UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 316

September Term, 2016

O'MALLEY, MILES, NYLEN &
GILMORE, P.A.

v.

MARIA RUTH BURLEY, *et al*.

Nazarian,
Arthur,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Arthur, J.

Filed: May 2, 2017

The law firm of O'Malley, Miles, Nylen & Gilmore, P.A. ("OMNG"), brought an action against its former client, Maria Ruth Burley, for unpaid legal fees for work dating back a decade or more. The firm alleged that 12 years earlier Ms. Burley had orally agreed with one of its former partners, Isaac Marks, to defer the billing and payment for that work until after the sale of a piece of property.

At the end of a bench trial, the Circuit Court for Montgomery County entered judgment in favor of Ms. Burley. The firm appealed. Finding no error, we affirm.

FACTUAL AND PROCEDURAL HISTORY

A. The Alleged Agreement to Defer Payment

Ms. Burley retained Mr. Marks and OMNG in 2002 to represent her in the administration of an estate. The representation included the sale of a piece of real property.

During the first year of representation, the firm sent Ms. Burley monthly billing statements, but she was unable to pay the fees.

Because of Ms. Burley's inability to pay, the firm claims to have proposed a modification of the billing and payment terms of the representation in mid-2003. Under the alleged proposal, the firm would continue to provide Ms. Burley with legal services, but it would not issue new monthly billing statements, and payment would be deferred until the real property was sold.

Mr. Marks had the responsibility of communicating the proposal to Ms. Burley and notifying the firm of her response. The firm had no documentation of Ms. Burley's

assent.

Nonetheless, from 2003 to early 2012, the firm continued to render legal services to Ms. Burley. Attorneys recorded the services rendered and the hours worked, but the firm did not send Ms. Burley a single bill.

In a letter dated March 8, 2012, OMNG notified Ms. Burley of Mr. Marks's departure from the firm and of her right to have her files forwarded to him or to remain with the firm. Ms. Burley informed the firm that she wanted to continue with Mr. Marks's representation. She requested that the firm forward all of her case files to Mr. Marks and transfer any remaining balance in her escrow account.

In October 2012, the property was sold. In a letter dated May 3, 2013, the firm sought payment from Ms. Burley for the past decade of work. In this letter, the firm referred to the terms of the alleged agreement and enclosed statements for services dating back to July 2003.

The bill amounted to $274,850.64. Ms. Burley did not pay.

B. Action for Payment of Legal Fees

On February 10, 2015, the firm filed a complaint against Ms. Burley for unpaid legal fees and accrued interest, alleging that she had breached the firm's retainer agreement. The firm sought payment in the amount of $332,569.30.

Ms. Burley moved for summary judgment on two grounds: (1) that limitations barred the firm's claim; and (2) that the alleged oral agreement was unenforceable under the statute of frauds. The court denied her motion.

Thereafter, the firm amended its complaint, adding a count for equitable estoppel. Ms. Burley moved to dismiss the claim on the ground that estoppel was not an affirmative claim for relief, but a defense or a means of avoiding a defense. Although the court agreed with Ms. Burley and dismissed the claim for equitable estoppel, it permitted the firm to raise the issue of estoppel at trial.

C. Bench Trial

On March 16 and 17, 2016, the court conducted a bench trial in this matter.

OMNG did not call Mr. Marks to prove the existence of the oral agreement to defer billing and payment.[1] Nor did the firm call Ms. Burley. Instead, the firm called one of its shareholders, Fred Troll, who attempted to testify that in 2003 Mr. Marks informed his partners of Ms. Burley's agreement to the proposal. Ms. Burley objected to this testimony on hearsay grounds, and the court sustained her objection.

OMNG introduced excerpts from Ms. Burley's deposition, which evidenced her knowledge that the firm had continued to perform legal services for her after 2003 and that she expected to pay something for those services. In addition, the firm called Janice Holman, its financial accounts controller; Matthew Osnos, the chair of the firm's litigation practice; and Judge John Paul Davey, the firm's former managing partner.

Mr. Osnos and Judge Davey testified about their belief and understanding that Ms. Burley had agreed to the proposal even though there was no documentation of such an

[1] Just before trial, the firm released Mr. Marks from a subpoena, because as the firm said at oral argument, "Mr. Marks would testify that [those conversations] didn't occur."

agreement. According to Judge Davey, the firm "would continue to record . . . the hours worked, [and] record the services provided, but no new bill was generated because it made no sense to generate it based upon the understanding, until the property was sold."

On cross-examination, Mr. Osnos and Judge Davey acknowledged that they never communicated with Ms. Burley about the alleged agreement. Mr. Osnos and Judge Davey had some general awareness of the firm's representation of Ms. Burley, but had no personal knowledge of any specific details. Furthermore, although the firm had disbursed thousands of dollars to Ms. Burley while the alleged agreement was in effect, neither could explain how those disbursements came about.[2]

Judge Davey acknowledged that Ms. Burley's alleged obligations were contingent upon the sale of the property. He also acknowledged that the firm had not obtained a signed, contingent-fee agreement, as Md. Rule 19-301.5(b) appears to require. He explained that he had been unaware that Mr. Marks had failed to obtain a written agreement.

At the end of the firm's case-in-chief, Ms. Burley moved for judgment under Md. Rule 2-519(b), which permits the court, "as the trier of fact, to determine the facts and to render judgment against the plaintiff" or to "decline to render judgment until the close of

[2] It appears that in 2005 OMNG represented Ms. Burley in refinancing a loan on the real property. As a result of the refinancing, Ms. Burley was able to convert some of the equity in the property into cash. The proceeds of the new loan, net of the amount necessary to pay off the existing debt, went into an OMNG escrow account. After deducting several thousand dollars for its own legal fees in that transaction and for other charges, such as title insurance, OMNG disbursed over $60,000 to Ms. Burley.

all the evidence." The court denied her motion.

Testifying in her own defense, Ms. Burley denied that Mr. Marks had ever communicated the alleged proposal or that she had accepted it. She said that she became aware of the proposal only from the May 3, 2013, letter, in which the firm demanded payment. Because she did not receive any billing statements for nearly a decade, Ms. Burley said that she did not know of any outstanding legal fees. She added that the balance in her escrow account was constantly changing, which she did not understand. The firm did not cross-examine Ms. Burley.

After the conclusion of the trial, the court ruled in Ms. Burley's favor on two grounds. First, the court found that OMNG had failed to prove the existence of an oral agreement to defer billing and payment until the sale of the real property, which meant that limitations barred the firm's claim unless Ms. Burley was equitably estopped to deny the existence of the agreement. Second, the court found that Ms. Burley was not equitably estopped.

In finding that OMNG had failed to prove the existence of the oral agreement, the court commented that "the only two people that can say there was an agreement [were] Ms. Burley and Mr. Marks" and that not calling Mr. Marks "sp[oke] volumes." The court was "flabbergasted" that a law firm would enter into an agreement to defer billing and payment for a decade "without documenting it any way." The absence of documentation confirmed the court's conclusion that the parties had never made such an agreement.

In finding that Ms. Burley was not equitably estopped to deny the existence of the agreement, the court said that it was "absolutely unreasonable" for the firm to do $275,000 of work without informing the client on a periodic basis of what it had done and how much she owed. The court also said that it would have been inequitable to impose liability on Ms. Burley in view of the firm's failure to memorialize the alleged agreement and its failure to keep her informed about what it had done and how much she owed.

The firm filed this timely appeal.

QUESTIONS PRESENTED

The firm presents two issues on appeal, which we have reordered and rephrased as follows:[3]

1. Did the circuit court err when, on hearsay grounds, it excluded the attorneys' testimony regarding Mr. Marks's statements about Ms. Burley's alleged acceptance?

[3] The firm presented the questions as follows:

1. Did the Circuit Court err in its determination, as a matter of law, based upon essentially undisputed facts, that the "reliance" element of OMNG's equitable estoppel argument to estop Burley from asserting the technical defense of the Statute of Limitations, was not established because OMNG's reliance on the conduct of Burley was not "reasonable"?

2. Did the Circuit Court err in barring testimony, that Burley's agent (Isaac Marks, the OMNG attorney primarily involved in representing Burley) told other shareholders of OMNG that Burley had accepted OMNG's 2003 proposal, communicated to Burley by Mr. Marks, to defer both billing and payment of Burley's legal fees until Burley sold the real property which was the subject of the representations, as "double hearsay"?

2. Did the circuit court err when it concluded that Ms. Burley was not equitably estopped from asserting a statute of limitations defense because the firm's reliance on Ms. Burley's conduct was unreasonable?

For the reasons that follow, we answer both questions in the negative. Consequently, we shall affirm the circuit court's decision.

DISCUSSION

I. Hearsay

The circuit court prevented the firm's attorneys from testifying that Mr. Marks said that Ms. Burley said that she agreed to the proposal to defer billing and payment until after the sale of the real property. The court characterized that testimony as "double hearsay." *See* Md. Rule 5-805.

OMNG challenges the court's characterization. It contends that Ms. Burley's alleged statement to Mr. Marks was not hearsay at all, but a verbal act by which she manifested her acceptance of the alleged proposal. *See Garner v. State*, 414 Md. 372 (2010). Although the firm agrees that Mr. Marks's alleged report of Ms. Burley's statement was hearsay, it contends that his report to his partners falls within the exception for statements by a party-opponent's "agent or employee made during the agency or employment relationship concerning a matter within the scope of the agency or employment[.]" Md. Rule 5-803(a)(4). We agree that Ms. Burley's alleged statement to Mr. Marks was not hearsay, but we disagree that Mr. Marks's alleged statement to his partners falls within any exception to the general prohibition on hearsay.

"[H]earsay rulings are evidentiary rulings, which are typically subject to review

for abuse of discretion." *Gordon v. State*, 431 Md. 527, 534 (2013). A trial court, however, "'has no discretion to admit hearsay in the absence of a provision providing for its admissibility.'" *Id.* at 536 (quoting *Bernadyn v. State*, 390 Md. 1, 8 (2005)). To the contrary, "[h]earsay, under our rules, *must* be excluded as evidence at trial, unless it falls within an exception to the hearsay rule . . . or is 'permitted by applicable constitutional provisions or statutes.'" *Bernadyn v. State*, 390 Md. at 8 (quoting Md. Rule 5-802) (emphasis in original); *accord Gordon v. State*, 431 Md. at 535. We thus conduct a *de novo* review of whether the evidence at issue was hearsay. *Gordon v. State*, 431 Md. at 533 ("'[w]hether evidence is hearsay is an issue of law reviewed *de novo*'") (quoting *Bernadyn v. State*, 390 Md. at 8); *see also Parker v. State*, 408 Md. 428, 437 (2009).

"But not all aspects of a hearsay ruling need be purely legal," because "[a] hearsay ruling may involve several layers of analysis." *Gordon v. State*, 431 Md. at 536. In particular, when a party contends that a hearsay assertion falls within some exception to the general prohibition against hearsay, the trial court may need "to make both factual and legal findings." *Id.* For example, in *Gordon v. State*, 431 Md. at 548, the circuit court found that, in presenting his driver's license in response to a detective's request for identification, the defendant made an adoptive admission of the information on the license, including his date of birth. The Court of Appeals reviewed that "preliminary factual determination" (*id.* at 550) under the deferential standard for clear error. *See id.* at 548, 550.

"Hearsay" is defined as "a statement, other than one made by the declarant while

testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Under this definition, Ms. Burley's alleged statement was not hearsay, because it was not offered to prove the truth of the matters asserted, but to prove that she committed a verbal act that evidenced her acceptance of the firm's proposal. Verbal acts are "out-of-court statements necessary to the creation of certain types of claims, charges, and defenses . . . and are non[-]hearsay." Lynn McLain, *Maryland Evidence: State and Federal* § 801:7, at 44 (2001); *see Banks v. State*, 92 Md. App. 422, 432 (1992) ("Since the law accords the making of such statements a certain legal effect, the sincerity and reliability of the declarant is of no consequence; [and] the simple fact that such statements are made is relevant"). The verbal expression of an offer, or of the acceptance or rejection of an offer, is a standard example of a verbal act. *See Banks v. State*, 92 Md. App. at 432 (citing *Hyatt v. Romero*, 190 Md. 500, 505 (1948)). Therefore, the circuit court erred in treating Ms. Burley's alleged assent to the proposal as hearsay.

The error is nonetheless immaterial, because the court did not commit clear error in finding that Mr. Marks's reported statement, that Ms. Burley had accepted the firm's offer, was inadmissible hearsay. As recounted by the firm's witnesses, Mr. Marks's statement unquestionably was hearsay, because it was offered in evidence to prove that he said that Ms. Burley had accepted the offer. Furthermore, the court did not err in rejecting the firm's contention that the statement fell within the exception for statements made "within the scope of the agency or employment" of the agent of a "party-

opponent." Md. Rule 5-803(a)(4). Although Mr. Marks was undoubtedly empowered to act as Ms. Burley's attorney (or agent) in representing her real estate interests in transactions with third parties, the firm offered no evidence that he was empowered to act as her agent in a transaction *with his own law firm*. Indeed, in view of Mr. Marks's fiduciary obligations as an employee and co-owner of the firm, it is difficult to envision how he could have avoided a conflict of interest in representing Ms. Burley as a "party-opponent" in a transaction *with his own firm*. It makes no difference that Maryland law recognizes "'[t]he possibility of dual agency'" (*Mercy Med. Ctr., Inc. v. United Healthcare of the Mid-Atlantic, Inc*., 149 Md. App. 336, 367 (2003) (quoting *Hampton Roads Carriers, Inc. v. Boston Ins. Co*., 150 F. Supp. 338, 343 n.9 (D. Md. 1957)): dual agency requires the absence of a conflict of interest and "due authority from both principals" (*id.*), none of which was in evidence here.

In summary, the court did not err in excluding the hearsay testimony that Mr. Marks said that Ms. Burley had agreed to the firm's proposal to defer billing and payment until after the sale of her real estate. Therefore, unless Ms. Burley was equitably estopped to deny the existence of the agreement and to assert a defense of limitations, the firm's claim would fail.[4]

II. Equitable Estoppel

The circuit court rejected OMNG's contention that Ms. Burley was equitably

[4] Even if the court had erred – which it did not – we would conclude that any error was harmless, because it was unlikely to have affected the judgment below. *See Crane v. Dunn*, 382 Md. 83, 91 (2004); *see also Barksdale v. Wilkowsky*, 419 Md. 649, 660 (2011)

estopped to raise the defense of limitations because she knew that the firm was providing legal services on her behalf, but did not question why she had received no bills, did not request that the firm stop providing services (at least until Mr. Marks left), and did not inform the firm that she would not pay. In reaching its decision, the court found that because the firm failed to keep Ms. Burley informed about what it was doing and how large the bill had become, its reliance on her conduct was unreasonable. For similar reasons, the court found that it would be it would be inequitable to permit the firm to recover.

Although OMNG characterizes the estoppel ruling as an issue of law based upon "undisputed evidence," it is beyond any serious dispute that estoppel is typically a question of fact to be determined in each case. *See*, *e.g*., *Creveling v. Gov't Emps. Ins.*

(in civil cases the appellant has the burden "to show that an error caused prejudice"); *Flores v. Bell*, 398 Md. 27, 33 (2007) (an appellate court "will not reverse a lower court judgment if the error is harmless"). In view of the court's comments about Mr. Marks's conspicuous absence from the trial and about the firm's failure to document any alleged agreement, we find it exceedingly unlikely that the court would have reached a different conclusion about Ms. Burley's acceptance of the oral proposal merely because OMNG's witnesses gave self-interested, hearsay testimony to the effect that Mr. Marks said that Ms. Burley had said that she accepted it. OMNG counters that if the court had allowed the hearsay testimony, Ms. Burley would have called Mr. Marks, which would have permitted the firm to subject him to cross-examination. Yet, if the firm really thought that its interests would be materially advanced by a withering examination of Mr. Marks, nothing prevented the firm from calling him in its case. Of course, if the firm had called him, Mr. Marks would have denied that Ms. Burley had accepted the firm's proposal (*see supra* n.1), which would not have aided the firm's case. But the failure to call him at all made it just as clear that his testimony would not have assisted the firm in proving the existence of the agreement. In these circumstances, OMNG would have taken a hit whether it did or did not call Mr. Marks in its case. Consequently, it is not particularly persuasive to argue that the hearsay ruling somehow prevented the firm from eliciting whatever useful information it might have gotten from him.

Co., 376 Md. 72, 102 (2003). In our view, the court's factual findings are supported by the evidence and, hence, are not clearly erroneous.

Maryland courts frequently recite the following definition of "equitable estoppel":

> Equitable estoppel is the effect of the voluntary conduct of a party whereby he [or she] is absolutely precluded both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse and who on his part acquires some corresponding right, either of property, of contract, or of remedy.

See, *e.g.*, *Knill v. Knill*, 306 Md. 527, 534 (1986) (quoting 3 J. Pomeroy, *Equity Jurisprudence* § 804 (5th ed. 1941)).

"[E]quitable estoppel is comprised of three basic elements: 'voluntary conduct' or representation, reliance, and detriment." *Id*. at 535. "The voluntary conduct or representation of the party to be estopped must give rise to the estopping party's reliance and, in turn, result in detriment to the estopping party." *Id.* In this case, the difficulty principally concerns the element of reliance.

In declining to apply equitable estoppel in the circumstances of this case, the circuit court began by citing an attorney's obligation to keep the client reasonably informed about the status of the matter. *See* Md. Rule 19-301.4(a)(2); *see also Attorney Grievance Comm'n of Maryland v. Ross*, 428 Md. 50, 74 (2012) (concluding that an attorney violated the professional rule regarding communications with clients where he failed to provide clients with monthly billing statements, did not inform clients of his actions, or explain how much it would cost). Because OMNG did not send periodic

statements detailing the specific work that it had done, who had done the work, what rates it had charged for the work, and how much debt the client had incurred, the court reasoned that Ms. Burley was precluded from making a reasonable assessment about whether she wanted to continue with the representation, instruct the firm to do less work, object to the amount of work or the amount of the charges, or exercise her right to engage different counsel. We see no basis to second-guess the circuit court's conclusion that the firm could not reasonably rely on Ms. Burley's silence or acquiescence in its work when the firm failed to provide her with the information necessary to evaluate the work and to register any pertinent objection to the services performed or the proposed charges.

OMNG complains that the court did not focus on whether the firm reasonably relied on Ms. Burley's conduct (or more precisely, her inaction), but on whether it was unreasonable for the firm not to obtain a signed document memorializing the alleged agreement. We do not think that this is a fair reading of the court's extemporaneous, oral ruling. In explaining why it would be inequitable to estop Ms. Burley from employing the defense of limitations, the court mentioned the firm's failure to keep the client informed, as well as the failure to memorialize the alleged agreement. By contrast, in explaining why it found the firm's conduct to be unreasonable, the court dwelled, at some length, on the attorney-client relationship, an attorney's obligation to keep the client informed, and the unreasonableness of a firm claiming an entitlement to hundreds of thousands of dollars in attorneys' fees without giving the client the information necessary to evaluate and object to the reasonableness of the work performed or the fees charged.

In short, although the firm's failure to obtain a signed agreement appears to have had a bearing on the court's assessment about whether to exercise its discretion to afford equitable relief, the failure to obtain a signed agreement was not the basis for the court's conclusion that the firm had acted unreasonably.

OMNG places extensive emphasis on three reported cases: *Mohr v. Universal C.I.T. Credit Corp.*, 216 Md. 197 (1958); *Wright v. Wagner*, 182 Md. 483 (1943); and *Ganley v. G &W Ltd. Partnership*, 44 Md. App. 568, 572 (1980). The cases do not compel reversal.

Two of those fact-specific cases simply hold that the evidence there was legally sufficient to support a finding of equitable estoppel. *Mohr v. Universal C.I.T. Credit Corp.*, 216 Md. at 203, 204, 206; *Ganley v. G &W Ltd. Partnership*, 44 Md. App. at 572, 576. Those cases are completely inapposite here, as no one denies that the circuit court could have employed equitable estoppel against Ms. Burley had it found the evidence against her to be sufficiently persuasive. The court itself recognized a triable question of fact on the issue of equitable estoppel when it denied Ms. Burley's motion for judgment at the end of the plaintiff's case. Hence, to demonstrate error in this case, OMNG must do more than merely show that the court could have ruled in its favor; it must show that the court had no choice but to rule in its favor.

In *Wright v. Wagner*, 182 Md. 483, 492 (1943), the Court of Appeals appears to have held that a lower court had no choice but to conclude that a plaintiff was equitably estopped from prevailing on his claims. In that case, the Wrights had purchased a piece

of real property from Wagner in 1924 and had given him a mortgage. *Id.* at 485-86. In 1929 the Wrights conveyed the property to Belsky, subject to his agreement to pay the mortgage debt and to indemnify them from any demands by Wagner. *See id.* at 489-90. In April 1929 Wagner acknowledged the transaction in writing (*id.* at 487-88) and, over the next 11 years, looked solely to Belsky for payment. *Id.* at 488. During those 11 years, Mr. Wright dealt with Wagner on a daily basis, but Wagner made no mention of the mortgage or of the Wrights' continuing obligation on it. *Id.* at 487, 488. Meanwhile, Wagner either extended Belsky's payment obligations (*see id*. at 488) or refrained from foreclosing (*id.* at 492) without informing the Wrights. Only when Belsky defaulted, 11 years after Wagner had begun to look to Belsky alone on the debt, did he assert claims against the Wrights. *Id.* at 488, 492. On these facts, the Court of Appeals held that the "course of dealing . . . fully justified the Wrights in their belief that Wagner had ceased to look to them as his obligors subsequent to the letter of April, 1929." *Id.* at 492. Wagner was equitably estopped "to repudiate the reasonable understanding which his course of dealings created." *Id.* at 493.

In our view, *Wright v. Wagner* does not compel the conclusion that Ms. Burley was equitably estopped from raising the defense of limitations in this case. A creditor who gives every indication that he does not intend to enforce an obligation against an obligor is not exactly in the same position as a client who receives no periodic billing statements and has little basis to evaluate the services that she is receiving, but who then is told that she owes a $275,000 bill. The circuit court, therefore, did not err in rejecting

the proposition that Ms. Burley was, as a matter of law, equitably estopped from asserting the defense of limitations.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.