Circuit Court for Queen Anne's County
Case No. C-17-CV-20-000092

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1244

September Term, 2022

ROSANNA BAILEY

v.

QUEEN'S LANDING COUNCIL OF UNIT OWNERS, INC.

Ripken,
Tang,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Ripken, J.

Filed: November 21, 2023

*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).

In April of 2020, Rosanna Bailey ("Bailey"), a Queen's Landing Condominium unit owner, filed a Complaint for Specific Performance and Other Relief against Queen's Landing Council of Unit Owners, Inc. ("Council") in the Circuit Court for Queen Anne's County alleging negligence, breach of contract, and breach of fiduciary duty, among other claims. Bailey sought multiple forms of redress for both property and personal injuries that resulted from water damage to her condominium unit. The Council filed a counterclaim asserting that an exculpatory clause ("the clause") within the Bylaws of the condominium relieved the Council of liability. Thereafter, the Council filed a motion for partial summary judgment. The circuit court granted the motion for partial summary judgment in favor of the Council on the claims of negligence, breach of contract, and breach of fiduciary duty. Bailey then filed a timely appeal.

Bailey presents the following issue for our review: [1] Whether the circuit court erred when it held that the exculpatory clause was enforceable and exculpated the Council from liability.

For the reasons to follow, we shall affirm the circuit court's entry of summary judgment in favor of the Council.

FACTUAL AND PROCEDURAL BACKGROUND

Queen's Landing Condominium is a residential condominium that operates

[1] Rephrased from: Did the Circuit Court err in holding that the exculpatory clause contained in the Condominium's Bylaws precludes Dr. Bailey's claims for damages under Counts Two through Five of the Complaint arising from defects in exterior components of the Condominium which the Association has a duty to maintain, repair, and replace?

pursuant to the Maryland Condominium Act ("the Act") and the condominium's Declaration and Bylaws. By owning a unit, individuals become members of the Council, an incorporated nonprofit association tasked with administering the condominium.

The powers and duties of the Council are dictated by the Declaration and Bylaws, as well as the Act. The Bylaws for the condominium prescribe the Council with the "powers and duties necessary for the administration of the affairs of the Council and the Condominium[.]" One duty articulated by the Bylaws, and mandated by the Act, requires the Council to "provide for the care, upkeep, repair, improvement or alteration and surveillance of the Condominium and services in a manner consistent with the provisions of the Condominium Instruments." *See* Maryland Code Annotated Real Property Article ("RP") § 11-108.1.

Section 11-108.1 of the Act and Article 5.5 of the Bylaws provide additional specifications concerning the maintenance, repair, and replacement of the condominium common elements and identify which parties are responsible for maintaining different components of the individual units and the condominium in its entirety. Md. Code Ann., RP § 11-108.1. The Bylaws, adopting similar language to the Act, dictate that the Council is responsible for the "maintenance, repair, and replacement . . . of the [c]ommon [e]lements (including the [l]imited [c]ommon [e]lements) as defined herein or in the Declaration, whether located inside or outside of the units[.]"

Bailey is a unit owner and a member of the Council who has been subjected to "water intrusion, moisture manifestation and excessive humidity" in her unit "as a result of defects and deficiencies in . . . [exterior building] components." She reported the issues to

the Council because the exterior building components constituted both common elements and limited common elements for which it was responsible to maintain and repair. Although the Council hired multiple contractors at various times attempting to resolve the issue, the water infiltration resulted in damage to personal property and components of Bailey's unit. The water damage also created an environment for mold to grow and as a result, Bailey required medical attention and was displaced from the condominium.

In April of 2020, when Bailey filed her complaint, she asserted that because the Council failed to properly maintain and repair the defects and deficiencies, she experienced damage to the unit and harm to her personal health. According to Bailey, this failure constituted a breach of contract for failure to maintain and repair the building components, a breach of the repair agreement due to the continuing defects, and a breach of the Council's fiduciary duty. Bailey then contended that by reason of the defects, the Council was "negligent in the performance of its obligations to maintain, repair and replace" the common elements for which it was responsible.

The Council filed a counterclaim asserting that although the association has numerous responsibilities, Article 3, Section 3.16(c) of the Bylaws "specifically exculpate[s] [the Council] from certain instances of water intrusion." The relevant section of the Bylaws states:

> The Council or Board of Directors shall not be liable for . . . injury or damage to person or property caused by the elements or by the Unit Owner or occupant of any Condominium unit, or any other person, resulting from electricity, water, snow or ice which may leak or flow from or over any portion of the [c]ommon [e]lements or from any pipe, drain, conduit, appliance, or equipment. . . . No diminution or abatement of any assessments, as herein elsewhere provided, shall be claimed or allowed for inconvenience

> or discomfort arising from the making of repairs or improvements to the [c]ommon [e]lements or [l]imited [c]ommon [e]lements or from any action taken by the Council to comply with any law, ordinance or with the order or directive of any governmental authority.

In March of 2021, the Council filed a motion for partial summary judgment asserting that no dispute as to material fact existed regarding Bailey's claims of negligence, breach of contract, and breach of fiduciary duty and thus, it was entitled to judgment as a matter of law.

After a hearing on the motion, the court issued a memorandum opinion and order and concluded that "[b]ased on the evidence presented, it is undisputed that Article 3, § 3.16(c), of the Bylaws is a valid exculpatory clause and exculpates the [Council] from liability for breach of contract, breach of fiduciary duty, and negligence as a matter of law." The court found that the plain language of the Bylaws relieved the Council of liability "'for injury or damage to person or property,' where the cause of such loss was the 'leak or flow' of water 'from or over any portion of' the common elements of Queen's landing." The court held that Bailey's "alleged losses f[e]ll squarely within the scope of" the exculpatory clause and granted partial summary judgment in favor of the Council.

In response, Bailey filed a motion for reconsideration, which was summarily denied. In August of 2022, after settling the remaining claims, the parties agreed to a voluntary dismissal. Additional facts will be included as they become relevant to the issues.

DISCUSSION

This Court reviews a circuit court's grant of summary judgment *de novo*. *See Livesay v. Balt.*, 384 Md. 1, 9 (2004). We determine (1) whether a dispute of material fact

exists and (2) whether the trial court was correct as a matter of law. *Thacker v. City of Hyattsville*, 135 Md. App. 268, 285 (2000). In making this determination, "[w]e review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the nonmoving party." *Myers v. Kayhoe*, 391 Md. 188, 203 (2006). "Contract interpretation is undoubtedly a question of law that may be properly determined on summary judgment." *United Servs. Auto. Ass'n v. Riley*, 393 Md. 55, 78 (2006).

Bailey alleges error in the grant of summary judgment, arguing that the clause was ambiguous and against public policy. Moreover, Bailey asserts that even if the exculpatory clause is otherwise enforceable, it is not applicable to the limited common elements of the condominium. The Council argues that the circuit court was correct in finding that the exculpatory clause released it from liability for negligence because the clause is unambiguous, does not violate Maryland law or the governing documents of the condominium, and is applicable to all common elements.

To determine whether the Council is relieved of liability, we must first establish whether the exculpatory clause at issue "unambiguously excused" the Council from responsibility for damages resulting from defects in the common elements. *See Seigneur v. Nat'l Fitness Inst., Inc.*, 132 Md. App. 271, 277–78 (2000). If the Council is relieved of liability, we then assess whether a public policy exception invalidates the exculpatory clause pursuant to Maryland Law. *See Wolf v. Ford*, 335 Md. 525, 531 (1994) (explaining public policy exceptions that invalidate exculpatory clauses). Finally, we determine whether the clause is applicable to limited common elements.

A. The Exculpatory Clause is Understandable and Unambiguous.

Bailey asserts that the exculpatory clause "does not clearly, unequivocally, specifically, and unmistakably express the parties' intention to exculpate the [Council] from liability resulting from its own negligence[.]" She grounds this assertion on the premise that the clause cannot unambiguously excuse the Council because it does not contain any reference to negligence in its text. The Council challenges this assertion, arguing that the clause is clear and relieves it of liability for its negligence.

The Bylaws of a condominium are interpreted by applying the principles of contract interpretation. *Floyd v. Mayor & City Council of Balt.*, 179 Md. App. 394, 436 (2008), *aff'd,* 407 Md. 461 (2009) (noting, when "interpreting bylaws we apply the general principles of contract construction."). The general standard, under principles of contract interpretation, for determining whether a party is indemnified "is a stringent and exacting one, under which the clause must not simply be unambiguous but also understandable." *Adloo v. H.T Brown Real Estate, Inc.*, 344 Md. 254, 264 (1996). Thus, "contracts will not be construed to indemnify a person against his own negligence unless an intention to do so is expressed in those very words or in other unequivocal terms." *Crockett v. Crothers*, 264 Md. 222, 227 (1972). While a strict standard, the Supreme Court of Maryland has emphasized that "the exculpatory clause need not contain or use the word 'negligence' or any other 'magic words'" to indemnify a party to a contract. *Adloo*, 344 Md. at 266 (First quoting *Hardage Enterprises, Inc. v. Fidesys Corporation*, 570 So. 2d 436, 437 (Fla. App. 1990); then quoting *Audley v. Melton*, 138 N.H. 416, 418 (1994)).

To determine whether the language of the clause unequivocally excuses the Council of liability for damages, we must ascertain "from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated." *Id.* at 266 (quoting *Gen. Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261 (1985)). This is accomplished by analyzing the "language of the subject clause." *Id.* at 267.

For example, in *Home Indemnity Company v. Basiliko*, the Supreme Court of Maryland analyzed an exculpatory clause to determine whether the landlords were relieved of liability for damages caused by a leaking air conditioning unit. 245 Md. 412, 416 (1967). The exculpatory clause at issue stated:

> landlord shall not be responsible for loss of or damage to property of Tenant in said building caused by fire or other casualty, or by any acts of negligence of co-tenants or other occupants of said building or any other person, by rain or snow or steam that may leak into or flow from said building through any defects in the roof or plumbing or from any other source.

Id. at 414. The plaintiff argued that the exculpatory clause was "susceptible [to] more than one meaning and that the instrumentality which caused the damage was not definitely specified." *Id*. at 416. The Court found that the clause was not subject to "more than one construction." *Id*. at 417. The Court also explained that the water leaking from a defective air conditioning unit was included in the clause because it is not "unreasonable to include an air conditioning unit as another source from which leakage of water might be expected." *Id*. The Court concluded that the clause was clear and unambiguous, relieving the landlords of liability for damage caused by the air conditioning unit. *Id*.

In contrast, in *Adloo v. H.T. Brown Real Estate, Inc.*, the Court determined that two exculpatory clauses did not contemplate negligence as a cause of property loss within the language of the clauses. 344 Md. 254, 268 (1996). The Court analyzed the two clauses, one in a real estate listing contract and one in a lock-box authorization agreement, to determine whether a real estate broker was absolved from liability for negligence resulting in loss of property. *Id*. at 256–57.

The lock box agreement at issue contained a provision which stated that the broker and his agents were not "insurer[s] against the loss of property" and that the seller "agrees to waive and release[] BROKER and his agents . . . from any responsibility therefore." *Id*. at 258. The Court found that the clause did not contemplate negligence and could only be interpreted to relieve the broker of liability for property loss that was not the result of negligence. *Id*. at 267–68. The Court explained that the clause does not contain any language, or additional context, to "suggest a different or broader intent." *Id*. at 268.

The second clause in the listing agreement stated that the broker and his agents are not "responsible for vandalism, theft, or damage of any nature whatsoever to the property[.]" *Id*. at 257. Using the same reasoning as it did for the first clause, the Court found that the language did not illustrate a "clear, unequivocal" intent to relieve the broker of liability for the loss caused by their own negligence. *Id*. at 268. Both *Adloo* and *Basiliko* stand for the proposition that exculpatory clauses relieving a party from liability for negligence are proper if the language is unambiguous and clear. *Adloo*, 344 Md. at 266; *Basiliko*, 245 Md. at 417.

Here, we conclude that the language of the exculpatory clause is unambiguous and clear and exculpates the Council from liability arising from its own negligence. The language of the clause, *supra*, has the effect of relieving the Council of liability for injury or damage to person or property in two distinct categories: (1) those "caused by the elements or the Unit Owner or occupant . . . or any other person," and (2) those "resulting from . . . water . . . which may leak or flow from or over any portion of the [c]ommon [e]lements[.]"

Similar to the language of the clause in *Basiliko*, the language of the second category is "neither doubtful or susceptible [to] more than one construction[.]" 245 Md. at 417. The second category clearly exculpates the Council from liability for any injury or damage "resulting from . . . water . . . which may leak or flow from or over any portion of the [c]ommon [e]lements[.]" The use of the phrase "resulting from" sufficiently expresses a clear intent to protect the Council from liability for *any* consequential damage from water intrusion over or from the common elements, irrespective of the reason the water intruded. As in *Basiliko*, the clause unambiguously focuses on a *category* of disclaimed damage, water intrusion, rather than a specific *reason* the water was able to intrude into the unit. *Id*. (emphasis added). Therefore, the clause, which exculpates the Council from liability for all damages resulting from water intrusion over or from the common elements, regardless of cause, necessarily includes water damage arising from the negligent maintenance and repair of the common elements.

Although the language of the clause does not explicitly include the term negligence, the word is not required. *See Adloo*, 344 Md. at 266 (explaining that an "exculpatory clause

need not contain the word 'negligence' or any other 'magic words' . . . to release the defendant from liability[.]"). It is sufficient that the clause clearly expresses its intent to relieve the Council of liability for damage that is the result of water leaking or flowing over the common elements, including water damage that arises from negligence, as evidenced by the phrase "resulting from."

Thus, the clause unambiguously relieves the Council of liability for the personal injury and property damage sustained by Bailey because her personal injuries and property damage were a result of water leaking into her unit from the common elements—a situation clearly and unambiguously contemplated by the exculpatory clause.

B. The Exculpatory Clause Does Not Violate Public Policy.

Bailey argues that recognizing the exculpatory clause in the Bylaws would constitute a public policy violation because it "would have the effect of nullifying . . . the duties prescribed by the legislature and those embodied in the governing documents[.]" Relying on *Wolf v. Ford*, Bailey asserts that this nullification constitutes a transaction that is not easily definable, but that is "so important to the public good that an exculpatory clause would be 'patently offensive'[.]" 335 Md. 525, 532 (1994) (quoting *Md. Nat'l Cap. Park & Planning Comm'n v. Wash. Nat'l Arena*, 282 Md. 588, 606 (1978)). The Council contends that the exculpatory clause does not violate public policy because the transaction does not affect the public interest and the Act does not prohibit exculpatory clauses.

"In Maryland, unambiguous exculpatory clauses are generally held to be valid in the absence of legislation to the contrary[,]" *Seigneur,* 132 Md. App. at 281, because "the public policy of freedom to contract is best served by enforcing [the] provision of the

clause[,]" *Wolf*, 335 Md. at 531. Outside of statutory limitations on exculpatory clauses, the Supreme Court of Maryland has recognized three general exceptions voiding the exculpatory clause in a contract: (1) instances of intentional harm or gross negligence; (2) transactions with grossly unequal bargaining power; and (3) agreements affecting the public interest. *Id*. at 531-32.

As Bailey's contention is focused on the third exception, we note the Supreme Court of Maryland has explained that the third exception typically "includes the performance of a public service obligation, e.g. public utilities, common carriers, innkeepers, and public warehousemen." *Id*. at 532. It can also "include[] those transactions, not readily susceptible to definition or broad categorization, that are so important to the public good that an exculpatory clause would be patently offensive, such that the common sense of the entire community would . . . pronounce it invalid." *Id.* (quoting *Wash. Nat'l Arena,* 282 Md. at 606)(internal quotation marks omitted). To properly examine this exception, this court must determine whether the transaction involves the public interest by "considering the totality of the circumstances of [the] given case against the backdrop of current societal expectations." *Id*. at 535.

The Supreme Court of Maryland's decision in *Wolf v. Ford* is instructive. 335 Md. 525 (1994). In *Wolf*, the Court enforced an exculpatory clause in a contract between an investor and a securities investment firm, after finding that "a stockbroker-client relationship is not one that so affects the public interest that we should disturb the parties' ability to contractually exempt a party from liability for negligence." *Id.* at 53–37.

The Court in *Wolf* explained that investing in the stock market inherently contains risks because of the "volatile nature of financial markets." *Id*. at 537. Therefore, when an individual selects an investment firm to "purchase stocks using the broker's best judgment[,]" they are placing the responsibility for decision making in the hands of a stockbroker. *Id*. The Court emphasized that when a stockbroker uses that responsibility to make an investment decision, "what may appear to be negligence in the purchase of securities one year may eventually turn out to be a stroke of genius in following years, and vice versa." *Id*. As a result, "allocat[ing] the risk of negligence" in a contractual relationship of this type "is not patently offensive[.]" *Id*.

Invoking a similar line of reasoning, the court in *Cornell v. Council of Unit Owners Hawaiian Village Condominiums, Inc. et al.*, applying Maryland law, enforced an exculpatory clause relieving a condominium council of liability for its negligent maintenance of a parking lot drain. 983 F. Supp. 640, 650 (D. Md. 1997). At the outset the court noted that, unlike other statutes, "the Act contains no indication of a legislative intent to restrict this type of exculpatory clause" in the declarations and bylaws of a condominium. *See id.* at 649. The court held that the transaction did not involve the public interest based on the circumstances of a relationship between a unit owner and their condominium council. *Id*. It described how a unit owner is "subject to the control of [its] [c]ouncil due to the [c]ouncil's role as drafter of the bylaws," yet, the unit owner "also reap[s] considerable benefits from the [c]ouncil's assumption of duties related to the condominium, such as maintenance and management services." *Id*. The court further emphasized that "[a]s in *Wolf*, reasonable purchasers of condominium units generally

understand that some risk is involved, and that condominium associations place important restrictions on the owner[.]" *Id*.

As in *Cornell*, we conclude that the transaction between Bailey and the Council does not involve the public interest in such a manner that ought to lead to the invalidation of the exculpatory clause. Notably, as the court described in *Cornell*, owning a condominium unit inherently includes some risk and lack of control. *Id*. When Bailey voluntarily purchased a condominium unit, she necessarily understood that her membership in the association carried with it benefits and restrictions.

Bailey received the benefit of the use and enjoyment of the common elements, including the limited common elements appurtenant to her unit, without having the responsibility to maintain or repair those components of the condominium. The Bylaws and the Act assign the duty to repair and maintain the common elements to the Council. This duty necessarily carries with it risks associated with the responsibility for hiring contractors, timeliness of repairs, and the effects of defects on the condominium unit itself. Therefore, although unit owners bear the risk of certain types of damage occurring to their own properties, this is counterbalanced by the fact they have no liability should the same type of damage occur to the unit of any other Council member. Thus, under these circumstances, it is not "patently offensive" for the Council to relieve itself of liability for negligence through an exculpatory clause in its Bylaws. *Wash. Nat'l Arena*, 282 Md. at 606.

Bailey further contends that the exculpatory clause nullifies the Council's duty to maintain, repair, and replace the common elements. We disagree. The relief of liability

does not nullify the Council's duty to maintain and repair the common elements as that responsibility is separate from a legal responsibility for damages. Notably, the language of the exculpatory clause does not reference the Council's duty to repair and maintain the common elements. Instead, the entirety of the provision is dedicated to the responsibility from which the Council is exculpated. Therefore, the Council remains obligated to maintain and repair common elements under the circumstances set forth in the exculpatory clause.

Furthermore, as the court found in *Cornell*, the Act does not express an intent to prohibit exculpatory clauses in condominium governing documents. 983 F. Supp. at 649. We note that when the General Assembly has found exculpatory clauses to be against the public interest, it has created statutory language prohibiting such clauses from inclusion within contracts and other legal instruments, as it has done in other Real Property statutes.[2] *See Basiliko*, 245 Md. at 416 n. 1.

C. The Exculpatory Clause is Applicable to the Limited Common Elements.

Bailey last asserts that in the event the exculpatory clause is enforced, the Council is not relieved of liability for the claims that resulted from the limited common elements. She argues that the language of the exculpatory clause does not apply to the "limited common elements" because the clause does not explicitly use the term "limited common elements." The Council contends that Bailey's argument is erroneous and a plain reading

[2] We note that Md. Code Ann., RP § 8-105 is an example of a statute prohibiting exculpatory clauses within leases.

of the clause "makes clear that it is applicable to all common elements, including the limited common elements."

The exculpatory clause uses the term "[c]ommon [e]lements" which is defined in the Act and the governing documents for the Council. Md. Code Ann., RP § 11-104. As previously discussed, the Act serves as a statutory authority that establishes the initial parameters for the Declaration and Bylaws. *See* Md. Code Ann., RP § 11-104.

We turn to the definitions within the Act and the governing documents to determine whether the term "[c]ommon [e]lements" encompasses "[l]imited [c]ommon [e]lements" within its meaning in the exculpatory clause. The Act, and the Declaration, define "[c]ommon elements" as "all of the condominium except the units." Md. Code Ann., RP § 11-101(c)(1). The Act then identifies two forms of common elements: "[l]imited common elements" and "[g]eneral common elements," both of which identify components of the condominium that do not constitute part of a unit. Md. Code Ann., RP § 11-101(c)(2)(3).

Within the Act, "[l]imited common elements" are defined as "those *common elements* identified in the declaration or on the condominium plat as reserved for the exclusive use of one or more but less than all of the unit owners." Md. Code Ann., RP § 11-101(c)(2) (emphasis added). Therefore, a "[l]imited common element," as defined by the Act, falls under the umbrella term "[c]ommon elements." Md. Code Ann., RP § 11-101(c)(1).

Here, the Declaration adopts the Act's definition of "[l]imited [c]ommon [e]lements" editing the definition only to reflect the names of the specific governing instruments for the Council. By incorporating the "[c]ommon element" and "[l]imited

common element" definitions from the Act, the Council has adopted the same line of classification that categorizes "[l]imited [c]ommon [e]lement" as a subcategory of "[c]ommon [e]lement." Therefore, by using the term "[c]ommon [e]lements" in the clause, the Bylaws convey that the term "[c]ommon [e]lements" encompasses all forms of common elements, including limited elements. As a result, the exculpatory clause relieves the Council of liability for all the damages resulting from the limited common elements.

Because Article 3, Section 3.16(c) of the Bylaws is applicable to limited common elements and unambiguously relieves the Council of liability for breach of contract, breach of fiduciary duty, and negligence as a matter of law, the circuit court did not err in granting summary judgment. We affirm.

JUDGMENT OF THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.