Circuit Court for Frederick County
Case No. C-10-CV-21-000162

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND**

No. 368

September Term, 2022

SUSAN MAHARAJ, et al.

v.

SMITH BALLOONING, LLC, et al.

Leahy,
Beachley,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: January 12, 2023

**At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Appellants, Susan Maharaj and Erich Blatter, filed suit in the Circuit Court for Frederick County against appellees, Smith Ballooning, LLC, Patrick Smith, Meagan Smith, and Kevin Smith; Barbara and Luke Galant; Thomas Barse and Carolann McConaughy, d/b/a Milkhouse Brewery at Stillpoint Farm (collectively, "Milkhouse Brewery"); and Berrywine Plantations, Inc. Appellants' operative complaint alleged that appellees committed, or aided others in committing, various torts against appellants related to the flying of hot air balloons over or near appellants' home. In addition to requesting an injunction against further tortious conduct, appellants sought to enjoin appellees from launching and landing hot air balloons from properties near appellants' home. Appellees filed motions to dismiss the claim for injunction, alleging that appellants failed to exhaust certain administrative remedies provided in the Frederick County Zoning Ordinance. The circuit court granted appellees' motions to dismiss. Appellants noted this timely appeal and present a single question for our review, which we have rephrased:[1]

> Did the court err in granting appellees' motions to dismiss the claim for injunctive relief on the basis that appellants failed to exhaust administrative remedies provided in the Frederick County Zoning Ordinance?

[1] Appellants present the following question:

> Did the [c]ircuit [c]ourt err in granting [a]ppellees' motion to dismiss Count I of Maharaj and Blatter's Second Amended Complaint because Maharaj and Blatter purportedly failed to exhaust administrative remedies for alleged violations of the Frederick County Code ("F.C.C."), when, in fact, F.C.C. §§ 1-19-2.210(J) and § 1-19-2.230 expressly afford Maharaj and Blatter the right to immediately file suit for injunctive relief to abate zoning violations?

In their brief, appellees assert that this appeal is precluded by the final judgment rule. We first conclude that this appeal is a proper interlocutory appeal. On the merits, we conclude that although the circuit court was correct in ruling that appellants must exhaust administrative remedies to the extent their claim for injunctive relief is based on an interpretation of zoning regulations, the court erred in dismissing appellants' request for injunctive relief based on appellees' alleged tortious conduct.

FACTUAL AND PROCEDURAL BACKGROUND[2]

This appeal arises from a longstanding dispute between appellants, who live in a rural area of Frederick County, and Smith Ballooning, Inc., an entity that provides hot air balloon tours in the county. Smith Ballooning is owned by Patrick Smith, Meagan Smith, and Kevin Smith. Smith Ballooning, which does business as Tailwinds Over Frederick, launches and lands hot air balloons at multiple locations across Frederick County, including three locations relevant to the present case: a residential property owned by Barbara and Luke Galant (the "Galant property"), Milkhouse Brewery, and Berrywine Plantations. The Galant property is located directly across the street from appellants' property. Milkhouse Brewery is "1.5 miles away" from appellants' property. Appellants allege that Berrywine Plantations "is in close enough proximity to [appellants' property] that flights undertaken to/from [Berrywine Plantations] are believed to maneuver over and/or within the direct proximity of" appellants' property. When launching from or landing at these locations, the

[2] Because this appeal is from the granting of a motion to dismiss, we assume the truth of all well-pled facts and allegations in appellants' complaint. *Grier v. Heidenberg*, 255 Md. App. 506, 511 (2022).

hot air balloons would sometimes fly at a low altitude over or near appellants' property, affording passengers a clear view of the property. Additionally, the burners used during flight made a loud noise audible from inside appellants' home.

Appellants contacted the Smiths on multiple occasions to inform them of the problems stemming from flights over or near their property. Smith Ballooning nevertheless continued to launch from and land at appellees' properties. Appellants contacted the Frederick County Zoning Administrator about the balloon launches and landings occurring on the Galant property. In July 2020, Kathy Evans, a representative of the Zoning Administrator, contacted Patrick Smith about Smith Ballooning's use of the Galant property. In a phone call, Ms. Evans "told Patrick Smith that despite having the Galants' permission, [Smith Ballooning does] not have approval from Frederick County Zoning to conduct such activities from the Galant property." After this conversation, Ms. Evans drafted a letter to the Galants informing them that they were in violation of Frederick County Ordinance 1-19-2.110,[3] but this letter was apparently never mailed. During a subsequent conversation with the Zoning Administrator, Patrick Smith agreed to no longer launch or land at the Galant property, after which the Zoning Administrator considered the matter closed. The Zoning Administrator was never made aware of launches and landings at Milkhouse Brewery or Berrywine Plantations.

[3] Frederick County Ordinance § 1-19-2.110 provides in part that "[i]t is unlawful to change the use [or] locate or begin new use . . . of any lot or structure without first obtaining a zoning certificate and building permit." Because the appellee property owners' properties are allegedly zoned agricultural, appellants argued that ballooning activities were not an authorized use under the Zoning Ordinance.

On April 16, 2021, appellants filed a complaint in the Circuit Court for Frederick County against Smith Ballooning, Patrick Smith, and the Galants. The complaint contained four counts: Invasion of Privacy, Private Nuisance, Trespass, and Aiding and Abetting Tortious Conduct. Appellants sought an injunction based on each of these claims, as well as monetary damages.

Appellants filed their First Amended Complaint on December 15, 2021. The First Amended Complaint added the following defendants: Meagan Smith and Kevin Smith (owners/agents of Smith Ballooning); Thomas Barse and Carolann McConaughy (the owners of Milkhouse Brewery); and Berrywine Plantations, Inc. In their First Amended Complaint, appellants added a separate count for "Injunctive Relief," while continuing to also request an injunction in the prayers for relief associated with each individual tort count. Appellants sought to enjoin appellees from "conducting and/or assisting, supporting, supplementing, encouraging, instigating and/or advising," the flights of commercial hot air balloons from the appellee property owners' properties. Appellants also added counts for "Loss of Consortium" and "Strict Liability for Abnormally Dangerous Activity."

On March 25, 2022, appellants filed their Second Amended Complaint, the operative complaint for this appeal. In the "Factual Allegations" section of the operative complaint, appellants alleged that passengers on the balloon flights were able to observe appellants "in the casual enjoyment of their property," including photographing and videotaping appellants on their property. Appellants further alleged that the balloon burners "make loud and audible noise" and "emit fumes which are perceptible" by

appellants, thereby disrupting the appellants' enjoyment of their home and property. Appellants alleged that the Galants, Milkhouse Brewery, and Berrywine Plantations "encouraged, incited, aided or abetted" Smith Ballooning's tortious conduct. In their count for injunctive relief, appellants averred that the appellees' "conduct is tortious, and constitutes invasion of privacy, trespass, nuisance, loss of consortium, strict liability for an abnormally dangerous condition and/or the aiding or abetting of those torts." Appellants maintained without substantive change Count I for Injunctive Relief against all appellees as it initially appeared in their First Amended Complaint.[4]

Appellees Smith Ballooning, the Smiths, and the Galants filed a Motion to Dismiss or in the Alternative, Motion for Partial Summary Judgment. They argued that appellants' claims were preempted by federal law because all claims involving the flying of aircraft are regulated by the Federal Aviation Administration ("FAA"). Smith Ballooning, the Smiths and the Galants further argued that appellants failed to exhaust administrative remedies available to them through the FAA, and asserted that an order enjoining Smith Ballooning from flying over or near appellants' property would interfere with their right to utilize navigable airspace. Appellees Berrywine Plantations, Milkhouse Brewery, and the Smiths also filed separate motions to dismiss in which they argued that Count I of the operative complaint for "Injunctive Relief" failed to state a claim upon which relief could be granted, providing two bases for their motions: (1) an injunction is a remedy, not a stand-

[4] Although appellants' request for relief is not a model for clarity, appellants' allegations were sufficient to state a cause of action to enjoin appellees from engaging in, or aiding and abetting, tortious conduct resulting from Smith Ballooning's operations.

alone cause of action, and (2) appellants failed to sufficiently allege that they will suffer irreparable harm as a result of appellees' actions.[5]

In appellants' opposition to the motions, they asserted that FAA regulations were not implicated because they did not seek to enjoin Smith Ballooning from flying over or near their property. Rather, appellants argued that, because they sought to enjoin Smith Ballooning from launching balloons from appellees' properties, regulatory authority of the ballooning activity was controlled by Frederick County Zoning Ordinance. In response, appellees argued that appellants failed to exhaust their administrative remedies before the Frederick County Zoning Administrator and Board of Appeals as provided in the Frederick County Code.

The court held a hearing on appellees' motions on March 31, 2022. At the hearing, appellees argued that "the Frederick County courts have no authority to prohibit the overflights of the balloons," which appellees argued was appellants' ultimate aim. In appellees' view, "the regulation of aircraft, air space and airmen lies within the total jurisdiction of the federal government." Appellees alternatively contended that, although appellants had made a complaint to the Zoning Administrator, they failed to exhaust their administrative remedies as provided in the Frederick County Zoning Ordinance.

Appellants responded that they were unable to appeal the Zoning Administrator's decision because, *first*, they were not made aware of any such determination, and, *second*,

[5] Appellees also moved to dismiss appellants' abnormally dangerous activities and aiding and abetting tortious conduct claims, and sought partial summary judgment for all other claims.

the Zoning Administrator did not affirmatively conclude that there was no zoning violation, but rather used his discretion to not pursue the case in light of Patrick Smith's assurance that Smith Ballooning would no longer launch from the Galant property. Appellants further argued that state courts have inherent power to enjoin intentional torts, and therefore appellants' request for injunctive relief related to each of their tort claims was proper.

The circuit court granted appellees' motion to dismiss Count I:[6]

> I am not persuaded that there is federal control over the issue that's here or federal privacy [sic] or supremacy over the issues that are involved here that concern where to land and where to take off in terms of residential zoning. In fact, that is something that is permitted to be done by localities. It's true that the alleged intentional torts are committed in the air. But so far as the zoning issues go, the localities had the authority to do that.
>
> However, I am persuaded by counsel's arguments and the law that I've been directed to, that there is the need for the plaintiffs to exhaust their remedies in connection with the zoning violation, because the [c]ourt determining the -- I don't believe that the purpose of the regulation is for the [c]ourt to supplant the zoning authority in terms of determining whether or not there is a zoning violation. And whether the plaintiffs are excused from seeking that administrative remedy before if they're dissatisfied with that, then they go and they file their suit. And I am persuaded by the cases cited by counsel that in fact they must do so.
>
> However, on that basis, that does not mean that I will grant summary judgment on the substance of the matter. However, I will grant the motion

[6] The court also granted appellees' motion for summary judgment in part. Specifically, summary judgment was granted in favor of Meagan Smith as to the invasion of privacy, nuisance, trespass, and loss of consortium claims. Summary judgment was granted in favor of all defendants for the abnormally dangerous activities claim. Summary judgment was also granted in favor of Berrywine Plantations as to the aiding and abetting tortious conduct claim. Because this interlocutory appeal is limited to the dismissal of appellants' claim for an injunction, we assume the truth of all well-pled facts in Count I ("Injunctive Relief"), including allegations that Berrywine aided and abetted tortious conduct related to the flying of hot air balloons.

> to dismiss without prejudice for them to pursue and exhaust their remedies with respect to that count.

Appellants noted this timely appeal. For the reasons explained herein, we shall reverse the circuit court's dismissal of Count I (Injunctive Relief) of appellants' Second Amended Complaint; however, to the extent that appellants seek injunctive relief based on an interpretation of Frederick County zoning regulations, we agree with the circuit court that appellants must exhaust their remedies as provided in the Frederick County Zoning Ordinance.

STANDARD OF REVIEW

This Court recently summarized the standard of review of the grant of a motion to dismiss in *Grier v. Heidenberg*, 255 Md. App. 506, 520 (2022):

> When reviewing the grant of a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, the appropriate standard of review "is whether the trial court was legally correct." *Davis v. Frostburg Facility Operations, LLC*, 457 Md. 275, 284, 177 A.3d 709 (2018). Appellate courts "review the grant of a motion to dismiss de novo [and will] affirm the circuit court's judgment on any ground adequately shown by the record, even one upon which the circuit court has not relied or one that the parties have not raised." *Sutton v. FedFirst Fin. Corp.*, 226 Md. App. 46, 74, 126 A.3d 765 (2015) (cleaned up), *cert. denied*, 446 Md. 293, 132 A.3d 195 (2016).
>
> In this exercise, an appellate court:
>
> > must assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them, and order dismissal only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff, *i.e.*, the allegations do not state a cause of action for which relief may be granted. Consideration of the universe of "facts" pertinent to the court's analysis of the

> motion are limited generally to the four corners of the complaint and its incorporated supporting exhibits, if any.
>
> *RRC Ne., LLC v. BAA Maryland, Inc.*, 413 Md. 638, 643, 994 A.2d 430 (2010) (cleaned up).

DISCUSSION

I. THE FINAL JUDGMENT RULE DOES NOT PRECLUDE THIS APPEAL

We shall first consider appellees' argument that the final judgment rule precludes this appeal. Appellees argue that the dismissal without prejudice of Count I of the Second Amended Complaint does not constitute a final judgment. Appellees reason that a dismissal without prejudice provides appellants the opportunity to amend their complaint, and, for that reason, there was no "final disposition" of the matter.

Appellants respond that, although the dismissal was without prejudice, it was also entered without leave to amend. Appellants cite Rule 2-322(c), which states, in pertinent part: "If the court orders dismissal, an amended complaint may be filed only if the court expressly grants leave to amend." Because the order was silent as to leave to amend, appellants reason that the order was entered without leave to amend, and was therefore immediately appealable as an order "[r]efusing to grant an injunction" under Md. Code (1974, 2020 Repl. Vol.), § 12-303(3)(iii) of the Courts and Judicial Proceedings Article ("CJP"). We agree.

As a general rule, an appeal may usually only be taken from a trial court's final judgment that adjudicates all claims. Md. Rule 2-602; *Huertas v. Ward*, 248 Md. App. 187, 200 (2020). Interlocutory appeals are allowed only in certain circumstances,

including, as relevant here, from an order "[r]efusing to grant an injunction." CJP § 12-303(3)(iii). Although interlocutory orders "are not final judgments in the ordinary sense, an appealable interlocutory order is deemed to be a 'judgment' for certain issues involving the timing of the appeal." KEVIN F. ARTHUR, FINALITY OF JUDGMENTS AND OTHER APPELLATE TRIGGER ISSUES 47 (2018). Thus, our caselaw, which has consistently held that a dismissal "without prejudice" is a final, appealable judgment if it does not grant the plaintiff leave to amend, is equally applicable to appealable interlocutory orders. *See Stidham v. R.J. Reynolds Tobacco Co., Inc.*, 224 Md. App. 459, 468 (2015) (citing *Moore v. Pomory*, 329 Md. 428, 432 (1993)). "[U]pon a dismissal without prejudice and without leave to amend, 'the case is fully terminated in the trial court.'" *Id.* (quoting *Moore*, 329 Md. at 432). "The effect of the designation 'without prejudice' is simply that there is no adjudication on the merits and that, therefore, a new suit on the same cause of action is not barred by principles of res judicata." *Id.*

Here, the order of dismissal did not grant appellants leave to amend the injunction count of their complaint. Accordingly, dismissal of the count for injunctive relief terminated that claim, and pursuant to Maryland precedent, the final judgment rule does not preclude this statutorily authorized interlocutory appeal.

II. THE COURT ERRED IN DISMISSING APPELLANTS' COUNT FOR INJUNCTIVE RELIEF IN ITS ENTIRETY

The circuit court granted the motion to dismiss on the basis that appellants failed to exhaust administrative remedies available in the zoning provisions of the Frederick County Zoning Ordinance.

Before we examine the provisions of the Frederick County Zoning Ordinance relevant to this appeal, we shall set forth accepted legal principles concerning the doctrine of exhaustion of administrative remedies.

> Whenever the Legislature provides an administrative and judicial review remedy for a particular matter or matters, the relationship between that administrative remedy and a possible alternative judicial remedy will ordinarily fall into one of three categories.
>
> *First*, the administrative remedy may be exclusive, thus precluding any resort to an alternative remedy. Under this scenario, there simply is no alternative cause of action for matters covered by the statutory administrative remedy.
>
> *Second*, the administrative remedy may be primary but not exclusive. In this situation, a claimant must invoke and exhaust the administrative remedy, and seek judicial review of an adverse administrative decision, before a court can properly adjudicate the merits of the alternative judicial remedy.
>
> *Third*, the administrative remedy and the alternative judicial remedy may be fully concurrent, with neither remedy being primary, and the plaintiff at his or her option may pursue the judicial remedy without the necessity of invoking and exhausting the administrative remedy.
>
> Which one of these three scenarios is applicable to a particular administrative remedy is ordinarily a question of legislative intent.
>
> While sometimes the Legislature will set forth its intent as to whether an administrative remedy is to be exclusive, or primary, or simply a fully concurrent option, most often statutes fail to specify the category in which an administrative remedy falls. Consequently, various principles have been applied by this Court to resolve the matter.
>
> Ordinarily a statutory administrative and judicial review remedy will be treated as exclusive only when the Legislature has indicated that the administrative remedy is exclusive or when there exists no other recognized alternative statutory, common law, or equitable cause of action.
>
> Despite occasional dicta in a few opinions suggesting the contrary, where neither the statutory language nor the legislative history disclose an

> intent that the administrative remedy is to be exclusive, and where there is an alternative judicial remedy under another statute or under common law or equitable principles, there is no presumption that the administrative remedy was intended to be exclusive. There is in this situation, however, a presumption that the administrative remedy is intended to be primary, and that a claimant cannot maintain the alternative judicial action without first invoking and exhausting the administrative remedy.
>
> Nonetheless, the presumption that the Legislature intended the administrative remedy to be primary is rebuttable, and other factors are pertinent. Thus, even though the legislative enactments may not specifically resolve the issue, it is important to consider any indications of legislative intent reflected in the statutory language, the statutory framework, or the legislative history.

Zappone v. Liberty Life Ins. Co., 349 Md. 45, 60–64 (1998) (footnotes omitted) (citations omitted).

Among the factors to consider in discerning whether a remedy is exclusive, primary, or concurrent are "[t]he comprehensiveness of the administrative remedy" and "the administrative agency's view of its own jurisdiction." *Id.* at 64–65. The *Zappone* Court further noted,

> An extremely significant consideration under our cases is the nature of the alternative judicial cause of action pursued by the plaintiff. Where that judicial cause of action is wholly or partially dependent upon the statutory scheme which also contains the administrative remedy, or upon the expertise of the administrative agency, the Court has usually held that the administrative remedy was intended to be primary and must first be invoked and exhausted before resort to the courts.

Id. at 65.

Applying these precepts to the instant case, we conclude that the circuit court was correct in granting the appellees' motion to dismiss, at least to the extent that appellants' claim for injunctive relief is based on an interpretation of Frederick County's zoning

regulations. Section 1-19-2.140 of the Frederick County Zoning Ordinance provides: "All questions of interpretation and enforcement shall be first presented to the Zoning Administrator and then such questions shall be presented to the Board of Appeals only on appeal from the decision of the Zoning Administrator, and recourse from the decisions of the Board of Appeals shall be to the courts as provided by law." Our review of the Zoning Ordinance persuades us that it provides a comprehensive delineation of zoning regulation in Frederick County. Given the expertise of the agency, it is logical that § 1-19-2.140 would require that "[a]ll questions of interpretation and enforcement" be "first presented to the Zoning Administrator." Here, appellants' cause of action for injunctive relief is based in part on the interpretation of provisions in the Zoning Ordinance. Specifically, appellants allege that the zoning use regulations preclude the property owner appellees—the Galants, Milkhouse Brewery, and Berrywine—from launching and landing hot air balloons on their properties. As stated in *Zappone*, where the "judicial cause of action is wholly or partially dependent upon the statutory scheme" or "upon the expertise of the administrative agency," courts have "usually held that the administrative remedy was intended to be primary and must first be invoked and exhausted before resort to the courts." *Zappone*, 349 Md. at 65. Given the comprehensiveness of zoning statutes and regulations generally, zoning cases typically require a party to exhaust administrative remedies.[7] *See*,

[7] Additionally, even where the agency and the court initially have concurrent jurisdiction over a claim, if the claim "'raises issues or relates to subject matter falling within the special expertise of an administrative agency,' courts should defer to the expertise of the agency." *Md. Comm'n on Hum. Rels. v. Downey Commc'ns, Inc.*, 110 Md. (continued)

e.g., *Prince George's Cnty. v. Ray's Used Cars*, 398 Md. 632, 646–47 (2007); *Md. Reclamation Assocs., Inc. v. Harford Cnty.*, 382 Md. 348, 363–64 (2004); *Josephson v. City of Annapolis*, 353 Md. 667, 677–78, 681 (1998). These accepted principles convince us that the administrative remedy here is primary, and therefore appellants are required to exhaust the administrative remedy of seeking the Zoning Administrator's interpretation of the relevant zoning regulations before pursuing an injunction in court on that basis. We further conclude that the zoning provisions in § 1-19-2.210(J) ("Nothing contained in this section shall prohibit or prevent the Zoning Administrator, or anyone else, from seeking other legal remedies, such as injunctions or criminal prosecution.") and § 1-19-2.230 ("The county, the County Attorney, the Board of Appeals, the Planning Commission or any property owner who would be specifically damaged by a violation may take appropriate legal action to prevent or abate a violation of this chapter, including seeking an injunction, mandamus, abatement or other appropriate legal remedies.") do not rebut the presumption that the administrative remedy was intended to be primary. [8]

App. 493, 529 (1996) (quoting *Consumer Prot. Div. v. Luskin's, Inc.*, 100 Md. App. 104, 113 (1994)).

[8] In their brief, appellees also maintain that appellants must exhaust federal administrative remedies available through the FAA. Although the circuit court rejected this argument, "it is within our province to affirm the trial court if it reached the right result for the wrong reasons." *Pope v. Bd. of Sch. Comm'rs of Balt. City*, 106 Md. App. 578, 591 (1995). Although 49 U.S.C. § 46101 provides that "[a] person may file a complaint in writing with the Secretary of Transportation . . . about a person violating [the air commerce and safety statutes]," and an injunction may follow if a violation is found, appellants have not alleged any such violation. Appellants have instead alleged various tort claims based on conduct which is not proscribed by the Federal Aviation Act or FAA regulations. *See,* (continued)

Here, appellants assert that the Zoning Administrator drafted a zoning violation notice letter to the Galants, which was never mailed. Appellants failed to further pursue the matter. Moreover, appellants never sought any interpretation of the zoning regulations or enforcement action from the Zoning Administrator as to the activities of Milkhouse Brewery or Berrywine on their respective properties. Thus, appellants have failed to exhaust administrative remedies against appellees pursuant to the Frederick County Zoning Ordinance.

In sum, the circuit court was correct in determining that, to the extent appellants seek an injunction based on violations of the Zoning Ordinance, they are required to exhaust administrative remedies available in the Code. However, appellants' "Count I, Injunctive Relief" also sought injunctive relief as a result of appellees' tortious conduct, including "invasion of privacy," "trespass," and "nuisance." As we shall explain, a plaintiff may maintain a cause of action for these torts independent of any cause of action based on a violation of the Frederick County Zoning Ordinance.

e.g., *Rogers v. Ray Gardner Flying Serv., Inc.*, 435 F.2d 1389, 1393–94 (5th Cir. 1970) ("The Federal Aviation Program regulates the licensing, inspection and registration of aircraft and airmen. It makes no provision for its application to tort liability and in fact provides that nothing in the Program shall abridge or alter the remedies now existing at common law or by statute." (quoting *Rosdail v. Western Aviation, Inc.*, 297 F. Supp. 681, 684–85 (D. Colo. 1969))). Furthermore, the Federal Aviation Act and FAA regulations do not preempt state and local laws concerning where aircraft may land or take off. *See, e.g.*, *Gustafson v. City of Lake Angelus*, 76 F.3d 778, 786 (6th Cir. 1996). Finally, appellees have failed to demonstrate that the federal regulatory scheme could afford appellants adequate remedies for the causes of action alleged in their complaint. We therefore conclude that, based on this record, the circuit court did not err in rejecting appellees' federal exhaustion argument.

"[T]he 'tort of invasion of privacy is not just one tort, but encompasses four different types of invasion tied together under one title.'" *Mitchell v. Balt. Sun Co.*, 164 Md. App. 497, 522 (2005) (quoting *McCauley v. Suls*, 123 Md. App. 179, 190 (1998)). The modality relevant to the present case is "unreasonable intrusion upon the seclusion of another," which "consists of an intentional intrusion, physical or otherwise, upon the solitude of another or his private affairs." *McCauley*, 123 Md. App. at 190 (citing Restatement (Second) of Torts § 652B (1977)).

As to trespass, it is well-established in Maryland that,

> "trespass is a tort involving 'an intentional or negligent intrusion upon or to the possessory interest in property of another.'" *Mitchell v. Baltimore Sun Co.*, 164 Md. App. 497, 508 (2005) (quoting *Ford v. Baltimore City Sheriff's Office*, 149 Md. App. 107, 129 (2002)), *cert. denied*, 390 Md. 501 (2006). "In order to prevail on a cause of action for trespass, the plaintiff must establish: (1) an interference with a possessory interest in his property; (2) through the defendant's physical act or force against that property; (3) which was executed without his consent." *Id.*

United Food & Com. Workers Int'l Union v. Wal-Mart Stores, Inc., 228 Md. App. 203, 234 (2016) (quoting *Royal Inv. Grp., LLC v. Wang*, 183 Md. App. 406, 444-45 (2008)). We are not aware of any precedent that would unequivocally absolve a landowner of liability for trespass or invasion of privacy resulting from activities occurring on his or her land simply because the land use complies with applicable zoning regulations. In other words, a landowner's activities may be fully compliant with zoning regulations, yet may constitute an actionable trespass or invasion of privacy.

The related tort of nuisance is "one of the most ancient concepts in the Anglo-American common law," and "became one of the primary tools for protecting private

landholders against 'substantial interferences' with their possession of the land." *Wietzke v. Chesapeake Conf. Ass'n*, 421 Md. 355, 373 (2011) (quoting DAVID A. THOMAS, THOMPSON ON REAL PROPERTY § 67.01, at 111 (2d ed. 2010 Supp.)). The *Wietzke* Court further explained,

> The universe of private nuisance is split into a further dichotomy, nuisances *per se* and nuisances in-fact. A nuisance *per se*, or a nuisance at law, involves the use of one's land, which is "so unreasonable," that it is deemed to constitute an actionable nuisance "at all times and under any circumstances." Such nuisances are typically found only where a particular land use is "motivated by malice toward the plaintiff landowner," is "forbidden by law," or is "flagrantly contrary to generally accepted standards of conduct."
>
> Nuisances in-fact, or nuisances *per accidens*, arise where, considering the "particular setting" and surrounding circumstances, a particular land use constitutes a nuisance even though "the conduct might not be a nuisance in another locality or at another time or under some other circumstances."

Id. at 374–75 (footnote omitted) (citations omitted) (quoting DAVID A. THOMAS, THOMPSON ON REAL PROPERTY § 67.03, at 117-24 (2d ed. 2010 Supp.)). Although in certain circumstances a zoning violation could constitute a nuisance *per se*, nuisances in-fact and other types of nuisances *per se* may exist independent of land use regulations. Indeed, appellants' nuisance claim here is premised on both the malice aspect of nuisance *per se* and the "particular setting" and "surrounding circumstances" aspects of nuisance in-fact. Thus, as with trespass and invasion of privacy, a property owner's compliance with applicable zoning regulations is not an absolute defense against a private nuisance claim.

We find *Zappone* instructive on this point. There, the Court held that because the plaintiffs' causes of action for deceit and negligence were "wholly independent of the

Insurance Code's Unfair Trade practices subtitle," the plaintiffs were not required to exhaust administrative remedies. *Zappone*, 349 Md. at 67. In so holding, the Court stated that "the expertise of the Insurance Commissioner would appear to be irrelevant to these common law causes of action." *Id.* Likewise, appellants' causes of action for invasion of privacy, trespass, and nuisance represent common law causes of action that are substantially independent of the Zoning Ordinance and the Zoning Administrator's expertise. The circuit court therefore erred in dismissing appellants' count for injunctive relief based on these common law torts.[9]

We shall therefore reverse the court's dismissal of Count I for "Injunctive Relief," and remand for further proceedings. On remand, the court, in its discretion, may consider entering a stay as to appellants' request for injunctive relief until appellants have secured an interpretation of the pertinent zoning regulations from the Zoning Administrator or Board of Appeals. *See Monarch Acad. Balt. Campus v. Balt. City Bd. of Sch. Comm'rs*, 457 Md. 1, 13 (2017) ("the appropriate action for a trial court in such an instance is generally not to dismiss the claim(s), but rather to 'stay further proceedings regarding the judicial complaint' until the party can obtain a final administrative determination as to the issue in dispute." (quoting *Carter v. Huntington Title & Escrow, LLC*, 420 Md. 605, 638 (2011))).

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY DISMISSING

[9] As previously noted, appellants have sufficiently alleged that the Galants, Milkhouse Brewery, and Berrywine have aided and abetted balloon flights conducted by Smith Ballooning and the Smiths.

COUNT I OF APPELLANTS' SECOND AMENDED COMPLAINT REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLANTS AND APPELLEES TO EACH PAY FIFTY PERCENT (50%) OF COSTS.