensure that an employee will have the assistance of competent counsel" even when pursuing "a relatively small claim." *Ocean City, Maryland Chamber of Commerce, Inc. v. Barufaldi*, 434 Md. at 393. The "treble damages option was included in the statute for a remedial purpose" of curing "an apparently widespread failure to pay workers their wages due and owing" and curing the "practical difficulties that employees had in bringing lawsuits to recover wages owed." *Peters v. Early Healthcare Giver, Inc.*, 439 Md. 646, 662 & n.14 (2014).

A bona fide dispute exists "where the employer has a good faith basis for refusing an employee's claim for unpaid wages" based on "'a legitimate dispute over the validity of the claim or the amount that is owing[.]'" *Peters v. Early Healthcare Giver, Inc.*, 439 Md. at 657 (quoting *Admiral Mortg., Inc. v. Cooper*, 357 Md. at 543). The determination of the existence of a bona fide dispute concerns "the employer's 'actual, subjective belief that the [employer]'s position is objectively and reasonably justified.'" *Peters v. Early Healthcare Giver, Inc.*, 439 Md. at 657 (quoting *Barufaldi v. Ocean City, Maryland Chamber of Commerce, Inc.*, 206 Md. App. 282, 293 (2012), *vacated on other grounds*, 438 Md. 304 (2014)) (further quotation marks omitted). Under this standard, an

employer's "incorrect . . . belief" that it had no legal obligation to pay the wages in question "may form the basis of a legitimate bona fide dispute." *Peters v. Early Healthcare Giver, Inc.*, 439 Md. at 659 n.12.

In some cases, there may be a bona fide dispute as to certain wages claimed, but no bona fide dispute as to other wages claimed. If the employer "concedes that a certain amount of wages are due . . ., the employer acts at [its] peril in failing to pay the conceded amount." *Baltimore Charters, Ltd. v. Ayd*, 365 Md. 366, 397 (2001). In those circumstances, the court may award enhanced damages on "those amounts which were not in dispute but for which the employer failed to make timely payment[.]" *Id.* at 397-98.

In an action under LE § 3-507.2, the employee bears "the initial burden of proving that [the employee] in fact performed the work that was inadequately compensated." *Peters v. Early Healthcare Giver, Inc.*, 439 Md. at 657. "In this context, the employer is in the best position to bring forward evidence concerning its own subjective belief as part of establishing a bona fide dispute." *Id.* at 658. Accordingly, the employer bears the burden to produce evidence that the employer withheld wages because of a bona fide dispute. *Id.* The employer will fail to meet this burden if the employer fails to produce any evidence that it actually believed that it had a legitimate reason for failing to pay the wages. *Id.* at 659-60. If the employer satisfies its burden of production, "the burden of production shifts back to the employee to rebut the employer's reason." *Id.* at 658. The ultimate burden of persuasion remains with the employee. *Id.*

If the trier of fact finds that the employer withheld wages not as a result of a bona

fide dispute, the trier of fact may award or decline to award up to three times the amount of the unpaid wages. *Peters v. Early Healthcare Giver, Inc.*, 439 Md. at 661. In other words, "an employee is not presumptively entitled to enhanced damages, even if the court finds that wages were withheld without a bona fide dispute." *Id.* at 662. Nevertheless, "trial courts are encouraged to consider the remedial purpose of the [MWPCL] when deciding whether to award enhanced damages to employees." *Id.* at 663.

In the present case, the circuit court awarded enhanced damages with respect to some of the unpaid wages. The court found that the defendants failed to pay $6,623.00 for compensation that Daniel earned before he left his position in October 2016. When granting his post-judgment motion, the court explained that the defendants offered "little or no contradiction" of this claim. The court found that "there was no bona fide dispute as to the payment of this sum." The court awarded an additional $13,246.00, resulting in a recovery of three times the amount of those unpaid wages.

Aside from those enhanced damages, the court declined to award enhanced damages for any other unpaid commissions. The court noted that "[t]he [d]efendants' conduct in failing to comply with discovery requests impaired Daniel's ability to introduce proof of damages, specifically the amount of 'net sales' received by AutoFlex" from the contracts for which he was seeking commissions. The court found that he was entitled to commissions of: $3,960.00 for the final extension of the Pentagon Motor Pool contract; $14,904.00 for the second option year of the NCIS contract; and $14,850.00 for the sale of vehicles at the end of the NCIS contract. Pointing to his lack of personal knowledge or documentary evidence regarding the net proceeds from the remaining

transactions, the court awarded no damages for those transactions.

Addressing Daniel's request for enhanced damages and counsel fees under LE § 3-507.2(b), the court wrote:

> As explained above, the precise amount of commissions owed to [Daniel], even now, remains difficult to determine with any degree of exactitude. For this reason, the court finds that there was a bona fide dispute as to the amount of commissions to be paid to [Daniel], precluding the recovery of treble damages and attorneys' fees under this count.

On appeal, Daniel contends that the circuit court "used a wrong basis for determining whether there was a bona fide dispute." He asserts that the court perceived the existence of a bona fide dispute by "look[ing] at the challenges that [he] faced in establishing net profits for commissions[.]" He further argues that the court's ruling improperly rewarded the defendants for withholding documents and then using that "employer-created" obstacle as the basis for denying enhanced damages.

Generally, the existence or absence of a bona fide dispute under LE § 3-507.2 is a question of fact for the trier of fact. *See Baltimore Charters, Ltd. v. Ayd*, 365 Md. 366, 396 (2001) (citing *Admiral Mortg., Inc. v. Cooper*, 357 Md. 533, 551 (2000)). Where the court serves as the trier of fact, the decision to award enhanced damages, and if so the amount of those enhanced damages, is a discretionary decision for the court as the trier of fact. *Admiral Mortg., Inc. v. Cooper*, 357 Md. at 547-53. "The standard that a trial court applies in evaluating" a claim for enhanced damages or attorneys' fees under the MWPCL "is a legal decision; the conclusion that the court arrives at after applying that standard to the facts of the particular case is an exercise of discretion." *Ocean City, Md. Chamber of Commerce, Inc. v. Barufaldi*, 434 Md. 381, 391 (2013). Thus, we review the

standard that the court used to evaluate the existence of a bona fide dispute without deference. *See id.*

In this case, the circuit court employed an incorrect standard. The relevant definitions of a bona fide dispute examine "whether the party making or resisting the claim [for unpaid wages] has a good faith basis for doing so[.]" *Admiral Mortg., Inc. v. Cooper*, 357 Md. at 543. As explained above, the inquiry into whether an employer withheld wages as the result of a bona fide dispute "focuses on 'the employer's actual, subjective belief that the party's position is objectively and reasonably justified.'" *Pinnacle Group, LLC v. Kelly*, 235 Md. App. 436, 465 (2018) (quoting *Peters v. Early Healthcare Giver, Inc.*, 439 Md. at 657) (further quotation marks omitted). Once an employee satisfies "the initial burden of proving that [the employee] in fact performed the work that was inadequately compensated[,]" the employer bears the burden of "bring[ing] forward evidence concerning its own subjective belief as part of establishing a bona fide dispute." *Peters v. Early Healthcare Giver, Inc.*, 439 Md. at 657-58.

Here, the court found that Daniel was entitled to commissions in the total amount of $33,714.00 for his work on the NCIS contract and the Pentagon Motor Pool contract. It was undisputed that the defendants failed to pay those commissions. Under the court's findings, therefore, Daniel met his burden of proving that he was inadequately compensated in the amount of $33,714.00. Next, the court was required to evaluate any reasons offered by the defendants for their refusal to pay those commissions for those transactions. This evaluation should have examined whether the defendants acted in good faith, with an actual, subjective belief that Daniel was not entitled to commissions

from those transactions.

The circuit court did not make this required evaluation. Instead, the court highlighted the "difficult[y]" that Daniel faced at trial in determining the "precise amount of commissions owed[.]" "[F]or th[at] reason," the court found that "there was a bona fide dispute as to the amount of commissions to be paid[,]" thereby "precluding the recovery of treble damages and attorneys' fees" under the MWPCL. It seems that the court perceived an entirely different type of "dispute" that was present in the case. The court identified a dispute that existed, at least at the time of trial, as to the exact amount of commissions owed. The court did not assess whether the defendants "withheld" commissions "not as a result of a bona fide dispute" (LE § 3-507.2(b)) at the time that the commissions first became due.

The "difficult[ies]" that Daniel faced in determining the exact amount of commissions were unrelated to the defendants' actual, subjective reasons for withholding commissions for the transactions in question. The defendants did not claim that they failed to pay Daniel promptly because AutoFlex was experiencing some difficulty in determining the net proceeds from those transactions. Nor did they offer testimony that they calculated an amount of net proceeds, paid commissions on that amount, and then disputed his claim for additional commissions. Rather, Luis offered a variety of other reasons why he believed that AutoFlex was not obligated to pay any commissions for those transactions. He did not mention any supposed difficulties in determining the net proceeds as a reason why AutoFlex failed to pay those commissions.

In his brief, Daniel asks this Court to direct the circuit court to award him three

times the amount of commissions owed. He asserts that the defendants "did not dispute that commissions were owed." According to Daniel, the only dispute was whether he was entitled to 45 percent or 38 percent of the net proceeds. He asserts that this case "is not a situation in which there was a dispute as to whether any commission was owed at all, but rather the amount of the commission."[18]

We disagree with this characterization of the evidence. It is true that the defendants vigorously disputed whether the three contracts at issue were "representative sourced opportunities" which would generate commissions at the rate of 45 percent. But it is not true that the rate of commissions was the *only* dispute.

At trial, Luis testified that he believed that Daniel had been "paid as agreed" by AutoFlex and thus that the defendants did not owe him any commissions. Among other things, Luis testified that he believed that Daniel was not entitled to commissions on the net proceeds from any sales of vehicles at the end of contracts. Luis emphasized that the NCIS contract and the Pentagon Motor Pool contracts predated the written agreement. He appeared to acknowledge that, under the agreement, Daniel might have been entitled to commissions on option years and extensions, "if he had performed" certain "contract administration" and "customer service" responsibilities for those contracts. Luis testified that Daniel performed "none" of the servicing work for AutoFlex contracts after October

[18] Under the terms of his own argument, Daniel overstates the enhanced damages that could be awarded. If a bona fide dispute existed over the rate of commissions, then he would not be entitled to enhanced damages on commissions calculated at the rate of 45 percent of the net proceeds. The court, at most, could award up to three times the amount of commissions when calculated at the rate of 38 percent. *See Baltimore Charters, Ltd. v. Ayd*, 365 Md. at 397.

2016.

Much of Luis's testimony about his understanding of AutoFlex's obligations under the Sales Agent Agreement was open to interpretation. Nevertheless, it is incorrect to say that the defendants conceded that AutoFlex was required to pay commissions of at least 38 percent of the net proceeds from the transactions in question. To the contrary, Luis repeatedly expressed his belief that Daniel was not entitled to *any* of the commissions sought.

The question of whether Luis had actual, subjective belief that AutoFlex was not obligated to pay commissions for the transactions in question is a question of fact for the circuit court. *See Admiral Mortg., Inc. v. Cooper*, 357 Md. at 551. Based on the evidence, the court might conclude that the reasons offered were pretextual. On the other hand, the court might credit his testimony and find that he acted in good faith. It is not our role to make this factual determination. *See Baltimore Harbor Charters, Ltd. v. Ayd*, 365 Md. at 396. If the court makes a predicate finding that the defendants withheld wages not as a result of a bona fide dispute, it not our role to dictate the court's discretion in assessing whether to award enhanced damages and the amount of those enhanced damages. *See Peters v. Early Healthcare Giver, Inc.*, 439 Md. at 661-62.

To summarize, we conclude that the circuit court employed an incorrect standard in evaluating whether AutoFlex withheld wages "not as a result of a bona fide dispute" within the meaning of LE § 3-507.2(b). We will set aside the court's decision to decline to award enhanced damages on $33,714.00 of wages that, the court found, the defendants withheld in violation of the MWPCL.

On remand, the court must reevaluate that decision. The court should reevaluate the evidence presented at trial concerning the reasons why the defendants failed to pay commissions for the three transactions in question: the final extension of the Pentagon Motor Pool contract; the second option year of the NCIS contract; and the sale of vehicles at the end of the NCIS contract. Evidence pertinent to this determination includes Luis's testimony and other oral or written statements concerning AutoFlex's refusal to pay commissions. The court should keep in mind that the defendants' reasons for failing to pay commissions may vary based on the transaction. The court should make distinct findings as to whether, for each of the three transactions, the defendants withheld commissions as a result of an actual, subjective belief that failing to pay commissions was objectively and reasonably justified.

In addition, there may be multiple layers of payment disputes. A dispute over whether Daniel was entitled to commissions at all should not be confused with the dispute over the rate of commissions. The court might find that there was no bona fide dispute that AutoFlex owed commissions for a particular transaction, but also find that there was a bona fide dispute over the rate of commissions owed. In that event, the court could award up to three times the amount of commissions when calculated at the lower rate of commissions (38 percent, the rate that would not be in bona fide dispute), not three times the amount of commissions when calculated at the higher rate of commissions (45 percent, the rate that would be in bona fide dispute). *See Baltimore Charters, Ltd. v. Ayd*, 365 Md. at 397-98.

If the court finds that the defendants withheld any of these commissions "not as a

result of a bona fide dispute," then the court must exercise its discretion in deciding whether to award up to three times the amount of the unpaid commissions. In the exercise of that discretion the court is "encouraged to consider the remedial purpose" of the MWPCL. *Peters v. Early Healthcare Giver, Inc.*, 439 Md. at 663.

If the court makes a finding that the defendants withheld commissions "not as a result of a bona fide dispute," the court may award not only enhanced damages but also "reasonable counsel fees and other costs[.]" LE § 3-507.2(b). Accordingly, after reconsidering the issue of enhanced damages, the court should consider whether to award counsel fees under this statute, as an additional ground for the award of attorneys' fees. In light of the remedial purpose of the statute, "when the factfinder concludes that there was no 'bona fide dispute' as to the employer's liability, 'courts should exercise their discretion liberally in favor of awarding a reasonable fee, unless the circumstances of the particular case indicate some good reason why a fee award is inappropriate in that case.'" *Ocean City, Maryland, Chamber of Commerce, Inc. v. Barufaldi*, 434 Md. 381, 393-94 (2013) (quoting *Friolo v. Frankel*, 373 Md. 501, 518 (2003)).

VI. Attorneys' Fees Awarded Under the Contract

In their cross-appeal, the defendants contend that the circuit court abused its discretion when it ordered them to pay attorneys' fees incurred by Daniel. They ask this Court to vacate the award of attorneys' fees and to remand the case for a new determination of whether to award attorneys' fees and, if so, in what amount.

The circuit court issued two separate orders requiring the defendants to pay attorneys' fees. Before trial, the court ordered the defendants, under Md. Rule 2-433, to

pay $5,487.00 for attorneys' fees incurred as a result of the defendants' discovery failures. After trial, the court ordered the defendants to pay $33,985.32 of attorneys' fees under a contractual provision authorizing an award of attorneys' fees to the prevailing party in litigation arising from the agreement. Because the court made these orders at different times and on different grounds, these two awards call for separate analyses.

In his motion for sanctions in February 2020, Daniel requested an order requiring the defendants to pay the attorneys' fees that he incurred as a result of the defendants' failures to comply with his requests for production of documents. Maryland Rule 2-433(a) provides that, if the court finds a failure of discovery, "the court, after opportunity for hearing, shall require the failing party or the attorney advising the failure to act or both of them to pay the reasonable costs and expenses, including attorneys' fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of costs and expenses unjust."

Along with his motion, Daniel filed a verified statement from his attorney as required by Md. Rule 2-433(e). His attorney affirmed that he had incurred $4,602.00 of attorneys' fees as a result of the defendants' refusal to produce documents. The verified statement included a summary of the legal services performed in attempts to obtain the documents and the fees incurred for those services.

The defendants filed no response in opposition to the motion for sanctions. Nor did the defendants file any response to the verified statement in support of the request for attorneys' fees. The defendants then failed to appear at the scheduled hearing for the motion for sanctions and request for attorneys' fees.

At the hearing in July 2020, Daniel's attorney stated that his client had incurred an additional $885.00 of attorneys' fees for services performed in preparing for and attending the hearing. His attorney asked the court to order the defendants to pay those additional fees, for a total of $5,487.00. The court granted the request. The court ordered the defendants to pay $5,487.00, "representing attorney's fees incurred by [Daniel] in pursuit of the discovery withheld by the [d]efendants[.]"

Although the defendants moved to vacate the order of default, their motion included no challenges to the award of attorneys' fees under Md. Rule 2-433 or to the statement in support of the request for that award. The court ultimately denied their motion to vacate the order of default. In denying their motion, the court also directed the defendants to pay the amount of $5,487.00 before trial. On the second day of trial, counsel for Daniel informed the court that the defendants issued a check in the amount of $5,487.00, as required by the court's order.

In their cross-appeal, the defendants argue that the order requiring them to pay $5,487.00 in attorneys' fees resulting from their discovery violation is excessive. They draw attention to some items of legal services described in the verified statement in support of the request for the award of attorneys' fees, such as emails and phone calls between the attorney and his client or opposing counsel. They dispute whether the descriptions of those legal services adequately show that these services related to discovery failures.

The time has long since passed for raising an item-by-item challenge to the statement in support of the request for his attorneys' fees. Maryland Rule 2-433(f)

provides: "Within 15 days after the filing of a statement in support of a request for an award of costs, expenses, or attorneys' fees, a party against whom the award in sought may file a response." Daniel filed the verified statement in support of his request for his attorneys' fees on February 22, 2020. During the 15-day period that followed, the defendants had the opportunity to raise any objections to the request for attorneys' fees or to the verified statement supporting the request. The defendants did not file a response within that time period or at any time thereafter. Because the defendants failed to present these issues to the circuit court, this Court will not address those issues for the first time on appeal. *See Hoang v. Hewitt Ave. Assocs., LLC*, 177 Md. App. 562, 614 (2007) (citing Md. Rule 8-131(a)).

In any event, we see no abuse of discretion in the decision to grant the request for attorneys' fees in connection with the order imposing discovery sanctions. The defendants have not questioned the reasonableness of the hourly billing rate. Given the magnitude of the discovery failures found by the court, the number of hours billed (18.6 hours) is hardly excessive. When reviewing requests for attorneys' fees, trial courts should not proceed "like a billing auditor" rejecting fees whenever it regards a particular time entry to be "insufficiently detailed." *Estate of Castruccio v. Castruccio*, 247 Md. App. 1, 59 (2020). Rather, the court may "find the billing records to be adequate 'even if the description for each entry was not explicitly detailed,' such as when the lawyers failed to identify the general subject matter of the activity involved,' with entries such as ''Conference with," "Research," "Review file," "Review documents," etc.'" *Id.* at 58-59 (quoting *Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 553 (6th Cir. 2008)) (other

citations and quotation marks omitted).

In addition to the order requiring the defendants to pay attorneys' fees resulting from their discovery failures, the circuit court ordered the defendants to pay $33,985.32 of attorneys' fees as part of the final judgment. That amount represents the balance of the attorneys' fees incurred by Daniel in the litigation (after subtracting $5,487.00 for attorneys' fees already paid by the defendants under the pretrial order). The court declined to award attorneys' fees under the count for violation of the Maryland Wage Payment and Collection Law. The court awarded attorneys' fees under the count for breach of contract, based on the fee-shifting provision from the Sales Agent Agreement.

The agreement provides: "The prevailing party in any legal action brought by one party against the other and arising out of this Agreement shall be entitled, in addition to any other rights and remedies it may have, to reimbursement for its expenses, including court costs and reasonable attorneys' fees." Because this fee-shifting provision "plainly states that the prevailing party '*shall* be entitled'" to reimbursement for attorneys' fees, the trial court "did not have discretion to refuse to award fees altogether." *Myers v. Kayhoe*, 391 Md. 188, 207-08 (2006) (emphasis in original). Once the court determined that a party seeking reimbursement of attorneys' fees under this provision was the prevailing party, however, the trial court had discretion to evaluate the reasonableness of the attorneys' fees and to determine the amount of attorneys' fees to award. *Id.* at 207. The determination of the reasonableness of attorneys' fees "is a factual determination that will not be overturned unless clearly erroneous." *Plank v. Cherneski*, 469 Md. 548, 616 (2020).

The defendants assert that "both parties prevailed" in this action. The defendants argue that the circuit court should have ordered Daniel to pay some of their attorneys' fees or, at least, "put into consideration the amount of attorneys' fees" that they paid when determining the award of attorneys' fees. They argue that the court erred or abused its discretion by ordering them to pay all attorneys' fees incurred by Daniel, "after denying all but a portion of [his] claims[.]"

The defendants' suggestion that the court should have required Daniel to pay their attorneys' fees is meritless. Maryland Rule 2-705 governs "an award of attorneys' fees attributable to litigation in a circuit court pursuant to a contractual provision permitting an award of attorneys' fees to the prevailing party in litigation arising out of the contract." Md. Rule 2-705(a). This Rule specifies that "[a] party who seeks attorneys' fees from another party pursuant to this Rule shall include a claim for such fees in the party's initial pleading or, if the grounds for such a claim arise after the initial pleading is filed, in an amended pleading filed promptly after the grounds for the claim arise." Md. Rule 2-705(b).

The defendants did not raise any claim for attorneys' fees under the agreement in their answer to the complaint, filed in May 2018. More than two years later, the defendants attempted to file an untimely counterclaim, which included requests for attorneys' fees. The court granted Daniel's motion to strike the untimely counterclaim. Because no claim to award attorneys' fees to the defendants was before the court, the court did not consider their non-existent claim. Moreover, the court could not "consider[]" the "amount" of attorneys' fees paid by the defendants, because they failed

to introduce any evidence concerning the amount of fees that they incurred or the reasonableness of those fees. Any "party requesting fees has the burden of providing the court with the necessary information to determine the reasonableness of its request." *Myers v. Kayhoe*, 391 Md. at 207.

Even if the defendants had raised a claim under the fee-shifting provision of the contract in compliance with Rule 2-705, the defendants were not "[t]he prevailing party in [a] legal action brought by one party against the other and arising out of th[e] Agreement[.]" The circuit court determined that the defendants were liable for breach of contract. The court found that Daniel was entitled to commissions calculated at the rate of 45 percent of the net proceeds from all transactions for which he was seeking commissions. The court also found that "[t]he defendants' conduct in failing to comply with discovery requests impaired Daniel's ability to introduce proof of damages, specifically the amount of 'net sales' received by AutoFlex from any of the subject contracts." Daniel's partial success, despite the defendants' failure to disclose evidence needed to establish the full extent of unpaid commissions, does not mean that the defendants "prevail[ed]" in an action arising out of the contract.

Moreover, to the extent that the defendants argue that the court abused its discretion in evaluating the award of attorneys' fees, their argument is not properly presented for this Court's consideration. As Daniel points out, the defendants did not provide all transcripts needed to review the ruling on attorneys' fees.

After the trial, the court initially ordered the defendants to pay $30,061.82 of attorneys' fees, representing the amount of fees that Daniel had incurred at the time.

After the parties made competing post-judgment motions, the court issued an amended judgment, but declined to reduce the award of attorneys' fees. The defendants moved for reconsideration on several issues, including the award of attorneys' fees. Meanwhile, Daniel made an updated request for additional attorneys' fees incurred in litigating the post-judgment motions.

In both of their post-judgment motions, the defendants argued that the court had failed to explain its consideration of the factors listed in Md. Rule 2-703(f)(3) when evaluating the request for attorneys' fees. The defendants also argued that court had used a "lodestar type calculation," which, in their view, was "not appropriate" under the circumstances of the case. Their motions did not, however, include the argument raised on appeal—that Daniel was not entitled to reimbursement for all fees incurred because he did not "prevail" on all claims raised.

The court held a hearing on the defendant's motion to alter or amend the amended judgment on December 7, 2021. On that same date, the court issued an order denying their motion and increasing the award of attorneys' fees. The order stated: "For the reasons stated on the record at a hearing on December 7, 2021, the court having made findings pursuant to Md. Rule 2-703(f)(3), the court amends its prior award of attorneys' fees to [Daniel] and awards the total amount of $33,985.32 to [Daniel]." This order indicates that the court made express findings about the reasons for the award of attorneys' fees award during the hearing on December 7, 2021. The record does not include a transcript from that hearing.

Nothing in the record shows that the defendants requested the preparation of a

transcript from that hearing. Under Md. Rule 8-411(a)(2), an appellant must "order in writing from the court reporter a transcript containing . . . a transcription of any portion of any proceeding relevant to the appeal that was recorded . . . and that: (A) contains the ruling or reasoning of the court or tribunal, or (B) is otherwise reasonably necessary for the determination of the questions presented by the appeal and any cross-appeal[.]" The trial court's statement of reasons for the award of attorneys' fees is, of course, necessary to evaluate the defendants' contention that the court abused its discretion in evaluating the award of attorneys' fees. Because the defendants failed to obtain those transcripts in connection with their cross-appeal, their challenge to the court's exercise of discretion is not properly before us. *See Kovacs v. Kovacs*, 98 Md. App. 289, 303 (1993) (stating that "[t]he failure to provide the court with a [necessary] transcript warrants summary rejection of [a] claim of error").

In addition, an appealing party must provide a record extract or appendix with "all parts of the record that are reasonably necessary for the determination of the questions presented by the appeal and any cross-appeal." Md. Rule 8-501(c). The defendants filed an appendix to their brief under Rule 8-501(e), but their appendix does not include any transcript of the hearing from December 7, 2021, most likely because the transcript itself is not part of the record. The failure to provide a proper record extract or appendix precludes this Court from assessing the defendants' claim of error or abuse of discretion in the award of attorneys' fees. *See Grubb Contractors v. Abbott*, 84 Md. App. 384, 388-89 (1990).

Absent the court's statement of reasons, we will not speculate as to what factors

the court may have considered. It shall suffice to say that it is not legal error for a court to award all attorneys' fees incurred by the prevailing party, even when the prevailing party does not obtain all relief sought. The "amount involved and the results obtained" (Md. Rule 2-703(f)(3)(H)) is one factor to be considered in assessing the reasonableness of the attorneys' fees. "In the context of an award of attorney's fees, a litigant is a 'prevailing party' if [the litigant] succeeds 'on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Royal Investment Group, LLC v. Wang*, 183 Md. App. 406, 457 (2008) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). Under this definition, a party "does not have to win it all to be regarded as prevailing." *Friolo v. Frankel*, 373 Md. 501, 523 (2003). This Court has rejected any "purely quantitative" standard for evaluating whether one party has prevailed as to the substantial part of the litigation. *Stevenson v. Branch Banking & Trust Corp.*, 159 Md. App. 620, 662 (2004) (rejecting argument that plaintiff was not prevailing party where plaintiff received only a fraction of damages sought).

In sum, without a transcript of the court's ruling, we cannot properly assess the challenge to the award of attorneys' fees under the fee-shifting provision of the contract. Under the circumstances, the decision to award the full amount of attorneys' fees incurred by Daniel does not constitute an error of law.

CONCLUSION

For the reasons stated in this opinion, the judgment is affirmed in part and vacated in part. The case is remanded to the circuit court for the purpose of reevaluating the requests for enhanced damages and attorneys' fees under the Maryland Wage Payment

and Collection Law.

The judgment is affirmed insofar as it establishes that AutoFlex is liable for breach of contract and that AutoFlex and Luis MacDonald are liable for violation of the Maryland Wage Payment and Collection Law. The judgment is affirmed to the extent that it orders the defendants to pay damages of $6,623.00, plus enhanced damages of $13,246.00 under the Maryland Wage Payment and Collection Law.

The judgment is affirmed to the extent that it orders the defendants to pay damages of $33,714.00, representing unpaid commissions related to the Pentagon Motor Pool contract and NCIS contract. The judgment is vacated to the extent that the court declined to award enhanced damages on those unpaid commissions plus reasonable counsel fees under the Maryland Wage Payment and Collection Law. The court must reevaluate whether the defendants withheld those commissions "not as a result of a bona fide dispute" and, if so, whether to award an amount not exceeding three times the unpaid commissions, plus reasonable counsel fees and other costs. LE § 3-507.2(b).

The judgment is affirmed insofar as it includes the interlocutory order requiring the defendants to pay $5,487.00 of attorneys' fees incurred as a result of the defendants' failures of discovery under Md. Rule 2-433. Finally, the judgment is affirmed to the extent that it orders the defendants to pay $33,985.32 for attorneys' fees and expenses incurred by Daniel MacDonald as the prevailing party in litigation arising out of the contract. The court may, however, reevaluate whether LE § 3-507.2(b) provides an additional basis for the award of attorneys' fees.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED IN PART AND VACATED IN PART. CASE REMANDED TO THE CIRCUIT COURT FOR FURTHER PROCEEDINGS CONSISTENT WIH THIS OPINION. COSTS TO BE PAID ONE-SIXTH BY APPELLANT AND FIVE-SIXTHS BY APPELLEES.