UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2548

September Term, 2015

WAYNE R. WEST

v.

HELGA E. LUEST

Woodward,
Graeff,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: January 30, 2017

On October 17, 2014, Wayne R. West, appellant, filed a complaint in the Circuit Court for Montgomery County against his ex-wife, Helga E. Luest, appellee, asserting four counts: malicious use of process (Count 1); malicious prosecution (Count 2); interference with beneficial and prospective contractual/economic relations (Count 3); and invasion of privacy (Count 4). The court subsequently granted Ms. Luest's Motion for Summary Judgment.

On appeal, Mr. West presents three questions for this Court's review, which we have consolidated and rephrased, as follows:

> Did the circuit court erroneously grant summary judgment for Ms. Luest because: (a) there were well-pleaded, disputed, material facts to support the Complaint; (b) the court previously denied her motion to dismiss for failure to state a claim; and (c) the ruling was contrary to the sanctions previously granted against Ms. Luest for her failure to respond to discovery?

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

FACTUAL AND PROCEDURAL BACKGROUND

In April 2001, the parties were married. In June 2002, the parties co-founded a non-profit organization called "Witness Justice." In 2003, the parties' two children were born. After the police were called to the parties' home in 2007, in response to Ms. Luest's allegation of domestic violence, divorce proceedings ensued. In March 2009, the parties divorced.

On October 17, 2014, Mr. West filed a four-count complaint against Ms. Luest. In his complaint, Mr. West made multiple allegations.[1] Paragraphs 20 through 25 alleged that, on November 9, 2011, Ms. Luest filed a number of criminal charges against him, asserting that, on three separate occasions in September and October 2011, Mr. West drove while intoxicated with their children in the vehicle. Mr. West alleged that the State voluntarily dismissed all of these charges, and the allegations Ms. Luest made in her application for statement of charges were "verifiably false," including that he was "under a court order to abstain from all alcohol use because of past concerns with abuse and anger" and that child care staff had refused to give him access to their children because they "both smelled and observed intoxication [of Mr. West]."

The Complaint continued, in relevant part, as follows:

> 27. [O]n November 21, 2011, [Ms. Luest] obtained [an] Ex Parte TPO [Temporary Protective Order] based solely on an allegation that [Mr. West] had obtained a firearm during a time when one of her previous TPOs was in effect. . . . This TPO had the immediate result of sabotaging [Mr. West's] and children's scheduled Thanksgiving holiday together. [Ms. Luest's] request for admissions and [Mr.West's] responses regarding ownership and possession of firearms neither referenced nor inferred any firearm acquisition date, either within or outside any TPO effective dates. . . . The [c]ourt dismissed [Ms. Luest's] petition for a Permanent Protective Order . . . on November 28, 2011.
>
> * * *

[1] The Complaint listed numerous allegations as background. As will be discussed in more detail, *infra*, Ms. Luest argues that these allegations, which involved acts that occurred before October 17, 2011, were time-barred. Mr. West does not dispute this assertion, and on appeal, he references only a limited selection of the allegations that he originally included in his complaint. Accordingly, we limit our discussion to the portions of the Complaint that are relevant to the parties' arguments.

31. In January 2012, [Ms. Luest] filed another child abuse charge against [Mr. West] with CPS, alleging that [Mr. West] intentionally kicked his son in the head while on a trampoline, and that in doing so further kicked him off the trampoline to the ground. Despite the independent, eye-witness testimony of [Ms. Luest]-approved "supervisors" confirming the falsehood of [her] allegations, [Ms. Luest] proceeded not only to file an abuse charge with CPS but also attempted to convince the Maryland State Police to pursue criminal/felony charges through the State's Attorney's Office. After enduring interviews by CPS and the Maryland State Police, [Mr. West] was informed that no criminal charges would be filed, and CPS . . . issued a finding of "Ruled Out" child abuse on March 1, 2012.

* * *

33. In or around February 2012, after subjecting the parties' son to a CAT scan following the trampoline "incident", [Ms. Luest] falsely reported to medical professionals that [Mr. West] has a history of violence/abuse toward the children. CPS later stated that the CAT scan by [Ms. Luest] was not only unnecessary but "potentially harmful" to the parties' son.

34. In or around February 2012, . . . [Ms. Luest] alleged [during a deposition] . . . that [Mr. West] was having or had had homosexual relations with the children's godfather.

* * *

37. In or about May 2012, [Ms. Luest] surreptitiously photographed what she alleged to be a "beer bottle" inside [Mr. West's] parked car at his residence and presented the photograph to the children's attorney as "evidence" in the custody proceeding. The "beer bottle" was in fact a non-alcoholic soda bottle which, despite the conspicuously and unexplained poor quality of the photo, can be clearly ascertained upon a cursory examination.

* * *

39. On June 27, 2012, [Ms. Luest] reported to the U.S. Office of Personnel Management (OPM), as part of a background check upon which [Mr. West's] new employment was contingent, that "Mr. West . . . was terminated [by Witness Justice] for nonperformance and violating company policy. *He has been criminally convicted* . . . and has declared bankruptcy in his past." [Ms. Luest] further reported that she

had adverse information about [Mr. West's] employment, residence or activities concerning: violations of the law; financial integrity; abuse of alcohol and/or drugs; and mental or emotional stability. Again, [Ms. Luest] provided no evidence to support her allegations and failed to mention that she was [Mr. West's] ex-wife and that the parties were embroiled in child custody proceedings. As a result, [Mr. West] was forced to endure multiple telephone interviews by OPM investigative personnel and/or contractors and respond to inquiries regarding false information and nonexistent "events" which have been alleged only by [Ms. Luest].

40. On July 30, 2012, [Ms. Luest] filed a report against [Mr. West] with Montgomery County, MD police, alleging that [Mr. West] burglarized her home more than a year earlier and stole her diary (but apparently nothing else.)[.] Plaintiff was interrupted at his new job by a call from a police officer investigating the allegation. In fact, years earlier, [Mr. West] had obtained the diary from the children, who were using a portion of it for drawing/coloring. Plaintiff removed it from the children to avoid (further) exposing them to its graphic nature . . . .

* * *

42. On September 8, 2012, the *Alternative Press* (NJ) published a 9/11 remembrance article wherein [Ms. Luest] is quoted as saying that on 9/11/01 [Mr. West] . . . was home because he was "coping with mental health issues" and that [he] "bought a gun" and said "let's leave" following 9/11/01. In reality, on 9/11/01 [Mr. West] simply happened to be teleworking.

* * *

47. [O]n October 25, 2012, after having received multiple calls from the U.S. Office of Personnel Management (OPM) to respond to various allegations made by [Ms. Luest] against him, [Mr. West] retained a private investigator to contact [Ms. Luest] for a background/reference check to determine if she was maliciously or wrongfully interfering with [Mr. West's] . . . employment. . . . [Mr. West's] private investigator contacted [Ms. Luest], indicating that the reference check was being done on behalf of the U.S. government as part of an evaluation to increase [Mr. West's] security clearance level.

The investigation report stated that on October 25, 2012, [Ms. Luest asked that their conversation remain confidential, and she told the

investigator that Mr. West was terminated from Witness Justice due to multiple violations of the company's code of ethics and misconduct involving a contract with the Department of Justice, he had threatened to kill her on two occasions, there had had been multiple orders of protection against him, he had been convicted of domestic violence in 2012, and he had filed for bankruptcy in 2009. She claimed that it was her duty to tell the investigator of the "possible national security issues that could arise with having Mr. West in any position within the government"].

* * *

48. On every occasion in which [Ms. Luest] provided a job reference for [Mr. West], she did so as an authorized representative of Witness Justice and violated the organization's employment reference policy, which [provides that the organization will not furnish any information "about work performance or employment," other than the employee's dates of employment and last job title, "unless the employee specifically directs it to do so and signs a release"].

* * *

50. On or about November 1, 2011, [Ms. Luest] (through her attorney), alleged that [Mr. West] surreptitiously videotaped her inside her home on October 31, 2011.

* * *

64. On or about June 2, 2013, [Ms. Luest] acknowledged that she continues to avow to the children her false allegation that [Mr. West] went on a rampage on December 31, 2007 and tried to kill her with a gun.

* * *

74. In or about November 2013, facing literal and imminent homelessness, and at the request of his employer, who made it clear to [Mr. West] that employer cannot continue to endure the ongoing legal entanglements initiated by [Ms. Luest's] multiple subpoenas to

appear in Court some 50 miles away, [Mr. West] "resigned" from his job as a salaried employee and became an independent contractor.[2]

* * *

79. On or about May 13, 2014, [Mr. West's] employer received a *third* subpoena from [Ms. Luest's] attorney to appear in Frederick, MD (some 50 miles away, from Virginia) and/or produce documents. The next day . . . [Mr. West] was informed by his employer that he will be laid off from his job effective May 31, 2014. [Mr. West's] employment was later extended on a half-time basis through June 14, 2014, at which time his employment was fully terminated.

* * *

81. At a hearing on or about May 28, 2014, . . . [Mr. West] testified that he was losing his job on June 14, 2014. [Ms. Luest] admitted that she filed a financial statement, under oath, on October 25, 2012, reporting her salary to be $60,000 for 2012. . . . However, she then admitted, upon cross-examination, that her salary that year was approximately $90,000 after being presented with clear and convincing evidence of such.

[Ms. Luest] also testified under oath that, "I know I can speak for myself and the [Witness Justice] Board, no one has ever been, phoned for a [job] reference [for [Mr. West]]." [She] further testified that, "I have never received a call" and "I don't recall ever having been approached by anyone about his employment" in 2012. When asked if she had ever suggested that [Mr. West] might pose a "national security threat", [she] testified, "I don't know what you're talking about." [Ms. Luest] did admit to subpoenaing [Mr. West's] employer at least three times since the start of her child custody proceedings in October 2011, all in the face of [Mr. West's] attorney's entreaties and warnings to the contrary.

[2] Ms. Luest argued in her Motion for Summary Judgment that Mr. West "resigned" from his job "as a 'salaried' employee and [became] an independent contractor in order to avoid subpoenas and other 'employer related' actions – such as enforcement of the Earnings Withholding Order and Writ of Garnishments."

After setting forth 47 pages of factual allegations, the complaint set forth four counts against Ms. Luest. In Count 1, claiming malicious use of process, Mr. West alleged that Ms. Luest "instituted a myriad of civil, criminal, and administrative legal proceedings against" him, the "proceedings were without substance, merit or probable cause, and were filed with actual malice toward" him, all but one proceeding were terminated in his favor, and as a result of Ms. Luest's "malicious lies," he "suffered special injury in deprivation of virtually all access to his children, as well as their love and companionship." In Count 2, claiming malicious prosecution, he alleged that Ms. Luest instituted many criminal charges against him, without probable cause, which were instituted to "gain advantage in her child custody/access dispute" with him and to "unlawfully deprive [him] of his right to parent his children and to enjoy their love and companionship." In Count 3, claiming interference with beneficial and prospective contractual/economic relations, Mr. West alleged that Ms. Luest "repeatedly, intentionally, and improperly interfered with [his] contractual/economic relations," and "her actions were calculated to cause damage to [his] lawful business without right or justification." Specifically, he alleged that she "provided highly disparaging job references" for him, she repeatedly subpoenaed his employers, resulting in his employment being terminated, and she filed repeated motions for wage-withholding orders. Finally, in Count 4, claiming invasion of privacy, Mr. West alleged that Ms. Luest "continually," "maliciously," and without "privilege or consent," "invaded [his] privacy by publishing and/or reporting to third parties intimate details of [his] life which were both defamatory and false, and which cast [him] in a negative false light." He

claimed that these alleged disclosures caused him "great embarrassment, humiliation, pain, and suffering," and they "damaged [his] standing in the community in an irreparable manner." For each count, Mr. West sought compensatory damages in the amount of two million dollars and punitive damages in the amount of five million dollars.

On January 26, 2015, Ms. Luest filed, *pro se*, a motion to dismiss, arguing that she was not properly served. Mr. West then served her, and the circuit court denied the motion.

On March 27, 2015, Ms. Luest filed, *pro se*, a second motion to dismiss, arguing that Mr. West failed to state a claim upon which relief could be granted. In that motion, she argued that Mr. West's claims were time-barred because they occurred more than three years prior to the initiation of the action, he failed to state a claim upon which relief could be granted with respect to each count, and he filed the action in bad faith and without substantial justification. On April 30, 2015, the court denied the motion.

On August 28, 2015, Ms. Luest filed a motion for summary judgment. In her accompanying memorandum, she argued that there was "no dispute as to any *material* fact, not time-barred, pertaining [to] the Complaint." She asserted that "there is no dispute that all Paragraphs [of Mr. West's Complaint] from Page 2 through the top of Page 21 (Paragraph 14), occurred prior to October 17, 2011," and therefore, these events were time-barred. With respect to the remainder of the allegations in Mr. West's Complaint, Ms. Luest listed, under the heading "Undisputed Material Facts," the following:

> 10. [Mr. West] admits that Paragraphs 13, 16-19, 26-28, 30, 34-38, 43-46, 49-58, 60-65, 67-74, and 77-82 *all relate to previously adjudicated factors in the family law case* in the Circuit Court for Frederick County . . . . In these Paragraphs, [Mr. West] admits that [Ms. Luest]

was the successor in most, if not all, filed primarily by [Mr. West]. [Mr. West] admits he *consented* to his loss of legal custody and *consented* to restricted access. [Mr. West] admits that an interlocking system was placed on his car. [Mr. West] admits that [Ms. Luest] was awarded multiple attorney's fees awards against him, including one award for $25,000.00 and another for $10,000.00 on June 30, 2014. [Mr. West] admitted that he appealed the $25,000.00 attorney fees award to the Court of Special Appeals, but his appeal was denied . . . .

11. [Mr. West] admits that there have been actions to collect the awarded child support and attorney's fees awards granted to [Ms. Luest], including enrolling judgment and/or Earnings Withholding Orders . . . .

12. [Mr. West] admits that he resigned from his job in order to avoid the Earnings Withholding Orders and/or subpoenas for pay information; that he was immediately rehired as an independent contractor for the same employer . . . ; and that the Circuit Court for Frederick County, Maryland denied his motion to modify child support regarding this "change" pled by [Mr. West], issuing sanctions against [him] for the same.

13. There is no dispute that CPS filings are confidential, and that there is no legal manner by which [Mr. West] could prove the statements claimed in Paragraph 15, 31, and 33. Notwithstanding, [Mr. West] *admits there was a CPS finding of "Indicated" neglect* against [him] on October 26, 2011 . . . .

14. [Mr. West] admits that [Ms. Luest] filed criminal charges ***after*** the CPS finding of "Indicated" for neglect against [Mr. West] related to the three incidents of drunk driving/conduct, and acknowledged that there was only one Statement of Charges filed by Defendant on November 9, 2011. . . .

15. [Mr. West] admits to possessing [Ms. Luest's] personal diary, to using the children to obtain the diary, and then proceeding to quote personal and private thoughts from this diary in [his] Complaint despite ironically claiming that it is [Ms. Luest] who is violating [his] privacy rights (*see* Paragraph 40).

16. Although [Mr. West] admits that [Ms. Luest] disputes ever providing any kind of "background check" to the U.S. Office of Personal Management . . . , and/or "job reference," there is no dispute that

> [Mr. West] was found guilty of Threatening Language – Telephone (*see* Case No. 5D00274769), that he had previously filed for bankruptcy, and these are a matter of public record.
>
> * * *
>
> 19. There is no dispute that the article published in the *Alternative Press*, as referenced in Paragraph 42, was written prior to October 17, 2011 (hence time-barred).

Ms. Luest then addressed each of Mr. West's claims individually, arguing that he "does not, and cannot, plead facts" necessary to support his claims. With respect to Count 1, malicious use of process, Ms. Luest argued that the civil actions against Mr. West were related to the family law case and were "generally found in [her] favor . . . , which supports her claim that the same were filed with probable cause."

With respect to Count 2, malicious prosecution, Ms. Luest argued that there was only one criminal proceeding instituted by her against Mr. West, the case involving the charges of driving while intoxicated with the children in the vehicle. She asserted that she did not file the charges until after CPS made a finding of "'indicated' for neglect," and therefore, the charges were not filed without probable cause or with malice or an improper motive. She asserts that Mr. West "concedes that there have been repeated court decisions in [her] favor, which ultimately demonstrate that [she] had a reasonable basis for her concerns regarding [Mr. West's] conduct."

With respect to Count 3, interference with beneficial and prospective contractual/economic relations, Ms. Luest argued that Mr. West failed to "demonstrate that any of [her] actions were performed with tortious intent or constituted improper or otherwise wrongful conduct." For example, she asserted that, even if Mr. West's

allegations regarding her talking to prospective employers were true, it was not improper for her to relate "accurate and proper" facts, such as his prior bankruptcy and prior misconduct. Moreover, there was no evidence that her filing of a wage-withholding action, issued by a court, was improper.

Finally, with respect to Count 4, invasion of privacy, Ms. Luest stated that the "only facts pled [sic] regarding this claim were contained in Paragraph 42," and "it is clear that this was a 9/11 remembrance article and is time-barred since the portion of the article quoted was written long before October 17, 2011." Moreover, Mr. West "failed to demonstrate that his buying a gun and/or wanting to leave the area on 9/11 would be highly offensive to a reasonable person considering the terrorist attacks on that day." And, "[m]ost importantly," Mr. West "*has not claimed he was even identified in the article*, and [Ms. Luest's] affidavit makes clear that *[he] was not identified*."

Ms. Luest attached an affidavit to support her motion for summary judgment. In her affidavit, she stated that she had personal knowledge of the facts set forth and stated:

> 5. To the best of my knowledge and information, all of the statements in the first 19 pages of [Mr. West's] Complaint occurred prior to October 17, 2011.
>
> * * *
>
> 8. However, since October 17, 2011 I filed one Statement of Charges related to three events in which [Mr. West] attempted to drive the children while intoxicated. I made this filing only after Child Protective Services reported there was "Indicated" neglect, and they insisted that I file the charges for the protection of the children and to demonstrate that I did not condone the conduct occurring at the children's school and/or daycare provider.

9. Since October 17, 2011, I have filed no actions with CPS against [Mr. West].

10. Since October 17, 2011, and to the best of my information and knowledge, the only civil actions as and against [Mr. West] relate to the ongoing family law matter in the Circuit Court of Frederick County, Maryland . . . . However, this does include my defense of [Mr. West's] appeal of my $25,000 attorney's fees award in the Court of Special Appeals (where I prevailed and was awarded an additional mandate in the amount of $831.60, which [Mr. West] never paid), and the entry of various judgments awarded in my favor for child support arrears and/or other attorney fees awards.

11. Since October 17, 2011, [Mr. West] has consented to me having sole legal and primary physical custody of our children, and consented that his access be restricted due to his conduct, including alcohol use. In fact, I am currently court ordered to administer a breathalyzer test before and after each of [Mr. West's] visits with the children.

12. Since October 17, 2011, and due to [Mr. West's] ongoing refusal to provide financial information regarding his employment despite his multiple filing for a reduction in child support, I have, through counsel, served subpoenas on [Mr. West's] employer for this information for the hearings regarding the same.

13. Since October 17, 2011, the Office of Child Support Enforcement has issued garnishments and/or Earnings Withholding Orders on [Ms. West's] employers for the purpose of collected child support and/or child support arrears owed by [Mr. West] for the benefit of our children.

14. To the best of my information and knowledge, all of the "fact[s]" pled after Page 20 in Paragraphs 13, 16-19, 26-28, 30, 34-38, 43-46, 49-50, 60-65, 67-74, and 77-82 all relate to previously adjudicated factors in the family law case in the Circuit Court for Frederick County . . . .

15. To the best of my information and knowledge, [Mr. West] was found guilty of Threatening Language – Telephone (*see* Case No. 5D00274769), after making threats to kill me. However, the filing of these charges occurred prior to October 17, 2011.

16. To the best of my information and knowledge, [Mr. West] did file bankruptcy and I have direct knowledge that his conduct related to

finances impacted our personal and business endeavors during the marriage.

17. To the best of my information and knowledge, I have provided no "job reference" for [Mr. West] to any third party since October 17, 2011.

18. At some point after October 17, 2011, I was contacted by someone representing himself as a National Security Officer doing a check for a top-level security clearance on [Mr. West]. I identified myself as [Mr. West's] ex-wife and stated I did not want to participate, but was assured that all information shared would be confidential and that I was required to respond.

19. My non-profit organization, Witness Justice, has been closed since December 31, 2014. Therefore, I would not have given a reference related to this organization after that date.

20. The article published in the *Alternative Press* referenced a prior article I had written on post-traumatic stress related to the attacks of 9/11. This was not an article written on or after October 17, 2011, and it was written under my maiden name with no reference whatsoever to the identity of [Mr. West] other than "my husband."

* * *

22. Since October 17, 2011, I have filed no civil or criminal proceedings against [Mr. West] without probable cause and/or without genuine concern for the safety and welfare of our children.

23. Since October 17, 2011, most civil and administrative proceedings have been found against [Mr. West], and most often in my favor, including more than $35,000.00 in attorney's fees awards.

24. Since October 17, 2011, I have engaged in no act intended to interfere with [Mr. West's] beneficial and/or prospective contractual relations, and further aver, that I [am] highly vested in [Mr. West] obtaining and maintaining employment so that he can pay child support for the benefit of our children and the collection of arrears and attorney's fees.

25. Since October 17, 2011, I have engaged in no act to invade [Mr. West's] privacy.

On September 14, 2015, Mr. West filed an opposition to Ms. Luest's motion for summary judgment. The pleading primarily disparaged Ms. Luest's filing, referring to her motion as "without question the most undisciplined and disjointed cacophony of relevant and irrelevant facts, smear and argument undersigned counsel has ever encountered in a Summary Judgment Motion in his more than 42 years of practice," having "all the fingerprints of a *pro se* filing." Counsel for Mr. West stated that he could not "possibly follow, much less respond to, whatever [Ms. Luest was] trying to communicate." He argued that Ms. Luest's motion constituted an attempt to reargue the points in her motion to dismiss that were denied by the court "in the hope of finding a judge who is more sympathetic to her plight. *Anything* to avoid a jury trial," but the court's denial of her earlier motion was "the law of the case." He further asserted that Ms. Luest's affidavit was "a rambling collection of relevant and irrelevant 'facts' and argument, which collectively do not justify either a full or partial summary judgment in this case."

Attached to the opposition was an affidavit executed by Mr. West.[3] The affidavit stated, as follows:

> I, Wayne R. West, Plaintiff, depose and state as follows:
>
> 1. I am over 18 years of age and am competent to testify as to the matters and facts contained herein, and that I have personal knowledge of such matters and facts.

[3] Mr. West also attached to his opposition printouts of case information from the "Threatening Language – Telephone" case that Ms. Luest claimed resulted in a guilty verdict. The documents indicated that Mr. West initially was found guilty of the crime in the District Court for Montgomery County, but after he appealed to the circuit court, the charges were *nolle prossed*.

2. That I am the Plaintiff in the captioned matter;

3. That I filed a Complaint in the captioned matter on or about October 17, 2014. (D.E. No. 1). Such has not been amended.

4. That each and every sentence of each and every paragraph of such Complaint is true to the best of my information, knowledge and belief;

5. That Defendant has filed two Motions to Dismiss said Complaint: D.E. No 11 (Denied at D.E. No. 24); and D.E. No. 32 (Denied at D.E. 50); as well as a Motion for Reconsideration, D.E. No. 48 (Denied at D.E. No. 60).

6. That, although Defendant raised the defense of Statute of Limitations as an Affirmative Defense in her Answer (D.E. No. 53), she has also raised the issue substantively in Argument II of her (second) Motion to Dismiss (D.E. No. 32; denied at D.E. No. 50) as well as in her Motion for Reconsideration (D.E. Nos. 48, amended at D.E. No 73; denied at D.E. No. 78).

I DO HEREBY SWEAR AND AFFIRM UNDER PENALTIES OF PERJURY THAT THE MATTERS AND FACTS CONTAINED HEREIN ARE TRUE TO THE BEST OF MY INFORMATION, KNOWLEDGE AND BELIEF, AND THAT I HAVE PERSONAL KNOWLEDGE OF SUCH MATTERS AND FACTS.

On November 17, 2015, the circuit court held a hearing. Counsel for Ms. Luest argued that the "first approximate 20 pages of the complaint" were "time barred." Counsel then argued that summary judgment should be granted on all counts because Mr. West had failed to "substantiate any of the elements under the law." With respect to the first count, malicious use of process, counsel argued that, in the family law matter, Ms. Luest repeatedly was awarded custody, showing that the proceedings were not instituted without probable cause, and she was awarded attorney's fees. Thus, the elements of the claim had not been shown, and the claim should be dismissed as a matter of law.

With respect to the second count, malicious prosecution, counsel referenced the criminal charges that Ms. Luest instituted against Mr. West, alleging that he drove while intoxicated with their children in the vehicle, and the charge of threatening telephone use. With respect to the driving while intoxicated charges, she argued that these were filed in light of "a child protective services report that [Mr. West] had been found indicated for neglect related to those incidents," and Ms. Luest may have been "held as condoning the conduct had she not filed" the criminal charges. With respect to the threatening telephone use charge, Mr. West was found guilty of the charge in District Court, although the case was *nolle prossed* in circuit court. Thus, counsel argued, there could be no showing that the proceeding was instituted without probable cause, and there was no cause of action. Counsel further argued that Mr. West's claimed damages, the "diminishing relationship with his children," did not constitute "special damages," and therefore, he could not show damages to sustain a cause of action.

With respect to the third count, interference with beneficial and prospective contractual relations, counsel argued that there must be a showing of malice and an intent to interfere. Counsel asserted that Mr. West could not make such a showing, stating the subpoenas she served on Mr. West's employer in relation to the modification of child support proceedings were "inherently . . . proper" filings used to request information regarding his income "since he refused to provide it in discovery." With respect to her communications with Mr. West's prospective employers, counsel argued that Ms. Luest was "vested in keeping [Mr. West] employed," and there was "absolutely no reasonable

way to substantiate the element that she would interfere with his employment with malice or intent."

Finally, with respect to the fourth count, invasion of privacy, counsel noted that the entire claim was based on the *Alternative Press* article. She argued that Mr. West "was never named, [Ms. Luest] used her maiden name and it was written around or about 9-11-2001." Counsel argued that "any subsequent printing of this article was not intended by [Ms. Luest] to malign or otherwise interfere or invade his privacy," and there was "no way that [Mr. West] could substantiate the elements necessary for an invasion of privacy."[4]

The court then asked counsel for Mr. West what material facts were in controversy. Counsel stated that Ms. Luest's affidavit had "nothing to do with the complaint," but rather, it was "a rambling diatribe of some irrelevant facts of some arguments some misstated facts and so on. It simply does not support the motion for summary judgment at all." The following colloquy then occurred:

> THE COURT: Well, I'm confused, they filed an affidavit demonstrating in their view the absence of genuine issues of material fact. Have you controverted that affidavit with anything admissible in evidence?
>
> [COUNSEL FOR MR. WEST]: We have, Your Honor. We did the only thing that I could see to do under the rules and that was to file the affidavit of Wayne West . . . . [We] filed an affidavit saying that everything that he said in this 50-page complaint, every syllable, every line was true to the best of his information, knowledge and belief and that therefore, must controvert the affidavit of Ms. Luest which we say simply --
>
> THE COURT: Well, his affidavit, number one is not made on personal knowledge, rather information or belief, and number two, it simply says yes,

[4] Counsel also argued that a plaintiff asserting invasion of privacy has to have "clean hands," which Mr. West did not have, given his quoting in pleadings the personal entries from Ms. Luest's diary, which were made long ago, when she was 19 to 21 years of age.

everything I said in the complaint is true to the best of my knowledge, information and belief. Why under our rule is that sufficient?

[COUNSEL]: Because as I originally said the affidavit filed by the defendant in this case simply can't hold up and the arguments that are raised as to the elements not being met are simply not supported by the affidavit.

THE COURT: Why are you claiming, why are your claims not time barred?

[COUNSEL]: They, we have cited a number of cases . . . that have said that you can allege facts that are in excess of the statute of limitations period of three years --

* * *

THE COURT: Let me try this way, when did your causes of action occur?

[COUNSEL]: They accrued after October 17, 2011.

THE COURT: What caused them to accrue at that time that's based on evidence, admissible evidence of record?

[COUNSEL]: Well, Your Honor, we have filed the 50 page complaint and as I say --

THE COURT: I said is based on admissible evidence of record, . . . complaints [are] not admissible evidence of record under our rules.

[COUNSEL]: Well, the affidavit of my client in controversy, in contravention of the summary judgment which says everything contained in the complaint was true. There was nothing else we needed to do.

THE COURT: It's not made on personal knowledge, it's made on information and belief.

[COUNSEL]: We would be happy to submit one that says that the facts as alleged are submitted on personal knowledge.

THE COURT: What else, folks?

[COUNSEL]: Nothing, Your Honor.

[THE COURT:] Motion[] Granted. Thank you.

On November 19, 2015, the court entered an order granting Ms. Luest's motion for summary judgment.

STANDARD OF REVIEW

The Court of Appeals in *Appiah v. Hall*, 416 Md. 533, 546-47 (2010), set forth the standard for reviewing the grant of a motion for summary judgment:

> When considering an appeal from an order granting summary judgment, our review begins with the determination whether a genuine dispute of material fact exists; only in the absence of such a dispute will we review questions of law. *O'Connor v. Balt. County*, 382 Md. 102, 110 (2004). "A trial court may grant summary judgment when there is no genuine dispute of material fact and a party is entitled to judgment as a matter of law." *120 W. Fayette St., LLLP v. Mayor & City Council of Balt. City*, 413 Md. 309, 329 (2010) (internal quotation marks and citation omitted). We review for legal correctness a trial court's application of this standard. *Id*.
>
> When reviewing the record to determine whether a genuine dispute of material fact exists, "[w]e construe the facts properly before the court, and any reasonable inferences that may be drawn from them, in the light most favorable to the non-moving party." *O'Connor*, 382 Md. at 111. To avoid summary judgment, however, the non-moving party must present more than general allegations; the non-moving party must provide detailed and precise facts that are admissible in evidence. *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 737-38 (1993). Merely proving the existence of a factual dispute is not necessarily fatal to a summary judgment motion. *O'Connor*, 382 Md. at 111. "'[A] dispute as to facts relating to grounds upon which the decision is not rested is not a dispute with respect to a material fact and such dispute does not prevent the entry of summary judgment.'" *Id.* (quoting *Lippert v. Jung*, 366 Md. 221, 227 (2001)). So long as the record reveals no genuine dispute of any material fact "necessary to resolve the controversy as a matter of law, and it is shown that the movant is entitled to judgment, the entry of summary judgment is proper." *Id.* (internal quotation marks and citation omitted).

(parallel citations omitted).

DISCUSSION

Mr. West contends that the circuit court erred in granting summary judgment for three reasons. First, he argues that Ms. Luest's affidavit in support of her motion for summary judgment "fell far short of establishing that no dispute of material fact exists for any of [the] four counts." He contends that Ms. Luest "wholly failed to address the all-important paragraphs that specify the material factual allegations at the heart of each count of the Complaint." With respect to the court's concern regarding the statute of limitations, Mr. West concedes that "some of the incidents listed in the Complaint as background fall outside the three-year Statute of Limitations," but he argues that the incidents included in his opening brief were not time-barred.[5]

Second, Mr. West argues that the court's "decision in this case, granting summary judgment for [Ms. Luest], constitutes an unwarranted reversal of a previous judge's ruling which denied [Ms. Luest's] Motions to Dismiss for failure to state a claim and which, in doing so, affirmed the sufficiency of the factual allegations." He contends that Ms. Luest's affidavit, filed with her motion for summary judgment, was insufficient to "establish 'undisputed material facts' sufficient [to] counter [his] Complaint in order to warrant granting summary judgment."

Finally, Mr. West argues that Ms. Luest's motion for summary judgment should not have been granted because that ruling "was contrary to the sanctions previously ordered

[5] We have reproduced these paragraphs in the Factual and Procedural Background section, *supra*.

against [Ms. Luest] for her failure to respond to discovery." He asserts that Ms. Luest previously had been sanctioned by the circuit court for failing to respond to discovery, and the court had ordered that Ms. Luest was "prohibited from opposing [Mr. West's] claims and from introducing any evidence not produced in discovery."

Ms. Luest contends that the circuit court properly granted summary judgment against Mr. West because he failed "to identify any admissible evidence to support the timeliness or elements of his claims." She asserts that Mr. West's failure "to identify *any* admissible evidence is dispositive" because his "reliance on his own Complaint and his Affidavit [was] not sufficient, as a matter of law, to establish that [his] causes of action accrued after October 17, 2011 or to create a disputed issue of material fact on that point."

Ms. Luest further argues that the circuit court "did not err when it refused to conclude that an earlier unsuccessful motion to dismiss precludes summary judgment." She contends that a "denial of a motion to dismiss cannot preclude a grant of a summary judgment, because a motion to dismiss challenges the sufficiency of pleading[s] whereas a motion for summary judgment challenges the sufficiency of evidence."

Finally, Ms. Luest argues that the circuit court "did not abuse its discretion in rejecting [Mr. West's argument] that a discovery order precluded summary judgment." She notes that Mr. West already had sought a default judgment as a sanction for Ms. Luest's discovery violations, but his request was denied by the court, demonstrating that Mr. West was still required to prove his case. Because he offered no evidence in support of his

claims, she asserts "the [c]ircuit [c]ourt recognized he could not do so and properly granted summary judgment."

I.

Dispute of Material Fact

Pursuant to Maryland Rule 2-501(a), a party may file a motion for summary judgment "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." The Rule provides that a response to a motion for summary judgment should be in writing and shall

> (1) identify with particularity each material fact as to which it is contended that there is a genuine dispute and (2) as to each such fact, identify and attach the relevant portion of the specific document, discovery response, transcript of testimony (by page and line), or other statement under oath that demonstrates the dispute. A response asserting the existence of a material fact or controverting any fact contained in the record shall be supported by an affidavit or other written statement under oath.

Md. Rule 2-501(b).

Here, Ms. Luest filed a motion for summary judgment asserting that there was "no dispute as to any *material* facts, not time-barred," in the Complaint. Ms. Luest filed a memorandum in support of her motion, and she attached to her motion an affidavit addressing the allegations in the Complaint.

In response, counsel for Mr. West did not respond specifically to the contentions in the motion, referring to them as "undisciplined and disjointed." He did, however, attach an affidavit from Mr. West stating that each sentence in the Complaint was true "to the best of [his] information, knowledge and belief." The court noted that the affidavit was not

based on personal knowledge, and it granted the motion for summary judgment. As explained below, we perceive no error in the court's ruling in this regard.

Pursuant to Rule 2-501(c), an "affidavit supporting or opposing a motion for summary judgment shall be made upon personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." In *County Comm'rs of Caroline County v. J. Roland Dashiell & Sons, Inc.*, 358 Md. 83, 103 (2000), the Court of Appeals stated:

> [A]ffidavits that are based on "the best of one's knowledge, information, and belief," or similar attestation, are insufficient to support a motion for summary judgment or an answer in opposition to such motion. When an affidavit is required, it must contain language that it is made on "personal knowledge," in order for it to be sufficient to sustain a motion for summary judgment, or a reply to a motion for summary judgment, and that wording such as "to the best of my knowledge, information and belief" is generally insufficient to satisfy this requirement.

(citations omitted) (emphasis added). *Accord Hogans v. Hogans Agency, Inc.*, 224 Md. App. 563, 569 (2015) ("[A]ppellant did not file a legally sufficient affidavit raising a dispute of material facts, because the affidavit filed was based upon appellant's 'knowledge, information and belief.'"); *Zilichikhis v. Montgomery County*, 223 Md. App. 158, 180 ("[A] party's interrogatory answers are insufficient to generate a genuine issue of fact if those answers are 'made to the best of [the witness's] information, knowledge and belief,' rather than on the basis of personal knowledge.") (citations and quotation marks omitted), *cert. denied*, 444 Md. 641 (2015). In *Muskin v. State Dept. of Assessments & Taxation*, 422 Md. 544, 567 (2011), the Court explained that the

> phrase "to the best of my knowledge" implies an acceptable margin of error in the declarant's statement. *See Cotton v. Frazier*, 170 Tenn. 301, 95 S.W.2d 45, 47 (1936) (finding that an affidavit would be "too much subject to the objection of uncertainty . . ." when qualified with the phrase "to the best of my knowledge."); *Swanson v. Kraft, Inc.*, 116 Idaho 315, 775 P.2d 629, 638 (1989) (Bistline, J., concurring) (finding that "to the best of my knowledge" was an "equivocating phrase."); *Portee v. State*, 277 Ga. App. 536, 627 S.E.2d 63, 66 (2006) (finding that "to the best of my knowledge" was a "representation that is equivocal at best").

Thus, couching a statement in an affidavit with one of these equivocating phrases takes it outside of the realm of "personal knowledge," and therefore, outside the requirements of the Rule. *See Faulk v. Dellinger*, 259 S.E.2d 782, 784 (N.C. Ct. App. 1979) ("Tilley asserts that by couching the statement in the affidavit by the phrase "to the best of my knowledge" Dellinger has presented facts not made upon personal knowledge . . . . What an affiant thinks are facts . . . is not information made on personal knowledge proper for consideration on a summary judgment motion."); *Bowden v. Robinson*, 136 Cal. Rptr. 871, 881 (Ct. App. 1977) ("The phrase 'To the best of my knowledge' indicates something less than the 'personal knowledge' required under Code of Civil Procedure . . . , and implies that the declarant's statement is based on something similar to information and belief.").

Here, the circuit court found that Mr. West's affidavit was invalid because he averred that his statements were made on "information, knowledge and belief," instead of "personal knowledge" as Rule 2-501(c) requires. Mr. West contends that the court erred in so ruling, asserting that his affidavit shares the "exact same wording" as Ms. Luest's affidavit, which the court accepted. Although this argument is a stretch, we need not address it because Mr. West did not make that argument below, and therefore, it is not

preserved for this Court's review. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court."). *Accord Sutton v. FedFirst Fin. Corp.*, 226 Md. App. 46, 80 n.18 (2015), *cert. denied*, 446 Md. 293 (2016) (declining to address an argument that was not made below).

Ms. Luest's affidavit set forth facts in support of her claim that there was no dispute of material facts, not time-barred, regarding the allegations against her. This triggered Mr. West's obligation to identify material facts, of which he had personal knowledge, which were in dispute regarding each claim. He failed to do so.[6] With respect to the only "fact" that he discussed, i.e., that everything he stated in his Complaint was true, he stated that this was true "to the best of [his] information, knowledge and belief." Such equivocal language does not comply with Rule 2-501(c).

Under these circumstances, where Mr. West did not show any facts supporting his allegations,[7] the circuit court properly granted summary judgment. *See Educ. Testing Serv.*

[6] Similarly, there were no facts asserted to support his other claims. Indeed, when pressed at oral argument to identify evidence of a dispute of fact on one claim, invasion of privacy, counsel for Mr. West conceded that summary judgment was proper on that count.

[7] For example, there were no facts showing that Ms. Luest filed proceedings without probable cause and with malice. *See Havilah Real Prop. Serv., LLC v. Early*, 216 Md. App. 613, 623-24 (2014) (elements of a malicious use of process claim include: (1) a prior civil proceeding must have been instituted by the defendant; (2) the proceeding must have been instituted without probable cause; (3) the prior civil proceeding must have been instituted by the defendant with malice; (4) the proceedings must have been terminated in favor of the plaintiff; and (5) the plaintiff must establish that damages were inflicted upon the plaintiff by arrest or imprisonment, by seizure of property, or other special injury which would not necessarily result in all suits prosecuted to recover for a like cause of action).

v. Hildebrant, 399 Md. 128, 141-45 (2007) (where party failed to show facts generating genuine issue for trial, court properly granted summary judgment).

II.

Motions to Dismiss

Mr. West contends that, even if he failed to show a dispute of material fact, the court erred in granting summary judgment against him because that ruling constituted "an unwarranted reversal" of the court's earlier denial of Ms. Luest's motions to dismiss. We are not persuaded.

As Ms. Luest points out, the standards for reviewing these types of motions are entirely different. *See Hrehorovich v. Harbor Hosp. Ctr., Inc.*, 93 Md. App. 772, 784 (1992) ("A motion to dismiss for failure to state a cause of action is a different animal from a motion for summary judgment."), *cert. denied*, 330 Md. 319 (1994). A motion to dismiss challenges the sufficiency of the pleadings to determine whether all the elements of the plaintiff's claims are present, *see Faulk v. Ewing*, 371 Md. 284, 305 (2002) ("A motion to dismiss . . . typically calls for the evaluation of the sufficiency of the pleadings in terms of the claim stated or potential procedural deficiencies."), whereas a summary judgment motion challenges whether there is sufficient evidence to support the plaintiff's claims, s*ee Davis v. DiPino*, 337 Md. 642, 648 (1995) ("Dismissal is proper only if the facts alleged fail to state a cause of action. On the other hand, a motion for summary judgment may be granted only if 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.") (citations and internal

quotation marks omitted). The denial of prior motions to dismiss did not require denial of Ms. Luest's motion for summary judgment.

III.

Discovery Sanctions

Mr. West's final argument is that the trial court erred in granting summary judgment because this ruling was "contrary to the sanctions previously ordered against [Ms. Luest] for her failure to respond to discovery." As Ms. Luest notes, however, Mr. West did not make this argument below in his opposition to the motion for summary judgment.[8] The claim, therefore, is not preserved for this Court's review, and we will not address it. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court.").

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[8] Mr. West did raise this argument in his motion to alter and amend, but counsel agreed at oral argument, appropriately, that his brief did not challenge the denial of the motion to alter or amend, but rather, it challenged only the denial of the motion for summary judgment, prior to which the present claim was not raised.