UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1649

September Term, 2014

JONATHAN C. JAVITT, et al.

v.

CUNNINGHAM CONTRACTING, INC.

Meredith,
Graeff,
Arthur,

JJ.

Opinion by Meredith, J.

Filed: August 26, 2016

This litigation began when Cunningham Contracting, Inc. ("Cunningham"), appellee/cross-appellant, filed a breach of contract action against Jonathan C. Javitt and Marcia Javitt ("the Javitts"), appellants/cross-appellees, to recover the balance due under a contract to install a new cedar shake roof and construct a storm water management system at the Javitts' house in Annapolis. The Javitts filed a counterclaim for breach of contract, and also asserted claims based upon fraud and the Maryland Consumer Protection Act ("MCPA"), Maryland Code (1975, 2013 Repl. Vol.), Commercial Law Article ("Com. Law"), § 13-301 *et seq*. Following a three day bench trial, the Circuit Court for Anne Arundel County entered a $25,500 judgment against Cunningham for breach of contract. But the trial court denied the Javitts' MCPA and fraud claims. The Javitts timely appealed and Cunningham filed a cross-appeal.

QUESTIONS PRESENTED

As appellant, the Javitts raise the following question for our review:

> Did the Trial Court err when it found that Cunningham did not violate the Maryland Consumer Protection Act when it constructed an underground storm water management system that had significant deviations from the contract and when the Court referenced Cunningham's "duplicity" and "false promises"?

As cross-appellant, Cunningham presents the following question:

> Did [the] Javitts offer valid proof as to the cost of reinstalling the drywell in spite of the fact that their expert has minimal drywell experience and did not testify within his area of expertise?

For the reasons that follow, we shall affirm the judgments entered by the circuit court.

FACTS AND PROCEDURAL HISTORY

In November 2011, the Javitts entered into a $100,800 contract with Cunningham to make repairs and improvements to their property in Annapolis. Under the contract, Cunningham agreed to install a new split cedar shake roof; install a storm water drainage system that included a dry well beneath the driveway; replace gutters and wooden columns; improve soffits and trim boards; and regrade the driveway to address pooling water. The portion of the contract price allocated to the storm water system was $22,800.

The proceedings in the circuit court addressed disputes concerning both the installation of the cedar shake roof and the installation of the storm water drainage system, but the circuit court rejected the Javitts' claim of breach of contract, fraud and violation of the MCPA with respect to the cedar shake roof, and no issue is raised in this appeal regarding those rulings. The instant appeal and cross-appeal concern the construction of the dry well and storm water management system only.

When the project had progressed to the point that Cunningham deemed the construction complete, Philip Smith, a project manager for Cunningham, invited Dr. Javitt to inspect the work. The Javitts notified Smith that there were problems with leaves clogging the drainage system, flooding the Javitts' basement and leading to water collecting around the wooden columns which housed the down spouts. Smith visited the property on several occasions, and he observed leaves and twigs clogging the pipes. But Smith defended Cunningham's work, attributing the flooding to the Javitts' failure to perform routine maintenance by clearing the gutters. Cunningham demanded that the Javitts pay the final

installment due under the contract — $18,303.36. The Javitts refused to pay this sum, contending that Cunningham and its subcontractors performed the work on both the roof and the storm water drainage system in a shoddy fashion.

Cunningham filed suit in the District Court of Maryland, claiming the outstanding balance. The Javitts requested a jury trial, whereupon the action was transferred to the Circuit Court for Anne Arundel County. The Javitts then filed a counter-claim (and later, an amended counter-claim) against Cunningham alleging breach of contract, violation of the MCPA, fraud in the inducement, and common law fraud. The parties eventually agreed to try the case before a judge without a jury.

At trial, William Bower, a professional land surveyor, testified as an expert on the Javitts' behalf, and described various deficiencies in the dry well that was installed by Cunningham. Bower testified that the dry well was located within the one hundred foot buffer required in the Critical Areas, and that Cunningham failed to obtain the requisite permits. Additionally, the construction of the dry well deviated from the contract in several respects: it was constructed too close to the Javitts' basement; was one-third of the size specified in the contract; lacked an observation well to allow one to view the inside of the dry well; the gravel inside of the well was the wrong size and was unwashed (increasing the risk of clogging); and finally, the dry well was improperly lined with cloth. Bower further testified that the dry well measured 8' x 10' x 4.5', whereas the contract specified that the dry well was to be constructed with dimensions of 10' x 15' x 4'. He also expressed

criticism that the dry well was built on a clay loam, which "doesn't infiltrate water very well."

Jack Reilly, a licensed home and commercial building inspector, testified as an expert witness for the Javitts. Reilly identified several aspects of Cunningham's work that he considered defective, and he estimated that the cost of replacing the inadequate dry well would be $20,000.

Smith conceded in his testimony that he did not procure the proper County permits; he said he believed that he was not required to do so because he was performing work on an existing system rather than constructing a new one.

The trial judge highlighted the following facts in his Memorandum of Opinion and Order. First, Cunningham installed four inch pipe instead of eight inch pipe as agreed to in the contract. Philip Smith acknowledged that his company did not report this deviation from the contract to the Javitts and offered the Javitts no credit for this deviation.

Second, Cunningham's 5 year warranty on workmanship should have covered the issue that the drainage system was clogged, causing water to overflow the bases of the column and flood the Javitts' basement.

Third, "Facts and testimony at trial revealed that the drywell was less than 1/3 the contracted volume, encased in a clay layer, filled with substandard materials and otherwise nonfunctional. . . . The drywell . . . had standing water, even though it had not rained for 4 days at that point."

The fact that the dry well was built in a layer of clay is material to the contract because the purpose of a dry well is to allow water to percolate into the soil. A less porous clay layer prevents collected water from draining. The trial court observed:

> **Not only was the drywell faulty in its construction, it was far smaller than contracted, with Plaintiff's full knowledge.** Plaintiff has no ability to blame an unsupervised subcontractor for this because [Philip] Smith personally marked the boundaries of the drywell for the subcontractor. Bowers and Reilly both testified that the actual drywell constructed by Plaintiff was only 8 x 10 feet, with a 3.5 foot effective depth. This is 1/3 the contracted-for volume (280 cubic feet vs. 750 cubic feet). This size deficiency alone would explain the backup, even if the drywell was not encased in a layer of clay. **Bowers testified as to the volume of water expected in a normal rainfall and the inadequacy of the drywell as constructed to contain that volume.**

(Emphasis added).

* * *

> **The stone material found in the drywell was not 3/4" washed gravel and was contaminated with stone dust, which markedly reduces the porosity of a drywell.** The stone dust-contaminated material used is clearly a lower grade of material than Defendant was charged for.

Fifth, Cunningham deviated from the contract by failing to install overflow hubs at each downspout location. Sixth, the black corrugated pipe was not replaced with PVC, as contracted. Seventh, Cunningham did not have an overflow pipe "so that if the drywell overfilled with water, that water would have someplace to go other than the Defendant's basement. When the drywell was opened for inspection, there was no sign of any overflow pipe." Finally, Cunningham "failed to honor the [promise to frame in and roof over all internal gutters on sides and rear of house]."

Although the court awarded the Javitts a judgment in the amount of $25,500 on their breach of contract claim to compensate them for the deficiencies in the drainage system and dry well (and also denied Cunningham's claim for the $18,303 balance due under its contract), the Javitts contend that it was error for the circuit court to reject their MCPA claim. In support of their MPCA claim, the Javitts emphasize that the trial judge used the phrase "Plaintiff's duplicity" regarding the installation of 4 inch pipe instead of the specified 8 inch pipe. With respect to the Cunningham's failure to install the 8 inch pipe specified in the contract, the trial judge wrote:

> This contract term was important because Plaintiff [Cunningham Contracting, Inc.] advised Defendant [the Javitts] that 8 inch underground piping was needed to prevent clogging by oak pollen and that the cost of such piping justified the high cost of the drainage system built. Plaintiff discussed the challenges of subsequent clogging of the 4 inch pipe that was installed with oak pollen, neglecting to mention that the condition was anticipated at the time of the contract, that the proposed method for mitigating the condition was the use of 8 inch pipe, and that Defendant had finally mitigated the condition via the installation of $5,000.00 of custom gutter guards.
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> Phil Smith could offer no explanation on the witness stand for Plaintiff's failure to use 8 inch pipe, when the drawing given to Defendant after the job clearly depicted 8 inch pipe. **Presumably, Plaintiff never expected Defendant to re-excavate the drainage system in order to prove Plaintiff's duplicity.** Smith did acknowledge that the deviation from contract had never been reported to Defendant and Defendant had been offered no credit.

(Emphasis added.)

For reasons explained in a written Memorandum of Opinion and Order, the trial judge denied Cunningham's claim for breach of contract, and found in favor of the Javitts on their counterclaim for breach of contract. The court entered judgment in favor of the Javitts

against Cunningham in the amount of $25,500. The trial judge arrived at this figure by adding the following values: $2,000 to disconnect the existing dry well, $15,800 to build a new dry well, $3,500 to repair PVC piping, and $4,200 to remove and replace the columns on the front of the house. The court denied all other claims for relief.

The Javitts timely appealed the denial of their MCPA claim, and Cunningham cross-appealed to challenge the trial judge's award of $15,800 for the construction of a new dry well. For the reasons that follow, we affirm the judgment of the Circuit Court for Anne Arundel County.

STANDARD OF REVIEW

This Court observed in *Mayor and Council of Rockville v. Walker*, 100 Md. App. 240, 256 (1994):

> It is hornbook law, memorialized in Md. Rule 8-131(c), that "[w]hen an action has been tried without a jury, the appellate court . . . will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of witnesses." **This means that if, considering "the evidence produced at trial in a light most favorable to the prevailing party . . . ," there is evidence to support the trial court's determination, it will not be disturbed on appeal.** *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 41 (1978). Moreover, "[i]f there is any competent, material evidence to support the factual findings below, we cannot hold those findings to be clearly erroneous." *Staley v. Staley*, 25 Md. App. 99, 110, cert. denied, 275 Md. 755 (1975).

(Emphasis added.)

DISCUSSION

I. Denial of the Javitts' Claim Under the MCPA

We discussed the elements of a claim under the MCPA in *Hoffman v. Stamper*, 155 Md. App. 247 (2004), *aff'd in part, rev'd in part and remanded*, 385 Md. 1 (2005). In *Hoffman*, we said:

> Maryland's Consumer Protection Act, Md. Code (2000 Repl. Vol.), Com. Law § 13-101, *et seq.*, prohibits unfair and deceptive trade practices in the sale of consumer real estate, *id.* § 13-303(1), and in the extension of consumer credit, including the financing of consumer realty. *Id.* § 13-303(3). Unfair and deceptive trade practices include failing to state material facts; making false, falsely disparaging, or misleading oral or written statements that have the capacity, tendency, or effect of misleading consumers; and knowingly concealing or omitting material facts with the intent that consumers rely on the same. *See id.* § 13-301; *Hartford Accident & Indem. Co. v. Scarlett Harbor Assocs. Ltd. P'ship*, 109 Md. App. 217, 242 (1996), *aff'd*. 346 Md. 122, 132 (1997). When the unfair and deceptive trade practice is a representation or omission of fact, it must be material, that is, it must concern "'information that is important to consumers and, hence, likely to affect their choice of . . . a product.'" *Luskin's Inc. v. Consumer Prot. Division*, 353 Md. 335, 359 (1999) (quoting *In re Cliffdale Assocs.*, Inc., 103 F.T.C. 110, 165-66 (1984)). **The plaintiff also must prove that the defendant knew of the falsity of the statement or omission and intended to induce reliance by the plaintiff. Upon a showing of reasonable reliance, the plaintiff may recover any actual losses.** *Citaramanis v. Hallowell*, 328 Md. 142, 157 (1992).

155 Md. App. at 310-311 (emphasis added).

The Javitts contend that the trial court erred by denying their MCPA claim despite expressly referencing Cunningham's "duplicity." As noted above, the trial judge wrote: "Presumably, Plaintiff never expected Defendant to re-excavate the drainage system in order to prove Plaintiff's duplicity. Smith acknowledged that the deviation from contract had never been reported to Defendant and Defendant had been offered no credit." The Javitts

argue that it was not legally possible for the trial court to find that Cunningham acted with duplicity but find no violation of the MCPA.

The Javitts acknowledge: "[T]he Court also made numerous other findings that the storm water management system that were not 'specific false promises' (E 42) but a failure to comply with the contract and County laws and regulations." Pressing their MCPA claim, however, the Javitts argue on appeal: "Cunningham's services were not of the quality they said they would provide and they withheld the material information from the Javitts about what they had constructed when the system never worked."

Although the Javitts acknowledge that they "produced no direct evidence that Cunningham schemed from the start to defraud them," they assert that

> Cunningham's deceptive actions during the construction process were a part of completing the contract and [one] can infer deception from the outset. **When [Cunningham] presented the Javitts with a drawing of the pipes and sent a final invoice that the work was complete, they *in effect* stated falsely that the work had been completed pursuant to the contract.**

(Emphasis added.)

Cunningham responds that the evidence supported a finding by the trial court that there was no knowing misrepresentation on its part. Cunningham asserts in its brief:

> Any defects identified by the Court were buried in the normal construction process and thus not discovered until many months after the job was finished. Javitts did not introduce any evidence that these defects were either (a) planned in advance by Cunningham who then intentionally misrepresented its plans in the contract, or (b) were intentionally hidden after the construction was complete. Without any intentional misrepresentation, there can be no reliance by Javitts and no resulting injury.

Noting that the clearly erroneous standard applies to the trial court's factual findings, appellee contends that the evidence, if considered in a light most favorable to Cunningham, supports a finding that it did not intentionally misrepresent any material information:

> First, failure to provide the "quality" of services expected — if true — constitutes a breach [of contract] and not an intentional misrepresentation or fraud. Secondly, there is no evidence that any information was intentionally withheld from Javitts or that the system "never worked". The evidence before the Court was that the system clearly worked for months following the completion of the job. There were no misrepresentations as to either the quality of the work or any hidden defects.

(Citation to record omitted.)

Certainly, the record supports the trial judge's finding that Cunningham breached the contract. There was evidence in the record to support findings that Cunningham: disregarded the Critical Area limits and failed to obtain required permits; built a dry well that was smaller than specified; failed to install an observation portal; installed the wrong type of stone in the dry well; improperly lined the dry well with cloth; and located the dry well in a layer of clay. But Cunningham argues correctly that proof of a breach of contract does not compel a finding of a breach of the MCPA.

The appellants do not take issue with this Court's statement in *Hoffman* that, in order to establish a claim for damages based upon the MPCA, a plaintiff "must prove that the defendant knew of the falsity of the statement or omission and intended to induce reliance by the plaintiff." 155 Md. App. at 311. But they argue that comments made by the trial court in the portion of its opinion discussing their breach of contract claims necessarily compel the conclusion that they also proved their MPCA claim, and, therefore, the trial court erred

when it failed to give effect to its own findings of fact. The Javitts' principal argument in their brief is: "These factual findings by the [trial] Court ('duplicity,' 'false promises,' and [']full knowledge[']of the size of the dry well) are completely inconsistent with the Court's finding that the Javitts produced no evidence that Cunningham made any false statements that they knew were false."

And yet, in the trial court's thorough memorandum opinion, the court explained that it did not find a violation of the MPCA. The court explained: "Here, just as with [their claim for damages based upon] fraud, [the Javitts] ha[ve] produced no evidence that [Cunningham] made any false statements which [Cunningham] knew were false, that [the Javitts] relied upon any such statements, or that [the Javitts] suffered any damages as a result of any alleged misrepresentations. The claim for Consumer Protection Violation must fail."

The trial court also set forth very terse findings rejecting the Javitts' fraud claims, explaining:

> The additional claim for fraud in the inducement and reckless regard to the truth is also rejected. [Cunningham] perpetrated no fraud.
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> Defendant alleges fraud against [Cunningham] for four reasons: (1) [Cunningham] misrepresented the material used for the roof was cedar breather; (2) [Cunningham] represented itself as a Cedar Bureau member; (3) [Cunningham] misrepresented the roof would be registered with the Cedar Bureau; and, (4) [Cunningham] represented that there was no need to comply with the Storm Plan.
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> * * *
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> Finally, [the Javitts argue that Cunningham] represented that the drainage system did not need to comply with the Storm Plan. [Cunningham], however, testified it was unaware a Storm Plan existed. [The Javitts'] claim for fraud must fail.

* * *

> On the other hand, we find that [Cunningham] did not complete the drainage portion in accordance with the contract.

Under the "clearly erroneous" standard of review, we are obligated to consider the evidence and all inferences therefrom in a light most favorable to the party that prevailed on an issue. With respect to the MCPA claim (and the fraud claims), Cunningham was the prevailing party. The specific factual finding made by the trial court regarding the fraud claims was that the court accepted Cunningham's evidence that "it was unaware a Storm Plan existed." More generally, the trial court also found that "[Cunningham] perpetrated no fraud." Similarly, with respect to the MCPA claim, the trial court found that the Javitts had not met their burden of persuading the court (as the trier of fact) that Cunningham had made material misrepresentations that were known to be false, and as to such false statements there had been detrimental reliance on the part of the Javitts.

The Javitts urge us to hold that the trial court's comments made in the course of explaining its breach of contract ruling — referring to "duplicity" and "false promises" — obligated the court to make similar findings when reviewing the tort claims being asserted by the Javitts. But, although the pejorative comments were made in the context of explaining the court's ruling on the breach of contract claims, the comments were not essential to the disposition of the contract claims, and it appears clear that the trial court did not intend the comments to be construed as its findings relative to the fraud and MCPA counts.

In short, the trial court did not need to make any finding of misrepresentation or false promise in order to make its ruling that it would deny Cunningham's claim for the balance

due under the contract and rule in favor of the Javitts on their breach of contract claim. But that does not persuade us that, if we consider the evidence in a light most favorable to Cunningham with respect to the MCPA claim, there was evidence that required that the trial court find in the Javitts' favor on the MCPA claim as a matter of law. Consequently, we will not disturb the trial court's judgment on that count.

II. Cunningham's Cross-Appeal on the Issue of Damages

In Cunningham's cross-appeal, it contends that the trial judge erred in awarding "$15,800.00 for the drywell." In support of this argument, Cunningham asserts that the court erred in admitting Jack F. Reilly's testimony estimating the cost of a new dry well at $20,000. Cunningham argues that Reilly's opinion was based in part on the statements of a hearsay declarant, namely an unnamed excavator.

We conclude that Cunningham failed to timely object to Reilly's testimony; therefore, this issue has not been preserved for appellate review. In *Randall v. State*, 223 Md. App. 519, 575–76 (2015) (quoting *Bruce v. State*, 328 Md. 594, 627–28 (1992)), we explained:

> 'Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling, and . . . [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record. . . .' Maryland Rule 5–103(a)(1). Maryland Rule 4–323(a) requires parties to make objection 'at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent'; otherwise, the objection is waived. The Court of Appeals has further explained:
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> 'Therefore, '[i]f opposing counsel's question is formed improperly or calls for an inadmissible answer, counsel must object immediately. Counsel cannot wait to see whether the answer is favorable before deciding whether to object.' 5 L. McLain, *Maryland Evidence* § 103.3, at 17 (1987); *Moxley v. State,* 205 Md. 507, 515, 109 A.2d 370, 373 (1954).

The pertinent testimony in this case is as follows:

> Q. [BY COUNSEL FOR JAVITTS]: Okay. The issue of the dry well, we heard the testimony from Mr. Bowers about the engineering costs. What do you estimate to be the cost of reinstalling the dry well at the new proposed location by Drumm Loyka (phonetic?) What's the approximate price for that for the construction work only?
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> A. [BY REILLY]: My estimate would be probably about $20,000.
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> Q. Okay. Let's move to the side — the north side of the house. I believe that's the last issue. What did you — you did a video of what you found out there, right?

As the record shows, Cunningham did not object to the appellants' counsel's inquiry soliciting Reilly's opinion as to the cost of constructing a new dry well. As a result, the $20,000 estimate formed part of the record when the trial judge calculated appellant/cross-appellee's damages. Although Cunningham's counsel later moved to strike the opinion after asking Reilly questions on cross-examination, the Javitts' counsel argued that the opinion had been properly admitted pursuant to Maryland Rule 5-703, and the court denied the motion to strike.

Even if the belated motion to strike is considered a timely objection to the testimony, we perceive no abuse of discretion in the trial court's denial of the motion. Rule 5-703(a) permits an expert to base an opinion on information that "need not be admissible in evidence." In defending the $20,000 estimate on cross, Reilly noted that pipes would need to be replaced because the dry well needed to be installed in a more suitable location. Further, the court had evidence that the dry well that Cunningham had actually installed was only one-third as large as the one called for in the contract. The amount awarded for the new

dry well — $15,800 — was less than Reilly's estimate and comparable to Cunningham's contract price for a major portion of the storm water management system.

We are therefore satisfied that the trial judge did not err in awarding damages in that amount.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID 1/2 BY APPELLANT AND 1/2 BY APPELLEE.