Circuit Court for Howard County
Case No. C-13-CV-19-000263

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 886

September Term, 2020

XUAN CAO

v.

JAMES ZALUCKI, M.D., ET AL.

Kehoe,
Gould,*
Zic,
JJ.

Opinion by Kehoe, J.

Filed: September 28, 2021

*Judge Steven B. Gould, now serving on the Court of Appeals, participated in the hearing and conference of this case while an active member of the Court; he participated in the adoption of this opinion as a specially assigned member of this Court.

Xuan Cao appeals from a judgment of the Circuit Court for Howard County that dismissed with prejudice his medical malpractice action against James J. Zalucki, M.D. and Colon Rectal Surgical Associates. He presents two issues, which we have reworded:

> 1. Did the circuit court abuse its discretion when it granted the motion to withdraw filed by appellant's prior counsel?
>
> 2. Did the circuit court abuse its discretion when it denied appellant's motion to modify the scheduling order?
>
> 3. Did the circuit court abuse its discretion in granting appellees' motion for sanctions and to dismiss all claims?[1]

We will affirm the judgment of the circuit court.

BACKGROUND

In 2015, appellant was experiencing anorectal health issues. He consulted with several colorectal surgeons, including Dr. Zalucki, who was employed by Colon Rectal Surgical Associates. In 2015, Dr. Zalucki performed a surgical procedure to alleviate the condition. Appellant asserts that the procedure was not performed properly, causing permanent injuries, emotional and physical pain and suffering, past and future medical expenses, lost income, and other economic damages.

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[1] Appellant articulates the issues as follows (formatting altered):

> Whether the trial court erred by granting the motion to strike appearance of appellant's former counsel, but subsequently denying appellant's motion to modify the scheduling order[?]
>
> Whether the trial court erred by dismissing appellant's claims[?]

On September 1, 2017, appellant filed a claim in the Health Care Alternative Dispute Resolution Office ("HCADRO") alleging medical malpractice against appellees and Howard County General Hospital.[2] After the case was waived out of HCARDO, appellant filed the present action on March 8, 2019. After repeated failures by appellant to respond to appellees' requests for discovery and to schedule depositions, appellees filed a motion for sanctions.

The court held a hearing on the motion on February 5, 2020. At the hearing, appellant's prior counsel took full responsibility for his client's failure to comply with the scheduling order and indicated that he was searching for co-counsel. The court granted the motion and, as a sanction, ordered prior counsel to pay a portion of appellees' attorneys' fees. Significantly, the court also directed counsel to "collaborate on a discovery plan." The court directed that the plan should be submitted to the court as a consent order "with language indicating that unexcused failure to comply . . . will result in an immediate hearing before the Court on sanctions."

Counsel agreed on new deadlines and submitted a proposed order to the court, which entered an order dated March 6, 2020. The order set out the following deadlines and dates:

Plaintiff's deposition:	April 1, 2020
Identification of defense experts:	April 30, 2020

[2] While the case was pending in the circuit court, appellant dismissed his claims against the hospital.

Completion date for depositions of plaintiff's expert witnesses:	June 1, 2020
Close of discovery:	July 1, 2020
Filing deadline for dispositive motions:	July 15, 2020
Start of trial:	October 5, 2020

Prior counsel failed to cooperate with appellees' counsel regarding scheduling depositions for appellant and appellant's designated expert witness, Jiri Bem, M.D. Appellant did not timely respond to appellees' requests for documentary discovery.[3] In short, appellant's compliance with the new discovery deadlines was no better than his compliance with previous deadlines.

Additionally, and through their own investigations, appellees came to believe that appellant's responses to discovery requests regarding his medical records were incomplete and misleading. This new information called into question some of Dr. Bem's conclusions in his certificate of a qualified expert. Among other things, the new material indicated that appellant had been examined by a different colorectal medical practice group at the same time that he was being treated by Dr. Zalucki. Appellees brought this information to the

[3] Appellant asserts that he filed complete responses to appellees' interrogatories and request for production of documents. Appellees do not agree with appellant's characterization of his response. In any event, the responses were filed after the July 1st discovery deadline.

attention of prior counsel and appellees renewed their request to set a deposition date for Dr. Bem but prior counsel did not respond.

On May 19, 2020, prior counsel filed a motion to withdraw his appearance. The court granted the motion, and appellant's current counsel entered his appearance on June 19th. With the July 1st discovery deadline quickly approaching, appellant filed a motion to modify the scheduling order, which appellees opposed. On July 6th, the court denied the motion.

Two weeks later, appellees filed a motion for sanctions seeking dismissal of the case. On September 9, 2020, the court held a hearing on all outstanding motions.[4] On September 25th, the court issued a thorough and well-reasoned memorandum opinion and order granting the motion for sanctions and dismissing the case with prejudice. The court denied the parties' remaining motions as moot.

THE STANDARD OF REVIEW

The judicial decisions at issue in this appeal, *viz*., granting a motion to withdraw counsel's appearance, denying a request to modify a scheduling order, and granting a motion for sanctions, are matters entrusted to the circuit court's discretion. Appellate courts

[4] In addition to the motion for sanctions, appellees also filed a motion to strike appellant's expert and a motion to dismiss based on appellant's failure to timely file a certificate of a qualified expert ("CQE"). In response, appellant filed a motion for extension of time to file a supplemental CQE, *nunc pro tunc* and a motion to extend the discovery deadline.

employ "a tri-partite and interrelated standard of review" for such decisions. *Matter of Meddings*, 244 Md. App. 204, 220 (2019). We review the circuit court's factual findings for clear error and its legal analysis without deference. *Id.* Absent erroneous fact-finding or legal error, an appellate court will set aside a trial court's decision for abuse of discretion. The classic articulation of this standard in Maryland is former Chief Judge M. Wilner's explanation for this Court in *North v. North*:

> A ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling. The decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable. That kind of distance can arise in a number of ways, among which are that the ruling either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective.

102 Md. App. 1, 14 (1994).

ANALYSIS

Appellant presents three contentions on appeal. None of them are persuasive.

1. Prior counsel's motion to withdraw

As we have related, on May 19, 2020, prior counsel filed a motion to strike his appearance. In the motion, prior counsel stated that: beginning on February 5, 2020, he had made "numerous attempts to secure co-counsel" in the case without success; a "fundamental disagreement" had arisen between him and appellant "regarding strategy of

the case," making prior counsel's continuing participation in the case impossible[5]; and appellant himself was "actively looking for alternative representation." Finally, prior counsel stated that he had sent written notice of his intent to withdraw to appellant along with a written consent for the latter to file in the circuit court. This letter was dated May 15, 2020. Appellant neither filed a written consent nor objected to prior counsel's withdrawal.

The circuit court signed the order striking prior counsel's appearance on June 3rd. The order was filed the next day. Appellant argues that prior counsel's notice was deficient and that the court abused its discretion by granting the motion. For these reasons, appellant argues that the circuit court abused its discretion in denying the motion for a modification of the scheduling order that was filed by his present counsel a few days after he entered his appearance. (We will address these contentions in part 2 of this opinion.)

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[5] Md. Rule 19-301.16 states in pertinent part:

> (b) Except as stated in section (c) of this Rule, an attorney may withdraw from representing a client if:
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> * * *
>
> (4) the client insists upon action or inaction that the attorney considers repugnant or with which the attorney has a fundamental disagreement[.]
>
> * * *
>
> (c) An attorney must comply with applicable law requiring notice to or permission of a tribunal when terminating representation. When ordered to do so by a tribunal, an attorney shall continue representation notwithstanding good cause for terminating the representation.
>
> * * *

Appellant is correct that prior counsel's motion to withdraw failed to comply with the requirements of Md. Rule 2-132(b). The rule states in pertinent part (emphasis added):

> the motion shall be accompanied by the client's written consent to the withdrawal or the moving attorney's certificate that notice has been mailed to the client at least *five days* prior to the filing of the motion, informing the client of the attorney's intention to move for withdrawal and advising the client to have another attorney enter an appearance or to notify the clerk in writing of the client's intention to proceed in proper person.

Prior counsel's letter was dated *four days* before he filed his motion to withdraw his appearance

Appellant is also correct that the circuit court signed the order prematurely. Md. Rule 2-132(b) also states that a court may not order an appearance stricken "before the expiration of the time prescribed by Rule 2-311 for responding." Md. Rule 2-311(b) states that the deadline for responding to a motion is fifteen days after service. Prior counsel's motion was mailed to appellant on May 19th. Service of a motion is complete when it is mailed. *Lee v. State*, 332 Md. 654, 658 (1993). The court signed the order on June 3rd, which was the fifteenth day after the motion was served.

The problem with appellant's arguments on these issues is that it isn't clear to us how he was prejudiced either by prior counsel's premature filing or the court's premature order.

As a general rule, "the burden . . . in civil cases is on the appealing party to show that an error caused prejudice." *Barksdale v. Wilkowsky*, 419 Md. 649, 660 (2011). An error is

harmless unless "the complaining party demonstrates a probability of prejudice." *Armacost v. Davis*, 462 Md. 504, 532 (2019).[6]

In his motion, prior counsel asserted that a "fundamental disagreement regarding strategy of the case" had arisen between appellant and himself that rendered it impossible for prior counsel to continue his representation. Accordingly, his withdrawal was permitted pursuant to Md. Rule 19-301.16(b)(4). Absent a showing by appellant that prior counsel's invocation of Rule 19-301.16(b)(4) was inappropriate—and no such showing was attempted, much less made—we see no reason why we should view the circuit court's order striking prior counsel's appearance as presumptively prejudicial.

On appeal, appellant asserts that the court's order "prejudiced [his] ability to comply with the discovery deadlines." At oral argument, counsel explained that, had prior counsel stayed in the case, appellees could have taken appellant's deposition and perhaps some other discovery could have been accomplished as well. But this misses the point—July 1, 2020 was the deadline for the completion of *all* discovery. In light of the disarray in appellant's case and his woeful track record when it came to complying with the earlier

[6] There are exceptions to this rule. For example, an order disqualifying counsel is presumptively prejudicial to the affected party. *Harris v. Harris*, 310 Md. 310, 319–20 (1987). But prior counsel was not disqualified by court order, he withdrew his appearance. Appellant doesn't argue that a court's decision to grant a motion to withdraw should be considered presumptively prejudicial.

discovery deadlines, it is impossible for us to conceive how all discovery in this medical malpractice case could have been completed by July 1st.[7]

2. The motion to modify the scheduling order

Appellant claims that the court's denial of his motion caused him "severe prejudice" because he "was left holding the bag with approximately three weeks to address his former counsel's failings." We are not persuaded.

Maryland Rule 2-504 sets out the requirements for a scheduling order in a civil action. Relevant for our case, Md. Rule 2-504(c) mandates that the court modify the scheduling order "to prevent injustice." *See Naughton v. Bankier*, 114 Md. App. 641, 653 (1997) (recognizing that "extraordinary circumstances which warrant modification do occur" and "absolute compliance with scheduling orders is not always feasible. . . ."). But importantly, "parties should not be able to deviate from a scheduling order's deadlines without establishing good cause for their failure to comply with the dates originally set." *Asmussen v. CSX Transportation,* 247 Md. App. 529, 548 (2020). Maryland courts should "demand

[7] Finally, appellant contends that the circuit court's notice to employ new counsel was misleading because it stated "unless new counsel enters his/her appearance in this case within fifteen (15) days after service upon you of this notice, your lack of counsel shall not be grounds for postponing any further proceedings concerning the case." He argues that the notice "implies that if new counsel enters his appearance within the 15 days after service of the notice, finding new counsel will allow for a postponement[.]"

Informing a party that the court might not postpone proceedings because a party doesn't have a lawyer is not the same as telling a party that the court will grant a postponement if the party retains another lawyer.

at least substantial compliance, or, *at the barest minimum*, a good faith and earnest effort toward compliance." *Naughton*, 114 Md. App. at 653 (emphasis in original). To permit otherwise, is "on its face, prejudicial and fundamentally unfair to opposing parties[.]" *Id.* at 654.

Here, the first relevant scheduling order was issued on April 8, 2019.[8] On October 7, 2019, defendants filed a motion to revise the discovery schedule based on appellant's failures to respond to discovery and prior counsel's failures to communicate with defense counsel. The court issued a revised scheduling order on October 31st. On March 6, 2020, and again based on appellant's continued failures to respond to discovery requests, the court entered another revised scheduling order that designated July 1, 2020 as the discovery deadline. There was very little, if any, substantive effort on appellant's part to comply with the new deadline.

To this Court, appellant places the blame for his failure to comply with the discovery order on prior counsel's shoulders. Appellees argue that appellant bears a significant share of the responsibility.[9] These contentions miss the point—regardless of who was responsible, appellant's failure to comply with the scheduling orders was fundamentally unfair to appellees and undermined the court's ability to manage its caseload. *See*

[8] The court had issued an initial scheduling order on March 19, 2019 but revised it *sua sponte* when the case was reclassified under the circuit court's case management plan.

[9] In its memorandum opinion, the circuit court stated that it was "aware that [appellant] is responsible for a portion of the discovery violations."

Valentine-Bowers v. Retina Group of Washington, 217 Md. App. 366, 380 (2014) (A plaintiff has an "affirmative duty to move [its] case toward trial[.]"); *Hossainkhail v. Gebrehiwot*, 143 Md. App. 716, 728 (2002) ("Cases cannot be permitted to linger at the will of the litigants or their attorneys.") (quoting *Tavakoli-Nouri v. Mitchell*, 104 Md. App. 704, 708 (1995) (cleaned up)).

The scheduling order in this case was modified twice to accommodate appellant's failures to provide the information required by appellees' discovery requests. The last modification was made on March 6, 2020. Between that date and July 1st, appellant's efforts to comply with the order were, at best, minimal and certainly fell very far short of the "good faith and earnest effort . . . toward compliance" required for an additional extension. *Naughton*, 114 Md. App. at 653. Under the facts of this case, it was well within the court's discretion to deny the motion to modify.

3. The motion for sanctions and dismissal

Appellant's final contention is that the court abused its discretion in granting the motion for sanctions and dismissing his case with prejudice.

"Maryland Rule 2-433(a)(3) gives trial courts broad discretion to impose sanctions for discovery violations," including the "ultimate penalty" of entering a default judgment or dismissing a case. *Valentine-Bowers*, 217 Md. App. at 378 (quoting *Mason v. Wolfing*, 265 Md. 234, 236 (1972)). The imposition of sanctions "turns on the facts of the particular case," and a court assesses various factors when deciding the proper sanction. *Taliaferro v. State*, 295 Md. 376, 390 (1983). In that opinion, Judge Lawrence F. Rodowsky explained

that, although a decision to impose sanctions must be based on the facts and circumstances of the case before the court, there are recurring "relevant factors" that courts should consider:

> 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. Frequently these factors overlap. They do not lend themselves to a compartmental analysis.

Id. at 390-91.

In considering whether to grant appellees' motion for sanctions, the circuit court applied the *Taliaferro* analytical template to the facts of the case. We will review the circuit court's reasoning against the backdrop of "the entire history and context of the case[.]" *Valentine-Bowers*, 217 Md. App. at 380.

a. Whether the discovery violations were substantial or technical

We agree with the trial court that appellant's disregard of discovery deadlines constituted a substantial violation. This Court has previously determined that discovery violations are "substantial" because the plaintiff "has an affirmative duty to move her case forward." *Hossainkhail,* 143 Md. App. at 726; *Valentine-Bowers*, 217 Md. App. at 380.

Appellant's violations were numerous. First, he failed to appear for deposition prior to the close of discovery. He claims that this is a technical violation because he was "ready, willing and able to be deposed," and faults appellees for not taking his deposition. We do not agree. Appellant requested postponements of his deposition multiple times over the

course of discovery and his prior counsel failed to respond to appellees' efforts to schedule it. When the deposition was finally scheduled, appellant failed to appear.

Second, he failed to produce his expert, Dr. Bem, for deposition. Appellant argues that he provided appellees with dates at the end of July 2020. But the deadline for his deposition was June 1, 2020, and he did not provide those dates until after that deadline had passed.

Finally, he did not produce executed answers to interrogatories and responses to document production when he was supposed to. He delivered what he contends were full and complete responses fifteen days past the deadline without explanation for the delay.[10] His failure to timely provide the documents requested by appellees made it impossible for them to properly depose appellant and his expert.

b. The timing of the ultimate disclosure

The trial court referenced appellant's multiple late and unexecuted disclosures in its opinion. We agree with the trial court that this factor weighs heavily against appellant. He did not deliver what he claims was full and complete written discovery responses until after the close of discovery, thus effectively sabotaging appellees' discovery efforts.

It is also important to note that appellant had "more than the standard amount of time for discovery[.]" *Valentine-Bowers*, 217 Md. App. at 383. The court issued the relevant scheduling order on April 8, 2019. The court then modified the scheduling order twice to accommodate appellant's failures to comply with appellees' discovery requests. Yet

[10] As we have noted, appellees do not agree with his characterization of his responses.

appellant did not produce executed responsive discovery until after the date for completion of all discovery. The trial court's decision to weigh this factor in favor of dismissal was reasonable.

c. The reasons for the violations

In their briefs, the parties expend significant efforts in attempting to fix the blame for the discovery violations in this case. Appellant points to his prior counsel, appellees argue that a significant amount of the responsibility must be attributed to appellant himself. The circuit court concluded that they shared responsibility. As we stated earlier, this exercise in finger-pointing is not particularly useful. What counts is that there was comprehensive failure on appellant's part to timely and adequately respond to appellees' discovery requests. This completely frustrated appellees' efforts to prepare for trial and interfered with the court's ability to manage its docket.

d. The degree of prejudice to the parties

The trial court acknowledged that dismissal of the case after the statute of limitations had expired was the "ultimate prejudice." But the court also found that the prejudice to appellees "will be severe" because they "will be unable to properly prepare for trial, due to failure of [appellant] to make timely discovery." The court continued:

> [Appellees] will not have a full and unfettered ability to pursue the discovery from third parties such as [appellant's] treating doctors that they may desire either due to the deadline having passed, witnesses becoming unavailable, or memories having faded. [Appellees] have diligently pursued the defense of this action, while [appellant] has come late to the party, putting forth little effort to move the case forward. His current counsel advised the Court that

> he learned in July 2020 that the expert witness, the very linchpin of [appellant's] case, had not . . . heard anything regarding the case since some time in 2018.

The court also noted, "[t]he delays in discovery have caused significant time to pass, meaning that witnesses may become difficult to locate, and memories may have faded." *See Warehime v. Dell*, 124 Md. App. 31, 49 (1998) ("there is prejudice inherent in delaying a trial, because the memories and even the location of witnesses can become problematic when, as here, the years go by."). As of September 9, 2020, the date the trial court held the hearing on the motion for sanctions, more than five years had passed since the alleged acts of negligence took place. We agree with the trial court's assessment that prejudice to the appellees was "severe."

e. Whether a continuance would cure prejudice and is desirable

The trial court found that a continuance would not cure prejudice considering appellant's track record in the case and the extent of discovery violations, which the court deemed "egregious and extreme." We agree. Appellant's failure to obey court orders, comply with discovery deadlines, make full disclosures, and cooperate with scheduling depositions gave the court no confidence to believe that additional problems would not arise if it extended the discovery deadline.

Appellant correctly points out in his brief that "dismissing a claim 'is among the gravest of sanctions, and as such, is warranted only in cases of egregious misconduct[.]'" *Butler v. S & S P'ship*, 435 Md. 635, 653 (2013) (quoting *Manzano v. Southern Maryland Hospital*, 347 Md. 17, 29 (1997)). He argues that we should consider his "good faith effort" to comply

with the scheduling order following his new counsel's entry of appearance. But this is too little, too late and disregards the pattern of "egregious and extreme" conduct prior to that point.

We are also not persuaded by appellant's contention that the administrative postponement, which set the trial for November 2021, would have cured any prejudice to the appellees.[11] In concluding that dismissal was appropriate, the court pointed to what it appropriately termed the "egregious and extreme" nature of appellant's "failure to comply with the rules for discovery and failure to obey the Court's Orders compelling discovery and for sanctions[.]"

In light of the history of the case, the circuit court's decision to dismiss appellant's case was not an abuse of discretion. *See Valentine-Bowers*, 217 Md. App. at 386 ("[W]hatever the trial court *could* have done by way of a postponement, it was not *required* to do so. Discretion means just that—it was up to the trial court to fashion a remedy that it deemed appropriate in light of the course of discovery[.]" (emphasis in original)).

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THE JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.

[11] At the time of filing and the hearing on the motion for sanctions, the trial was set for October 5, 2020. Because of the shut-down of court operations due to the COVID-19 pandemic, the trial was administratively postponed to November 1, 2021.