Circuit Court for Howard County
Case No. 13-C-16-109204

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 134

September Term, 2018

JUDITH A. HANRAHAN, ET AL.

v.

WYNDHAM CONDOMINIUM ASSOCIATION

Kehoe,
Arthur,
Reed,

JJ.

Opinion by Kehoe, J.

Filed: July 30, 2019

Judith Hanrahan and her son, Brian Hanrahan, appeal from a decision of the Circuit Court for Howard County granting summary judgment in favor of Wyndham Condominium Association, Inc. ("Wyndham") in their lawsuit alleging claims for breach of a settlement agreement, defamation, and related counts. In their brief, the Hanrahans identify twenty-five errors on the part of the circuit court and have selected two as issues for this Court's consideration. We have reworded them slightly:

> 1. Did the circuit court err by granting summary judgment to Wyndham as to the Hanrahans' breach of contract and misrepresentation claims based upon their failure to designate an expert witness to opine on the issue of damages?
>
> 2. Did the circuit court abuse its discretion when it entered an order sealing a privileged email between Wyndham and its prior counsel on the ground that it had been inadvertently disclosed during discovery?

Because our answer to both of these questions is "no," we will affirm the judgment of the circuit court.

Facts and Proceedings

This is the second appeal to reach this Court arising from a dispute that began in 2008 over the towing of a car. In his opinion for a panel of this Court in *Brian Hanrahan v. Wyndham Condominium Association, Inc.*, No. 765, Sept. Term 2011 (Md. App. Feb. 26, 2013) ("*Hanrahan I*"), Judge Zarnoch set out the background facts:

> [Mr. Hanrahan] and [Ms. Hanrahan] jointly own a condominium at 5827 Wyndham Circle in Columbia, Maryland. In 2008, Wyndham caused a vehicle owned or operated by [Mr. Hanrahan] to be towed from the property. [Mr. Hanrahan] and [Ms. Hanrahan] believed that the vehicle was towed improperly, in violation of Wyndham's bylaws, and filed a suit against Wyndham in the District Court for Howard County ["the First

> Towing Case"]. Wyndham filed a counterclaim for attorney's fees. At trial, Wyndham argued that the district court lacked subject matter jurisdiction over the case because resolving the issue required that the district court sit as an equity court to determine whether the enforcement action was proper. The district court agreed and dismissed the Hanrahans' claim. Wyndham likewise dismissed its counterclaim for attorney's fees. Later, Wyndham apparently attempted to bill the Hanrahans for the attorney's fees it incurred as a result of their claim, as provided for in Wyndham's governing documents, but was unable to secure payment.

Id., slip op. at 1-2 (footnotes omitted).

Wyndham was represented by Nagle & Zaller, P.C. in the First Towing Case. After that action was dismissed, Nagle & Zaller pursued collection of its attorneys' fees on Wyndham's behalf. On February 2, 2011, Wyndham, through Craig Zaller, a named partner at the same law firm, caused a lien to be recorded in the Land Records for Howard County against the Hanrahans' condominium unit in the amount of $724.84 "plus interest . . . fines, costs of collection and actual attorney's fees incurred." In a letter to the Hanrahans' counsel, Wyndham calculated the total outstanding amount to be $3,929.14.

On February 10, 2011, Mr. Hanrahan filed suit against Wyndham in the Circuit Court for Howard County challenging the lien ("the Lien Case"). Wyndham moved to dismiss the Lien Case on limitations grounds. At a hearing on the motion, the circuit court converted the motion to dismiss to one for summary judgment and granted judgment in favor of Wyndham for a reason unrelated to limitations. Mr. Hanrahan appealed. *See Hanrahan I.*

During the pendency of the *Hanrahan I* appeal, on September 14, 2011, Ms. Hanrahan filed a second action against Wyndham and related entities in the District Court of Maryland for Howard County for damages arising from the towing of the car (the "Second Towing Case"). Wyndham again counterclaimed for attorneys' fees. In April 2012, Ms. Hanrahan prevailed and was awarded $300 in damages. The court also entered judgment in favor of Ms. Hanrahan on Wyndham's counterclaim.

On February 26, 2013, a panel of this Court filed its unreported opinion in *Hanrahan I*, reversing the judgment of the circuit court. The panel held that the circuit court erred by converting Wyndham's motion to dismiss to one for summary judgment without giving Mr. Hanrahan an opportunity to respond to the motion and to provide evidence. *Hanrahan I*, slip op. at 8-11. We remanded the case to the circuit court for further proceedings.

After the *Hanrahan I* mandate was issued, the parties executed a Settlement Agreement and Mutual Release ("the Agreement"). Among other matters, (1) Wyndham agreed to file a release of the lien on the Hanrahans' unit; (2) the parties agreed to jointly dismiss with prejudice the claims outstanding in the Lien Case; (3) the parties mutually released one another from all claims existing on the date of the execution of the Agreement. (We will refer to this provision as the "Release Clause.").

At the heart of the parties' present dispute is Paragraph 4 of the Agreement (the "Litigation Clause"). The relevant parts of the Litigation Clause required Wyndham to sue Nagle & Zaller to recover legal fees paid by Wyndham to that law firm. Wyndham's

obligation to do so, however, was subject to a number of provisos and contingencies. For example, Wyndham was obligated to commence litigation only if it could retain counsel to represent it on a "100% contingent basis." Additionally, the Litigation Clause provided that the parties would execute waivers and releases to permit Lawrence Holzman, Esq., the lawyer representing the Hanrahans at the time, to represent Wyndham relative to the lawsuit against Nagle & Zaller**.** Finally, if Holzman was unable or unwilling to pursue the litigation, Wyndham agreed to make "diligent efforts" to find other counsel to pursue the claim against Nagle & Zaller.

The Litigation Clause also obligated Wyndham to pay the Hanrahans 45% of any recovery it obtained against from Nagle & Zaller. Wyndham also agreed not to settle its claims against the law firm for an amount less than $800,000 without the Hanrahans' prior consent. If Wyndham breached this "settlement limitation," then the Hanrahans would be entitled to liquidated damages in the amount of $207,000.[1]

Simultaneously with the execution of the Agreement, the parties signed a waiver agreement permitting Holzman to represent Wyndham in the Nagle & Zaller action. Wyndham then signed a retainer agreement with Holzman.

Ten days later, Holzman contacted Walter Clark, who was at the time the president of Wyndham's Board of Directors ("the Board"), to outline his plan for the

[1] This amount was calculated by deducting from the $800,000 settlement threshold "expected contingent attorney fees of $320,000" and $20,000 in out-of-pocket costs and then multiplying the remainder by 45%.

"initial stages of investigation and drafting a suit on behalf of [W]yndham." He advised that he would need to interview current and former Board members; identified other attorneys he planned to reach out to and potential expert witnesses he wished to retain; and asked for access to all of Wyndham's "official books and records and all written communications, particularly any file that is expressly labeled as related to the Hanrahans[.]" He asked for contact information for current and former Board members and for Wyndham's property management company, Tidewater Property Management ("Tidewater"). Clark replied promptly and advised that he would provide the requested information within a few days.

Thereafter, Holzman investigated the feasibility of a legal action against Nagle & Zaller. A few months later, Mr. Hanrahan, who had been elected to Wyndham's Board, advised the Board's president that Tidewater had been in communication with Nagle & Zaller concerning the potential litigation. A Tidewater employee asked Mr. Hanrahan if he would consider accepting $15,000 from Nagle & Zaller to "drop any claim." Mr. Hanrahan also advised the Board that Tidewater was refusing to provide information to Mr. Holzman relevant to his investigation.

As a result, the Board held a conference call on February 24, 2014 with Holzman. During that phone call, Holzman was asked when he planned to file suit and he replied that "he did not have a timeline" because he was waiting on necessary information from Tidewater.

Three days later, Holzman met with one of Tidewater's owners. The meeting was fruitful, and Tidewater agreed to provide the requested information "on [an] ASAP basis." Holzman advised the Board by email that to commence litigation against Nagle & Zaller, he would need to, metaphorically, "put together a giant jigsaw puzzle" using pieces mixed up with pieces from "100 other puzzles." He would begin by obtaining electronic records from Tidewater, but he also needed to undertake the "time-consuming and tedious" task of reviewing boxes of hard-copy files in Tidewater's control.

The Board agreed that Mr. Hanrahan would review the Tidewater documents. He visited Tidewater's offices, reviewed documents, and left with copies of all the documents he deemed relevant. According to Mr. Hanrahan, he then provided the copies to Holzman.

Just under two years after he was retained by Wyndham, on September 29, 2015, Mr. Holzman terminated his representation. In a letter to Wyndham, he advised that he had "suffered a serious health condition" that necessitated his withdrawal. He stated that he had not yet "received documents from Mr. Hanrahan's file review," "emails from Nagle & Zaller" and a "cost advance that was discussed." Holzman further advised that the statute of limitations would run on a potential cause of action against Nagle & Zaller no later than October 2016.

At his deposition in the instant case, Holzman testified that when he terminated his representation of Wyndham, he did not have "sufficient documentary evidence to go forward." He explained that he had hoped to find documents to support a claim that

Nagle & Zaller "had misrepresented facts to the [B]oard or otherwise led the [B]oard to spend money on litigation simply for the purpose of generating fees for themselves," but could not identify a specific cause of action he would have pursued against Nagle & Zaller.

In January 2016, at the Board's request, Mr. Hanrahan reached out to Wyndham's general counsel, Andrew Robinson, to ask him to contact two attorneys who might be willing to take over the case.[2] The first attorney Robinson contacted already was familiar with the case because Mr. Holzman had communicated with him about it. That attorney told Robinson that he thought there were "too many hurdles to it to make it successful." The second attorney contacted by Robinson also declined to represent Wyndham. Robinson contacted several other lawyers but none of them were interested in representing Wyndham in litigation against Nagle & Zaller. Robinson ceased his efforts to find new counsel in March 2016. While Robinson was searching for counsel, Mr. Hanrahan also contacted an attorney and asked her to review the matter. She declined to represent Wyndham.

On October 5, 2016, the Hanrahans filed the present action against Wyndham. The operative complaint is the second amended complaint. It asserted eight counts,

[2] Mr. Holzman sent his termination letter to the Board via Tidewater Properties and the Board did not learn he had withdrawn from the case for several months.

numbered Counts I through V and IX through XI.[3] Count I asserted that Wyndham breached the Litigation Clause in the Agreement by not promptly commencing suit against Nagle & Zaller. Count II asserted that Wyndham intentionally misrepresented that it would fulfill its promise to commence litigation against Nagle & Zaller pursuant to the Agreement. Counts III, IV, and V asserted claims for abuse of process (Count III) and violations of the Maryland Consumer Debt Collection Act ("MCDCA") (Counts IV and V) arising from the First and Second Towing Cases. Counts IX through XI asserted claims for defamation arising from statements made by members of the Board about Mr. Hanrahan at an open Board meeting and statements allegedly made to police about Mr. Hanrahan by a Board member in 2017.

Wyndham moved for summary judgment on all counts of the second amended complaint and the Hanrahans moved for summary judgment on Count I (breach of contract).

On March 13, 2018, a four-day trial was scheduled to commence. On that morning, the court held a hearing on Wyndham's motion for summary judgment and granted it as to all claims. It ruled that Counts I (breach of contract) and II (misrepresentation), both of which were premised on a breach of the Litigation Clause of

[3] Counts VI, VII, and VIII in the original complaint asserted claims for defamation and were dismissed by order entered February 3, 2017. Upon filing their first and second amended complaints, the Hanrahans reasserted claims for defamation, but renumbered the counts IX through XI.

the Agreement, failed as a matter of law because expert testimony on the viability, *vel non*, of a lawsuit against Nagle & Zaller was necessary to prove damages and no expert had been designated on that issue. The court ruled that Counts III (abuse of process), IV, and V (MDCPA) were barred by limitations and/or by the Release Clause of the Agreement. The court ruled that Counts IX, X, and XI, asserting claims for defamation, all failed as a matter of law because none of the alleged defamatory statements were actionable.

After granting the motion for summary judgment, the court heard argument from counsel regarding a motion for a protective order filed by Nagle & Zaller. We will discuss this motion in part 2 of our analysis.

This timely appeal followed.

Analysis

1.

The Hanrahans contend the trial court erred by granting summary judgment on Counts I and II and, consequently, denying them their right to a jury trial as to those counts. As the Court of Appeals has explained:

> Summary judgment is not a substitute for trial. The function of the trial court at the summary judgment stage is to determine whether there is a dispute as to a material fact sufficient to require an issue to be tried. Thus, an appellate court's review of the grant of summary judgment involves the determination whether a dispute of material fact exists, and whether the trial court was legally correct. Evidentiary matters, credibility issues, and material facts which are in dispute cannot properly be disposed of by summary judgment. Instead, a trial court reviewing a motion for summary judgment must ask whether there exists a genuine dispute as to a material

> fact and, if not, what the ruling of law should be upon those undisputed facts. If the facts are susceptible of more than one inference, the materiality of that arguable factual dispute must be judged by looking to the inferences that may be drawn in a light most favorable to the party against whom the motion is made and the light least favorable to the movant.

Frederick Road Ltd. P'Ship v. Brown & Sturm, 360 Md. 76, 93-94 (2000) (internal citations and quotation marks omitted). For the reasons that follow, we hold that the court did not err by granting judgment as a matter of law on Counts I and II.

In Count I, the Hanrahans alleged that Wyndham breached the Litigation Clause of the Agreement by not promptly commencing litigation against Nagle & Zaller. In Count II, they alleged that Wyndham intentionally misrepresented that they would comply with the Litigation Clause. In both counts, they sought $207,000 in damages, which was the amount of liquidated damages they would have been entitled to under the terms of the Agreement had Wyndham not breached the settlement provision of the Litigation Clause.

In granting judgment to Wyndham, the circuit court reasoned that to succeed under either count, the Hanrahans had to show a breach of the Agreement and that damages resulted from the breach. The court observed that, to prove damages, the Hanrahans had to be able to establish the nature of the cause of action Wyndham could and should have brought against Nagle & Zaller *and* that that action had "some viability to it." In other words, they had to show that if Wyndham had "complied with their contractual obligations, some benefit would have conferred to [the Hanrahans], some money[.]" Expert testimony was required, in the court's view, to "talk about what the

cause of action is and how it could have been successful." That the Litigation Clause in the Agreement provided for liquidated damages does not change the result because the liquidated damages provision would apply only if Wyndham filed suit against the law firm and then settled the case without the Hanrahans' consent.

The Hanrahans contend the circuit court erred because there was evidence of "blatant fraud and abuse of process" by Nagle & Zaller that would not be "too complicated for a jury to understand[.]"[4] We disagree.

The Hanrahans bore the burden of proof on each of the elements of their causes of action. Proof of damages is an element of a breach of contract claim and a claim for misrepresentation. *See, e.g., Kumar v. Dhanda*, 198 Md. App. 337, 345 (2011) (elements of a breach of contract action are: a contractual obligation, a breach of that obligation, and damages caused by the breach); *Brass Metal Prods. v. E-J Enters., Inc.*, 189 Md. App. 310, 353 (2009) ("damage directly resulting from the misrepresentation" is an element of a claim for intentional misrepresentation).

The existence of contractual obligations arising from the Litigation Clause of the Agreement is clear and undisputed. Assuming without deciding that Wyndham breached its obligations by failing to file a lawsuit against Nagle & Zaller and/or intentionally

[4] The Hanrahans cite to *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), a case concerning the right to a jury trial on legal issues in a case that also involved claims for equitable relief. That case has no bearing upon the court's ruling that expert testimony was required.

misrepresented its willingness to comply with that promise,[5] the Hanrahans still had to show that they sustained damages as a result. In other words, they had to prove that if a lawsuit had been filed against Nagle & Zaller, Wyndham would have prevailed, thus entitling the Hanrahans to their 45% share of any recovery. It was the likelihood of success of a potential lawsuit that necessitated expert testimony because, if a lawsuit against Nagle & Zaller was not viable, then the Hanrahans did not suffer any damages occasioned by any putative breach of the Litigation Clause. *Cf. Fishow v. Simpson*, 55 Md. App. 312, 323 (1983) (reasoning in a legal malpractice action that unless a client "has a good cause of action against the party proposed to be sued, the first party loses nothing by the conduct of his attorney even though the latter were guilty of gross negligence").

The Hanrahans are correct that their cause of action against Wyndham was not one for professional malpractice. However, to recover on their breach of contract and misrepresentation claims, the Hanrahans needed to prove that, had Wyndham actually filed suit against Nagle & Zaller, the action would have been successful. This necessarily would require a jury to decide whether Nagel & Zaller's conduct in defending Wyndham in the First and Second Towing Cases, filing the notice of lien, and otherwise pursuing attorneys' fees reflected appropriate legal strategies or constituted an abuse of process.

[5] The court ruled that no reasonable juror could find on the undisputed facts that Wyndham failed to act diligently to hire new counsel. The Hanrahans do not dispute this on appeal.

For these reasons, expert testimony was required for the Hanrahans to prevail. *See Schultz v. Bank of America*, 413 Md. 15, 28 (2010) (Expert testimony ordinarily is necessary in professional malpractice cases because "professional standards are often 'beyond the ken of the average layman[.]'" (quoting *Bean v. Dep't of Health*, 406 Md. 419, 432 (2008)).

We agree with the trial court that expert testimony was necessary to explain the relevant ethical and legal standards applicable to Nagle & Zaller in its handling of the related lawsuits and to establish whether the firm violated those standards in such a way as would have made it liable in damages to Wyndham. Because the Hanrahans did not designate an expert for that purpose, the court did not err by granting summary judgment on Counts I and II. *See Rodriguez v. Clarke*, 400 Md. 39, 74 (2007) (summary judgment appropriately granted where plaintiffs in a medical malpractice action failed to properly designate an expert and, thus, could not sustain their burden as to the standard of care or causation).

2.

Before the trial was scheduled to begin, Nagle & Zaller filed an emergency motion for a protective order to compel the return of a privileged document and other appropriate relief. Nagle & Zaller asserted that, after the present action commenced, Wyndham's trial counsel requested that Nagle & Zaller provide them with its files relating the prior litigation between Wyndham and the Hanrahans. Nagle & Zaller compiled four boxes of relevant documents and provided them to Wyndham's attorneys. This material included

an email exchange between attorneys at Nagle & Zaller and the law firm's current legal counsel pertaining to potential litigation they might pursue (or need to defend against) relative to Wyndham and the Hanrahans. The email exchange was eventually turned over to the Hanrahans in discovery. In its motion, Nagel & Zaller stated that this disclosure was inadvertent and that the firm learned of the disclosure only when the emails were identified as an exhibit by the Hanrahans' attorney during Zaller's deposition in the instant case.

After the court granted summary judgment in favor of Wyndham, it heard argument on the motion and granted Nagle & Zaller's motion.[6] The court ordered that the email exchange that was the subject of the latter motion would be placed in an envelope in the court file under seal and ordered the Hanrahans's counsel to return all copies of the email exchange in his or the Hanrahans' possession to the court within two business days.

In their brief, the Hanrahans argue that the court erred by ordering the email exchange sealed because any privilege attached to it was waived by its disclosure and the email exchange is relevant to show that Zaller was planning to sue individual members of Wyndham's Board and to "unlawfully abuse legal processes[.]" We do not agree.

[6] During the same hearing, the circuit court denied a motion by Wyndham that sought similar relief regarding other documents which it asserted were privileged and were inadvertently disclosed in discovery.

Courts in various jurisdictions have reached different conclusions as to whether an inadvertent disclosure of privileged material during the discovery process constitutes a waiver of the attorney-client privilege. In *Elkton Care Center Assocs. v. Quality Care Management, Inc.*, 145 Md. App. 532, 545 (2002), this Court adopted a five-part test to determine whether an inadvertent disclosure effectively waived the privilege. These factors are:

> (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosure; and (5) whether the overriding interests of justice would or would not be served by relieving a party of its error.

Id. at 545 (citing *Sampson Fire Sales v. Oaks*, 201 F.R.D., 351, 360 (M.D. Pa. 2001)).

The circuit court concluded that the first factor (reasonableness of the precautions taken to prevent inadvertent disclosure) inured to the Hanrahans' benefit because the total number of documents disclosed in discovery was rather limited; the second factor (the number of inadvertent disclosures) weighed in favor of Wyndham because there was only one document in question; and the third factor (extent of the disclosure) also weighed in Wyndham's favor because the emails discussed only one topic. Additionally, the court found that the remaining factors, namely whether there was a delay in filing a motion to rectify the problem, and the interests of justice, also weighed in Wyndham's favor. {E 844–45}. The court ordered that the document in question was to be placed in a sealed envelope in the court file.

We can perceive no abuse of discretion on the part of the trial court in its ruling on the motion. Only one document had been inadvertently disclosed, that document addressed but one issue, and Nagle & Zaller filed its motion for a protective order on a timely basis once it learned of the disclosure. The interests of justice would not be served by concluding that there had been a waiver because the court had already granted judgment to Wyndham for reasons unrelated to the contents of the disputed material. Application of the *Elkton Care Center* balancing test to the facts of this case clearly points towards the conclusion that there was no waiver of the attorney-client privilege.

THE JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY IS AFFIRMED. COSTS TO BE PAID BY THE APPELLANTS.