Circuit Court for Frederick County
Case No. 10-C-17-002154

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED

No. 1625, September Term, 2019

and

No. 2369, September Term 2019

ROBERT CRAIG, *et al.*

v.

B&R DESIGN GROUP, INC., *et al.*

Reed,
Wells,
Gould,

JJ.

Opinion by Gould, J.

Filed: December 11, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Robert and Barbara Craig appeal the dismissal of their complaint against the engineers they hired to assist them in subdividing a piece of real property in Frederick County. The Circuit Court for Frederick County found that the complaint triggered plaintiff's statutory requirement to file a certificate of a qualified expert. Because the Craigs did not file this requisite certificate, the court dismissed their complaint without prejudice.

The Craigs noted a timely appeal, and present the following question for our consideration:

> Did the trial court err by dismissing Appellants' Second Amended Complaint in its entirety for failing to timely file a Certificate of Qualified Expert where Count III of the Second Amended Complaint was not directed toward Appellees' alleged professional negligence?

Finding no such error, we affirm.

BACKGROUND FACTS AND PROCEEDINGS

In January 2012, the Craigs retained B&R Design Group, Inc. ("B&R Design") to provide professional services to help them subdivide certain real property that they own in Frederick County. B&R Design provided services pursuant to the contract from 2012 through 2014.

On August 21, 2014, the Frederick County Board of County Commissioners (the "Board") held a "Briefing of the Community Development Division" to discuss the subdivision proposal. Neither Mr. Craig nor Mrs. Craig attended the briefing. But, Carl Thomas, a licensed surveyor from B&R Design, did attend.

At the briefing, the Board discussed "whether the installation of wells at a proposed subdivision site was necessary for approval" and also discussed the location of the common driveway for the subdivision. During the discussion about the driveway, the Board was advised that the Craigs' surveyor was in attendance. Mr. Thomas spoke to the Board, and, according to the Craigs, "undercut [their] positions relating to the subdivision project, not only as to the driveway location, but also on the question of whether the county could require that wells be drilled prior to approval of a record subdivision plat."

Ultimately, the Craigs did not receive approval for the subdivision. Convinced that Mr. Thomas's testimony "contributed to the failure to achieve a successful resolution[,]"in August 2017, the Craigs filed a complaint against B&R Design, its president William J. Brennan, and Mr. Thomas.[1] The complaint contained separate counts for gross negligence, negligence, and breach of the implied covenant of good faith and fair dealing.

In January 2019, B&R moved to dismiss the action, alleging, *inter alia*, that the complaint was barred by the statute of limitations, that improper parties were sued, and that the complaint failed to state a claim upon which relief may be granted. A hearing was scheduled for April 22, 2019. That same day, the Craigs filed an amended complaint that, among other things, added B&R Engineering Group, LLC ("B&R Engineering") as a defendant. The court continued the hearing.

B&R moved to dismiss the amended complaint on the same grounds as before. Later, they supplemented their motion to argue that the amended complaint should be

[1] Collectively, we shall refer to the defendants (including another defendant added later, as "B&R").

dismissed because the Craigs failed to file a certificate of a qualified expert as required under Section 3-2C-02(a) of the Courts and Judicial Proceedings Article ("CJP") of the Maryland Annotated Code (1974, 2013 Repl. Vol.).

Approximately one week before the scheduled hearing on the motion, the Craigs filed a second amended complaint that added a breach of contract count.

At the hearing, there was a discussion about the status of the service attempts on each of the defendants. Although at least one of the parties had not been formally served, B&R's counsel stated that she represented each defendant and that the pending motion asserted the same issues on behalf of each defendant. Additionally, B&R's counsel contended that although the pending motion was filed in response to the amended complaint, the same arguments applied to the second amended complaint, particularly the argument as to the expert certificate. Thus, B&R's counsel suggested that the motion to dismiss applied to the second amended complaint on behalf of all of defendants, served or not. Without any objection from the Craigs' counsel, the court proceeded with the hearing on that basis.

As to the merits of the motion to dismiss, the Craigs argued that the certificate requirement did not apply because the complaint was based on Mr. Thomas's appearance at the hearing without the Craigs' knowledge and his testimony against the interests of the Craigs, not the negligent provision of "technical services." The Craigs also argued that the breach of contract claim was based on the allegations that appellees failed to complete their contractual obligations.

The court disagreed. Finding that the Craigs' complaint was "in essence, an action for professional negligence[,]" the court dismissed the entire action for failure to include the certificate. On October 2, 2019, the court entered a written order that provided:

> For the reasons set forth in Defendants' Motions, and those raised at the hearing on September 30, 2019, the Court determines that the Motions should be granted; it is therefore,
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> **ORDERED** that Defendants' Motions are hereby **GRANTED**; and it is further
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> **ORDERED** that Plaintiffs' Amended Complaint is DISMISSED [without] prejudice.

It did not take long for B&R to recognize that the written order referenced the first amended complaint instead of the second amended complaint, and that the order did not apply to at least one defendant. As a result, on October 9, B&R filed a motion to clarify the order to include the second amended complaint and to apply the ruling to each defendant.

On October 24, the Craigs filed a notice of appeal, referencing the October 2 order. That same day, in conjunction with the Craigs' counsel's motion to withdraw, they filed a pro se motion for reconsideration.

The circuit court granted B&R's motion to clarify and entered a new order, docketed November 14, 2019, which dismissed the second amended complaint without prejudice as to each defendant.

On November 15, the court denied the Craigs' pro se motion for reconsideration.

On November 25, the Craigs filed a motion to alter the November 15 order denying their pro se motion for reconsideration. There, the Craigs asked the court to waive the

certificate requirement and "for such other and further relief as justice requires." The court denied the Craigs' motion to alter on January 8, 2020.

The Craigs filed a notice of appeal on February 4, 2020.

By order dated March 12, 2020, we consolidated both appeals.

DISCUSSION

I.

MOTION TO DISMISS

B&R tries to impose two procedural barriers to the Craigs' appeal. First, they contend that the Craigs' notice of appeal did not apply to the order dismissing the second amended complaint, and therefore argue that the Craigs are precluded from claiming error in the court's dismissal of the breach of contract count. Second, B&R contends that the Craigs failed to preserve the issues raised on appeal. We reject both arguments.

A.

NOTICE OF APPEAL

We must first identify the order that, under Maryland Rule 2-602, constitutes the final judgment. We can rule out the October 2, 2019 order because, on its face, it applied only to the first amended complaint and did not dispose of the counts asserted against one of the defendants, B&R Engineering. Thus, it did not dispose of all claims against each party, as required by Rule 2-602(a).[2] But the order that *did* resolve all claims against all parties was the November 14, 2019 order. So that was the final judgment.

[2] Maryland Rule 2-602(a) provides:

We must next determine the outside date by which the notice of appeal had to be filed. Ordinarily, a notice of appeal must be filed within 30 days from entry of the final judgment. Md. Rule 8-202(a).[3] An exception is made under Rule 8-202(c) when a party

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> Except as provided in section (b) of this Rule, an order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action (whether raised by original claim, counterclaim, cross-claim, or third-party claim), or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action:
> (1) is not a final judgment;
> (2) does not terminate the action as to any of the claims or any of the parties; and
> (3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties.

[3] Maryland Rule 8-202 provides, in relevant part:

> (a) **Generally.** Except as otherwise provided in this Rule or by law, the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken. In this Rule, "judgment" includes a verdict or decision of a circuit court to which issues have been sent from an Orphans' Court.
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> (c) **Civil action – Post judgment motions.** In a civil action, when a timely motion is filed pursuant to Rule 2-532, 2-533, or 2-534, the notice of appeal shall be filed within 30 days after entry of (1) a notice withdrawing the motion or (2) an order denying a motion pursuant to Rule 2-533 or disposing of a motion pursuant to Rule 2-532 or 2-534. A notice of appeal filed before the withdrawal or disposition of any of these motions does not deprive the trial court of jurisdiction to dispose of the motion. If a notice of appeal is filed and thereafter a party files a timely motion pursuant to Rule 2-532, 2-533, or 2-534, the notice of appeal shall be treated as filed on the same day as, but after, the entry of a notice withdrawing the motion or an order disposing of it.
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files a timely motion under Rule 2-534.[4] In that scenario, the 30-day period begins when the motion is either withdrawn or resolved by entry of an order. Md. Rule 8-202(c).

Here, the Craigs filed a timely motion to alter on November 25, 2019 that expressly invoked Rule 2-534.[5] Under Rule 8-202(c), the filing of that motion tolled the commencement of the 30-day period for filing the notice of appeal until January 8, 2020, when the court entered an order denying the motion to alter. Under Rule 8-202(c), the 30-day window for noting an appeal ended on February 7, 2020. The Craigs' notice of appeal filed on February 4 was, therefore, timely.

> (f) **Date of Entry.** "Entry" as used in this Rule occurs on the day when the clerk of the lower court enters a record on the docket of the electronic case management system used by that court.

[4] Maryland Rule 2-534 states:

> In an action decided by the court, on motion of any party filed within ten days after entry of judgment, the court may open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment, or may enter a new judgment. A motion to alter or amend a judgment may be joined with a motion for new trial. A motion to alter or amend a judgment filed after the announcement or signing by the trial court of a judgment but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.

[5] The tenth day following entry of the November 14 order was Sunday, November 24. Under Maryland Rule 1-203(a)(1), the tenth day is deemed to be the next business day, which was November 25.

It is irrelevant that, as appellees argue, the February 4 notice of appeal stated expressly that it was appealing the denial of the motion to alter, and did not mention the final order dismissing the second amended complaint. As stated by the Court of Appeals:

> Maryland Rules do not require that a notice of appeal designate the order or judgment from which the appeal is taken. In fact, the present and prior rules of procedure in this State have not regulated the content of a notice of appeal or an "order for appeal" as it was formerly called. Therefore, Maryland cases usually have construed notices of appeal liberally and have ignored limiting language in notices of appeal, deeming it surplusage.

B&K Rentals and Sales Co., Inc. v. Universal Leaf Tobacco Co., 319 Md. 127, 133 (1990). Thus, the Craigs were not required to identify *any* order or decision in their notice of appeal; on appeal, all orders preceding the notice of appeal are fair game.

Nor is there any merit to appellees' contention, made at oral argument before this Court, that the tolling provision under Rule 8-202(c) does not apply to the Craigs' motion to alter. The essence of appellees' argument was that the Craigs' motion to alter was not, in fact, a Rule 2-534 motion, and therefore the Craigs are not entitled to the tolling benefit under Rule 8-202(c). That's because, according to appellees, the motion to alter didn't seek to alter or amend the final judgment, but instead sought to amend the November 15 interlocutory order that denied the Craigs' pro se motion for reconsideration.

Appellees' argument is misguided for two reasons. First, the Craigs expressly invoked Rule 2-534 in their motion to alter. Assuming for the sake of argument that appellees are correct that the motion to alter did not purport to alter or amend the final judgment, that would only mean that the Craigs used the rule improperly, the consequence of which would be a denial of the motion for that reason alone. There is nothing in the

language of Rule 8-202 stating that the tolling provision does not apply if a party incorrectly invokes Rule 2-534.

Second, although the motion to alter did not *expressly* state that it was seeking to alter or amend the final judgment, in substance it did, which is enough to properly invoke the rule. *Hill v. Hill*, 118 Md. App. 36, 44 (1997). In their motion to alter, the Craigs asked the court to waive the certificate requirement so that they could proceed with their claims. Such relief would have been impossible unless the court also altered or amended the final judgment by vacating the dismissal of the second amended complaint. In that regard, we note that in addition to "grant[ing] the requested waiver," the Craigs also requested "such other and further relief as justice requires." We hold that the motion to alter properly invoked Rule 2-534 because, in substance, it requested relief that, if granted, would have necessarily entailed altering or amending the November 14 final judgment. Thus, the tolling effect of Rule 8-202(c) applies here, and the notice of appeal was timely and valid.

B.

PRESERVATION

Appellees contention that the Craigs failed to preserve their right to appeal also fails.

Rule 8-131(a) provides, in relevant part:

> The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

On appeal, the Craigs argue that the court should not have dismissed the breach of contract claim in the second amended complaint because it was predicated on allegations that B&R failed to complete the obligations they had under the contract, not that they violated the standard of care. To determine whether they preserved this issue, we need not look any further than the transcript of the September 30, 2019 hearing on the motion to dismiss, where the Craigs' counsel argued the following:

> The other claims that we have are breach of contract which are that they had an obligation to complete the subdivision applications and submittals that they had been hired to do and failed to do that. Again, it's not a question of whether they mis-designed or inappropriately designed something, it's a question of simply failing to complete the ministerial obligations that they had under, under the application itself.

The circuit court heard this argument and rejected it by dismissing the entire second amended complaint, including the breach of contract count.[6] Thus, the Craigs preserved this issue for appeal.

II.

DISMISSAL OF THE BREACH OF CONTRACT CLAIM

We review the circuit court's decision granting of a motion to dismiss without deference. *Bradley v. Bradley*, 214 Md. App. 229, 234 (2013). We "accept all well-pled facts in the complaint, and reasonable inferences drawn from them, in a light most favorable to the non-moving party." *Sprenger v. Pub. Serv. Comm'n of Md.*, 400 Md. 1, 21 (2007) (quotations omitted). "Dismissal is proper only if the alleged facts and

[6] Because the motion to dismiss was filed as to the first amended complaint, it is not surprising or troubling that this argument was made for the first time at the hearing.

permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff." *Pendleton v. State*, 398 Md. 447, 459 (2007) (quotations omitted).

The Craigs argue that the court erred in dismissing the breach of contract cause of action asserted in Count III of the second amended complaint. They argue that Count III was based on B&R's failure to complete the work they contractually promised to perform, which did not implicate the quality of the services provided. Thus, the Craigs assert, Count III did not require a certificate from an expert under Section 3-2C-02(a), and for that reason, it should have survived the motion to dismiss. We disagree.

The principles of statutory construction that guide our inquiry were succinctly summarized by the Court of Appeals as follows:

> The cardinal rule of statutory interpretation is to ascertain and effectuate the real and actual intent of the Legislature. A court's primary goal in interpreting statutory language is to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by the statutory provision under scrutiny.
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> To ascertain the intent of the General Assembly, we begin with the normal, plain meaning of the language of the statute. If the language of the statute is unambiguous and clearly consistent with the statute's apparent purpose, our inquiry as to legislative intent ends ordinarily and we apply the statute as written, without resort to other rules of construction. We neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute, and we do not construe a statute with "forced or subtle interpretations" that limit or extend its application.

Lockshin v. Semsker, 412 Md. 257, 274-5 (2010) (internal citations omitted).

We start with the plain language of Section 3-2C-02(a), which provides: "Except as provided in subsections (b) and (c) of this section, a claim shall be dismissed, without prejudice, if the claimant fails to file a certificate of a qualified expert with the court." In

discerning the meaning of this provision, we observe that the *thing* that is subject to the dismissal is "a claim," so we must first understand what the General Assembly meant by its use of the word "claim." Fortunately, this requires no speculation on our part, because Section 3-2C-01(b), defines a "claim" as follows:

> a *civil action*, including an original claim, counterclaim, cross-claim, or third-party claim, originally filed in a circuit court or United States District Court against a licensed professional or the employer, partnership, or other entity through which the licensed professional performed professional services that is based on the licensed professional's alleged negligent act or omission in rendering professional services, within the scope of the professional's license, permit, or certificate, for others.

(Italics added).

For our purposes, there are two take-aways from this subsection: (1) a claim is a civil action, not a count; and (2) the civil action must be "based on the licensed professional's alleged negligent act or omission in rendering professional services, within the scope of the professional's license, permit, or certificate, for others." CJP § 3-2C-01(b).

What, then, is a "civil action?" To begin with, Maryland Rule 1-202(a) defines an "action" as "collectively all the steps by which a party seeks to enforce any right in a court or all the steps of a criminal prosecution." In *Pepsi Bottling Group v. Plummer*, 226 Md. App. 460, 469-70 (2016), we were tasked with interpreting the phrase "civil action" in the context of Section 14-410(a) of the Health Occupations ("HO") Article of the Maryland Annotated Code (2014), which generally bars admission in any "civil action" of records or files from disciplinary proceedings against physicians.[7] At issue was the admission in a

[7] HO § 14-410(a) provides:

workers' compensation case of the disciplinary records of the employee's medical expert. *Id*. at 469. The employer wanted the records admitted, and the employee wanted to exclude the records. *Id.* at 476. The trial court agreed with the employee and excluded the records. *Id*.

On appeal, the employer argued that the phrase "civil action" was intended to apply only to civil actions filed against physicians for malpractice. *Id*. at 469. In affirming the trial court's exclusion of the disciplinary records, we adopted a far broader interpretation of "civil action":

> The statute states that, "in a civil ... action," the "proceedings, records, or files of the Board ... are not admissible in evidence," and that "[a]ny order passed by the Board or disciplinary panel is not admissible in evidence." The term "civil action" is generally understood to have a plain meaning which is considerably broader than suits brought against a physician for malpractice.
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> For example, Maryland Rule 2–101(a) provides: "A civil action is commenced by filing a complaint with a court." Maryland Rule 1–202(a) defines "action" as "collectively all the steps by which a party seeks to enforce any right in a court...." Neither of these definitions restricts the term "civil action" to one in which a claim is brought against a physician for malpractice. We conclude that the term "civil action," as used in HO § 14-410(a), includes any civil proceeding filed in a court, and is not limited to a civil proceeding alleging medical negligence. Had the legislature wanted to limit the reach of HO § 14-410(a) to civil actions against a licensee physician alleging claims of medical negligence, it certainly could have done so. But the statutory language contains no such restriction, and to read such a

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> Except by the express stipulation and consent of all parties to a proceeding before the Board, a disciplinary panel, or any of its investigatory bodies, in a civil or criminal action:
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> (1) The proceedings, records, or files of the Board, a disciplinary panel, or any of its other investigatory bodies are not discoverable and are not admissible in evidence; and
>
> (2) Any order passed by the Board or disciplinary panel is not admissible in evidence.

> restriction into the statutory language would be to add words to an unambiguous statute in order to give it a meaning not reflected by the words the General Assembly chose to use.

Id. at 471.

Our reasoning in *Plummer* applies equally here. A civil action is more than just a single count within a complaint; it embraces the *entire* complaint. Had the General Assembly intended to limit the mandatory dismissal to only those counts that alleged negligent acts or omissions in the performance of professional services, the General Assembly could have limited its definition of "claim" by replacing "civil action" with, for example, "counts within a civil action." Our job is to enforce the plain meaning of the words chosen by the General Assembly, not rewrite them. *See Johnson v. Nationwide Mut. Ins. Co.*, 388 Md. 82, 96 (2005); *Dep't of Economic and Emp't Dev. v. Taylor*, 108 Md. App. 250, 278 (1996) (quotation omitted), *aff'd sub nom. Dep't of Labor, Licensing & Regulation v. Taylor*, 344 Md. 687 (1997). For that reason alone, the court was correct to dismiss the civil action.

In any event, even if we were to interpret "civil action" to mean only those counts that trigger the certificate requirement, the result would not change given the structure of the second amended complaint. Paragraphs 1 through 69 fall under the heading "facts common to all counts." Count I of the second amended complaint—which asserts the cause of action of gross negligence—begins with paragraph 70 which states: "Plaintiffs incorporate by reference as if fully restated herein Paragraphs 1-69." Count II, for negligence, begins at paragraph 88, which states: "Plaintiffs incorporate by reference as if fully restated herein Paragraphs 1-87, excepting paragraph 81." And then, Count III, for

breach of contract, begins at paragraph 89, which states: "Plaintiffs incorporate by reference as if fully restated herein Paragraphs 1-88." In other words, the breach of contract claim incorporated the gross negligence and negligence claims. And because the Craigs do not challenge on appeal the court's finding that the negligence and gross negligence claims triggered the certificate requirement, the inescapable conclusion is that the breach of contract claim also triggered the certificate requirement. As such, the court did not err in dismissing the second amended complaint.

III.

SANCTIONS

B&R argues that the Craigs' "repeated unsuccessful attempts" to question the dismissal of their complaint "are being filed for harassment and in bad faith in violation of Md. Rule 1-311(b)." On that basis, B&R "seek[s] recovery of their attorneys' fees for this Appeal and opposition thereto as sanctions in accordance with Md. Rule 1-311(c)." The sanctions request warrants denial for many reasons, not the least of which is that appellees provide zero evidence that the Craigs are pursuing this matter to harass them or in bad faith.

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