Circuit Court for Baltimore County
Case No. 03-C-13-012963

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 762

September Term, 2017

CLINTON BROWN *ET AL.*

v.

J&M SWEEPING, LLC

Berger,
Reed,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: April 5, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Clinton Brown, Sylvester Mitchell, Frank Blackwell, Jr., Frank Blackwell, III, and John Cannon, appellants, filed an original complaint and four amended complaints with jury demands in the Circuit Court for Baltimore County. Appellants alleged violations of the Maryland State Finance and Procurement Article (MSFPA) § 17-201, violations of the Labor and Employment Article (LEA) § 3-401 and § 3-501, violations of local and county laws, retaliation, wrongful discharge, and deceit. Appellants' essential contention was that J&M Sweeping LLC (appellee) was required to pay its workers the prevailing wage rate, failed to do so, and owed them lost wages. On May 18, 2017, at the conclusion of a three-day jury trial, the court entered judgment for appellee. Appellants timely filed this appeal and present the following questions for our review:

1. Whether the court abused its discretion when it denied [appellant's] motion to extend discovery?

2. Whether the circuit court erred when it granted [appellee's] *Motion in Limine* to exclude testimony of corporate individuals?

3. Whether the circuit court erred when it granted [appellee's] *Motion in Limine* to exclude the testimony of Marjorie Chilcoat?

4. Whether the court erred when it granted [appellee's] motion for summary judgment on the wrongful discharge claims of [appellants] John Cannon, Sylvester Mitchell, and Frank Blackwell, III.

5. Whether the court erred when it ruled that third-tier sub-subcontractors (sub-subcontractors) were not required to pay the prevailing wage on Maryland public works contracts?

6. Whether the court erred when it denied adding Julie Kestner as a defendant in this case?

7. Whether the court erred when it denied [appellants'] amendment of their complaint to add a deceit claim against [appellee]?

BACKGROUND

The facts were established by both parties through witness testimony and evidence admitted during the motions hearing and at trial. We recite here only those facts necessary for context regarding the issues before us.

A. Procedural history.

Appellants' first complaint and demand for a jury trial, filed on November 12, 2013, alleged that appellee was a "Maryland public works contracts" subcontractor mandated to comply with the prevailing wage "as set forth in Maryland State Finance and Procurement Article (MSFPA) § 17-201." Appellants asserted that they were employed by appellee, but did not receive the required pay rate or benefits for their work. Count one alleged that they were collectively damaged by appellee's failure to provide the required wages and benefits. Count two stated that as a group they were denied their lawful wages as required by LEA § 3-401 and § 3-501. In response, appellee filed a motion to dismiss count two for failure to state a claim, which the court denied. Thereafter, on October 14, 2014, both parties filed a joint motion to extend discovery, which the court granted the request.

On December 18, 2015, appellants filed an amended complaint adding four new claims. Counts three and four alleged that appellee retaliated against and wrongfully discharged appellant Blackwell, III, for filing the lawsuit. Counts five and six alleged appellee retaliated against and wrongfully discharged appellant Mitchell, for participating in the litigation.

On January 28, 2016, appellants filed a second amended complaint raising two additional issues. Counts seven and eight suggested that appellee retaliated against and wrongfully discharged appellant Cannon, for participating in the proceeding. The next day, both parties, again, submitted a request to extend discovery, which was granted by the court.

On February 29, 2016, appellants filed a third amended complaint, which included three additional claims. On July 1, 2016, appellant filed a fourth amended complaint, which corrected the numbering issues in the previous complaint[1]. Count nine stated appellee violated local and county laws in Montgomery County and Prince George's County pertaining to prevailing wages. Counts ten and eleven alleged that Julie Kestner, appellee's corporate officer, "intentionally and knowingly" reported false information to the general contractor related to appellee's payment of the prevailing wage and that appellee was responsible for the deceit.

B. Appellants' February 29, 2016 motion to extend.

Appellants filed a request to extend discovery on February 29, 2016. Their motion alleged that appellee "was not able to produce accurate records of the wage[s] paid" or a "complete listing of contractors for whom it performed services." Appellants also contended the discovery they had received contained "obviously false entries[,]" was unorganized, [and] required a tedious wage calculation process that appellants could only

[1] In the third amended complaint appellants incorrectly labeled the additional claims. Counts six and seven appeared twice even though each listing is different in content and the repeat counts were numerically in the eighth and ninth position.

complete at the end of the discovery period. As a result, appellants claimed they needed additional time.

In response, appellee submitted a motion opposing the extension, highlighting the fact that the deadline had been extended "over [sixteen] months" and arguing that the discovery was "excessive and overbroad." The trial court issued an order denying appellants' request. Appellants filed a motion for reconsideration, which appellee opposed. The trial court denied the request for reconsideration.

C. Appellee's motion to preclude substantive trial testimony from a non-party corporate witness.

On January 26, 2017, appellee filed a motion in *limine* that sought to preclude appellant from adducing "any and all substantive testimony from the records custodians or other representatives or designees" of non-party corporate entities that appellants subpoenaed. At the time appellee's motion was filed, trial was scheduled to take place on January 30, 2017. Appellants sought a continuance three days before the trial date, which was granted. The court scheduled a motions hearing for all pending matters on March 21, 2017, and re-set the trial for May 15 through May 19, 2017.

At the motions hearing on March 21, 2017, all parties presented their arguments. Appellee contended that it was extremely prejudicial for appellants to indicate six weeks after the close of discovery that they intended to call non-party witnesses because appellee did not have time "to depose these witnesses" as they were revealed the day before the January trial date. Appellants countered that they had "sixteen communications with defense counsel trying to get records" but, because of appellee's recalcitrance, appellants

issued subpoenas to the contractors who may have been in a contract with appellee. Appellants intended to call those non-parties to authenticate documents and confirm the subcontractor status of appellee, among other things. Appellants admitted they were untimely in identifying the witnesses, but claimed it was not prejudicial because they filed a motion to extend discovery and a reconsideration motion after the request was denied. Ultimately, the court found allowing appellants to call such witness would prejudice appellee because the reason for their testimony has changed. The court indicated that it was "clear" that appellants wanted to "call these folks to give substantive testimony," but that "the prejudice is that the [appellee was] hard pressed to anticipate what these folks would say."

D. Appellee's motion to exclude the testimony of Marjorie Chilcoat.

On January 23, 2017, appellee filed a motion to prevent appellants' administrative assistant, Marjorie Chilcoat, from testifying about a document appellants timely offered into evidence, arguing appellants originally identified "Mr. Seabron" as their "purported damages expert in this case." Appellee noted that appellants waited a week before the close of discovery to provide the nature of Seabron's "potential expert testimony" and claimed appellants withheld that Seabron did not have knowledge of the alleged damage calculations. On March 11, 2016, which was eleven days after the close of discovery, appellants' counsel admitted his "legal administrative assistant" prepared the "damages calculation spreadsheets," not Seabron. Appellee then moved to preclude Chilcoat from testifying pursuant to Maryland Rule 2-402(g)(1)(A) and moved to exclude the damages

document she prepared for evidence. Appellants stated that they "never considered using Chilcoat as a witness," but disclosed her as a witness once they realized she gained "material" information when preparing the document.

On March 21, 2017, both parties presented their argument and the court held the following:

> It's the prejudice that arises from the failure to alert the [appellee] that Ms. Chilcoat was going to be a witness inside of discovery … Mr. Seabron was previously disclosed as an expert, the spreadsheets were passed along, … [but] he could not answer the very questions [of] … how did these spreadsheets come to be … So, it is the denial of the opportunity to the [appellee] because discovery had closed to depose Ms. Chilcoat that, in fairness, prejudices them … we begin with the assumption that [appellee is] denied the opportunity to understand the exhibits, well, I can't let them be admitted into evidence, because then I'm letting something come in that the [appellee] will have to kind of challenge on the fly, without knowing until they cross examine Ms. Chilcoat, how the figures were arrived at … so, in effect, I'm excluding an exhibit that was timely disclosed, albeit at the last minute, for reasons that the witness who can explain them was untimely disclosed

E. Appellee's motion for summary judgment on claims for retaliation and wrongful discharge.

On May 18, 2017, after both parties rested their respective cases, appellants motioned for summary judgment, arguing the testimony and evidence elicited during the trial "established that … [Cannon, Mitchell, and Blackwell, III,] [had] been terminated unfairly and [are] entitled to judgment as to the retaliation." Appellee objected, stating that sufficient evidence was produced to have the retaliation judgement in their favor. Appellee further contended, "at a minimum, sufficient facts [were] in dispute as to why these [appellants] were not recalled for work.

After hearing argument on both sides, the court explained that there was enough evidence for the question to be submitted to the jury because of text message evidence and the parties stipulating that appellants worked "at some point between the fall of 2013 and the spring of 2014[,]" and did not work for appellee after. The court noted that this matter is about a "prevailing wage claim[,]" highlighting that a majority of the evidence "is that prevailing wages weren't paid and the proof has been about the failure … of payment." However, the court ruled that the claims failed.

In response to the evidence presented in the retaliation claims the court held:

> To make a case for those counts, each of the [appellants] must prove that the [appellants'] employer took an adverse action against the [appellants and] the [appellants'] employer's adverse action was causally connected to the [appellants'] protected activity … [T]he burden of production would then shift, … to the employer to show … or offer proof that there was a non-retaliatory reason for some adverse employment action. Upon a sufficient showing in that regard, it could be said that the burden of production would then shift back to the [appellant] to show … that the reasons proffered by the [appellee] were a pretext … But in terms of evidence in this case, I, I think the evidence is not consistent … To the extent that the [appellant] shoulders the burden to prove that the [appellants], each of them, engaged in a protected activity. In this case, that would be … filing a lawsuit … [However,] if each of the [appellants] was not employed by the [appellee,] then I don't think I need to go there I can stop there and simply say that if there is no triable issue in a light most favorable to the [appellant], no question, no evidence to contradict the opinion that these [appellants] were anything but non-employees when they filed the lawsuit. I think that's the end of it.

Ultimately, considering the evidence presented the court held "that there's a complete dearth or absence of evidence that the [appellants]" were employed by appellee. The court explained there was no paycheck or payment of benefits to show employment in the winter of 2013. However, there was evidence to prove other people were hired the following year

after failed attempts to hire the appellants.

Moreover, the court found that even assuming that appellants were employees at the time they filed the lawsuit, the "evidentiary record" does not support the claim that appellee "took any adverse action" against the appellants. The court noted that "two of five … were rehired by the company in 2014." The court further indicated that, out of those remaining, appellee admitted it "would have rehired" two of the appellants, but was unable to establish contact with them. The court noted that Blackwell, III, was not asked to return because of customers' complaints. The court granted judgment on the retaliation and wrongful discharge claims.

Assuming that the burden of production in this matter shifted to appellee, the court stated that appellee would have had the responsibility to "offer[] a non-retaliatory reason for the alleged action." The court, citing the trial testimony, noted appellee stated it awaited a response from appellant, Mitchell, but received none because he had found other employment. As a result, the court concluded the action taken by appellee in that instance was not "retaliatory." In the case of appellant, Cannon, the court noted neither party could reach the other, and concluded that the lack of communication was non-retaliatory in nature. The court found appellee's receipt of complaints against appellant, Blackwell, III, was a sufficient non-retaliatory reason from excluding him from rehire.

Additionally, the court indicated that "no evidence [was provided] to support the notion that there was employment when the alleged discharge occurred." Thus, the court held "there can be no wrongful discharge," and granted judgment for appellee on each

wrongful termination count. The court further found "that the state of the record of proof of damages is such that were the jury to pass on damages, it would be speculat[ion]" indicating that the sole evidence available was one W-2 from 2013. The court granted judgment for appellee on each of the retaliation counts.

F. The court's ruling that sub-subcontractors are exempt from the prevailing wage requirement.

On January 5, 2015, appellee filed a motion for summary judgment arguing that it could not be liable for a failure to pay prevailing wages because it often acted "as an informal sub-subcontractor without any written contract," which made it exempt from paying the prevailing wage. At a hearing, on July 23, 2015, appellants claimed that sub-subcontractors must be included as a part of the prevailing wage law to discourage companies from evading the law by creating shell companies to shield themselves from the higher wage requirement. In response, the court noted the that MSFPA § 17-214, provides that each contractor and subcontractor under a public work contract shall pay the prevailing wage." However, the "prevailing wage statute does not include the term … sub-subcontractors or lower tier subcontracts." The court held it would allow discovery to proceed, but that appellee was not "liable to the appellants under the prevailing wage act" when it worked as a sub-subcontractor on public works contracts.

During trial on May 17, 2017, the prevailing wage issue arose for the final time when appellee argued appellant "failed to present prim[a] facie proof that [appellants] were not paid prevailing wages owed to them under the Maryland Prevailing Wage law." The court found that, after viewing the evidence in a light most favorable to appellants, they

failed to make out "a prim[a] facie case of quantifiable damages, something short of rank speculation." Ultimately, the court held appellants' inability to prove damages related to this issue cancelled all the prevailing wage claims.

G. The court's denial of appellants' request to amend their complaint to add Julie Kestner as an appellee.

Pursuant to the May 21, 2014, scheduling order, both parties were required to join all additional parties by December 15, 2015 and discovery was to close on February 29, 2016. Appellants attempted to add Julie Kestner as a party to the case. As noted previously, appellants requested the discovery deadline be extended beyond the February 2016 deadline. Appellants maintained that they did not originally name Kestner as a party to the case "because the standard for establishing deceit is much higher than other tort claims." Additionally, appellants argued they did not have the evidence to support that claim until their compilation calculating wages was complete six days before the close of discovery. On March 7, 2016, the court denied appellants' request to extend the discovery date, preventing appellants from adding Kestner as a party.

H. The court's denial of appellants' request to add a deceit count against appellee.

In an order dated May 31, 2016, the court denied appellants "leave to amend" counts eight and nine in their third amended complaint. The court held count nine, "[d]eceit against J&M Sweeping, LLC," was untimely because the third amended complaint was filed on February 29, 2016 and the "deadline for adding new parties was 12/15/2015."

At trial, after considering arguments from both parties regarding appellee's motion

for judgment, the court stated that count ten, "claim for deceit against Kestner," and count eleven, claim that they were bound by the deceitful conduct of Kesnter because she calculated the wages and assigned jobs to the workers, were both dismissed.

DISCUSSION

I. The court did not abuse its discretion when it denied appellants' motion to extend discovery filed on February 29, 2016.

Appellants argue the court erred when it denied their February 29, 2016 motion to extend discovery to June 15, 2016, "without comment." Appellants contend that they "diligently pursued discovery from" appellee, but that they had to "cobble the necessary information from alternate sources." In light of appellee's alleged "failure to provide proper documents of wages paid," appellants suggest that their motion was "reasonable" and "should have been examined and evaluated by the [c]ourt." In response appellee notes that the "discovery deadline already had been extended ***three times over*** by a total of over ***[sixteen] months***."

Maryland discovery rules "'were deliberately designed to be broad and comprehensive in scope.'" *Gallagher Evelius & Jones, LLP v. Joppa Drive-Thru, Inc.*, 195 Md. App. 583, 595 (2010) (quoting *Ehrlich v. Grove,* 396 Md. 550, 560 (2007)). Discovery in this jurisdiction is intended to allow parties to "acquire accurate and useful information," "information which appears reasonably calculated to lead to the discovery of admissible evidence," and information that "aid[s] in cross-exam[ination]." *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 351 Md. 396, 405 (1998) (citing *Kelch v. Mass Transit Administration*, 287 Md. 223, 231 (1980)). However, discovery is not boundless,

and thus, "trial courts are vested with [the] reasonable, sound discretion [to] apply[] the discovery rule[s]." *Falik v. Hornage*, 413 Md. 163, 182 (2010) (internal citations and quotations omitted). As a reviewing court, we do not disturb a trial court's ruling absent an abuse of discretion. *Id*. (internal citations and quotations omitted). Additionally, "[t]he exercise of a judge's discretion is presumed to be correct" and without "an indication from the record that the trial judge misapplied … [the law], the presumption is sufficient for us to find no abuse of discretion." *Cobrand v. Adventists Healthcare, Inc.*, 149 Md. App. 431, 446 (2003) (internal citations and quotations omitted). Trial courts are not "necessarily required to explain the exercise of [their] discretion. *Kierein v. Kierein*, 115 Md. App. 448, 456 (1997).

Here, appellants submitted a lengthy motion to extend discovery at the close of the discovery deadline. Both parties had already been granted previous extensions and the court had clearly allowed for a "broad and comprehensive" discovery period. *Gallagher Evelius & Jones, LLP*, 195 Md. App. at 595. Appellants point to no factual or legal error made by the court in denying the request, but rather that the court did not provide an explanation. Considering the number of extensions previously granted, the reasons propounded by the appellants for an extension, and the lack of any showing of undue hardship or emergency, we hold the court did not abuse its discretion when it denied appellants' request to extend discovery.

II. The court did not abuse its discretion when it granted appellee's motion to preclude substantive trial testimony from non-party corporate witnesses.

Appellants assert the court abused its discretion when it barred them from eliciting testimony from corporate representatives that was "clearly laid out in documents provided to [appellee] prior to the close of discovery [as supplements to interrogatories]," and, as a result, they were "unfairly prejudiced." In opposition, appellee contends the court's limitation on appellants' non-party testimony was not an abuse of discretion, and that appellants' delayed disclosure was harmful to its position. Approximately six weeks after the close of discovery appellants indicated they were supplementing appellee's interrogatory question number one and would be calling eleven[2] "non-party corporate entities" to authenticate documents.

Our review of a trial court's ruling on untimely interrogatory responses is governed by the abuse of discretion standard. *Lone v. Montgomery County*, 85 Md. App. 477, 485 (1991). Under Maryland Rule 2-421(b):

> The party to whom the interrogatories are directed shall serve a response within [thirty] days after service of the interrogatories or within [fifteen] days after the date on which that party's initial pleading or motion is required, whichever is later.

"[I]nterrogatories are continuing in nature," and the "failure of a party to give his opponent the added information may be grounds for refusing to allow the introduction of relevant evidence." *Klein v. Weiss*, 284 Md. 36, 55–56 (1978) (internal citations and quotations omitted).

[2]At the March 2017 motions hearing, the admissibility of non-party corporate witness testimony from three individuals was litigated rather than eleven.

In our view, at the March 21, 2017 motions hearing, the court properly limited appellants to calling three non-party witnesses for authentication purposes. The court held appellee would be otherwise prejudiced because appellants' motivation for calling these individuals had changed from "that [which] was originally espoused," and that appellee would have had a difficult time "anticipat[ing]" their testimony. We agree with the trial court that appellee would have been prejudiced if the testimonies were allowed because they would not have had sufficient time to prepare. Therefore, we find the trial court did not abuse its discretion when it limited appellants' non-party corporate witness testimony.

III. The court did not abuse its discretion when it granted appellee's motion to preclude testimony and evidence from Marjorie Chilcoat.

Appellants argue the court abused its discretion when it excluded the testimony of Majorie Chilcoat because appellee was advised about the nature of her testimony "twelve days after the close of discovery." Appellants maintain they were unaware they would call Chilcoat as a witness until they realized the knowledge she acquired compiling the wage exhibit documents, was "material information which should be communicated" to appellee. Appellants allege they engaged in a "good faith effort to comply with the scheduling order," and their ability to present their case was "severely prejudiced" because she was excluded. On the other hand, appellee argues it was prejudiced because it received the "listing of wages owed" in a rushed time frame; got an untimely notification about Chilcoat's potential testimony; and conducted a deposition of Seabron on March 15, 2017, only to find out that Seabron did not participate in preparing the "listing of wages owed."

Additionally, appellee suggests appellants' untimely disclosure "constituted yet another violation of Maryland Rule 2-421(b)."

We review a trial court's decision regarding the application of discovery sanctions for abuse of discretion. *See Braxton v. Faber*, 91 Md. App. 391, 396–97 (1992) (the trial court has the sound discretion when it comes to the rules of discovery). As noted previously, Maryland Rule 2-421(b) requires that a party submit interrogatory responses "within [thirty] days after service" or "within [fifteen] days after the date on which that party's initial pleading or motion is required." Maryland Rule 2-432(a) allows a "discovering party [to] move for sanctions under Rule 2-433(a) without first obtaining an order compelling discovery," and Maryland Rule 2-433(a)(2) permits the issuing of an order that refuses to "allow the failing party" to "support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence." Thus, in conjunction, a discovering party may seek sanctions if a party fails to comply with discovery, even without filing a motion to compel.

We assess "the propriety of the imposition of sanctions" according to the "particular facts of each case." *Hossainkhail v. Gebrehiwot*, 143 Md. App. 716, 733 (2002). For example, in *Hossainkhail*, we held the court did not abuse its discretion where discovering parties "sought dismissal based on appellant's failure of discovery and failure to obey a court order." *Id.* The Court of Appeals also addressed this issue in *Attorney Grievance Com'n of Maryland v. James*, where the Court held that when discovery requests were untimely filed, just twenty days before a hearing, that the "hearing judge did not abuse his

discretion in determin[ing] that the conceded untimeliness of all of the discovery responses was an essential factor" in issuing a sanction. 385 Md. 637, 659 (2005).

Additionally, where an expert was disclosed one year after the deadline established by the scheduling order and one day before trial, the court abused its discretion by allowing the expert to testify at trial. *Naughton v. Banker*, 114 Md. App. 641, 654 (1997). In contrast, we held a trial court did not abuse its discretion when it allowed a witness, not identified in an interrogatory answer until one week before trial, to testify. *See Giant Food Inc. v. Satterfield*, 90 Md. App. 660, 670–71 (1992). As evidenced by the aforementioned cases, trial judges in Maryland are "vested with a large measure of discretion in applying sanctions for failure to adhere to discovery rules." *Klein v. Weiss*, 284 Md. 36, 56 (1978).

In this case, eleven days after the discovery deadline elapsed, appellants notified appellee that Chilcoat prepared their wage documents and would be called as a witness. This notification occurred after appellants indicated Seabron would be their expert on this issue. Appellee then filed a motion to exclude Chilcoat's testimony, and to prohibit the admission of wage documents prepared by her. On March 21, 2017, after considering argument from both parties, the court held that the untimely nature of the disclosure prejudiced appellee and that it could not be cured as appellee had not deposed Chilcoat. In addition, appellants had received three extensions and had made other last minute disclosures. The court carefully considered the arguments propounded and did not abuse its discretion in precluding Chilcoat's testimony and the wage related evidence.

IV. The trial court did not commit error when it granted appellee's motion for judgment on appellants claims for retaliation and wrongful discharge.

Appellants next argue the court erred when it found Blackwell, III, Mitchell, and Cannon were not employees and granted judgment on appellants' claims for retaliation and wrongful discharge. According to appellants, they had been called back "year after year" demonstrating a pattern of conduct and had an "expectation that they would be rehired." They also insist the jury should have had the opportunity to calculate damages based on the presentation of a 2013 W-2. In response, appellee argues the workers were not employees when the lawsuit was filed, there were "non-retaliatory reasons they were not re-hired," and that appellants "failed to present sufficient evidence to establish *prima facie* proof of damages."

"We review without deference, the trial court's grant of a motion for judgment in a civil case." *C&B Construction, Inc. v. Dashiell*, 460 Md. 272, 278 (2018) (quoting *D.C. v. Singleton*, 425 Md. 398, 406 (2012)). Such "review requires this Court to evaluate 'all evidence and reasonable evidentiary inferences, viewed in a light most favorable to [the non-moving party].'" *C&B Construction, Inc.*, 460 Md. at 279 (quoting *Thomas v. Panco Mgmt. of Maryland, LLC*, 423 Md. 387, 394 (2011)). In reviewing allegations of retaliation, "we must decide … whether the record shows a legally sufficient basis … [that would allow a] jury … [to find that the employer's] decision to take an adverse action … was made in retaliation for protected conduct." *Lockheed Martin Corp. v. Balderrama*, 227 Md. App. 476, 506 (2016).

MSFPA § 17-201(f)(1) defines an employee as "an apprentice or worker employed by a contractor or subcontractor under a public work contract." MSFPA § 17-224(g)(1) protects employees from illegal discharge by disallowing an employer to "discharge …

retaliate … against an employee regarding compensation or other terms and conditions of employment because that employee … reports or makes a complaint under this subtitle or otherwise asserts the worker's rights under this section[.]" MSFPA § 17-224(h)(1) forbids "[a] contractor or subcontractor … [from] retaliat[ing] or discriminat[ing] against an employee in violation of this section." These provisions of the Act are applicable to employees only.

In the absence of a specific statute, "public policy prohibits an employer from terminating the employment of an employee in retaliation for the employee's assertion of his or her rights." *Ruffin Hotel Corp. of Maryland, Inc. v, Gasper*, 418 Md. 594, 615–16 (2011). "In resolving a claim of retaliation when the employee does not have direct evidence of an intent to discriminate, Maryland has followed the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, U.S. 792, 93 (1973)." In a successful claim for retaliation, a plaintiff must allege the following: "[they] engaged in statutorily protected expression or activity; [they] suffered an adverse action by [their] employer; [and] t]here is a causal link between the protected activity and adverse action." *Magee v. DanSources Technical Services, Inc.*, 137 Md. App. 527, 563–64 (2001) (citing *Manikhi v. Mass Transit Admin.*, 360 Md. 333, 349 (2000)).

Once a *prima facie* retaliation case is made and the "plaintiff meets [their] threshold burden of production, the burden of production then shifts to the defendant to offer a non-retaliatory reason for the adverse employment action." *Edgewood Management Corp. v. Jackson*, 212 Md. App. 177, 200 (2013). If the defendant employer offers a non-retaliatory reason, "the burden of production shifts back to the plaintiff to show that the preferred

reasons for the employment action were a mere pretext." *Id.* (citing *Killian v. Kinzer*, 123 Md. App. 60, 68 (1998)). A plaintiff can prove that an adverse employment action was a pretext for discrimination by demonstrating to the court that "a discriminatory reason[] more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804–805 (1973)).

"The tort of wrongful discharge is [an] exception to the well-established principle that an at-will employee may be discharged by his employer for any reason, or no reason at all." *Wholey v. Sears Roebuck*, 379 Md. 38, 49 (2002). This jurisdiction does "recognize a cause of action for abusive [or wrongful] discharge … of an at will employee when the motivation for the discharge contravenes some clear matter of public policy." *Adler v. American Standard Corp.*, 291 Md. 31, 47 (1981). A plaintiff may prove a claim for wrongful discharge by demonstrating: "that the employee was discharged; that the dismissal violated some clear mandate of public policy; [and] that there is a nexus between the defendant [employer] and the decision to fire the employee. *Shapiro v. Massengill*, 105 Md. App. 743, 764 (1995) (citing *Leese v. Baltimore Co.*, 64 Md. App. 442, 468 (1985)). To be successful, a plaintiff "must demonstrate the policy in question with clarity, specificity, and authority." *Id*. at 764.

In the case at bar, the court found that the three appellants— Blackwell, III, Mitchell, and Cannon— "worked for the company in the fall of 2013" and "filed the suit between the fall of 2013 and the spring of 2014." The court heard testimony that many of the

workers had been called back over the years. However, the court noted that there was no "evidence that paychecks … persisted through the winter [during the off season]," or that the workers had a "defined date" to report back "after the winter months." The court further, indicated "no paperwork" was submitted that established an employment relationship and there were no "employment contracts." Resultantly, because they were not employees the court found the workers could not seek the protections extended to employees pursuant to MSFP § 17-224(g)(1).

When evaluating all the evidence and "evidentiary inferences" in the light most favorable to appellee, appellants did not establish their case. *C&B Construction, Inc.*, 460 Md. at 279. We agree with the trial court, appellants did not offer sufficient evidence to establish their claim that they were employees at the time the lawsuit was initiated.

The court made an alternate ruling, stating that even if the workers were employees who made a *prima facie* case for retaliation, the employer effectively asserted non-retaliatory reasons explaining why they were not rehired the following season. We agree with the trial court *arguendo*.

Appellants presented evidence that they wanted to come back to work and endured some emotional harm when they could not return to work the next season. However, appellee adduced evidence of its intent to rehire two of the men who filed a retaliation claim, but could not contact them. Moreover, the one employee appellee did not attempt to contact, was not invited to return because of issues with the quality of his work. Appellants' claims were credibly rebutted when appellee indicated the non-retaliatory reasons that led appellee to sever its relationship with Blackwell, III, Mitchell and Cannon.

V. The courts ruling on sub-subcontractors.

Appellants contend it was error for the court to rule that "third-tier subcontractors (sub-sub-contractor[s]) were not required to pay [their] workers the prevailing wage on Maryland public works jobs." Appellants suggest the "Maryland prevailing wage law is derived from the federal Davis-Bacon Act," and appellees are required to pay third tier subcontractors "the prevailing wage on State contracts … [when] required." In opposition, appellee argues the text of the MSFPA "expressly applies only to [a] contractor or subcontractor under a public work contract."

We decline to reach the issue of whether a sub-subcontractor is required to pay the prevailing wage on Maryland public works contracts. We have determined that the trial court did not err in granting appellee's motion for summary judgment on the retaliation and wrongful discharge claims because it correctly found appellants were not employed by appellee during the alleged time. As a result, we decline to review the statutory question.

VI. The court did not abuse its discretion when it denied appellants' request to amend their complaint to add Julie Kestner as a defendant.

Appellants suggest the liberal amendment of pleadings for the purpose of adding parties is supported in Maryland and the court erred in denying their request to amend their complaint to add Julie Kestner as a defendant. As support for this contention, appellants argue the main objective of Maryland's amendment and joinder rules is to "facilitate the attainment of a just, speedy and inexpensive determination of all disputes between the same parties." In response, appellee notes that appellants' attempt to add Julie Kestner was "two-and-a-half months after the December 16, 2015 [s]cheduling [o]rder deadline".

Maryland Rule 2-341(a) explicitly states that "[a] party may file an amendment to a pleading without leave of court by the date set forth in a scheduling order." However, "[a] party may file amendment to pleading after the dates set forth in section (a) only with leave of court." Md. Rule 2-341(b). "The determination to allow amendments to pleadings or to grant leave to amend pleadings is within the sound discretion of the trial judge." *Schmerling v. Injured Workers' Inc. Fund*, 368 Md. 434, 443–44 (2002) (internal citations omitted).

We hold the trial court did not abuse its discretion in this instance as discovery was extended multiple times and appellants had ample time before the close of discovery to add Kestner as a party. Again, the court had been very liberal in providing extensions and accommodating parties throughout the litigation. Its refusal to indulge appellants once again was not an abuse of discretion.

VII. The court did not abuse its discretion when it denied appellants' request to add a deceit count against appellee.

Appellants claim the court abused its discretion when it dismissed the deceit count contained in the third amended complaint because the "scheduling order did not have a deadline for amending the complaint." Appellants argue under Maryland Rule 2-341(a), a complaint can be amended until thirty "day[s] before a scheduled trial date" and that no trial date had been scheduled when they filed their amendment.

While appellants correctly argue the text of Maryland Rule 2-431(a) permits "amendment of a pleading without leave of court" within thirty days of a trial date, a trial court does not abuse its discretion by refusing to accept a timely amendment. See *Walls v.*

Bank of Glen Burnie, 135 Md. App. 229 (2000) (internal citations and quotations omitted) (finding that "a trial court should not grant leave to amend if the amendment would result in prejudice to the opposing party or undue delay.").

In the matter at hand, the court had already accepted a second amended complaint. Thus, a reasonable court could find that acceptance of additional counts in the third amended complaint would result in "prejudice" or "undue delay." *Id.* The court issued an order rejecting the amendments because they were untimely. At the close of trial on May 18, 2017, the court again addressed the deceit count and the court found that there was no basis to support appellants' claim for deceit. The untimely amendments after discovery had already been extended three times and the lack of support for appellants' deceit were enough for the court to not grant appellants amendments. Resultantly, we find the court did not abuse its discretion.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.