Circuit Court for Baltimore County
Case Nos.: C-03-CV-21-001316,
C-03-CV-21-001057, and
C-03-CV-21-000810

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

Nos. 1104, 1108, 1110

September Term, 2022

MELISSA JERRO HENCKEN

v.

SERVPRO OF CARROLL COUNTY,
PROFESSIONAL RESTORATIONS,
USAA CASUALTY INSURANCE
COMPANY

Reed,
Beachley,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: March 4, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Melissa Jerro Hencken appeals the judgments entered by the Circuit Court for Baltimore County dismissing, with prejudice, three complaints she filed against Servpro of Carroll County, Professional Restorations, and USAA Casualty Insurance Company (collectively, the defendants and appellees), for damages resulting from their efforts to remediate the effects of a sewage leak in her home. She raises one question on appeal: Did the circuit court err in dismissing her complaints with prejudice? After addressing the myriad substantive and procedural issues raised in this appeal, we shall affirm in part and reverse in part the circuit court's judgments.

FACTS AND LEGAL PROCEEDINGS

On 13 March 2018, due to pipes damaged by tree roots, raw sewage flowed from two toilets into Hencken's Catonsville home, where she lived with her three minor children and pets. She contacted USAA Casualty Insurance Company ("USAA"), through whom she had a homeowner's insurance policy. According to Hencken, USAA "referred" her to Professional Restorations ("PR"), a contractor listed on USAA's "Property Direct Repair Program" ("PDRP"), a home contractor network.

Three days after the overflow, Hencken executed a contract with PR. Although Hencken, her children, and pets lived in the house during some of the remediation work, at some point they moved out, with USAA paying "additional living expenses" under her homeowner's insurance policy. PR's work consisted mostly of removing and storing her personal property and removing some drywall and debris.

Dissatisfied with the work done by PR,[1] Hencken fired it. She then called USAA, who, according to Hencken, "referred" her to a second remediation company, Servpro of Carroll County ("ServPro"), who is also an approved PDRP business.[2] On 17 April 2018, Hencken executed a contract with ServPro. Its work consisted mostly of demolition work. She was dissatisfied also with the work done by ServPro.

Frustrated with the entire experience, Hencken filed, pro se, separate complaints against her insurer and the two remediation companies. She filed a complaint against USAA on 15 March 2021; PR on 9 April 2021; and ServPro on 27 April 2021. The complaint filed against USAA alleged one count of breach of contract. The complaint filed against PR alleged one count each for breach of contract, negligence, destruction of property, and theft, and sought monetary damages in excess of $75,000.[3] The complaint filed against ServPro alleged one count each for breach of contract, negligence, and destruction of property.[4] Each of her complaints were two pages long.

[1] PR alleges that USAA issued a check to Hencken, payable to both PR and Hencken, for the work it did. PR alleges further that Hencken negotiated the check without obtaining its endorsement and that it has not been paid for its services.

[2] Appellees allege in their appellate briefs that Hencken did not use USAA's PDRP, but hired the two remediation companies directly.

[3] Hencken alleged, among other things, that PR did not pack or store properly her personal belongings from the house; failed to address the mold in the insulation, drywall, and studs; failed to remove the walls surrounding the toilets where the backup originated; and failed to disengage the heating and air conditioning systems; thus allowing contaminants from the sewage to circulate throughout her house.

[4] Hencken alleged, among other things, that ServPro failed to test for the presence of lead; disposed of a vanity top and bathtub against her wishes; failed to contain properly (continued…)

PR filed a motion to dismiss for failure to state a claim. Hencken filed a motion to consolidate the PR and ServPro cases.[5] The court granted PR's motion to dismiss but allowed Hencken 20 days to amend her complaint and refile. As a consequence, Hencken filed a first amended complaint ("FAC") in both the PR and ServPro cases. The court denied her motion to consolidate. The FAC filed against PR sought $2.1 million in monetary damages and plead: gross negligence; conversion; fraud; breach of the Maryland Consumer Protection Act ("MCPA"); intentional infliction of emotional distress; and pain and suffering. This FAC alleged 11 counts in its 12 pages. The FAC filed against ServPro raised: trespass; gross negligence; conversion; breach of contract; fraud; breach of the MCPA; intentional infliction of emotional distress; and pain and suffering, in its 20 pages containing 24 counts.

An attorney entered his appearance on Hencken's behalf. He filed initially a motion in the PR and ServPro cases to join the three defendants in a single action.[6] The court denied the motion to join. PR filed a motion to dismiss the FAC for failure to state a claim.

On 9 February 2022, without leave of court, Hencken's attorney filed a second amended complaint ("SAC") in each of the three cases. The SAC named each of the three defendants in its 23 single spaced pages, containing 373 paragraphs and 34 counts. The

lead dust, mold, and other contaminants; and destroyed, among other things, flooring, insulation, humidifiers, and the fireplace in her house.

[5] Around this time, ServPro and USAA filed answers to the original complaints lodged against them. PR did not file an answer.

[6] Hencken's attorney did not move to join the USAA case.

SAC purported to add additional defendants: Professional LLC, a holding company for PR, and three employees of ServPro, Charles Holland, Barbara Gibbes, and Lyndon Gibbes.[7] The 34 counts raised in the SAC included: one count of trespass; four counts of gross negligence; 17 counts of conversion; two counts of breach of contract; three counts of fraud; two counts of breach of the MCPA; and one count each of breach of failure to settle claims in good faith, negligence, violation of the MCPA, intentional infliction of emotional distress, and pain and suffering. The court denied PR's motion to dismiss the FAC as moot because Hencken filed the SAC.

On 16 March 2022, ServPro and PR filed a joint motion to dismiss the SAC. The motion named each of the three defendants and claimed that the SAC failed to state a claim upon which relief could be granted because it, among other things: failed to specify which of the defendants was subject to the allegations in any count; failed to allege sufficiently any cause of action; and pain and suffering was not a proper cause of action. On 3 June 2022, ServPro filed a separate, additional motion to dismiss the SAC arguing, among other things, that the Federal Toxic Substances Control Act allegations within two of Hencken's gross negligence counts were not actionable; Hencken was bound to the arbitration

[7] Hencken claimed in her SAC that Professional, LLC owns PR, and Holland, Gibbes, and Gibbes own ServPro. PR claims that Hencken failed to serve these additional defendants – the SAC was only served electronically on the three defendants in the original pending actions. Hencken does not respond to this claim. The circuit court did not address these added parties. Thus, there is no case remaining against them.

On a different note, ServPro's assertion that it was not served properly was not responded to by Hencken. Likewise, the trial judge did not mention this argument as a ground upon which it relied in granting dismissal. We shall not resolve the effect of this ground on the state of this record.

provision in their contract; and intentional infliction of emotional distress was not a proper cause of action. On 13 June 2022, USAA joined the joint motion to dismiss filed earlier by ServPro and PR, and an additional motion to dismiss, alleging lack of service of process.

At a hearing on 28 June 2022, Hencken and her attorney, and all three defendants and their attorneys, were present. At 11:01 p.m. the night before the hearing, Hencken's attorney had filed a "further responses" memorandum to the defendants' motions to dismiss. At the hearing, the court chastised Hencken's attorney for filing the exceedingly late paper and stated that, although she (the judge) had not and would not read the memorandum, Hencken's attorney could argue from it, which he did. During the parties' arguments, the court observed: "How could anybody follow [the SAC]? . . . [T]here is no reference to anything. . . . I have never seen such pleadings in my life. . . . I mean, am I supposed to read every paragraph and then go back and start trying to figure out which thing this applies to and who?" Following arguments by counsel, the circuit court announced its decision from the bench, stating:

> I am going to dismiss the complaint [against PR]. It is not filed with any specific factual clarity. It is indecipherable as to which defendants are alleged to have done what. It is – I think I used the word, a mismatch. It is – I can't make heads or tails of it. It is not – it is not compliant with what the rules require. It . . . does not place the defendants on adequate notice as to what is alleged that each individual defendant was to have done, which counts are applicable to which. It basically fails to state a complaint for which relief can be granted. So for all those reasons the complaint is dismissed.
>
> In the alternative, I will just cover bases and say that I would dismiss USAA as not having been served. There is an insufficient service in these proceedings and as pointed out by counsel, Professional [Restorations] filed a motion to dismiss in advance of an answer which is permissible under the rules claiming lack of service.

> I would also dismiss Serv[P]ro because there is an arbitration, mediation clause which does govern and preclude actions in the Circuit Court. This is not the proper forum[.]

That same day, the circuit court entered also a written order in the ServPro case granting, with prejudice, its motion to dismiss the SAC against each of the three defendants. The court denied Hencken's subsequent motions for reconsideration and amended motion for reconsideration.[8]

We shall provide additional facts where necessary in our analysis.

STANDARD OF REVIEW

The standard under which we review a circuit court's grant of a motion to dismiss is well-established:

[8] PR argues on appeal that Hencken's appeal was filed untimely. It argues that the court docketed its judgment dismissing the SAC on 28 June 2022; she filed untimely her motion for reconsideration on 11 July 2022, 13 days after the entry of judgment on the motion to dismiss; then, filed her notice of appeal on 30 August 2022. According to PR, because the notice of appeal was untimely, the only issue preserved on appeal is whether the circuit court abused its discretion in denying Hencken's motion for reconsideration.

PR is wrong. The circuit court's order dismissing, with prejudice, the SAC was not docketed in PR's case until 8 September 2022. Under Rule 8-602(d), the appeal relates back even though filed prematurely. Therefore, the appeal was filed timely. PR's argument, however, might have been true as to ServPro because, in that case, the circuit court's order dismissing the SAC with prejudice was docketed on 28 June 2022. Because her motion for reconsideration was filed untimely, it did not toll the time for filing her appeal on 30 August 2022. *Pickett v. Noba, Inc.*, 114 Md. App. 552, 556 (1997) (citing Md. Rule 2-534, which provides that motions to amend or alter judgment must be filed within 10 days of judgment, and Md. Rule 8-202(c), which provides that a party generally has 30 days to file an appeal, and then holding that an untimely filed motion under Md. Rule 2-534 does not toll the time for filing an appeal), *cert. denied*, 351 Md. 663 (1998). Because ServPro did not raise this issue on appeal, it appears waived. *See Rosales v. State*, 463 Md. 552, 562-70 (2019) (holding that the 30-day time period for filing an appeal is no longer a jurisdictional rule but a "claim-processing" rule that can be waived if not raised on appeal).

> The standard of review of the grant or denial of a motion to dismiss is whether the trial court was legally correct. *RRC Ne., LLC v. BAA Maryland, Inc.*, 413 Md. 638, 643-44 (2010). In reviewing the ruling on the motion to dismiss, "we accept all well-pled facts in the complaint, and reasonable inferences drawn from them, in a light most favorable to the non-moving party." *Converge Servs. Grp., LLC v. Curran*, 383 Md. 462, 475 (2004). When examining the pertinent facts, the Court limits its analysis to the "four corners of the complaint. . . ." *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 497 (2014) (cleaned up). The pleader must set forth a cause of action with sufficient specificity – "'bald assertions and conclusory statements by the pleader will not suffice.'" *Id.* (quoting *RRC Ne.*, 413 Md. at 644).

Davis v. Frostburg Facility Operations, LLC, 457 Md. 275, 284-85 (2018) (footnote omitted).

The Maryland Supreme Court states that, even though we have "abandoned the formalities of common law pleading, our Rules do require a pleading to allege facts, if proven true, sufficient to support each and every element of the asserted claim." *Horridge v. St. Mary's Cnty. Dep't of Soc. Servs.*, 382 Md. 170, 181 (2004) (quotation marks and citation omitted). Md. Rule 2-303, on form of pleadings, provides:

> (b) **Contents.** – Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings are required. A pleading shall contain only such statements of fact as may be necessary to show the pleader's entitlement to relief. . . . It shall not include argument, unnecessary recitals of law, evidence, or documents, or any immaterial, impertinent, or scandalous matter.

The Maryland Supreme Court states that the four important purposes of Maryland's pleading rule are to: (1) provide notice to the parties as to the nature of the claim or defense; (2) state the facts upon which the claim or defense allegedly exists; (3) define the boundaries of litigation; and (4) provide for the speedy resolution of frivolous claims and

defenses. *Woolridge v. Abrishami*, 233 Md. App. 278, 296 (citing *Scott v. Jenkins*, 345 Md. 21, 27-28 (1997)), *cert. denied*, 456 Md. 96 (2017).

DISCUSSION

Hencken argues that the circuit court erred in dismissing her SAC with prejudice. She contends that, contrary to the circuit court's holding, her SAC was pled sufficiently to withstand a motion to dismiss. The circuit court erred in dismissing the SAC with prejudice because "any insufficiency [could have been] cured by amendment."

Appellees argue that the circuit court dismissed properly Hencken's SAC because it does not conform to the basic requirements of Md. Rule 2-303(b) as it fails to allege any cause of action with sufficient specificity upon which relief may be granted. Appellees argue further that because Hencken, with or without her attorney, demonstrated consistently a disregard for the Md. Rules, the circuit court dismissed properly her SAC with prejudice.

We shall address each of the counts raised as to whether it met the required test of specificity. We shall then address some remaining procedural issues that the parties have raised on appeal. Ultimately, we shall affirm the circuit court's ruling to dismiss all counts, with prejudice, except for one, count 21 against PR.

Trespass - Count 1

"[T]respass is an intentional or negligent intrusion upon or to the possessory interest in property of another." *Schuman v. Greenbelt Homes, Inc.*, 212 Md. App. 451, 475 (quotation marks and citation omitted), *cert. denied*, 435 Md. 269 (2013). "Thus, there must be an interference with the owner's possession of the property." *Id*.

Hencken's first count alleges trespass and states that the "Defendants entered portions of Plaintiff's home which did not require remediation or mitigation" and "[b]y entering places in Plaintiff's home that were not part of the scope of work Defendant has intentionally and deliberately committed the tort of trespass."

We agree with appellees that this count is not cognizable because it lacks sufficient detail. It is unclear what areas of Hencken's home were entered without her consent, by whom and when, and the count fails further to allege how the entry interfered with her possessory interest. Accordingly, we affirm the circuit court's dismissal of this count.

Gross Negligence - Counts 2-5

The elements of negligence are well-established. To state a claim, the plaintiff must allege facts demonstrating: "(1) that the defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the loss or injury proximately resulted from the defendant's breach of the duty." *Remsburg v. Montgomery*, 376 Md. 568, 582 (2003) (quotation marks and citation omitted). We are mindful that "[m]erely stating that a duty existed, or that it was breached, or that the breach caused the injury does not suffice" to state a negligence cause of action in a complaint. *Horridge*, 382 Md. at 182.

"Gross negligence" is defined as:

> an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and also implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them. Stated conversely, a wrongdoer is guilty of gross negligence or acts wantonly and willfully only when he inflicts injury intentionally or is so utterly indifferent to the rights of others that he acts as if such rights did not exist.

Barbre v. Pope, 402 Md. 157, 187 (2007) (quotation marks and citation omitted). Like "simple" negligence claims, "conclusory allegations" and "somewhat vague" pleadings are not enough to sustain a gross negligence claim, which requires wanton or reckless conduct. *Id*. at 188.

Hencken captions these four counts as "Gross Negligence". In her first two counts, she cites to the Federal Toxic Substances Control Act ("TSCA"), *see* 15 U.S.C. § 2601 *et seq.*, and regulations "40 C.F.R. Part 745, Subparts E and L," which she argues require: 1) a person renovating a pre-1978 home to provide the owner with a lead hazard information pamphlet before performing any renovations; and 2) certain accreditations and certifications for those performing lead paint tests. In her first count, alleging the failure to provide a lead hazard pamphlet, she states that both ServPro and PR knew or should have known that her home was constructed prior to 1978, but then she deploys alternately references to a singular defendant, the plural defendants, and the possessive singular defendant's in the rest of the count. In her second count, alleging a failure to have a lead paint specialist test the property, she never mentions any of the defendants by name and alternately again uses a singular defendant, the plural defendants, and the possessive singular defendant's throughout the count.

We agree with appellees that the first two counts do not state a cognizable claim for gross negligence. The TSCA permits a civil action only for injunctive relief in federal courts 60 days after giving notice of a violation to the Administrator of the Environmental Protection Agency ("EPA") and the violator(s), none of which alleged occurred here. *See* 15 U.S.C. § 2619 (setting forth the requirements for a citizen's civil action). *See also Sipes*

ex rel. Slaughter v. Russell, 89 F. Supp. 2d 1199, 1204-05 (D. Kan. 2000) ("[The TSCA] permits only the United States (through the EPA) to impose fines and penalties on TSCA violators. It does not allow private citizens to enforce the penalty provisions as a method for recovering compensatory damages."); *Brewer v. Ravan*, 680 F. Supp. 1176, 1184 (M.D. Tenn. 1988) ("[E]ven a cursory reading of TSCA's civil penalty provision reveals that only the Administrator of the EPA may assess civil penalties against violators of the TSCA.").

Moreover, even if, as Hencken suggests, these counts are state law claims that "merely" rely on TSCA, federal courts have made clear that TSCA-based state law claims are subject to the same limitations as TSCA claims filed in federal court. *Cf. Sanford St. Loc. Dev. Corp. v. Textron, Inc.*, 768 F. Supp. 1218, 1223-24 (A negligence claim "alleging a violation of the TSCA is little different than an implied right of action under the TSCA for money damages. Since the latter is not available because of Congress' desire to provide aggrieved parties with only equitable remedies, this Court finds that the former is preempted as well[,]" because, if otherwise, the States' common law would be in "direct conflict" with federal law, which is "prohibited by the Supremacy Clause."), *vacated on other grounds*, 805 F. Supp. 29 (W.D. Mich. 1991). Therefore, these counts are not proper claims in the State courts of Maryland. Additionally, it is unclear to whom the counts are directed. Moreover, although she claims that the "Defendant's behavior was reckless, wanton, and intentional" in both counts, she provides no factual support for those allegations.

In her remaining two counts, Hencken alleges that: 1) ServPro and PR had a duty to "[c]onduct quality control inspections during the job" and "grossly, wantonly, and

recklessly" breached that duty by not "shutting off the HVAC" and allowing contaminants to spread throughout the house so that she and her family "suffered greatly due to Defendant's gross negligence[,]" and 2) ServPro and PR knew the insulation and wood behind the walls were covered with mold when they removed the walls; "Defendant had a duty" not to expose her and those in the home to "toxic substances"; "Defendant wantonly, recklessly, and intentionally" breached that duty by not putting up plastic around the work areas; and that she and her family "suffered grave injuries as a result of Defendant's gross negligence." After citing to both PR and ServPro in each count, she three times refers to only a singular defendant in the remainder of the counts.

Hencken argues baldly on appeal that these two counts "are fully stated"; that dismissal with prejudice was error; and, if the first two counts are "inaccurate in some respect, an amendment to cure the defect is practicable." PR responds that these counts fail to support a claim of gross negligence, let alone evidence that their actions were willful, wanton, or reckless.[9] Because these counts plead insufficiently against whom they are directed, we affirm the circuit court's dismissal of these counts.

[9] These four counts did not plead sufficiently simple negligence either, for the reason that the pleadings are conclusory. For example, as to the element of damages, she states only "Plaintiff and her family have suffered greatly due to Defendant's gross negligence" and "Plaintiff, and her family, have suffered grave injuries as a result of Defendant's gross negligence." Moreover, as stated earlier, the counts are unclear as to whom they are against.

Although one of appellees' attorneys seemed at oral argument to concede that perhaps simple negligence was plead sufficiently, we are not bound by counsel's concession (if it was one) on a point of law.

Conversion - Counts 6-22

"Conversion evolved from trover, which occurred where a defendant, a finder of lost goods, refused to return them to the plaintiff, the owner of the goods." *Thompson v. UBS Fin. Servs. Inc.*, 443 Md. 47, 56 (2015) (cleaned up). It has been expanded to cover now "nearly any wrongful exercise of dominion by one person over the personal property of another[.]" *Lawson v. Commonwealth Land Title Ins. Co.*, 69 Md. App. 476, 480 (1986).

Conversion consists of two elements: "a physical act combined with a certain state of mind." *Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 261 (2004). Conversion requires an act "of ownership or dominion" over another's personal property "in denial of . . . or inconsistent with" the owner's right to that property. *Id.* (quotation marks and citations omitted). The required state of mind can range from "an intent to exercise a dominion or control over the goods which is in fact inconsistent with the plaintiff's right[,]" to "actual malice." *Id*. at 262-63 (quotation marks and citations omitted). The term "actual malice" refers to "conduct 'characterized by evil or wrongful motive, intent to injure, knowing and deliberate wrongdoing, ill will or fraud'" while "implied malice" refers to conduct that is "grossly negligent or involved a wanton or reckless disregard of another's rights, or, in a malicious prosecution case, actions taken without probable cause." *Shoemaker v. Smith*, 353 Md. 143, 163 (1999) (quoting *Montgomery Ward v. Wilson,* 339 Md. 701, 728-29 n.5 (1995)). Only when actual malice is alleged may punitive damages be awarded. *Darcars,* 379 Md. at 263.

Hencken alleges 17 counts of conversion. In the first 14 counts, she states that ServPro "knowingly and wantonly" "destroyed" various items and then she lists separately

in each count what was destroyed: a kitchen sink; a hose bib; carpeting; smoke detectors; carbon monoxide detectors; an alarm system; a television; a "surround sound system"; an air scrubber; humidifiers; fans; a "solar power battery backup system"; windows; and a sliding glass door.[10] In her 15th conversion count, she alleges that ServPro knowingly and wantonly "deprived" her and her family of the "use of the Property." In her last two conversion counts, she alleges that: 1) PR took her security cameras and used them elsewhere, and 2) PR had "unrestricted and largely unsupervised access to [her] home and without a complete inventory it would be impossible to know the extent of Defendant's conversion." In these last two counts, she does not allege that PR "destroyed" anything, nor does she allege that PR's actions were "knowing" and/or "wanton." In each of her conversion counts, she asks for compensatory and punitive damages.

Hencken argues baldly on appeal that her conversion counts "should survive any motion to dismiss." Although she acknowledges that "'actual malice' may not be pled with detail[,]" she argues that her counts were pled sufficiently for the circuit court to "fairly inject 'actual malice[,]'" and the "destruction" of her belongings was sufficient to plead malice because "[n]o one destroys another's proper[t]y cavalierly. Some form of legally cognizable malice undoubtedly comes into play." ServPro argues that the 14 conversion counts as to it are not viable because nothing in the SAC supports Hencken's conclusory allegations that ServPro "intentionally destroyed" any of her property. PR argues that the two conversion counts as to it are not viable because she fails to allege when the conversion

[10] Hencken uses the phrase "knowingly and wantonly" as to each specific count, except as to the carbon monoxide detectors.

occurred or by what means. They argue also, without support, that '"destruction of property is not conversion."'

We are persuaded that Hencken did plead sufficiently her claims for conversion, except for the last count. Except for that count, she specifies which defendant was responsible and what was converted. However, although "destroyed" may be sufficient to implicate the requisite state of mind for conversion, which includes an intent to exercise dominion or control, her generic use of the words "reckless," "wanton," or "knowing" without any factual support is insufficient to meet the malice requirement for punitive damages. Accordingly, counts 6-20 are viable counts against ServPro and count 21 is viable against PR. Count 22 is not a viable count for the reasons stated above, and none of her counts are viable for punitive damages as she fails to allege adequately malice.

Breach of Contract - Count 23

To state a claim for breach of contract, a plaintiff need only "allege the existence of a contractual obligation owed by the defendant to the plaintiff, and a material breach of that obligation by the defendant." *RRC Ne.*, 413 Md. at 658.

Hencken alleges in this count that she and "all named Defendants formed contracts for the remediation of the Property." As evidence of a breach, she alleges baldly: "The Property is still under construction and has not yet been fully remediated." She acknowledges in her appellate brief that "more detail would be preferable, [but that] the basics of a breach of contract are here." Her breach of contract count is insufficient. Accordingly, this count is not a viable cause of action, and we affirm the circuit court's dismissal of this count.

Fraud - Counts 24 and 25

In a civil action, there are five elements of a fraud claim:

> (1) that the defendant made a false representation to the plaintiff, (2) that its falsity was either known to the defendant or that the representation was made with reckless indifference as to its truth, (3) that the misrepresentation was made for the purpose of defrauding the plaintiff, (4) that the plaintiff relied on the misrepresentation and had the right to rely on it, and (5) that the plaintiff suffered compensable injury resulting from the misrepresentation.

Maryland Env't Tr. v. Gaynor, 370 Md. 89, 97 (2002) (quotation marks and citations omitted). The misrepresentation element may be based on an affirmative misrepresentation of fact; a concealment of fact, which includes a partially misleading disclosure; or a non-disclosure of fact in the face of a duty to disclose. *See Lubore v. RPM Assocs., Inc.*, 109 Md. App. 312, 329-31, *cert. denied*, 343 Md. 565 (1996). "General or conclusory allegations of fraud are insufficient." *Antigua Condo. Ass'n v. Melba Invs. Atl., Inc.*, 307 Md. 700, 735 (1986).

Hencken alleges in her first fraud count that: PR "stated that they would take an inventory of all items removed" from her home; she relied on this representation and gave it access to her property; PR failed to take an inventory of the property it removed from her home; and she "suffered injury including not knowing exactly how much conversion took place as a direct result of Defendant's deceit." In her second fraud count, she alleges that PR: "represented that they would have all of [her] belongings packed and labeled"; "carried [her] belongings to the moving van without labeling many objects"; and "unloaded the van at their warehouse so she was unable to even know which items were hers and what

belonged to [their] other clients." She states then that PR's actions were "intentional," "reckless," and "malicious."

In her appellate brief, she does no more than restate these counts and then argue baldly that these counts "state[] a cause of action for fraud" and that the "elements are pled with sufficient specificity." PR responds that these two fraud counts are untenable because there is no factual support or documentation to support her "conclusory" statements. We agree with PR and find no error by the circuit court in dismissing this count as pled insufficiently.

Breach of the Maryland's Consumer Protection Act ("MCPA") - Count 26

The MCPA is found at Md. Code Ann., Commercial Law ("CL"), Title 13. The MCPA provides that "[a] person may not engage in any unfair, abusive, or deceptive trade practice," CL § 13-303, which is defined to include, among other things: a false or misleading oral or written statement and a failure to state a material fact if the failure deceives or tends to deceive. CL § 13-301(1), (3). The MCPA lists a total of 54 types of violations. *See* CL §13-301(1)-(14). Generally, "any person may bring an action to recover for injury or loss sustained . . . as the result of a practice prohibited by" the MCPA. CL § 13-408(a). The MCPA is to be "construed and applied liberally to promote its purpose." CL § 13-105. A consumer bringing a private action under the MCPA must allege: (1) an unfair or deceptive practice or misrepresentation, (2) that is relied upon, and (3) causes them actual injury. *Bey v. Shapiro Brown & Alt, LLP*, 997 F. Supp. 2d 310, 319 (D. Md. 2014), *aff'd*, 584 F. App'x 135 (4th Cir. 2014).

To observe that Hencken's count for breach of the MCPA is not a paragon of clarity is an understatement. In her SAC, she alleges that PR "misrepresented their mitigation process concerning inventory, conversion, and storage which resulted in fraud to the plaintiff" and failed to "submit[] a bill to USAA per the requirements of the PDRP, instead insisting Plaintiff pay for Defendant's substandard and ultimately damaging work." She alleges that "[a]ll of the aforementioned actions were purposeful, deceptive, and could not have been done without absolute disregard for human life and dignity."

Hencken argues baldly on appeal that this cause of action was "pled with sufficient specificity [so] that [PR] is on notice of the claim. More specificity is not required." PR responds that this count is not viable as it provides no supporting "factual statement included to support" the cause of action. We agree with the circuit court (and PR) that Hencken failed to plead this count with sufficient specificity – she fails to mention how and when PR misrepresented any inventory or storage actions they took as part of the remediation effort. Moreover, she fails to allege reliance on any particular misrepresentation or explain how the misrepresentation caused her damage. Accordingly, we affirm the circuit court's dismissal of this count.

The next four counts, counts 27-30, refer to USAA by name or by strong implication.

Failure to Settle Claims in Good Faith - Count 27

Md. Code Ann., Insurance Art. ("Ins."), § 27-1001, permits an insured to bring a cause of action against an insurer in the circuit court, who fails to act in "good faith" when

making decisions under property and casualty insurance policies.[11] *See* Ins. § 27-1001(g)(1). "Good faith" is defined as "an informed judgment based on honesty and diligence supported by evidence the insurer knew or should have known at the time the insurer made a decision on a claim." Ins. § 27-1001(a).

In this count, Hencken cites to Ins. § 27-1001 and then alleges that USAA "willfully and consistently":

- "failed to make a judgment on Plaintiff's claim based on honesty and diligence";
- made decisions "not supported by evidence that substantiates Defendant's refusal to grant full indemnification for the Plaintiff";
- "ignored the facts of the claim and has substantially underpaid the claim and allowed for further damages to accrue by failing to act in good faith";
- "refused to justify its positions with regards to denying coverage on" her claim; and
- "arbitrarily removed [additional living expense] coverage and then arbitrarily resumed offering [additional living expense] coverage after substantial damage has occurred."

Hencken admits in her appellate brief that this count "could provide more background and allegations" but argues nonetheless that it is "sufficient to put USAA on notice of the basics of the claim." USAA responds that this count does nothing more than recite "mere definitions and conclusory, legal elements that mirror the language of § 27-1001 and no more." We agree that the claim is devoid of any facts specific to inaction or

[11] We note that the statute provides for an administrative claims process, and states that, only after exhausting the provided administrative remedy may one sue in circuit court. *See* Ins. § 27-1001(a)-(g). Hencken argues that because she exhausted her administrative remedies, she may proceed in circuit court. USAA does not dispute this.

actions taken by USAA. Accordingly, this count fails to state a claim upon which relief may be granted and we affirm its dismissal.

Breach of Contract - Count 28

In this count, Hencken reiterates the two elements for breach of contract. She then states that her homeowner's insurance policy with USAA "constitutes a binding contract[.]" She states that USAA's failure and/or refusal "to pay full compensation on [her] covered Property due to a covered loss breaches [her] policy" with USAA, who has not cited any "policy exclusion that justifies denial of full coverage under the policy" and has not "fully indemnified for [her] losses[.]"

Hencken reiterates simply the above allegations in her appellate brief to argue that this count was pled sufficiently. We agree with USAA that this count provides only generic, legal assertions and is devoid of any facts specific to actions taken by USAA. Accordingly, this count fails to state a viable claim.

Negligence - Count 29

In this count, Hencken reiterates the four elements of negligence. She then states that the "Defendant owed a duty under Md. Code § 27-303 to Plaintiff to provide adequate justification for Defendant's position denying Plaintiff full coverage of Plaintiff's claim"; "Defendant violated this duty under Md. Code § 27-303, by refusing to pay Plaintiff's claim for an arbitrary and capricious reason based on all available information"; and that she suffered damages because she "was unable to fully repair its buildings[.]" She then states:

> There is a legally cognizable causal relationship between the breach of duty and the harm suffered. Defendant's breach is the actual cause of Plaintiff's damages. But for Defendant's denial of Plaintiff's claim for an arbitrary and capricious reason, Plaintiff would not have been denied coverage for the damages suffered to Plaintiff's buildings. Defendant's breach is the proximate cause of Plaintiff's damages. It was reasonably foreseeable that the denial of coverage for certain portions of Plaintiff's claim by Defendant would result in damages to Plaintiff.

She states further that she is entitled to attorney's fees pursuant to "*Md. Code Ann., Ins. § 27-1001* and *Md. Code Ann., Cts. & Jud. Proc. § 3-1701*." Citing "*Md. Code Ann., Ins. § 27-1001 and Md. Code Ann.,* and pursuant to *Cts. & Jud. Proc. § 3-1701*" she alleges that she has exhausted her "primary remedy and is now eligible to pursue underlying damages in circuit court."

On appeal, Hencken argues that this count "cannot be more clear[,]" while admitting also that this count "could provide more background" information. Although she does not identify which defendant this claim is against, by referring to a "claim" and by referring at the end of this count to the Ins. Article, we assume she was pursuing this cause of action against USAA. We can dispose quickly with this count as there is no private cause of action under Ins. § 27-303, which provides for administrative remedies only. *See* Ins. § 27-301(b)(1) ("This subtitle provides administrative remedies only."). Moreover, we agree with USAA that, if her count is against USAA for violating Ins. § 27-303, she is mirroring merely the statutory language and the pleading consists of nothing more than conclusory allegations. Accordingly, we find no error by the circuit court in dismissing this count for failure to state a claim.

Fraud - Count 30

In this count, Hencken reiterates the five elements of fraud and asserts that:

> - "Defendant made a false representation to Plaintiff that it would act reasonably to cover all losses sustained by Plaintiff in the event of damage to Plaintiff's covered buildings."
>
> - "Defendant made this false representation knowing that it had no intention of aiding the Plaintiff in arriving at a reasonable resolution of his claim."
>
> - "Defendant's misrepresentation was made for the purpose of defrauding the Plaintiff by allowing Plaintiff to submit compensation to Defendant in return for reasonable coverage of damages sustained to Plaintiff's covered buildings."
>
> - "Plaintiff had a right to rely on Defendant's misrepresentation because as a nationally recognized insurance company, Defendant had a reputation for properly assessing claims and promptly returning all communications with policyholders."
>
> - "As a result of this misrepresentation, Plaintiff's home cannot be fully repaired, substantial other losses have occurred, and Plaintiff remains only partially compensated for the necessary repairs to Plaintiff's covered buildings."

She never states who this claim is against, but USAA is implicated strongly by referring to "coverage" and "claim(s)" and the statement that the "Defendant" is a "nationally recognized insurance company[.]" Because there is no supporting factual statement other than conclusory statements, however, we find no error by the circuit court in dismissing this count.

Breach of the Maryland Consumer Protection Act - Count 31

In this count, Hencken alleges that the "*Defendants* misrepresented their mitigation process concerning inventory, conversion, and storage which resulted in fraud to the plaintiff." (Italics added.) She alleges then that the "*Defendant* has not submitted a bill to

USAA per the requirements of the PDRP, instead insisting Plaintiff pay for *Defendant's* substandard and ultimately damaging work." (Italics added.) She then alleges that she has had to make "substantial personal payments due to the failures of *Defendant*" and that she was forced to sell her assets "to pay for all of the Damages caused by *Defendant*" at a diminished value and loss of $200,000. (Italics added.)

On appeal, Hencken seems to realize that it is unclear which defendant or defendants this count is directed to (she never names any of the defendants and uses both the singular defendant and plural defendants in her allegations). In her appellate brief, she inserts ServPro in brackets when she relates this count. The "write in" defendant in her appellate brief does not suffice to make her pleading clear nor does it put any of the defendants on proper notice. Accordingly, the circuit court did not err in dismissing this count for lack of specificity.

Violation of the Maryland Consumer Protection Act - Count 32

Hencken alleges that "Defendant USAA engaged in unfair or deceptive trade practices" in violation of the MCPA. We can dispose quickly of this count as the MCPA specifically states that it does not apply to "[t]he professional services of a[n] . . . insurance company authorized to do business in the State[.]" *See* CL § 13-104(1).

Intentional Infliction of Emotional Distress - Count 33

The tort of intentional infliction of emotional distress ("IIED") has the following four elements: "(1) The conduct must be intentional or reckless; (2) The conduct must be extreme and outrageous; (3) There must be a causal connection between the wrongful conduct and the emotional distress; [and] (4) The emotional distress must be severe."

Lasater v. Guttmann, 194 Md. App. 431, 448 (2010) (quotation marks and citations omitted), *cert. denied*, 417 Md. 502 (2011). "Extreme and outrageous" conduct is conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id*. (quotation marks and citations omitted). "Whether the conduct complained of meets this test is, in the first instance, for the court to determine[.]" *Id*. (quotation marks and citation omitted).

In this count, Hencken lists the four elements of this type of action and then states that PR, ServPro, "and their agents acted recklessly." She alleges that the "Defendants took Plaintiff's home from her and her family"; "Defendant's converted Plaintiff's property and that of her recently deceased father for their own gain"; "Professional Restorations killed Plaintiff's dog[,] . . . leaving Plaintiff and her three children heartbroken[,]" explaining that the dog "did not die quickly, but only after vomiting yellow bile and being spoon-fed her final meals" by her children because the dog "lacked the strength to feed herself"; and "Defendants . . . caused a litigation between Plaintiff and [her ex-husband] in connection with the status of the Property" and that she "had to eventually go pro-se because she is unable to work due to disability and after being cut off by USAA she could not afford multiple homes while ServePro [sic] and Professional Restorations continued to ruin her family home"; and she and her family have "suffered monetarily, physically, and emotionally from Defendant's actions."

On appeal, Hencken argues that she pled sufficiently that the defendants had acted outrageously when she stated that "her home has been taken away [from] her [] for *four*

years[,]" one of her therapy dogs died because of the improper lead and mold remediation, and that "she was forced to act *pro se*" when the father of her children challenged custody of their children during the remediation process. PR responds that Hencken failed to allege factual allegations that show that any alleged conduct was "intentional," "reckless," "extreme" or "outrageous." We find that this count was pled insufficiently as it is unclear against whom the action is against (she alleges both singular and plural generic defendants) and the factual allegations are too vague. *Cf. Lasater*, 194 Md. App. at 448 ("In support of his motion, [defendant] argued below that, accepting as true all of the allegations in the amended complaint and the facts averred in [plaintiff's] affidavit, his conduct did not rise to the level of 'extreme and outrageous.' For the reasons that follow, we agree.").

Pain and Suffering - Count 34

Hencken alleges in this count that Md. Code Ann., Cts. & Jud. Proc. Art. § 11-108 authorizes specifically renumeration for her pain and suffering. We can dispose quickly of this count. That section does not provide an independent theory of recovery for "pain and suffering," but is a "cap statute" that places a $350,000 cap on non-economic damages in Maryland negligent and strict liability cases. *Hollingsworth & Vose Co. v. Connor*, 136 Md. App. 91, 126 (2000). She seems to concede this point as she does not address this count in her appellate brief nor did she address this count during oral arguments. Accordingly, this count was dismissed properly.

In sum, we believe that the circuit court properly dismissed all of the raised counts, except for counts 6-20, the conversion counts against ServPro, and count 21, the conversion count against PR.

With Prejudice

We believe also that the circuit court did not abuse its discretion by dismissing the counts with prejudice. "A trial court has discretion to dismiss a claim with prejudice if it fails to state a claim that could afford relief." *Pulte Home Corp. v. Parex, Inc.*, 174 Md. App. 681, 727 (2007), *aff'd*, 403 Md. 367 (2008). We review a circuit court's decision to dismiss with prejudice for an abuse of discretion. *Zdravkovich v. Siegert*, 151 Md. App. 295, 310, *cert. denied*, 377 Md. 114 (2003). An abuse of discretion occurs:

> when a decision is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable. Thus, a ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling. Whether there has been an abuse of discretion depends on the particular circumstances of each individual case.

Consol. Waste Indus., Inc. v. Standard Equip. Co., 421 Md. 210, 219 (2011) (quotation marks and citations omitted).

Throughout the litigation, Hencken showed a repeated disregard for the rules of procedure. This occurred both when she proceeded pro se and when she was represented by counsel in the trial court.[12] She attempted repeatedly to consolidate forcefully her cases without leave of court and despite the circuit court's clear prior rulings on the issues of consolidation and joinder. Moreover, she garnered 15 deficient filing notices from the

[12] "It is a well-established principle of Maryland law that *pro se* parties must adhere to procedural rules in the same manner as those represented by counsel." *Dep't of Lab., Licensing & Regul. v. Woodie*, 128 Md. App. 398, 411 (1999). "While we recognize and sympathize with those whose economic means require self-representation, we also need to adhere to procedural rules in order to maintain consistency in the judicial system." *Pickett v. Noba, Inc.*, 122 Md. App. 566, 568, *cert. denied*, 351 Md. 663 (1998).

clerk during the saga of these cases.[13] Given the severe lack of clarity in her SAC, which was a *second* amended complaint, and her repeated disregard for the rules of procedure, we find no abuse of discretion by the circuit court in dismissing, with prejudice, all of the raised counts, except for counts 6-20, the conversion counts against ServPro, and count 21, the conversion count against PR.

We turn now to some remaining issues.

Arbitration - ServPro

The Maryland Uniform Arbitration Act ("MUAA") "expresses the legislative policy favoring enforcement of agreements to arbitrate[.]" *Rankin v. Brinton Woods of Frankford, LLC*, 241 Md. App. 604, 619 (2019) (quotation marks and citations omitted). "Arbitration is the process whereby parties voluntarily agree to substitute a private tribunal for the public tribunal otherwise available to them." *The Redemptorists v. Coulthard Servs., Inc.*, 145 Md. App. 116, 134 (2002) (quotation marks and citation omitted).

At the hearing on ServPro's motion to dismiss on 28 June 2022, ServPro argued as an alternative theory of dismissal, that, because the contract between themselves and Hencken contained an arbitration clause, any claims that Hencken might have must be

[13] These deficient filing notices are: in PR dated – 12.2.21; 2.10.22; 3.31.22; 6.28.22; ServPro – 11.3.21; 12.2.21; 12.8.21; 12.15.21; 12.16.21; 2.10.22; 3.31.22; 6.28.22; and USAA – 7.21.22; 2.10.22; 6.28.22. In one notice of deficiency, the clerk brought to Hencken's attention that she added several new parties in violation of Md. Rule 20-203(d)(1).

brought before an arbitrator.[14] Hencken's attorney conceded that some of the counts in the SAC do fall within the arbitration clause. Hencken argued, however, that ServPro had refused to participate in arbitration, stating that she had contacted a "Mr. Finamore and requested arbitration. He ignored her. He denied her the arbitration request." The circuit court responded: "[Y]ou don't have to contact the other side and say do you agree to arbitration? If you have an arbitration clause, you file for arbitration. And then it is up to the arbitrator . . . to notify the other side." In conclusion, the circuit court ruled that it "would also dismiss Serv[P]ro because there is an arbitration, mediation clause which does govern and preclude actions in the [c]ircuit [c]ourt. This is not the proper forum[.]"

On appeal, Hencken argues that her complaint against ServPro should not have been dismissed on the additional basis of the arbitration clause because it is unclear whether the arbitration clause is enforceable, citing case law on the defense of unconscionability. ServPro responds that the circuit court acted properly (and we should affirm the court's

[14] The contract between ServPro and Hencken, which she attached to her SAC as an exhibit, contains the following arbitration clause:

> Should any dispute arise concerning (a) the intent or meaning of the work described in the Scope of repairs or any change order, (b) the quality of workmanship or materials, (c) the value of any work, (d) payment for work, or (e) for other reasons pertaining to the terms and conditions of the Contract, the parties agree that, except for disputes and claims that may be brought in the District Court of Maryland and for which a party is not entitled to a trial by jury, and except as necessary to enforce the mediation and arbitration obligations of this Section, all disputes or claims arising out of this Contract shall be resolved through mediation or arbitration as specified in this section as the exclusive remedy for resolving such disputes or claims.

dismissal of all the claims against it) because of the arbitration clause contained in the contract between themselves and Hencken.

Hencken did not raise below the argument that the arbitration clause was unenforceable, let alone unconscionable. Therefore, she has not preserved that argument for our consideration on appeal. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"). *See also DiCicco v. Baltimore Cnty.*, 232 Md. App. 218, 224-25 (2017) (stating that a contention not raised or considered below is not properly before an appellate court).[15] Accordingly, counts 6-20, the conversion counts against ServPro, were properly dismissed.

Service of Process - USAA

Md. Rule 2-322(a), governing preliminary mandatory motions, provides that the following defenses "shall" be made by motion to dismiss filed before the answer, if an answer is required: "(1) lack of jurisdiction over the person, . . . (3) insufficiency of process, and (4) insufficiency of service of process. If not so made and the answer is filed, these defenses are waived." After dismissing the complaints for failing to properly plead a cause of action, the circuit ruled: "In the alternative, . . . I would dismiss USAA as not having been served. There is an insufficient service in these proceedings[.]"

[15] Whether arbitration remains a viable avenue for Hencken to pursue remains to be seen. Neither party filed a petition in the circuit court to compel the other party to engage in arbitration. Here, ServPro used the arbitration argument as a shield, asking the court to dismiss the counts because of it.

Hencken argues that this ruling was error. She maintains that USAA answered the original complaint on 9 November 2021, and in doing so, waived any ineffective service claim as to the original complaint, as well as to her first and second amended complaints.[16] She contends further that a dismissal for failure of service of process can only be a dismissal *without* prejudice, not a dismissal *with* prejudice. *See* Md. Rule 2-507(b), (f) (stating that "[a]n action against any defendant who has not been served . . . is subject to dismissal as to that defendant" and "the clerk shall enter on the docket 'Dismissed for lack of jurisdiction . . . without prejudice'" 30 days after notice of ineffective service); *Hariri v. Dahne*, 412 Md. 674, 684-85 (2010) (holding that the plain language of Md. Rule 2-507 means that an action against a defendant that has not been served can only be dismissed "without prejudice"). USAA responds that it never filed a pleading or paper in the case, let alone an answer, until it filed the joint motion to dismiss for insufficiency of process on 13 June 2022.[17]

USAA and the circuit court were mistaken. On 9 November 2021, USAA filed an answer to Hencken's original complaint. We know of no law, nor do the parties cite to any, that would limit USAA's answer only to the original complaint and not to a first or second amended complaint. Because USAA filed an answer before their motion to dismiss, the circuit court had personal jurisdiction over USAA. *See Hariri*, 412 Md. at 683 (stating that Md. Rule 2-322(a) "requires that the defense of lack of jurisdiction over the person be

[16] Hencken never filed the first amended complaint in the USAA case.

[17] USAA's motion to dismiss for insufficiency of service of process is contained in the record extract, and is date-stamped as being docketed on 13 June 2022.

asserted by motion to dismiss filed before the answer, and . . . if not so made and the answer is filed, that defense is waived" (cleaned up)).

Remaining Complaints by Hencken

Hencken argues that the circuit court hearing on 28 June 2022, was unfair. Specifically, she perceives that, because the hearing was scheduled only in the ServPro case to address ServPro's 16 March 2022 motion to dismiss, ServPro's additional motion to dismiss filed on 3 June 2022, as to why the TSCA did not apply, and USAA's motion to dismiss filed on 13 June 2022, arguing a lack of service of process, should not have been entertained. She argues that allowing the defendants to argue these additional motions prejudiced her unfairly. She claims further that the circuit court restricted unfairly the parties' oral arguments to only an hour and refused to consider the "further response" memoranda her attorney filed the night before the hearing. Because of the confusion about what was to be heard at the hearing, she imagines that the circuit court, on its initiative, should have postponed the hearing to give the court and her attorney "sufficient time to examine all the issues."

We can dispose quickly of this argument. The swamp-like state of the pleadings and papers is a result of the way Hencken began and pursued the litigation. Plainly put, there is no legal rule requiring the circuit court to postpone the hearing, which she and her legal counsel never requested the court to do, so that her counsel could "examine all the issues" in the case. Moreover, she failed to show any prejudice, e.g., whether the TSCA was a viable cause of action did not affect the circuit court's ruling; we have reversed the circuit court's ruling on USAA's argument regarding service of process; and, as related

above, the circuit court allowed Hencken's counsel to argue from its "further response" memo that he filed only hours before the hearing.

In summary, we shall affirm the circuit court's ruling to dismiss all counts, with prejudice, except for one, count 21 against PR.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED IN PART AND REVERSED IN PART; CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE COUNTY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY APPELLEES.