Circuit Court for Talbot County
Case No. 20-C-15-009032

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2403

September Term, 2017

RICHARD S. PHILLIPS, Sr., *et ux.*

v.

ROBERT HIGGINS, *et al.*

Reed,
Beachley,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: April 10, 2019

In September 2011, Richard and Kathleen Hargrove (the "Hargroves"), Robert and Teresa Higgins (the "Higginses"), Matthew and Margaret Fitzgerald (the "Fitzgeralds"), and Richard and Kay Phillips (the "Phillipses") entered into an agreement to purchase a golf course and restaurant in Easton, Maryland (the "Easton Club Facilities").[1] Unfortunately, shortly after purchasing the Easton Club Facilities, disputes arose between the Phillipses on one side, and the Hargroves, Higginses, and Fitzgeralds on the other. The parties have been involved in highly contentious litigation ever since.

Following a bench trial in the Circuit Court for Talbot County, on January 11, 2018, the court issued a Memorandum Opinion and corresponding order in an effort to resolve all pending claims between the parties. The court order: 1) awarded the Higginses $50,846.21 against the Phillipses for breach of contract; 2) awarded the Hargroves $39,577.71 against the Phillipses for breach of contract; 3) awarded the Fitzgeralds $15,000.00 in compensatory damages and $1.00 in punitive damages against Mr. Phillips for malicious prosecution; 4) entered a judgment in favor of the Higginses, Hargroves, and Fitzgeralds, and against the Phillipses, with regard to all of the Phillipses' claims against those three families; and 5) dismissed with prejudice all other claims filed in the case that were not otherwise specifically disposed of. The Phillipses timely appealed and present the following issues for our review:

[1] The Fitzgeralds were self-represented throughout the proceedings below. They initially noted and filed a cross-appeal in this case, but voluntarily dismissed that cross-appeal. The Fitzgeralds never filed an appellee brief, however, to respond to the Phillipses' allegations of error.

1. Did the [c]ourt err by failing [to] enforce the global settlement between the [Higginses], [Hargroves], and [Phillipses]?

2. Did the court err by failing to grant [the Phillipses] summary judgment as to Margaret Fitzgerald's counterclaim for malicious prosecution?

3. Did the court err in this matter by improperly limiting discovery?

4. Did the court err by allowing late answers to Request for Admissions?

5. Did the court err by ruling that posting on Facebook and emails to crowds of people did not amount to publication as required under false light?

6. Did the [c]ourt err by failing to apply the Continuing Harm Doctrine?

Perceiving no error, we affirm.

FACTS AND PROCEEDINGS

The Previous Litigation

As stated above, this case originated from the parties' purchase of the Easton Club Facilities. In order to finance the purchase of the Easton Club Facilities, the parties borrowed funds from Talbot Bank (the "Talbot Loan Obligations"). Shortly after purchasing the Easton Club Facilities, however, disputes arose between the parties, culminating in the Phillipses filing a lawsuit (the "Previous Litigation") against the Higginses, Hargroves, and Fitzgeralds.[2]

Ultimately, the Previous Litigation between the Phillipses and Higginses concluded on March 29, 2013, when the parties entered into a Settlement Agreement and Joint Tort-

[2] The Phillipses also filed claims against HFE, LLC; AJ, LLC; Tom Hanna; and Michael Rork. HFE, LLC and AJ, LLC are limited liability companies owned by the Hargroves and Higginses, respectively. Both companies were involved in the purchase of the Easton Club Facilities, but are not relevant for purposes of this appeal.

Feasor Release (the "Settlement Agreement"). The Phillipses and Hargroves entered into a similar Settlement Agreement on April 2, 2013, resolving their claims in the Previous Litigation. The Settlement Agreements articulated that the Phillipses would purchase both the Higginses' and Hargroves' ownership interests in the Easton Club Facilities for $175,000 each.

In addition to entering into separate Settlement Agreements, the Phillipses also entered into separate Membership Interest Purchase Agreements (the "Purchase Agreements") with both the Higginses and Hargroves. The Purchase Agreements acknowledged the $175,000 purchase price for each family's interest in the Easton Club Facilities, but also provided that the Phillipses

> [s]hall use their best efforts to have the [Higginses and the Hargroves] removed from liability for the Talbot Loan Obligations and to have Talbot Bank provide a written agreement that releases [the Higginses and the Hargroves] from the Talbot Loan Obligations. In the event [the Higginses and the Hargroves] are not removed from the Talbot Loan Obligations on or before March 29, 2014, [the Phillipses] shall pay to [the Higginses and the Hargroves, separately] the sum of Ten Thousand Dollars ($10,000) on March 29, 2014. To the extent [the Higginses and the Hargroves] have not been removed from the Talbot Loan Obligations thereafter, the [Phillipses] shall pay [both the Higginses and the Hargroves] Ten Thousand Dollars ($10,000) on or before March 29 of each year thereafter (the "**Anniversary Date**"). To the extent [the Higginses and the Hargroves] are removed from the Talbot Loan Obligations at a date other than the Anniversary Date, the $10,000 payment shall be apportioned based upon the number of days from March 29 when the [Higginses and Hargroves] are removed from the Talbot Loan Obligations.

Unlike the Higginses and Hargroves, the Fitzgeralds did not enter into a Settlement Agreement or Purchase Agreement with the Phillipses to resolve the Previous Litigation. Instead, it appears that the Previous Litigation between the Phillipses and Fitzgeralds

concluded on May 9, 2014 with the Phillipses being granted summary judgment against the Fitzgeralds.[3]

The Present Litigation

The seeming resolution of the dispute concerning the Easton Club Facilities was short-lived. On February 24, 2015, the Higginses and Hargroves filed separate claims in the District Court of Maryland, sitting in Talbot County, alleging that the Phillipses had not discharged their liabilities on the Talbot Loan Obligations, and therefore owed them $10,000 each, due on March 29, 2014, pursuant to the Purchase Agreements. Both complaints requested jury trials. The filing of these two claims began what we shall refer to as the "Present Litigation."

The Phillipses responded by filing a counterclaim against the Higginses and Hargroves on March 20, 2015. The Phillipses filed their Second Amended Counterclaim on August 12, 2015, and added the Fitzgeralds as third-party defendants. The seventy-page amended counterclaim contained nine counts, essentially alleging that the Higginses, Hargroves, and Fitzgeralds conspired to defame the Phillipses, and invaded the Phillipses' privacy by casting them in a false light. Additionally, the Second Amended Counterclaim alleged tortious interference with business and contract relations, breach of contract, fraudulent inducement, intentional misrepresentation, and negligent misrepresentation.

[3] The order itself states that the court granted the Phillipses' motion for summary judgment "for the reasons set forth at the hearing on May 9, 2014."

Finally, on November 12, 2015, the Fitzgeralds, as self-represented litigants, filed a counterclaim against the Phillipses, essentially alleging abuse of process, malicious prosecution, fraud, interference with business relations, breach of fiduciary duty, and breach of contract.

Following a six-day bench trial held on November 8, 9, 13, 14, 15, and 21, 2017, in the Circuit Court for Talbot County, the parties submitted proposed findings of fact and conclusions of law. On January 11, 2018, the trial court issued its Memorandum Opinion, which ruled in favor of the Higginses, Hargroves, and Fitzgeralds, and against the Phillipses. As stated above, the Phillipses timely appealed. We shall provide additional facts as necessary to resolve the issues presented.

DISCUSSION

I. The Global Settlement Agreement Between the Higginses, Hargroves, and Phillipses

The Phillipses' first allegation of error concerns the trial court's denial of their motion to enforce a "Global Settlement Agreement." Specifically, in an effort to settle all claims arising from the Present Litigation between the Higginses, Hargroves, and Phillipses, the parties' attorneys exchanged e-mails throughout 2015. Apparently, the Higginses were to receive $60,000 from their insurance company to settle the defamation claims stemming from the Phillipses' Second Amended Counterclaim. The parties contemplated using funds from the insurance company in order to reach a settlement in the Present Litigation.

On December 7, 2015, the Higginses' attorney, Alicia Stewart,[4] proposed "a global settlement amount of $50,000, of which $20,000 [would] be paid to the [Higginses] as previously agreed and $20,000 [would] be paid to the Hargroves. This [would] resolve both the [Higginses'] and the Hargroves' Complaints and [the Phillipses'] Counterclaim."[5] This offer was apparently rejected. Negotiations continued, and in an e-mail dated December 15, 2015, at 1:28 p.m., Ms. Stewart proposed a global settlement amount of $60,000, wherein $20,000 would be distributed to each of the Higginses, Hargroves, and Phillipses. That proposal was contingent on the Phillipses securing releases on behalf of the Higginses and Hargroves from liability for claims by extant and potential future creditors associated with the purchase of the Easton Club Facilities.

The Phillipses responded that same day, at 3:01 p.m., stating that they accepted the terms proposed, contingent upon the $60,000 check being deposited in the Phillips Law Firm[6] client trust account by December 21, and the $20,000 checks being issued by December 23. Additionally, the Phillipses agreed to assume responsibility for any debts owed in relation to the purchase of the Easton Club Facilities, but stipulated that the Phillipses be permitted "to negotiate a settlement" with a creditor ("TCF") rather than pay the creditor immediately. At 3:10 p.m., Ms. Stewart responded by requesting a W-9 form

[4] At oral argument, the parties clarified that the Higginses and Hargroves maintained separate counsel throughout these proceedings.

[5] Presumably, the Phillipses would receive the remaining $10,000.

[6] Mr. Phillips is an attorney who has represented himself at various points throughout this case, including at oral argument in our Court.

from the Phillipses' law firm so that the insurance company could issue a check "ASAP." The Phillipses apparently sent Ms. Stewart the requested W-9 form at 4:14 p.m.

The next day, counsel for the Hargroves, Demetrios Kaouris, sent an e-mail to the Phillipses, explaining that the Phillipses' request to receive the check by December 21 would be "logistically impossible" and that the payment logistics would need "to be more fully resolved." Additionally, Mr. Kaouris expressed concerns regarding "the TCF issue," a creditor associated with the Easton Club Facilities. On December 18, 2015, at 11:43 a.m., Mr. Kaouris sent another e-mail to the Phillipses, asking them to prepare a draft. The e-mail referenced a previous conversation, and provided that:

> the agreement must include terms that provide that the original [Settlement Agreement] remains in full force and effect and that the [Phillipses] are releasing any and all claims against the [Higginses and Hargroves] arising from the date of the original [Settlement Agreement] through the present. The [Higginses and Hargroves] are settling their claims against the [Phillipses] with respect to the payments that were due under the [Settlement Agreement] in March of 2014 and March of 2015.
>
> There are of course other terms that we need to negotiate in connection with the agreement.

No written settlement agreement was executed, however, and no payments were issued to any of the parties.

On January 5, 2016, the Phillipses filed a Motion to Enforce Settlement Agreement. In the motion, the Phillipses claimed that the communications on December 15, 2015, from 1:28 p.m. to 3:10 p.m. constituted an enforceable settlement agreement. Specifically, the Phillipses argued that Ms. Stewart accepted their terms when she requested the Phillipses to provide a W-9 form. The Phillipses further contended that Mr. Kaouris undermined the

settlement by adding new terms, including the provision that the proposed settlement would not terminate the Settlement Agreement from the Previous Litigation.

The Higginses and Hargroves responded by filing an opposition. It is true that, in their opposition, the Higginses and Hargroves initially agreed that the parties reached a settlement agreement on December 15, 2015, but they quickly walked-back that position by noting that there had been no meeting of the minds regarding whether the agreement would be in writing, and whether the new settlement agreement would nullify the Settlement Agreement from the Previous Litigation. The Higginses and Hargroves contended that the terms discussed in the e-mails on December 15 made no mention of the Settlement Agreement from the Previous Litigation, whereas the Phillipses contended that this new settlement agreement would completely supersede the Settlement Agreement from the Previous Litigation.

On February 18, 2016, the parties appeared for a hearing on the motion to enforce. Notably, at this hearing, the court received no evidence and none of the attorneys involved in the settlement negotiations testified. At the conclusion of the hearing, the court denied the Phillipses' motion to enforce, concluding that "there's been no meeting of the minds."

On appeal, the Phillipses argue that an agreement was reached on December 15, that the Higginses and Hargroves attempted to change the terms of that agreement after there had been a meeting of the minds, and that the court erred in not enforcing that agreement. The Higginses and Hargroves respond that there was no mutual assent, and accordingly, nothing for the court to enforce.

Regarding the formation of a contract, "[i]t is universally accepted that a manifestation of mutual assent is an essential prerequisite." *Cochran v. Norkunas*, 398 Md. 1, 14 (2007) (citing *Creel v. Lilly*, 354 Md. 77, 101 (1999)). "Manifestation of mutual assent includes two issues: (1) intent to be bound, and (2) definiteness of terms. Failure of parties to agree on an essential term of a contract may indicate that the mutual assent required to make a contract is lacking." *Id*. (citations omitted).

The following colloquy from the February 18, 2016 hearing demonstrates the parties' failure to agree to an essential term of the contract: the meaning of the word "global."

> THE COURT: Okay, but [the Phillipses'] position is, that the settlement agreement that you're proposing to enforce incorporates whatever dispute there was between the parties under the previous [Settlement Agreement].
>
> MR. PHILLIPS: Correct.
>
> THE COURT: And, the [Higginses'] position is, no, that previous [Settlement Agreement] still stands. [The Phillipses] still didn't, they didn't comply with that [Settlement Agreement] they didn't take [us] off the loan, they didn't pay [us] $10,000 a year and that claim is still alive. And [the Higginses' position] is, that settlement agreement that Mr. Phillips is trying to enforce today was relating to the claim of disparagement, only. . . . Okay, so . . . [the Higginses] agreed in this settlement or proposed settlement that they would drop or rather consider settle [sic] money claims that they had against Phillips up until that date but the original [Settlement Agreement] that gave rise to the original lawsuit is still in effect to the extent that any future payments arising out of that [Settlement Agreement] from Phillips . . . to Higgins is still alive.

Mr. Phillips then told the trial court,

> First, first of all, the obligation the offer that was made was for a, it's stated, a global settlement. And so I don't understand how you can say essentially the position is that the [Higginses] and the Hargroves have taken is, oh, this is a global settlement of all claims but when we get to March, 2013 [sic] we're going to be able to sue you for another $10,000. I mean the offer was we give you $60,000, we take twenty, you take twenty, you know, we each take twenty, you take twenty, you get to keep that twenty but what they're saying now is oh, but what we really intended by that is when we get to March of 2013 we can sue you again. 2016, we can sue you again and take that $10,000 and *I don't think that's what the parties intended*.

(Emphasis added).

The Phillipses construed the word "global" to mean that the proposed "global settlement agreement" would nullify the Settlement Agreement and Purchase Agreement from the Previous Litigation. The Higginses and Hargroves construed the word "global" to refer to only their current claims stemming from violations of the Settlement Agreement as well as the Phillipses' claims in their Second Amended Counterclaim, i.e., claims arising from the Present Litigation only.

Not only was it clear from argument on the motion that the parties did not agree on the meaning of an essential term, but the Phillipses failed to meet their burden of proof. In *David v. Warwell*, 86 Md. App. 306, 319-20 (1991), this Court noted that a trial court cannot enforce a settlement agreement where the court received no evidence on the matter. There, in holding that the trial court erred in granting a motion to enforce, this Court noted,

> There was no sworn testimony by anyone, nor were there any affidavits, depositions, interrogatories or anything remotely resembling evidence adduced at the motion hearing . . . . Neither appellees nor appellants were sworn. Neither party was called to testify. The attorneys involved in the settlement negotiations were not called upon to give sworn testimony. At most, the case was decided solely on the arguments of counsel.

Id. at 319. We held that "a hearing on a motion to enforce a settlement agreement, where the existence of the agreement is contested, is not a routine motions hearing. Where the agreement itself is contested, we hold that a full plenary hearing is required." *Id*. at 320. Because there was no evidence before the trial court, the proponent of the asserted agreement could not establish the existence of a settlement agreement. *Id*. at 321.

Here, the Phillipses never introduced any evidence to support their motion. Rather than present sworn testimony or other admissible evidence at the February 18, 2016 hearing, the Phillipses merely attached exhibits of the e-mails to their motion to enforce. Although Mr. Phillips filed an affidavit in support of his motion to enforce, Mr. Kaouris attached his own counter-affidavit to his opposition. Neither party attempted to introduce their affidavits into evidence at the hearing, nor did either party testify or introduce any evidence at the hearing. Indeed, Mr. Phillips conceded this much at oral argument in our Court, acknowledging, "there was no evidence at an evidentiary hearing." Our decision in *David v. Warwell* makes clear that, because the Phillipses produced no evidence in support of their motion to enforce, the trial court did not abuse its discretion nor commit legal error in denying the motion. In addition, the Phillipses failed to even prove that Ms. Stewart, the Higginses' attorney, had the authority to enter into a settlement agreement on behalf of the Hargroves when subsequent e-mails indicated that only Mr. Kaouris represented them.[7]

[7] At oral argument, Mr. Phillips stated that Mr. Kaouris sent an e-mail in early December confirming that Ms. Stewart was negotiating on behalf of the Hargroves for purposes of settlement. Having scoured the record extract, we could find no e-mail wherein Mr. Kaouris expressly stated that Ms. Stewart possessed the authority to negotiate on behalf of the Hargroves.

Id. (stating that when "there is a material dispute about the existence of a settlement agreement, or the authority of an attorney to enter a settlement agreement on behalf of his client, the trial court must, of course, conduct a plenary evidentiary hearing in order to resolve that dispute").

Although neither the parties nor the trial court addressed the lack of evidence as a basis for denying the motion to enforce, it is well settled in Maryland that "an appellate court will affirm a 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." *Pope v. Bd. of Sch. Comm'rs of Balt. City*, 106 Md. App. 578, 591 (1995) (citing *Faulkner v. American Cas. Co. of Reading, Pa.*, 85 Md. App. 595, 629 (1991)). Accordingly, we affirm the trial court's decision denying the Phillipses' Motion to Enforce Settlement Agreement.

II. Mrs. Fitzgerald's Claim for Malicious Prosecution

The second allegation of error is that the trial court erred by failing to grant Mr. Phillips summary judgment regarding Mrs. Fitzgerald's counterclaim for malicious prosecution. Mrs. Fitzgerald's claim for malicious prosecution stemmed from statements Mrs. Fitzgerald made at a deposition on December 9, 2013, during the Previous Litigation. For purposes of context, we note that in 2007, the Fitzgeralds tragically lost their son Kennedy and daughter Maggie Rose, in a major fire at the family's home. With this in mind, we provide the colloquy during the deposition that gave rise to Mrs. Fitzgerald's claim for malicious prosecution.

[MR. PHILLIPS]: Now, I'm going to draw your attention to a specific series of posts. These are all part of your Facebook posting. It's attached to Matthew's deposition as [Exhibit 21]. And I'm drawing your attention to a series of posts all made within hours of each other on August the 30th, 2013. The first is a picture of the house that you owned --

[MRS. FITZGERALD]: That's a private picture of my house that burned to the ground, and the fact that you're using that in this deposition is extremely upsetting to me.

[MR. PHILLIPS]: I'm sorry.

[MRS. FITZGERALD]: Well, I am sorry that you are stalking me. It's very upsetting that you're using a picture of my house and my son in this deposition, okay. That has nothing to do with you.

[MR. PHILLIPS]: It has everything to do with me.

[MRS. FITZGERALD]: No, it has nothing to do with this lawsuit. I am very upset that you have copied that. And I'm very upset that you're copying my private life, just for the record. That is sick.

[MR. PHILLIPS]: Peg.

[MRS. FITZGERALD]: Dick. That's sick. That is an image of my house that burned to the ground and I lost my two children in that house. And you know that. That is a photo that I happened to find, and the fact that you're putting that up here is -- that is just as low as you can possibly go. You are so goddam low, I can't believe that you're pulling this into my life.

[MR. PHILLIPS]: Let me just read you these --

[MRS. FITZGERALD]: I can't believe -- I have to take a break, I'm sorry. I can't believe that you're pulling in a picture of

my house that burned to the ground. You are so goddam sick.

(Recess taken.)

[MR. PHILLIPS]: Peg, on August the 30th, you posted a picture of your house that burned down in 2007, correct?

[MRS. FITZGERALD]: Correct.

[MR. PHILLIPS]: And above it, it says gratitude on the miles, sigh, correct?

[MRS. FITZGERALD]: Correct. I can see that. Why are you asking me that? Correct.

[MR. PHILLIPS]: Above that it doesn't say the timing here, but my recollection is it was a matter of an hour or less, you posted a picture of Kennedy on a route . . . I assume somewhere in South America in the Amazon?

[MRS. FITZGERALD]: I don't know where that was taken to be honest.

[MR. PHILLIPS]: And it says a damn fine young man, correct?

[MRS. FITZGERALD]: That's correct.

[MR. PHILLIPS]: Above that, you posted a video which you described as saying that a 1,000-mile journey starts with one step, correct?

[MRS. FITZGERALD]: Correct.

[MR. PHILLIPS]: And then you posted your updated seeking justice logo with Happy Labor Day, correct?

[MRS. FITZGERALD]: Correct.

[MR. PHILLIPS]: So tell me what is the point of the juxtaposition of this series of postings together with the seeking justice logo?

[MRS. FITZGERALD]: I will tell you, Dick. You are incredibly paranoid. I was cleaning up my computer, okay. My house burned down in 2007. I lost everything, including images of my house, including images of my fine young son Kennedy, okay. I was cleaning up my computer at work, and I found this buried into my computer, and I said holy shit, there's my goddam house that burned down and there's my fine young man Kennedy, my son. What are you doing?

[MR. PHILLIPS]: I'm looking at a calendar.

[MRS. FITZGERALD]: Okay.

[MR. PHILLIPS]: Go ahead.

[MRS. FITZGERALD]: So that's what I did. I found an image of my house that burned to the ground and I lost my two children. I found an image of my son. And I posted them on Facebook because the Fitzgerald family, for the last 20 years, we correspond by Facebook, we used to have our own website called the Fitzgerald website. That's how our entire family, which is enormous, there's 26 grandchildren under the age of eight, that's how we communicate. We have a very large family. This was Happy Labor Day, I'm still seeking justice. I am still seeking justice. There was no plan or juxtaposition of my house and my son. And for you to assume that I sit there and think oh, how could I get Dick and Kay, I don't do that, okay. When I make these posts, I do them like that, it takes two minutes. I do not belabor this. I do not discuss it. Matthew [Mr. Fitzgerald] has nothing to do with it. No one has nothing to do with it. It's the grander scale of seeking justice. Seeking justice other places than in this area. Okay, it's not just seeking justice for you. Every post I make is different. I'm an artist. I express artistically. There was absolutely no reason to post that house except that I found the image of

my house that burned to the ground. And for you to bring that up is sick, just for the record.

[MR. PHILLIPS]: I hear you.

[MRS. FITZGERALD]: Wait until you lose Beau and Betsy [the Phillipses' children] are dead and your house burns to the ground. And I take a picture of you and say Dick, tell me the juxtaposition of that picture. I mean can you see how upset I am? I'm shaking, I'm shaking. To lose your two children, then have you and Kay sit there and bring that up is sick.

[MR. PHILLIPS]: In the preceding pages --

[MRS. FITZGERALD]: My beautiful children.

[MR. PHILLIPS]: Starts back. And the record should reflect that her voice is raised.

[MRS. FITZGERALD]: Yes. I am very upset. My voice is raised. I'm thinking of the death of my two children, and I'm thinking of how you are bringing the death of my two children and me losing every single thing I had except for a pair of shorts and a shirt, including the images that I put on my Facebook for my greater, larger family. And you're trying to bring that into this lawsuit. I am very upset with that. My voice is raised. I'll agree to that. I am shaking. Look at my hands.

[MR. PHILLIPS]: I see you. I'm very sorry --

[MRS. FITZGERALD]: Wait until you have your children die.

[MR. PHILLIPS]: Well, let me ask you something. You don't mean that as a threat?

[MRS. FITZGERALD]: I don't mean that as a threat, of course. I would not wish that upon anybody. That was the most horrific thing for anyone to ever experience. And for you to bring it up and keep referring to it is just really upsetting to me.

[MR. PHILLIPS]: Peggy, I am simply looking at --

[MRS. FITZGERALD]: My Facebook and stalking me. . . .

[MR. PHILLIPS]: And what you have posted.

[MRS. FITZGERALD]: You're stalking me.

[MR. PHILLIPS]: I am not stalking you, Peg.

[MRS. FITZGERALD]: Yes, you are.

[MR. PHILLIPS]: People give me this stuff.

[MRS. FITZGERALD]: This is my private life. If I post that I don't like Kleenex, I don't like it. . . . I'm sorry, I'm just very upset.

[MR. PHILLIPS]: Then don't put it on Facebook anymore. If it's private, don't put it on Facebook.

[MRS. FITZGERALD]: It's my life.[8]

The next day, on December 10, 2013, Mr. Phillips went to the District Court in Talbot County and submitted an Application for Statement of Charges wherein he described the deposition colloquy reprinted above. As a result, the District Court Commissioner issued an arrest warrant for Mrs. Fitzgerald for threat of arson. Consequently, Mrs. Fitzgerald was arrested, but the State's Attorney ultimately chose not to proceed and *nol prossed* the charge.

[8] We note that the record extract does not contain the original transcript of this deposition, and neither party provided the entire colloquy above in either of their supplemental materials—the Phillipses' supplemental extract or the Higginses' and Hargroves' appendix. Instead, we provide the Phillipses' recitation of the transcript as set forth in their memorandum in support of their proposed findings of fact and conclusions of law in the circuit court.

In the Fitzgeralds' countercomplaint in the Present Litigation, Mrs. Fitzgerald alleged that Mr. Phillips maliciously prosecuted her by obtaining criminal charges based on the December 9, 2013 deposition. Mr. Phillips moved for summary judgment, and in an order dated December 21, 2016, the circuit court denied Mr. Phillips's motion. As noted, Mr. Phillips challenges the court's denial of his summary judgment motion.

Regarding the standard for summary judgment,

> A trial court may "enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law."

Fischbach v. Fischbach, 187 Md. App. 61, 75 (2009) (quoting Md. Rule 2-501(f)). Even when there is no dispute of material fact, a trial court may exercise its discretion to deny a motion for summary judgment. This Court has noted that,

> Although a trial court's decision to grant a motion for summary judgment is subject to *de novo* review on appeal, a trial court has discretionary authority to *deny* a motion for summary judgment in favor of a full hearing on the merits, even when the moving party "has met the technical requirements of summary judgment."

Id. (quoting *Dashiell v. Meeks*, 396 Md. 149, 164-65 (2006)). In *Dashiell*, the Court of Appeals stated that,

> [O]rdinarily no party is entitled to a summary judgment as a matter of law. It is within the discretion of the judge hearing the motion, if he finds no uncontroverted material facts, to grant summary judgment or to require a trial on the merits. It is not reversible error for him to deny the motion and require a trial. As indicated, a trial court may even exercise its discretionary power to deny a motion for summary judgment when the moving party has met the technical requirements of summary judgment.

Id. at 164-65 (footnote, internal citations, and quotation marks omitted).

At the outset, we note that in this contentious and complex litigation involving multiple claims between the parties, we see no abuse of discretion by the trial court in denying summary judgment "in favor of a full hearing on the merits." *Fischbach*, 187 Md. App. at 75. Even if we put aside the trial court's broad discretion in denying summary judgment, we would still affirm the trial court's denial of Mr. Phillips's motion. We explain.

To succeed on a claim for malicious prosecution, a plaintiff must prove the following elements:

1) the defendant instituted a criminal proceeding against the plaintiff;

2) the criminal proceeding was resolved in the plaintiff's favor;

3) the defendant did not have probable cause to institute the proceeding; and

4) the defendant acted with malice or a primary purpose other [than] bringing the plaintiff to justice.

Okwa v. Harper, 360 Md. 161, 183 (2000). Mr. Phillips does not dispute that the first two elements were met. Instead, Mr. Phillips appears to argue that the circuit court erred in denying his motion because Mrs. Fitzgerald could not, as a matter of law, prove the third element—that Mr. Phillips did not have probable cause to institute the proceeding. From what we can glean from his brief, Mr. Phillips seems to claim that he did have probable cause to institute the proceeding because, prior to submitting the Application for Statement of Charges, Mr. Phillips "consulted with Counsel to get an independent evaluation of whether it was appropriate to see the Commissioner. Counsel Cecilia Lavrin Esq. offered an affidavit explaining the facts she was told and the conclusions she arrived at in advising

Mr. Phillips about what was appropriate." According to Mr. Phillips, Ms. Lavrin's affidavit required the trial court to grant him summary judgment. We disagree.

In his brief, Mr. Phillips correctly notes that,

> If a person who is contemplating the institution of a criminal proceeding obtains the advice of counsel learned in the law and acts thereon, he is protected not only because the adviser can view the facts calmly and dispassionately, but also because he has the ability to judge the facts in their legal bearings. Proof that he placed the facts fully and fairly before his counsel and acted upon [her] advice is a good defense to the charge of want of probable cause.

Kennedy v. Crouch, 191 Md. 580, 587 (1948). In Mr. Phillips's view, Ms. Lavrin's affidavit shielded Mr. Phillips from any malicious prosecution claim. Because Ms. Lavrin's affidavit was not in the form required by the Maryland Rules, however, the trial court was within its discretion to ignore it and deny the motion for summary judgment.

Rule 2-501(c) provides that, "An affidavit supporting or opposing a motion for summary judgment shall be made upon personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." Maryland courts have strictly enforced the requirement that the affidavit be made with personal knowledge. *See Cty. Comm'rs v. J. Roland Dashiell & Sons, Inc.*, 358 Md. 83, 102 (2000) (quoting *A.J. Decoster Co. v. Westinghouse Elec. Corp.*, 333 Md. 245, 263 (1994) ("We have long held that to be sufficient to sustain a motion for summary judgment, an affidavit must contain language that it is made on personal knowledge.")).

Ms. Lavrin's affidavit simply provided that she was "over the age of 18 and competent to testify about the matters contained herein[.]" She did not affirm that her

affidavit was made upon personal knowledge, as required by the Rule and settled Maryland case law. On this basis alone, the trial court could have correctly disregarded the affidavit and denied Mr. Phillips's motion for summary judgment.

Mr. Phillips also asserts that because his statements to the District Court Commissioner were truthful, he could not be liable for malicious prosecution. Whether Mr. Phillips's statements were truthful, however, is typically an issue reserved for determination by the fact-finder, in this case, the trial judge.

As stated above, in this contentious and complex litigation involving multiple claims between the parties, we discern no abuse of discretion in the trial court's decision denying the motion for summary judgment "in favor of a full hearing on the merits." *Id*.[9]

III. Protective Order

The Phillipses' third argument on appeal is that the trial court erred in granting a protective order which limited their discovery requests in the Present Litigation. During the discovery phase of the Present Litigation, the Phillipses propounded discovery to the Higginses and Hargroves, seeking documents that predated the signing of the two Settlement Agreements that resolved the Previous Litigation—March 29, 2013. On April 13, 2015, the Higginses and Hargroves sought protective orders, requesting the court to

[9] After a full hearing on the merits, the court found Mr. Phillips liable for malicious prosecution and awarded Mrs. Fitzgerald $15,000 in compensatory damages and $1 in punitive damages.

prohibit discovery of information prior to March 29, 2013.[10] The Phillipses opposed those motions, arguing that the Higginses and Hargroves were in breach of the non-disparagement clauses of the Settlement Agreements, justifying the discovery requests which predated the Settlement Agreements. At a motions hearing on September 10, 2015, the court noted that the Settlement Agreements were "very broad" and determined that "any matters that go beyond the date of the [Settlement Agreements] are irrelevant" to the Present Litigation. Accordingly, the court limited the scope of discovery to matters following the execution of the Settlement Agreements.

On appeal, the Phillipses assert that, because they alleged a civil conspiracy in their Second Amended Counterclaim, any evidence that predated the Settlement Agreements would be relevant to prove those claims. Specifically, the Phillipses contend that "communications prior to the settlement could potentially be admissible to show that the [Higginses] and Hargroves entered into the Conspiracy and never withdrew from the Conspiracy." As we shall explain, the circuit court did not err in granting the Higginses' and Hargroves' motions for protective orders.

Generally, appellate courts

> review a discovery order under "the abuse of discretion standard and will only conclude that the trial court abused its discretion where no reasonable person would take the view adopted by the [trial] court [] . . . or when the court acts without reference to any guiding principles, and the ruling under

[10] Although the Higginses entered into their Settlement Agreement on March 29, 2013, the Hargroves did not enter into their Settlement Agreement until April 2, 2013. Neither the parties nor the circuit court appeared to be concerned with this discrepancy for purposes of the protective order.

> consideration is clearly against the logic and effect of facts and inferences before the court[] . . . or when the ruling is violative of fact and logic."

Indep. Newspapers, Inc. v. Brodie, 407 Md. 415, 440 (2009) (quoting *Beyond Sys., Inc. v. Realtime Gaming Holding Co., LLC*, 388 Md. 1, 28 (2005)).

Here both Settlement Agreements contain "Mutual Releases" clauses which provide, in relevant part,

> (a) Release by the [Phillipses]. Other than for enforcement of this Agreement and the Purchase Agreement, and immediately upon the signing of this Agreement by the Parties, [the Phillipses] completely release and forever discharge, irrevocably and unconditionally, [the Higginses and Hargroves], from any and all claims, charges, complaints, rights, demands, actions, liabilities, promises, agreements, controversies, damages, obligations, causes of actions, suits, counterclaims, recoupments, contracts, costs, losses, debts and expenses (including reasonable attorneys' fees and costs actually incurred) or any other claims of any nature whatsoever, known or unknown, suspected or unsuspected, and whether presently ascertainable or not, whether based in tort, including but not limited to, a negligent or intentional tort, contract (implied, oral or written), or any other theory of recovery under federal, state or local law and whether for compensatory damages, punitive damages or equitable relief, which the [Phillipses] had or may have had against the [Higginses and Hargroves], including the claims asserted in or that could have been asserted in the [Previous Litigation], pursuant to this Joint Tort-feasor Release. Nothing herein shall release any person or entity not a party to this Agreement.

This unequivocal language indicates that, by signing the Settlement Agreements, the Phillipses irrevocably discharged any potential claims against the Higginses or Hargroves that existed as of the signing of the Settlement Agreements. Accordingly, the court did not abuse its discretion in precluding discovery related to claims that, by their definition in the Settlement Agreement, were unequivocally resolved.

IV. Late Answer to Request for Admissions

The Phillipses' fourth allegation of error is that the trial court improperly accepted the Fitzgeralds' late responses to requests for admissions. Initially, we note that nowhere in the argument section of their briefs do the Phillipses cite to the record extract to direct us to the applicable motions or the trial court's resolution of this issue. On this basis alone, ordinarily we could dismiss the argument because "[w]e cannot be expected to delve through the record to unearth factual support favorable to [the] appellant." *Rollins v. Capital Plaza Assocs., L.P.*, 181 Md. App. 188, 201 (2008).

Through our own efforts, however, we obtained all of the relevant motions and the trial court's order regarding this discovery issue. In an order dated July 31, 2017, the circuit court found that the Phillipses "sustained some prejudice as a result of an untimely filing by [Mrs.] Fitzgerald." The court concluded ultimately, however, that the Phillipses were not prejudiced by Mr. Fitzgerald's untimely responses. As to Mrs. Fitzgerald, the court ordered her to provide supplemental responses to the requests for admissions.

Maryland Rule 2-424(d) provides, in relevant part, that,

> Any matter admitted under this Rule is conclusively established unless the court on motion permits withdrawal or amendment. The court may permit withdrawal or amendment if the court finds that it would assist the presentation of the merits of the action and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining the action or defense on the merits.

We review the court's decision regarding an untimely response to a request for admissions for an abuse of discretion. *Wilson v. John Crane, Inc.*, 385 Md. 185, 198 (2005). We confirmed the trial court's broad discretion in *Gonzales v. Boas*:

> [A]s established by the permissive language throughout Rule 2-424, the [circuit] court has a great deal of discretion in deciding how to handle the situation when an untimely or insufficient response to a request for admission is filed. Under our standard of review, we shall not disturb such decisions, absent a showing of abuse of discretion. An abuse of discretion is present where no reasonable person would take the view adopted by the [trial] court. Thus, where a trial court's ruling is reasonable, even if we believe it might have gone the other way, we will not disturb it on appeal.

162 Md. App. 344, 357 (2005) (internal citations and quotation marks omitted).

Additionally, we note the presumption that "[t]he exercise of a judge's discretion is presumed to be correct, he is presumed to know the law, and is presumed to have performed his duties properly." *Cobrand v. Adventist Healthcare, Inc.*, 149 Md. App. 431, 445 (2003) (quotation marks omitted) (quoting *Lapides v. Lapides*, 50 Md. App. 248, 252 (1981)). "Absent an indication from the record that the trial judge misapplied or misstated the applicable legal principles, the presumption is sufficient for us to find no abuse of discretion." *Id*. Furthermore, a judge "is not required to set out in intimate detail each and every step in his or her thought process." *Id*. (quoting *Kirsner v. Edelmann*, 65 Md. App. 185, 196 n.9 (1985)). Here, the court's order shows that the court correctly considered the requirements of Rule 2-424(d). There was no clear misapplication or misstatement of law, and accordingly, there was no abuse of the court's broad discretion.

V. False Light

The Phillipses next argue that the trial court erred in rejecting their claims for false light invasion of privacy against the Higginses, Hargroves, and Fitzgeralds. As stated above, in their Second Amended Counterclaim, the Phillipses alleged that the Higginses, Hargroves, and Fitzgeralds cast the Phillipses in a false light through various e-mails and

Facebook posts. Rejecting the claims as applied to the Higginses and Hargroves, the trial court found that

> none of these "publications" satisfy the element of publicity, which is required to prove a false light claim, because they were only communicated to a small number of people, or were simply opinions or were privileged. Also, the [Phillipses] did not present credible evidence to show that any of the enumerated statements were false and thus have failed to meet their burden of proof.

(Citation omitted). Regarding Mr. Fitzgerald, the trial court found that he "was not involved in the Facebook comments" and accordingly entered judgment in his favor. As to the claims against Mrs. Fitzgerald, the trial court ruled as follows:

> The [Phillipses'] case against Mrs. Fitzgerald is rendered more complicated because of the Facebook entries, the pursuit of a [p]eace order and criminal proceedings and the collateral effect the actions had on the community in which the parties' [sic] resided. Even if the [c]ourt concluded that [Mrs. Fitzgerald's] Facebook actions are evidence of any of the counts against the Fitzgeralds, the [Phillipses'] claims would fail. Succinctly, the [Phillipses] claim damages to their law practice, the business at the golf club, the loss of home and loss of office building were caused by [Mrs. Fitzgerald's] actions. The [c]ourt does not find that to be the case. The damages that the [Phillipses] sustained were self-inflicted.
>
> The [Phillipses] initiated a multi-million dollar lawsuit against the [Higginses], the Hargroves, and the Fitzgeralds in a close community. Mr. Phillips alienated the members of the community surrounding the golf course and caused Mrs. Fitzgerald to be arrested on the night of the Hospice Christmas Party, which was attended by several hundred people. It is Mr. Phillips' actions that caused the golf course to lose customers and his law firm to lose clients, not the Facebook postings or emails or communications from Mrs. Fitzgerald.

On appeal, the Phillipses argue that the trial court erred because Mrs. Fitzgerald's Facebook posts constituted publication for purposes of false light invasion of privacy.

Additionally, the Phillipses argue that the contents of e-mails Mrs. Fitzgerald and Mr. Hargrove sent contained false statements which cast them in a false light.

This Court has provided the following definition of the tort of false light invasion of privacy:

> [G]iving publicity to a matter concerning another that places the other before the public in a false light . . . if (a) the false light in which the other person was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Lindenmuth v. McCreer, 233 Md. App. 343, 367 (2017) (quoting *Bagwell v. Peninsula Reg'l Med. Ctr.*, 106 Md. App. 470, 513-14 (1995)). Additionally, we note that "[a]n allegation of false light must meet the same legal standards as an allegation of defamation." *Piscatelli v. Van Smith*, 424 Md. 294, 306 (2012) (citing *Harnish v. Herald-Mail Co.*, 264 Md. 326, 337 (1972)). To establish defamation, a party must prove "(1) that the defendant made a defamatory statement to a third person, (2) that the statement was false, (3) that the defendant was legally at fault in making the statement, and (4) that the plaintiff thereby suffered harm." *Id*.

We first address the Phillipses' argument that the Facebook posts and e-mails constituted publication for purposes of their false light claim. In their brief, the Phillipses claim, without citation to the record, transcript, or case law, that Mrs. Fitzgerald's Facebook posts yielded "809,400 exposures" for purposes of establishing "publication"

under false light.[11] On this basis alone, we could reject the Phillipses' assertion that the court erred regarding the publication element. *Rollins*, 181 Md. App. at 202 (stating that it is not this Court's obligation to seek out the law in support of a party's position). In fact, the only legal support the Phillipses provide in this argument section of their brief is a passing reference to *Sublet v. State*, 442 Md. 632 (2015), a case which the Phillipses claim "explores the different pieces of Facebook including how it used [sic] and what the different elements of it are." *Sublet*, however, is a case involving the evidentiary authentication and admissibility of Facebook posts. *Id*. at 658. Put simply, *Sublet*, a criminal case, provides no support for the Phillipses' argument concerning the "publicity" element of a claim for false light invasion of privacy. The Phillipses have provided neither a reference to the extract nor to any law that supports their argument that the Facebook posts and e-mails in this case were sufficient to constitute "publication" as prescribed by false light invasion of privacy.

Even if we were to assume that the trial court erred in its analysis of false light "publication," we would still affirm. In their briefs, the Phillipses never disputed the trial court's findings that the Phillipses' damages in this case were "self-inflicted" and that "it [was] Mr. Phillips' actions that caused the golf course to lose customers and his law firm

[11] To be clear, the Phillipses did provide some references to the extract in this argument section. Not once, however, did the Phillipses cite to the extract to support their calculation that Mrs. Fitzgerald's Facebook posts constituted "809,400 exposures"—a figure the Phillipses rely on to claim that they proved the "publication" element of their false light claim.

to lose clients, not the Facebook postings or emails or communications." Because damages are a requisite element in defamation and false light invasion of privacy claims, *Piscatelli*, 424 Md. at 306, and because the Phillipses do not even contest the trial court's determination that they failed to prove damages, we will not find trial court error where none was alleged.[12]

VI. Continuing Harm Doctrine

Finally, the Phillipses appear to argue that the trial court erred by failing to apply the "continuing harm doctrine" to their case. As best we can tell, the Phillipses argue that the trial court erred in disregarding certain defamatory statements because the continuing harm doctrine should have tolled the running of the statute of limitations.[13] Our Court has explained that the "continuing harm doctrine"

> tolls the statute of limitations in cases where there are continuous violations. Under this theory, violations that are continuing in nature are not barred by the statute of limitations merely because one or more of them occurred earlier in time. . . . "[C]laims that are in the nature of a 'continuous tort,' such as nuisance, can extend the period of limitations due to their new occurrences over time [.]" Continuing violations that qualify under this theory are continuing unlawful acts, for example, a monthly over-charge of rent, not merely the continuing effects of a single earlier act. [The] "'continuing tort

[12] At oral argument, Mr. Phillips acknowledged that his brief failed to contest the court's decision regarding damages, but nonetheless claimed that the trial court erred on this point. Maryland law is clear that appellate courts do not address arguments raised by a party for the first time at oral argument. *Uninsured Emp'rs' Fund v. Danner*, 388 Md. 649, 664 n.15 (2005).

[13] The Phillipses' argument regarding the continuing harm doctrine is particularly challenging to comprehend. Generally, "[A]rguments not presented in a brief or not presented with particularity will not be considered on appeal." *Diallo v. State*, 413 Md. 678, 692-3 (2010) (quoting *Klauenberg v. State*, 355 Md. 528, 552 (1999)). Nevertheless, we shall address this argument to the extent that we can decipher it.

> doctrine' requires that a tortious act—not simply the continuing ill effects of prior tortious acts—fall within the limitation period[."]

Bacon v. Avery, 203 Md. App. 606, 655-56 (2012) (quoting *MacBride v. Pishvaian*, 402 Md. 572, 584 (2007)). Our review of the trial court's opinion shows that it only applied the statute of limitations to the Phillipses' defamation claims set forth in the Second Amended Counterclaim when it stated: "In Maryland, [d]efamation actions are governed by a one-year statute of limitations. Any alleged defamatory statements made before January 21, 2014, are not actionable because the statutory period had ceased." In other words, the trial court expressly declined to consider any statements made prior to January 21, 2014, for purposes of the Phillipses' defamation claims.

In this section of their brief, the Phillipses identify three instances of potential defamatory statements: 1) a Facebook post Mr. Higgins shared on July 17, 2014; 2) Mrs. Fitzgerald's Facebook posts on July 17, 2014; and 3) "a letter dated August 22, 2014" from Mrs. Fitzgerald. Significantly, all three of these alleged defamatory statements were made *after* January 21, 2014. In light of the court's ruling that any alleged defamatory statements after January 21, 2014 were not barred by the statute of limitations, the court presumably considered all of the statements articulated in the Phillipses' brief. In short, the continuing harm doctrine was irrelevant to the July 17 and August 22, 2014 statements that the court held were within the one-year statute of limitations for defamation claims. Accordingly, the Phillipses fail to identify any cognizable harm.

To the extent the Phillipses argue that those same statements should not have been excluded for purposes of their false light invasion of privacy claims, or their civil

conspiracy claims, we note that nothing in the trial court's opinion indicates that those statements were not considered vis-à-vis those claims. Additionally, as discussed in Section V above, the trial court found that the Phillipses failed to prove any damages in their false light and civil conspiracy claims. Instead, the trial court cogently rejected all of the Phillipses' claims for damages in all of their claims in this case when it concluded:

> The damages that the [Phillipses] sustained were self-inflicted.
>
> The [Phillipses] initiated a multi-million dollar lawsuit against the [Higginses], the Hargroves, and the Fitzgeralds in a close community. Mr. Phillips alienated the members of the community surrounding the golf course and caused Mrs. Fitzgerald to be arrested on the night of the Hospice Christmas Party, which was attended by several hundred people. It is Mr. Phillips' actions that caused the golf course to lose customers and his law firm to lose clients, not the Facebook postings or emails or communications.

We perceive no error.

JUDGMENT OF THE CIRCUIT COURT FOR TALBOT COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.