Circuit Court for Harford County
Case No. C-12-CV-20-000592

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1793

September Term, 2021

MARY AYERS

v.

TINA MARIE LOANE PETERSON

Wells, C.J.,
Graeff,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: January 30, 2023

* At 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.

** 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 Circuit Court for Harford County, appellant Mary Ayers brought an automobile tort action against appellee Tina Marie Sloane Peterson. During discovery, a dispute arose that resulted in an order precluding the testimony of Ms. Ayers' sole medical causation witness. On the first day of trial, after a jury had been selected, the trial court denied a motion to vacate that order. Ms. Ayers acknowledged that without the expert witness, she could not prove her case. Ms. Peterson moved for judgment, which the court granted. A timely motion for new trial or to alter or amend judgment was denied. This appeal followed. We shall vacate the judgment and remand for further proceedings.

FACTS AND PROCEEDINGS

On August 25, 2020, Ms. Ayers sued Ms. Peterson for negligence arising out of an automobile accident. During the discovery phase of the case, Ms. Peterson conceded "liability," that is, that she violated the standard of care in operating her vehicle. That left medical causation and damages as the remaining issues. The discovery dispute central to this appeal concerns Ms. Peterson's document request to Stanley Friedler, M.D., Ms. Ayers' medical causation expert.

On February 2, 2021, Ms. Peterson filed a notice of deposition and subpoena duces tecum directed to Dr. Friedler, seeking enumerated records for the ten-year period from 2011 through 2021. The ten categories of documents to be produced were:

1. Any and all ledgers, logs, emails and/or correspondence reflecting referrals from counsel for the Plaintiff;

2. Any and all ledgers, logs, emails and/or correspondence reflecting referrals from counsel for all Plaintiffs in general;
3. Any and all documents reflecting a profit/loss income analysis for the last 15 years;
4. Any and all tax returns for the last 10 years;
5. Any and all financial documents reflecting cash flow statements for the last 10 years;
6. Any and all balance sheets for the last 10 years;
7. Any and all income statements for the last 10 years;
8. Any and all statements reflecting changes in equity, including issuance of purchase of shares, and/or dividends issued;
9. Any and all communication with counsel concerning this case;
10. A listing of all depositions conducted within the last five years, including the jurisdiction where the suit was filed, the name and case number, the attorneys involved, and the date of the deposition.

Dr. Friedler produced a copy of a July 2020 report he had prepared concerning Ms. Ayers.

On June 4, 2021, Ms. Peterson filed a motion to compel, seeking full and complete production of documents responsive to the list in the subpoena duces tecum.[1]

Less than a week later, Ms. Ayers produced a letter by Dr. Friedler providing a copy of his "entire file on my patient[,]" a list of depositions he had given and court appearances he had made in the preceding 5 years, and information about referrals he had received from her lawyer. Ms. Ayers filed an opposition to the motion to compel and in the alternative a motion to quash the subpoena and for protective order, arguing that Dr. Friedler was a treating physician and therefore was not required to produce financial records and that he had substantially complied with the document request.

[1] There was no Rule 2-431 certification attached to the motion.

A hearing was held on pending motions on July 26, 2021, before Judge Daniels (Ret. Circuit Court for Baltimore County). The court rejected the argued distinction between treating and expert witnesses and ordered Dr. Friedler to produce the remaining requested documents in the next 10 days. On August 5, 2021, the court's order was sent by facsimile to Dr. Friedler's office, but he did not receive it. On August 6, 9, 10, 11, 12, and 16, Ms. Ayers' lawyer attempted, unsuccessfully, to contact counsel for Ms. Peterson by telephone. On August 18, Ms. Ayers' lawyer emailed Ms. Peterson's lawyer and legal assistant. The first response from counsel for Ms. Peterson was on August 20.

In the meantime, on August 16, Ms. Peterson filed a motion to strike Dr. Friedler as an expert witness.[2] On August 23, counsel for the parties finally spoke by telephone. On August 26, Ms. Ayers' lawyer provided Ms. Peterson's lawyer a letter from Dr. Friedler in which he stated that 75-80% of his time spent testifying was in forensic cases, usually involving workers' compensation; in 75-80% of those cases he testified for the defense; in possibly 10% of those cases, he testified for the plaintiff; and he does not keep separate balance sheets.

Ms. Ayers filed an opposition to the motion to strike. A hearing on that motion was held on August 30, 2021, before Judge Howard (Ret. Circuit Court for Baltimore City). The trial date was approximately one month away. After argument of counsel, the court issued an order granting the motion with the provision that if, by September 7, 2021, Dr. Friedler either stated under oath that the records requested did not exist or

[2] No Rule 2-431 certification was filed with that motion either.

provided the records (except those in items 8 and 10), then upon notice the court would vacate the order striking Dr. Friedler as an expert witness. In that regard, the court directed counsel to file the notice with the court and give it to the clerk; that the clerk would notify him; and that he would vacate the order electronically.

On September 3, 2021, Ms. Ayers produced income tax returns for Dr. Friedler for 2014 through 2020, with a letter from his accountant and an affidavit by Dr. Friedler. By email on September 6, 2021, counsel for Ms. Peterson responded with respect to the items produced that "[a]ll seems ok" but there were no 1099 forms, which he asserted Judge Howard had mentioned specifically. The next day, counsel for Ms. Ayers replied that he did not recall discussing 1099s at the hearing, and in any event Judge Howard had ordered Dr. Friedler to produce all items listed in the deposition notice duces tecum and subpoena (except those in items 8 and 10) and 1099s were not listed.

Also on September 7, 2021, Ms. Ayers' lawyer sent the following email to the clerk of court, with copies to Ms. Peterson's lawyer:

> At the end of the hearing before Judge Howard on Monday, August 30, 2021, the Judge asked that I email you with confirmation that Dr. Stanley Friedler had responded to the Order compelling his response to Defendant's subpoena/Notice of Deposition *Duces Tecum*. I am forwarding this email with attachments [the documents produced], that was sent to defense counsel last Friday, September 3, 2021. Dr. Friedler and his accountant have produced those requested documents that were in their possession/control and Dr. Friedler has provided an affidavit explaining that certain requests were for documents that did not exist and/or were not kept in the ordinary course of business, so he was unable to produce them.
>
> It is my understanding that defense counsel is in a trial today, so he may not be able to respond until later. However, based on an earlier email exchange with [defense counsel], I believe he has an issue with not

> receiving 1099 forms from Dr. Friedler. In response, I noted that the subpoena/Notice of Deposition *Duces Tecum* did not request 1099 forms. I wanted to make the court aware of this potential issue.

The clerk responded that he would pass the email and information on to Judge Howard. Two days later, counsel for Ms. Peterson emailed the court clerk that it was his position that because Dr. Friedler had not produced any 1099s he had not fully complied with the court's directive to produce all requested documents. The same day, counsel for Ms. Ayers replied that the document request did not include 1099s and therefore Dr. Friedler had complied with the deposition notice and subpoena duces tecum. He stated that he was available for a telephone conference if Judge Howard wished to hold one.

On September 13, 2021, Ms. Ayers took the *de bene esse* deposition of Dr. Friedler. Ms. Peterson had not noted a discovery deposition of Dr. Friedler.[3]

The parties appeared for trial in the Circuit Court for Harford County on September 28, 2021. A jury was selected, the trial judge gave preliminary instructions, and the jury was excused temporarily for the court and counsel to confer. After the court heard a motion in limine regarding medical bills and the issue of objections made during Dr. Friedler's *de bene esse* deposition was raised, Ms. Peterson's lawyer said: "Before we get to that, I think we need to address the bigger issue, which is the fact that Dr. Friedler was struck by Judge Howard a few weeks ago and has never been unstruck in this matter." Counsel for Ms. Ayers responded that all the documents Judge Howard had

[3] The deposition notice and subpoena duces tecum directed to Dr. Friedler was for the purpose of obtaining records only.

ordered to be produced had been produced, within the designated time, so Dr. Friedler should be permitted to testify. Ms. Ayers' counsel recounted the history of the rulings by Judges Daniels and Howard. Ms. Peterson's lawyer argued that because 1099s had not been furnished, not all the documents requested had been produced. Counsel for Ms. Ayers responded that the document request did not include form 1099s.

The trial judge reviewed the transcript of the hearing before Judge Howard and ruled that, in his view, Judge Howard had meant for 1099s to be produced; and if all the requested documents were produced, Judge Howard would vacate his order striking Dr. Friedler as an expert witness. The trial judge went on to state:

> That simply never happened. There is no order striking [Judge Howard's] former order striking Dr. Friedler. So, that is the law of the case. Whether this Court is happy with that or unhappy with that is really of no import because there is an order that strikes Dr. Friedler, that order was not stricken, and I am satisfied that the reason that order was not stricken was because Dr. Friedler did not provide the documents that Judge Howard ordered be produced in anticipation of the trial.

With that ruling, counsel for Ms. Ayers stated that he would not be able to prove Ms. Ayers' case, as Dr. Friedler was her only expert on medical causation. Counsel for Ms. Peterson moved for judgment. In response, Ms. Ayers' counsel argued that the trial judge's ruling was legally incorrect, and that Ms. Peterson was not entitled to the 1099s because they had not been requested. He complained that the entire situation was frustrating and unfair. He pointed out that the subpoena duces tecum directed to Dr. Friedler used the exact same language of the subpoena duces tecum that counsel for Ms.

Ayers had directed to Ms. Peterson's expert witness, and that Ms. Ayers had received fewer records from the defense expert than the defense had received from Dr. Friedler.[4]

The trial judge stated that he shared counsel's frustration in some respects, but "again, I believe that because it is the law of the case that I'm compelled to stick with the order that was issued by Judge Howard that has not been stricken by Judge Howard. So, as a consequence I will grant the defense's motion for a directed verdict in this matter."

As noted, this appeal followed the denial of a timely post-trial motion.

QUESTIONS PRESENTED

Ms. Ayers' questions presented, rephrased slightly, are:

1) Did the circuit court abuse its discretion by imposing a case-ending sanction not warranted by the nature of and reason for any discovery violation and the respective degrees of prejudice to the parties?

2) Did the circuit court abuse its discretion by compelling the production of information beyond the scope of the expert witness discovery approved by Maryland case law?

DISCUSSION

As the questions presented are interrelated, we shall address them together.

Ms. Ayers contends the trial court erred by precluding Dr. Friedler from testifying because Judge Howard's order striking Dr. Friedler was "the law of the case" and could not be changed regardless of what had transpired since it was issued. The law of the case doctrine did not apply, she argues, and the trial court should have exercised discretion to

[4] At oral argument before this Court, counsel for Ms. Peterson acknowledged that the defense did not produce its expert witness's 1099 forms in response to the request for tax returns.

consider the factors relevant to whether Dr. Friedler should be precluded from testifying, as established in Maryland case law. Had it done so, it would have permitted Dr. Friedler to testify, because the factors relevant to discovery sanctions would not support the extreme, case-ending sanction of preclusion of a material witness. Ms. Ayers takes the position that the notice of deposition and subpoena duces tecum did not include form 1099s, because they were not among the documents enumerated for production. She acknowledges that Judge Howard seemed to think 1099s were included, but nevertheless ordered production in conformity with the language of the subpoena, which did not mention 1099s.

Ms. Peterson responds that remarks by Judge Howard and by counsel for Ms. Ayers during the hearing before Judge Howard support a conclusion that form 1099s were covered by the request for tax returns in the subpoena duces tecum to Dr. Friedler and that, without 1099s, her counsel's ability to cross-examine Dr. Friedler was hampered, to her prejudice. She maintains that the burden was on Ms. Ayers and her lawyer to make sure Judge Howard took action to vacate the order striking Dr. Friedler as an expert, and the fact that Judge Howard did not do so must mean he was of the view that because the 1099s were not produced, the circumstances did not warrant vacating the order precluding Dr. Friedler from testifying. Hence, the order remained in place and the trial court did not abuse its discretion by keeping it in place.

Financial information about compensation paid to a non-treating expert witness can be a valuable tool for cross-examination, as it may show "bias or interest in the

outcome of the proceeding." *Goldberg v. Boone*, 396 Md. 94, 116 (2006). Maryland law recognizes that, to aid in cross-examination, "[t]he production of limited financial documents, from a contemporary and finite period of time, that reflect payments made to the witness in connection with medical-legal services is permitted[.]"*Falik v. Hornage*, 413 Md. 163, 188 (2010). *See also Wrobleski v. de Lara*, 353 Md. 509 (1999) (upholding cross-examination of a non-treating expert witness about income derived from testimony and forensic work).

When there is a failure of discovery and sanctions are sought, the decision whether to impose a sanction and what sanction to impose is in the discretion of the court and is reviewed on appeal for abuse. *Dackman v. Robinson*, 464 Md. 189, 231 (2019). In exercising discretion as to whether to impose a sanction for a discovery violation, the circuit court

> "should weigh (1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility of curing any prejudice; and (4) any other relevant circumstances."

Id. at 231-32 (quoting *Beka Indus., Inc. v. Worcester Cnty. Bd. of Educ.*, 419 Md. 194, 232 (2011) (cleaned up)). The considerations quoted above derive from *Taliaferro v. State*, 295 Md, 376 (1983), in which the Court synthesized factors deemed relevant in prior decisions. The *Taliaferro* factors are

> 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. at 390-91.[5]

Most recently, in *Asmussen v. CSX Transp., Inc.*, 247 Md. App. 529, 550-51 (2020), in which the trial court struck the plaintiff's expert witness for violation of a scheduling order, we observed that two inquiries are central to the *Taliaferro* factors: whether "the party seeking to have the evidence admitted *substantially complied* with the scheduling order?" and whether "there [is] *good cause* to excuse the failure to comply with the order?" (Emphasis in original.) Sanctions for discovery violations and for violations of discovery covered by scheduling orders are subject to the same analysis. *See Dorsey v. Nold,* 362 Md. 241, 256 (2001) ("Just as there are sanctions for the violation of the discovery rules, sanctions are available for the violation of directives in scheduling orders, although they are not specified in any rule.").

If a court decides to impose a sanction for a discovery or scheduling order violation, it also has discretion over the severity of the sanction. Notwithstanding this discretion, "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." *Admiral Mortg., Inc. v. Cooper*, 357 Md. 533, 545 (2000). *See also Thomas v. State*, 397 Md. 557, 572 (2007) ("Exclusion of evidence for a discovery violation is not a favored

[5] Although *Taliaferro* is a criminal case, the factors it articulates are applied by the Maryland appellate courts in civil cases. *See, e.g., Butler v. S & S P'ship*, 435 Md. 635 (2013); *Heineman v. Bright*, 124 Md. App. 1 (1998).

sanction and is one of the most drastic measures that can be imposed."); *Manzano v. S. Maryland Hosp., Inc.*, 347 Md. 17, 29 (1997) (observing that dismissal of a claim is a discovery sanction warranted only in cases of "egregious misconduct").

We return to the case at bar. The trial judge made clear that he was not going to exercise any discretion to decide whether Dr. Friedler should be allowed to testify as an expert witness at trial because Judge Howard had entered an order striking Dr. Friedler as an expert witness and had not vacated that order. The trial judge reasoned that the "law of the case doctrine" applied, making him powerless to vacate Judge Howard's order.

The law of the case doctrine holds that "once an appellate court rules upon a question presented on appeal, litigants and lower courts become bound by the ruling, which is considered to be the law of the case." *Scott v. State*, 379 Md. 170, 183 (2004). "It is the country cousin to the more ornately named doctrines of *res judicata*, collateral estoppel and *stare decisis*." *Baltimore Cnty. v. Fraternal Ord. of Police, Baltimore Cnty. Lodge No. 4*, 449 Md. 713, 729 (2016) (footnote omitted). The order precluding Dr. Friedler from testifying was a circuit court order, not an appellate mandate. The law of the case doctrine did not apply to Judge Howard's order and the trial court's ruling that it did was legally incorrect.

Moreover, Judge Howard's order was interlocutory, entered before all claims by and against all parties were resolved. It is well settled in Maryland that an interlocutory order may be vacated, revised, or amended either by the judge who issued it or another judge. *See* Md. Rule 2-602(a)(3) (With an exception not applicable, "an order or other

form of decision, however designated, that adjudicates fewer than all of the claims in an action … or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action … is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties."). Thus, the trial judge was not bound by Judge Howard's order and was free to exercise his own independent discretion over whether Dr. Friedler should be permitted to testify. Indeed, although Judge Howard had not vacated the preclusion order (for reasons not known), once the trial judge was asked to decide anew whether Dr. Friedler should be precluded from testifying, it was incumbent upon him to exercise discretion to rule on that question and to do so in light of the circumstances then existing. By not doing so, the court abused its discretion. *Gray v. State*, 368 Md. 529, 565 (2002) (When court has discretion, "the actual failure to exercise discretion is an abuse of discretion."). *See also Barufaldi v. Ocean City, Chamber of Com., Inc.*, 196 Md. App. 1, 36 (2010) (holding that when exercise of discretion is called for, failure to exercise discretion is itself an abuse of discretion).

The question becomes whether the trial court's abuse of discretion was prejudicial to Ms. Ayers. We conclude that it was because the *Taliaferro* factors and the law restricting case-ending discovery sanctions to egregious failures and contumacious behavior would not support an exercise of discretion to preclude Dr. Friedler from testifying as an expert witness.

After the hearing before Judge Howard, Ms. Ayers produced the requested documents to the satisfaction of Ms. Peterson's lawyer, however the parties differed as to whether form 1099s were included in the discovery request. Thus, defense counsel had received the financial documents needed to effectively cross-examine Dr. Friedler except to the extent 1099s would aid in that endeavor. Relying on *Falik v. Hornage*, 413 Md. 163, Ms. Peterson argues that precluding a non-treating expert witness from testifying is an acceptable sanction when that expert has not produced form 1099s to show from whom he received payments for his services.

Falik was a follow-up to the holding in *Wrobleski* that a non-treating expert witness could be cross-examined about possible financial bias. It involved two separate civil cases in which Dr. Falik, a non-treating doctor, was identified as a defense expert. In both cases, extensive records requests were made to Dr. Falik that specifically included tax returns and form 1099s. Dr. Falik moved for protective orders, the trial courts ordered that certain of the records be produced, and Dr. Falik noted immediate appeals. The Supreme Court of Maryland[6] consolidated the appeals and approved the order in one case but not the other.

The order the Court affirmed "allow[ed] only a controlled inquiry into whether a witness offered as an expert earns a significant portion or amount of income from applying his or her expertise in a forensic nature and is thus in the nature of a

[6] On December 14, 2022, the name of the Court of Appeals was changed to the Supreme Court of Maryland.

'professional witness.'" *Falik*, 413 Md. at 186. In fashioning that order, the trial court "tailored the scope" of the tax returns it directed Dr. Falik to produce to cover "those portions which referenced any payment in connection with medical legal services and to a narrow sweep of contemporary time, the two years prior to the inquiry." *Id.* "Similarly, the ordered production of 1099 forms was limited in scope to the proffered expert's services as an expert witness or for work done at the request of the defendant's insurance carrier[.]" *Id*. By contrast, the order the Court found unacceptable "did not control tightly the scope of the desired inquiry consistent with what was allowed in *Wrobleski*. The order directed Dr. Falik to produce all income tax records from the previous three years, without limiting the records to those related to forensic services." *Id*. at 187. The latter order was "impermissible" because it "more closely approximate[d] a 'wholesale rummaging' through Dr. Falik's personal finances" that the *Wrobleski* Court had admonished against. *Id.*[7]

The *Falik* case is instructive but distinguishable. It does not support the starting point to Ms. Peterson's argument, which is that the subpoena duces tecum to Dr. Friedler included form 1099s. In both *Falik* cases, the subpoena duces tecum expressly identified 1099s as documents to be produced, separate from tax returns, and on appeal from the orders directing disclosure, the Court discussed the two requests separately. The trial

[7] In the second case, where the order was found unacceptable, Dr. Falik had been withdrawn as an expert witness by the time the case was argued on appeal. The Court determined that because the issue was capable of repetition yet evading review, it came within an exception to the mootness doctrine. *See Powell v. Maryland Dep't of Health*, 455 Md. 520, 540 (2017).

court order that was affirmed directed a limited subset of the 1099s to be produced. The essence of the decision in *Falik* is that non-treating expert witnesses may be required to produce limited and specific financial documents tailored in relevancy to show possible bias in their opinions.

In the case at bar, by contrast, tax returns were requested but form 1099s were not. Instead, the parties were left to debate whether a request for "tax returns" did not mean what it said but impliedly requested related 1099s (to the extent they related to income from forensics). At best, the language was ambiguous. Notably, Ms. Peterson did not apply any such ambiguity to the request to her expert, as she did not produce her own expert witness' form 1099s, but only applied it to the identical request to Dr. Friedler. In our view, given the *Falik* Court's approval of limited and specific requests for financial documents to non-treating expert witnesses, the reasonable interpretation of the request for "tax returns" was that only tax returns, and not supporting documents, were sought. A request for form 1099s easily could have been included in the subpoena but was not.

Falik not only differs from this case in that it concerned requests to produce form 1099s but also differs in the nature and effect of the orders that were being reviewed on appeal. The orders in *Falik* were not sanctions imposed for discovery failures; they were orders compelling the production of specified documents. Here, the trial court's ruling precluded Ms. Ayers' expert witness from testifying - - a discovery sanction - - and the sanction effectively ended her case by making it impossible for her to prove necessary elements of her cause of action. Although *Falik* appears to be the only Maryland case

addressing production of an expert witness's form 1099s, it does not concern case-ending sanctions. The cases that do, in the contexts of discovery and scheduling order violations, apply the *Taliaferro* factors on review and approve the most drastic preclusion sanctions sparingly.

In *Ausmussen v. CSX Transp., Inc*., 247 Md. App. 529, for example, the plaintiff in a negligence case disclosed his expert witness's identity six weeks after the close of discovery; gave no information about the substance of the expert's opinions; and at the same time attempted to expand his theory of causation, all of which prejudiced the defendant's ability to mount a defense. We affirmed the resulting summary judgment in the defendant's favor, holding that while the case-ending sanction was harsh it was caused solely by the plaintiff's lawyer's "indefensible lack of diligence[.]" *Id.* at 556. *See also Lowery v. Smithburg Emergency Med. Serv*., 173 Md. App. 662 (2007) (expert precluded from testifying because his report was filed two and one-half months after close of discovery and 12 days before trial, thereby prejudicing the opposing party); *Heineman v. Bright*, 124 Md. App. 1 (summary judgment was granted in favor of defendant after plaintiff ignored interrogatories, failing to identify any witnesses with knowledge of her claim, to the prejudice of the defense).

By contrast, in *Maddox v. Stone*, 174 Md. App. 489 (2007), we reversed summary judgment entered against plaintiffs who were precluded from calling their expert witness in their negligence case, holding that the court had abused its discretion by imposing that sanction. The plaintiffs had produced their expert's report 34 days after the deadline for

doing so in the scheduling order. The expert previously had been identified and deposed by the defendant, however, and another expert the plaintiffs had expected to call at trial had died in the meantime. We could not "discern from the record … that the trial court took into consideration any factors such as those identified in *Taliaferro*." *Id*. at 505. The court did not consider whether the plaintiffs had substantially complied with the order, whether they had good cause to disclose the report after the deadline because the expert did not give it to them until then, and whether the late disclosure of the report did not prejudice the defendant because he had deposed the expert well in advance of trial. We observed that when a deadline such as this in a scheduling order has not been met, imposing a sanction that precludes the testimony of a necessary witness, thereby effectively dismissing a meritorious claim, "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 on the part of the party or counsel." *Id*. at 507.

When reversing a defense judgment entered after the plaintiff in a lead paint case was precluded from introducing an expert witness's report that was disclosed after the discovery deadline, the Supreme Court of Maryland quoted *Maddox* with approval. In *Butler v. S & S P'ship*, 435 Md. 635, the Court stated

> [A]bsent a showing of an egregious violation or "willful or contemptuous or otherwise opprobrious behavior," a court should not exclude fundamental and essential evidence that effectively dismisses a case for a violation of a scheduling order.

Id. at 653 (quoting *Maddox v. Stone*, 174 Md. App. at 507). *See also Scully v. Tauber*, 138 Md. App. 423 (2001) (reversing default judgment entered against defendant as sanction for defendant's failing to attend his noted deposition when counsel for defendant had disclosed that he was undergoing surgery to remove a tumor that day and plaintiff's lawyer would not provide another date for the deposition).

In the case at bar, the court did not apply the *Taliaferro* factors, as it did not exercise any discretion to decide whether Dr. Friedler should have been permitted to testify. If it had, those factors would not have supported continued preclusion of Dr. Friedler as an expert witness. The form 1099 documents at issue did not concern the identity of Ms. Ayers' expert witness, the subject matter on which he was to testify, or his opinions on that subject matter. That information had been timely disclosed, and Ms. Peterson had had the opportunity to engage in discovery, such as a deposition, to explore Dr. Friedler's opinions. By the deadline imposed by Judge Howard, which was three weeks before trial, counsel for Ms. Ayers had produced all the material requested in the subpoena duces tecum. Except for the disagreement about form 1099s, the dispute over whether Dr. Friedler had produced the requested financial documents was resolved between the parties. Indeed, it was resolved before his *de bene esse* deposition was taken. The disputed form 1099s, in addition to not having been requested, did not concern the substance of Dr. Friedler's testimony, only any tendency he might have toward bias.

Under these circumstances, there either was no discovery violation at all, or any violation was technical, not substantial. The reason form 1099s were not produced - - that they had not been requested - - had been made plain, was reasonable, and was consistent with Ms. Peterson's own expert's production. Ms. Ayers had substantially complied with the subpoena to Dr. Friedler and her refusal to produce the 1099s was not without good cause.

Even if one were to assume a discovery violation, which we do not, any prejudice to Ms. Peterson's defense was negligible. The experts on both sides were in the same position as far as material for cross-examination was concerned. The parties appeared for trial, and the jury was selected and instructed before counsel for Ms. Peterson raised the topic of Judge Howard's prior order. If he had brought it up at the outset, any inconvenience in postponing a trial that already had started could have been avoided. The court could have ordered the form 1099s produced - - which Judge Howard's order did not do - - and given that there had not been a prior postponement, there would have been little prejudice to Ms. Peterson or the court from that.

By contrast, the prejudice to Ms. Ayers from precluding Dr. Friedler from testifying was enormous. She could not prove her case without his testimony, and summary judgment was granted against her on that basis. Her case appears to have been meritorious, given that Ms. Peterson already had conceded that she was the at fault driver. There was nothing on the part of Ms. Ayers, her counsel, or Dr. Friedler evidencing an egregious discovery violation or "willful or contemptuous or otherwise

opprobrious behavior" that would support the exclusion of key, material, and necessary expert witness testimony. Accordingly, we shall vacate the judgment in favor of Ms. Peterson and remand to the circuit court for further proceedings.

JUDGMENT VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR HARFORD COUNTY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE APPELLEE.