UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND
(Corrected)

PHYLLIS WILSON, et al.
v.
EXXON MOBIL CORPORATION
No. 1524, Sept. Term 2014

SHARON STAHL, et al.,
v.
EXXON MOBIL CORPORATION
No. 1525, Sept. Term 2014

KIRA BRUCKER, et al.,
v.
EXXON MOBIL CORPORATION
No. 1526, Sept. Term 2014

RALPH DEGRAW, et al.,
v.
EXXON MOBIL CORPORATION
No. 1527, Sept. Term 2014

Zarnoch,
Hotten,
Leahy,
JJ.

Opinion by Zarnoch, J.

Filed: August 13, 2015

Appellant property owners who lived near a gasoline leak in Baltimore County brought claims for fraud, private nuisance, and strict liability against Appellee Exxon Mobil Corporation (Exxon). This same leak has been discussed at length in *Exxon Mobil Corporation v. Albright*, 433 Md. 303 (2013) and *Exxon Mobil Corporation v. Ford*, 433 Md. 426 (2013), in which the Court of Appeals reversed most of a jury verdict against Exxon. The only significant difference in this case is that it did not go to trial and was instead dismissed by the Circuit Court for Baltimore County, which relied heavily on *Albright* to dismiss Appellants' claims. We hold that Appellants failed to plead reliance on Exxon's alleged statements; nor did they plead that their properties were actually contaminated. We hold that Appellants fail to establish a plausible entitlement to relief and we affirm the circuit court's ruling.

FACTS AND PROCEEDINGS

Appellants filed complaints against ExxonMobil, Inc. (Exxon) and Storto Enterprises, Inc. (Storto) (collectively, Defendants) in the Circuit Court for Baltimore County in 2009. Appellants failed to serve Storto and the corporation was voluntarily dismissed by Appellants with the consent of Exxon while this appeal was pending. The substance of the complaints and subsequent filings are identical to each other, and concerned the same gasoline leak at issue in *Albright* and *Ford*. During those trials, Exxon admitted responsibility for the leak and its resulting damage.

Exxon purchased a property located at 14258 Jarrettsville Pike in Phoenix (the Property) in 1981. Appellants allege that on or about January 12, 2006, an Exxon

contractor "inappropriately and negligently drilled a hole in the pipe for unleaded regular gasoline at the Jacksonville Exxon station."

In their Amended Complaint on April 25, 2014, Appellants alleged:

> 37. Exxon has inaccurately and inconsistently reported its alleged successes in supposedly containing and cleaning up the majority of the discharged gasoline. . . .
>
> 38. Exxon has also provided area residents with inaccurate and misleading test results pertaining to the levels of gasoline in their water supplies. Exxon has not disclosed adverse test results on monitoring wells adjacent to area residents' properties, and has not provided residents, including the Plaintiffs, with complete and timely information pertinent to the residents' properties.
>
> 39. Even while tacitly acknowledging the immediate and long-term health risks that can be associated with water and soil infiltration by gasoline, Exxon has misrepresented the nature and extent of area residents' exposure to property damage and personal injury as a result of this gas discharge. . . .
>
> Plaintiffs relied to their detriment on the reasonable assumption that, because Defendants did not disclose any problems or **warn the Plaintiffs about any dangers** ~~concerns~~ pertinent to the condition of the underground storage tank system, there was no reason to be concerned that a gas discharge affecting their community was likely to occur.

(emphasis and alterations in Amended Complaint).

Notably, the Amended Compliant deleted most of the previous allegations of actual contamination of their property, including any sources of water. Exxon then filed its Motion to Strike and/or Dismiss the Amended Complaint, or for Summary Judgment in each case.

On June 18, 2014, while Exxon's motion was pending, Appellants filed their Second Amended Complaints, stating that they were not alleging actual contamination of their

property or trespass. Appellants also removed all references to actual contamination of their properties and potable water.

For example, new Paragraph 107 replaced old Paragraph 100 to read:

> As a direct and proximate result of Defendants' conduct, the Plaintiffs' home ~~has been invaded with levels of gasoline constituents, including MTBE, at or above EPA or MDE action levels, and/or~~ will *probably* be contaminated with such constituents in the future.

(alteration in original) (Emphasis added).

Appellants also deleted their allegation that "Plaintiffs' water supply was invaded with gasoline constituents." Instead, Appellants only alleged threatened future contamination, apparently under the theory that their property was "probably" contaminated. They also deleted their claim for intentional infliction of emotional distress. ExxonMobil then filed its Motion to Dismiss Plaintiffs' Second Amended Complaint or for Summary Judgment.

Exxon did not dispute that the leak occurred in Jacksonville in 2006, however Appellants never pleaded that their well water was actually contaminated by the leak. Appellants did plead that they all live or used to live in Baltimore County, and stated at argument that their residences were between 1.3 and 2.5 miles from the station. Appellants claim that their

> property values have suffered and will continue to suffer as a result of the gasoline discharge for which Exxon is responsible. Appellants' enjoyment of their property has been substantially diminished as a result of the gasoline discharge for which Exxon is responsible. This ordeal has caused Appellants to fear for their health and safety, and to suffer physical manifestations as a result, *inter alia*, headaches, anxiety, nausea, loss of appetite, insomnia and diarrhea.

In a one-page order entered on August 21, 2014, the court ruled that Appellants failed to state a claim under *Albright*. The court granted Exxon's motions and dismissed Appellants' complaint without prejudice. Appellants filed a timely appeal.

QUESTION PRESENTED

Appellants ask:

> Did the Circuit Court err in dismissing the Appellants' Second Amended Complaints for failure to state a claim upon which relief can be granted based solely upon the *Albright* decision?

We rephrase the questions:

> Did the court err in finding that Appellants failed to state a claim for fraud, nuisance, strict liability, and negligence in light of the Court of Appeals' resolution of these causes of action in *Albright*?

STANDARD OF REVIEW

At the outset, we note that the core of Appellants' argument is that the "Circuit Court's citation to *Albright* as the single basis for granting the Appellees [sic] motion to dismiss was incorrect because the *Albright* case was not an appeal of a motion to dismiss, rather it was an appeal from jury verdicts after a lengthy trial." We are aware of the distinction. We also note Appellants' concession at argument that their allegations are essentially identical to those in *Albright* and *Ford*. This appeal, therefore, reiterates the same liability theories that were rejected as a matter of law (not just fact) in those previous appeals.

We review a motion to dismiss *de novo*. We may affirm or reverse on any ground "adequately shown by the record, whether or not relied upon by the trial court." *Gomez v. Jackson Hewitt, Inc.*, 427 Md. 128, 142 (2012). Plaintiffs must plead their cause of action

with sufficient specificity upon which a court could conclude they had stated a plausible legal entitlement to relief. *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 497 (2014). The Rules are clear that any claim "shall contain a clear statement of the facts necessary to constitute a cause of action and a demand for judgment for the relief sought." Md. Rule 2-305. Though "we must assume the truth of all well-pleaded relevant and material facts as well as all inferences that reasonably can be drawn therefrom . . . any ambiguity or uncertainty in the allegations bearing on whether the complaint states a cause of action must be construed against the pleader." *Alleco Inc. v. Harry & Jeanette Weinberg Found., Inc.*, 340 Md. 176, 193 (1995).

I. Fraud

A misrepresentation falls short of an actionable fraud claim when it is made not to the plaintiffs but instead solely to a third-party government entity. *See Albright*, 433 Md. at 334. Throughout their pleadings and their brief, Appellants fail to address this deficiency in their allegations and never claim that any one of them ever personally relied on a statement made by Exxon. Without this, there can be no recovery for fraud.

A claim for fraud requires, *inter alia*, that "the defendant . . . made a false representation *to the person defrauded*" and that "the plaintiff relied on the misrepresentation and had a right to rely on it." *Id.* (Emphasis added) (Quotation omitted). Appellants argue that the Restatement (Second) of Torts §531 entitles them to relief. ("One who makes fraudulent misrepresentation is subject to liability to the persons or class of persons who he intends or has reason to expect to actor to refrain from action in reliance upon the misrepresentation.").

They contend:

> Manifestly, Appellants, as neighbors of the business driving by it every day and as customers at the station, were within the class of person that Exxon knew would reasonably rely on Exxon's ostensibly conducting the business of storing and selling gasoline near the Appellants' homes in compliance with the law. . . .The Appellants *did not directly hear these statements when they were repeatedly made in various iterations to government officials*, but every day when they drove by or shopped at the station, they relied on the station's approval by the County and Maryland authorities . . .

(Emphasis added).

Although there are instances where a plaintiff may recover when there is a misrepresentation to a third party, this scenario arises almost exclusively in the context of commercial transactions. *See* Restatement (Second) of Torts § 551 (Nondisclosure) (1977) ("One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, *if, but only if, he is under a duty to the other* to exercise reasonable care to disclose the matter in question."); Restatement (Second) of Torts § 550 (Fraudulent Concealment) (1977) ("One party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he had stated the nonexistence of the matter that the other was thus prevented from discovering.").

For instance, a buyer of a loan on the secondary market may pursue a fraud claim against the initial borrower. *See Diamond Point Plaza Ltd. P'ship v. Wells Fargo Bank, N.A.*, 400 Md. 718, 741-42 (2007) (Diamond Point had "reason to expect that the loan

documents, including [the fraudulent misrepresentation], would be presented to, would be considered by, and would influence the decision of prospective buyers in the secondary market."). Yet there is no Maryland case since *Albright* in which plaintiffs recovered on a statement made to a government entity. There, the Court explained that "Maryland law does not permit a third party to recover damages for fraud purely on the basis of a false statement made to a governmental entity." 433 Md. at 337. The Court of Appeals made clear in *Albright* that plaintiffs failed to establish reliance "purely by virtue of being residents in the area" near the site of the Jacksonville Exxon Station. *Id.* at 337-38.

The Court went on to reject what it termed plaintiffs' "attenuated third-party reliance theory" by which "fraud on the people's government constitutes fraud on the people." *Id.* at 335. The Court rejected this generalization of the tort, repeating the long-established principle that a plaintiff must rely either directly or indirectly, on the relevant misrepresentation. *Id.* at 336. We further emphasize, to the extent it needs saying, a complaint must plead reliance on such a misrepresentation to survive a motion to dismiss.

Here, Appellants admit they did not individually rely on a statement by Exxon to them. This is exactly the type of reliance *Albright* required for plaintiffs to plead to recover for fraud based on a misrepresentation to a government authority. Absent that, Exxon may or may not be liable to state and local authorities, but it is not liable to Appellants.

We are aware that Appellants are frustrated with the recurrence of environmental accidents affecting what the *Albright* Court labeled the "seemingly cursed Jacksonville community." 433 Md. at 316. Appellants also argue that the Maryland Department of the Environment (MDE) "has utterly failed to hold Exxon accountable for this disaster" and

that the Consent Decree entered into by Exxon and MDE "contains an equally impotent enforcement mechanism." Whatever merit or salience such arguments hold, they are irrelevant to this litigation. *See Albright*, 433 Md. at 337 ("Government is capable and empowered generally to take action in such instances to protect its interests and those of the public. Other parties meeting the elements of fraud may proceed properly on such an action if they so choose.").

Appellants further argue that as a general matter, the public can "rely on the public officials, because the officials are presumed to act competently." *See Lerch v. Maryland Port. Auth.*, 240 Md. 438, 457 (1965) ("There is a strong presumption that public officials properly performed their duties."). This is not a basis for civil liability. The principles of representative government do not transfer Exxon's liability from the State of Maryland to Appellants. Nor does any other legal doctrine.

Appellants also fail to plead detrimental reliance or damages. Appellants claim that "between January 12, 2006 and February 17, 2006, [they] relied on the reasonable assumption that, because Defendants failed to disclose or warn during the period exceeding 37 days, the existence of a voluminous gas discharge, that no such discharge existed" so they "continued to use their well water, reasonably relied upon Exxon's concealment, took no action to monitor or filter it, and took no action to compel Exxon to install reliable and credible leak detection equipment." Appellants never allege, however, that they suffered any actual harm as a result of continuing to drink well water, nor do they allege that the water itself was ever contaminated. Even had the water been contaminated, that alone would be insufficient to establish grounds for recovery. *See Albright*, 433 Md. at 347

("Bare contamination of a well or brief consumption of water containing contaminants at or below the MDE and EPA action levels [20 ppb MTVE and 5 ppb benzene] is not, without more, sufficient to support detrimental reliance.").

Furthermore, diminution in real property values is, "without more, *damnum absque injuria*—a loss without legal injury." *Id.* at 413. Here, appellants failed to plead that their property values were adversely affected, unlike the plaintiffs in *Albright*.

Additionally, "in the absence of fraud, malice, or like motives, 'emotional distress attendant to property damage is not compensable.'" *Id.* at 395. Because there was no fraud, there are no damages for economic loss. *Lloyd*, 336 Md. at 108.

Appellants also claim there was a failure of remediation efforts, yet fail to identify any statement by Exxon on which they relied. Instead, they simply assert that they "wrongly believed" facts about the remediation. Appellants claim that Exxon "placed a misleading sign about its remediation activities" in February 2006, but do not plead what the sign stated, whether they saw the sign, or that they relied on the sign. Furthermore, appellants also failed to plead that their wells were actually contaminated as a result of the gasoline leak.

Assuming *arguendo* that placing a misleading sign gives rise to a fraud claim, appellants would still have had to plead a "change in behavior resulting from any of the allegedly false statements" such as changes in "their water consumption habits in response to the assumedly false statements or in response to their discovery of the assumed falsity of the gasoline recovery estimates." *Id.* at 344 (Footnotes omitted). Appellants would have also needed to plead that their well was actually contaminated, an allegation they supported

before they retracted it in their Second Amended Complaint. Moreover, "[b]are contamination of a well or brief consumption of water containing contaminants at or below the MDE and EPA action levels is not, without more, sufficient to support detrimental reliance." *Id.* at 347.

Appellants also assert the "amorphous concept of remediation fraud" *see id.* at 52. The simple posting of a sign, however, is not specific to the plaintiffs. The Court of Appeals resolved this exact issue:

> Of those Appellees that claimed to have relied on the misleading sign, none established that he or she suffered injury or damages as a result of his or her reliance. Appellees testifying as to reliance either did not have demonstrable contamination of their wells stemming from the Jacksonville Exxon leak until months after Appellees learned about the leak, or never had a positive well test for contamination. Thus, no Appellee proved by clear and convincing evidence any resulting injury from consuming contaminated water during the five-day period during which the sign was displayed. As a result, Appellees failed to establish a cause of action for fraud based on the posting of the "misleading" sign. The sign fraud verdicts as to all Appellees are therefore reversed.

Albright, 433 Md. at 339-40.

In substance, Appellants' pleadings repeat many of the same legal arguments that Court clearly rejected in *Albright*, and we do the same.

II. Nuisance

Appellants claim they properly pleaded nuisance by alleging "Defendants' have caused an unreasonable and continuous invasion of the area around and **including** Plaintiffs' property, which has **materially diminished** the value of Plaintiffs' property and **substantially interfered** with their rights to use and enjoy their property." (Emphasis in original). Appellants argue that the "release of gasoline into **Plaintiffs' soil and drinking**

water supply is substantially offensive, discomforting, and annoying to persons of ordinary sensibilities, tastes, and habits." (Emphasis in original). What Appellants fail to plead, as Exxon notes, is that these alleged injuries are substantial or objectively reasonable, because Appellants never alleged that their water was actually contaminated. As such, the fear of acquiring an illness from contact that never occurred is objectively unreasonable under *Albright*.

A nuisance claim must arise from "a nontrespassory invasion of another's interest in the private use or enjoyment of land." *Blue Ink, Ltd. v. Two Farms, Inc.*, 218 Md. App. 77, 92 (2014) (Citations omitted). A plausible nuisance claim may allege an intrusion of many forms "including noise, odor, and light," and may involve physical or non-physical injury. *Id.* A plaintiff must prove, however,

> an unreasonable and substantial interference with his or her use and enjoyment of his or her property, such that the injury is of such a character as to diminish materially the value of the property as a dwelling . . . and seriously interfere with the ordinary comfort and enjoyment of it.

Albright, 433 Md. at 408-09 (Quotations and citations omitted).

We explained in *Exxon Corp. v. Yarema*, 69 Md. App. 124 (1986) that the "gravamen of a nuisance claim rests not on a tangible invasion of property, but rather on the disturbance and interference in use and enjoyment of property resulting from a defendant's actions." *Id.* at 147. *Yarema* involved gasoline contamination of ground water that "imposed crippling restrictions not only on the contaminated land but on all the property adjacent to that land," as the "the Baltimore County Health Department forbade plaintiffs from using their ground water, building houses on their land or selling the land

even at a reduced price." *Id.* at 153. The Court of Appeals distinguished *Yarema* from the leak in *Albright* (also the subject of this appeal), by noting that the owners of uncontaminated, or "non-detect" properties were not entitled to relief.

> Unlike the plaintiffs in *Yarema*, the gravamen of Appellees' complaints consist largely of relatively minor disturbances and stigma impacts that are not comparable to the severe restrictions placed on the *Yarema* plaintiffs. Although interference with the use and enjoyment of property, in the absence of physical impact, need not rise necessarily to the level of the restrictions in *Yarema* to constitute a nuisance, the disturbances reported in this case fall well on the opposite end of the continuum and are insufficient to maintain a nuisance action. For example, most non-detect Appellees complain primarily of using bottled water or Brita filters, entertaining in and about their homes less than expected, reducing the frequency of use of outdoor spaces, and taking shorter showers and baths. Such Appellees were not deprived, however, of the use of significant portions of their property, nor was the availability of their properties for their customary uses impaired substantially.

433 Md. at 410-11. In sum, *Albright* made abundantly clear that nuisance in Maryland is not minor inconvenience from "modest adjustments" to daily activities, especially in the absence of any contamination from which a reasonable fear of disease might arise:

> In order to recover for nuisance, however, a plaintiff must establish that any adjustments he, she or it makes in the use of his, her, or its property as a result of the defendant's tortious conduct are objectively reasonable. As noted above in our discussion of fear of contracting cancer, however, these Appellees' fear of future contamination and resultant effects thus far is not objectively reasonable. They have no detected contamination, nor been advised that their water is unsafe for use. Unlike the plaintiffs in *Yarema,* Appellees have not received communication from governmental entities that would lead them to believe reasonably that alteration of water use is necessary to protect their health. Thus, in the absence of physical injury to real property resulting from Exxon's actions, Appellees must demonstrate more than modest adjustments in their use of their real property resulting from the leak in order to establish nuisance.

Albright, 433 Md. at 409-11 (Citation omitted).

Furthermore, because Maryland law is clear "that the mere diminution of property value, *absent such tortious interference*, is not sufficient basis for recovery," *Yarema*, 69 Md. App. at 151 (Emphasis added), the Court concluded that the property owners "may not recover damages for diminution in value of real property on the grounds that Exxon's actions constituted a nuisance." *Albright*, 433 Md. at 411.

Appellants here have similarly failed to plead a theory of nuisance that meets *Albright*'s standard. They have not alleged actual contamination of their property (unlike some of the owners in *Albright*), so whatever fears of disease they may have are objectively unreasonable. Nor have they pleaded that there was "communication from governmental entities that would lead them to believe reasonably that alteration of water use is necessary to protect their health." *Id.* As their pleadings are essentially indistinct from *Albright*, even had they gone through trial and proved their cause of action, they would have still been unable to recover.

III. Strict Liability and Negligence

Appellants' arguments regarding strict liability and negligence are also nearly identical to the pleadings in *Albright* and *Ford*. Appellants argue that "the placement of large underground gasoline tanks in close proximity to private residences and drinking wells constitutes an abnormally dangerous activity from which strict liability may flow." (citing *Yommer v. McKenzie*, 255 Md. 220 (1969)).

Appellants do not, as Exxon notes, show direct evidence of physical injury upon which to ground a strict liability or negligence action. Injury is required to plead either. *See* Restatement (Third) of Torts: Phys. & Emot. Harm § 20 (2010) (Emphasis added) ("An

actor who carries on an abnormally dangerous activity is subject to strict liability for *physical harm* resulting from the activity."); *see Remsburg v. Montgomery*, 376 Md. 568, 582 (2003) (A prima facie claim for negligence requires an allegation that, *inter alia*, "the plaintiff suffered actual injury or loss[.]").

In *Ford*, the Court of Appeals held that owners properties where no contamination occurred, or "non-detect" properties, were unable to recover under either strict liability of negligence. 433 Md. at 485-86. ("Respondents here who owned or resided in non-detect properties failed similarly to show a substantial interference sufficient to sustain actions for nuisance, trespass, negligence, or strict liability." *Exxon Mobil Corp. v. Ford*, 433 Md. 426, 485-86 (2013) (citing *Albright*, 433 Md. at 409-415). Here, for the same reason, in the absence of injury stemming from interference with enjoyment of their property undermines both causes of action.

Appellants offer only conclusory statements on appeal, stating without citation that they have "properly pled physical injury" and that the "types of symptoms pled by the Appellants interfere with their reasonable use of their property and, if proven at trial to be a proximate result of Exxon's conduct, they are imminently recoverable under *Albright* and *Ford.*" Yet appellants do not allege any injury distinct from the other "non-detect" cases. Logically, just as the alleged interference with property fails to meet the requirements of a nuisance action, Appellants claims are indistinct from those raised and rejected by the Court in *Albright*.

We also note that because the court granted the motion without prejudice. If Appellants later establish that they personally relied on Exxon's allegedly false statements,

or that their properties were actually contaminated, they are not prevented from bringing an action under that theory. Absent that, however, the court did not err in finding Appellants did not present a plausible claim for relief and we accordingly affirm.

JUDGMENT AFFIRMED.
APPELLANTS TO PAY COSTS.