Circuit Court for Frederick County
Case No. 10-C-15-002642

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 498

September Term, 2016

ESTATE OF LEWIS HAMILTON TABLER, JR., ET AL.

v.

NATIONAL RIFLE ASSOCIATION OF AMERICA, ET AL.

Wright,
Graeff,
Raker, Irma S.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: September 20, 2017

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This appeal arises from the ruling of the Circuit Court for Frederick County relating to the Amended Complaint filed by the Estate of Lewis Hamilton Tabler, Jr. (the "Estate") and Myles Morse ("Myles"), collectively, appellants. The court granted the Motion to Dismiss filed by the National Rifle Association of America ("NRA"), NRA Freedom Action Foundation ("NRA FAF"), NRA Institute for Legislative Action ("NRA-ILA"), Timothy G. Fisher, and J. Pierce Shields, collectively, appellees.

On appeal, appellants raise three questions for our review, which we have rephrased slightly, as follows:

1. Did the amended complaint allege facts sufficient to entitle appellants to relief ?

2. Did the circuit court err in concluding that appellants' claims are barred by collateral estoppel based on an earlier settlement between appellee NRA and a third party?

3. Did the circuit court err in finding that Counts Four and Five of the amended complaint are barred by the statute of limitations?

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

FACTUAL AND PROCEDURAL BACKGROUND

On September 17, 2015, appellants filed a complaint, alleging that, on January 10, 2012, Mr. Tabler, who was then 56 years old, "committed suicide by shooting himself in the chest with his shotgun in the parking lot of his employer, Applied Industrial Technologies, Inc." ("AIT"). At that time, Mr. Tabler was in poor physical health and "a deteriorating mental and emotional state of mind."

Prior to Mr. Tabler's death, he and Stormy Kay Morse had been "exclusive domestic partners and had resided together and held themselves out to the public as husband and

wife." During the 18 years of Mr. Tabler's relationship with Ms. Morse, Mr. Tabler "had fathered Ms. Morse's single son, Myles, beginning from the time that Myles was six years old," and Mr. Tabler and his "stepson" Myles "developed a close, loving relationship."

On August 27, 1997, Mr. Tabler designated Ms. Morse as the sole beneficiary of his life insurance and 401(k) plans managed by AIT. Myles was designated as the contingent beneficiary. In 2007, Mr. Tabler provided in his will that Ms. Morse was the primary beneficiary and personal representative of the Estate of Lewis Hamilton Tabler, Jr.

In the summer of 2011, Mr. Fisher, Director of Planned Giving with the NRA, and Mr. Shields, an attorney who was the NRA's Assistant Director of Planned Giving, "orchestrated without the consent or knowledge of Ms. Morse or Myles the submission of forms to [AIT] that resulted in the designation of" NRA-ILA, and subsequently, NRA FAF, as Mr. Tabler's sole beneficiary under his 401(k) plan.[1] After Mr. Tabler's suicide, Ms. Morse discovered that Chad Rupert, "a 25-year-old drinking companion of Mr. Tabler, claimed 50% of Mr. Tabler's life insurance based on Mr. Tabler's purported change of beneficiary made on December 29, 2011, just twelve days prior to his suicide."

The complaint alleged that, during the last six months of his life, Mr. Tabler "lacked sufficient mental capacity to execute or change the designation of his beneficiary to his 401K plan and life insurance policy." He engaged in multiple irrational acts during that period. In one incident, fifteen days prior to his suicide, Mr. Tabler pointed a loaded gun

[1] The complaint alleges that the "NRA-ILA, also known as the NRA Institute for Legislative Action, is the lobbying arm of the [NRA], and manages its political action committee, the Political Victory Committee," and the NRA Freedom Action Foundation is "an entity of the [NRA]."

at Myles's head as Myles was sitting on the toilet, called Myles an "'intruder,'" and threatened to shoot him. As a result of that incident, Mr. Tabler was charged with first degree assault, second degree assault, and reckless endangerment, although he committed suicide prior to those charges being adjudicated.

The complaint alleged that, "[o]n or about August 1, 2014, Mr. Shields, acting in his capacity as an attorney and Assistant Director of Estate Planning for the [NRA], conferred with Mr. Tabler regarding [his] estate planning." Mr. Tabler advised Mr. Shields that his 401(k) plan had a value of approximately $462,000, and based on instructions from Mr. Shields, Mr. Tabler mailed AIT a change of beneficiary form, indicating that the beneficiary of his 401(k) should be changed from Ms. Morse to NRA-ILA. Mr. Tabler sent a copy of the change of beneficiary form to Mr. Shields, but he did not notify Ms. Morse, "or any third party who was likely to notify her," of the change.

Mr. Shields and Mr. Fisher, on behalf of the NRA, the NRA FAF, and the NRA-ILA, subsequently met Mr. Tabler and provided Mr. Tabler with "additional estate planning and tax counselling, advice, and instructions." They "counselled, advised, and instructed Mr. Tabler concerning his estate planning, including negative tax consequences from designating . . . NRA-ILA as his 401K plan beneficiary" and "instructed him that he should change the designation to . . . NRA Freedom Action Foundation due to its status under the Internal Revenue Code." In reliance on this advice, Mr. Tabler emailed AIT another change of beneficiary form, indicating that the beneficiary of his 401(k) plan should be changed from NRA-ILA to NRA FAF.

Appellants were not aware of appellees' actions until after Mr. Tabler's death, when Ms. Morse appealed the denial of her claim to his 401(k) benefits. AIT disclosed the documents regarding the change in beneficiary to Ms. Morse's attorney on September 19, and 22, 2012. These documents included "signed affidavits" of Mr. Shields and Mr. Fisher, in which they admitted "under oath to actions that consist of tax advice and estate planning that they provided to Mr. Tabler."

The complaint further alleged that Ms. Morse settled her claim to any 401(k) benefits in prior litigation in federal court ("AIT case"), but neither the Estate nor Myles was a party to that litigation or its settlement. The Settlement Agreement and Release (the "Agreement") was "made by and among Stormy Morse ("Morse"), the NRA Freedom Action Foundation ("FAF"), Applied Industrial Technologies, Inc. Retirement Savings Plan (the "Plan") and Applied Industrial Technologies, Inc. ("Applied")." Pursuant to the Agreement, Mr. Tabler had $543,716.90 in his 401(k) plan, and $110,000 was distributed to Ms. Morse, with the remainder to be paid to NRA FAF. The Agreement further provided:

> [The payments to Ms. Morse] are in full and final settlement of all claims made or which could have been made in the Litigation by any Party against any other Party or any entity related to a Party.
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> ***
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> (3) Mutual Release. The Parties hereby mutually release each other, their past, present, and future members, agents, representatives, shareholders, principals, employees, attorneys, affiliates, parent corporations, subsidiaries, officers, directors, employees, predecessors and successors and heirs, executors and assigns, from any and all legal, equitable or other claims, counterclaims, claims made or which could have been made in the Litigation or, demands, setoffs, defenses, contracts, accounts, suits, debts, agreements,

> actions, causes of action, sums of money, reckoning, bonds, bills, specialities, covenants, promises, variances, trespasses, damages, extents, executions, judgments, findings, controversies and disputes of any kind or nature, and any past, present or future duties, responsibilities, or obligations, from the beginning of the world to the date hereof, whether known or unknown, and whether or not such claims arise out of, or may, can, or shall arise out of, or which have or ever had arisen out of, or which could have arisen out of any actions prior to the Effective Date, including but not limited to any breach of fiduciary duty claims under ERISA with respect to the acts or omissions of Applied or the Plan (including its fiduciaries) and further including but not limited to any such actions in connection with the Litigation Dispute (the **"Released Matters"**).

Count I, Constructive Fraud, alleged that the consultations, advice, and instructions to Mr. Tabler by Mr. Shields and Mr. Fisher constituted the practice of law, and their relationship with the NRA was in "direct conflict with their fiduciary duty to Mr. Tabler." Moreover, they knew that Mr. Tabler, who was suffering from obvious "lack of capacity, depression, and delusional behaviors" would rely on their "self-serving statements," which caused Mr. Tabler to change his beneficiaries to the NRA and a drinking acquaintance and to commit suicide "using the instrumentality that Defendants had promoted." The complaint alleged that "Myles suffered severe emotional trauma from the depression and suicide of Mr. Tabler caused by Defendants' actions."

Count II, Legal Malpractice, alleged that Mr. Fisher and Mr. Shields breached the duty of a reasonably competent attorney to avoid conflicts of interest. Absent the breach of that duty, "Mr. Tabler would not have made the changes to his estate planning [or] continued his descent into depression and ultimate suicide," causing Mr. Tabler and Myles "economic loss and emotional trauma."

Count III, Intentional Infliction of Emotional Distress, alleged that the conduct of Mr. Shields and Mr. Fisher was "intentional, reckless, and in deliberate disregard of a high degree of probability that emotional distress would result to" Mr. Tabler and Myles. As a result of their conduct, the complaint asserted, Mr. Tabler and Myles "have suffered, and [Myles] will continue to suffer, severe and extreme emotional distress."

On October 16, 2015, appellees filed a motion to dismiss, alleging that, although the complaint alleged that they induced Mr. Tabler to change his beneficiary designation of his 401(k) account, "the only reasonable inference established by the allegations of the complaint is that Mr. Tabler wished to make a gift to the NRA or one of its other entitles upon his death," and therefore, the complaint failed to set forth "sufficient factual allegations to establish a cause of action against any of the defendants." Appellees then addressed the deficiencies in each specific count.

With respect to Count I, appellees asserted that Myles "failed to plead that constructive fraud was perpetrated against him" because his only allegation was that he was "damaged as a result of a constructive fraud committed against *Mr. Tabler*." Moreover, neither the Estate nor Myles sufficiently pled damages to state a cause of action. Myles was a contingent beneficiary, and the complaint did not allege that Ms. Morse predeceased Mr. Tabler, "or any other reason why [Myles], as contingent beneficiary, would have received any distribution from Mr. Tabler's 401k upon Mr. Tabler's death." Nor was there any allegation that the Estate, at any time, was a beneficiary of Mr. Tabler's 401(k) account. Accordingly, both the Estate and Myles were in the same position as they would have been had the designation change never occurred. Moreover, the complaint

contained "no factual allegations to support the notion" that appellees actions caused emotional trauma. The complaint failed to allege "how changing the beneficiary designation of one's 401K account could possibly cause someone to experience severe emotional trauma," especially where it was alleged that Mr. Tabler allegedly already was suffering from emotional trauma.

With respect to Count II, the motion asserted that appellants could not maintain a legal malpractice action against Mr. Fisher because he is not a lawyer. Additionally, a claim for legal malpractice was improper because there was not an attorney-client relationship between Mr. Shields and either Mr. Tabler or Myles. Moreover, Myles could not establish that he suffered a loss caused by negligence, for the reasons it asserted in Count I.

With respect to Count III, appellees asserted in the motion that the complaint failed to allege the elements of intentional infliction of emotional distress with specificity. There were no specific factual allegations that any conduct was extreme and outrageous, and no facts were alleged to support a finding that appellees' actions were intentional or reckless. In addition, the complaint failed to allege a causal connection between the alleged conduct and any emotional distress suffered by Mr. Tabler or Myles. Finally, any emotional distress "resulting from Mr. Tabler's 401k beneficiary designation being changed cannot be described as of such quality that no reasonable person should be expected to endure it, especially where the alleged cause of distress is so easily curable," i.e., by "the simple execution of an additional change in beneficiary designation form."

Appellees next asserted that the complaint should be dismissed because the claims were resolved by the Agreement in the AIT case. Although Myles and the Estate "were not expressly parties to the settlement agreement, they are nonetheless bound by its terms and precluded from filing the instant Complaint," as the Agreement fully and finally settled "all claims made or which could have been made in the Litigation by any Party against any other Party or any entity related to a Party."

Finally, appellees asserted that the complaint should be dismissed because it was not filed within the applicable three-year statute of limitations. In that regard, appellees asserted that appellants had "knowledge sufficient to put [them] on inquiry" on August 2, 2012, the date that Ms. Morse's claim for benefits was first denied. Alternatively, they asserted that the limitations period began to run on August 28, 2012, when Ms. Morse first requested documents in response to the denial of her claim for Mr. Tabler's 401(k) benefits. The complaint, however, was not filed until September 17, 2015, more than three years after the accrual of the limitations period.

On November 3, 2015, appellants filed a response to the motion to dismiss, as well as an amended complaint, asserting that the counts are "appropriately pled," and that neither the Estate, nor Myles, were parties to the litigation that led to the settlement, or to the settlement itself, and therefore, they were not parties to that agreement. With respect to the statute of limitations, appellants asserted that it did not begin to run until AIT "disclosed the hidden evidence of [appellees'] misconduct on September 19 and 22, 2012, less than three years before the complaint was filed."

The amended complaint added two new counts. In Count IV, Fraud by Intentional Misrepresentation and/or Concealment, appellants asserted that appellees, who "had knowledge of Mr. Tabler's lack of capacity, depression, and delusional behaviours," failed to "disclose to any of the natural objects of Mr. Tabler's affections, including . . . Myles . . . , the existence of their communications, relationship, and change of beneficiary of [the] 401K," which constituted a "failure to disclose a material fact which [they] had a duty to disclose." This conduct, which was "malicious, willful, and intentional," caused Mr. Tabler and Myles to suffer "severe and extreme injuries, including economic injuries, emotional distress, and physical distress and manifestations resulting from the death of Mr. Tabler."

In Count V, Negligence, appellants asserted that appellees "were under a duty to protect the Plaintiffs from the injuries that have been pled," and the breach of that duty caused Mr. Tabler and Myles to suffer "severe and extreme injuries, including economic injuries, emotional distress, and physical distress and manifestations resulting from the death of Mr. Tabler."

Appellants attached Exhibits A and B to their amended complaint, which they characterize on appeal as "sworn statements . . . in support of their pleading." Exhibit A is a notarized letter from Mr. Shields to Terry Sobnosky, Director and Assistant General Counsel of AIT. The letter states, in relevant part, as follows:

> In my role as Assistant Director of Planned Giving, I help oversee, plan and direct estate, trust, bequest, and charitable giving from the NRA membership to both the non tax-exempt and tax-exempt entities of the NRA, including the NRA Freedom Action Foundation. . . .

In that capacity, I received a voice mail from [Mr. Tabler] . . . on the afternoon of August 1, 2011. . . . When I returned his call that afternoon, [Mr. Tabler] informed me that; he had heart disease since 1988, that he hated liberals, that his girlfriend was the current beneficiary of his 401k, that it was valued around 462k, that his 'yorkies' were his children, that he sold industrial equipment, that he did not want his girlfriend "to receive a dime of his retirement plan" and that she was a "crazy bitch." He said that he loved freedom and what the NRA stood for and there was no better place for him to leave his money.

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On Tuesday, August 2nd [Mr. Tabler] emailed me attaching a copy of his latest retirement statement for my review. He stated that "he wanted to get this ball rolling. I would hate to check out without having fulfilled this pledge. There is no organization that reflects my own personal views on freedom or that I feel is more deserving of my hard earned money tha[n] the NRA."

On Friday, August 26th, [Mr. Tabler] copied me on correspondence to Sue Switalksi in Human Resources at [AIT] attaching a change of beneficiary form and telling her to "please make this change effective immediately." On that form he listed the NRA-ILA . . . as the beneficiary and also wrote that the relationship to NRA-ILA was that they were a "friend of all Americans that care about the US Constitution."

On Tuesday, August 30th, [Mr. Tabler] emailed me a copy of his NRA Heritage Society Ambassador Membership Application, indicating that he would like to be publicly recognized for his gift to NRA-ILA. . . .

On Wednesday, August 31st, [Mr.] Fisher, the Director of Planned Giving, and I met [Mr. Tabler] for lunch at [AIT] . . . . [Mr. Tabler] gave me a tour of his office and introduced me to his co-workers, including his closest friend 'Bob.' We then drove together to May's Restaurant in Frederick. During this lunch [Mr. Tabler] told me how his girlfriend 'Stormy' was a "low-life" and that her first husband committed suicide and how there was much suspicion that 'Stormy' was involved. He said that he would kick her out but she would end up on the street. He also joked that if something ever happened to him she was probably involved in it. He also had a clear understanding of the nature and extent of his assets and knew who the natural objects of his estate were. He was clear, lucid, calm, not under duress and competent.

> On Tuesday, September 6th, on our tax advice, [Mr. Tabler] copied me on correspondence to Sue Switalski stating "I apologize for asking you to make another change to my 401k beneficiary (form attached), but I want to make sure to designate the correct tax-exempt arm of the [NRA]. I don't want the government getting their hands on any of my money, if I can help it." [Mr. Tabler] changed his beneficiary form at this point to the NRA's Freedom Action Foundation, the tax-exempt affiliate of NRA-ILA.
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> Through the remainder of September 2011 up until January 10, 2012, [Mr. Tabler] and I exchanged a number of emails and phone conversations regarding; planning [his] visit to NRA headquarters to be recognized for his gift, sharing hunting stories, extending invites to hunt at each other's properties and talking about [his] gift and what it would mean for the NRA.
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> The process of designating the NRA-FAF as beneficiary with [Mr. Tabler] was fairly representative of the timing, nature, consideration and documentation of other planned gifts in my experience.
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> At no point in time was [Mr. Tabler] not cognizant of his estate, his intentions, his health, the decision he had made and his knowledge of the intended result.

Exhibit B is a notarized letter from Mr. Fisher to Terry Sobnosky, Director and Assistant General Counsel of AIT. That letter provided, in relevant part, as follows:

> At the time of our meeting Mr. Tabler had designated [NRA-ILA] as the beneficiary of his 401-K. At lunch, Mr. Tabler spoke passionately about his desire to protect the Second Amendment and freedom in general. He felt a gift of his 401-K to NRA-ILA would accomplish his charitable aspirations.
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> The purpose of my meeting with Mr. Tabler for lunch was two-fold. First, I wanted to thank him for his generous gift and for including NRA in his estate plan. Secondly, I wanted to make sure he understood the tax consequences of his beneficiary designation. I explained to him that while NRA-ILA is a non-profit it is not tax exempt. Since Mr. Tabler's 401-K was funded with pre-tax dollars I further explained that a gift of the 401-K to NRA-ILA would trigger a taxable event in his estate before the distribution could be made. I asked Mr. Tabler if he wanted any of his gift to go for taxes. He said no. I then explained to Mr. Tabler that if he changed his beneficiary designation to the Freedom Action Foundation, this would provide NRA resources to conduct non-political, but essential activity to the political process such as voter registration and issues [such as] education. And there would be no

> taxation of his gift at his passing. He said he liked that much better and the proof of that is that as I write you, the beneficiary designation of Mr. Tabler's 401-K is the Freedom Action Foundation.
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> Mr. Tabler was equally adamant about who he did not want to benefit from his 401-K and that of course was Stormy. He repeatedly made it known during lunch that his intent was not to give any of the 401-K to Stormy. He expressed his dismay that Stormy did not work outside the home and did not contribute financially. He further indicated that he was making some provision in his estate plan for Stormy, but that he did not intend to make it possible for her to just sit around for the rest of her life and do nothing. I do not know Stormy and I do not have any agenda regarding Stormy. What I do have is a clear obligation to fulfill Mr. Tabler's wishes and those wishes were expressly to make sure that the Freedom Action Foundation was the beneficiary of his 401-K.
>
> As I understand it, Mr. Tabler seemed to give a lot of thought to his planning. He did not leave Stormy penniless. He left her his house, truck and checking/savings account. He also made her a 50% beneficiary of his life insurance at work. Given Mr. Tabler's management level I would assume that is a reasonably substantial amount of money. He also made a gift to a friend of the remaining 50% of his life insurance at work. And, then, as already discussed, he made a charitable gift and ultimately positioned that gift so that it would legally avoid taxation upon distribution. These are not the actions of an incoherent or unhinged person. Rather these actions denote the extensive, deliberative, and reasonable actions of a competent man.

On November 20, 2015, appellees filed a motion to dismiss the amended complaint. They asserted that the amended complaint failed "to cure the deficiencies of the allegations of the original Complaint," and Exhibits A and B contradicted the material factual allegations of the amended complaint and demonstrated that "the change in beneficiary designation of Mr. Tabler's 401k account was executed in accordance with Mr. Tabler's wishes while Mr. Tabler was of sound mind." They asserted that the amended complaint failed to state a claim as to any of the five counts, and it was barred by the statute of limitations.

On March 21, 2016, the court held a hearing. At the hearing, the parties reiterated the positions taken in their pleadings.

On April 13, 2016, the court filed an Opinion and Order granting appellees' motion to dismiss with prejudice. In a thorough analysis, the court found that appellants failed to plead a cause of action for any of the five counts. The court found, *inter alia*, that the complaint failed to allege damages that resulted from appellees' actions, noting that (1) the change in beneficiary did not damage any claim to the decedent's pension because Myles was merely a contingent beneficiary and the Estate was not designated a beneficiary; and (2) the claim of emotional trauma failed for a lack of factual allegations supporting that claim. The court also found that appellants were estopped from relitigating issues relating to the pension funds by virtue of the Agreement in the AIT case, and that, although the original complaint was timely filed, the amended complaint added "two entirely new claims," and these claims, Counts IV and V, were barred by the statute of limitations.

STANDARD OF REVIEW

In reviewing the circuit court's grant of appellees' motion to dismiss the amended complaint, we initially note that, in their motion, appellees attached two exhibits, the Settlement Agreement and Release between Ms. Morse and appellees, and an October 2, 2012, letter and affidavit from Ms. Morse to Mr. Tabler's Plan Administrator. Subsequently, in appellants' amended complaint, they attached two additional exhibits, letters that they characterized as "sworn statements . . . in support of their pleading."

Pursuant to Maryland Rule 2-322(c),

> [i]f, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2–501, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 2–501.

See Advance Telecom Process LLC v. DSFederal, Inc., 224 Md. App. 164, 175 (2015) ("[W]here matters outside of the allegations in the complaint and any exhibits incorporated in it are considered by the trial court, a motion to dismiss generally will be treated as one for summary judgment."); *Worsham v. Ehrlich*, 181 Md. App. 711, 722 (The trial court has "discretion to convert a motion to dismiss to a motion for summary judgment by considering matters outside the pleading."), *cert. denied*, 406 Md. 747 (2008).

Here, the circuit court considered matters outside the complaint. Therefore, for purposes of review on appeal, "we treat the trial court's grant of a motion to dismiss as one for summary judgment." *Heneberry v. Pharoan*, 232 Md. App. 469, 475 (2017).

We review the trial court's grant of a motion for summary judgment *de novo* as to the law and in a light most favorable to appellants, the non-moving party. *Crickenberger v. Hyundai Motor Am.*, 404 Md. 37, 45 (2008). "Summary judgment is appropriate where 'there is no genuine dispute as to any material fact' and 'the party in whose favor judgment is entered is entitled to judgment as a matter of law.'" *Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 294 (2007) (quoting Md. Rule 2-501(f)). "'[T]he mere existence of a scintilla of evidence in support of the plaintiffs' claim is insufficient to preclude the grant of summary judgment; there must be evidence upon which the [trier of fact] could reasonably find for the plaintiff.'" *Crickenberger*, 404 Md. at 45 (quoting *Beatty v.*

Trailmaster Prods., Inc., 330 Md. 726, 738-39 (1993)). "'[W]hile a court must resolve all inferences in favor of the party opposing summary judgment, "those inferences must be reasonable ones."'" *Id.* (quoting *Beatty*, 330 Md. at 739).

DISCUSSION

Appellants assert that the circuit court's judgment granting appellees' motion "was wrong as a matter of law." We disagree. The circuit court properly dismissed the claims set forth in the amended complaint, on multiple grounds, including that the amended complaint did not sufficiently allege facts to support a claim of damages due to appellees' actions.

I.

Circuit Court's Rulings With Respect to Damages

The circuit court addressed the deficiency in the pleadings regarding the alleged damages for appellees' actions on several occasions. With respect to Count I, alleging constructive fraud, the court stated:

> Mr. Morse further fails to allege any injury that resulted from the alleged fraud. It is uncontested that Mr. Morse was designated as a contingent beneficiary on the decedent's 401K pension prior to the modification. Contingent beneficiaries do not receive any distributions unless the designated primary beneficiary predeceases the pension holder. Mr. Morse thus would not have received any distributions from the 401K pension even if the designated beneficiaries had not been changed given that Ms. Morse was still alive at the time of the decedent's death. Ms. Morse, as the primary beneficiary, would have received the distributions. Mr. Morse additionally contends that he should be compensated for the emotional trauma he has allegedly endured as a result of the depression and suicide of the decedent. In order to recover non-economic damages one must show that the "injury was objectively ascertainable" and that it "was shown to be a provable consequence of the wrongful conduct". *Hoffman v. Stamper*, 385 Md. 1, 34 (2005). The wrongful conduct upon which this allegation is

founded on are the interactions Mr. Fisher and Mr. Shields had with the decedent. The alleged fraud committed upon the decedent and the effects it had upon him is argued to be the proximate cause of Mr. Morse's emotional trauma. The deficiency with this claim stems from the factual allegations found within the Amended Complaint itself. The petitioner's state that the decedent "had been in a deteriorating mental and emotional state of mind linked to a downward spiral in his physical health condition, combined with substance and alcohol abuse and was severely depressed." The Amended Complaint further alleges that the decedent "exhibited a substantial and visible change in his mental competency and emotional stability" throughout the entire year leading up to his death. These factual allegations are in direct contradiction with Mr. Morse's claim that Mr. Fisher and Mr. Shields' conduct caused the decedent's emotional instability, which thereby caused his emotional injuries.

The decedent's Estate similarly cannot succeed on this claim for failure to assert damages caused by the alleged fraud. Firstly, the Estate was never designated as a beneficiary of the decedent's 401K and thus cannot construe any deprivation of those funds as damages for itself. Distributions would have never reached the Estate even if the beneficiary designation had not been changed. Therefore, the Estate cannot allege damages stemming from the pension's beneficiary modification when its position in regards to the pension has remained unchanged. The Estate also cannot succeed on its claim of emotional trauma suffered by the decedent due to an absence of factual allegations that support the claim. As discussed above, the Amended Complaint belies any claims of emotional trauma due to its extensive discussion regarding the decedent's psychological and emotional deterioration prior to meeting with Mr. Fisher and Mr. Shields. Aside from conclusory statements, the Amended Complaint fails to provide any sort of medical documentation showing that the decedent was indeed suffering from emotional trauma or that the trauma was caused by the respondent's alleged conduct.

Similarly, in addressing Count II, alleging legal malpractice, the court stated:

Both petitioners also fail to allege any damages arising from the alleged legal malpractice. Mr. Morse, as the previously named contingent beneficiary of the 401K, would not have received any distributions even assuming an attorney-client relationship were to have been established and abused by the respondents. The Estate, as mentioned earlier, was never named as a beneficiary on the 401K and therefore suffered no economic injury by not receiving the funds therein. The lack of an existing attorney-client

> relationship coupled with a lack of damages arising from the alleged malpractice renders this claim unsuccessful.

Additionally, in addressing Count III, alleging Intentional Infliction of Emotional Distress, the court stated, *inter alia*, as follows:

> The causal connection between the respondent[s'] conduct and emotional distress allegedly suffered by the petitioners has not been adequately plead. The decedent's psychological and emotional issues were alleged to have commenced prior to meeting with Mr. Fisher and Mr. Shields. The Amended Complaint first blames the respondents for knowingly taking advantage of the decedent's apparent psychological condition. Later, the Amended Complaint places blame upon the respondents for intentional[ly] inflicting emotional distress on the decedent by virtue of the change in beneficiaries he made on his 401K. This glaring contradiction destroys any notion of an existing causal nexus between the alleged conduct and distress.

II.

Damages

Appellees argue in their brief that the circuit court properly granted their motion to dismiss because, *inter alia*, appellants failed "to plead damages caused by [their] alleged conduct." They assert that neither Myles nor the Estate suffered any economic damages as a result of the change in beneficiary designation because Myles was a contingent beneficiary and the Estate was never designated as a beneficiary, and therefore, neither would have received any distribution from the 401k following Mr. Tabler's death, regardless of the change in beneficiary designation. Accordingly, they assert, both are in the "same economic position, following the beneficiary designation changes, as they would have been in had such changes not occurred," and therefore, they did not allege economic damages proximately caused by appellees' alleged conduct.

Appellees further argue that appellants did not suffer any non-economic damages, asserting that the only non-economic damages alleged were emotional injuries and trauma, but appellants failed to plead how appellees' alleged conduct proximately caused any emotional injuries or trauma suffered by either Mr. Tabler or Myles. They argue that, although the amended complaint makes conclusory allegations, there were no supporting factual allegations sufficient to defeat a motion to dismiss. Instead, they assert, the amended complaint's factual allegations directly "contradict the conclusory assertion that [a]ppellees' alleged conduct proximately caused" Mr. Tabler to suffer any emotional injury, as the factual allegations indicated that he was already suffering from severe emotional trauma prior to meeting with Mr. Shields and Mr. Fisher, as opposed to as a result of any alleged conduct on their part. With respect to Myles, appellees assert that, because any alleged conduct on their part "was not the cause of Mr. Tabler's depression and suicide, any emotional injuries experienced by [Myles], as a result of Mr. Tabler's depression and suicide, could not have been proximately caused by" their alleged conduct.

We agree with appellees that the circuit court properly dismissed the amended complaint based on appellants' failure to plead cognizable damages. Each of the five causes of action alleged, Count I, constructive fraud, Count II, legal malpractice Count III, intentional infliction of emotional distress, Count IV, fraud by intentional misrepresentation and/or concealment and, Count V, negligence, requires cognizable damages. *See Dynacorp Ltd. v. Aramtel Ltd.*, 208 Md. App. 403, 491 n.45 (2012) ("Constructive fraud . . . requires proof of damages."), *cert. denied*, 430 Md. 645 (1988); *Marcus v. Bathon*, 72 Md. App. 475, 487 (1987) ("The elements of a legal malpractice

action are: . . . (3) that such negligence resulted in and was the proximate cause of loss to the client."), *cert. denied*, 313 Md. 612 (1988); *Manikhi v. Mass Transit Admin.*, 360 Md. 333, 367 (2000) (A claim of intentional infliction of emotional distress has four elements, including "a causal connection between the wrongful conduct and the emotional distress."); *Crawford v. Mindel*, 57 Md. App. 111, 122 (1984) ("One suing for fraud or deceit must establish that he sustained damage by reason of the fraud, and that his injury was the natural and proximate consequence of his reliance on the fraudulent act."); *Hemmings v. Pelham Wood Ltd. Liab. Ltd. P'ship,* 375 Md. 522, 535 (2003) ("To succeed on a negligence claim, a plaintiff must prove . . . (4) that the loss or injury proximately resulted from the defendant's breach of the duty.").

We begin with the claim for damages in the form of economic loss. Although appellants alleged economic loss in the amended complaint, at oral argument on appeal, counsel for appellants stated that they were not claiming damages in the form of loss of potential pension funds. Rather, the damages they are claiming is limited to non-economic damages, i.e., emotional distress experienced by Mr. Tabler and Myles, and which Myles will continue to suffer due to Mr. Tabler's death.

Damages based on "speculation or conjecture are not recoverable as compensatory damages." *Kleban v. Eghrari-Sabet*, 174 Md. App. 60, 95 (2007). Here, the alleged emotional distress damages were speculative. There was nothing to support the claim that changing his beneficiaries caused Mr. Tabler or Myles emotional distress. Indeed, as the circuit court found, the allegations in the amended complaint that the decedent's mental

health was deteriorating contradicts the assertion that appellees' conduct caused the decedent's emotional instability and emotional injuries.

We agree with the circuit court that, "[a]side from conclusory statements," appellants failed to assert, through factual allegations, that appellants suffered any damages proximately caused by appellees' alleged conduct. Accordingly, the circuit court properly found that the amended complaint failed to state a claim upon which relief could be granted, and it properly granted appellees' motion to dismiss. *RRC Northeast, LLC v. BAA Md., Inc.*, 413 Md. 638, 644 (2010) (Facts set forth in the complaint must be "pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice."); *Walton v. Network Solutions*, 221 Md. App. 656, 672 n.2 (2015) ("[C]onclusory statements without supporting factual allegations are insufficient to defeat a motion to dismiss."). *See also Giordano v. MGC Mortgage, Inc.*, 160 F.Supp.3d 778, 785 (D. N.J. 2016) (motion to dismiss granted where bare allegations of emotional distress "as a result of" defendant's actions insufficient).

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