UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0851

September Term, 2016

FELICIA M. BARLOW CLAR, ET AL.

v.

KYLE MUEHLHAUSER, ET AL.

Wright,
Berger,
Leahy

JJ.

Opinion by Wright, J.

Filed: July 12, 2017

On March 24, 2015, appellants, Felicia M. Barlow Clar, Jennifer Kalita, and Bernice Bangs, filed a class action complaint against appellees, Kyle Muehlhauser and The Rams Head at Savage Mill LLC ("RHSM"), in the Circuit Court for Howard County, alleging intrusion upon seclusion through visual surveillance with prurient intent, breach of contract, negligence, and violations of Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL") § 3-902 *et seq*. On October 30, 2015, appellants filed an amended class action complaint, adding a claim for intentional infliction of emotional distress against both appellees and claims for negligent hiring, retention, supervision, selection and qualification, and negligent entrustment against RHSM. On April 4, 2016, appellants filed a second amended class action complaint that added appellees, Restaurant Management LLC ("RM") and The Rams Head Group ("RHG"), as defendants. That same day, appellants also filed a motion for class certification, which appellees opposed. Thereafter, appellees filed a motion for summary judgment.

Following a motions hearing on June 2, 2016, the circuit court denied appellants' motion for class certification and granted summary judgment in appellees' favor. An order reflecting the court's rulings was entered on June 7, 2016. On June 27, 2016, appellants timely noted this appeal.

Questions Presented

For clarity, we have consolidated and reworded the questions presented by all parties as follows:

1. Was the circuit court correct in granting summary judgment in favor of appellees?

2. Was the circuit court correct in denying appellants' motion for class certification?

For the reasons that follow, we affirm the judgment of the circuit court.

Facts

I. The Parties

RHSM was formed in 1998 for the purpose of owning and operating a restaurant and tavern in Savage, Maryland, known as Rams Head Tavern. Muehlhauser served as RHSM's managing member until February 2015. In connection with his responsibilities, Muehlhauser visited the Rams Head Tavern on a weekly basis.

RM was formed in August 2002 for the purpose of performing, among other things, marketing, accounting, and managerial services on behalf of the various separate entities operating "Rams Head" Restaurants and entertainment venues. At RM's inception, Muehlhauser's father, William, was the sole member and as of March 2015, he is again the sole member of the entity. However, between approximately 2010 and 2015, Muehlhauser also served as a member of RM.

In December 2013, Michael Lechner was hired to act as RM's Director of Operations. In that position, his job was to provide managerial services for the various entities operating a "Rams Head" restaurant or entertainment venue, wherein the general managers employed by each separate entity reported to him and he oversaw them. Prior to Lechner's position being created in December 2013, this managerial oversight and assistance to each entities' general managers was provided by Muehlhauser.

RHG is a marketing name utilized by RM's marketing and promotional department in an effort to promote the various restaurants and venues that bear a "Rams Head" name in their title. This entity has its own letterhead, website, and e-mail domain. RHG's officers, such as "President" and "Vice President," exist for the purposes of communications and have always been either a member of RM, such as Muehlhauser, or high ranking employee of RM, such as Lechner or Erin McNaboe, RM's Director of Marketing. The "Rams Head" entities, including RHSM, send income to RM, and RM compensates the officers for their roles.

Appellants, Clar, Kalita, and Bangs, are patrons of Rams Head Tavern who dined and used the restroom there, on numerous occasions between 2011 and 2014. Since RHSM's inception, it has had a policy to inspect restrooms of Rams Head Tavern for cleanliness and any operational issues throughout the course of each day. At all times relevant to the allegations set forth by appellants in their complaint, RHSM employed a general manager and several assistant managers who were tasked with overseeing the day-to-day operations of Rams Head Tavern.

II. May 9, 2014

On May 9, 2014, at approximately 5:00 p.m., Lauren Atwood, a patron at Rams Head Tavern, was using a single-occupancy women's restroom when a portable camera fell from underneath the sink near the toilet and onto the floor next to her. At the time of that incident, Chris Neugroschel was the general manager and he kept a restroom checklist at the host stand to ensure that staff and managers were regularly inspecting the

restrooms at the restaurant. Atwood thereafter delivered the camera to the Howard County Police Department ("HCPD") and reported what happened.

After speaking to Atwood, HCPD conducted a full investigation of the camera found in the restroom at Rams Head Tavern. As a result of the forensic examination, HCPD identified a total of 16 videos stored on the device's memory card. Four of the videos were readily accessible, but 12 were recovered (*i.e.*, deleted and restored) video files reconstructed by HCPD. The detectives viewed the video files and were able to get a general description of the person who had mounted the camera because he was recorded by the camera at the time that he placed it in the restroom. Based on the time stamp of the video, the detectives were able to determine that Atwood discovered the camera 47 minutes after it had been mounted. Because Atwood stated that she found the camera at approximately 5:00 p.m. on May 9, 2014, the detectives deduced that the camera had been mounted under the sink in the restroom at approximately 4:10 p.m.

HCPD detectives visited Rams Head Tavern and were given access to security videos. By viewing the videos from May 9, 2014, the detectives were able to identify Muehlhauser as the individual who had placed the camera in the restroom. After identifying Muehlhauser as the suspect, HCPD executed a search warrant on May 15, 2014, conducting a full search of Muehlhauser's home and seizing several electronic devices, including cell phones and computers.

HCPD's investigation continued for at least nine months, resulting in Muehlhauser's arrest on February 19, 2015. The investigation included a full forensic analysis of all electronic devices seized.

Based on analysis of the camera found on May 9, 2014, HCPD noted that all 16 videos stored on the device's memory card contained footage of a bathroom. The four videos that were readily accessible depicted the Rams Head Tavern restroom where Atwood discovered the recording device. HCPD's analysis of those videos depicted six different individuals inside the Rams Head Tavern restroom from approximately 4:10-5:00 p.m. The only individuals who were able to be identified, however, were Atwood and Kimberly Armstrong, a woman who accompanied Atwood to Rams Head Tavern that day and used the restroom immediately before Atwood. Although some of the bathrooms depicted in the 12 recovered video files were "reasonably believed to be the same" as each other, HCPD did not indicate that any of those bathrooms matched the Rams Head Tavern restroom seen on the four video files from May 9, 2014.

HCPD also conducted forensic analysis of electronic devices seized from Muehlhauser's home, including two computers, an Apple iPad, a digital camera, and two memory cards. According to HCPD, those devices "revealed none (0) of the digital media examined . . . contain[ed] any digital data of notable investigative interest." Muehlhauser later stated in discovery that, from May 9, 2014, through February 19, 2015, he "neither possessed nor deleted any illegal or illicit images or videos."

On July 16, 2015, a criminal hearing was held in the District Court for Howard County, at which time Muehlhauser pleaded guilty to two counts of violating CL § 3-902, by conducting video surveillance with prurient intent, as they related to Atwood and Armstrong.[1] An agreed statement of facts was presented, indicating that Muehlhauser had placed the video recording device recovered by Atwood on May 9, 2014, and that Atwood and Armstrong were videotaped at approximately 5:00 p.m. Muehlhauser was sentenced that same day.

III. The Civil Suit

Appellants filed the present lawsuit on March 24, 2015, prior to Muehlhauser's criminal hearing. They claimed to have "frequented the Rams Head Tavern" and to have "used the ladies restroom" on several occasions during the two to three year period prior to May 9, 2014. During discovery, appellants "admit[ted] that they were not present at the Rams Head Tavern located in Savage, Maryland, on May 9, 2014." They also "admit[ted] they are not in possession of a video depicting them in the interior of a restroom inside any of the Rams Head locations" and have no "personal knowledge demonstrating the existence of [such] video."

When asked what personal knowledge, facts, or circumstances led her to believe that a camera was present at the time she was using the restroom at Rams Head Tavern,

[1] Atwood and Armstrong are not parties to the case before us. Although Muehlhauser's defense attorney acknowledged that Muehlhauser acted on his "voyeuristic instincts" four years prior to the criminal trial and again "a year-and-a-half" after that – possibly recording numerous people not individually identified – the only appellants in the instant case are Clar, Kalita, and Bangs.

Clar stated: "The criminal case and the newspaper reports and learning through the criminal case revelations that he had been recording for three years in the bathroom." Similarly, Bangs responded as follows: "Knowing that I was in the same location as what they're saying on the news as to where the camera was located." Likewise, Kalita admitted to having no personal knowledge that she was actually videotaped while using the restroom at Rams Head Tavern, only referring to what she heard on the news or from Clar. When appellants deposed Muehlhauser, appellants' counsel asked several questions to which Muehlhauser invoked his Fifth Amendment privilege against self-incrimination.

The corporate appellees maintain that they were not put on notice that Muehlhauser was the individual who had potentially placed a camera in the Rams Head Tavern restroom until after police began investigating the May 9, 2014 incident. They also assert that they were never made aware that a recording device was placed in any of the RHSM restrooms at any time other than the day Atwood discovered the portable camera.

Appellants each claim that they sustained injuries and damages related to emotional and/or mental distress. During discovery, Clar averred:

> When I first saw the news article I immediately felt violated. Since then I've had emotional distress. I don't sleep well at night, if at all. I have anxiety. I've registered my dog as an emotional support animal so that I can go in public places and not feel victimized.

Meanwhile, Bangs stated:

> It's a huge invasion of privacy, lack of sleep, it's added stress to my entire family. Obviously, we don't go there anymore. It makes you think before using any public restrooms in any establishment now. Even moving out to

> Missouri. It's just, it's very, it's embarrassing and just, you know, very emotional.

Finally, Kalita described "a lack of sleep, a nervousness, an anxiety, and an ongoing [avoidance of] public restrooms."

Additional facts will be included, below, as they become relevant to our discussion.

Discussion

The issues presently before us are only those that stem from the claims brought by appellants, Clar, Kalita, and Bangs. Therefore, we reiterate that although Muehlhauser's alleged actions may have affected numerous people, even if not individually identified, our decision here applies only to the parties of record. *See Cecil v. Cecil*, 19 Md. 72, 78 (1862) (stating that a party who "avails himself of the provisions of the Code, and places himself in a condition to appeal, by immediately notifying his intention, and having the testimony reduced to writing, at his expense, . . . becomes a party to the record, and may be concluded by it").

I. Summary Judgment

Appellants first argue that the circuit court erred in granting summary judgment because "factual disputes render the factual intrusion and surveillance questions appropriate for jury consideration." Specifically, appellants aver that Muehlhauser's assertion of the Fifth Amendment in response to numerous questions, coupled with other relevant evidence, "required [the court] to draw the adverse inferences against [him] that he secretly recorded women (including Appellants) using the women's restroom of the

Rams Head Tavern on dates between January 1, 2011 and May 9, 2014." Similarly, they assert that evidence that Muehlhauser deleted 12 of the 16 video files identified by HCPD constituted spoliation, which also allowed the circuit court to draw adverse inferences against him. Lastly, appellants contend that all of the corporate appellees are liable for Muehlhauser's alleged misconduct.

In response, appellees argue that the circuit court properly granted summary judgment. According to Muehlhauser, the court correctly determined that there was no evidence to support appellants' claims. Agreeing with Muehlhauser that appellants were unable to "demonstrate this threshold requirement," the corporate appellees assert that, as a result, this Court need not address appellants' causes of action against the corporate appellees.

Pursuant to Md. Rule 2-501(a), "[a]ny party may file a written motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law." When appellate courts review a grant of summary judgment, "'we must make the threshold determination as to whether a genuine dispute of material fact exists, and only where such dispute is absent will we proceed to review determinations of law.'" *Stachowski v. Sysco Food Servs. of Balt., Inc.*, 402 Md. 506, 515-16 (2007) (quoting *Remsburg v. Montgomery*, 376 Md. 568, 579 (2003)). The Court of Appeals has stated that "[a] material fact is 'a fact the resolution of which will somehow affect the outcome

of the case.'" *Taylor v. NationsBank, N.A.*, 365 Md. 166, 173 (2001) (quoting *Jones v. Mid-Atlantic Funding Co.*, 362 Md. 661, 675 (2001)).

In making that determination, we review the record "in the light most favorable to the non-moving party." *Bednar v. Provident Bank of Maryland, Inc.*, 402 Md. 532, 542 (2007) (citation omitted). While we are required to "resolve all inferences in favor of the party opposing summary judgment, [t]hose inferences . . . must be *reasonable* ones." *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 739 (1993) (citation and quotation omitted). "Consequently, mere general allegations or conclusory assertions which do not show facts in detail and with precision will not suffice to overcome a motion for summary judgment." *Educ. Testing Serv. v. Hildebrant*, 399 Md. 128, 139 (2007) (citations omitted); *see Boucher Invs., L.P. v. Annapolis-West Ltd. P'ship*, 141 Md. App. 1, 10 (2001) (stating that the non-moving party must proffer "facts which would be admissible in evidence") (citation omitted). In other words, "when a movant has carried its burden, the party opposing summary judgment must do more than simply show there is some metaphysical doubt as to the material facts." *Beatty*, 330 Md. at 738 (citation and quotations omitted). "The basic rule is that the burden of proof is on the party asserting the affirmative of the issue, as determined by the pleadings and the nature of the case." *Chesapeake & Potomac Tel. Co. of Maryland v. Hicks*, 25 Md. App. 503, 523 (1975) (citing *Brehm v. Lorenz*, 206 Md. 500, 506 (1955)). Thus, "[s]ummary judgment is appropriate if the nonmoving party has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof." *Cent.*

Truck Ctr., Inc. v. Cent. GMC, Inc., 194 Md. App. 375, 386 (2010) (citation and quotations omitted).

Because under Maryland's summary judgment rule, a trial court determines issues of law, makes rulings as a matter of law, and resolves no disputed issues of fact, "the standard for appellate review of a trial court's grant of a motion for summary judgment is simply whether the trial court was legally correct." *Beatty*, 330 Md. at 737 (citations omitted). *See also Messing v. Bank of America, N.A.*, 373 Md. 672, 684 (2003) ("The standard of review of a trial court's grant of a motion for summary judgment on the law is *de novo*, that is, whether the trial court's legal conclusions were legally correct.") (Citations omitted).

In this case, appellants asserted several causes of action, all of which were based on the allegation that Muehlhauser had installed a video camera in the women's restroom at Rams Head Tavern and surreptitiously recorded appellants and the class of people they proposed to represent while they used that restroom. Thus, to defeat summary judgment, appellants had to "make a sufficient showing" that they were videotaped while using the restroom at Rams Head Tavern, or at the very least, that a video recording device was present while they used that restroom. *See Cent. Truck Ctr., Inc. v. Cent. GMC, Inc.*, 194 Md. App. at 386 (citation omitted). Upon review of the record, we hold that they failed to do so.

It is undisputed that none of the appellants were at Rams Head Tavern on May 9, 2014, the only date on which there exists evidence that Muehlhauser placed a video

camera inside a restroom in the establishment. Appellants also admitted that "they are not in possession of a video depicting them in the interior of a restroom inside any of the Rams Head locations," and that they have no "personal knowledge demonstrating the existence of [such] video." As corporate appellees aptly state, the "*potentiality* that each of them . . . *possibly* utilized a restroom at the [Rams Head Tavern] when a video recording device was *perhaps* present" is not sufficient. We reiterate that, in Maryland, "conclusory statements, conjecture, or speculation by the party resisting the motion will not defeat summary judgment[,] and an opposing party's facts must be material and of a substantial nature, not fanciful, frivolous, gauzy, spurious, irrelevant, gossamer inferences, conjectural, speculative, nor merely suspicions." *Carter v. Aramark Sports & Entm't Servs., Inc.*, 153 Md. App. 210, 225 (2003) (citation and quotations omitted). Because appellants failed to demonstrate that they were videotaped while using the restroom at Rams Head Tavern or that a video recording device was present while they used that restroom, their claims for intrusion upon seclusion,[2] breach of contract,[3]

[2] Appellants did not sufficiently show that Muehlhauser "intentionally intrude[d], physically or otherwise, upon the solitude or seclusion of [appellants or their] private affairs or concerns" such that "the intrusion would be highly offensive to a reasonable person." *Bailer v. Erie Ins. Exch.*, 344 Md. 515, 526 (1997) (citation omitted). *Cf. New Summit Assocs. Ltd. P'ship v. Nistle*, 73 Md. App. 351, 360 (1987) (finding invasion of privacy where it was undisputed that an individual *actually* placed a peephole in plaintiff's bathroom).

[3] Appellants did not challenge Muehlhauser's motion for summary judgment on their breach of contract claim, and they conceded this issue during the hearing before the circuit court.

negligence,[4] violations of CL § 3-902 *et seq.*,[5] and intentional infliction of emotional distress[6] fail. Consequently, their claims for negligent hiring, retention, supervision,

[4] Appellants did not challenge Muehlhauser's motion for summary judgment on their negligence claim, and they conceded this issue during the hearing before the circuit court.

[5] CL § 3-902(c) provides:

> A person may not with prurient intent conduct or procure another to conduct visual surveillance of:
>
> (1) an individual in a private place without the consent of that individual; or
>
> (2) the private area of an individual by use of a camera without the consent of the individual under circumstances in which a reasonable person would believe that the private area of the individual would not be visible to the public, regardless of whether the individual is in a public or private place.

Here, appellants failed to sufficiently show, at a minimum, that Muehlhauser conducted "visual surveillance" of them, that is, "deliberate, surreptitious observation . . . by any means," including surveillance by "direct sight," "the use of mirrors, "or the use of cameras." CL § 3-902(a)(6).

[6] Because appellants' claim for intentional infliction of emotional distress rested upon their allegation that Muehlhauser recorded them in the Rams Head Tavern restroom, they failed to prove "with specificity" the elements of this claim: "(1) The conduct must be intentional or reckless; (2) [t]he conduct must be extreme and outrageous; (3) [t]here must be a causal connection between the wrongful conduct and the emotional distress; (4) [t]he emotional distress must be severe." *Manikhi v. Mass Transit Admin.*, 360 Md. 333, 367 (2000) (citations omitted).

selection and qualification,[7] and negligent entrustment[8] against RHSM also fail. Thus, the circuit court properly granted summary judgment in favor of all appellees.

A. Fifth Amendment

Appellants contend that because Muehlhauser asserted his Fifth Amendment right in response to numerous questions during discovery, the circuit court was required to draw adverse inferences against him, in light of the following "evidentiary record:"

[7] To succeed on this claim, appellants must show:

> (1) the existence of an employment relationship;
> (2) the employee's incompetence;
> (3) the employer's actual or constructive knowledge of such incompetence;
> (4) the employee's act or omission causing the plaintiff's injuries; and
> (5) the employer's negligence in hiring[, supervising] or retaining the employee as the proximate cause of plaintiff's injuries.

Latty v. St. Joseph's Soc. of Sacred Heart, Inc., 198 Md. App. 254, 272 (2011) (citations omitted). Because, at a minimum, appellants could not establish the fourth factor – Muehlhauser's act or omission causing the appellants' injuries – their claim fails.

[8] The doctrine of negligent entrustment provides:

> One who supplies directly or through a third person a chattel for use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Broadwater v. Dorsey, 344 Md. 548, 554 (1997) (citations omitted). Here, the only evidence of Muehlhauser's misconduct are the videos from May 9, 2014. As the tort of negligent entrustment requires foreseeability on the supplier's part, *see id.*, based upon the record before us, we cannot say that the corporate appellees knew or could have known that Muehlhauser used the Rams Head Tavern restroom in a manner involving risk to others in the years preceding May 9, 2014, when appellants say that they visited the establishment.

- An undisputed admission by Muehlhauser that he secretly recorded women using the restroom of the Rams Head Tavern on May 9, 2014;
- An undisputed admission by Muehlhauser that he visited the subject Rams Head Tavern on a weekly basis during the proposed Class period;
- An undisputed admission by Muehlhauser the he had unfettered access to and supervisory control over the subject restroom at the Rams Head Tavern;
- An adopted admission by Muehlhauser while appearing in his criminal prosecution proceedings that suggests that he conducted similar voyeuristic activities as far back as four (4) years prior to May 9, 2014;
- Sixteen (16) videos of restrooms on the device found in the ladies' room of the Rams Head Tavern with date-stamps showing filming as far back as one (1) year;
- Undisputed evidence that twelve (12) videos on the device found in the women's restroom of the Rams Head Tavern not recorded on May 9, 2014 had been deleted; and
- Receipts, testimony, and bank records that confirm Appellants visited the Rams Head Tavern and used its ladies' restroom facility where the subject recording device was found on numerous occasions during the proposed Class period.

(Internal citations omitted).

It is well-settled that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them[.]" *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (citation omitted). But, "before the Court will permit an inference to be drawn against a person exercising his privilege against self incrimination," three criteria must be met:

> 1. the action must be a civil action;
>
> 2. the party seeking to draw the inference must have established a *prima facie* case;
>
> 3. the person must be a party and not a mere witness.

Kramer v. Levitt, 79 Md. App. 575, 586 (1989) (citations omitted). In other words, "an adverse inference may be drawn from the refusal . . . to . . . testify" if "coupled and considered with proper and relevant evidence *tending to prove such fact*." *Whitaker v. Prince George's Cty.*, 307 Md. 368, 386 (1986) (emphasis added). "[T]he adverse party's refusal, taken alone, does not relieve a party of his or her burden of proof on the issue which was the subject of the question." *Robinson v. Robinson*, 328 Md. 507, 516 n.2 (1992) (citing *Whitaker*, 307 Md. at 386).

In this case, even if we view the statements gleaned by appellants from the "evidentiary record" in the light most favorable to them, we find no evidence tending to establish a *prima facie* case that Muehlhauser videotaped appellants, or that a video recording device was present, while they used the restroom at Rams Head Tavern. We shall address each of appellants' assertions, in turn.

First, as to the "admission by Muehlhauser that he secretly recorded women using the restroom of the Rams Head Tavern on May 9, 2014," it is undisputed that appellants were not at the establishment on that day. Next, as to the "admission by Muehlhauser that he visited the subject Rams Head Tavern on a weekly basis during the proposed Class period" and that "he had unfettered access to and supervisory control over the subject restroom at the Rams Head Tavern," appellants failed to present evidence that Muehlhauser recorded the restroom on each day that he visited, much less on the days that appellants were there. As to the "adopted admission by Muehlhauser while appearing in his criminal prosecution proceedings that suggests that he conducted similar

voyeuristic activities as far back as four (4) years prior to May 9, 2014," we note that nothing said at the criminal proceeding suggested that appellants were the subject of video surveillance or that a camera was present in a restroom at Rams Head Tavern at the same time as appellants.[9] Next, as to the "[s]ixteen (16) videos of restrooms on the device found in the ladies' room of the Rams Head Tavern with date-stamps showing filming as far back as one (1) year" and "[e]vidence that twelve (12) videos on the device found in the women's restroom of the Rams Head Tavern not recorded on May 9, 2014 had been deleted," it is undisputed that four of the videos were from May 9, 2014, when appellants were not present, and the remaining 12 videos not from that day depicted bathrooms that were not indicated by HCPD to have been filmed in the Rams Head Tavern women's restroom. Finally, although it is undisputed that appellants have "receipts, testimony, and bank records that confirm Appellants visited the Rams Head Tavern and used its ladies' restroom facility where the subject recording device was found on numerous occasions during the proposed Class period," as we previously pointed out, appellants have admitted that "they are not in possession of a video depicting them in the interior of a restroom inside any of the Rams Head locations," and that they have no "personal knowledge demonstrating the existence of [such] video."

[9] It is also worth noting that the statement made by Muehlhauser's defense attorney – referring to his actions "four (4) years prior" – was made on July 16, 2015, such that a reference to "four (4) years prior" does not support an inference that he was referring to four years before May 9, 2014.

In sum, appellants simply failed to meet their burden of establishing a *prima facie* case. Muehlhauser's invocation of the Fifth Amendment, taken alone, will not save appellants' claims.

B. Spoliation

On appeal, appellants also argue that Muehlhauser's "undisputed spoliation" requires an inference of the existence of additional videos. Assuming that this argument is properly before us,[10] we conclude that it has no merit.

In *Klupt v. Krongard*, 126 Md. App. 179, 199 (1999), we adopted the following test to be used in determining whether spoliation had occurred:

> (1) An act of destruction;
>
> (2) Discoverability of the evidence;
>
> (3) An intent to destroy the evidence;
>
> (4) *Occurrence of the act at a time after suit has been filed, or, if before, at a time when the filing is fairly perceived as imminent.*

(Citation omitted and emphasis added). In this case, although it is undisputed that 12 of the 16 video files in the camera analyzed by HCPD had been deleted and restored, such destruction occurred before the lawsuit was filed and even before discovery of the subject camera that gave rise to such lawsuit. Accordingly, appellants' reliance on the doctrine of spoliation is inaccurate and misguided.

[10] Muehlhauser primarily argues that this argument was waived because appellants never asserted it in support of their opposition to the motion for summary judgment.

II. Class Certification

As we have concluded that the circuit court properly granted summary judgment in favor of appellees, our disposition of that issue renders moot appellants' challenge to the court's denial of their motion for class certification. *See Miller v. Fairchild Indus., Inc.*, 97 Md. App. 324, 334-35 (1993). In any event, the circuit court's denial of that motion is consistent with our ruling and thus, did not amount to an abuse of discretion. *See Creveling v. Gov't Employees Ins. Co.*, 376 Md. 72, 90 (2003) ("We ordinarily review a trial court's decision regarding whether to certify a class action for an abuse of discretion.") (Citations omitted). We briefly explain.

In Maryland, a party seeking class certification bears the burden of proving that all of the requirements of Md. Rule 2-231(a) have been satisfied. *Creveling*, 376 Md. at 88-89 (citation omitted). Those are as follows:

> (1) the class is so numerous that joinder of all members is impracticable [("numerosity")],
>
> (2) there are questions of law or fact common to the class [("commonality")],
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [("typicality")], and
>
> (4) the representative parties will fairly and adequately protect the interests of the class [("adequacy of representation")].

Md. Rule 2-231(a); *see also Creveling*, 376 Md. at 88.

As we previously stated, appellants in this case do not have a valid claim against appellees. Because appellants are unable to show that unlawful conduct was directed at

them, then even if we were to assume that unlawful conduct was shown to have been directed at the class sought to be represented, appellants would still be unable to satisfy the commonality or "typicality" requirement of Md. Rule 2-231(a). *See Bergmann v. Bd. of Regents of Univ. Sys. of Maryland*, 167 Md. App. 237, 287-88 (2006) (citation omitted).

Thus, for all of the foregoing reasons, we affirm the judgment of the circuit court.

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