Circuit Court for Kent County
Case No. C-14-CV-18-000056

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0760

September Term, 2020

ORGANIC FARMACY MANAGEMENT, LLC

v.

FOUR GREEN FIELDS, LLC

Wells,
Zic,
Wright,
(Senior Judge, Specially Assigned),
JJ.

Opinion by Wells, J.

Filed: July 27, 2021

*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.

This appeal arises from a seven-day bench trial in the Circuit Court for Kent County. Organic Farmacy Management, LLC ("Organic Farmacy Management" or "Appellant") filed suit against Four Green Fields, LLC ("Four Green Fields" or "Appellee") for allegedly breaching their Agreement for Dispensary Management Services ("ADMS"). In its second amended complaint, Organic Farmacy Management asserted four counts of breach of contract and one count of fraud. Four Green Fields counterclaimed, alleging one count of each of the following: declaratory judgment (rescission of contract), intentional misrepresentation, negligent representation, and breach of contract.

The trial judge granted judgment in favor of Four Green Fields on three of Organic Farmacy Management's breach of contract claims. However, the court ruled in favor of Organic Farmacy Management on the remaining breach of contract claim involving the contract preparation fee and awarded judgment in the amount of $150,000.00. The trial judge also ruled in favor of Organic Farmacy Management on Four Green Fields' counterclaims. Organic Farmacy Management timely appealed. Four Green Fields timely cross appealed.

On appeal, Organic Farmacy Management raises two questions for our review, which we rephrase:[1]

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[1] Organic Farmacy Management's verbatim questions read:

I. DID THE TRIAL COURT ABUSE ITS DISCRETION IN FINDING THAT THE DAMAGES ANALYSIS OF ROBERT CARTER, APPELLANT'S EXPERT, FAILED TO PROVE DAMAGES TO WHICH APPELLANT IS ENTITLED TO AS A RESULT OF APPELLEE'S BREACH OF THE AGREEMENT FOR DISPNESARY MANAGEMENT SERVICES (ADMS)?

1. Did the circuit court abuse its discretion in concluding that Organic Farmacy Management's expert witness failed to prove damages for breach of the Agreement?
2. Was the circuit court's interpretation of the length of the Agreement for damage calculation purposes in error?

Additionally, Four Green Fields raises six questions for our review, which we likewise rephrase:[2]

II. DID THE TRIAL COURT ERR IN INTERPRETING THE AGREEMENT FOR DISPENSARY MANAGEMENT SERVICES (ADMS) TO BE A TWO-YEAR TERM WITH FOUR DISCRETIONARY RENEWALS, RATHER THAN A TOTAL TEN-YEAR TERM, FOR THE PURPOSE OF CALCULATING DAMAGES?

[2] Four Green Fields' verbatim questions read:

1. Whether the Trial Court erred as a matter of law when it failed to determine that the ADMS was null and void when none of the material elements of § 4.1.1 of the ADMS were satisfied despite the fact that § 4.1.1 required OFM [(Organic Farmacy Management)] to obtain a Grower *(sic)* license for its affiliate, Hippocratic Growth, LLC ("Hippocratic"), to supply inventory to FGF [(Four Green Fields)] on consignment at 50% of FGF's retail sales or otherwise to reach an amendment to the ADMS to provide FGF with an alternative cost-effective source of inventory.

2. Whether the Trial Court erred as a matter of law because it disregarded the failure of performance of § 4.1.1 because the Trial Court determined that for § 4.1.1 to apply, FGF was required to provide OFM with written notice of breach and an opportunity to cure.

3. Whether the Trial Court abused its discretion as a finder of fact when it determined as a matter of fact that FGF's Counterclaim, filed before OFM's performance under § 4.1.1 of the ADMS was due, did not provide adequate notice and opportunity for OFM to cure the failure to satisfy § 4.1.1 of the ADMS.

4. Whether the Trial Court erred as a matter of law when, in the alternative, it severed § 4.1.1 of the ADMS pursuant to § 9.10 without any basis for determining that it

1. Did the circuit court err in failing to conclude that the Agreement was void because none of its material elements were satisfied?
2. Did the circuit court err by finding that Four Green Fields was required to provide Organic Farmacy Management with written notice of breach and opportunity to cure?
3. Did the circuit court err by determining that Four Green Fields' counterclaim did not provide adequate notice and opportunity to cure under § 4.1.1 of the Agreement?
4. Did the circuit court sever § 4.1.1 of the Agreement and, if so, was doing so error with respect to § 9.10 of the Agreement?
5. Was the circuit court's denial of Four Green Fields' negligent misrepresentation claim in error?

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was invalid or unenforceable and without consideration that it was a material term of the ADMS that was a primary benefit of the bargain for FGF.

5. Whether the Trial Court erred as a matter of law when it denied FGF's negligent representation claim based on its ruling of law that OFM's *(sic)* materially understated representation to FGF, made as FGF's industry expert, that "$200,000 will adequately capitalize the licensing, start-up costs, projected operating expenses, and cash flow projections" because the Trial Court ruled that this is a statement of opinion that can never give rise to a negligent misrepresentation claim.

6. Whether the Trial Court erred when it interpreted § 1.4 of the ADMS to entitle OFM to full payment of the Application Preparation Fee of $150,000 from FGF's revenues without regard to profitability (when FGF was operating at substantial losses) based upon language in the ADMS stating that OFM shall be paid "from Dispensary operation revenues *prior to any payments or distributions to [FGF].*" (Emphasis added [by Four Green Fields]).

6. Did the trial court erroneously interpret § 1.4 of the Agreement by ruling that Four Green Fields must pay the entire application fee to Organic Farmacy Management without regard to profitability?

For the following reasons, we perceive no error in any of the circuit court's rulings and affirm each judgment.

FACTUAL BACKGROUND

The parties detail a long assortment of factual assertions in their briefs concerning the background of the dispute and the proceedings at trial. Both parties make several unsubstantiated assertions and a variety of arguments in the Statement of Facts sections of their briefs, rather than simply summarizing the events that led to the dispute. We will not repeat in detail the entire history between the two entities, we summarize the relevant factual circumstances for this appeal. We will save an analysis of the parties' arguments for our discussion below.

A. Organic Farmacy Management Company Formation

In response to the Maryland legislature's creation of the Natalie M. LaPrade Medical Cannabis Commission ("MCC" or "the Commission") to regulate, cultivate, process, and distribute cannabis for medicinal purposes, two sisters, Ashley and Paige Colen, along with attorney Stephen Meehan, formed Organic Farmacy Management and another company, Hippocratic Growth, LLC ("Hippocratic Growth").[3] The Colen sisters

[3] Mr. Meehan also represents Organic Farmacy Management on appeal.

had worked in a processing lab in the cannabis industry in California and sought to build a medical cannabis business in Maryland.

Because COMAR 10.62.25.02E provides that one cannot own an interest in more than one dispensary license, the Colen sisters sought to achieve common branding and management through a central management company that would contract with individual dispensary licensees. As a result, the Colen sisters and Mr. Meehan formed Hippocratic Growth to secure licenses for a grower, processor, and dispensary for their business. They formed Organic Farmacy Management to prepare applications and undertake dispensary management.

B. Four Green Fields Company Formation

Four Green Fields, like Organic Farmacy Management, also was formed by two sisters. Julie Donavan, who passed away before trial, and Elizabeth MacLeod founded the company. Charles MacLeod, Ms. MacLeod's husband, is an attorney who represented Four Green Fields on legal matters prior to this appeal. As it happens, Mr. MacLeod and Mr. Meehan have been close friends since college. Similarly, Ms. Donavan knew Mr. Meehan because he was her attorney for the administration of her father's estate.

Unlike the Colen sisters, who had ample experience working in the cannabis industry, Ms. Donovan and Ms. MacLeod had no such experience, but they had capital to invest in the industry. Organic Farmacy Management presented its business plan to interested investors, including Ms. Donavan and Ms. MacLeod.

C. Contract Formation and Subsequent Disputes

In September 2015, Organic Farmacy Management and Four Green Fields began discussing the prospect of entering into a business arrangement. Mr. Meehan began drafting the ADMS between the parties, which went through multiple revisions after review by Mr. MacLeod. Organic Farmacy Management prepared dispensary applications for Four Green Fields that detailed ownership, management, and operations of the dispensary, which were executed by Four Green Fields in November 2015. Applications were also simultaneously submitted for Hippocratic Growth at that time.

Much of this case centers on the parties' pursuit of licenses to become a cannabis grower, processor, or dispenser. In August 2016, the MCC announced that Hippocratic Growth would not be awarded the grower or processor licenses that it had applied for. However, the MCC announced that Four Green Fields would be awarded a preliminary dispensary license in Senatorial District 35 and that Hippocratic Growth would be awarded a preliminary dispensary license in Senatorial District 36. The parties' Agreement for Dispensary Management Services (hereafter, "ADMS" or "Agreement") contemplated that Hippocratic Growth would be awarded a grower license. In the event that Hippocratic Growth did not receive a grower license, the Agreement provided for Organic Farmacy Management and Four Green Fields to "find a cost-effective source of medical cannabis product and this Agreement will be amended accordingly[.]"

After the MCC denied Hippocratic Growth a grower license, several disagreements arose between the parties regarding contract performance. We will not delve into the details of the disputes at this point, because we will discuss the relevant disagreements

more thoroughly in our analysis. Nonetheless, we note the main points of contention. Organic Farmacy Management took issue with Four Green Fields' late deposit of dispensary buildout funds and its slowness in providing a dispensary building in preparation for a final license. At the same time, Four Green Fields demanded that Organic Farmacy Management amend the Agreement after Hippocratic Growth failed to obtain a grower license. Organic Farmacy Management refused to alter the Agreement.

D. Circuit Court Decision

The circuit court found for Organic Farmacy Management in part and for Four Green Fields in part. *First*, in ruling for Organic Farmacy Management, the circuit court declined to rescind the ADMS: "Evidence produced at trial fully supports the proposition that [Four Green Field]'s lawyer was both experienced and sophisticated in business contract matters when the ADMS was negotiated. Certainly, he would have understood that the language in question would in no way support rescission of the contract[.]" *Second*, the court interpreted the contract to require Four Green Fields to provide Organic Farmacy Management with written notice of an alleged breach and an opportunity to cure. *Third*, the court declined to find that Four Green Fields' counterclaim served as written notice of an alleged breach. *Fourth*, the court found that § 4.1.1 was severable from § 9.10 of the Agreement. *Fifth*, the circuit court held that Four Green Fields' negligent misrepresentation claim failed because the "facts" they alleged to be misrepresentations were not facts at all but rather opinion and mere puffery of no legal consequence. Even if they were construed to be facts, however, the court nonetheless found that no damages were proven to support such a claim. *Finally*, the court found that § 1.4 of the Agreement

allowed for Four Green Fields' payment of the application fee to be paid from revenues without regard to profits.

In ruling in favor of Four Green Fields, the circuit court found that (1) Organic Farmacy Management failed to prove by a preponderance of evidence that it was entitled to management fee damages. As will be discussed later, the circuit court (2) rejected the "yardstick" approach to damages which Organic Farmacy Management advocated. The court reasoned that

> use of the [Hippocratic Growth] dispensary as the sole yardstick for [the] computation of [Organic Farmacy Management]'s damages fails to take into account the disparities between the operation of the two dispensaries. It is the equivalent of contending that all McDonald's franchises should have like profits because they all sell Big Macs and Quarter Pounders. The dispensaries are in two different counties servicing two different populations groups. The evidence shows that [Hippocratic Growth's] dispensary has far more competitors within a short driving distance than does [Organic Farmacy Management]. [Hippocratic Growth] has a larger and more varied inventory of cannabis products than does [Organic Farmacy Management] giving it a clear sales advantage over [Organic Farmacy Management]. In short, the comparison of the two dispensaries is much too slender a reed to support a calculation of [Organic Farmacy Management]'s damages, even by a mere preponderance of the evidence.

The court concluded by holding that the "analysis fails, by a preponderance of the evidence, to prove damages to which [Organic Farmacy Management] is entitled as a result of [Four Green Field]'s breach of the ADMS." The circuit court also found in favor of Four Green Fields that (3) the length of the Agreement was a two-year term with four discretionary renewals.

DISCUSSION

I. STANDARDS OF REVIEW

The parties agree on the appropriate standards of review. The bench trial below involved both questions of fact and law. "Where a case involves both issues of fact and questions of law, [appellate courts] will apply the appropriate standard to each issue." *Clickner v. Magothy River Ass'n Inc.*, 424 Md. 253, 266-67 (2012) (citing *Dickerson v. Longoria*, 414 Md. 419, 432 (2010) and *Diallo v. State*, 413 Md. 678, 695 (2010)). Accordingly, we apply separate standards of review when addressing the different questions posed in this appeal.

For the reliability of an expert witness's methodology, we review the decisions of the circuit court on an abuse of discretion standard. *MEMC Elec. Materials, Inc. v. BP Solar Int'l, Inc.*, 196 Md. App. 318, 355 (2010). A trial court has abused its discretion when "no reasonable person would take the view adopted by the trial court" or when the trial court acts "without reference to any guiding rules or principles." *Powell v. Breslin*, 430 Md. 52, 62 (2013) (internal quotation and citations omitted). Indeed, regarding the methodology of expert witnesses, we have described the amount of discretion afforded to trial courts as "wide" and that the trial judge's "action in admitting or excluding such testimony will seldom constitute a ground for reversal." *MEMC Elec. Materials, Inc.*, 196 Md. App. at 355.

Factual findings, meanwhile, are subject to a clearly erroneous standard of review. Md. Rule 8-131(c). And in situations where a court's order involves interpretation of Maryland statutes or case law, we "determine whether the lower court's conclusions are

'legally correct' under a de novo standard of review." *Walter v. Gunter*, 367 Md. 386, 392 (2002).

II. ANALYSIS OF ISSUES RAISED BY ORGANIC FARMACY MANAGEMENT

For organizational purposes, we begin by analyzing the issues raised by Organic Farmacy Management. We will separately address the issues raised by Four Green Fields as cross-appellant.

A. The Parties' Contentions

Organic Farmacy Management raises two arguments on appeal. *First*, Organic Farmacy Management argues that the circuit court abused its discretion in finding that its expert witness failed to prove damages resulting from Four Green Fields' breach of the ADMS. Expert Witness Robert Carter, a certified public accountant and valuation specialist, calculated the damages from two sources: the management fees and the application fee. For the management fees, Carter found that the damages amounted to $1,403,145.00. For the application fee, Carter calculated the damages to amount to $150,000.00. The total amount of damages calculated by Carter, therefore, amounted to $1,553,145.00. The circuit court, however, found that Organic Farmacy Management was only entitled to the $150,000.00 application fee and not the $1,403,145.00 of additional damages found by Carter. Specifically, the court found that the so-called, "yardstick" approach to damages that Carter employed "fail[ed] to take into account the disparities between the operation of the [Four Green Fields and Hippocratic Growth] dispensaries." Organic Farmacy Management directs us to cases from the United States Supreme Court and the Court of Appeals for the Fourth Circuit , arguing that the yardstick method is an

accepted damage calculation method and that the circuit court abused its discretion in failing to award it damages using this method. *See Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931); *Metrix Warehouse, Inc. v. Aktiengesellschaft*, 828 F.2d 1033, 1044 n.21 (4th Cir. 1987); *S. Pines Chrysler-Plymouth, Inc. v. Chrysler Corp.*, 826 F.2d 1360 (4th Cir. 1987).

Four Green Fields counters that the circuit court did not wholly reject the yardstick method but instead rejected Organic Farmacy Management's factual premise that Hippocratic Growth is an appropriate entity of comparison for the analysis. Four Green Fields contends that to appropriately use the yardstick method, the business being used as the "yardstick" must be as closely identical as possible to Four Green Fields' business, which they argue was not the case here. Consequently, Four Green Fields argues that the court correctly declined to use this method of calculating damages.

Second, Organic Farmacy Management takes aim at the court for, in its view, wrongly "interpreting the ADMS to be a two-year term with four discretionary renewals, rather than a total ten-year term." Organic Farmacy Management asks us to review Section 2.1.11 of the Agreement, which provides:

> This Agreement shall commence upon its execution by all parties and payment of fees related thereto and shall extend for the life of the Company's Dispensary license. The agreement shall renew automatically with no further action of the parties on bi-annual (or thereabouts) basis on the 90th day prior to the expiration of a current Dispensary license at which time the Dispensary Manager shall prepare the Dispensary books for audit and prepare the Dispensary Renewal Application. The automatic renewal of this Agreement shall continue for four (4) consecutive license terms, subject to periodic adjustments to the Dispensary Budget and Personnel Plan (Exhibit B).

Organic Farmacy Management believes this portion of the ADMS seems to "speak[] for itself" and plainly and unambiguously provides for four consecutive automatic bi-annual renewals, which total a ten-year term. Four Green Fields responds that Organic Farmacy Management is "placing all of its eggs in the basket of maximum damages" and that it "failed to introduce any evidence to support damages based upon th[e] reasonably foreseeable scenario" that Four Green Fields "could sell its dispensary at any time[.]"

B. The Circuit Court Did Not Abuse Its Discretion in Concluding that Organic Farmacy Management's Expert Witness Failed to Prove Damages for Breach of the ADMS.

The issue here, separate from the circuit court's award of $150,000.00 of damages for the application fee, involves the court's decision not to award $1,403,145.00 for management fees. Carter, Organic Farmacy Management's damages expert, utilized the yardstick approach to calculate the amount of damages that he believed that Organic Farmacy Management was owed over a ten-year period.[4] In explaining the yardstick method, Organic Farmacy Management points this Court to an online article authored by Serena Morones, a "forensic CPA" in Portland, Oregon who "specializes in forensic accounting, damage analysis for litigation and business valuation." Serena Morones, *Five Pillars of a Lost Profits Analysis Pt. 1*, Morones Analytics (Feb. 15, 2017), https://moronesanalytics.com/lost-profits-analysis-fivepillars-1; *see also* Serena Morones: https://moronesanalytics.com/team/serena-morones/. In this article, Morones explains:

[4] The next section of this opinion analyzes whether the ten-year timeframe that Carter used was the appropriate length for this calculation.

"The 'yardstick' method to determine lost revenues looks for another product, service, or company within the industry that can reasonably be compared with the damaged company or product. The expert assumes that the damaged company would have performed as well as the yardstick, if not for the wrongful act." Serena Morones, *Five Pillars of a Lost Profits Analysis Pt. 1*. Morones writes that expert witnesses

> should consider using the yardstick method when the plaintiff does not have its own track record of revenues that they allegedly lost, but had a reasonable prospect of earning the revenues in question. The yardstick method assumes that since another company does have a track record of generating the predicted revenues, that the predicted revenues are possible and reasonable to earn, assuming no other obstacles, and that the yardstick is comparable.

Id. In her fourth and final paragraph on the topic, Morones concludes by cautioning that "[o]ne must carefully select a reasonably comparable [other entity as the] yardstick to use this method successfully." *Id.*

Neither party points us to any Maryland state case in which the yardstick method has been used. Our research yields the same result. Both parties, however, point us to persuasive authority from the United States Supreme Court, the Court of Appeals for the Fourth Circuit, and the Court of Appeals for the Fifth Circuit. *See Bigelow*, 327 U.S. 251 (1946); *Story Parchment Co.*, 282 U.S. at 563; *Metrix Warehouse, Inc*, 828 F.2d 1033, 1044 n.21; *S. Pines Chrysler-Plymouth, Inc.*, 826 F.2d 1360; *Lehrman v. Gulf Oil Corp*, 500 F.2d 659, 667 (5th Cir. 1974). Consequently, whether the yardstick method should be adopted by Maryland courts and, if so, how Maryland courts would apply it, is an open question.

Given the facts of this case, we do not find it necessary to decide, generally, the

applicability of the yardstick approach to damage calculations in Maryland. But, even if we determined that the yardstick approach was an appropriate method of calculating damages, we would still conclude that the court did not abuse its discretion in finding that Hippocratic Growth was not a comparable business to Organic Farmacy Management. We acknowledge that Carter recognized specific and significant differences between Organic Farmacy Management and Hippocratic Growth, namely population (based on location) and nearby competition. The circuit court, however, expressly considered these factors and noted additional factors in concluding that "the comparison of the two dispensaries is much too slender a reed to support" an accurate damage calculation:[5]

> Carter's use of the [Hippocratic Growth] dispensary as the sole yardstick for his computation of [Organic Farmacy Management]'s damages fails to take into account the disparities between the operation of the two dispensaries. It is the equivalent of contending that all McDonald's franchises should have like profits because they all sell Big Macs and Quarter Pounders. The dispensaries are in two different counties servicing two different populations groups. The evidence shows that [Organic Farmacy Management's] dispensary has far more competitors within a short driving distance than does [Hippocratic Growth]. [Hippocratic Growth] has a larger and more varied inventory of cannabis products than does [Organic Farmacy Management] giving it a clear sales advantage over [Organic Farmacy Management]. In short, the comparison of the two dispensaries is much too slender a reed to support a calculation of [Organic Farmacy Management]'s damages, even by a mere preponderance of the evidence.

Accordingly, after hearing Carter say that his opinion was conservative for Organic Farmacy Management when factoring in population based on location and nearby competition, the court still concluded that these and additional differences rendered

[5] The circuit court mistakenly referred to the incorrect entities in this discussion of its opinion, which we have corrected in brackets.

Hippocratic Growth an unsuitable business against which to compare Organic Farmacy Management for a yardstick damages calculation. Notably, the court considered Hippocratic Growth's more diverse cannabis product inventory. Similarly, the court noted that Hippocratic Growth's cannabis product inventory was larger than that of Organic Farmacy Management. It also considered the sales advantage that it believed Hippocratic Growth would have over Organic Farmacy Management as a result of its more varied and larger product inventory.

Despite the persuasive case law from the other jurisdictions cited by both parties that employ the yardstick method, we are unconvinced that the circuit court, particularly after highlighting the important differences between Organic Farmacy Management and Hippocratic Growth, abused its discretion in finding that Hippocratic Growth is not a sufficiently comparable entity. Indeed, the Fifth Circuit, in highlighting the need for a plaintiff's business and the comparable entity to be very similar under the yardstick method, has described this method of damage calculation as one that "consists of a study of the profits of business operations that are **closely comparable** to the plaintiff's. Although allowances can be made for differences between the firms, **the business used as a standard must be as nearly identical to the plaintiff's as possible**." *Lehrman*, 500 F.2d at 667. Similarly, Morones, in her article which Organic Farmacy Management favorably cites, cautioned that in order "to use this method successfully," "[o]ne must carefully select a reasonably comparable [other entity as the] yardstick." Serena Morones, *Five Pillars of a Lost Profits Analysis Pt. 1*. Also, Organic Farmacy Management cites the Fourth Circuit, which opined in a footnote that "[i]f a plaintiff can demonstrate that its

assumptions about market behavior rest on adequate bases **and there is a reasonable comparability between the businesses** or markets in question, it may properly rely on a 'yardstick' measure of proof." *Metrix Warehouse, Inc*, 828 F.2d at 1044 n.21 (emphasis added) (citations omitted).

After examining the cited precedents, we conclude that the application of the yardstick method in Maryland would require that the businesses being compared, at a minimum, have a "reasonable comparability[,]" *Metrix Warehouse, Inc*, 828 F.2d at 1044 n.21; *see* Serena Morones, *Five Pillars of a Lost Profits Analysis Pt. 1*, and would likely require that the two entities be "nearly identical[.]" *Lehrman*, 500 F.2d at 667. Given the significant differences that the circuit court found between Hippocratic Growth and Organic Farmacy Management we cannot conclude that the court abused its discretion in not using the yardstick method of calculating damages. Thus, regardless of whether the yardstick method may be applied in Maryland courts, the trial court was justified in its conclusion that the method was inapplicable because Organic Farmacy Management and Hippocratic Growth were not comparable businesses.

C. Because We Hold That the Circuit Court Did Not Err in Awarding Damages Solely for the Application Fee, We Need Not Consider Whether the Court Erroneously Interpreted the Length of the Agreement.

In the prior section, we held that the court did not err in declining to award damages for the management fees, which Organic Farmacy Management argued was subjected to a ten-year term. Instead, the court only awarded damages for the $150,000.00 application fee. Because we find that the court did not err in declining to award damages with respect to the management fees, and because the length of the contract is irrelevant for any issue

related to damages for the application fee, it is irrelevant as to whether the court erred in interpreting the length of the contract for Organic Farmacy Management's claim of the management fee. As such, we decline to address the issue.

III. ANALYSIS OF ISSUES RAISED BY FOUR GREEN FIELDS

A. The Parties' Contentions

In its cross-appeal, Four Green Fields raises six questions of its own. *First*, Four Green Fields argues that the Agreement should have been declared void and rescinded. Specifically, Four Green Fields contends that (1) the ADMS was void because conditions precedent to enforceability never occurred, (2) the Agreement was unenforceable because Hippocratic Growth failed to obtain a grower's license, and (3) the Agreement required full performance; therefore, the substantial performance doctrine is inapplicable.

Organic Farmacy Management responds to each point respectively, arguing (1) that Four Green Fields failed to prove that any ambiguity existed and failed to identify any language in § 4.1.1 of the Agreement that sets forth a condition precedent. Consequently, rescinding the contract would be inappropriate, (2) that there was no agreement to negotiate a contract but rather an agreement to work together to find an alternative supply of medical cannabis after Hippocratic Growth was denied a grower's license, and (3) that the trial court did not conflate the substantial performance doctrine for the terms of the Agreement.

Second, Four Green Fields argues that the court erred by interpreting the ADMS to require Four Green Fields to provide Organic Farmacy Management with written notice of breach and opportunity to cure before it could unilaterally terminate the agreement. In support, Four Green Fields first points us to § 8.1.1 and § 8.1.3, which it argues permits

unilateral termination of the Agreement if a ten-day notice of breach and an opportunity to cure is provided. Four Green Fields also points to § 8.2.1, which states that any remedy provided is not an exclusive remedy and is cumulative. Four Green Fields reasons, therefore, that the circuit court wrongly interpreted the ADMS to require them to provide written notice of breach and an opportunity to cure its defect more generally. Instead, Four Green Fields believes that it was not required to comply with the termination provisions because the conditions from § 4.1.1 failed to come to fruition. Organic Farmacy Management replies that even if a party's right to terminate a contract under the contract and common law are cumulative rights, that party must still prove that the opposing party was in breach, which Four Green Fields never established here.

Third, Four Green Fields contends that the circuit court abused its discretion in determining that its counterclaim did not provide Organic Farmacy Management with adequate notice of an alleged breach and an opportunity to cure the alleged breach. Four Green Fields argues that this counterclaim, which Organic Farmacy Management allegedly received in September 2018, put them on notice that Four Green Fields would seek rescission of the Agreement if it did not perform by the time that Four Green Fields received the final dispensary license. Four Green Fields identifies an unreported case from the Eastern District of New York, which it claims stands for the proposition that "[a] breaching party cannot hide behind a hyper-technical interpretation of notice and opportunity to cure provision in contract when it has actual notice of its breaches and has been informed clearly of the non-breaching parties' intent to terminate. In response, Organic Farmacy Management contends this is a "meritless" and "disingenuous"

argument. It asserts that the counterclaim was not given in accordance with ADMS § 9.6 and thus this alleged notice of termination was improper.

Fourth, Four Green Fields argues that the circuit court inappropriately severed § 4.1.1 from the rest of the ADMS. Four Green Fields asserts that the court "simply severed § 4.1.1, in the alternative, without any analysis" in contradiction with case law that does not allow a court to "apply a severance provision to eliminate a contract term unless the court properly determines that the offending provision is illegal or unenforceable as a matter of law" and "'so interwoven as to be logically inseparable from the rest of the contract.'" Farmacy Management replies to this argument in a one-paragraph rebuttal, which we reprint here in full:

> [Four Green Fields] argues that the Trial Court wrongly "declared § 4.1.1 to be severed from the ADMS." Cross-Appellant's Br. 42. This is a misstatement of the Trial Court's action. The Circuit Court ordered no severance. The Trial Court found as a matter of law that there was no ambiguity in the language of § 4.1.1. E 95. The Trial Court did suggest: "Should the Court's analysis as to this issue be overturned on appeal, the Court points out that paragraph 9.10 **SEVERABILITY** would allow the severance of paragraph 4.1.1 without voiding the other provisions of the ADMS." E 98 (emphasis in original). *See also* Cross-Appellant's Br. 42 ("§ 9.10 of the ADMS allows a court to sever a provision that the Court determines 'invalid or unenforceable.'"). This comment had no legal significance subject to appeal.

Fifth, Four Green Fields asserts that the circuit court erred by failing to find that Organic Farmacy Management negligently misrepresented that $200,000.00 would be a sufficient amount of start-up costs for this business venture. The circuit court found that the amount of money necessary to start a business venture like this "is not a fact" but "an opinion" and that "[a]s an opinion[,] it is not actionable." Four Green Fields, relying on

eighty-year old Court of Appeals precedent, argues that a negligent misrepresentation "action lies for negligent words, recovery being permitted where one relies on statements of another, negligently volunteering an erroneous opinion intending that it be acted upon and knowing that loss or injury are likely to follow if it is acted upon." *Virginia Dare Stores v. Schuman*, 175 Md. 287, 292 (1938). Organic Farmacy Management, in response, distinguishes the facts here from those in *Virginia Dare Stores*. There, the defendant store's representative told the plaintiff "to stand on the molding of [a] show case . . . assuring him and guaranteeing that it would hold his weight." The plaintiff believed the "representations to be true" and "placed one of his heels upon the block or molding . . . and while cleaning the part of it . . . the section of the molding or block upon which he stood was torn . . . thereby throwing him to the floor, causing his injuries." *See id.* at 289. Organic Farmacy Management argues that because the facts are so divergent, the case is inapposite.

Sixth, and lastly, Four Green Fields contends that the court erroneously interpreted § 1.4 of the ADMS to provide for the $150,000.00 dispensary application fee from Four Green Fields' revenues without regard to whether those revenues generated profits. Four Green Fields asserts that even though the ADMS states that the application preparation fee is to be paid from revenues, it is to be paid "prior to any payments or distributions to" Four Green Fields. In arguing that the contract should be interpreted as a whole, Four Green Fields sees the only possible conclusion to be that the revenues must be revenues that generated profits. Organic Farmacy Management argues that the two sections of the ADMS that Four Green Fields' maintains should be read together are entirely unrelated and cannot

be coherently harmonized.

B. The Circuit Court Correctly Concluded that the ADMS Was a Nullity Because of Lack of Satisfaction of Its Material Elements.

1. The Court Appropriately Found that No Condition Precedent Existed.

The issue presented here is whether a condition precedent exists in § 4.1.1 of the ADMS and if that condition was unfulfilled, would Four Green Fields be excused from performance. We begin by examining the circuit court's interpretation of § 4.1.1 of the ADMS. The circuit court found that "Maryland law subscribes to the objective interpretation of contracts[, which] excludes parole evidence of contract formation unless the contract is found to be, as matter of law, ambiguous." In Maryland, judges are "presumed to know the law . . . and are presumed to intend the necessary and legitimate consequences of their actions in its light." *State v. Chaney*, 375 Md. 168, 181 (2003). We agree with the trial court. It determined that no ambiguity existed and refused to allow extrinsic evidence to alter the meaning of § 4.1.1. Our independent review of § 4.1.1 yields the same result; the language used is not ambiguous. Therefore, the circuit court properly denied Four Green Fields' use of extrinsic evidence.

Four Green Fields argues that the trial court's finding of no ambiguity was not central to the existence of a condition precedent. Four Green Fields asserts that the condition precedent existed, on its face, in a plain reading of § 4.1.1. We disagree.

Our reading of § 4.1.1 is like that of the trial court. We do not find a specifically articulated condition precedent anywhere in § 4.1.1 of the ADMS. On this point, the trial court reasoned:

> [W]hy didn't [Four Green Fields] simply demand language in the ADMS to the effect that the failure of Hippocratic Growth to obtain a grower's license would make the contract null and void? Evidence produced at trial fully supports the proposition that [Four Green Fields'] lawyer was both experienced and sophisticated in business contract matters when the ADMS was negotiated. Certainly, he would have understood that the language in question would in no way support rescission of the contract as trial counsel for [Four Green Fields] argues in its submission.

We concur with the trial court. Rather than seeking a judicially mandated and implied condition precedent, Four Green Fields could have simply inserted a condition precedent if they had wanted. An experienced and sophisticated contracts attorney would be savvy enough to insert such language if desired, but that was not done. In short, we do not see how the language of § 4.1.1 regarding (1) the inventory supply arrangement involving Hippocratic Growth if it received a license or (2) the arrangement for the parties to find an alternative supplier if Hippocratic Growth did not receive the appropriate license in any way expressly creates a condition precedent, and Four Green Fields fails to explain how this is the case.

Regardless, in addition to finding no express condition precedent, and in analyzing *Chirichella v. Erwin*, cited by both parties, we look to the court's analysis that "although no particular form of words is necessary" to create a condition precedent, "such words and phrases as 'if' and 'provided that' are commonly used to indicate that performance" has been made conditional, "as have the words 'when, after, as soon as, or subject to.'" 270 Md. 178, 182 (1973). No such words or phrases commonly used to create a condition precedent are found in § 4.1.1 of the ADMS. Instead, § 4.1.1 of the Agreement states:

> During the life of this agreement, the Company authorizes the Dispensary Manager to contract with Hippocratic Growth, LLC to

> exclusively supply medical cannabis inventory, including cured cannabis, flower/bud and cannabis-infused products such as infused cartridges or Gray's botanicals Medipen vaporizers and other Gray's Botanicals products and all other products that Hippocratic Growth offers for sale, on a 50/50 cost share basis, and non-cannabis products at a whole sale price . . . In the event that Hippocratic Growth is not awarded a grower's license, but the Company is awarded a dispensary license, the Dispensary Manager will work with the company to find a cost-effective source of medical cannabis product.

Within this section there exists no "if[,]" "provided that[,]" "when," "after," "as soon as," "subject to[,]" or any other phrases to indicate that, if these events do not occur, Four Green Fields is excused from performance.

Four Green Fields contends that the evidence that would establish the existence of a condition precedent comes in three categories. *First*, it believes that there is uncontroverted evidence establishing that neither of the alternative conditions precedent in § 4.1.1 ever came to fruition. Four Green Fields claims that because the evidence is undisputed that means a condition precedent existed. We are not persuaded. Organic Farmacy Management's and the trial court's failure to dispute this information is not evidence that a condition precedent exists within the plain meaning of the agreement.

Second, Four Green Fields argues that the conditions precedent were material to the overall agreement, so failure of their occurrence means that a contract no longer exists. But, arguing (or even showing) that the conditions precedent were material does not mean that such conditions actually existed.

Third, Four Green Fields claims it provided notice that they intended to declare the ADMS null and void as a result of the failure of either of the conditions precedent to occur. While this may appear to have significance, extrinsic evidence, such as the letter or service

of the counter claim as indicated by Four Green Fields, would not be allowed unless the court found § 4.1.1 was ambiguous. Four Green Fields does not dispute unambiguity; therefore, this evidence is unpersuasive.

As we see it, Four Green Fields failed to establish that conditions precedent existed within the plain meaning of § 4.1.1 of the ADMS and we therefore reject their argument.

2. The ADMS Was Not an Unenforceable Agreement to Reach a Future Agreement.

This issue involves whether an agreement to agree was formed within § 4.1.1 when Organic Farmacy Management failed to secure a grower's license and the parties failed to find a cost-effective substitute. The Court of Appeals has held that "the overwhelming weight of authority holds that courts will not enforce an agreement to negotiate a contract." *First Nat'l Bank of Md. v. Burton, Parsons & Co., Inc.*, 57 Md. App. 437, 450 (1984). Four Green Fields' assertion that under § 4.1.1 of the ADMS there is an unenforceable agreement to agree is not persuasive. Four Green Fields asserts that because Organic Farmacy Management failed to obtain a grower or processor license, § 4.1.1 required the parties to find a new medical cannabis supplier and amend the agreement, but neither of these events occurred. Because neither of these events occurred, Four Green Fields contends that the parties were left with an agreement that lacked definite material terms and imposed uncertain obligations. To support these assertions, Four Green Fields attempts to use the trial court's statement as follows:

> Before you leave the [Four Green Fields] declaratory judgment, is it not at this point debatable that the contract is -- there is an impossibility of performance, you know, because Hippocratic cannot provide the cannabis as outlined here and you haven't been able to sit down and agree on -- as the

> language says, "Dispensary manager will work with the company to find cost effective source of medical cannabis, and this agreement will be amended." That essentially is saying the parties have to agree and one party -- it takes two parties to agree. One party can simply say am not going to agree to anything else and your contract is frustrated, is it not?

After reading the entire transcript, determining when the judge made this statement and the surrounding circumstances, we are convinced that the trial judge was not interpreting § 4.1.1 as Four Green Fields argues. Rather, the trial judge was posing a question to the parties, seeking information that would help the court reach a decision. Put simply, this was not a finding of fact that the circuit court made, but rather a question posed to the parties over the course of the bench trial. Accordingly, we decline to recognize a question posed to the parties as a holding, as Four Green Fields urges.

Additionally, our *de novo* review of § 4.1.1 reveals that this provision does not contain an agreement to agree. Both parties cite *Horsey v. Horsey*, 329 Md. 391 (1993), whose holding states:

> Because of the waiver of arbitration, the modification provision of the Horseys' separation agreement is simply an agreement to attempt to agree in the future, without any guidelines, formula or basis for ascertaining the amount of modification. In accordance with the principles that the terms of a contract must be sufficiently definite for enforcement and that a court will not make a contract for the parties, it is generally held that an "agreement to agree" is unenforceable.

Horsey held that there were no guidelines, formulas, or any basis for ascertaining the amount of modification.

We think *Horsey* is inapposite to this case. Plainly reading § 4.1.1, as Four Green Fields argues, we conclude that this section does not have any vague or indefinite language relating to the finding of a cost-effective alternative cannabis supply. The contract was

definite and clear. Specifically, if Organic Farmacy Management failed to obtain the specific license, the parties would work together to find an alternative. The record shows that Organic Farmacy Management had knowledge and experience in the medicinal cannabis field, and Four Green Fields knew this. Consequently, Four Green Fields' argument that the obligations are unclear, is unpersuasive. Based on its experience, Organic Farmacy Management would know who a cost-effective supplier would be, and that information would have been disclosed if Four Green Fields had discussed this issue with them.

And regardless, Four Green Fields assumes, without evidence or proof, that this "new agreement" would be less profitable. But such notion is unimportant in terms of what § 4.1.1 actually says. The Agreement clearly states that both parties were obliged to work together to find a cost-effective alternative, regardless of profitability should Hippocratic Growth fail to obtain a grower's license. Finally, although no timeline was provided in § 4.1.1 for when a cost-effective alternative needed to be found, the burden was on both parties to find their alternative.

In sum, we do not see § 4.1.1 as an agreement to agree but rather an already-specified, clear, and definite set of duties that the parties agreed to undertake if Hippocratic Growth did not obtain a grower's license. At the point in which Hippocratic Growth did not receive their applied-for license, it then became the duty of Four Green Fields and Organic Farmacy Management to follow the ADMS in obtaining inventory from a source other than Hippocratic Growth.

3. Sections 4.1.1 and 1.3 Are Not Intertwined, And There is No Clear Language in Either to Indicate Complete Performance Was Required.

Four Green Fields asserts that performance of §§ 4.1.1 and 1.3 are intertwined and that substantial performance of the duties expressed in § 1.3 does not override the full performance required in § 4.1.1. Four Green Fields looks to our decision in *Cambridge Techs., Inc. v. Argyle Indus.*, 146 Md. App. 415 (2002), which states:

> The substantial performance rule does not apply where the parties, by the terms of their agreement, make it clear that only complete performance will be satisfactory. The general acceptance of the doctrine of substantial performance does not mean that the parties may not expressly contract for literal performance of the contract terms; however, where the parties have not made it clear that literal and exact compliance is necessary, substantial performance will suffice, especially if requiring literal performance will result in a forfeiture. Thus, substantial performance is ordinarily not applicable to excuse the nonoccurrence of an express condition precedent to a contract. Stated otherwise, if the terms of an agreement make full or strict performance an express condition precedent to recovery, then substantial performance will not be sufficient to enable recovery under the contract.

While we undoubtedly agree with this holding, we analyze certain phrases within it with respect to the factual circumstances of the case presently before us. *First*, "where the parties, by the terms of their agreement, make it clear that only complete performance will be satisfactory" does not apply here. Sections 4.1.1 and 1.3 read as follows:

> **1.3 Dispensary Premise Description.** [Four Green Fields] shall furnish a site plan, including a location map, zoning information, full information concerning available service and utility lines both public and private, above and below grade, including size, inverts and depths, and the premises owner/agent contact information. It is understood that [Organic Farmacy Management] has undertaken due diligence with respect to potential dispensary locations and will assist [Four Green Fields] in gathering the information described in this paragraph.
>
> **4.1.1 Exclusive Supply Agreement.** During the life of this agreement, the [Four Green Fields] authorizes the [Organic Farmacy

> Management] to contract with Hippocratic Growth, LLC to exclusively supply medical cannabis inventory, including cured cannabis, flower/bud and cannabis-infused products such as infused cartridges or Gray's botanicals Medipen vaporizers and other Gray's Botanicals products and all other products that Hippocratic Growth offers for sale, on a 50/50 cost share basis, and non-cannabis products at a whole sale price . . . In the event that Hippocratic Growth is not award a grower's license, but the [Four Green Fields] is awarded a dispensary license, the [Organic Farmacy Management] will work with the company to find a cost-effective source of medical cannabis product.

In reading both § 4.1.1 and § 1.3, we see no "clear" language that indicates full performance is required. Additionally, Four Green Fields does not identify any direct language to support its assertion.

Second, "if the terms of an agreement make full or strict performance an express condition precedent to recovery, then substantial performance will not be sufficient to recovery," is also not applicable here. We articulated above that no conditions precedent exist in § 4.1.1, so there is no "express condition" that full performance is necessary to recover.

Because there is no clear, express language in either section to show complete performance is required, we determine that the doctrine of substantial performance applies. In analyzing § 1.3 and § 3.2.1, Organic Farmacy Management and Four Green Fields had agreed to duties that Organic Farmacy Management must complete in order for the application fee to be paid. We agree with the trial court that substantial performance is concerned with the agreed exchange of the obligations under the contract, and with preventing "a forfeiture for work, labor, and materials when there is substantial performance of that promissory duty in accordance with the terms of the contract." Section

1.3 simply provides that Organic Farmacy Management will undertake due diligence to find locations and assist Four Green Fields in gathering information. As the trial court concluded, the facts indicate that, in conjunction with § 3.2.1, Organic Farmacy Management substantially completed its express duties, and thus they are not required to pay back the $150,000.00 application fee for completing those duties. Even if these two provisions were intertwined, there is still no "clear language" that requires complete performance to obtain the $150,000.00 application fee.

For these foregoing reasons, we affirm that the ADMS is valid and should neither be rescinded nor deemed a nullity.

C. The Circuit Court Correctly Found That Four Green Fields Was Required to Provide Written Notice to Organic Farmacy Management for Breach and Provide an Opportunity to Cure.

Next, we address Four Green Fields' contention that the circuit court erred in finding that Four Green Fields was required to provide written notice of breach and provide an opportunity for Organic Farmacy Management to cure. The parties disagree on their interpretations of §§ 8.1.1, 8.1.3, and 8.2.1, and how those provisions relate to their contention that § 4.1.1 was not satisfied. The relevant provisions state:

> **ARTICLE VIII. TERMINATION AND REMEDIES**
>
> **8.1 Termination of this Agreement**
>
> **8.1.1. Termination for Cause or by Mutual Consent.** This Agreement may be terminated for cause or by mutual consent of the parties as set forth in Sections 8.1.2 and 8.1.3 but may not be unilaterally terminated by the Company for convenience or without cause.
>
> . . . .

> **8.1.3 Termination by the Company**. This Agreement may be terminated by the Company for cause only upon ten (10) days written notice should the Dispensary Manager fail to perform in accordance with the terms of this Agreement, however, *(sic)* the Dispensary Manager shall have ten (10) business days to cure any defect giving rise to the termination notice. Cause shall include acts of the Dispensary Manager that may lead to suspension or revocation of Dispensary license, loss of revenues exceeding 20 percent of the prior year's revenues in any given year, or bankruptcy or insolvency of Dispensary Manager.
>
> . . . .
>
> **8.2 Remedies**
>
> **8.2.1. Cumulative Remedies.** No remedy conferred upon the Company or the Dispensary Manager by the terms of this Agreement is intended to be exclusive of any other remedy provided at law or in equity. Each and every remedy of the Company or the Dispensary Manager shall be cumulative and shall be in addition to any other remedy given to the Company hereunder or now or hereafter existing.
>
> **8.2.2. Remedies Not Waived.** No delay, omission or forbearance to exercise any right, power, or remedy accruing to the Company or the Dispensary Manager hereunder shall impair any such right, power or remedy or shall be construed to be a waiver of any breach hereof or default hereunder. Every right, power or remedy may be exercised from time to time and as often as deemed expedient.

At the outset, our reading of §§ 8.1.1 and 8.1.3 of the Agreement is that it plainly requires that the ADMS "may not be unilaterally terminated by the Company for convenience or without cause." Should Four Green Fields have cause and decide to unilaterally terminate the ADMS, Four Green Fields would be required to provide "ten (10) days written notice should [Organic Farmacy Management] fail to perform in accordance with the terms of this Agreement," at which point Organic Farmacy Management would then "have ten (10) business days to cure any defect giving rise to the termination notice." Like the circuit court, though, we concede that these provisions must be harmonized with

§ 8.2.1 of the ADMS, which states that "[e]ach and every remedy . . . shall be cumulative and shall be in addition to any other remedy given[.]" Here, Four Green Fields asks us to conclude that it may escape liability by using the common law remedy of termination for § 4.1.1 of the Agreement, which is not subject to the timely written notice requirement found in § 8 of the ADMS.

As we see it, the circuit court appropriately harmonized these provisions by construing the Agreement to mean that Four Green Fields "is not limited to the definition of cause set out in paragraph 8.1.3 but can assert any breach or default. To do so, however, it must give notice within ten days of the breach in writing and afford [Organic Farmacy Management] ten days to cure the breach." Upon our *de novo* review of the issue, we come to the same interpretation of the contract as the circuit court. This Court is charged with construing a contract "in its entirety and, if reasonably possible, [giving] effect . . . to each clause so that a Court will not find an interpretation which casts out or disregards a meaningful part of the language[.]" *Rourke v. Amchem Prods., Inc. et. al.*, 153 Md. App. 91 (2003). We, like the circuit court, believe it to be reasonable to construe the Agreement to mean that although § 8.1.3 does not limit Four Green Fields solely to the annunciated instances of "cause" listed in that provision, § 8.1.3 indeed requires Four Green Fields to provide written notice of an alleged breach by Organic Farmacy Management in order for Four Green Fields to unilaterally terminate the Agreement.

To be sure, moreover, even if we were to conclude that Four Green Fields is not subject to the written notice requirement under the contractual remedy for termination, Four Green Fields would be unable to find relief under the more general common law

remedy for termination. The Court of Appeals has long held that "[u]nless a contract provision for termination for breach is in terms exclusive . . . it is a cumulative remedy[.]" *Foster-Porter Enters. v. De Mare*, 198 Md. 20, 36 (1951) (citing *Bartol v. Gottlieb-Bauernschmidt-Straus Brewing Co.*, 129 Md. 32 (1916)). Importantly, however, a material breach is required in order for the general termination remedy to be able to apply: "[a non-exclusive contract provision for termination] does not bar the ordinary remedy of termination for 'a breach which is material, or which goes to the root of the matter or essence of the contract[.']" *Id.* (quoting Williston on Contracts § 842 (Revised Ed.)). Problematic for Four Green Fields, though, is the fact that this Court has not concluded nor did the circuit court find Organic Farmacy Management in breach of the ADMS, much less one that could be considered "material[or] go[ing] to the root of the matter or essence of the contract." *See id.* This important fact stands in contrast to the conclusion of *Foster-Porter Enterprises*, upon which Four Green Fields relies, where a material breach had been found. *See id.* Accordingly, because Organic Farmacy Management did not commit a material breach, the common law remedy of termination is not available to Four Green Fields.

D. The Court Did Not Err by Finding that Four Green Fields' Counterclaim Did Not Amount to Adequate Notice and Opportunity to Cure.

The next issue is whether the circuit court erred by finding that Four Green Fields' counterclaim did not amount to adequate notice and opportunity to cure. Section 9.6 of the ADMS addresses notices and sets forth the notice that the parties agreed to provide to each another:

> **9.6 Notices.** All notices, certificates, requests or other communications hereunder shall be in writing and shall be deemed to be given if delivered in person to the individual or to a member of the company or organization for whom the notice is intended or if delivered at or mailed by registered or certified mail, postage prepaid, to the appropriate following address:
>
> . . . .
>
> If to the Dispensary Manager:
>
> Organic Farmacy Management, LLC
> 208 High Street, Ste. 200
> Chestertown, Maryland 21620
> Attn: Stephen Z. Meehan, Dispensary Representative

It is undisputed that Four Green Fields did not comply with the requirements set forth in § 9.6 of the Agreement. Instead, the counterclaim, which Four Green Fields now argues gave proper notice, "was served via MDEC, direct electronic mail, and first-class mail, postage prepaid, on: James B. Astrachan. Esq.[,] . . . Elizabeth A. Harlan, Esq.[, and] . . . H. Mark Stichel, Esq.[, attorneys for] Astrachan, Gunst Thomas, PC.[,] 217 East Redwood Street, Suite 2100[,] Baltimore. Maryland 21202[.]"

Although Four Green Fields' counterclaim failed to provide notice per the terms of the ADMS, as it was not delivered to the appropriate person, our Court has reasoned that when "we are satisfied that [a party] had actual, ongoing knowledge of [the opposing party]'s complaints under the terms of [a l]ease" and there exists an "extensive paper trail created by the parties [that] makes clear that notice effected pursuant to [the contract] . . . would have been, at best, duplicative[,]" then a party's failure to strictly comply with the contractual notice requirement may be excused and actual notice may be accepted in place of the contractual requirement. *B & P Enters. v. Overland Equip. Co.*, 133 Md. App. 583,

612 (2000). As we see it, the question becomes whether Organic Farmacy Management "had actual, ongoing knowledge" of Four Green Fields' complaints that would make the "notice effected . . . at best, duplicative" and, consequentially, whether we may excuse Four Green Fields' failure to comply with § 9.6 of the Agreement.

There are significant differences between the facts here and those in *B & P Enterprises* such that we cannot excuse the failure to conform with the notice requirements as we did there. *See* 133 Md. App. at 612. In that case, the opposing parties had frequent, written contact via facsimile about the alleged breach of contract from June 1998 until September 28, 1998, when the party filed a complaint in the Circuit Court for Prince George's County. *Id.* at 593-95. Written communication between the parties regarding the alleged breach continued after the court filing through the beginning of 1999. *Id.* at 595-98. Given these conversations, we held that even though notice of breach had not been served per the terms of the contract by certified mail, registered mail, or in person, the extensive paper trail between the appropriate persons through facsimile that detailed the alleged breach would have made compliance with the notice requirement merely duplicative. *Id.* at 612.

In stark contrast, here, we are unable to find a similar paper trail between the parties regarding the alleged breach. Four Green Fields points us solely to the counterclaim filed in circuit court. Notably, unlike the frequent facsimile exchanges regarding breach, which occurred immediately upon commencement of the alleged breach, *id.* at 593-98, in this case, the counterclaim was not filed until September 2018, more than two years after the alleged breach in August 2016. Although the ADMS states that delay will not waive

remedy, we decline to hold that the filing of a counterclaim more than two years after an alleged breach and after litigation has already commenced excuses Four Green Fields from complying with the agreed upon notice requirement under the ADMS. To hold otherwise would go against the precedent in *B & P Enterprises* where we placed particular importance on the notion that strictly adhering to the contract would be merely duplicitous to the paper trail already created and the knowledge already possessed by the appropriate persons. Accordingly, we reject Four Green Fields' contention that its counterclaim, filed after the commencement of litigation to the incorrect persons more than two years after the alleged breach, provided adequate notice of an alleged breach to Organic Farmacy Management.

E. Whether the Circuit Court Appropriately Severed § 4.1.1 of the ADMS Is Irrelevant for this Appeal.

We agree with Organic Farmacy Management that whether the circuit court severed § 4.1.1 of the Agreement and, if it did, whether a severance violated § 9.10 of the Agreement is irrelevant for this appeal. On this point, the circuit court "conclude[d] as a matter of law that FGF has no contractual basis to assert a breach of the ADMS against" Organic Farmacy Management. The circuit court then noted, in dicta, that "[s]hould the Court's analysis as to this issue be overturned on appeal, the Court points out that paragraph 9.10 **SEVERABILITY** would allow for the severance of paragraph 4.1.1 without voiding the other provisions of the ADMS."

This was not a circuit court finding upon which Four Green Fields could appeal. The circuit court, in dicta, was merely highlighting the existence of § 9.10. As this

statement was not a finding by the circuit court, it is not a basis upon which Four Green Fields may appeal.

F. The Circuit Court Did Not Err in Denying Four Green Fields' Negligent Misrepresentation Claim.

Next, we analyze whether the court erred in denying Four Green Fields' negligent misrepresentation claim. On this point, the circuit court found:

> The "facts" that [Four Green Fields] contends were misrepresented to the principles of [Four Green Fields include (]1) the amount of startup capital that [Four Green Fields] would require to capitalize its dispensary[.]
>
> . . . .
>
> The difficulty that we have with "fact one," the amount of money necessary to capitalize the dispensary, is that it is not a fact. It is an opinion.
>
>> *[E]stimate made by seller/installer of contract to buyer that job would take "somewhere between around nineteen and twenty thousand yards" was an opinion rather than a representation of a fact that could be relied upon and, hence, buyers were not entitled to rescind on ground that a fact was misrepresented and that they were induced to contract by virtue of misrepresentation; Snyder v. Herbert Greenbaum & Associates, Inc., 38 Md. App. 144, 149 (1977).*
>
> As an opinion it is not actionable.

(Emphasis in original). In short, Four Green Fields believes this holding by the circuit court to be in error based on the Court of Appeals' holding in *Virginia Dare Stores*, where the Court opined that a negligent misrepresentation "action lies for negligent words, recovery being permitted where one relies on statements of another, negligently volunteering an erroneous opinion intending that it be acted upon and knowing that loss or injury are likely to follow if it is acted upon." 175 Md. at 292.

While looking at this quote, alone, might lead to the impression that Four Green Fields is correct in its assertion, further examination of both the *Virginia Dare Stores* case as well as subsequent case law by the Court of Appeals and our Court makes clear that Four Green Fields cannot succeed on its claim. At the outset, we point out the notable differences of the facts of *Virginia Dare Stores* and the facts of the case before us. There, the negligent misrepresentation was that of a store employee who "**assur[ed]**" and "**guarant[eed]**" the injured plaintiff that a molding "would hold his weight[,]" which broke and caused his injuries. *Id.* at 289 (emphasis added). Here, the alleged negligent misrepresentation was Organic Farmacy Management's opinion that Four Green Fields would need approximately $200,000.00 as its investment.

Even more importantly, our Court and the Court of Appeals have since repeatedly held that a mere opinion, on its own, is not enough to support a negligent misrepresentation claim. For instance, as relied upon by the circuit court in its written opinion, our precedent from *Snyder* clearly states that an "estimate made by seller/installer of contract to buyer that [the] job would take 'somewhere between around nineteen and twenty thousand yards' was an opinion rather than a representation of a fact that could be relied upon" and thus found that the "buyers were not entitled to rescind on ground that a fact was misrepresented and that they were induced to contract by virtue of misrepresentation[.]" 38 Md. App. at 144. Besides the fact that the circumstances of *Snyder* much more align with the circumstances of this case, this case shows that such a mere professional estimation as to the future amount cannot give rise to a successful negligent misrepresentation claim. Similarly, the Court of Appeals has reasoned that alleged "[m]isrepresentations, by

whomsoever made, must relate to facts, or matters of fact, and not mere matters of expectation or opinion." *Johnson v. Maryland Tr. Co.*, 176 Md. 557, 565 (1939). As we see it, like in *Snyder*, (cited in the above quote), the statements at issue here related to the future expectation that approximately $200,000.00 rather than to some existing fact or matter of fact.

Finally, we find further support for our conclusion that the trial court did not err in rejecting Four Green Fields' negligent misrepresentation claim by the fact that the Agreement itself included a provision that clearly stated in § 2.1.2 that the parties "do not have control over the cost of labor, materials or equipment, over contractors' methods of determining bid prices, or over competitive bidding, market or negotiating conditions." That section, as written, continued to clearly provide that Organic Farmacy Management "cannot and does not warrant or represent that bids or negotiated prices will not vary from the Dispensary Start-Up budget or from any estimate of cost or evaluation prepared by or agreed to by [Organic Farmacy Management]." Accordingly, for this reason and for the reasons explained above, we cannot hold that the circuit court erred by rejecting Four Green Fields' claim for negligent misrepresentation.

G. The Court Appropriately Ruled that Four Green Fields Must Pay the Entire Application Fee Without Regard to Profitability.

Finally, we conclude that the circuit court did not err in determining that Four Green Fields must pay the application fee without regard to profitability. Here, Four Green Fields asserts that §§ 1.4 and 1.5 of the ADMS should be looked at together in determining where the application fee payment should come from. Four Green Fields cites *Hebb v. Stump*,

where we held that "where two clauses or parts of a written agreement are apparently in conflict, and one is general in character and the other is specific, the specific stipulation will take precedence over the general." 25 Md. App. at 478. However, § 1.4 read plainly states that the application fee is "to be paid following issuance of a final license by the Commission from Dispensary operation revenue prior to any payments or distributions to [Four Green Fields]." Section 1.5, meanwhile, is titled "Capital Requirements" and does not discuss the application fee of $150,000.00, nor does it mention anything about waiting to use profits to pay that application fee. Four Green Fields has not identified any direct language in either § 1.4 or § 1.5 to indicate how the provisions should be read together in order reach the conclusion it seeks. Additionally, because there is no language of payment for the application fee in § 1.5, there is no "conflict between two clauses" as we held in *Hebb*. Therefore, the case law that Four Green Fields cited to is not on point given the circumstances before us.

As articulated by the circuit court, the term "dispensary operation" refers to Organic Farmacy Management as the dispensary manager. The plain language of § 1.4 shows that Organic Farmacy Management could "pay itself the application fee" Four Green Fields owed from sales income it received as Dispensary Manager. We agree with the trial court that because of the way this provision is written, Organic Farmacy Management would never be able to collect its application fee because it never had the opportunity to act as Dispensary Manager before the breach occurred. Going further, even if the parties had proceeded with the contract without dispute, there would still be the chance that the business would never be profitable. If Four Green Fields' argument was to be taken as true

and this scenario had indeed occurred, Organic Farmacy Management would have never received this fee. To base the application fee payment off future profits of the company would be inequitable. Therefore, we affirm the circuit court's decision that the application fee payment was not required to be paid from future company profits.

THE JUDGMENT OF THE CIRCUIT COURT FOR KENT COUNTY IS AFFIRMED. COSTS TO BE EVENLY DIVIDED.