Circuit Court for Carroll County
Case No. 06-C-17-073314

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 730

September Term, 2019

WILSON HOMES, INC. and
CHRISTOPHER WILSON

v.

CHRISTOPHER and SUZEESHA PUTMAN

Friedman,
Gould,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

On Motion for Reconsideration

Filed: November 2, 2020

*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.

This case involves a contract to build a custom home. We are asked to review the circuit court's directing a verdict on liability and the striking of the counterclaim. On April 12, 2017, appellees, Christopher and Suzeesha Putman [hereinafter "the Putmans"], filed suit against appellant, Wilson Homes, Inc. and Christopher Wilson [hereinafter "Wilson"], asserting a breach of contract claim, a Consumer Protection Act ("CPA") claim under §§ 13-301 through 13-501 of the Md. Ann. Code Commercial Law Article ("CL") a claim predicated on violations of the Maryland's Custom Home Protection Act ("CHPA"), § 10-501, et seq., of the Md. Ann. Code Real Property Article ("RP"), and other causes of action. Wilson answered and then counterclaimed for breach of contract and *quantum meruit*. The Putmans moved to dismiss the counterclaim, arguing that the dismissal of Wilson's mechanics lien was *res judicata*. The circuit court denied the motion, the Putmans answered the counterclaim and the case went to trial. On the sixth day of trial, the judge learned that the defense did not turn over a manila folder containing notes. After discussion, the circuit court ultimately directed a verdict on liability against Wilson and struck the counterclaim. The jury returned a verdict in the amount of $170,000. Wilson filed this timely appeal.

Questions Presented

1) Did the circuit court abuse its discretion by imposing the ultimate sanction of default and dismissal, without finding willfulness, taking evidence of what the non-produced document contained, or allowing a brief recess to retrieve the document?

2) Did legally sufficient evidence support the $170,000 damage award?

3) Did legally sufficient evidence support the jury's finding that [the Putmans'] contract damages included injury resulting from statutory violations?

4) Was it clear error to award more fees than [the Putmans] claimed and refuse to apportion these fees between the statutory and common law claims?

There are two separate and distinct issues raised by the cross-appeal:

1) Did the Court err in granting judgment on the fraud count and not allowing punitive damages to be submitted to the jury?

2) Did the Court err in not holding that the defendant's failure to deny the factual averments resulted in these matters being admitted under Rule 2-323 (e)?

For the reasons that follow, we answer the first question in the affirmative and, therefore, reverse the judgment and remand to the circuit court for further proceedings consistent with this opinion. Accordingly, we need not reach the remaining questions or those raised in the cross-appeal and leave those to be considered in proceedings below.

Factual and Procedural Background

On May 13, 2016, the Putmans entered into a $250,000 contract with Wilson to build their family home. Christopher Wilson was the lead contractor on the project and was promised $25,000 at the start of construction, with additional sums to be paid as the bank inspected and authorized his work throughout construction. Through October 24, 2016, Wilson was paid draws by the bank with the understanding that his work was approved. Based on the Putmans' many concerns with the construction, including issues with the drywall installation, basement stairs, and drain slope, however, they ordered a

stop payment to the bank. On October 27, 2016, Mr. Putman emailed Wilson a list of 11 problems he had with the construction of his home and asked that the issues be rectified. Wilson responded to his email, stating he would fix most of the issues on the list but believed some of the Mr. Putman's concerns were invalid because the projects were done properly. Wilson contended the drywall installation, in particular, had been done correctly. These disagreements led to the termination of the contract at the end of October 2016. In order to finish the work on the home, Mr. Putman left his job and took out $110,000 from his retirement account prematurely, resulting in penalty fees and taxes of $31,000.

On April 12, 2017, Wilson filed a complaint against the Putmans for breach of contract, a CPA claim predicated on violations of the CHPA and other causes of action. The Putmans answered and counterclaimed for breach of contract and *quantum meruit*. Wilson filed a motion to dismiss the counterclaim, which the circuit court denied. After Wilson answered Putmans' counterclaim, the issue of which party breached the contract was still at issue. An eight-day jury trial was held in August 2018. At trial, The Putmans argued that Wilson's construction of their home violated many provisions of the residential building codes and, therefore, Wilson breached their contract. Wilson argued his work was not yet completed on the home and that accusations relating to safety hazards and code violations were premature. He further argued the Putmans' complaint would not have existed if he was not terminated early and had been allowed to complete the contract.

Wilson testified on day five of the trial using notes to refresh his recollection. On day six, the Putmans requested to see the notes Wilson was referring to during direct examination. The colloquy went as follows:

> Q: And, sir, did you keep a construction log?
>
> A: I kept notes.
>
> Q: Are those notes made contemporaneously that at the time of the work? Or is this something you just prepped for trial?
>
> A: I have a folder where I keep notes on my folder.
>
> Q: Did you produce that in this case?
>
> A: I did not.

The trial court indicated it would ask Wilson directly the question that will answer "what we will do." The question was "you testified that there was some type of a construction log which you maintained where you put papers in a folder or something like that, were those papers produced to counsel as part?"

When the trial court proceeded to call Wilson to the bench, it directed the question as follows:

> THE COURT: All right. Mr. Wilson, the question has arisen as far as your testimony that you had just gotten into, there was a question raised that you had some – that you – I think my notes indicated that you had some type of a construction log where your response to Counsel's question was you have a folder where you keep your notes.
>
> THE WITNESS: Uh-huh.
>
> THE COURT: Was that folder of notes produced to counsel during the Pretrial Discovery process?

THE WITNESS: No.

The court, however, did not ask Wilson if he actually had a construction log, and Wilson simply confirmed his prior testimony that he had a folder he took notes on and did not give it to counsel. The court determined Wilson committed a fundamental discovery violation. Nevertheless, the court decided that it would be sufficient for counsel for the Putmans to take 10 minutes to look over the folder and then cross-examine Wilson for inconsistencies about the notes. The circuit court said: "I am not going to go so far as to conclude that this is willful intentional perjury or fake testimony." A review of the folder was not immediately possible as the folder was not in the Westminster courthouse, but *only* in Finksburg. The court did not allow time to retrieve the folder. Instead the court reversed its decision to allow counsel to examine the folder briefly and took a recess to determine the appropriate sanction. Counsel for the Putmans initially requested relief by asking Wilson's testimony to be stricken, but then demanded the counterclaim be dismissed. Defense counsel asked for the opportunity to question Wilson as to what was in or on the folder,[1] but the Putmans objected, and the court agreed.

> THE COURT: I do not have a choice in this matter, Mr. Hickman. I mean I have tried to be as even handed as I can in this case. But the simple fact of the matter is this is a pretty significant failure of discovery . . . I do not see a way around it other than to grant the request in this case that the counterclaim, as a sanction for a discovery failure, pursuit of the

[1] Counsel persisted in bringing to the trial court's attention that the court did not know what was in the file or what he has referred to as a file as well stating: "It could be the documents that are in the file are here, collectively here."

> counterclaim in this matter, is going to be precluded . . . . I am just going to indicate for the record, that based upon the information that has been disclosed, as far as the records that were previously testified to in deposition, where there was an affirmative response indicating that they were that the records did not exist, and now we hear on the witness stand that a folder of contemporaneous notes pertaining to the progress of the construction in this case did in fact exist, and was utilized to prepare in some portion the notes that Mr. Wilson has testified to extensively in connection with this case. The fact that Mr. Brown has not had access to it, to look at it, to prepare and properly cross-examine him on that testimony, I feel my hands are tied. I do not have a choice in this matter. I think it is an egregious enough violation that I have to grant Mr. Brown's motion, which is to preclude any further testimony in support of the counterclaim and in fact to preclude the counterclaim from being submitted to the jury in this matter. That is the only proper sanction I think I could give in this case at this point. And I do it reluctantly, Mr. Hickman . . . I cannot see a way to fix this other than to do what I have just done. So, that is going to be the Court's ruling. The counterclaim . . . is going to be stricken. It will be precluded.

Ultimately, the trial court felt obliged to direct a verdict on the Putmans' contract claim as well because it determined that a finding to permit Wilson to challenge liability would risk an inconsistent verdict. Only the issue of damages went to the jury.

The trial court did allow Wilson to proffer his argument on the record for appeal purposes only. Wilson stated that the items in the folder were given to the Putmans before trial and that the folder he was referencing on the stand had the building permit, a few dates, and some names of subcontractors on it.

On August 24, 2018, Wilson moved for judgment notwithstanding the verdict and a new trial. The court denied reconsideration of sanctions on May 17, 2019, finding the trial court did not abuse its discretion. Wilson filed this timely appeal on June 12, 2019, and the Putmans cross-appealed on June 17, 2019.

Standard of Review

Maryland's discovery rules were designed to be broad and comprehensive in scope. Broad and comprehensive rules eliminate, "as far as possible, the necessity of any party to litigate going to trial in a confused or muddled state of mind, concerning the facts that gave rise to litigation." *Baltimore Transit Co. v. Mezzanotti*, 227 Md. 8, 13 (1961).

Granting sanctions for discovery violations generally is within the discretion of the trial court. *Lowery v. Smithsburg Emergency Med. Serv.*, 173 Md. App. 662, 674 (2007) (citing *Heineman v. Bright*, 124 Md. App. 1, 7 (1998)). "[Md.] Rule 2-433(a)(3) gives trial courts broad discretion to impose sanctions for discovery violations," including the ultimate penalty of dismissing a case or entering a default judgment. *Valentine-Bowers v. Retina Grp. of Washington, P.C.*, 217 Md. App. 366, 378 (2014). Abuse of discretion occurs "where no reasonable person would take the view adopted by the [trial] court," or when the court acts "without reference to any guiding rules or principles." *North v. North*, 102 Md. App. 1, 13 (1994). Even when the most serious sanctions are invoked, they "cannot be disturbed on appeal without a clear showing that [the trial judge's] discretion was abused." *Mason v. Wolfing*, 265 Md. 234, 235 (1972). An appellate court can find an abuse of discretion when a trial court fails to consider relevant factors when choosing a sanction – such as whether a continuance or lesser sanction would be more appropriate given the circumstances. *Colter v. State*, 297 Md. 423, 430-431 (1983).

Discussion

A trial court must consider five factors when deciding which sanctions to order for discovery violations. *Muffoletto v. Towers*, 244 Md. App. 510, 542 (2020). *See also Schneider v. Little*, 206 Md. App. 414, 433 (2012) [the judgment by the CSA in *Schneider* was reversed, but not because the factors were misstated.] These factors, drawn from the Court of Appeals' decision in *Taliaferro v. State*, 295 Md. 376, 390-91 (1983), assist the trial court in exercising its discretion:

> whether the disclosure violation was technical or substantial, the timing of the ultimate disclosure, the reason, if any, for the violation, the degree of prejudice to the parties respectively offering and opposing the evidence, whether any resulting prejudice might be cured by a postponement and, if so, the overall desirability of a continuance.

Id. Courts prefer cases to be resolved on merits instead of dismissed as a sanction. *Weaver v. ZeniMax Media, Inc.*, 175 Md. App. 16, 46 (2007). "The most accepted view of discovery sanctions is that in fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules." *Thomas v. State*, 397 Md. 557, 571 (2007). Dismissal of a claim, or entering default judgment, are the most drastic sanctions and are acceptable only when there is a finding of "[e]gregious misconduct such as willful or contemptuous behavior, a deliberate attempt to hinder or prevent effective presentation of defenses or counterclaims, or stalling in revealing one's own weak claim or defense." *Manzano v. S. Maryland Hosp., Inc.*, 347 Md. 17, 29 (1997).

The Putmans argues that consideration of the *Taliaferro* court's factors is an inappropriate measure because they do not address discovery violations compounded

with false deposition testimony. They contend Wilson was sanctioned mostly for perjury and only in part for a discovery violation. Therefore, they argue, the *Taliaferro* factors do not cover instances of perjury or false testimony and thus should not be considered. We disagree, as concluding that the sanction imposed was for perjury or false statement is incorrect because the court rejected that proposition, stating: "I am not going to go so far as to conclude that this is willful intentional perjury or false testimony." As Wilson argued in his brief, it appears the court was only sanctioning a discovery violation and should have considered the *Taliaferro* factors.

1. Technical v. Substantial

Wilson argues that the discovery violation was not a substantial violation for the trial court did not deduce enough corroboration to determine the severity of the violation. When considering if a discovery violation is either technical or substantial, an appellate court must only consider what was known to the trial court at the time the sanction was granted. *N. River Ins. Co. v. Mayor & City Council of Baltimore*, 343 Md. 34, 48 (1996). "A 'right for the wrong reason' rationale does not apply to the imposition of discovery sanctions . . . because that rationale would have the appellate court exercising its discretion in the first instance." *Id.* Though it is undisputed that the folder was in fact not handed over during discovery, the trial court did not have enough information about the folder in question to determine that withholding the folder from counsel during discovery was a substantial violation.

We disagree with the Putmans' argument that there was no concrete answer as to what was in or on the folder because its existence was denied until counsel asked Wilson about his notes on the sixth day of trial. Regardless of when or how the folder was discovered, the court had several options to ascertain more information concerning the folder. The court did not allow counsel time to retrieve the folder so that Putmans' counsel, or the court, could examine it.[2] The court did not allow Putmans' counsel to cross-examine Wilson, nor did it allow Wilson's counsel to question him on the stand as to the contents of the folder or to the notes referenced on the folder. The court refused to allow time to find out the severity of the violation and presumed the folder was of great significance to the case. It relied on the categorization of the folder as a "construction log" as opposed to finding out what the notes actually covered. In addition, the court went so far as to acknowledge that the folder absent from discovery may have not changed anything at trial.

Although we agree with the Putmans and the trial court that "construction logs" made contemporaneously during an ongoing project are substantial and important evidence as to whether there is a breach of a construction contract, that does not automatically create a substantial discovery violation without verification that the folder

[2] Md. Rule 2-508(a) provides that "[o]n motion of any party or its own initiative, the court may continue or postpone a trial or other proceedings as justice requires." The "court may assess costs and expenses occasioned by the continuance or postponement." Md. Rule 2-508(d).

actually was a "construction log." With all of this considered, it is impossible to conclude this discovery violation was a substantial one.

2. Timing

A discovery violation revealed before trial demands different remedies or sanctions than a discovery violation discovered on the eve of trial or once the trial has commenced. *Schneider*, 206 Md. App. at 433; *see also* John A. Lynch, Jr. & Richard W. Bourne, *Modern Maryland Civil Procedure*, § 7.8(c), at 597 (1993). The typical remedy for such a late disclosure would be exclusion of the evidence offered. *Bartholomee v. Casey*, 103 Md. App. 34, 48 (1994). In the present case, however, the issue did not concern admission of the folder into evidence. Though postponement may have been impractical based on the timing of the late disclosure, six days into trial, the court could have opted to take a brief continuance as it appeared that the folder could have been retrieved in short order as the file was nearby in Finksburg.

3. Reason for Violation

The Putmans contend a valid reason was not offered at trial for Wilson's discovery violation, and that courts have upheld dismissals for lack of explanation (citing *Scully v. Tauber*, 138 Md. App. 423, 432 (2001)).

> In all the cases that we have found where the offending party had acted non-contumaciously and where the trial court either dismissed the plaintiff's case as a sanction or entered a default against a non-complying defendant, the offending party had no valid excuse for failing to comply with discovery orders and/or for failing to comply timely with discovery requests by the opposing party.

In the case at bar, however, the court did not directly ask for a reason nor did the court give Wilson a chance to offer an explanation or the details of the folder until he was permitted to make a proffer for the appeal. It may have been, based on counsel's statements to the court, that the folder was not turned over in discovery because the contents of the folder were delivered to Putmans' counsel in the form of the binder which included all pertinent information.

Essentially, Wilson's argument as to this point is that the violation was one of non-willful failure, and the trial court agreed. In response, the Putmans contend that willfulness is not a requirement for dismissal of a case. Although that may be the case and non-willful failure can result in dismissal and default, courts tend to affirm such a sanction only for the worst violations. *Lakewood Eng'g & Mfg. Co. v. Quinn*, 91 Md. App. 375, 387 (1992) ("the common thread running throughout is that a default judgment is generally reserved for a party who willfully disobeys a court order or otherwise demonstrates bad faith. Conversely, where the conduct falls short of being willful or contumacious, courts resort to a less restrictive alternative . . . ."). Since the opportunity to offer justification was not allowed and because the court did not find egregious conduct on Wilson's behalf, there is no merit to the Putmans' arguments.

4. Degree of Prejudice to Parties Offering and Opposing Evidence

"When a discovery violation becomes apparent only after the trial has commenced, the potential for prejudice is greater than if the discovery violation had

occurred prior to trial." *Storetrax.com, Inc. v. Gurland*, 168 Md. App. 50, 89 (2006). Even still, prejudice must still be evaluated and not simply assumed. *Colter*, 297 Md. at 428. In *Colter*, the Court of Appeals held that based on the record the lower court abused its discretion when the trial judge "applied a hard and fast rule" when choosing its sanction. *Id.* The court did not consider the potential prejudice to either party when evaluating the discovery violation as required by *Taliaferro*. *Id.*

The Putmans contend they were greatly prejudiced by not having access to Wilson's folder. They argue that, without the dates allegedly scribed on the folder, they were unable to create a concrete timeline for the construction of the Putman home and, therefore, were hindered in the examination of their witnesses. The court felt inclined to agree with the Putmans as it believed construction notes, including dates and timelines, were by definition so important that prejudice should be presumed. In *Schnieder*, the court stated "[w]hen a circuit court bases evidentiary rulings on consistent treatment of parties rather than consideration of the *Taliaferro* factors, we will reverse." *Schneider,* 206 Md. App. at 437.

Here, the judge stated on the record that he believed his "hands were tied" when making his decision. That statement – paired with the assumption that all construction notes are crucial and, thus, are inherently prejudicial to the party lacking access to such notes – seems to indicate that the court was of the opinion that it was following an inflexible rule. Not using judicial discretion by following unspoken rules, or "assuming

arguendo a discovery violation actually ha[s] occurred," has been found as an abuse of discretion in itself. *Schneider*, 206 Md. App. at 435.

Because Wilson was not given the opportunity to fully explain the evidence, the court did not know how the Putmans would have been prejudiced. It is impossible to find conclusive prejudice without knowing about the actual evidence in dispute. The trial court, in fact, prematurely decided the weight of the prejudice against the Putmans, without much consideration, and found prejudice in the heaviest form and extended the sanction to include a default on liability. The Putmans argue there could be no prejudice for breach of contract for Wilson because Wilson's counterclaim was unmerited and would have failed as a matter of law. They contend Wilson had inadequate proof of proper damage evidence and, therefore, there was no harm or prejudice resulting from the preclusion. Because the counterclaim was dismissed and the jury did not get to decide the merits of the counterclaim, however, that argument falls short. Based on the record, there was nothing to base such a high level of prejudice against the Putmans as to require dismissal of Wilson's counterclaim.

5. Whether Prejudice Might be Cured by Postponement or Continuance

The most severe sanction, dismissal of a case, "should be one of last resort, to be invoked only in those cases where other less stringent sanctions are not applicable to effect the ends of justice." *Taliaferro*, 295 Md. at 395 (citation and quotation omitted). It is important to consider a postponement or continuance for it is preferred. *See Colter*, 297 Md. at 430. The circuit court in this case favored staying on a tight, time-restricted

schedule, without deviation, over a short continuance. The record indicates a continuance was not discussed, when a continuance should be the first choice contemplated when considering a discovery violation sanction.

The Putmans claim Wilson did not ask for a continuance and, therefore, was not entitled to be granted one. It, however, can be reasonably understood based on defense counsel's requests that a continuance was inferred. Counsel asked to retrieve the folder that was *only* in Finksburg but was denied that request. Prejudice to the Putmans possibly could have been cured by a brief recess with time allotted to recover the folder. When the court believed the folder was in the courtroom, it suggested a 10-minute recess for the Putmans to review the contents. This suggestion leads us to believe: 1) a short continuance was reasonable, and 2) the court did not originally feel the folder was to any extent prejudicial for it only considered allotting 10 minutes to the Putmans for review. If the prejudice to the Putmans was in fact minimal, such prejudice could have been cured through cross-examination of Wilson. Unfortunately, the weight of the prejudice was and still is undetermined – after 22 minutes, the court made its decision to dismiss the counterclaim without further inquiry into the contents of or writing on the folder. Further, a brief recess would have been a proper cure to any potential prejudice to the Putmans. For the reasons set forth, the sanction was imposed in error.

6. Reversible Error

Finding the sanction was made in error, we must then consider whether the error was harmless or reversible. Appellate courts will "not reverse a lower court judgment if

the error is harmless." *Barksdale v. Wilkowsky*, 419 Md. 649, 657-58 (2011). "The harmless error rule 'embod[ies] the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial.' " *Id*. at 662. The "focus of … inquiry is on the probability, not the possibility, of prejudice." *Id*. Here, the error was extremely prejudicial to Wilson, for the court directed a verdict against Wilson, leaving to the jury only the amount of damages.

Although the Putmans contend there was no prejudice, for Wilson's counterclaim was unmerited, there is no support for the assertion since it was not handed to the jury to determine such a conclusion. Wilson certainly was prejudiced. There is no sanction more prejudicial to a complainant than the dismissal of their case, therefore, the court made a reversible error when it granted such a sanction.

JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY REVERSED AND REMANDED TO THE CIRCUIT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEES.