Circuit Court for Baltimore County
Case No. 03-C-16-013001

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3417

September Term, 2018

DANIEL W. BURT

v.

DELMARVA SURETY ASSOCIATES, INC.

Graeff,
Nazarian,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: April 30, 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.

Appellants, Daniel W. Burt, Cynthia Burt (his wife), D.W. Burt Concrete Construction, Inc., and 1111 Edgewater, LLC ("Burt" generally or sometimes, as apparent in context, Daniel W. Burt as an individual), seek reversal of the grant of summary judgment by the Circuit Court for Baltimore County entered in favor of Appellees, Delmarva Surety Associates, Inc. ("Delmarva") and Thomas Whipple ("Whipple"), a principal of Delmarva. The underlying litigation was initiated as a claimed breach of an indemnity agreement filed by the United States Surety Company and U.S. Specialty Insurance Company ("Sureties") against Burt regarding the construction of a Residence Inn hotel in Ocean City. Burt filed a third-party complaint against Appellees. In it, Burt alleged negligent/fraudulent inducement by Appellees to act as the indemnitor on the construction surety bonds for the Residence Inn project. Appellees, reputedly long-time counselors to Burt in similar matters, knew of facts (undisclosed to Burt) suggesting the indemnification was risky and almost guaranteed to fail because of the financial and performance weaknesses of the prime contractor on the project.[1] The circuit court determined that there was no genuine dispute of material fact regarding the third-party complaint and granted summary judgment, as a matter of law, in favor of the Appellees. Burt appealed timely. We shall reverse the judgment of the circuit court regarding Burt's third-party complaint and remand the matter for further proceedings.

[1] D.W. Burt Concrete Construction, Inc. was also the concrete subcontractor on the Residence Inn project.

QUESTION PRESENTED

Appellant presents for our consideration three questions, which we have rephrased and reordered:

1. Whether Whipple's false assurances to Burt (that Burt would be "protected" if he agreed to indemnify the Sureties) constituted an actionable statement upon which Burt could rely and ground claims of negligent/fraudulent misrepresentation?
2. Whether the trial court erred in granting summary judgment in favor of Whipple and Delmarva on the basis that they owed no duty to disclose to Burt?
3. Whether a jury trial waiver provision in the indemnification agreements precluded Burt from pressing the third-party common law claims against Whipple and Delmarva before a jury?

FACTUAL BACKGROUND

I. The Relevant Parties' Business Relationship.

In 1976, Daniel Burt incorporated in Maryland the D.W. Burt Concrete Construction Company, Inc.[2] Experiencing success on the Eastern Shore of Maryland, the company, prior to the time of this litigation, had more than 100 employees and was thriving as a concrete subcontractor.

In 1988, Whipple began working in the business insurance/bonding/surety industry. He formed Delmarva seven years later in 1995. Delmarva serves as a bond broker, advisor,

[2] Burt entered initially the concrete business in Maryland in 1974 when he founded an unincorporated business known as D.W. Burt Concrete Work.

and agent for clients who require construction-related surety bonds and in reciprocal capacities for surety companies.

During Delmarva's first year of business, Burt became a client. Although the transactional relationship between the businesses was sporadic—Burt states that he was an "infrequent bond user[]", while Delmarva notes that there had been no surety bond relationship between the parties since 2011[3]—Burt claims, as such, to have used Delmarva as its exclusive surety bond agent. Although not denying outright Burt's assertions, Appellees contend that there were insufficient facts (admissible in evidence) alleged to support the characterization advanced by Burt as to the nature of the business relationship.

What does the record reveal? In his deposition testimony, Whipple acknowledged, during cross-examination, that Delmarva acted as a surety bond broker with regard to Burt:

> Burt's counsel: Did you consider Delmarva Surety to be his surety bond broker?
> Whipple's counsel: Objection.
> Whipple: When Dan needed surety credit, we tried to get it for him. So I guess that makes—yes.
> Burt's counsel: Are you aware of whether he was using any other broker to get surety bonds other than Delmarva Surety?
> Whipple: I have no knowledge of that.
> Burt's counsel: So as far as you know, Delmarva Surety was the exclusive bond agent for Mr. Burt's companies, correct?
> Whipple's counsel: Objection.
> Whipple: As far as I knew.

During Burt's deposition testimony, he testified that, although his company's use of surety bonds was limited, Delmarva was the sole source for those bonds. Further, he stated

[3] According to Whipple's deposition testimony, his son, Brian Whipple, acted as an insurance agent for Burt prior to 2011. Brian joined Delmarva in 2011. Delmarva was Burt's insurance advisor from 2011 until 2016.

that he did not perceive a need to retain an attorney to advise him before signing indemnity agreements in connection with bonding matters "[b]ecause Tom Whipple and I had talked on various bonds over the years since he started in 1995, and my recollection with Tom was that he . . . he got the bonds—he got the approval for the bond and that was all I remember." In an affidavit filed in this litigation, dated 22 November 2017, Burt maintained that "[t]hroughout that time, I provided Delmarva with confidential financial information regarding the concrete company and the Burt parties; received professional insurance and surety advice and counsel from Whipple and Delmarva as to surety matters and insurance issues/coverage . . ."

II. The Underlying Construction Project and the Indemnification.

In 2014, Sens, Inc. and Sens Mechanical, Inc. ("Sens") were hired as the general contractor to construct a Residence Inn hotel in Ocean City, Maryland. As noted *supra* at n.1, D.W. Burt Concrete Construction Co., Inc. became the concrete subcontractor on the project. As part of the project, Sens was required to provide performance and payment bonds in the penal sum of the contract amount. That sum was approximately $17.8 million. Appellees acted as surety bond agents for Sens. Sens, however, was not in a financial position to obtain the bonds on its own strength and required an indemnitor (with an interest in the project) to execute a general indemnity agreement.

Acting on behalf of Sens, Whipple approached Burt in August 2014, requesting that the latter act as the indemnitor for the surety bonds for the Residence Inn project. Burt had acted previously as an indemnitor for Sens, once in 2011 as part of a Hampton Inn & Suites

project and once in 2014 for another construction project in Berlin, Maryland. According to Burt's deposition testimony, Whipple told Burt, as to the Residence Inn project, that "they were going to need 1111 [Edgewater] [a limited liability company operated by Burt that owned condominium units] as an additional indemnitor, and . . . that I didn't need to worry about it and he would make sure I was protected." Further, Burt claimed he did not feel the need to read the indemnity agreement in its entirety because "Tom told me I was protected." Due purportedly to his sense of safety and security in his relationship with Appellees, Burt chose to forgo seeking legal and financial review and advice regarding the proposed indemnity agreement.

Unbeknownst to Burt, but understood by Appellees, Sens's financial status in August 2014 was shambolic. Both Sens companies, according to analysis by a senior underwriter for the Sureties, had negative net worth and negative working capital. The senior underwriter contacted Whipple by email, dated 9 April 2014 (prior to Whipple approaching Burt), stating "I am not certain how [Sens] maintain[s] operations," and noting further that "[f]rom a standard underwriting [standpoint], negative working capital, negative net worth, [Sens is in a] distressed financial position." The 2014 year-end statements for Sens, mirroring those of the mid-year statements, were shared with Whipple and confirmed a negative net worth and negative working capital.

Whipple was aware also that two surety companies refused previously to provide bonds for Sens due to its financial situation. An agent for Aegis Surety Insurance Company declined to write bonds for the earlier project in Berlin, stating, in an email to Appellees, "[g]uys, tough case. On a consolidation basis for 2012 and 2011, it was not pretty."

Another surety company, Berkley Surety, refused the opportunity to provide a bond for the Residence Inn project, stating "[w]e will take a pass on this. As I suspected, there is not enough in terms of capital and experience to get us comfortable with this leap in job size/scope." Thus, Appellees were aware of the financial situation of Sens when they solicited Burt to serve as an indemnitor for the Sens surety bonds on the Residence Inn project. At that time Appellees were acting as agents for Sens and the Sureties. On the other hand, Burt did not have a contractual or compensatory relationship with Appellees as regards the Residence Inn project. Thus, the nature of the relationship between the parties here is disputed, with Burt claiming it was an ongoing special advisory relationship and Appellees claiming there was no relationship whatsoever that would give rise to a tort duty on the part of Appellees to disclose what it knew about the relevant status of Sens's financial condition or to caution Burt.

Based on the execution by Burt of the indemnification agreement, the Sureties provided the bonds and the Residence Inn project commenced. Eventually, during 2015 and 2016, construction fell behind schedule and the project was abandoned by Sens. The Sureties stepped in to finish the project.

III. Off to Court.

Inns of Ocean City LLC, which had contracted with Sens to construct the Residence Inn hotel, filed a performance bond claim against the Sureties. The Sureties brought suit in the Circuit Court for Baltimore County against Sens and Burt. Burt filed a counterclaim against the Sureties, claiming the indemnity agreement was void and seeking damages for

fraud and negligence. In addition, Burt filed a crossclaim seeking indemnity against Sens and pro-rata contribution.

Of particular relevance here, Burt filed also a third-party complaint against Appellees. In that complaint, Burt alleged that he, his wife, and his business entities had been induced fraudulently and/or negligently by Appellees to serve as indemnitors. This claim was based on the contention that Appellees concealed the negative information regarding the financial status of Sens and failed to warn of the resultant risk to completing the project, as well as misrepresenting the "protection" for Burt should he enter into the indemnification agreement and the project go awry.[4] A jury trial was prayed.

On 29 March 2017, Burt filed an answer to the Sureties complaint, which answer included a request for a jury trial, and, separately, counterclaims against Sureties and third-party claims against Appellees. The circuit court granted the Sureties' motion to strike and objection to the Burt Parties' request for jury trial based on a waiver provision in the indemnity agreement. The waiver reads:

> THE PRINCIPAL AND THE INDEMNITOR EXPRESSLY AGREE THAT ANY SUIT, ACTION OR PROCEEDING, WHETHER CLAIM OR COUNTERCLAIM, BROUGHT OR INSTITUTED BY ANY PARTY TO THIS AGREEMENT, OR ANY OF THE SUCCESSORS OR ASSIGNS, IN CONNECTION WITH OR WITH RESPECT TO THIS AGREEMENT OR THE PRINCIPAL AND THE INDEMNITOR'S OBLIGATIONS HEREUNDER OR PURSUANT TO OR IN CONNECTION WITH ANY BONDS, CONTRACT OR BONDED CONTRACT SHALL BE TRIED ONLY BY A COURT AND NOT BY A JURY. THE PARTIES

[4] Burt claimed that Appellees had a number of duties it failed to live up to, including, but not limited to, the duty to advise Burt to obtain legal counsel, the duty to advise review of Sens financial statements, and the duty to provide them with additional documents. He advanced two common law counts in the third-party complaint: fraudulent and negligent misrepresentation.

EXPRESSLY WAIVE ANY RIGHT TO A TRIAL BY JURY IN ANY SUCH ACTION OR PROCEEDING.

Burt filed a motion for clarification of order, or in the alternative, motion to revise order striking jury trial demand in response to the court's decision. The motion included a request for a jury trial regarding the third-party claims against Appellees. Although they had not joined the Sureties' jury trial waiver objection, Appellees took this opportunity to object to a jury trial, noting that the counterclaims and third-party claims arose from the same facts. The court denied Burt's motion, deciding that the bench alone would decide all claims in the case, including the third-party claims.

Following discovery, the Sureties and Appellees filed separate motions for summary judgment against Burt's respective complaints against them. Burt opposed the motions. On 18 December 2018, the judge filed a written opinion and order granting the Sureties' motions as to the counterclaim and indemnification against Burt, as well as Appellees' motion regarding the third-party complaint.

Burt and the Sureties eventually came to a settlement agreement. Burt filed timely this appeal as to the summary judgment regarding the third-party complaint against Appellees, including the purported waiver of a jury trial as to the third-party complaint.

STANDARD OF REVIEW

A circuit court may grant summary judgment "if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). "A

determination of '[w]hether a circuit court's grant of summary judgment is proper in a particular case is a question of law, subject to a non-deferential review on appeal.'" *D'Aoust v. Diamond*, 424 Md. 549, 574 (2012) (quoting *Tyler v. City of College Park*, 415 Md. 475, 498 (2010)). An appellate court reviews a grant of summary judgment under a non-deferential standard of review as to whether there was a material fact in genuine dispute. *Haas v. Lockheed Martin Corp.*, 396 Md. 469, 478 (2007). In doing so, we "consider the facts . . . in the light most favorable to the non-moving parties." *Sadler v. Dimensions Healthcare Corp.*, 378 Md. 509, 533–34 (2003).

DISCUSSION

I. Actionability of Whipple's Statement to Burt That the Latter "Would be Protected" in the Indemnification Agreement.

The first sticking point we shall address revolves around the contested versions of the statement by Whipple to Burt that the latter "would be protected" in the indemnification. To establish a negligent misrepresentation, a plaintiff must show that: "(1) the defendant, owing a duty of care to the plaintiff, negligently asserts a false statement; (2) the defendant intends that his statement will be acted upon by the plaintiff; (3) the defendant has the knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury; (4) the plaintiff, justifiably, takes action in reliance on the statement; and (5) the plaintiff suffers damage proximately caused by the defendant's negligence." *Cooper v. Berkshire Life Insurance Co.*, 148 Md. App. 41, 57

(2002). [5] Burt claims that the alleged statement by Whipple satisfied these elements as Whipple knew it to be false, intended for and knew it would be acted on by Burt, Burt did in fact act on it, and suffered harm as a result.

Appellees disputed mightily Burt's interpretation of the statement and its asserted satisfaction of the elements of either negligent or fraudulent misrepresentation. The statement, as Appellees see it, was little more than an "estimate," "opinion," or "puffing." Thus, it cannot support an actionable claim of misrepresentation. *Snyder v. Herbert Greenbaum & Assocs., Inc.*, 38 Md. App. 144, 149 (1977); *see also Parker v. Columbia Bank*, 91 Md. App. 346 (1992). Appellees contend also that the statement was too vague to be considered actionable and, thus, Burt could not have relied justifiably on it.

Additionally, Appellees point out that Burt omitted an important portion of the asserted statement by Whipple. A more complete version of the statement, according to Appellees, was that "[Whipple] made sure that you [Burt] are and will be protected no matter what happens on the project." Appellees imagine that the second half of the

[5] Burt claimed also that the statement was actionable as a fraudulent misrepresentation, which requires that:

> [A] plaintiff must prove that a false representation was made, that its falsity was either known to the maker or that the representation was made with such reckless indifference to the truth as to be equivalent to actual knowledge of falsity, that the representation was made for the purpose of defrauding the plaintiff, that the plaintiff not only relied on the representation but had a right to rely on it and would not have done the thing from which the injury arose had the misrepresentation not been made, and that the plaintiff actually suffered damage directly from the misrepresentation.

Swinson v. Lords Landing Village Condo., 360 Md. 462, 476 (2000).

statement absolves them of any tort duty because it forewarns implicitly that something could go wrong on the project. By acknowledging that possible occurrence, the statement was not "an 'estimate' that Sens would certainly or likely complete the project." Because the statement hinted at the possibility of the project's abandonment by Sens, that is enough to have alerted Burt to the risk inherent in the potential of undertaking the indemnification and, thus, the statement was not a misrepresentation of any kind.

The question for us is whether the dispute over the nature of the statement presented a triable claim. We hold that it did. This Court has held that a similar statement was actionable. *Parker*, 91 Md. App. at 364 (a bank manger claimed he would protect a borrower's interest throughout construction of his home "while in fact [the bank manager] had no intention of" doing so). There is a reasonable possibility that a fact-finder could find that the statement was one "where the circumstances indicate to the addressee that the speaker has a factual basis for his predictions so that the existence of facts is implied by the representations." *Cooper*, 148 Md. App. at 73–74.

Appellees are not without some support for their contention that the statement was merely "puffing" and thus one that should preclude recovery. *Dynacorp Ltd. v. Aramtel Ltd.*, 208 Md. App. 403, 453 (2012) (stating that "plaintiffs could not reasonably rely on the defendant's 'statements . . .' [because they were] so vague and general . . ."). Thus, the argument that Burt did not act reasonably in relying on the statement may carry the day with an ultimate fact-finder, after a trial, as vague and indefinite statements "'ought to put the person to whom they are made upon the inquiry, and if he chooses to put faith in such statements, and abstained from inquiry, he has no reason to complain.'" *Goldstein v. Miles*,

159 Md. App. 403, 436 (2004) (quoting *Buschman v. Codd*, 52 Md. 202, 207 (1879)).

Nonetheless, "if the underlying facts are susceptible of more than one permissible inference, the choice between those inferences should not be made as a matter of law but should be submitted to the trier of fact." *Berkey v. Delia*, 287 Md. 302, 326–27 (1980). Based on the record at the time summary judgment was entered, a fact-finder, presented with the alleged facts (and able to draw reasonable inferences from them), could interpret the statement in favor of either party's contention and, with proper instruction by a judge on the applicable law, return an appropriate verdict. Thus, we hold that granting summary judgment on this basis was improper.

II. Duty Arising from a Special Relationship.

Burt advances an alternative theory for why summary judgment was granted erroneously, arguing that the relationship formed between he and Whipple was a "special relationship" that created a heightened duty to disclose what he knew about Sens's condition, irrespective of the absence of a contractual relationship between them relative to the Residence Inn project. Burt claims that the determination of whether a duty was owed because of the nature of the relationship is not one to be made on summary judgment. In his brief, Burt states that "[t]he evidence created a genuine dispute of material fact as to whether in making representations and providing advice to Burt, Whipple, in his capacity as a surety broker, was acting as an advisor as to surety matters and indemnity agreements

for [] Burt . . . ."[6]

Appellees point out that there was no actual or implied contract between the parties. Further, Appellees claim they did not owe Burt a common law duty in the interactions regarding the indemnification. For a misrepresentation claim to succeed where there is no contractual relationship between the parties, the plaintiff must show that special circumstances exist "such that [the defendant] owed a fiduciary duty over and above any contractual obligations." *Parker v. Columbia Bank,* 91 Md. App. 346, 367–68 (1992). Appellees highlight that the trial court, considering the duty element of Burt's claim, agreed with their position, stating "Whipple and Delmarva likewise did not owe the Burt Parties a duty related to the issuance of the bonds."

In *Sadler v. Loomis Co.*, we held that "in the absence of a special relationship, an insurance agent or broker has no affirmative, legally cognizable tort duty to provide unsolicited advice to an uninsured regarding the adequacy of liability coverage." 139 Md. App. 374, 410 (2001). The relationship in question in *Sadler* was between an insurance agent who did not recommend the purchase of higher coverage limits on an automobile liability policy and an insured. The Court found that the agent did not fail to satisfy a duty as there was no affirmative duty "to render unsolicited advice to Sadler concerning the advisability or availability of liability coverage . . ." *Id.* at 378.

The Court in *Sadler* explained, however, that a special relationship between an

[6] Additionally, Burt argues that Appellees owed him a duty to disclose material facts so as to ameliorate the partially misleading statement. Because we agree with Burt's main contention, it is unnecessary that we grapple here with his alternative theory.

insurance agent and an insured "may be shown when an insurance agent or broker holds himself or herself out as a highly skilled insurance expert, and the insured relies to his detriment on that expertise. A special relationship may also be demonstrated by a long-term relationship of confidence, in which the agent or broker assumes the duty to render advice, or has been asked by the insured to provide advice, and the adviser is compensated accordingly, above and beyond the premiums customarily earned." *Id.* at 392. The Court held further that, when determining if there was a duty owed, the determination is based on the harm likely to result by breach and its nexus to the relationship between the parties. *Id.* at 374. "This intimate nexus is satisfied by a contractual privity or its equivalent." *Id.*

Burt argues for a favorable comparison with *Cooper v. Berkshire Life Insurance Co.*, 148 Md. App. 41 (2002). In that case, we stated that, if the parties "cultivated [a] . . . relationship of trust and confidence" and the agents "held themselves out as highly-skilled insurance experts, possessing the special knowledge and expertise needed to interpret and understand the complex and sophisticated" business mechanics in question in the case, then that is sufficient to show that there was a reasonable expectation of notice regarding an issue in the insurance policy. *Id.* at 80–81.

Burt contends that he adduced a sufficient basis from which a reasonable fact-finder could conclude that a long-term working relationship between himself and Appellees was sufficient to find a special relationship and thus a duty to disclose material facts existed, despite the lack of a formal or implied contractual relationship. According to Burt, Appellees withheld information regarding Sens's financial condition that was pertinent to his decision whether to sign the indemnification agreement. This withholding amounted

to an actionable concealment.[7] The parties had worked together for more than twenty years. In that time, Burt had not used any other surety broker for like transactions. He relied on Appellees exclusively as an advisor for surety bonds and related indemnity agreements, e.g., the parties had cultivated a relationship of trust and confidence. Further, Appellees held themselves out as possessing special knowledge and expertise regarding surety bonds and the legal milieu surrounding them.

Appellees see it differently. They note that, with regard to soliciting Burt's execution of the indemnity agreement, there was "no agency, no contract, no compensation, no bond procurement, and no history of business risk advice or legal advice of the kind allegedly required." Further, Burt exaggerated the relationship between the parties. Regarding Burt's claim that there was a twenty-year working relationship between them, Appellees point out that they were only Burt's surety broker for a "handful" of bonds between 1995 and 2011 and were only insurance agents regarding workers compensation, builders' risk, and associated insurances after 2011. Appellees deflect the notion of a special relationship formed merely based on the length of time the two parties worked together, citing *Hardy v. Davis*, 223 Md. 229, 233–34 (1960), which states that after an

[7] Concealment requires that:

1) The defendant owed a duty to the plaintiff to disclose a material fact;
2) The defendant failed to disclose that fact;
3) The defendant intended to defraud or deceive the plaintiff;
4) The plaintiff took action in justifiable reliance on the concealment; and
5) The plaintiff suffered damages as a result of the defendant's concealment.

Hoffman v. Stamper, 385 Md. 1, 28 (2005).

agency relationship has terminated the duties inherent therein terminate typically as well. *See also Sadler*, 139 Md. App. at 407 (stating that an insurance agent-insured relationship "does not usually give rise to a duty to provide such ongoing guidance").

Finally, Appellees note that, even if Burt relied on them generally as advisors, doing so in this instance was not reasonable. As marshalled in their brief, Appellees advance a number of reasons showing that reliance was unreasonable. Among these reasons are: (1) Whipple's affidavit denying the relationship between the two parties; (2) inconsistent references in the record by Burt to Appellees as his advisors, brokers, and bond agents; (3) Burt's struggles to delineate the timeline of the relationship between the parties; and (4) Burt's access to lawyers to help him decipher whether the proposed indemnity agreement was too great a risk and/or lacked sufficient "protection" of his interests.

The parties' arguments are fact-driven largely and demonstrate credibility and interpretational disputes proper for a fact-finder to resolve. "[I]f the underlying facts are susceptible of more than one permissible inference, the choice between those inferences should not be made as a matter of law but should be submitted to the trier of fact." *Berkey v. Delia*, 287 Md. 302, 326–27 (1980). Here, Appellees provide one possible version of the facts a fact-finder might accept, and Burt presents another. It is not for us (nor was it for the motions judge) to determine which version is the one a fact-finder would credit or find more persuasive after trial, to which it would apply the relevant law as instructed.

III. Jury Trial Waiver.

The final question presented to us is whether a waiver of jury trial provision in the

indemnity agreement is enforceable regarding Burt's third-party common law claims against Appellees. Burt's argument is, essentially, that the indemnity agreement only applies to cases involving claims between parties to the agreement or persons otherwise intended as beneficiaries, which Appellees were not. Additionally, Burt claims that the common law tort claims brought against Appellees do not arise in the main from disputes regarding the enforcement or interpretation of the terms of the agreement, but relate to misconduct occurring prior to execution of the agreement viewed as duties owed under common law. Appellees retort by asserting that, as Burt's claims against them exist exclusively as a result of the operation of the intended objectives of the indemnification agreement, the jury trial waiver is applicable here. We disagree with Appellees and hold that the indemnification agreement does not bar a potential jury trial with regard to Burt's third-party complaint against them.

Maryland Rule 2-325 requires that: "[w]hen trial by jury has been elected by any party, the action, including all claims whether asserted by way of counterclaim, cross-claim or third-party claim, as to all parties, and as to all issues triable of right by a jury, shall be designated upon the docket as a jury trial." A party may forfeit this right, however, through contractual waiver. *Walther v. Sovereign Bank*, 386 Md. 412, 442 (2005). In *Westbard Apartments, LLC v. Westwood Joint Venture, LLC*, we found persuasive *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999), "which held that the non-signatories of an applicable arbitration contract were entitled to enforce its provisions under two circumstances of equitable estoppel." 181 Md. App. 37, 51 (2007). The first circumstance being when a signatory "'must rely on the terms of the written agreement in asserting [its]

claims. When each of a signatory's claims against a non[-]signatory 'makes reference to' or 'presume[s] the existence of' the written agreement, the signatory's claims 'arise . . . out of and [are] related . . . directly to the agreement.'" *Id.* (quoting *MS Dealer Serv. Corp.*, 177 F.3d at 947).

As noted earlier, the indemnification agreement in the present case reads as follows:

> THE PRINCIPAL AND THE INDEMNITOR EXPRESSELY AGREE THAT ANY SUIT, ACTION OR PROCEEDING, WHETHER CLAIM OR COUNTERCLAIM, BROUGHT OR INSTITUTED BY ANY PARTY TO THIS AGREEMENT, OR ANY OF THE SUCCESSORS OR ASSIGNS, IN CONNECTION WITH OR WITH RESPECT TO THIS AGREEMENT OR THE PRINCIPAL AND THE INDEMNITOR'S OBLIGATIONS HEREUNDER OR PURSUANT TO OR IN CONNECTION WITH ANY BONDS, CONTRACT OR BONDED CONTRACT SHALL BE TRIED ONLY BY A COURT AND NOT BY A JURY. THE PARTIES EXRESSLY WAIVE ANY RIGHT TO A TRIAL BY JURY IN ANY SUCH ACTION OR PROCEEDING.

Generally, "[a] contract is an agreement that creates an obligation or a promise or set of promises for breach of which the law provides a remedy, or the performance of which the law recognizes as a duty." *Gables Construction, Inc. v. Red Coats, Inc.* 241 Md. App. 1, 31 (2019). Thus, a "contract is binding only upon the parties to the contract and their privies." *Id.* (quoting *Homeseekers' Realty Co. v. Silent Automatic Sales Corp*., 163 Md. 541, 545 (1933)). By parity of reasoning then, because Appellees were not parties to or beneficiaries of the indemnity agreement, they are not able to invoke its "benefits." "Where a non-signatory benefits from the contractual relation of parties to an agreement, but not the agreement itself, the non-signatory has not 'directly benefitted; hence an arbitration clause will not have binding effect.'" *Thompson v. Witherspoon*, 197 Md. App. 69, 87 (2011) (quoting *Coots v. Wachovia Sec., Inc.*, 304 F.Supp.2d 694, 699 (D.Md.2003)). This

Court, in *Westbard*, held that an agreement to arbitrate is analogous to a waiver of trial by jury. *Westbard*, 181 Md. App. at 50.

Westbard is inapposite in some respects to the present case. The claims in *Westbard* were reliant directly on the relevant underlying agreement, whereas the claims raised by Burt are based on alleged misrepresentations and concealment committed by Appellees prior to Burt signing the indemnification. In *Westbard*, the claims brought were based on an earlier lease between the parties. We held there that a party was estopped equitably from bringing a claim based on the lease while, at the same time, attempting to avoid enforcement of a waiver of jury trial present in the same agreement in a claim against a non-signatory. There is no such corollary here. Burt's claims, as pleaded, exist as a result of alleged incomplete statements made, and facts concealed, by Appellees in the run-up to execution of the agreement. We imagine that copies of the pre-execution draft of the indemnification agreement and the executed version may be offered in evidence at the trial of the present case so as to allow the fact-finder to conclude whether "protections" for Burt were included. Nonetheless, the efficacy of the agreement is not at issue as regards the third-party complaint. We hold that the jury waiver in the indemnification agreement may not be invoked by Appellees to bar a jury trial with regard to Burt's third-party complaint against them.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AS TO ITS GRANT OF SUMMARY JUDGMENT IN FAVOR OF APPELLEES REGARDING APPELLANTS' THIRD-PARTY

COMPLAINT REVERSED; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEES.