Circuit Court for Baltimore City
Case No. 24-C-22-003488

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 363

September Term, 2023

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511 SOUTH CENTRAL AVENUE, LLC

v.

COOPER CARRY, INC., *et al.*

Zic,
Albright,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Albright, J.

Filed: March 24, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant, 511 South Central Avenue, LLC ("Owner"), owns a hotel in downtown Baltimore. This case involves Owner's claims for (1) breach of contract and professional negligence against the architect who designed the hotel ("Architect"), (2) breach of contract and negligence against the contractor who constructed the hotel ("Contractor"), and (3) negligence against the subcontractor who constructed the hotel's roofing system ("Subcontractor"). Below, the Circuit Court for Baltimore City dismissed Owner's claims against Architect and Subcontractor because the statute of limitations had run before the claims were filed. Owner's negligence claim against Subcontractor was also barred by the economic loss doctrine. Later, Owner's claim against Contractor was also dismissed on limitations grounds and Owner's Amended Complaint against Contractor was stricken as futile. Here, Owner challenges all of these decisions.

Owner presents four questions for our review,[1] which we consolidate and rephrase

[1] Owner phrased its four questions as follows:

i) Whether the Circuit Court erred in granting Defendants' motions to dismiss on statute of limitations grounds by resolving an issue of fact concerning when Owner knew or, with due diligence, reasonably should have known of the roofing system defects.

ii) Whether the Circuit Court erred in granting Defendants' motions to dismiss on statute of limitations grounds by resolving an issue of fact concerning whether Owner's failure to discover the roofing system defects prior to June 2020 was due to its lack of diligence, or to the subcontractor's concealment of its defective work.

iii) Whether the Circuit Court erred when it granted the subcontractor's motion to dismiss based upon the economic loss doctrine because (A) the Circuit Court resolved an issue of fact concerning whether the systemic roofing system defects created a substantial and

as:

I. Did the circuit court err in granting Appellees' motions to dismiss?

II. Did the circuit court abuse its discretion in striking Owner's Amended Complaint?

For the reasons stated below, we answer both questions in the negative. Accordingly, we affirm the judgment of the circuit court.

BACKGROUND

Owner owns and operates the Hyatt Place Baltimore/Inner Harbor (the "Hotel") in Baltimore, Maryland. Appellees are Cooper Carry, Inc. ("Architect"), AHP Construction LLC ("Contractor"), and Cole Roofing Co., Inc. ("Subcontractor"). Owner contracted separately with Architect and Contractor to, respectively, design and build the Hotel. Contractor retained Subcontractor to construct the Hotel's roofing system. Firestone Building Products Company, LLC ("Manufacturer") provided a limited warranty for the roof.

The building's construction was completed in 2014. Approximately four years later, Owner discovered that the roof was leaking and reported the leaking to

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unreasonable risk of personal injury from mold exposure, and (B) because the economic loss doctrine did not apply to Owner's claim for damages to property other than the roofing system.

iv) Whether the Circuit Court erred by failing to grant Owner even one opportunity to amend the Complaint to assert additional facts and allegations concerning: (A) Owner's discovery and knowledge of the systemic roofing defects; (B) subcontractor's concealment of the systemic roofing system defects; and (C) the danger and damage caused by the systemic roofing system defects.

Manufacturer. Owner's first notice to Manufacturer was in July 2018. Owner subsequently reported leaking to Manufacturer in November 2018, twice in February 2019, April 2019, and May 2019. Manufacturer assigned Subcontractor to repair the roof each time. In each of Manufacturer's letters to Owner regarding the receipt of these leak notices, Manufacturer stated that it had directed Subcontractor "to investigate and permanently repair the leak, if possible[,]" and that "[i]f a permanent repair cannot be accomplished, [Subcontractor] is to attempt to temporarily stop the inflow of water until a comprehensive investigation by [Manufacturer] personnel can be made." There is no evidence that Manufacturer conducted investigations in connection with these leak notices.

In May 2020, Owner directed its roofing company, Columbia Roofing, to inspect the roof. According to Owner, Columbia Roofing detected "several warranty issues that ha[d] not been addressed." In May 2020, Owner notified Manufacturer of Columbia Roofing's findings and requested a full inspection by Manufacturer. In June 2020, Owner again reported leaking to Manufacturer, who then assigned Ruff Roofers Inc. to conduct repairs. Ruff Roofers then made repairs and reported to Owner in June 2020 that there were several problems with the roof that needed to be addressed.

In 2021, Owner retained engineering firm Simpson Gumpertz & Heger ("Firm") to investigate issues with the roofing system. Firm conducted testing and found several design and construction defects. Firm's March 2022 report detailed its findings about the roofing system defects. On April 29, 2022, Owner sent a written Notice of Construction

Defect Claims ("Notice") to Appellees informing them of defects discovered in the Hotel's roofing system. Owner attached Firm's report to the Notice.

On August 11, 2022, Owner filed its Complaint. Owner asserted (1) breach of contract against Architect; (2) professional negligence against Architect; (3) breach of contract against Contractor; (4) negligence against Contractor; and (5) negligence against Subcontractor. Owner alleged that "shortly" after construction was completed and the Hotel began operations, the "Roofing System began showing signs of failure and water intrusion." Owner alleged that the roofing system defects "have resulted in damage to the [Hotel's] interior" and that "[Firm's] investigation revealed that the prolonged and extended periods of moisture have revealed significant moisture content within the building, with the possibility of mold in certain areas of the Hotel." In the Complaint, Owner referred to the Notice sent to Appellees.

Architect moved to dismiss Owner's Complaint, explaining that Owner's claims were barred by the applicable statute of limitations. Architect attached a copy of the Notice, which had not been attached to the Complaint. Contractor filed an answer, raising several defenses including that Owner's claims were barred because of the applicable statute of limitations. Subcontractor also moved to dismiss, arguing that: (1) the statute of limitations barred all claims; and (2) Subcontractor did not owe the duties alleged to Owner because there was no contractual privity between Owner and Subcontractor.

Owner opposed both Architect's and Subcontractor's motions to dismiss. Owner attached to its oppositions, among other documents, a copy of Manufacturer's letters in

response to each leak notice, email correspondence between Owner and Manufacturer, and email correspondence between Owner and Ruff Roofers. Owner argued that, although it discovered and reported leaks beginning in 2018, it did not discover the extent of the problems with the roof until later. Owner explained that because the leaks reported to Manufacturer were seemingly permanently repaired by Subcontractor and no further action was taken by Manufacturer or Subcontractor, Owner had not been on notice of the roofing issues giving rise to its cause of action. Owner contended that it had not become aware of the facts giving rise to its cause of action until June 2020, when it received the report from Ruff Roofers and retained Firm to investigate further. Owner also argued that there is a reasonable inference that Subcontractor fraudulently concealed the problems with the roof because Subcontractor had been retained by Manufacturer for all the leak investigations before June 2020. Further, Owner argued that the economic loss doctrine does not bar recovery because an "intimate nexus" between Owner and Subcontractor existed in that Subcontractor knew or should have known that Owner relied upon Subcontractor's skill and care in the performance of its work.

The circuit court held a hearing on November 23, 2022, and granted both Architect's and Subcontractor's motions to dismiss. The circuit court dismissed all counts against Architect and Subcontractor with prejudice and without leave to amend. The circuit court explained

> the allegations themselves permit [the circuit court] to conclude that the cause of action . . . accrued at the latest on July 31st of 2018 based on the knowledge of circumstances, the extent of roof leaks at that point, which put the owner on inquiry notice to conduct an investigation and discover the basis

> for the claims within three years and to bring this action within three years, which it did not do.

The circuit court cited to Paragraph 12 of the Complaint in which Owner alleged that the roof began showing signs of failure and water intrusion "shortly" after construction was completed, which "dovetails with the statement in the [Notice] that discovery was made at least as of July of 2018."[2] The circuit court further explained that although it was "certainly reasonable" that Owner waited to see if the repairs by Subcontractor made at the direction of Manufacturer would be effective, *Booth Glass Co. v. Huntingfield Corp.*, 304 Md. 615 (1985), "makes very clear that that does not toll limitations." The circuit court noted that it is "undisputed that [Owner] was aware within the three-year inquiry period of continued failures of the roof and that the repairs were not effective[,]" and that this was not a case where "it was reasonable for [Owner] to believe that all the problems had been addressed until sometime after the three-year limitations period ran[.]"

The circuit court also found that Owner's allegations were insufficient to amount

[2] We note that the circuit court's consideration of the April 29, 2022 Notice when granting Appellees' motions to dismiss did not convert these motions into motions for summary judgment.

Generally, when matters outside of the allegations in the complaint and any exhibits incorporated in it are considered by the trial court, a motion to dismiss is treated as one for summary judgment. *Advance Telecom Process LLC v. DSFederal, Inc.*, 224 Md. App. 164, 175 (2015). However, when a document "merely supplements the allegations of the complaint, and the document is not controverted, consideration of the document does not convert the motion into one for summary judgment." *Id.*

Here, Owner explicitly referred to the Notice in its Complaint and does not dispute that the document attached to Architect's motion to dismiss and considered by the circuit court was the Notice referenced in its Complaint. Thus, Appellees' motions to dismiss were appropriately treated as such.

to fraudulent concealment by Subcontractor. The circuit court said:

> With respect to [Subcontractor], it certainly is plausible that [Subcontractor] would be interested in making repairs and not disclosing its own negligen[t] performance of its contract, but there's no allegation here of concealment nor could there be because of the ability of the owner at any time to do a full inspection with an independent engineering firm of its own roof. There's no allegation, for example, that [Subcontractor] covered over some design defect or some other defect in the roof in order to make it, you know, impossible to inspect during the three-year period, so there can be no successful allegation of fraudulent concealment by [Subcontractor] in these circumstances.

Regarding Subcontractor's motion to dismiss, the circuit court found that Subcontractor was additionally entitled to dismissal of the negligence claim based on the economic loss doctrine. The circuit court rejected Owner's argument that reliance existed in this case. The circuit court explained that finding such an exception to the economic loss doctrine would be available in any construction case and, therefore, "would destroy the doctrine in this context." The circuit court also rejected, for the same reason, Owner's argument that there was a direct human health impact simply "because a roof problem like this could lead to a mold problem which could lead to health problems[.]"

On December 5, 2022, Owner filed a motion to alter or amend the circuit court's decision and requested a hearing. Owner argued that the circuit court went beyond the allegations of the Complaint by making "the unsubstantiated leap that [Owner] was not only aware of the Roofing System Defects in 2018 but that an investigation in 2018 would have uncovered all of the defects enumerated in the Complaint." Owner also argued that the circuit court, by ruling that the potential mold problem would not be an exception to the economic loss rule, "improperly reject[ed] [Owner]'s allegations that

there is a threat to human health caused by the prolonged and extended periods of moisture at the Hotel with the possibility of mold in certain areas of the Hotel." The circuit court treated Owner's December 5, 2022 motion as a motion for reconsideration, which it denied on January 3, 2023.

On December 27, 2022, Owner filed an Amended Complaint amending only the counts against Contractor. The Amended Complaint alleged that "[o]n or around July of 2018, the Roofing System began showing signs of failure and water intrusion in the form of a leak." Owner amended its allegations about the circumstances surrounding the roof leaks, including Owner's belief based on Manufacturer's letters that the leaking had been permanently repaired by Subcontractor under Manufacturer's warranty. Owner alleged that it lacked knowledge of further issues with the roofing system until after Ruff Roofers' report in June 2020. Owner also added, after referencing Firm's investigation revealing the possibility of mold, that "[t]he possibility of mold poses a risk to human health." Owner attached as exhibits copies of Manufacturer's roofing system warranty, Manufacturer's letters regarding the leak notices, and email correspondence between Owner and Ruff Roofers.

On December 28, 2022, i.e., the day after Owner filed its Amended Complaint, Contractor moved to dismiss Owner's original Complaint on the basis of limitations. Contractor explained that because the reasons relied upon in dismissing Owner's claims against Architect and Subcontractor were equally applicable to Contractor, the statute of limitations also barred the claims against Contractor. On January 11, 2023, Contractor

moved to strike Owner's Amended Complaint pursuant to Rule 2-341.[3] Contractor argued that the Amended Complaint "attempts to alter the wording of the original Complaint," but "is the same argument rendered by [Owner] at the November 23, 2022 hearing, which this Court already rejected."

On January 17, 2023, Owner filed its opposition to Contractor's motion to dismiss the original Complaint. Owner argued that disputes of material fact existed as to when Owner had sufficient knowledge of the facts as to put it on inquiry notice. Owner reiterated that it did not discover the facts giving rise to the cause of action against Contractor until it received the report from Ruff Roofers in June 2020 and retained Firm to investigate further, and that there is a reasonable inference that Subcontractor concealed material information from Contractor. On January 30, 2023, Owner filed its opposition to Contractor's motion to strike the Amended Complaint. Owner argued that its Amended Complaint was permitted by the scheduling order and Rule 2-341(a).

On March 29, 2023, the circuit court dismissed the original Complaint and struck Owner's Amended Complaint. The circuit court dismissed the claims against Contractor for the same reasons articulated by the circuit court in its November 23, 2022 decision dismissing the claims against Architect and Subcontractor. The circuit court explained that nothing in the record suggested that notice to Owner of its claims against Contractor occurred any later than notice of its claims against Architect and Subcontractor. With

[3] The Rule provides, in pertinent part, that "[w]ithin 15 days after service of an amendment, any other party to the action may file a motion to strike setting forth reasons why the court should not allow the amendment." Md. Rule 2-341(a).

respect to the motion to strike the Amended Complaint, the circuit court emphasized that the new allegations in the Amended Complaint "would not save" Owner's claims against Contractor because "[t]hey merely add that [Owner] tried to get the leaks remedied by [Manufacturer] before [Owner] decided to file this lawsuit." The circuit court pointed out that it had already considered—and rejected—this argument from Owner. Owner then noted this timely appeal.

STANDARD OF REVIEW

Maryland Rule 2-322(b)(2) permits a defendant to move to dismiss for failure to state a claim upon which relief can be granted. We review the granting of a motion to dismiss for failure to state a claim de novo. *Sullivan v. Caruso Builder Belle Oak, LLC*, 251 Md. App. 304, 316 (2021). We presume that all well-pleaded facts in the complaint are true, along with any reasonable inferences derived from them. *Id.* at 317. A motion to dismiss should not be granted for failure to file within the statute of limitations "unless it is clear from the facts and allegations on the face of the complaint that the statute of limitations has run." *Rounds v. Md.-Nat'l Cap. Park & Plan. Comm'n*, 441 Md. 621, 655 (2015).

The decision to permit or disallow amendments to pleadings is within the sound discretion of the trial judge. *Shabazz v. Dep't of Pub. Safety*, 261 Md. App. 355, 379 (2024). Such a decision "will be reversed only on a showing of a clear abuse of discretion." *Id.* (cleaned up).

DISCUSSION

I. The circuit court did not err in dismissing Owner's claims.

We first address—and affirm—the circuit court's dismissal of Owner's claims against all three Appellees on the basis of limitations. We then address—and affirm—the circuit court's further conclusion that Owner's allegations were insufficient to amount to fraudulent concealment by Subcontractor, and that Subcontractor was additionally entitled to dismissal of the negligence claim based on the economic loss doctrine.

A. Statute of Limitations

Owner argues that the circuit court erred in dismissing its claims on the basis of limitations because a dispute of material fact existed as to when Owner knew, or reasonably should have known, about the roofing system defects. In Owner's view, the leaking of the roof was insufficient to put Owner on notice of the roofing system defects. Rather, Owner contends that "nothing before the Circuit Court unequivocally refuted" that Owner was not aware of the roofing system defects until the June 2020 report by Ruff Roofers. Owner insists that it acted reasonably and with due diligence under the circumstances because it had reason to believe that the roof leaks had been permanently repaired and that no further investigation was needed.

Appellees point to the language of the Complaint and the April 29, 2022 Notice to support their argument that Owner's claims are barred by limitations. Paragraph 12 of the

Complaint provides: [4]

> Construction of the Project was completed and the Hotel began operations. Shortly thereafter, the Roofing System began showing signs of failure and water intrusion.

Paragraph 20 provides:

> On or about April 29, 2022, Owner sent its Notice of Construction Defect Claims to Architect, Contractor and Subcontractor ("Notice"). The Notice detailed SGH's findings and enclosed copy of SGH's Report.

The Notice, which Architect attached as an exhibit to its motion to dismiss, states:

> Starting as early as July 2018 and continuing thereafter, Owner has repeatedly placed Subcontractor on notice of the Roofing System Failures, resulting in significant water intrusion incidents throughout the Project.

We agree with Appellees that the language of Owner's own allegations and the Notice permitted the circuit court to conclude that Owner's claims were barred by limitations. The applicable statute of limitations on Owner's breach of contract and negligence claims is Section 5-101 of the Courts and Judicial Proceedings Article, which provides that "[a] civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced." Md. Code Ann., Cts. & Jud. Proc. ("CJP") § 5-101. In order to give effect to the legislature's purpose in creating such statutory

[4] Owner suggests that paragraph 12 of the Complaint (alleging that such defects became apparent "shortly" after construction was completed) was "merely a typographical error that was corrected by the Amended Complaint." Regardless of the specific phrasing in paragraph 12, it remains undisputed that Owner, in July 2018, knew that the roof was leaking. In fact, the Amended Complaint itself alleged at paragraph 12 that "[o]n or around July of 2018, the Roofing System began showing signs of failure and water intrusion in the form of a leak."

periods, we "typically construe such statutes strictly." *Murphy v. Liberty Mut. Ins. Co.*, 478 Md. 333, 343 (2022) (citations omitted). Although the legislature has expressly provided exceptions to CJP § 5-101, "it has made no such provision in cases where a party is assured that a defect will be corrected and attempts at repair are made by a defendant." *Booth Glass*, 304 Md. at 624.

The question of when a cause of action accrues under CJP § 5-101 is left to judicial determination. *Frederick Rd. Ltd. P'ship v. Brown & Sturm*, 360 Md. 76, 95 (2000). This determination may be based "solely on law, solely on fact, or on a combination of law and fact, and is reached after careful consideration of the purpose of the statute and the facts to which it is applied." *Id*.

Maryland has adopted the discovery rule, which "tolls the accrual of the limitations period until the time the plaintiff discovers, or through the exercise of due diligence, should have discovered, the injury." *Id.* at 95–96. A plaintiff must have notice—actual or constructive—of the nature and cause of their injury before an action can accrue under the discovery rule. *Id.* at 96; *Windesheim v. Larocca*, 443 Md. 312, 327 (2015). Actual notice can be either express or implied. *Windesheim*, 443 Md. at 327. Implied notice, also known as inquiry notice, is "notice implied from knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry (thus, charging the individual) with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued." *Id.* (cleaned up); *see also Bacon v. Arey*, 203 Md. App. 606, 652 (2012) ("[A] person cannot fail to investigate

when the propriety of the investigation is naturally suggested by circumstances known to him; and if he neglects to make such inquiry, he will be held guilty of bad faith and must suffer from his neglect." (cleaned up)). Actual knowledge of a causal relationship between injury and its cause is not required to begin the running of the statute of limitations. *Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435, 450 (2000).

In breach of contract cases, this means that a cause of action typically accrues, for limitations purposes, when a plaintiff knows or should have known of the breach. *Fitzgerald v. Bell*, 246 Md. App. 69, 88 (2020). Similarly, a cause of action for negligence accrues when a plaintiff knows or should have known of the negligent act. *Edwards v. Demedis*, 118 Md. App. 541, 566 (1997).

Owner's claims for breach of contract and negligence accrued no later than July 31, 2018. Owner's Complaint and Notice describe how the roofing system defects became apparent from leaking shortly after construction was completed, starting as early as July 2018. The accrual date of July 31, 2018 means that the filing deadline was July 31, 2021, about one year before Owner filed on August 11, 2022.

As the circuit court recognized, Owner's delay based on its assumption that the leak repairs would be effective does not toll limitations. *Booth Glass*, referenced by the circuit court in its decision, is instructive. *Booth Glass* involved claims brought by the owner of a newly constructed building alleging that a subcontractor negligently installed glass. *Booth Glass*, 304 Md. at 618. Just as Owner knew here that the hotel roof was leaking beginning in July 2018, the building owner in *Booth Glass* knew for more than

three years prior to filing suit that the glass may have been negligently installed because the glasswork was leaking. *See id.* at 617. The building owner in *Booth Glass* noticed within two weeks of completed construction that "the glasswork 'leaked like a sieve.'" *Id.* Over a period of two years after this discovery, the subcontractor repeatedly attempted repairs and assured the building owner that it would be corrected. *Id.* The Supreme Court held that the statute of limitations had run on the building owner's negligence claim and was not tolled by the subcontractor's efforts or promises to repair the defects. *Id.* at 622–24.

Owner attempts to distinguish *Booth Glass* by contrasting the facts of *Booth Glass* with those here, where "isolated" leaking was discovered four years after construction was completed. But the number of years between completion of construction and when a defect is, or reasonably should be, discovered is not determinative. Owner's argument that such "isolated" leaking was insufficient to put Owner on notice of the roofing system defects also fails because the July 2018 leak alone need not have demonstrated the extent of the issues or their cause in order for Owner's claims to have accrued then. *Cf. Lumsden*, 358 Md. at 452 (holding that the running of the statute of limitations commenced when petitioners first discovered a wrong—there, that their respective driveways were defective—and not later when they discovered the cause of the problem). Rather, Owner was put on inquiry notice when the roof began to leak because this should have prompted Owner to investigate further. Owner knew, and as is common knowledge, that the Hotel roof was not supposed to leak. Owner therefore was upon notice of

possible roofing system defects and that Appellees may have been in breach of contract or may have been negligent. *See Sisters of Mercy of Union in U.S. of America v. Gaudreau, Inc.*, 47 Md. App. 372, 379 (1980) (holding that the statute of limitations had run on a professional malpractice claim related to a leaking roof because the plaintiff "knew that there was leakage and that it was a recurring thing[,]" "knew or should have known that the roof should not have leaked whenever it rained[,]" and "could have ascertained the cause and the responsibility long before they did so").

Finally, we emphasize that, more than three years prior to filing suit in August 2022, Owner reported leaking to Manufacturer not once, but *six* times: once in July 2018, once in November 2018, twice in February 2019, once in April 2019, and once in May 2019. Accordingly, we agree with the circuit court that Owner's claims were time-barred and were properly dismissed for that reason.

B. Fraudulent Concealment

Owner argues that there is a set of facts which lends itself to the reasonable inference that Subcontractor fraudulently concealed the roofing system defects. Owner points to the fact that Subcontractor failed to report any issues when Manufacturer assigned Subcontractor to investigate and repair the leaks in 2018 and 2019. Owner notes that Ruff Roofers discovered issues with the Hotel roof the first time it was assigned to investigate and repair the roof in June 2020.

A general exception to the accrual of the statute of limitations exists if an adverse party "fraudulently conceals the cause of action from the plaintiff so as to prevent its

discovery by the exercise of due diligence." *Bacon*, 203 Md. App. at 653 (cleaned up); *see also* CJ § 5-203. CJ § 5-203 provides that:

> If the knowledge of a cause of action is kept from a party by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud.

CJ § 5-203. However, in order for the exception to apply, fraudulent concealment must be alleged with particularity:

> In order for [CJ § 5-203] to apply and extend the applicable statute of limitations, a plaintiff must plead fraud or fraudulent concealment with particularity, and the complaint must "contain specific allegations of how the fraud kept the plaintiff in ignorance of a cause of action, how the fraud was discovered, and why there was a delay in discovering the fraud, despite the plaintiff's diligence."

Bacon, 203 Md. App. at 653–54.

Here, Owner concedes that it failed to plead in its Complaint that there was fraudulent concealment by Subcontractor, as would have been required to extend the applicable statute of limitations. As addressed below, Owner argues—but we disagree—that the circuit court erred in striking its Amended Complaint. Owner's stricken Amended Complaint alleged that Owner believed that Subcontractor had permanently repaired the leaks in 2018 and 2019 because there was no follow-up or comprehensive investigation by Manufacturer.

We agree with the circuit court that there was no allegation of fraudulent concealment by Subcontractor and that no such allegation could be successful. This is because Owner knew about the leaky roof in July 2018, and was able at any time after

that to do a full inspection of possible roofing system defects. There was not, even in Owner's stricken Amended Complaint, any allegation that Subcontractor's conduct prevented Owner from inspecting the roof or that Subcontractor somehow rendered the roofing system defects undetectable during the three-year period.[5] Because Owner did not exercise due diligence by investigating further after learning that the roof was leaking in 2018, this exception to the statute of limitations does not apply here.

C. Economic Loss Doctrine

Owner argues that the circuit court erred in finding that the economic loss doctrine precludes its claim against Subcontractor. First, Owner contends that an exception applies in this case because the roofing system defects have resulted in "the possibility of mold in certain areas of the Hotel." Second, Owner argues—for the first time on appeal—that the economic loss doctrine is not applicable to Owner's claim for damages to "other property" caused by the roofing system defects. We reject both arguments and explain below.

The economic loss doctrine precludes tort liability for negligence that causes purely economic harm in the absence of privity. *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*, 451 Md. 600, 612 (2017). Here, it is undisputed that there

[5] We note that such an allegation would seem implausible given that Columbia Roofing (in May 2020) and Ruff Roofers (in June 2020) identified several problems with the roof.

was no contractual privity between Owner and Subcontractor. [6]

There is an exception to the economic loss doctrine where there is a "clear, serious, and unreasonable risk of death or personal injury." *Morris v. Osmose Wood Preserving*, 340 Md. 519, 532–33 (1995). To make this determination, we analyze two elements: the severity and probability of the risk involved. *Id.* We "examine both the nature of the damage threatened and the probability of damage occurring to determine whether the two, viewed together, exhibit a clear, serious, and unreasonable risk of death or personal injury." *Id.* (explaining that "conditions that present a risk to general health, welfare, or comfort but fall short of presenting a clear danger of death or personal injury will not suffice"). In *Morris*, the Supreme Court held that the possibility of roofs collapsing (due to defects in the plywood used) and causing personal injury either when people are on the roof or when the roof is under any significant pressure, such as a heavy snowfall, failed to meet the threshold for either element of the exception to the economic loss analysis. *Id.* at 536. The Court in *Morris* noted that plaintiffs did not allege that any injury occurred or that any roofs had collapsed because of the plywood defects. *Id.* Particularly relevant to this case is the Supreme Court's explanation in *Morris* that

> mere possibilities are legally insufficient to allege the existence of a clear danger of death or serious personal injury. Our cases emphasize that it is the *serious* nature of the risk that compels recognition of a cause of action in tort for economic loss, absent actual injury. To lower the threshold to encompass

[6] Before the circuit court, Owner argued that there was an "intimate nexus" between it and Subcontractor such that Subcontractor owed Owner a tort duty. *See Balfour Beatty Infrastructure, Inc.*, 451 Md. at 614 (discussing the "intimate nexus test" as an exception to the economic loss doctrine). The circuit court rejected this argument, and because Owner does not reraise it here, we do not address it.

> mere "possibilities" of injury, as presented in this case, and as the dissent seemingly advocates, is to "cheapen" the legitimacy of the exception to the economic loss rule and thereby invite an avalanche of such tort claims in future cases.

Id. (emphasis in original).

Owner does not provide support for its claim that the roofing system defects have led to a "clear, serious, and unreasonable risk of death or personal injury" because of the possibility of mold in certain areas of the Hotel. In fact, the stricken Amended Complaint only added that "[t]he possibility of mold poses a risk to human health." Owner also has not alleged that mold has in fact been found in the Hotel.

Neither the nature of the damage threatened nor the probability of damage alleged meets the threshold established in *Morris*. First, Owner does not allege that the potential for impacts to human health include serious bodily injury or death. Considering Owner alleges only the mere *possibility* (rather than a clear, substantial risk) of mold, its attempts to demonstrate that this exception should be applied are legally insufficient. As such, we affirm the circuit court's finding that the economic loss doctrine bars Owner's negligence claim against Subcontractor.

We also decline to take up Owner's new argument about the inapplicability of the economic loss doctrine to damages to "other property."[7] Owner now argues that the

[7] Below, in opposing dismissal of its Complaint, Owner never argued that the "other property" that it claimed was damaged meant that the economic loss doctrine did not apply. In its Complaint, Owner alleged merely that it had incurred (or will incur) "[f]ees, costs and other related direct and indirect expenses related to repairing damages to other property caused by the Roofing System Defects[.]" It did not argue, much less

circuit court erred in dismissing the Owner's negligence claim against Subcontractor because its claim included a request for damages for "expenses related to repairing damages to other property caused by the Roofing System Defects[.]"

Because this argument was not raised below, it is not preserved for appellate review. *See Jones v. State*, 379 Md. 704, 712 (2004); Md. Rule 8-131(a) ("Ordinarily, an 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."). Owner does not explain why it failed to raise this argument below or why it is either necessary or desirable for us to decide it on appeal. We decline to exercise our discretion to consider Owner's unpreserved argument.

II. The circuit court did not clearly abuse its discretion in granting Contractor's motion to strike Owner's Amended Complaint.

Owner argues that the circuit court abused its discretion by striking Owner's Amended Complaint because it "should have given Owner at least one opportunity" to amend its Complaint in order to allege additional facts concerning its discovery of issues with the roof, Subcontractor's alleged concealment of these issues, and the applicability of the economic loss doctrine. Appellees respond that there was no abuse of discretion because the circuit court appropriately determined that any amendment would be futile,

allege, that the "other property" was not part of an "integrated whole" such that the economic loss doctrine would not apply. *See Pulte Home Corp. v. Parex, Inc.*, 174 Md. App. 681, 738 (2007).

as no amendment would change the fact that Owner's claims are barred by limitations. We agree with Appellees and affirm the circuit court's striking of the Amended Complaint.

Ordinarily, as Owner points out, amendments to pleadings are to be allowed liberally. *See Nouri v. Dadgar*, 245 Md. App. 324, 365 (2020); Md. Rule 2-341(c) ("Amendments shall be freely allowed when justice so permits."). However, "an amendment should not be allowed if it would result in prejudice to the opposing party or undue delay, such as where an amendment would be futile because the claim is flawed irreparably." *RRC Ne., LLC v. BAA Maryland, Inc.*, 413 Md. 638, 673–74 (2010).

In striking Owner's Amended Complaint, the circuit court explained that the new allegations in the Amended Complaint "would not save" Owner's claims against Contractor. In other words, Owner alleged no facts suggesting that it was on notice of its claims against Contractor later than when it knew about its claims against Architect and Subcontractor. Rather, the additional allegations only reiterated Owner's previously unsuccessful argument before the circuit court (and before us here) that the leaking of the roof did not put Owner on notice of the roofing system defects because Owner believed it would be remedied by Subcontractor's repairs. Because Owner's amendment would be futile, and would only cause undue delay if permitted, we conclude that the circuit court did not clearly abuse its discretion in striking Owner's Amended Complaint.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.