UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1437

September Term, 2015

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DERRICK QUEENSBURY

v.

RABIA RAFIQ

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Eyler, Deborah, S.,
Woodward,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Battaglia, J.

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Filed: September 26, 2016

The present case requires that we consider whether the Circuit Court for Baltimore City abused its discretion by striking a standard of care expert in a medical malpractice case in which negligence and lack of informed consent had been alleged by Derrick Queensbury, Appellant, against Dr. Rabia Rafiq, Appellee. We also are asked to consider whether, then, the court abused its discretion by denying Mr. Queensbury's voluntary motion to dismiss that required leave of court, and, thereafter whether the trial judge erroneously granted summary judgment to Dr. Rafiq. We conclude that the trial court did not abuse its discretion by striking the standard of care expert and denying the motion for voluntary dismissal, nor did it err in granting summary judgment.

Three questions have been presented for appeal:

I. Whether the trial court abused its discretion when it struck Dr. Hulteen as Plaintiff's standard of care expert;
II. Whether the trial court abused its discretion when it denied Plaintiff's motion to dismiss; and
III. Whether the trial court erred when it granted Defendant's motion for summary judgment?

## BACKGROUND

In May of 2014, Derrick Queensbury, Appellant, filed suit in the Circuit Court for Baltimore City against Dr. Rabia Rafiq,[1] Appellee, a chiropractor with offices in Baltimore; Mr. Queensbury alleged that Dr. Rafiq had been negligent and had failed to obtain his informed consent in her chiropractic treatment of Mr. Queensbury in 2013. In the Complaint, Mr. Queensbury alleged in Count 1 that Dr. Rafiq was negligent in that:

[1] Maryland Healthcare Clinics, LLC initially was sued also, but was dismissed by stipulation on January 22, 2015.

> 11. Defendants negligently failed to exercise reasonable care, skill and judgment, in that Defendants
> - Failed to evaluate and assess Plaintiff to determine the appropriateness of subjecting Plaintiff to chiropractic procedures, including cervical manipulation;
> - Performed medically unnecessary chiropractic procedures on Plaintiff, including cervical manipulation; and
> - When subjecting Plaintiff to cervical manipulation applied chiropractic techniques and methods in a manner that was negligent and below the standard of care.

In Count 2, Mr. Queensbury alleged that Dr. Rafiq failed to secure his informed consent to the procedures:

> 17. Before performing chiropractic procedures on Plaintiff as described herein, Defendants had a duty to disclose all material risks of such treatment and alternatives to such chiropractic treatment.
>
> 18. A material risk of the cervical manipulation performed by Defendants, as described herein, was spinal cord compression injury. Defendants failed to disclose the risk of such injury prior to performing this chiropractic procedure on Plaintiff.
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> 19. If Defendants had adequately disclosed the risks of chiropractic cervical manipulation, Plaintiff would not have agreed to undergo such treatment, and no reasonable person in similar circumstances would have agreed to undergo such treatment.

After an Answer was filed in which Dr. Rafiq denied liability, a scheduling order was entered pursuant to Maryland Rule 2-504(a) (2008)[2] establishing the deadline for Mr.

[2] Maryland Rule 2-504(a) (2008) governs the entering of scheduling orders in civil cases, and provides, in relevant part:

(a) **Order Required.** (1) Unless otherwise ordered by the County Administrative Judge for one or more specified categories of actions, the court shall enter a scheduling order in every civil action, whether or not the court orders a scheduling conference pursuant to Rule 2-504.1.

> (2) The County Administrative Judge shall prescribe the general format of scheduling orders to be entered pursuant to this Rule. A copy of the prescribed format shall be furnished to the Chief Judge of the Court of Appeals.

(continued . . . )

Queensbury to identify experts as September 18, 2014, Dr. Rafiq's deadline to identify experts as December 18, 2014, and the designation of Mr. Queensbury's rebuttal experts on January 18, 2015; the discovery deadline was set as February 17, 2015, with a trial date of June 15, 2015. Pursuant to its terms, the scheduling order was:

> [S]ubject to modification, including the scheduling of the pretrial conference and trial, upon a written motion for modification filed within 15 days of the date of this order. Thereafter, this order may be modified only upon a written motion for modification setting forth a showing of good cause that the schedule cannot reasonably be met despite the diligence of the parties seeking modification. If exigent circumstances prevent a motion in writing, an oral motion shall be made at a hearing at 1:45 p.m. on a daily basis in Room 231, Courthouse East, 111 North Calvert Street.

On September 18, 2014, Mr. Queensbury filed an initial designation of experts in which he identified Dr. Alan Bragman, a chiropractor from Atlanta, Georgia, as his standard of care expert as well as his expert regarding the alleged failure to obtain informed consent. Mr. Queensbury also designated Dr. Nancy Epstein, a neurosurgeon from New Hyde Park, New York, as his causation and damages expert. Later, on October 27, 2014, however, Mr. Queensbury notified Dr. Rafiq by letter that he had withdrawn Dr. Epstein as an expert and replaced her with Dr. Kenneth Lippman, an orthopedic surgeon from Baltimore, although the scheduling order deadline to designate

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( . . . continued)

> (3) Unless the court orders a scheduling conference pursuant to Rule 2-504.1, the scheduling order shall be entered as soon as practicable, but no later than 30 days after an answer is filed by any defendant. If the court orders a scheduling conference, the scheduling order shall be entered promptly after conclusion of the conference.

All further references to Maryland Rule 2-504 will reflect the language in effect in 2015.

experts had passed and no modification to the scheduling order had been requested; Dr. Rafiq did not challenge this substitution.

Dr. Bragman, nevertheless, notified Mr. Queensbury that he was withdrawing as an expert in December 2014, but counsel for Mr. Queensbury, James P. Koch, did not advise counsel for Dr. Rafiq, Paul J. Weber, of the change until Mr. Koch attempted to cancel Dr. Bragman's deposition by email on January 8, 2015.[3] Mr. Weber demurred to the cancellation, and the deposition was held on January 16, 2015,[4] despite Mr.

[3] Mr. Koch emailed Mr. Weber on January 8, 2015 to cancel Dr. Bragman's deposition scheduled for January 16, 2015 and replace Dr. Bragman with Dr. Henry Hulteen, a chiropractor, as the standard of care expert; Mr. Koch wrote:

> Dr. Bragman is withdrawn from this case and is not available to testify, whether at deposition or otherwise. Dr. Hulteen will provide a supplemental certificate of merit and report (which is substantially the same as Bragman's). If you want to contest Plaintiff's right to substitute experts and file a supplemental certificate of merit, that is your call.

[4] The scheduled January 16, 2015 deposition of Dr. Bragman was held, and Dr. Bragman, being questioned by Mr. Weber, stated:

> Q: So sitting here today -- what I am just establishing is, you can't answer these questions --
> A. I --
> Q. -- sitting here today?
> A. -- cannot answer the questions. At the time I did that, I had reviewed the records and I was familiar with them. I did not do any preparation. I was -- I withdrew as the expert, and I have not read through anything in preparation for this deposition, so I can't answer that.
> Q. All right. When did you withdraw as an expert?
> A. I think it was probably sometime within the last few weeks.

Dr. Bragman further stated:

> BY MR. WEBER:
> Q. But, Doctor, did you have a conversation with Mr. Koch as to your status in the case?

(continued . . . )

Queensbury having had filed a motion for protective order and to quash the subpoena as well as having had requested leave to substitute testifying and certifying experts on January 12, 2015 in which he attempted to withdraw Dr. Bragman as an expert and substitute Dr. Henry Hulteen, a chiropractor in Camden, South Carolina, as the standard of care expert as well as the expert regarding the failure to obtain informed consent.

Dr. Bragman's deposition had occurred in January, but on February 5, 2015, Judge Audrey J. S. Carrion denied Mr. Queensbury's Motion for Protective Order and his request to withdraw Dr. Bragman and substitute Dr. Hulteen as the certifying expert by written order. Judge Carrion considered Dr. Rafiq's opposition in which she argued that the deadline for expert identification had passed by nearly four months, in violation of the scheduling order and that Mr. Queensbury had not complied with the directives of the scheduling order requiring a showing of good cause; Dr. Rafiq also argued she was entitled to depose Dr. Bragman, who was the certifying expert in this case, under Section 3-2A-04 of the Maryland Courts and Judicial Proceedings Article of the Maryland Code

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( . . . continued)

A: I did at some point, yes.
Q. Okay. Was it a phone call?
A. I believe it was, yes.
Q. What did you discuss in the phone call with Mr. Koch?
MR. KOCH: Objection
THE WITNESS: I don't remember the exact -- the exact wording of the conversation.

BY MR. WEBER:
Q. Well, what was the gist of the conversation?
MR. KOCH: Objection
THE WITNESS: That after reviewing the additional deposition transcripts, that I didn't think the case was as strong as I thought initially.

(1973, 2013 Repl. Vol.) to determine the legitimacy of Dr. Bragman's Certificate of Merit.[5] Judge Carrion also ordered:

> [T]hat the scheduled deposition of Alan H. Bragman, D.C. on 01/16/2015 proceed or, in the alternative, allow the Defendant to depose Alan H. Bragman, D.C. on a later date to determine the validity of his Certificate of Merit.

Mr. Queensbury, then, filed a Motion to Extend Discovery Deadline to March 31, 2015 as well as a Motion to Extend the Deadline for Designation of Experts *Nunc Pro Tunc* in which he alleged that there was good cause to extend the deadline because:

> The case before this Court is a malpractice case against a health care professional. Plaintiff can not proceed without a standard of care expert. Plaintiff could not possibly have designated Dr. Hulteen, or have filed the extension request presently before this Court, prior to the 9/18/2014 deadline for designating experts because Dr. Bragman withdrew approximately three (3) months after the deadline.

Dr. Rafiq opposed the substitution arguing that the deadline for designating experts had passed by six months and for discovery, by seventeen days; and that Dr. Hulteen was yet another expert designated in the case; she also alleged that the withdrawal of Dr. Bragman was intentional, and substitution should have occurred earlier.

After a hearing on the Motion to Extend and Dr. Rafiq's opposition on May 5, 2015, Judge Carrion granted Mr. Queensbury's Motion to Extend the Deadline for

[5] Section 3-2A-04(b) of the Maryland Courts and Judicial Proceedings Article of the Maryland Code requires the party filing the complaint in a medical malpractice case that is not solely based on lack of informed consent to file a certificate of a qualified expert who attests to the departure from the standard of care. Section 3-2A-04(b) provides, in relevant part:

> (3) (i) The attorney representing each party, or the party proceeding pro se, shall file the appropriate certificate with a report of the attesting expert attached.
>
> (ii) Discovery is available as to the basis of the certificate.

Md. Code Ann., Cts. & Jud. Proc. § 3-2A-04 (1973, 2013 Repl. Vol.).

Designation of Experts *Nunc Pro Tunc* as well as extended the discovery deadline "for the sole purpose of scheduling and completing the deposition of" Dr. Hulteen. She ordered that Dr. Hulteen's deposition occur by May 22, 2015. A new trial date also was set for August 3, 2015 with a pre-trial conference date of June 15, 2015. The order was specific that "no other changes or modifications to the Scheduling Order shall be considered."

According to exhibits filed in the case, Mr. Koch did advise Mr. Weber on May 8, 2015 that Dr. Hulteen was available for a deposition on May 19, 2015 and May 21, 2015 in Camden, South Carolina. Mr. Weber chose May 19, 2015 as the date of Dr. Hulteen's deposition and his travel and other arrangements were established for travel on May 18 to South Carolina. According to the pleadings, however, Mr. Koch, nonetheless, called Mr. Weber at 3 P.M. on May 18, 2015 and informed him that he was unilaterally cancelling Dr. Hulteen's deposition; Mr. Koch also stated that he intended to file a motion for voluntary dismissal of the case and asked if Dr. Rafiq would consent to the dismissal. Dr. Rafiq, however, conditioned any agreement on extant discovery being apposite in any refiled case and on Dr. Hulteen remaining as the expert in the case; the terms were not acceptable to Mr. Queensbury.[6]

[6] In a May 18, 2015 email that was sent after Mr. Queensbury cancelled Dr. Hulteen's deposition and that was included in the pleadings, Mr. Weber outlined his conditions to consent to the stipulation of dismissal:

> You called today stating that it was your intention to file a Motion to Dismiss the Queensbury matter without prejudice. You inquired as to whether I would agree to the dismissal. I indicated that I would check with the carrier.

(continued . . . )

A flurry of motions ensued: Dr. Rafiq moved to strike Dr. Hulteen as an expert; Mr. Queensbury moved to voluntarily dismiss the action; and Dr. Rafiq also moved for summary judgment. Dr. Rafiq argued in her Motion to Strike Dr. Hulteen that Mr. Queensbury failed not only to make Dr. Hulteen available for deposition, but also cancelled his deposition at the eleventh hour. Mr. Queensbury opposed, stating that Mr. Weber "unilaterally scheduled Dr. Hulteen's deposition, on 5/19/2015, even though his availability had not been confirmed" and that the notice for deposition was defective under Maryland Rule 2-412 (2004)[7] because less than ten days' notice was provided prior to the deposition.

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( . . . continued)

> As I have just relayed to you by telephone the carrier will allow me to agree to the Dismissal Without Prejudice under two conditions:
>
> 1) Discovery conducted to date in this action will be applicable to any case that is refiled;
> 2) The plaintiff will not employ any other expert in the subsequent action other than Drs. Hulteen and Dr. Lippman, the two current experts named by the plaintiff, each of whom had replaced experts originally named by the plaintiff. The only exception to this restriction will be the death, permanent illness or permanent incapacity of either of these experts.

[7] Maryland Rule 2-412(a) (2004) provided in 2015 and continues to provide, in relevant part:

> A party desiring to take a deposition shall serve a notice of deposition upon oral examination at least ten days before the date of the deposition or a notice of deposition upon written questions in accordance with Rule 2-417. The notice shall state the time and place for taking the deposition and the name and address of the person to be examined or, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena is to be served on the person to be examined, it shall be served at least ten days before the date of the deposition.

Judge Carrion orally granted the Motion to Strike Dr. Hulteen, after a hearing. Judge Carrion noted that the complaint had been filed for over a year at that point, yet "there's been no disclosure, at all and no deposition of the standard of care expert," and despite that she had ordered that the deposition occur by May 22, 2015. Judge Carrion noted that the date Dr. Rafiq scheduled the deposition – May 19, 2015 – was one of the two days suggested by Mr. Queensbury and found "unacceptable" his reasons to cancel the deposition, those being that the May 19, 2015 date was not agreed-upon; there was not enough time to coordinate schedules; and that Mr. Koch had a hearing in Frederick County on May 18, 2015. Judge Carrion stated that her May 5 order to extend the deadline for discovery was "for the sole purpose of completing the deposition of" Dr. Hulteen, and that the order had amounted to an order compelling discovery, which had been violated.

Noting on the record that the sanction for the violations of the scheduling order and discovery order could have been dismissal of the action, Judge Carrion granted Mr. Queensbury's Motion to Strike Dr. Hulteen, explaining that she had considered the factors articulated in *Taliaferro v. State*, 295 Md. 376 (1983),[8] to include:

[8] In considering discovery violations in a criminal context, the Court of Appeals has articulated the following factors in *Taliaferro v. State*, 295 Md. 376, 390-91 (1983):

> [W]hether 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.

> I've considered all of the factors that one needs to consider pursuant to *Taliaferro*; that is the reason for the violation . . . I consider the degree of prejudice to the parties respectively offering an[d] opposing the evidence in this case.
>
> It is clear that Defense needs to depose the alleged standard of care expert for the Plaintiff, and there's been attempts to do that and they were not complied with.
>
> In addition to that, I take note of the colloquy or the discussions that have been – that Plaintiff counsel and Defense counsel have engaged concerning the viability of this case.
>
> Take note, also, as well as to the timing of these motions. There is a hearing before Judge Hong on July 20th in this case. There is also the trial date, which is on August 3, 2015.

In granting the Motion to Strike, Judge Carrion concluded:

> I am satisfied, given the length of time that . . . the parties have been involved in this dispute and have not resolved it, that this dispute cannot be cured by a postponement of the trial.

Dr. Rafiq, thereafter, moved for summary judgment because, relying on *Johns Hopkins Hospital v. Genda*, 255 Md. 616 (1969) and *Meda v. Brown*, 318 Md. 418, 428 (1990), Mr. Queensbury no longer had a standard of care expert to support his claims of negligence and lack of informed consent. No opposition was filed.

While the summary judgment motion was pending, Judge Jeannie J. Hong heard oral arguments with regard to Mr. Queensbury's motion to voluntarily dismiss the action without prejudice, filed pursuant to Section 3-2A-04(b) of the Maryland Courts and Judicial Proceedings Article of the Maryland Code[9] and Maryland Rule 2-506 (2014)[10],

[9] Section 3-2A-04(b) of the Maryland Courts and Judicial Proceedings Article of the Maryland Code governs the requirements for the certificates of qualified experts in a medical malpractice action, and provides, in pertinent part:

(continued . . . )

and Mr. Queensbury's opposition. In the motion, Mr. Queensbury alleged that there was: (1) the need for additional time to determine the full extent of Mr. Queensbury's injuries because of new injuries; (2) the desire to avoid the expense and delay of anticipated litigation respecting the qualifications of Dr. Bragman as the certifying expert; (3) that his trial schedule included a two to three week jury trial in Frederick County to start on June 29, 2015. Dr. Rafiq opposed, and iterated that a voluntary dismissal was inappropriate

( . . . continued)

(b) *Filing and service of the certificate of qualified expert.* – Unless the sole issue in the claim is lack of informed consent:

(1)(i) 1. Except as provided in item (ii) of this paragraph, a claim or action filed after July 1, 1986, shall be dismissed, without prejudice, if the claimant or plaintiff fails to file a certificate of a qualified expert with the Director attesting to departure from standards of care, and that the departure from standards of care is the proximate cause of the alleged injury, within 90 days from the date of the complaint; and

2. The claimant or plaintiff shall serve a copy of the certificate on all other parties to the claim or action or their attorneys of record in accordance with the Maryland Rules; and

(ii) In lieu of dismissing the claim or action, the panel chairman or the court shall grant an extension of no more than 90 days for filing the certificate required by this paragraph, if:

1. The limitations period applicable to the claim or action has expired; and

2. The failure to file the certificate was neither willful nor the result of gross negligence.

Md. Code Ann., Cts. & Jud. Proc. § 3-2A-04 (1973, 2013 Repl. Vol.).

[10] Maryland Rule 2-506(c) (2014) provides, in relevant part:

(c) **By order of court.** Except as provided in section (a) of this Rule, a party who has filed a complaint, counterclaim, cross-claim, or third-party claim may dismiss the claim only by order of court and upon such terms and conditions as the court deems proper. If a counterclaim has been filed before the filing of a plaintiff's motion for voluntary dismissal, the action shall not be dismissed over the objection of the party who filed the counterclaim unless the counterclaim can remain pending for independent adjudication by the court.

All further references to Maryland Rule 2-506 will reflect the applicable language in effect in 2015.

because Mr. Queensbury did not accept the condition of the stipulation that required him to use Dr. Hulteen as his expert were the case to be refiled. In denying the motion to dismiss, Judge Hong relied on *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405 (2007)[11] and found:

> In the present case, the Defendant, the non-moving party, has expended significant time and money. Parties have conducted discovery, taken depositions, and made various motions. Second, there is delay and lack of diligence on the part of the Plaintiff. Upon recognizing a need for additional time, Plaintiff should have immediately sought a postponement with the Judge in Charge of the Civil Division. Furthermore, the Plaintiff should have brought any discovery issues before the Discovery Judge. Third, Plaintiff opines that dismissal is needed because it does not have a standard of care expert. This case was filed over a year ago. Plaintiff was given ample opportunity to find and depose a standard of care expert, but failed to act diligently. For example, Judge Carrion granted at least two of Plaintiff's requests for additional time to conduct discovery and solidify experts. Finally, there is an outstanding motion for summary judgment pending. Thus, this Court does not find that Plaintiff is entitled to voluntary dismissal without prejudice.

With respect to the outstanding motion for summary judgment filed by Dr. Rafiq, which was heard thereafter, Judge Christopher Panos granted the motion, finding and determining that "given Plaintiff's failure to be able to designate a standard of care expert and all of the extensions of time which have previously been granted to Plaintiff so as to afford Plaintiff the opportunity to do so, the Court does find, indeed, that there exists no

[11] In *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 420 (2007), the Court of Appeals explicated that the following four factors are to be used to analyze whether to grant the motion for voluntary dismissal under Maryland Rule 2-506:

> (1) the non-moving party's effort and expense in preparing for litigation; (2) excessive delay or lack of diligence on the part of the moving party; (3) sufficiency of explanation of the need for a dismissal without prejudice; and (4) the present stage of the litigation, i.e., whether a motion for summary judgment or other dispositive motion is pending.

genuine dispute as to any material fact." The court also specifically noted, "Plaintiff, while not consenting to the motion, is submitting on the motion."

We address, sequentially, the grant of Dr. Rafiq's Motion to Strike Dr. Hulteen as an expert, the denial of Mr. Queensbury's Motion to Dismiss, and the grant of Dr. Rafiq's Motion for Summary Judgment.

## DISCUSSION

### I.

### Motion to Strike

The seminal issue that we are tasked to address in this case is whether Judge Carrion abused her discretion when she struck Dr. Hulteen as Mr. Queensbury's standard of care expert as a sanction for non-compliance with the scheduling and discovery orders. Before us, Mr. Queensbury contends that striking Dr. Hulteen was a "draconian sanction," only available for egregious violations of court orders. Dr. Rafiq counters that the sanction was appropriate, given Mr. Queensbury's substantial, consistent and deliberate abuses of the scheduling and discovery orders.

In the present case, as with most civil cases that originate in the circuit court, a scheduling order was entered pursuant to Maryland Rule 2-504(a), which explicates the necessity of dates upon which parties must designate experts and complete discovery. Under Rule 2-504(b)(1), the scheduling order must contain, among other requirements: "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)," and "a date by which all discovery must be completed." Maryland Rule

2-504 does not explicate any sanctions for scheduling order violations, but the Court of Appeals and we have consistently held that a judge may issue sanctions for scheduling order violations. In *Manzano v. Southern Maryland Hospital, Inc.,* 347 Md. 17, 29 (1997), for example, the Court of Appeals concluded:

> Thus, although [Maryland] Rule [2–504] does not, by its terms, provide for sanctions, the case law of Maryland makes the imposition of sanctions for the violation of a scheduling order appropriate.

*See also Dorsey v. Nold,* 362 Md. 241, 256 (2001) ("[S]anctions are available for the violation of directives in scheduling orders, although they are not specified in any rule."); *Admiral Mortgage, Inc. 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.").

Striking experts in a medical malpractice claim when there have been scheduling order violations has been affirmed in *Livingstone v. Greater Washington Anesthesiology & Pain Consultants, P.C.*, 187 Md. App. 346, 387-91 (2009). In that case, we determined that it was not an abuse of discretion for the trial court to deny the request to designate an additional expert two months past the scheduling order deadline to designate experts and without articulating good cause for the late designation. In *Naughton v. Bankier*, 114 Md. App. 641, 653-54 (1997), we held that it *was* an abuse of discretion for a circuit court to allow the testimony at trial of an expert witness who was disclosed one day before trial and over one year past the disclosure date set in the scheduling order absent a finding of good cause. *See also Shelton v. Kirson*, 119 Md. App. 325, 332-33, *cert. denied*, 349 Md.

236 (1998) (upholding the trial court's exclusion of an expert designated twelve months after the scheduling order deadline).

Trial courts, similarly, have "broad discretion" to administer sanctions for discovery violations. *Logan v. LSP Mktg. Corp.*, 196 Md. App. 684, 699 (2010); *Warehime v. Dell,* 124 Md. App. 31, 43 (1998). In *Logan v. LSP Marketing Corp.*, we stated, "Once a trial court resolves a discovery dispute, our review of that resolution is 'quite narrow; appellate courts are reluctant to second-guess the decision of a trial judge to impose sanctions for a failure of discovery. Accordingly, we may not reverse unless we find an abuse of discretion.'" 196 Md. App. at 699 (*quoting Warehime,* 124 Md. App. at 44).

Maryland Rule 2-433(a) (2014) governs available sanctions against a party in a discovery dispute and includes:

> (1) An order that the matters sought to be discovered, or any other designated facts shall be taken to be established for the purpose of the action in accordance with the claim of the party obtaining the order;
> (2) An order refusing to allow the failing party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; or
> (3) An order striking out pleadings or parts thereof, or staying further proceeding until the discovery is provided, or dismissing the action or any part thereof, or entering a judgment by default . . . .

Maryland Rule 2-433(a) (2014). Like the imposition of sanctions for scheduling order violations, a trial court is "vested with great discretion in applying sanctions for discovery failures." *Rodriguez v. Clarke*, 400 Md. 39, 56 (2007). The Court of Appeals has recognized that "the appropriate sanction for a discovery or scheduling order violation is

largely discretionary with the trial court." *Admiral Mortgage, Inc. v. Cooper*, 357 Md. 533, 545 (2000).

Striking the designation of an expert has been affirmed on appeal as a sanction for discovery violations in *Rodriguez v. Clarke*, 400 Md. at 69, in which the following had ensued:

> [T]he Petitioners sought information about the Clarkes' experts through the preliminary expert designation, by way of interrogatories, and by attempting to take their depositions. Having received inadequate information and access to discoverable information, Petitioners continuously requested cooperation from the Clarkes in arranging the depositions of the experts. Despite those requests, the Clarkes failed to cooperate, prompting the Petitioners to file motions to compel discovery, as well as supplemental motions to compel.

*Id.* at 69. The Court of Appeals concluded that:

> The Clarkes' preterition reflected by their sparse expert witness designation, elusive answers to interrogatories, and failure to communicate, warrant preclusion of their experts – the sanctions were proportionate to the discovery abuse.

*Id.* at 69-70.

In *Logan*, 196 Md. App. 684, we reviewed whether it was an abuse of discretion for the trial court to exclude the testimony of all but one of the plaintiff's expert witnesses in a lead paint poisoning case in which Logan had failed to respond to interrogatory requests for experts by the deadline stipulated in the scheduling order, despite one written reminder before the deadline, one written letter six days after the deadline, and two phone calls eighteen and twenty-four days after the deadline. One month and ten days after the scheduling order deadline, Logan did answer the interrogatories, but failed to include the substance of the experts' findings and opinions and the summary of the grounds for the opinions in violation of the discovery rules. We concluded that the expert designations

were missing details about what each expert would opine to and why the expert held that belief and labeled these designations as "boilerplate." *Id.* at 701. We determined that the sanction of striking the experts was appropriate because Logan's failure to respond to the interrogatories was a failure "to make good-faith efforts to provide access to information about their expert witnesses." *Id.* at 700.

In *Taliaferro v. State*, 295 Md. 376, the Court of Appeals outlined certain factors that a trial court could consider when exercising its discretion to sanction discovery abuse. Though a criminal case, we have had occasion to rely on *Taliaferro*'s articulation of the following factors when considering discovery sanctions in civil cases:

> [W]hether 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.

When considering what constitutes an abuse of discretion, the Court of Appeals in *Wilson v. John Crane, Inc.*, 385 Md. 185, 198-99 (2005) has stated:

> There is an abuse of discretion 'where no reasonable person would take the view adopted by the [trial] court[ ]' . . . or when the court acts 'without reference to any guiding rules or principles.' An abuse of discretion may also be found where the ruling under consideration is 'clearly against the logic and effect of facts and inferences before the court[ ]' . . . or when the ruling is 'violative of fact and logic.'
>
> '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 '[t]he 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.'

Measured against this backdrop of cases, Judge Carrion did not abuse her discretion in striking Dr. Hulteen as an expert on behalf of Mr. Queensbury, when she applied the *Taliaferro* factors and based upon her unassailable findings that there had been no deposition of a standard of care expert despite her extension of the deadlines for discovery and the designation of experts *nunc pro tunc*. Judge Carrion had permitted two extensions to the deadlines to designate experts and take depositions: when she permitted Mr. Queensbury to designate Dr. Hulteen as an expert four months beyond the scheduling order deadline, despite Mr. Queensbury having failed to file a written motion to extend the deadline, as well as when she extended the discovery deadline for a second time solely to allow for the deposition of Dr. Hulteen.

Judge Carrion further considered the degree of prejudice to the parties, noting Dr. Rafiq's need to depose the standard of care expert and found that the attempts to depose Dr. Hulteen were not complied with, which was in violation of her May 5 order to depose Dr. Hulteen by May 22, 2015. She noted that there was a pending hearing addressing Mr. Queensbury's motion for voluntary dismissal as well as an upcoming trial date. Because the case had been pending for over a year and that the parties were unable to resolve the discovery dispute, Judge Carrion concluded that "this dispute cannot be cured by a postponement of the trial."

Mr. Queensbury, however, relies on *Maddox v. Stone*, 174 Md. App. 489 (2007), to disavow the imposition of the sanction at hand. In *Maddox*, we determined it was an

abuse of discretion for the trial court to strike an expert witness that was designated 34 days after the scheduling order deadline and cited *Admiral Mortgage*, 357 Md. at 545 for the proposition that "draconian sanctions" are to be used for "persistent and deliberate violations that actually cause some prejudice." 174 Md. App. at 501. We also stated that while the scheduling order in issue was not strictly complied with, the party in violation of the scheduling order had provided opposing counsel with not only the expert's opinions, but also had made the expert available for deposition; the deposition had occurred before the trial court struck that expert. In the instant case, unlike *Maddox*, Mr. Queensbury unilaterally cancelled Dr. Hulteen's deposition after the court order was entered and after the date upon which the deposition was to occur had been provided by Mr. Queensbury's counsel.

Mr. Queensbury also refers us to *Scully v. Tauber*, 138 Md. App. 423 (2001), in which we vacated a default judgment entered as a result of the defending party's non-appearance at a deposition and subsequent lack of responsiveness to a sanctions request. We reasoned, however, that defense counsel was medically unable to attend the deposition and had advised opposing counsel weeks before and we resolved that neither the defendant nor defense counsel "had done anything wilfully to delay discovery, and neither had acted contumaciously." *Id.* at 435.

In the present case, Mr. Queensbury had two bites at the apple. He was twice granted an extension of the discovery deadline as well as an extension to designate experts past the scheduling order deadline. Mr. Koch, Mr. Queensbury's counsel, unilaterally cancelled the deposition of Dr. Hulteen on its eve, on a date that had been

communicated by him as available. We agree with Judge Carrion that Mr. Koch's excuses for his unilateral decision were inadequate.

Mr. Queensbury, finally, asserts that *Hart v. Miller*, 65 Md. App. 620 (1985), *cert. denied*, *Miller v. Hart*, 305 Md. 621 (1986), informs the evaluation that Judge Carrion abused her discretion. In *Hart*, we reversed the dismissal of a case as a result of plaintiff's failure to answer interrogatories after the trial judge had extended the time to answer. Because counsel had finally answered the interrogatories on the eve of the hearing we remonstrated, "Some sanction as to counsel was appropriate; dismissal was not." *Id.* at 628. In the present case, Mr. Queensbury's counsel's eleventh hour machinations as to why he cancelled Dr. Hulteen's deposition were not tantamount to redemption.

As a result, we affirm Judge Carrion's decision to strike Dr. Hulteen.

**II.**

**Motion to Dismiss**

A party who has filed a claim may voluntarily dismiss without leave of court only under limited conditions, according to Maryland Rule 2-506(a):

> (a) **By notice of dismissal or stipulation**. Except as otherwise provided in these rules or by statute, a party who has filed a complaint, counterclaim, cross-claim, or third-party claim may dismiss all or part of the claim without leave of court by filing (1) a notice of dismissal at any time before the adverse party files an answer or (2) by filing a stipulation of dismissal signed by all parties to the claim being dismissed.

Maryland Rule 2-506(a). Under subsection (c) of Maryland Rule 2-506, leave of court is required, however, after an answer has been filed or absent consent to a stipulation of dismissal:

> (c) **By order of court**. Except as provided in section (a) of this Rule, a party who has filed a complaint, counterclaim, cross-claim, or third-party claim may dismiss the claim only by order of court and upon such terms and conditions as the court deems proper. If a counterclaim has been filed before the filing of a plaintiff's motion for voluntary dismissal, the action shall not be dismissed over the objection of the party who filed the counterclaim unless the counterclaim can remain pending for independent adjudication by the court.

Maryland Rule 2-506(c).

In *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, the Court of Appeals expounded the considerations that govern in balancing the request for a voluntary dismissal against any "plain legal prejudice" to the defending party if dismissal were to be entered:

> (1) the non-moving party's effort and expense in preparing for litigation; (2) excessive delay or lack of diligence on the part of the moving party; (3) sufficiency of explanation of the need for a dismissal without prejudice; and (4) the present stage of the litigation, i.e., whether a motion for summary judgment or other dispositive motion is pending.

*Id.* at 420. Judge Hong considered the *Aventis* factors in denying the voluntary motion to dismiss and we agree with her assessment to deny the motion.

Judge Hong found that Dr. Rafiq had "expended significant time and money" during the more than one year of litigation. She also found that Mr. Queensbury had failed to comply with the scheduling order requirement of filing a written motion to extend deadlines and failed to seek postponement when he discovered he needed additional time, thereby delaying the litigation. Judge Hong also did not find sufficient to

warrant delay that after over a year of litigation, Mr. Queensbury was without a standard of care expert even though he had requested two extensions of time for the scheduling order. Judge Hong did consider, as both parties argued, that Mr. Queensbury did not agree to retain Dr. Hulteen were he to refile the case. Finally, Dr. Rafiq's Motion for Summary Judgment was pending at the time.

Mr. Queensbury disingenuously alleges that under Section 3-2A-04 of the Courts and Judicial Proceedings Article of the Maryland Code that the case against Dr. Rafiq should have been dismissed because Dr. Bragman was not a qualified expert under Section 3-2A-04(b)(1)(i) of the Courts and Judicial Proceedings Article. In essence, Mr. Queensbury argues a point that was not raised by Dr. Rafiq, within the statutory 90 day framework from the date of the Complaint, to justify his appeal.

Judge Hong did not abuse her discretion in denying Mr. Queensbury's voluntary motion to dismiss.

## III.

## Summary Judgment

In the present case, Judge Christopher Panos granted Dr. Rafiq's motion for summary judgment and denied all relief to Mr. Queensbury, by relying in part on the procedural posture before trial, including Judge Carrion's decision to impose sanctions on Mr. Queensbury by striking Dr. Hulteen as an expert witness. Judge Panos, at the hearing, stated:

> [G]iven Plaintiff's failure to be able to designate a standard of care expert and all of the extensions of time which have previously been granted to Plaintiff so as to

> afford Plaintiff the opportunity to do so, the Court does find, indeed, that there exists no genuine dispute as to any material fact.

When reviewing a trial court's grant of summary judgment:

> The question of whether the trial court properly granted summary judgment is a question of law and is subject to *de novo* review on appeal. *Standard Fire Ins. Co. v. Berrett,* 395 Md. 439, 450, 910 A.2d 1072, 1079 (2006); *Miller v. Bay City Prop. Owners Ass'n, Inc.*,393 Md. 620, 632, 903 A.2d 938, 945 (2006), quoting *Myers v. Kayhoe;* 391 Md. 188, 203, 892 A.2d 520, 529 (2006); *Ross v. State Bd. of Elections,* 387 Md. 649, 658, 876 A.2d 692, 697 (2005); *Todd v. MTA,* 373 Md. 149, 154, 816 A.2d 930, 933 (2003); *Beyer v. Morgan State Univ.,* 369 Md. 335, 359, 800 A.2d 707, 721 (2002). If no material facts are in dispute, we must determine whether summary judgment was correctly entered as a matter of law. *Standard Fire Ins. Co.,* 395 Md. at 450, 910 A.2d at 1079; *Ross,* 387 Md. at 659, 876 A.2d at 698; *Todd,* 373 Md. at 155, 816 A.2d at 933; *Beyer,* 369 Md. at 360, 800 A.2d at 721. On appeal from an order entering summary judgment, we review 'only the grounds upon which the trial court relied in granting summary judgment.' *Standard Fire,* 395 Md. at 450, 910 A.2d at 1079; *Ross,* 387 Md. at 659, 876 A.2d at 698, quoting *Eid v. Duke,* 373 Md. 2, 10, 816 A.2d 844, 849 (2003), quoting in turn *Lovelace v. Anderson,* 366 Md. 690, 695, 785 A.2d 726, 729 (2001).

*Property & Casualty Ins. Guar. Corp. v. Yanni*, 397 Md. 474, 480-81 (2007).

Here, Mr. Queensbury alleged that Dr. Rafiq was negligent in her chiropractic procedure and treatment and she failed to obtain his informed consent, which required expert opinion under Maryland Rule 5-702[12]. There is no dispute that expert opinion was

[12] Maryland Rule 5-702 governs testimony by experts and provides:
Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

necessary. Mr. Queensbury, however, argues that the error in striking his standard of care expert led to error in granting summary judgment.

In *Rodriguez v. Clarke*, 400 Md. 39, another medical malpractice case, the Court of Appeals affirmed summary judgment when the Clarkes failed to present expert testimony regarding negligence and causation in an action for failure to recognize abnormal electrocardiogram ("EKG") results. In that case, the trial court had struck experts as a sanction for discovery violations, and the Court of Appeals affirmed the trial court's grant of summary judgment. The Court of Appeals articulated the importance of expert testimony in medical malpractices cases, where necessary, and determined that summary judgment was appropriate "because, without expert witness testimony, the Clarkes could not sustain their burden of proof as to standard of care or causation, as articulated in *Aventis,* 396 Md. at 443." *Id.* at 73.

We affirm the grant of summary judgment in favor of Dr. Rafiq.

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS IN THIS COURT TO BE PAID BY APPELLANT.**