Circuit Court for Howard County
Case No. 13-C-15-103806

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1868

September Term, 2016

DWIGHT WILSON, *et al.*

v.

CAPITAL CLEANING CONCEPTS, INC. T/A MOLD AND MOISTURE SOLUTIONS, *et al.*

Arthur,
Fader,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: July 27, 2018

In July 2014, Dwight and Sharon Wilson engaged Capital Cleaning Concepts, Inc., t/a Mold and Moisture Solutions ("M&MS"), to remediate mold contamination in their residence. The terms of the engagement were embodied in a written contract. The contract stated that "[t]he standard of cleaning is to go beyond any established levels of microbial and biological contaminants currently followed in the Indoor Environmental Quality Industry."

On or about July 28, 2014, M&MS began to work on the Wilsons' residence. The Wilsons stayed at a hotel while the project was underway.

After M&MS had spent over a month working on the house, it told Ms. Wilson that the job had been completed. She disagreed and refused to make the final payment.

The Wilsons hired a company called Mold Aid to test the mold levels in their house. Though Mold Aid's methods and results are not in evidence, the results were presumably unsatisfactory to the Wilsons, who unsuccessfully attempted to get M&MS to complete the job to their satisfaction.

In October 2014, the Wilsons hired Jenkins Environmental, Inc., which agreed to reduce "class one molds" in the house to a "zero level." After three attempts, Jenkins Environmental apparently succeeded. The Wilsons did not return to their residence until February 3, 2015, after Jenkins Environmental had completed its work.

On June 8, 2015, the Wilsons filed a three-count complaint in the Circuit Court for Howard County against M&MS and its principal, David Stough. The Wilsons alleged that M&MS and Stough breached the contract. The Wilsons also alleged that the breach

amounted to negligence. Finally, the Wilsons alleged that M&MS and Stough defrauded them by asserting "false representations of material facts that [their] home would be properly remediated."

In their defense, M&MS and Stough invoked a broad, exculpatory clause in the contract with the Wilsons. The clause reads as follows:

> In no event shall M&MS be responsible for any losses or damages, whether direct, indirect, special, nominal, incidental, punitive or consequential, or for any penalties, regardless of the legal or equitable theory asserted, including contract, negligence, warranty, strict liability, statute or otherwise, or for the claims by a third party.

After discovery and the denial of the defendants' motion for summary judgment, the case proceeded to trial. At the outset of the trial, the court directed the Wilsons not to advance a theory of fraud that they had not disclosed in their complaint. On the fourth day of trial, the court prohibited the Wilsons from calling an expert witness out-of-turn, in M&MS's case; the witness had not been present to testify during the three previous days in which the Wilsons were putting on their case.

At the close of the Wilsons' case, M&MS moved for judgment on several grounds, including the operation of the exculpatory clause, the absence of expert testimony to support the Wilson's negligence and breach of contract claims, and the absence of evidence of fraud. In response to the motion, the court dismissed the fraud claim. In response to another motion for judgment at the close of all the evidence, the court dismissed the remaining claims against Mr. Stough, reserved on all other issues, and submitted the case to the jury.

The jury found in the Wilsons' favor. It awarded $36,600.00 in economic damages for breach of contract, an additional $15,300.00 in economic damages for negligence, and $75,000.00 in noneconomic damages.[1]

Immediately after the jury returned its verdict, M&MS made an oral motion for judgment notwithstanding the verdict and for remittitur. The court did not rule on that motion. Instead, it requested additional briefing on the aspects of the motion for judgment on which it had reserved. In its additional briefing, M&MS withdrew its oral motion on the ground that it was premature.

Once the court had received and reviewed the additional briefing from both sides, it granted M&MS's motion for judgment in an order that was docketed on October 19, 2016. The court based its ruling on the exculpatory clause in the contract between M&MS and the Wilsons.

The Wilsons noted a timely appeal.

QUESTIONS PRESENTED

The Wilsons presented four questions, which we quote verbatim:

I. Did the circuit court err by ruling on a withdrawn motion, since a motion for judgment that a court reserves ruling on until after a jury's verdict

[1] The $36,600.00 award appears to coincide with Jenkins Environmental's charges for the additional remediation work that it performed to reduce "class one molds" to a "zero level." The parties do not identify the basis for the other awards. Because the substance of the negligence claim appears to have been identical to that of the breach of contract claim, it is unclear how the jury could have awarded additional economic damages for negligence. But because M&MS does not raise that issue, we do not address it.

becomes, as a matter of law, a motion for JNOV, which motion the appellees expressly withdrew in writing?

II. Did the circuit court err by enforcing an exculpatory clause in a contract for both breach of contract and negligence where there was harm caused by reckless, wanton, or gross behavior; where the contract resulted from grossly unequal bargaining power; and/or where the transaction adversely affected the public interest?

III. Did the circuit court err by excluding all evidence of the appellees' alleged fraud and then dismissing the fraud count based on lack of evidence?

IV. Did the circuit court err by refusing to allow an out-of-state expert witness to be called out of turn by just one hour and forty-one minutes' time and forcing the appellants to rest their case?

We answer the first, third, and fourth questions in the negative: the court did not err in proceeding to rule on the motion for judgment; it did not abuse its discretion in excluding evidence of an unpleaded theory of fraud or err in entering judgment against the Wilsons on the fraud claim; and it did not abuse its discretion in declining to permit the Wilsons to call a witness during their adversaries' case. We need not answer the second question concerning the exculpatory clause, because we can affirm the grant of the motion for judgment on another ground that is adequately shown in the record: the Wilsons' failure to adduce expert testimony in support of their claims of breach of contract and negligence. Accordingly, we shall affirm the judgment.

DISCUSSION

I. The Effect of Withdrawing the Oral Motion for Judgment Notwithstanding the Verdict

As previously stated, M&MS made an oral motion for judgment notwithstanding the verdict and for remittitur after the jury had returned a verdict in the Wilsons' favor. The court did not rule on the motion, but directed the parties to submit post-trial briefing.

In its post-trial memorandum, M&MS wrote that it had prematurely moved for judgment notwithstanding the verdict and for remittitur, because the judgment had not yet been entered. Accordingly, it withdrew those motions pending the entry of judgment.

In a written opinion, the court granted the motion for judgment on which it previously reserved. The Wilsons argue that the court erred in granting the motion, because, they say, M&MS had withdrawn it. Their argument has no merit.

Rule 2-532(b) states that "[i]f the court reserves ruling on a motion for judgment made at the close of all the evidence, that motion becomes a motion for judgment notwithstanding the verdict if the verdict is against the moving party or if no verdict is returned." In this case, the court reserved ruling on the motion for judgment that M&MS made at the close of all the evidence. Under Rule 2-532(b), therefore, M&MS's motion for judgment became a motion for judgment notwithstanding the verdict as soon as the jury returned a verdict in the Wilsons' favor.

It was completely unnecessary for M&MS to make an oral motion for judgment notwithstanding the verdict after the jury returned the verdict, because the verdict itself had already transformed the undecided motion for judgment into a motion for judgment

notwithstanding the verdict. Furthermore, because the oral motion was completely unnecessary, nothing of consequence could possibly have occurred when M&MS withdrew it. By withdrawing a superfluous oral motion, M&MS did not withdraw the pending motion for judgment that, by operation of law, had become a motion for judgment notwithstanding the verdict when the jury returned a verdict in the Wilsons' favor.

In its written ruling, the court granted the motion for judgment that M&MS had made at the close of all of the evidence. In substance, the court granted judgment notwithstanding the verdict, because M&MS's motion had become a motion for judgment notwithstanding the verdict under Rule 2-532(b) when the jury returned its verdict. M&MS's assertion and withdrawal of an additional motion for judgment notwithstanding the verdict had no effect on the court's ability to decide the motion on which it had reserved after the close of all of the evidence. Therefore, the Wilsons are simply incorrect in asserting that the court decided a motion that it had no power to decide.

II. Absence of Expert Testimony

In their respective briefs, the parties spent most of their effort debating the enforceability of the expansive exculpatory clause in M&MS's contract. We need not decide that issue,[2] because the circuit court's judgment can be upheld on a separate and

[2] Although the parties to a contract may agree that one shall have no liability to the other for ordinary negligence (*see, e.g.*, *Wolf v. Ford*, 335 Md. 525, 531 (1994)), they cannot agree that one shall have no liability to the other for intentional or reckless

independent ground: the Wilsons' failure to adduce expert testimony in support of their claims. *Offutt v. Montgomery Cnty. Bd. of Educ.*, 285 Md. 557, 563 n.3 (1979) ("[a]n appellate court may, on a direct appeal, affirm a trial court's decision on any ground adequately shown by the record, even though not relied on by the trial court or the parties").

To prevail on their claim for negligence, the Wilsons had to prove that M&MS breached the applicable standard of care for a mold remediation service. To prevail on their claim for damages both for breach of contract and for negligence, the Wilsons had to prove that M&MS's breaches proximately caused the damages that they claimed to have suffered. M&MS argued both of these points in its motions for judgment, in its post-trial memorandum, and in its appellate brief.

"Where the plaintiff alleges negligence by a professional, expert testimony is generally necessary to establish the requisite standard of care owed by the professional." *Schultz v. Bank of Am., N.A.*, 413 Md. 15, 28 (2010). "This is because professional standards are often 'beyond the ken of the average layman,' such that the expert's

misconduct or for gross or wanton negligence. *See id.* The clause in this case arguably violates those prohibitions, because it states that M&MS shall not be responsible "for any losses or damages," "regardless of the legal or equitable theory asserted," including a theory of intentional or reckless misconduct or of gross or wanton negligence. In fact, the clause purports to exculpate M&MS from liability for punitive damages, which can be awarded in Maryland only upon proof of "actual malice" (*see, e.g., Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 460 (1992)), i.e., a subjective intention to inflict injury. Furthermore, insofar as the clause purports to exculpate M&MS for liability for breach of contract, one might question whether M&MS had given any consideration to the other party. If M&MS received payment, but refused to perform its contractual obligations, would the exculpatory clause deprive its customer of a remedy?

testimony is necessary to elucidate the relevant standard for the trier of fact." *Id.* (quoting *Bean v. Dep't of Health*, 406 Md. 419, 432 (2008) (which quoted *CIGNA v. Zeitler*, 126 Md. App. 444, 463 (1999)).

Similarly, if the question of causation involves complex medical, scientific, or mechanical issues, a plaintiff typically must have expert testimony to prove that the defendant's breach proximately caused his or her injuries. *See, e.g.*, *Blackwell v. Wyeth, Inc.*, 408 Md. 575, 623 (2009) (causal connection between vaccine and autism); *Barnes v. Greater Balt. Med. Ctr., Inc.*, 210 Md. App. 457, 481 (2013) (complex medical malpractice case); *Jacobs v. Flynn*, 131 Md. App. 342, 354 (2000) (complex medical malpractice case); *see also Dover Elevator Co. v. Swann*, 334 Md. 231, 256 (1994) (defect in inner workings of elevator machinery); *Mohammad v. Toyota Motor Sales, U.S.A., Inc.*, 179 Md. App. 693, 697, 713 (2008) (defect in automotive suspension); *Wood v. Toyota Motor Corp.*, 134 Md. App. 512, 518 (2000) (defective design and manufacture of automotive air bag); *Hartford Acc. & Indem. Co. v. Scarlett Harbor Assocs. Ltd. P'ship*, 109 Md. App. 217, 257-58 (1996) (design of the heating system for an elevator shaft), *aff'd*, 346 Md. 122 (1997); *see also Jensen v. Am. Motors Corp.*, 50 Md. App. 226, 232-34 (1981) (noting absence of expert testimony regarding causal connection between injury and defect in steering mechanism of automobile).

The Wilsons called one expert, Evan Cook, an employee of Jenkins Environmental, the company that did additional remediation after M&MS had ceased

working at the Wilsons' residence. The court accepted him as an expert in the field of mold remediation.

Mr. Cook's testimony appears to have been directed towards admitting evidence of the amounts that his company charged to the Wilsons. He was not asked, and did not testify, about the standard of care or about whether M&MS had breached the standard of care. For example, he was not asked to explain exactly what it meant for M&MS to agree that "[t]he standard of cleaning is to go beyond any established levels of microbial and biological contaminants currently followed in the Indoor Environmental Quality Industry," or whether M&MS had failed to meet that standard. Similarly, he was not asked, and did not testify, about whether M&MS's alleged breach of the contract or the standard of care had proximately caused the damages that the Wilsons claim to have suffered, including the charges for the additional work that Jenkins Environmental performed.

The closest Mr. Cook came to offering an opinion about breach or causation was in testimony concerning an estimate that he gave to Mr. Wilson. According to Mr. Cook, he explained to Mr. Wilson that his company "had to clean the entire home" because "there was cross-contamination from some demolition" or from "some [remediation] that was done by another company . . . without containment." Read generously, Mr. Cook's explanation of his estimate might entail an opinion (though not the requisite opinion to a

reasonable degree of probability)[3] that his company would need to do certain work to meet the Wilsons' expectations, because of something that "another company" (presumably M&MS) had done or failed to do. It is not, however, testimony that the standard of care required M&MS to meet the Wilsons' expectations, which, as stated in the contract with Mr. Cook's employer, were to reduce "class one molds" to a "zero level." Nor is it testimony that the additional work was necessary as a proximate consequence of some specific breach of the contract between M&MS and the Wilsons, and not because the Wilsons insisted on a higher standard of remediation than that contract may have required, or because the Wilsons would have faced some level of contamination even if M&MS had completely done everything that it was required to do.

In summary, we don't know what is required by the standards that M&MS agreed to exceed in its contract ("any established levels of microbial and biological contaminants currently followed in the Indoor Environmental Quality Industry"), so we don't know whether M&MS did or did not exceed those standards. Similarly, we don't know whether those standards required M&MS to go as far as Jenkins Environmental agreed to go in remediating mold, which was to reduce "class one molds" (whatever they are) to a "zero level," so we don't know whether M&MS should be liable for the additional costs that the Wilsons incurred in paying Jenkins Environmental to meet that standard. We don't know whether the standard of care required M&MS to do more than, less than, or

[3] *See, e.g.*, *Barnes v. Greater Balt. Med. Ctr., Inc.*, 210 Md. App. at 481 (citing *Jacobs v. Flynn*, 131 Md. App. at 355).

exactly the same as what it agreed to do in the contract, whatever that was. Even if M&MS had done everything that it was required to do under the contract and the standard of care, we don't know whether the Wilsons would have ended up with approximately the same level of contamination that Mold Aid (the third-party testing service, whose methods and findings are not in the record) found a couple of months after M&MS had left the Wilsons' residence. And if we don't know these things, a lay jury certainly would not know them without the aid of expert testimony.

Absent expert testimony on breach and causation, therefore, the Wilsons could not generate a triable issue of fact on their contractual claim and their claim for negligence. Mr. Cook did not provide the requisite testimony, and the Wilsons called no other expert to fill the gap. For that reason, the defendants were entitled to judgment in their favor on the claims for breach of contract and negligence.

III. Fraud

In their complaint, the Wilsons purported to assert a claim for fraud. The allegations, however, did little more than track the elements of the tort. The complaint recounted a number of legal conclusions, but it did not "contain a clear statement of the *facts* necessary to constitute a cause of action" (Md. Rule 2-305) (emphasis added), much less allege fraud with the "requisite degree of particularity." *McCormick v. Medtronic, Inc.*, 219 Md. App. 485, 527 (2014) (collecting cases). The complaint did not, for example, "identify who made what false statement . . . ; why the statement [was] false; and why a finder of fact would have reason to conclude that the defendant acted with

scienter (*i.e.*, that the defendant either knew that the statement was false or acted with reckless disregard for its truth) and with the intention to persuade others to rely on the false statement." *Id.* at 528. The only alleged misrepresentation, which was said to have been made both orally and in writing, was that the Wilsons' residence "would be properly remediated."

Although the Wilsons' fraud claim was subject to dismissal because of the failure to plead fraud with particularity, M&MS did not make a motion to dismiss. Instead, on the first day of trial, M&MS moved to preclude the Wilsons from supporting the fraud claim with evidence that it had made false representations about the existence of insurance coverage.[4] In essence, M&MS argued that because the Wilsons had not expressed that theory in their complaint, the court should preclude them from advancing it at trial. The court reserved on the issue, but instructed the Wilsons' counsel not to mention insurance in his opening statement.

At the close of the Wilsons' case, M&MS moved for judgment on the fraud count. The court granted the motion, reasoning that the complaint did not "refer, even in a veiled or subtle way, to insurance." The Wilsons contend that the court erred in disposing of the fraud claim in that manner.

[4] The record reflects that M&MS actually has insurance coverage, but that its insurer took the position that an exclusion in the policy negated coverage for the specific claims that the Wilsons asserted.

In support of their contention, the Wilsons principally argue that "[t]he circuit court violated Maryland Rules 2-303(b) and 2-303(e) when it excluded all evidence of the appellees' alleged fraud." Their contention could not have less merit.

Rule 2-303 has nothing to do with the admission or exclusion of evidence at trial; it is a rule concerning the contents of pleadings.

Rule 2-303(b) states:

> 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 or ground of defense. It shall not include argument, unnecessary recitals of law, evidence, or documents, or any immaterial, impertinent, or scandalous matter.

Rule 2-303(e) states: "All pleadings shall be so construed as to do substantial justice."

Both of these rules are subject to the requirement that a complaint must contain "a clear statement of the facts necessary to constitute a cause of action" (Md. Rule 2-305), as well as the longstanding, common-law rule that a party must plead fraud with particularity. *See, e.g.*, *McCormick v. Medtronic, Inc.*, 219 Md. App. at 527. It is more than arguable that the Wilsons's conclusory allegations of the legal elements of fraud would not have satisfied Rule 2-305's requirement that they plead a clear statement of facts (*see, e.g.*, *Shepter v. Johns Hopkins Univ*., 334 Md. 82, 103 (1994); *Margolis v. Sandy Spring Bank*, 221 Md. App. 703, 721-22 (2015)); it is beyond any serious dispute that the Wilsons failed to allege fraud with particularity.

On the morning of the first day of trial, the circuit court was confronted with the defendants' motion *in limine* to preclude the Wilsons from pursuing a theory that they had not disclosed in a bare-bones claim for fraud that consisted solely of legal conclusions unsupported by any specific factual allegations. "An evidentiary ruling on a motion *in limine* 'is left to the sound discretion of the trial judge and will only be reversed upon a clear showing of abuse of discretion.'" *Ayala v. Lee*, 215 Md. App. 457, 474-75 (2013) (quoting *Malik v. State*, 152 Md. App. 305, 324 (2003)). In addition, in its discretion, the trial court may limit the plaintiff's evidence to the issues framed in the complaint. *See Q C Corp. v. Maryland Port Admin*., 68 Md. App. 181, 210-11 (1986), *aff'd in part, rev'd in part*, 310 Md. 379 (1987).

Other than a reference to an inapplicable rule of pleading, the Wilsons offer no basis to conclude that the circuit court abused its discretion in precluding them from attempting to prove a set of factual allegations that they had not alleged in their complaint. Nor do we see a basis for concluding that the court abused its discretion. To the contrary, the court, in our view, exercised its discretion in a sound and capable manner.[5]

[5] The Wilsons argue that Mr. Stough "opened the door" to the issue of insurance when, on cross-examination, he explained that he had combined two companies into one to save money on insurance and other expenses. It is unclear that the Wilsons preserved this argument by presenting it to the circuit court and giving the court an opportunity to rule on it. *See* Md. Rule 8-131(a). In any event, it is difficult to conceive how M&MS opened the door to an unpleaded theory of common-law fraud merely by answering a question about why two companies had been combined into one.

At the close of all the evidence, M&MS moved for judgment on the fraud claim, because the Wilsons had introduced no evidence in support of it. The court granted that motion. We review that decision by asking "whether on the evidence presented a reasonable fact-finder could find the elements of the cause of action by a preponderance of the evidence." *Univ. of Md. Med. Sys. Corp. v. Gholston*, 203 Md. App. 321, 329 (2012).

In their brief, the Wilsons do not claim to have introduced any evidence upon which a reasonable jury could find that M&MS had committed fraud. Instead, they reiterate the complaint that the circuit court prohibited them from proving the factual allegations that they had failed to disclose in their defective complaint. Because the court did not abuse its discretion in precluding the Wilsons from offering that proof, and because the Wilsons tacitly acknowledge that they offered no other proof of fraud, the court could not possibly have erred in granting the motion for judgment on the fraud claim.[6]

IV. The Unavailable Expert

On the afternoon of the third day of what was supposed to be a four-day trial, the Wilsons ran out of witnesses. They told the court that they had one more witness, an expert named Brandon Powell, but that he would not be available until the following day.

[6] In the circuit court, the Wilsons argued that they were unaware of the putative lack of insurance coverage until after they had filed their complaint. Yet nothing prohibited them from amending their complaint to disclose that theory once they learned of it.

They asked the court to adjourn the proceedings until the following day. The court rejected their request, directed M&MS to proceed with its case, but reserved on the question of whether to allow the Wilsons to call Mr. Powell during M&MS's case. On the following day, the court declined to permit the Wilsons to call Mr. Powell.

The Wilsons recognize that a trial court has broad discretion to control the proceedings before it,[7] but they contend that the court abused its discretion in this case by "taking over" their case and "forcing" them to rest. We see no abuse of discretion.

Had the court adjourned the proceedings until the following day, M&MS could not have begun to put on its case until what was supposed to have been the final day of the trial. If the trial was still to conclude within four days, M&MS's presentation might have to be shortened or compressed, to its detriment. Alternatively, if M&MS was to have a full opportunity to present its defense, the jurors, their families, and the court system itself would be inconvenienced because the case had run longer than the forecast. In these circumstances, it was a perfectly reasonable exercise of discretion for the trial judge not to adjourn the proceedings until the following day.

[7] *See, e.g., Cooper v. Sacco*, 357 Md. 622, 637 (2000) (stating that the decision whether to allow a party to reopen its case falls within the discretion of the trial court); *Sippio v. State*, 350 Md. 633, 665-66 (1998) (stating that, "[w]hile trial judges may vary the order of proof based on a proffer or condition, the judge is not required to do so"); *Applied Indus. Techs. v. Ludemann*, 148 Md. App. 272, 289 (2002) (stating that "[w]hether to grant a mid-trial continuance is among those decisions left to the court's discretion"); *see also* Md. R. 5-611(a) (requiring a court to exercise "reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment").

It was similarly reasonable for the court to decide not to allow the Wilsons to call their expert during M&MS's case. Had the court allowed the Wilsons to do so, it might have disrupted the presentation of M&MS's case, one or more of the jurors might have mistaken the Wilsons' expert for one of M&MS's witness, or M&MS might have been required to locate and recall a witness whom it had excused so that it could rebut the expert's testimony. Another judge might have handled the situation differently, but it was far from an abuse of discretion for the trial judge in this case to have handled it as he did. *See Corry v. O'Neill*, 105 Md. App. 112, 124, 127 (1995).

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