Circuit Court for Montgomery County
Case No. 468143V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 603

September Term, 2021

PARK SUTTON CONDOMINIUM, INC.
and
BARKAN MANAGEMENT, LLC

v.

DORA C. JOHNS

Shaw,
Wells,
Zic,

JJ.

Opinion by Shaw, J.

Filed: February 23, 2022

In the Circuit Court for Montgomery County, Dora C. Johns, appellee, brought an action against Park Sutton Condominium, Inc. and Barkan Management, LLC, appellants, for breach of contract, negligence, nuisance, trespass, fraud, and negligent representation. Appellants answered her Complaint and filed a Motion for Summary Judgment, which was granted as to the nuisance and trespass issues, as well as the breach of contract issue for appellant Barkan. The remaining counts were tried before a jury and resulted in a verdict for Johns, awarding her $90,000 in damages on the claim against Barkan and $95,000 in damages on the claim against Park Sutton. Appellants timely appealed and present four questions for our review:

1. Under Maryland law, does the limitation of liability clause in the Association's bylaws (the "Bylaws") insulate the Defendants from liability for damages from water and moisture?
2. Was it prejudicial error for the trial court to decline Defendants' request to provide a jury instruction on contributory negligence?
3. Were Plaintiff's mold experts qualified to testify as to the source of mold and alleged moisture intrusion (i.e., stemming from construction or building defects within the building envelope)?
4. Was the evidence legally sufficient to support a finding that Plaintiff's alleged damages were proven to a reasonable certainty?

For reasons set forth below, we affirm the judgment of the circuit court.

BACKGROUND

Appellee purchased a condominium in the Park Sutton Condominium in 2013 and resided there until January of 2019. Appellants, The Park Sutton Unit Owners Association Inc., are charged with the administration of the condominium building. Barkan Management, LLC. is the managing agent for the property.

On September 24, 2018, appellee found mold on a wall in her bedroom. She immediately contacted the building manager, Christian Klarner, who in turn contacted two handymen to deal with the issue. The next day, appellant discovered mold in her guest bedroom and again, contacted Klarner. Klarner returned with the two handymen, who again took steps to remediate the mold. A few days later, appellee left for a visit with her son. When she returned ten days later, on October 8, 2018, the condominium had a strong foul odor. Appellee contacted Klarner who stated he would make the necessary arrangements. Appellee requested a mold test, and Klarner agreed. According to appellee, Klarner, however, did not take any further action until October 24, 2018, when he arrived at the condominium with a mold expert, who removed the walls "adjoining the building's outside walls in [a]ppellee's master bedroom and guest bedroom." Appellants contend that within a week of appellee's return, a contractor performed an inspection of the unit that "included the removal of baseboard and drywall that contained any suspected moisture." Appellants further contend that by October 22, 2018 the condominium "had been fully remediated."

On October 31, 2018, appellee returned to her unit to obtain some personal items and discovered mold in her bathroom vanity. Appellee reported this finding to the new building manager, Tammy Groth. Appellee testified that Groth told her there was mold in the vanity because of a leak in her sink. Appellee did not see a leak, nor did appellants' handyman. Groth then said that the vanity needed to be removed. Appellants presented a different scenario, contending that Groth came to inspect the vanity with a technician engineer and found that the mold was "wholly confined to one drawer and took the shape

of a wet towel having been placed inside." After this discovery, Groth told appellee that the vanity was appellee's responsibility to repair. Groth had no other conversations with appellee on this topic.

Appellants employed a building inspector, Jeffrey Pace, in order to determine the next steps for removal of the mold. Pace's inspection led to a report which concluded the mold found in appellee's vanity was present throughout the unit in "elevated levels." Pace recommended the vanity be fixed or removed from the condominium. This report was provided to appellee in January of 2019.

After Pace performed his inspection but before appellee was given his report, appellee hired a home contractor, Chris Steinhauer, to examine her unit. Steinhauer brought Paul Burger of NoVa Environmental Solutions to make an assessment. Like Pace's report, Burger's report found mold in the entire condominium and recommended remediation. According to appellee, she was informed that asbestos had been released, and as a result, she could not stay in her condominium because it was toxic and dangerous. She testified that she had developed a cough and she decided to temporarily move out. Appellants agree that appellee left her condominium, and state that she "turned off her heating [sic], air conditioning, stuffed towels underneath doors, turned off the lights, and vacated her Unit for two years." Appellee testified that she first moved in with a neighbor, then her son, next an employer, and briefly to a hotel.

On June 12, 2019, appellee filed a complaint in the Circuit Court for Montgomery County. Appellants filed a Motion to Dismiss that was partially granted, with leave to amend. Appellee then filed an Amended Complaint on October 18, 2019. The Amended

Complaint asserted claims against appellants for breach of contract, negligence, nuisance, trespass, fraud, and negligent representation. Appellants answered with a general denial and after discovery, filed a Motion for Summary Judgment. The court granted partial summary judgment on December 1, 2020, finding for both appellants as to nuisance and trespass and for Barkan as to breach of contract. The judge denied the motion for summary judgment as to the remaining claims.

A four-day jury trial began on June 22, 2021, and each side presented witnesses. Appellants objected to the expert testimony of one of appellee's witnesses, Paul Burger, arguing that he lacked data to form an opinion on the source of the mold in appellee's vanity. Following an extensive voir dire, the judge overruled the objection and allowed the witness to testify. At the conclusion of appellee's case, appellants moved for judgment. The court granted the motion in part, striking the claims for fraud and negligent misrepresentation,[1] but finding that, as a matter of law, the limitation of liability clause in the condominium's governing documents did not shield appellants from potential liability.

Appellants then presented their case, and at its conclusion, moved for judgment, which was denied. The judge reiterated that the limitation of liability clause could not prevent the jury from finding appellants liable on the remaining counts. Appellants made a request for a jury instruction on contributory negligence, which the court declined, stating that the instruction was not appropriate based on the evidence presented at trial.

[1] Appellee's brief states that the motion for judgment on these claims was granted at the close of appellants' argument. Our review of the record indicated that this ruling was made at the end of appellee's own argument, and we have proceeded with that understanding.

The jury returned a verdict in favor of appellee on June 25, 2021, awarding her (1) $75,000 from appellant Park Sutton for breach of contract; (2) $20,000 from appellant Park Sutton for negligence; and (3) $90,000 from appellant Barkan for negligence.

On July 2, 2021, appellants filed a Motion for Judgment Notwithstanding the Verdict, which the trial court denied on August 5, 2021. Appellants timely noted this appeal.

STANDARD OF REVIEW

"Where a case involves the application of Maryland statutory and case law, our Court must determine whether the lower court's conclusions are legally correct under a *de novo* standard of review." *Spaw, LLC v. City of Annapolis*, 452 Md. 314, 338 (2017); *see also Plank v. Cherneski*, 469 Md. 548, 559 (2020).

"[T]he standard of review for jury instructions is that so long as the law is fairly covered by the jury instructions, reviewing courts should not disturb them. This standard places the burden on the complaining party to show both prejudice and error." *Univ. of Md. Med. System Corp. v. Malory*, 143 Md. App. 327, 337 (2001) (cleaned up). "We apply the abuse of discretion standard of review when considering a trial judge's denial of a proposed jury instruction." *Collins v. Nat'l R.R. Passenger Corp.*, 417 Md. 217, 228 (2010).

"When the basis of an expert's opinion is challenged pursuant to Maryland Rule 5-702, the review is abuse of discretion." *Rochkind v. Stevenson*, 471 Md. 1, 10 (2020). We have also repeatedly held that "the admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such

testimony will seldom constitute a ground for reversal." *Clemons v. State*, 392 Md. 339, 359 (2006); *see also CSX Transp., Inc. v. Miller*, 159 Md. App. 123, 208 (2004) (holding that appellant must prove that the expert's testimony was "not even arguably reliable and that any judge who could even think otherwise would be guilty, *ipso facto*, of an abuse of discretion").

The standard of review for sufficiency of the evidence is:

> In a civil case, the evidence is legally sufficient to support a finding in support of the prevailing party if, on the facts adduced at trial viewed most favorably to that party, any reasonable fact finder could find the existence of the elements of the cause of action by a preponderance of the evidence. In a jury trial, the quantum of legally sufficient evidence needed to create a jury question is slight. If there is legally sufficient evidence to support a finding in favor of the party bearing the burden of proof, it would be error on the part of the trial judge to grant a motion for judgment in favor of the opposing party and withhold the case from the jury for decision.

Univ. of Md. System Corp. v. Gholston, 203 Md. App. 321, 329 (2012) (internal citations omitted). We note that "[i]t is not our function to inquire into the weight of the evidence, rather, we determine only whether there was legally sufficient evidence to support the jury verdict." *Fraidin v. Weitzman*, 93 Md. App. 168, 193-94 (1992).

DISCUSSION

I.

Appellants argue the Park Sutton Bylaws contain a limitation of liability clause that is enforceable and insulates it from liability in this case. Appellants contend that exculpatory clauses are "generally valid" and not enforcing the clause in the present case would be against public policy. Appellee argues that the limitation clause is not

unequivocal and clear and thus, it does not excuse appellants from liability for their negligent behavior or breaches of contract.

"It is well settled in this State, consistent with the public policy of freedom of contract that exculpatory contractual clauses generally are valid." *Adloo v. H.T. Brown Real Estate, Inc.*, 344 Md. 254, 259 (1996) (cleaned up). Maryland follows the objective law of contract interpretation:

> A court construing an agreement under this test must first determine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated. In addition, when the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed. In these circumstances, the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant. Consequently, the clear and unambiguous language of an agreement will not give away [sic] to what the parties thought that the agreement meant or intended it to mean. As a result, when the contractual language is clear and unambiguous, and in the absence of fraud, duress, or mistake, parol evidence is not admissible to show the intention of the parties or to vary, alter, or contradict the terms of that contract.

General Motors Acceptance Corp. v. Daniels, 303 Md. 254, 266-67 (1985). The Court of Appeals has further explained that while using the word "negligence" is not required when disclaiming liability, "general release language" is not sufficient. *Adloo*, 344 Md. at 265.

The limitation of liability clause found in the bylaws reads as follows:

> Section 4. Limitation of Liability. The Corporation shall not be liable for any failure of water supply or other services to be obtained by the Corporation or paid for out of the common expense funds, or for injury or damage to persons or property caused by the elements from any pipe, drain, conduit,

appliance, or equipment.

Appellants make several arguments as to why the clause should be enforced, and we address them in turn. First, they contend that they are not contractually liable because the trial court misinterpreted the term "elements" as used in the bylaws. They argue that the damage arose from water, not a casualty loss and that the trial court read the term to mean "structural elements" when it truly meant "natural elements." While we understand the distinction that appellants are making, we are not persuaded that it is dispositive. As the trial judge articulated: the use of the term elements here "is [a] terrible use of language in this particular context because in this contract, it uses the term, general elements, common elements, special elements, but it never defines what the word elements or the elements means." In our view, this lack of clarity as to the meaning of the term establishes that the clause is ambiguous, is capable of more than one interpretation and therefore is unenforceable.

Appellants next argue that the language in the limitation clause shields them from negligence and the clause further insulates the association from liability for actions taken in the performance of maintenance of the common elements.[2] Appellee argues that the clause is "devoid of any language manifesting" an intent to waive negligence claims. She

[2] Appellants specifically argued that "the trial court determined that the [c]lause is unambiguous, enforceable, but somehow failed to insulate the [appellants] from claims for damages stemming from the breach of contract and negligence claims." Based on our review of the trial transcript, we do not believe this is an accurate description of the judge's ruling. After appellants' Renewed Motion for Judgment, the judge said: "[A]lthough I think that this limitation of liability clause is valid, I don't believe the language of it is unambiguous in limiting the liability of the [appellants] for its own negligence."

views the language as general release language. The trial judge held:

> So . . . the condominium association is responsible for the common elements, which includes the exterior perimeter walls and roof, and, therefore, under article 8, section 1, it's the responsibility of the Park Sutton Condo Association to maintain the exterior perimeter walls and the roof. So that, under the breach of contract theory, there's been evidence produced here that the condominium association breached that responsibility and duty by failing to maintain, because . . . it was water which penetrated the exterior surface of unit 1206. . . .
>
> ***
>
> So the duty that is present is established by the contractual relationship, and that duty is to maintain the common areas for the protection and benefit of the units and the unit owners.
>
> And so the breach would be the failure to properly maintain the common areas and the proof of that is, if believed by the jury, that there's a chronic water problem created by the penetration through the exterior walls.
>
> Obviously, the damage being the presence of the mold colony and the causation being that it was the presence of this chronic penetrating water situation that created the chronic moisture problem that led to the mold colony.
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> ***
>
> In this case, the condo association is specifically under an obligation to care for the benefit of the unit owners, because their [sic] responsible for maintaining the exterior of the building for the benefit of the unit and the unit owners.
>
> So for a couple of reasons, because the rationale for this clause doesn't fit the fact pattern of our case, it is not the intent of these parties that the defendant have no obligation to care for the benefit of the plaintiff, it's the opposite.
>
> And secondly, because of the language, I don't find that this language is unambiguous in limiting the liability of the condo owner against its own negligence.
>
> So for those reasons, I don't believe that – although I think that this limitation of liability clause is valid, I don't believe the language of it is unambiguous in limiting the liability of the defendant for its own negligence.
>
> So because of that, I don't believe that this clause will exculpate the

> defendant against negligence or breach of contract under the facts of this case, if the jury believes the testimony that's been presented.

On review, our focus is to "attempt to construe contracts as a whole, to interpret their separate provisions harmoniously, so that, if possible, all of them may be given effect." *Walker v. Dep't of Human Res.*, 379 Md. 407, 421 (2004). Here, we cannot find that a provision that is silent as to exculpation, absolves appellants from a claim of negligence when other provisions in the contract expressly do so. As appellee points out, other portions of the bylaws specifically indemnify certain parties against "any mistake of judgment, negligence, or otherwise, except for their own individual willful misconduct or bad faith." We agree with appellee that a reasonable person in her position could have believed that she was not waiving her right to ask for damages if appellants acted negligently. We hold the limitation clause is not unequivocal and clear and does not shield appellants from contractual or negligence claims.

II.

Appellants also contend that the court erred in not providing a jury instruction on contributory negligence. Appellee counters that the evidence did not support such an instruction. She argues the court did not abuse its discretion.

To be sure, a trial judge is entrusted with the responsibility "to discern and ensure that the jury instructions encompass the substantive law applicable to the case." *Collins v. National R.R. Passenger Corp.*, 417 Md. 217, 228 (2010). Jury instructions must be relevant to the facts and evidence presented. *Gimble v. State*, 198 Md. App. 610, 627 (2011).

In the case at bar, the judge declined to give the requested instruction, stating that he "didn't think it c[ould] be said that anything [appellee] did led to the initial condition, which was, the entry of mold into the unit." He, instead, instructed the jury on appellee's duty to mitigate, as there was evidence presented that appellee may have exacerbated the situation and "failed to take reasonable precautions to protect her own property, and as a result of that, that her damages are worse now than they would have been. . ." Under these circumstances, we hold the judge did not abuse his discretion. The judge's determination that an instruction on contributory negligence required additional facts that had not been presented was proper. We observe also that appellants have not shown, as required, that the court's decision resulted in prejudice.

III.

Appellants argue that the court erred in allowing the expert testimony of appellee's witness, Paul Burger. Appellants assert that he "should not have been qualified to testify regarding the cause of water infiltration in the [u]nit as he lacked an adequate factual basis to justify his opinions." Appellee argues that Burger's testimony was properly admitted and that any concerns about his basis of knowledge go to the weight of the evidence rather than its admissibility.

Maryland Rule 5-702 provides that expert testimony

> may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine
>
> (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education,
>
> (2) the appropriateness of the expert testimony on the particular

subject, and

(3) whether a sufficient factual basis exists to support the expert testimony.

"In assessing the three factors set forth in Maryland Rule 5-702, 'the trial court is only concerned with whether the expert's testimony is admissible.' As such, '[o]bjections attacking an expert's training, expertise[,] or basis of knowledge go to the weight of the evidence and not its admissibility.'" *Dackman v. Robinson*, 464 Md. 189, 216 (2019) (quoting *Levitas v. Christian*, 454 Md. 223, 236 (2017)) (citations omitted). The Court of Appeals, in *Dackman v. Robinson*, stated: ". . . an adequate factual basis requires two things—'(1) an adequate supply of data; and (2) a reliable methodology for analyzing the data.'" *Id.* (quoting *Levitas*, 454 Md. at 246).

Appellants contend that because Burger had not reviewed any building plans, inspected the building envelope, nor possessed construction expertise, he could not have an adequate factual basis.[3] However, a factual basis is not so narrowly constricted and "may be derived from a number of sources, such as facts obtained from the expert's first-hand knowledge, facts obtained from the testimony of others, and facts related to an expert through the use of hypothetical questions." *Taylor v. Fishkind*, 207 Md. App. 121, 143 (2012) (citing *Sippio v. State*, 350 Md. 633, 653 (1998)).

[3] Appellants make further arguments about the causal connection between Burger's expertise and conclusions by reciting the facts in *Wean v. U.S. Home Corp.*, 2020 WL 1082327, (N.J. Super. Mar. 6, 2020). Despite recent changes to this Court's policy on the use of unreported opinions of courts other than Maryland state courts, we do not permit the use of unreported opinions from New Jersey courts, even for persuasive authority. *See* https://mdcourts.gov/sites/default/files/import/cosappeals/pdfs/20210908policymemounreportedopinions.pdf. As such, we do not consider any arguments related to that case.

In our review of the record, Burger's testimony stemmed from his own first-hand knowledge and facts found in the record. Burger testified that he had visited appellee's condominium on two occasions, completing an inspection and taking samples of what he believed to be mold growth. Based on these visits, he responded to hypotheticals posed by appellants, appellee, and the court and opined on the source of the mold. As such, we hold that the court did not err or abuse its discretion in allowing his expert testimony. The witness clearly testified based on a factual basis that adequately supported his testimony.

IV.

According to appellants, there was a legally insufficient basis for the jury's award of damages. Appellee contends that because the jury's damage award was "neither excessive nor unreasonable," there are no grounds for this Court to overturn the jury's verdict. We agree.

Appellants rely on two cases for their broad contention that appellee's damages were not reasonably certain, and therefore, were not recoverable, *Hoang v. Hewitt Ave. Associates, LLC*, 177 Md. App. 562 (2007) and *Thomas v. Capital Med. Management Associates, LLC*, 189 Md. App. 439 (2009). In both cases, this Court held that the damages awarded in a bench trial had been proven with reasonable certainty such that the awards of the respective trial courts should be upheld. Appellants offer no case law where there was some evidence and an appellate court determined that it was not sufficient to create a jury question.

Appellants argue that appellee's testimony regarding her damages was insufficient because (1) appellant is not qualified to testify to the hypothetical rental value of her

condominium because she is not an expert; and (2) appellant's testimony as to her increased food costs, bedding costs, and travel costs were too speculative because they were based on appellee's testimony rather than receipts.

We can find no basis under Maryland law that an expert is required to testify to the rental value of a piece of property. In our view, appellee's testimony as to the rental value of condominium units like her own was based on her personal knowledge and was sufficient to create a question for the jury as to the value she lost when she was unable to live in her condominium.

"In a jury trial, the quantum of legally sufficient evidence needed to create a jury question is slight." *Gholston*, 203 Md. App. at 329. Further, "it is not the province of an appellate court to express an opinion regarding the weight of the evidence when reviewing a judgment on a jury verdict." *Pulte Home Corp. v. Parex, Inc.*, 174 Md. App. 681, 711 (2007). While appellants may not have been convinced by appellee's testimony, the testimony met the bar required to create a jury question. We hold, as a result, that it is not within our province to disturb the jury's ultimate decision.

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