Circuit Court for Prince George's County
Case No. CAL20-05756

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1123

September Term, 2021

STEVEN HEMSTREET, ET UX.

v.

GREGORY CALDWELL

Wells, C.J.
Berger,
Leahy,

JJ.

Opinion by Leahy, J.

Filed: February 10, 2023

* 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.

** In the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Mr. Steven Hemstreet was riding his motorcycle south on Maryland Route 197 in Prince George's County ("Route 197"), when he collided with a car driven by Mr. Gregory Caldwell, appellee, at the intersection with Montpelier Drive. Mr. Hemstreet and his wife, Mrs. Barbara Hemstreet (together, "Appellants," and "Plaintiffs" below), filed a lawsuit in the Circuit Court for Prince George's County asserting negligence and loss of consortium against Mr. Caldwell.

The circuit court issued a scheduling order for the case and, on the day of their deadline to identify expert witnesses, the Plaintiffs designated six experts. The experts included three doctors, an economist, a clinical nurse, and an accident reconstructionist. Two weeks later, the Plaintiffs sent Mr. Caldwell an "AMENDED Identification of Experts," which designated an additional accident reconstructionist, Mr. Joseph Hancock. Four weeks after the amended identification of experts, *after* the close of discovery, and less than two months before trial, the Plaintiffs sent Mr. Caldwell a copy of Mr. Hancock's expert report. Although Mr. Caldwell timely moved to strike Mr. Hancock's appearance and his report, the circuit court did not rule on the motion until the second day of trial, at which time it granted the motion due to the Plaintiffs' untimely designation of the expert witness and untimely provision of the report.

After a two-day trial, a jury concluded that both Mr. Caldwell and Mr. Hemstreet were negligent in the operation of their motor vehicles, thus rendering a verdict for the defense under the doctrine of contributory negligence. The Appellants noted a timely

appeal and present one question for our review which boils down to this: Did the circuit court abuse its discretion in striking the Plaintiffs' expert during a hearing held on the first day of trial, on Mr. Caldwell's pre-trial motion to strike? [1]

After carefully considering the procedural posture and circumstances in this case, we discern no abuse of discretion in the circuit court's decision to grant Mr. Caldwell's motion to strike the Plaintiffs' expert witness after holding a hearing on Mr. Caldwell's motion to strike during the trial. Accordingly, we affirm the judgment of the circuit court.

BACKGROUND

The Accident and Initiation of Litigation

On July 19, 2019, Mr. Hemstreet was riding his motorcycle southbound on Route 197, and as he approached the intersection with Montpelier Drive, the traffic signal had turned from green to yellow. At nearly the same time, Mr. Caldwell was traveling northbound in a passenger vehicle, attempting to turn left from Route 197 onto Montpelier Drive. While Mr. Caldwell was attempting his left turn, his vehicle collided with Mr.

[1] In their opening brief, the Appellants present their question as follows:

> "Did the trial court *abuse its discretion* in conducting a hearing in the middle of a jury trial on Defendant's Motion to Strike Expert Witness, where Defense Counsel was supposed to set this hearing in advance of the jury trial; then in GRANTING that Motion with STRIKE of Plaintiff[s'] accident reconstruction expert's testimony, in its entirety vs. disallowing the photos which were produced 10 days after close of discovery?"

Hemstreet's motorcycle. One of the issues in the underlying litigation was whether the light had turned from yellow to red as Mr. Hemstreet rode into the intersection.[2]

The Hemstreets filed suit on February 13, 2020, in the Circuit Court for Prince George's County. The complaint alleged that Mr. Caldwell negligently attempted to turn onto Montpelier Drive as he failed "to yield the right of way, failed to clear the southbound traffic on the Boulevard, … [and] failed to operate his vehicle in a careful, safe and lawful manner[.]" Count I for negligence demanded an award in excess of $75,000 in damages, claiming that "[a]s a direct and proximate result of the aforesaid negligent breach of duty[,]" Mr. Hemstreet "suffered serious, permanent, and painful injuries, aggravation of pre-existing injuries, and lost wages" and has incurred medical bills and expenses. Count II asserted a derivative claim of loss of consortium and demanded an award in excess of $75,000 in damages.

On the same day that he filed his answer to the complaint, May 27, 2020, Mr. Caldwell sent the Plaintiffs interrogatories and requests for production of documents via "mail postage." On July 8, 2021, counsel for Mr. Caldwell wrote to Plaintiffs' counsel, informing her that her client's answers and responses were past due. Counsel sent a second notice to Plaintiffs' counsel on July 22, and a third notice on August 5, 2020. It was not

[2] Appellants aver in their opening brief that it was undisputed that Mr. Caldwell had a red arrow, and Appellee does not refute this contention in his brief. We note that a portion of the trial transcript is not included in the record on appeal; therefore, the Court cannot determine that Appellee never stipulated to that fact. This is of no matter, however, for in this case it is "not reasonably necessary for the determination of the questions presented by the appeal[.]" Md. Rule 8-501(c).

until October 21, 2020, that Plaintiffs' counsel filed a notice of service, explaining, in part, that the responses to some interrogatories and production requests had already been served via email. Also, rather than produce other documents, Plaintiffs' counsel advised: "Executed Releases to be provided on or before Oct. 23, 2020."

Meanwhile, in late September, Mr. Caldwell's counsel noticed Plaintiffs' depositions, and on October 5, 2020, the circuit court issued a track 2 scheduling order for the case. Trial was set for September 8 and 9, 2021. The order advised that it could not be "modified except by order of court upon a showing of good cause" and clarified that "[s]tipulations between counsel are not effective to change any deadlines in [the] order."[3] The court ordered that "Plaintiff[s'] Experts, if any, identified per Maryland Rule 2-402(g) or 2-504.2(9)" must be designated "90 days prior to trial," or June 10, 2021. "All discovery" and the designation of "Defense Experts, if any, identified per Maryland Rule 2-402(g) or 2-504.2(9)" must be completed "60 days before trial," or July 10, 2021.

The court order named a circuit court judge assigned to "consider … all discovery disputes, dispositive motions, and default motions[,]" and explained that hearings, "where appropriate, will be set by the assigned Judge not later than thirty (30) days after the motion

[3] The scheduling order contained one exception to this general pronouncement, providing that "[p]arties are permitted to request ONE automatic continuance of the trial. To request an automatic continuance, parties may submit a Consent Request for Modification of Trial Form[.]"

The order further qualified: "**Please note the request must be submitted at least 30 days prior to the original trial date and the proposed trial date cannot exceed sixty (60) days past the original court designated trial date.** (Emphasis in original).

and response have been filed." However, it clarified that it is "counsel's responsibility to follow-up with the assigned motions judges' chambers for a status on their motion." (Emphasis omitted). Failures to comply with "all terms" of the scheduling order could "result in the imposition of appropriate sanctions."

The Motion to Compel Discovery

In January 2021, more than seven months after discovery requests were served on Plaintiffs, Mr. Caldwell filed a motion to compel "full and complete Discovery Responses." The motion asserted that defense counsel had written Plaintiffs' counsel on July 8, July 22, August 5, September 1, and November 23 requesting full and complete discovery responses to no avail. Plaintiffs' responses to certain interrogatories were, in Mr. Caldwell's view, incomplete and Plaintiffs had not "provided any medical bills or a complete set of medical records to support the allegations of [Mr. Hemstreet's] purported injuries." These deficiencies, Mr. Caldwell argued, were "severely prejudic[ial]" as they hindered defense counsel's ability to prepare an adequate defense.

The Plaintiffs responded by arguing that "[t]his situation does not warrant the grant of an [o]rder [c]ompelling anything." While "apologiz[ing] for some things," Plaintiffs asserted that they were "under huge stress" and claimed they had "fully complied with all discovery obligations" having "answered all interrogatories under oath" and "produced dozens of records, including but not limited to voluminous medical records[.]" In reply, Mr. Caldwell challenged Plaintiffs' assessment of the production, asserting that no

"emergency room records, doctor records, or surgery follow up records or billing records [had] been provided."

The circuit court granted Mr. Caldwell's motion on February 25, 2021, ordering the Plaintiffs to provide "full and complete discovery responses" within ten days.

The Disclosure of Experts and Close of Discovery

On June 10, 2021—the deadline for Plaintiffs' expert disclosures—Plaintiffs identified six experts they intended to call at trial. Among the experts designated, Plaintiffs identified Mr. David P. Plant, a mechanical engineer and accident reconstructionist, who was expected to "do a complete accident reconstruction based upon deposition transcripts, police report[s], and all other related document[s]." Plaintiffs did not provide a copy of Mr. Plant's expert's report, curriculum vitae, or fee schedule as required by Maryland Rule 2-402(g).

Two weeks later, on June 24, Plaintiffs filed an "Amended Identification of Experts," adding Mr. Joseph M. Hancock, of JMH Associates, as an expert on accident reconstruction and noted that he would:

> [Do] a complete accident reconstruction based upon a site inspection and photographing session, all deposition transcripts, police report, and all other related documents. He is also expected to testify as to "human factors" including but not limited to witness perception, recall, and associated impact on opinions. He will outline travel distance, relative to speed, and address the timing of the subject traffic lights, and line of sight as to both the Plaintiff and the Defendant. Mr. Hancock is expected to testify about the subject roadway, the intersection traffic controls (including the traffic lights, and lanes of travel), witness line of sight, Plaintiff line of sight and expected risk factors incident to his travel into the subject intersection, and the position of both Plaintiff and Defendant on the roadway, on the day of the accident. Mr. Hancock is expected to testify about all witness perception issues and related

> factors, as to witnesses of the subject accident. Mr. Hancock will testify as to the Maryland Boulevard Rule, it's [sic] application to this case, and the relative rights of travel between the Plaintiff and the Defendant at this intersection. Mr. Hancock is expected to testify that the Plaintiff was proceeding on the "Boulevard", and that defendant, who has a blocked line of vision and a red arrow, had an absolute duty under this rule to yield the right of way to the Plaintiff.

Mr. Caldwell designated his experts on July 9, 2021, including a collision reconstructionist, Mr. Charles Simpson, Jr., prior to his discovery deadline of July 10, 2021.

On July 22, 2021—after the close of discovery and almost six weeks after plaintiffs' expert designations were due—the Plaintiffs sent Mr. Caldwell an expert report from Mr. Hancock of JMH Associates. The report detailed that the "yellow light for S/B Md. Rt. 197 at Montpelier Road lasted 5 seconds." Aiming to illustrate how much notice Mr. Hemstreet would have had of the yellow light in a worst-plausible-case scenario, the report charted Mr. Hemstreet's position on the road for each of the five seconds of the light cycle, based on an asserted assumption of speeds between 40 and 45 miles per hour. Mr. Hancock explained that, through the review of "the available material," he "formed opinions relating to this incident[,]" but did not articulate the substance of those opinions in the report.

Motion to Strike

Mr. Caldwell filed a "Defendant's Motion to Strike Plaintiff[s'] Expert and Report" that was docketed on August 2, 2021. He argued that because Plaintiffs failed to identify Mr. Hancock as an expert by the deadline established in the scheduling order, and then failed to supply his report before the end of the discovery period, the Plaintiffs failed to

substantially comply with the scheduling order. Given that Plaintiffs had neither sought the circuit court's permission to extend any of the deadlines established in the scheduling order nor asserted "any type of 'undue hardship or an emergency situation[,]'" he asked that the circuit court strike Mr. Hancock's report and preclude him from testifying at trial.

Plaintiffs responded that they had substantially complied with the scheduling order because they had amended their expert designation to include Mr. Hancock only two weeks after their designation deadline. They argued that the addition of Mr. Hancock was not significant, as he was simply replacing Mr. Plant, who was identified in the original designation as the accident reconstructionist who would testify at trial. In Plaintiffs' view, Mr. Caldwell was "simply harassing Plaintiff[s'] counsel with a disingenuous motion to strike . . . based upon [defense counsel's] failure to notice a deposition." Plaintiffs asserted that defense counsel "[f]ailed to notice and take the . . . expert's deposition within the discovery deadline," and that "even after close of discovery Plaintiff[s'] counsel offered to produce the expert for deposition[.]" Quoting from a passage in *Maddox v. Stone*, 174 Md. App. 489, 49[3] (2007) in which this Court held that the circuit court "abused its discretion in striking one of the appellants' expert witnesses because of a lack of strict compliance with the scheduling order[,]" Plaintiffs urged that, in this case, "it would present clear reversible error to strike Plaintiff[s'] expert."

Mr. Caldwell countered that "neither the timely [expert] designation or the late [expert] designation complied with [Maryland] Rule 2-402(g)." This failure was highlighted by the fact that Plaintiffs never "provided a copy of any expert's CV or fee

schedule." Mr. Caldwell also distinguished *Maddox v. Stone* for the reason that, in that case, when plaintiff's amended expert designation and written report were filed, although approximately one month after they were due, the discovery window was still open. Moreover, the defense counsel in *Maddox* consented to the amendment and deposed plaintiff's expert before discovery closed. Mr. Caldwell also noted that "[t]he most significant difference" between the case at bar and *Maddox* was that, in *Maddox*, striking the expert mandated that the plaintiff's claim be dismissed while, here, "not allowing the Plaintiffs' untimely expert to testify . . . will not result in a dismissal of the Plaintiffs' claim."

Plaintiffs' opposition to the motion to strike contains a certificate of service that shows the motion was emailed to the opposing party on August 5, and the docket shows the opposition was entered on August 9, 2021. Although the scheduling order commanded that a hearing be set "not later than thirty (30) days after the motion and response have been filed," a separate hearing was not scheduled; however, the trial was already set to proceed on September 8, 2021.

Trial

The liability portion of the trial commenced,[4] as scheduled, on September 8, 2021, with jury selection.[5] The following day, defense counsel informed the trial judge "there's

[4] Ten weeks prior to trial, the circuit court granted the parties' consent motion to bifurcate the trial as to liability and damages.

[5] Because of the COVID-19 emergency, jury selection took place remotely on Zoom.

a pending motion" to "strike the plaintiff[s'] expert," as "the expert report is untimely and prejudicial." After noting that the motion should have already "been dealt with by somebody," the trial judge explained that he would review the pending motion during lunch. Other than advising the judge that "you've got to be careful what you ask for because if you don't allow me to have my expert testifying I'll probably get a second bite at the apple," Plaintiffs' counsel did not object.

Following a lunch recess, the circuit court heard argument on the motion to strike the Plaintiffs' expert.[6] Defense counsel presented many of the arguments contained in the pending motion, adding that, although the defense had properly designated an accident reconstruction expert, the defense did not commission a report from her own expert because during discovery she was not provided with any accident reconstruction report from the Plaintiffs to dispute. Defense counsel also noted the report's lack of relevance, which, she explained, was highlighted by the fact that it has "pictures of the scene" but contained "no opinions[.]"

Plaintiffs' counsel argued that the expert testimony was relevant, as the defense was arguing that Mr. Hemstreet "ran a red light" and Plaintiffs' witness would refute this theory by "working with what we established with the traffic guy. There was a five second yellow and how fast you go per second." The judge asked Plaintiffs' counsel how that testimony would be relevant without any evidence of where Mr. Hemstreet was when the light turned

[6] Given that the motion was still pending, the trial judge asked that "no one mention any findings regarding this particular expert until the [c]ourt has had an opportunity" to review the motion.

yellow. Plaintiffs' counsel clarified that the expert would not be able to place Mr. Hemstreet on the roadway but would instead "say where [Mr. Hemstreet] would be assuming he is telling the truth that he was doing 40 miles per hour, where he would be on the roadway[.]"

When asked what good cause prompted the delay in designating the expert and disclosing his report, Plaintiffs' counsel argued that she did timely designate her experts but had to "switch experts." In her view, the defense's motion to strike was simply a "legal charade to prevent evidence that we want to put forth" as she had offered to "consent to moving the trial date 60 days" so that defense counsel could depose the expert. Plaintiffs' counsel also argued that her "deficiency must be absolutely profound for this expert to be stricken from the evidence."

In response, defense counsel noted:

> Okay. So, plaintiff filed this lawsuit, Your Honor, on February 13th, 2020.
>
> On October 2nd, 2020, again 2020, this Honorable Court issued a scheduling order and told everyone the trial was September 8th.
>
> At that point counsel could have obtained an expert and found out whether or not they are available on September 8th. She didn't do any of that until her expert deadline came up.
>
> Her answers to interrogatories didn't provide any expert information at all whatsoever . . . and then two weeks after discovery is closed I'm given a report which is completely inconsistent with the late designation that she filed. The designation says one thing, and then the report says something else.
>
> So, what am I supposed to prepare for trial? Am I supposed to prepare for one or the other?

> I now need to hire an expert. I can't just—I'm not an engineer. I'm not a physicist. I'm a lawyer, so I would need to consult an expert to review this report that would help me cross examine an expert.
>
> And we're six weeks before trial at that point. This case is—she filed it in February of 2020. . . . And the expert report is completely—it doesn't say anything that the expert designation says.

After this rebuttal from defense counsel, Plaintiffs' counsel, referring to the *Maddox v. Stone* opinion, mentioned the "Draconian sanction[]of dismissing a claim[.]" The judge interposed, "I'm not dismissing your claim." The judge continued:

> . . . [I]f I preclude the expert, if I preclude the evidence it wouldn't lead to the dismissal of your claim.
>
> * * *
>
> And it's not necessary to support a claim. [In *Maddox v. Stone*] [t]hey are talking about a situation if I was to strike a medical expert in a med-mal case and then without that expert you could not prove medical negligence that would be necessary.
>
> You still have a case. Your client says he didn't run the red light. The defense says he did. And the jury will make a determination on that, but I don't find—first of all, the designation given the amount of time that the plaintiff had to designate an expert, to say that you designated an expert who wasn't available on the trial date which was known from the date you got a scheduling order—[interruption by counsel]
>
> * * *
>
> And I don't find good cause for the late designation. Number one, the designation as initially provided didn't really provide any information under which—by which the defense could make a determination about what if anything it would need to do. He would need to do for expert witness notwithstanding that, you know, by the time you sent the designation discovery had closed. By the time you sent the report discovery had closed.
>
> * * *

> . . . I guess by the time you provided the information that the defendant requested from you in discovery that was not timely.
>
> So, the [c]ourt is going to grant the defendant's motion to exclude JMH Associates as an expert witness.

On September 13, 2021, the jury found that Mr. Caldwell was "negligent in the operation of his motor vehicle and that his negligence was a cause of the accident." However, the jury also found that Mr. Hemstreet "was negligent in the operation of his motor vehicle and that his negligence was a cause of the accident," thereby rendering a defense verdict. The Plaintiffs filed a notice of appeal on September 28, 2021.

DISCUSSION

The Parties' Contentions

Before this Court, Appellants contend that the trial judge abused his discretion when he struck their expert "in the middle of a jury trial" instead of simply "disallowing the photos which were produced 10 days after the close of discovery[.]" They aver that they substantially complied with the scheduling order, as they "timely identified the expert and summarized the testimony within the discovery deadline." The Appellants maintain that they properly substituted their accident reconstructionist after the deadline, and because "there is no[] [expert] REPORT requirement in the scheduling order OR in State Court rules," they posit that "[s]triking the photos would have been a better resolution[.]" Appellants set out the reasons for their late disclosures as follows:

> 1) they were made with the impression that the trial date of September 8, 2021 would not likely go forward because of COVID closures, 2) The date for the photos to be taken was scheduled without checking the Scheduling

> order/discovery deadlines, and MOST importantly 3) Plaintiff[s'] counsel scheduled the photos to be done by the expert on the exact date (July19) and time (5:00 pm) of the subject accident.

Given that Mr. Hemstreet testified that "he is a cautious rider [] and does not speed up at yellow lights to get through [an] intersection[,]" the Appellants insist that the expert reconstructionist's testimony was crucial, as it would help the jury resolve the "ONE factual dispute[,]" "whether [Mr. Hemstreet's] light was yellow or red" when he crossed the intersection. Quoting *Maddox v. Stone*, 174 Md. App. 489, 492 (2007), the Appellants argue that "the more draconian sanctions, of dismissing a claim or precluding the evidence necessary to support a claim, are normally reserved for persistent and deliberate violations that actually cause some prejudice, either to a party or the court."[7]

Mr. Caldwell, to the contrary, initially asserts that the circuit court "did not err when it conducted a hearing on . . . defense counsel's motion to strike the Plaintiffs' expert on the first day of trial[.]" He avers that he moved promptly to strike Plaintiffs' expert "only five business days" after Plaintiffs produced the untimely report. In his view, Appellants are not entitled to a hearing under Maryland Rule 2-311(f), as the motion to strike was not "dispositive of [their] claim." He asserts further, the Maryland Rules do not preclude the circuit court from conducting an oral hearing on a motion to strike a witness "during trial prior to a witness testifying." Mr. Caldwell argues that Plaintiffs' counsel "should have

[7] Because we limit our review to the propriety of the trial judge's actions in this case, we decline to summarize the Appellants' argument that the trial judge has utilized a "lenient approach" to discovery violations in other cases.

followed-up with the judge's chambers for a status on the motion and requested that it be heard prior to the day of trial" if Plaintiffs thought there was "an issue with the timing[.]"

Mr. Caldwell urges that Plaintiffs' failure to substantially comply with the scheduling order or provide "good cause for not complying" justify the circuit court's use of its discretion to strike the expert witness. According to Mr. Caldwell, Plaintiffs did not "substantially comply" with the scheduling order as they: (1) "filed an [e]xpert [d]esignation on the day of the deadline that did not include any reports"; (2) "subsequently filed an untimely amendment to the designation without contacting counsel and without explaining a reason why the substitution was required"; and (3) "ten days after the close of discovery . . . provided a report by the substituted expert JMH Associates."

Mr. Caldwell expounds that Plaintiffs' amended expert disclosure, in addition to being untimely, "did not include a report by the expert and did not convey the substance of the accident reconstructionist's findings or opinions. Instead, it only set forth the parameters of what the expert might say." As for the report that was ultimately provided by the substituted expert 10 days after the close of discovery, Mr. Caldwell asserts that, "[i]n this red light-green light case, the Plaintiffs' accident reconstructionist did not and could not determine the color of the light with scientific or reasonable probability or certainty at the time [Mr. Hemstreet] entered the intersection, and he offered no opinions or findings to that effect." Mr. Caldwell insists the incomplete report, filed 10 days after the close of discovery, provided no basis for deposing the substituted expert. Accordingly,

he could not consent to a postponement, as any delay in the trial proceedings would "be inherently prejudicial to the defense."

Finally, Mr. Caldwell contends that Appellants have failed to show good cause for the delay in naming the substituted expert and producing the expert's report. In his view, none of the Appellants' justifications—that Plaintiff's counsel "believed the trial date of September 8, 2021, would not go forward because of COVID closures" and so "scheduled a date for photos to be taken for the expert report without checking the scheduling order or discovery deadlines" with the intent that the photos "be taken by the expert on the exact day and time of the subject incident" amount to good cause "for failing to meet the required deadlines." Mr. Caldwell argues that the circuit court's sanction of striking a witness who "was not necessary to support the Plaintiffs' claim" was far from draconian. Citing *Asmussen v. CSX Transportation, Inc.*, 247 Md. App. 529 (2020), he states "the Court has upheld striking even a necessary witness if there is reckless disregard of the scheduling order." Finally, Mr. Caldwell argues that the expert's report was "not probative as to any issue in the case," and "striking the witness was not severely prejudicial to the Plaintiffs[.]"

Appellants reply that the expert's testimony was critical, as it was their only avenue to "combat [an] eyewitness's assertion that [Mr. Hemstreet's] light had turned to red" when he entered the intersection. Additionally, citing *Watson v. Timberlake*, 251 Md. App. 420 (2021), *cert. denied*, 476 Md. 281 (2021), Appellants argue that Mr. Caldwell did not timely dispute their substitute expert witness disclosure. In their view, the amended expert designation was a "complete outline of the expected testimony." They accuse Mr.

Caldwell's counsel of engaging in a "litigation tap dance" by using a "fabricated 'report' requirement [] as an excuse to strike Appellant[s'] accident reconstruction expert[.]" In their view, Mr. Caldwell's attorney "failed to retain an expert . . . and the [trial] judge bailed her out [] by striking the [Appellants'] expert witness."

Standard of Review

We review a circuit court's decision to strike a witness for a failure to comply with a scheduling order for abuse of discretion. *Admiral Mortgage v. Cooper*, 357 Md. 533, 545 (2000) ("[T]he appropriate sanction for a discovery or scheduling order violation is largely discretionary with the trial court[.]"); *Watson v. Timberlake*, 215 Md. App. 410, 431 (2021), *cert. denied*, 476 Md. 288 (2021) ("We review a circuit court's decision not to sanction a scheduling order violation for abuse of discretion."); *Asmussen v. CSX Transp., Inc.*, 247 Md. App. 529, 551 (2020) (The decision "whether to . . . strike a witness for a failure to comply with a scheduling order . . . [is] committed to the circuit court's discretion). A trial court abuses 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.'" *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (quoting *North v. North*, 102 Md. App. 1, 13, (1994)). The Supreme Court of Maryland[8] has instructed that,

[8] In the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also*, Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these (continued)

> "Questions within the discretion of the trial court are 'much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred.' In sum, to be reversed '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.'"

Wilson v. Crane, 385 Md. 185, 198-99 (2009) (quoting *In re: Adoption/Guardianship No. 3598*, 347 Md. 295, 312-13 (1997) (other internal citations omitted)). Accordingly, an abuse of discretion will be found "in the extraordinary, exceptional, or most egregious case." *Id.* at 199.

Analysis

A. The Trial Court's Exclusion of the Plaintiffs' Expert

Scheduling orders "are critical to the circuit court's assignment of actions for trial and the efficient management of its caseload."[9] *Watson v. Timberlake*, 251 Md. App. 420, 432 (2021), *cert. denied*, 476 Md. 281 (2021); *Naughton v. Bankier*, 114 Md. App. 641, 653 (1997) (Scheduling orders "maximize judicial efficiency and minimize judicial inefficiency."). They serve to "move the case efficiently through the litigation process by setting specific dates or time limits for anticipated litigation events to occur." *Dorsey v. Nold*, 362 Md. 241, 255 (2001). To that end, Maryland Rule 2-504(a)(1) requires that, in

Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland . . . .").

[9] Judge Raymond G. Thieme, Jr. has explained that scheduling orders "light the way down the corridors [along] which pending cases will proceed." *Naughton v. Bankier*, 114 Md. App. 641, 653 (1997).

every civil action, "[u]nless otherwise ordered by the County Administrative Judge," "the court shall enter a scheduling order[.]" Md. Rule 2-504(a)(1). "Unless the court orders a scheduling conference . . . the scheduling order shall be entered as soon as practicable, but no later than 30 days after an answer is filed by any defendant." *Id.* at (a)(3).

While some scheduling order provisions are "permitted," others are "required." *Watson*, 251 Md. App. at 433. Among other things, the Maryland Rules *require* a scheduling order to provide: (1) "one or more dates by which each party shall identify each person whom the party expects to call as an expert witness at trial, including all information specified in Rule 2-402(g)(1)"; (2) "a date by which all discovery must be completed"; and (3) a date by which all dispositive motions must be filed, "which shall be no earlier than 15 days after the date by which all discovery must be completed[.]" Md. Rule 2-504(b)(1). Scheduling orders *may* contain other provisions, such as "any reasonable limitations on the number of interrogatories, depositions, and other forms of discovery[.]" Md. Rule 2-504(b)(2)(A).

Although this Court has clarified that scheduling order deadlines need not be "unyieldingly rigid," *Naughton v. Bankier*, 114 Md. App. 641, 653 (1997), "they should not be complaisantly lax either[,]" and we have "held that circuit courts should demand 'at least substantial compliance, or, *at the barest minimum*, a good faith and earnest effort toward compliance' with the scheduling order's requirements[.]" *Asmussen v. CSX Transp., Inc.*, 247 Md. App. 529, 548 (2020) (quoting *Naughton*, 114 Md. App. at 653). We have previously held that "there is inherent power for the courts to 'enforce their

scheduling orders through the threat and imposition of sanctions.'" *Maddox v. Stone*, 174 Md. App. 489, 507 (2007); *Dorsey*, 362 Md. at 256 ("[S]anctions are available for the violation of directives in scheduling orders[.]"). Thus, "we have seen scheduling order violations asserted, and sometimes sanctioned, in a variety of circumstances." *Watson*, 215 Md. App. at 433 (collecting cases).

When, as in the case before us now, "the asserted scheduling order violation involves a discovery failure, the trial court has wide discretion to determine what sanction, if any, is appropriate." *Id.* at 434 (citing *Admiral Mortgage, Inc. v. Cooper*, 357 Md. 533, 545 (2000)). Indeed, when an "expert [is] not identified until after the deadline set in the scheduling order," we have previously "upheld a trial court's ruling excluding [the] expert testimony." *Livingstone v. Greater Washington Anesthesiology & Pain Consultants, P.C.*, 187 Md. App. 346, 387 (2009).

In *Taliaferro v. State*, the Supreme Court of Maryland affirmed the trial court's decision to exclude an alibi witness who was first disclosed on the last day of trial, contrary to the requirements of the Maryland Rule requiring pretrial disclosure of such witnesses. 295 Md. 376 (1983). The court summarized a variety of factors, commonly referred to as the "*Taliaferro* factors," that a trial court should consider in deciding whether to grant or deny motions to strike witnesses and other evidence as a sanction for scheduling order and discovery violations. Those factors are: (1) whether the disclosure violation was technical or substantial; (2) the timing of the ultimate disclosure; (3) the reason, if any, for the violation; (4) the degree of prejudice to the parties respectively offering and opposing the

evidence; (5) whether any resulting prejudice might be cured by a postponement; (6) and, if so, the overall desirability of a continuance. *Id.* at 390-91. We clarified in *Asmussen*, that "two broader inquiries lie at the heart of the *Taliaferro* factors. First, has the party seeking to have the evidence admitted *substantially complied* with the scheduling order? . . . Second, is there *good cause* to excuse the failure to comply with the order?" 247 Md. App. at 550. We explained that good cause is more likely to be found when "the party seeking an accommodation has a good reason for noncompliance, [and] where the prejudice he suffers from non-admission is great, and where the prejudice his opponent suffers from admission is less severe." *Id.* at 550-51.

In their arguments below and in their opening brief before this Court, the Appellants rely on the principle recited in *Maddox v. Stone* that "'the more draconian sanctions, of dismissing a claim or precluding the evidence necessary to support a claim, are normally reserved for persistent and deliberate violations that actually cause some prejudice, either to a party or to the court.'" 174 Md. App. 489, 501 (2007) (quoting *Admiral Mortgage, Inc.*, 357 Md. at 545 (2000)). Contrary to Appellants' contention, however, when considered within the full context of the *Maddox* and *Admiral Mortgage* opinions and our caselaw more broadly, the foregoing precept does not propel a determination that the trial judge in this case abused his discretion under the circumstances presented.

In *Maddox*, the plaintiffs identified their expert in a negligence action more than two weeks before the deadline for plaintiff's expert disclosures under the court's scheduling order. 174 Md. App. at 495. Despite this timely identification, plaintiffs did

not provide the expert's report until more than a month after that deadline and two days after the defense expert disclosure deadline (but still one month before the discovery deadline). *Id.* at 494-95. The defense had already noted the deposition of plaintiffs' expert, and after receiving the belated report, defense counsel requested that he be allowed to retain an expert to counter the report. Plaintiffs agreed. *Id.* at 496. Plaintiffs also made it clear that their expert would be available for the deposition on the date already noticed. *Id.* The defendant filed a motion with the court requesting either an extension of the expert disclosure deadline, or a continuance, or for an order striking plaintiffs' expert, arguing that the defense "now has no ability to counter the new opinion by the plaintiffs' expert." *Id.* While the motion was pending, defense counsel took the deposition of plaintiffs' expert. *Id.*

After a hearing, the circuit court granted the defendant's motion to strike, reasoning that plaintiffs "had not satisfied the requirements of the scheduling order" as they did not disclose their expert report "until two days after the [defendant's] deadline for identifying defense experts" passed. *Id.* Ultimately, plaintiffs conceded that they could not prove causation if they could not call an expert witness on causation, and the circuit court granted the defendant's motion for summary judgment. *Id.* at 498

On appeal this Court reversed and held that the circuit court had abused its discretion in striking the plaintiffs' expert witness. *Id.* at 505-07. We reasoned that the trial court did not take "into consideration any factors such as those identified in *Taliaferro*" nor did it "consider whether any option other than exclusion of the [plaintiffs'] expert would be an

appropriate response to the lack of strict compliance with the discovery deadlines imposed by the scheduling order." *Id.* at 505-06. We pointed out that the defendants could not claim any surprise because plaintiffs provided the expert report a few weeks in advance of the expert's deposition, which was scheduled on a mutually agreed date. *Id.* at 506. We explained that our holding "is not to say that trial counsel and litigants are free to treat scheduling orders as mere suggestions or imprecise guidelines for trial preparation," however "the imposition of a sanction that precludes a material witness from testifying, and, consequently effectively diminishes a potentially meritorious claim without a trial, should be reserved for egregious violations of the court's scheduling order, and should be supported by evidence of willful or contemptuous or otherwise opprobrious behavior [.]" *Id.* at 507.

Appellants' reliance on *Maddox* fails on several points. Initially, we observe that the untimely disclosure of the expert witness and further belated expert report were not the Appellants' only discovery failures, as the circuit court had to grant a motion to compel complete answers to interrogatories and the production of documents several months after the scheduling order was issued. Unlike the expert disclosure in *Maddox,* Mr. Hancock of JMH Associates was not one of the six experts identified by Appellants before the deadline established in the scheduling order. Mr. Hancock was not named until 14 days after the expert disclosure deadline when the Appellants, without good cause or explanation, filed an amended identification of experts, beyond the deadline, and without conferring with defense counsel or seeking permission from the circuit court. The Appellants further

compounded the prejudice of their untimely disclosure by, again in contrast to *Maddox*, providing their expert report not just beyond the expert disclosure deadline, but after the close of discovery, thereby foreclosing Mr. Caldwell an opportunity to depose Mr. Hancock. By stark contrast, in *Maddox*, the plaintiffs' expert was excluded even though the defendant had the expert's report and took his deposition before the close of discovery. 174 Md. App. at 496. Additionally, here, because the late disclosure of the expert report in the underlying case was so close to the trial date (Plaintiff's response to the motion to strike was entered approximately 30 days before trial), and with the pending motion not having been ruled on prior to trial, the trial judge's options were significantly limited as compared to the judge in *Maddox*, who excluded the plaintiffs' expert several months before trial. Finally, as the trial judge pointed out, unlike in *Maddox*, where the plaintiffs' expert's evidence was necessary for the claims to proceed, here, even without the expert, the Hemstreets "still [had] a case."

Likewise, the factual differences between Appellants' case and that of *Admiral Mortgage, Inc.* compel different holdings. In *Admiral Mortgage, Inc*., an employee brought a claim against his employer insurance company seeking to recover unpaid commissions, damages, attorneys' fees, and costs. 357 Md. at 536. During discovery, the defendant employer requested discovery of plaintiff employee's expert witnesses, including the experts' reports, and a listing of damages claimed, with supporting documentation. *Id.* at 544. The plaintiff disclosed no experts in his response, nor did he include attorney's fees in his list of damages. *Id.*

At trial, the plaintiff sought to offer as evidence a summary statement of the legal fees not previously disclosed to the opposing party, which the court disallowed. *Id.* That night, at the court's direction, plaintiff's counsel prepared and served on defense counsel a detailed fee statement, offering himself as an expert witness to testify to their reasonableness. *Id.* at 544-45. The defense objected to the admission of the late-disclosed document into evidence and to counsel as an expert witness, arguing these to be egregious violations of the court's scheduling order. *Id.* at 545. The court overruled, admitting the fee statement, and allowing plaintiff's counsel to support it with his own expert testimony. On appeal, the plaintiff challenged those rulings as abuse of the court's discretion. *Id.*

The Supreme Court upheld the trial court's decision to allow the evidence and the testimony. *Id.* The Court noted that the defendant employer "knew from the beginning that a claim for attorneys' fees was being made and that the full amount of those fees could not be determined at least until trial was *completed*." *Id*. (emphasis added).

Here, Appellants' failure to disclose the expert's report within the discovery deadline left its contents a surprise and prejudiced Mr. Caldwell's defense, as it stripped him of his ability to investigate and respond to the report's claims. Mr. Caldwell had timely disclosed an expert accident reconstructionist witness, for the purpose of rebutting the Appellant's anticipated presentment. However, when Appellants failed to produce an expert report of their own in response to Mr. Caldwell's discovery requests, as they were required to do, Mr. Caldwell reasonably concluded that Appellant had commissioned no such report, thus eliminating his own need to commission rebuttal testimony from a witness

of his own. By the time Appellants disclosed their report, it was too late for Mr. Caldwell to respond in kind.

Here, Appellants hope to sway us with the first half of to the Court's dictum in *Admiral Mortgage, Inc*., of a "governing principle" that "*the appropriate sanction for a discovery or scheduling order violation is largely discretionary with the trial court,* and that the more draconian sanctions, of dismissing a claim or precluding the evidence necessary to support a claim, are normally reserved for persistent and deliberate violations that actually cause some prejudice, either to a party or to the court." *Id.* at 545 (emphasis added) (collecting cases). However, Appellants' consistent breach of the court's orders and rules of procedure "actually cause[d] some prejudice, either to a party or to the court." *Id.*

In *Lowery v. Smithburg Emergency Medical Services*, a case involving allegations of defamation and intentional interference with economic relations, we held that the trial court did not abuse its discretion when it excluded, as a discovery violation, an expert's report pertaining to lost wages and benefits. 173 Md. App. 662, 678 (2007). There, in a timely answer to interrogatories, Mr. Lowery, appellant and plaintiff below, responded that he had "not yet retained any experts" and that he estimated his lost wages to be "approximately $24,000 per year" based on a conversation with a would-be supervisor. *Id.* Before the expert witness disclosure deadline, Mr. Lowery had designated "Dr. Richard Edelman as an expert to render an opinion in regard to future lost wages" but did not send Dr. Edelman's report until March 15, 2006, well beyond the November 25, 2005, close of

discovery. *Id.* at 668-69. The appellees moved to exclude the expert "as having been untimely designated after the time provided therefore in the discovery schedule had provided." *Id.* at 669. The circuit court granted the motion, and then Mr. Lowery and Ms. Lowery, *et ux,* filed an appeal after the court granted the appellees' motion for judgment. *Id.*

Mr. Lowery posited an argument very similar to the argument Appellants present in the current appeal; namely, that the scheduling order required that experts be designated by a certain time but did not require an expert report. *Id.* at 669-70. Mr. Lowery also likened the court's decision to preclude the expert's opinion because of alleged deficiencies in the timely-filed expert's letter, to that of the trial court's decision to grant a motion to strike plaintiff's expert filed on the first day of trial in *Food Lion, Inc. v. McNeill,* which the Supreme Court of Maryland ultimately held was improperly granted. *Id.* at 670-71 (discussing *Food Lion, Inc. v. McNeill,* 393 Md. 715, 724-25 (2006)). We explained why Mr. Lowery's attempt to compare his case to *Food Lion* was unsuccessful:

> First, the discovery in *Food Lion* was completed on time, but, in the instant case, appellants' expert report was filed after the discovery deadline and the motion filed in *Food Lion,* unlike the motion in this case, was filed after the deadline established by the court.

Id. at 671-72. Walking through each of the *Taliaferro* factors, we determined, among other things, that "[t]he delay in obtaining the expert report did not allow appellees sufficient time to prepare their defense and was therefore prejudicial." *Id.* at 676. We concluded that "a balance of these factors favored the exclusion of the appellants' expert" and, therefore, that the trial court did not abuse its discretion. *Id.* at 678.

Returning to the case before us, we observe, as we did in the *Lowery* case, that the Appellants' expert report was filed *after* the discovery deadline a mere 48 days before trial. Appellants did not motion the court to: (1) provide good cause; (2) extend the discovery period; or (3) postpone the trial. We also note that Mr. Caldwell's motion to strike was filed *before* trial, right after the report was received, unlike plaintiff's oral motion to exclude a defense expert on the first day of trial in *Watson.* 251 Md. App. at 429.

The Appellants' amended identification of experts was also not timely, as it was submitted two-weeks after the plaintiff's expert disclosure deadline. Appellants failed to motion the court and provide good cause for why the late designation should be accepted. The amended designation was different from the original only in that it named an additional accident reconstructionist—Mr. Hancock. **E. 31**. While Mr. Hancock's designation explained the subject matter that he would testify to, it did not, in any way, "state the substance of the findings and the opinions to which the expert is expected to testify."

Because of the Appellants' continued discovery violations and their violations of the scheduling order, the trial court found that there was not "good cause for the late designation" of Mr. Hancock. The trial court's ruling, therefore, was not "clearly against logic and effect of facts and inferences before the court[ ]." *Wilson v. Crane*, 385 Md. 185, 198-99 (2009) (cleaned up). We agree that, without good cause justifying a late disclosure, it cannot be said that the Appellants "substantially complied" or even made "'a good faith and earnest effort toward compliance' with the scheduling order's requirements."

Asmussen v. CSX Transp., Inc., 247 Md. App. 529, 248 (2020) (citing *Naughton*, 114 Md. App. at 653).

Furthermore, the circuit court pointed out, correctly, that the sanction of striking Mr. Hancock was not of the "draconian" variety described in *Maddox*. First, the trial judge observed that Mr. Hancock's testimony and report were "not necessary to support a claim" and without the expert they still "ha[d] a case." Second, defense counsel made clear that Mr. Caldwell did not prepare his accident reconstruction expert or intend to call him to testify at trial because there was no expert opinion to challenge as Appellants did not identify timely an accident reconstructionist under Maryland Rule 2-402(g) as required by the scheduling order. Had the court permitted Mr. Hancock to testify at trial, it would have unfairly prejudiced Mr. Caldwell.

Under these circumstances, we cannot hold that the trial judge, in exercising his discretion to exclude Mr. Hancock and his report at trial, was "arbitrary or capricious, or without the letter or beyond the reason of the law." *Nelson v. State*, 315 Md. 62, 70 (1989).

B. The Hearing

We also reject the Appellants' contention that the trial judge abused his discretion by holding a hearing on Mr. Caldwell's motion to strike "in the middle of a jury trial." Maryland Rule 2-311(f) provides, among other things, that "[e]xcept where a rule expressly provides for a hearing, the court shall determine in each case whether a hearing will be held, but the court may not render a decision that is dispositive of a claim or defense without a hearing if one was requested as provided in this section." Despite the fact that Appellants

were not entitled to a hearing on Mr. Caldwell's motion to strike, the circuit court exercised its discretion to hold a hearing. Given that the trial judge was not assigned to the case's pre-trial motions, the trial judge decided the motion at the earliest possible juncture. Indeed, the practice of handling such motions during trial is quite common. *See Watson*, 251 Md. App. at 429 ("At the start of trial . . . Watson moved orally to preclude [the expert] from testifying, a motion on which [the judge] reserved until [the next day]."); *Food Lion v. McNeill*, 393 Md. 715, 725 (2006) ("On the day of trial, the appellant made an oral motion to prohibit Dr. Fulton from testifying[.]"). While it is unfortunate that the circuit court did not address Mr. Caldwell's motion to strike before trial, the circuit court accommodated the motion immediately after it was advised of its existence. Similar to *Watson*, here, the trial judge addressed the motion as soon as practicable after being advised of its existence. Appellants did not request a hearing on the motion before trial and failed to demonstrate how they were prejudiced by the court holding a hearing during the trial. *See Shaeler v. Straka*, 459 Md. 68, 102 (2018) ("The party complaining that an error has occurred has the burden of showing prejudicial error."). Therefore, we hold that the trial judge did not abuse his discretion in holding the hearing during the trial.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.