Circuit Court for Baltimore City
Case No. 24 C 17000907

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2991

September Term, 2018

JUSTIN PRESTIA

v.

SAUL KERPELMAN &
ASSOCIATES, P.A.

Graeff,
Nazarian,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: December 26, 2019

Justin Prestia, appellant, filed a legal malpractice suit in the Circuit Court for Baltimore City against his former attorneys, Saul Kerpelman & Associates, P.A. ("Kerpelman"), appellee, for negligence in representing him in a lead paint claim. The circuit court ultimately granted: (1) Kerpelman's motion to strike experts named after the date designated in the scheduling orders; and (2) Kerpelman's motion for summary judgment on the ground that appellant could not prove that Kerpelman was negligent without a standard of care expert.

On appeal, appellant presents the following questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the circuit court abuse its discretion in striking appellant's expert witnesses where there had been substantial compliance with discovery, and discovery was still open at the time of the motions hearing?

2. Was an expert in the legal standard of care required to prove this legal malpractice claim?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The Lead Paint Case[1]

Appellant alleges that he was exposed to lead paint while he was living at 819 North Payson Street, Baltimore, Maryland ("the Property"), from 1992 through 1998. A violation notice from the Baltimore City Health Department, issued to Roger Hewitt on October 17,

[1] The factual background regarding the underlying case is taken from the complaint and affidavits filed by the parties in the malpractice action.

2000, stated that lead paint was found at this address. Appellant alleges that his exposure to lead paint while at this address caused him injuries, including anger and other behavioral issues.

In July 2008, while appellant was still a minor, his mother retained Kerpelman to represent him in his lead paint injury claim. Appellant turned 18 years old on April 29, 2010, and therefore, the statute of limitations to file a lead paint personal injury claim was April 29, 2013. *See* Md. Code (2014) § 5-101 of Courts and Judicial Proceedings ("CJP") ("A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced."); CJP § 5-201(a) ("When a cause of action subject to a limitation under Subtitle 1 . . . accrues in favor of a minor or mental incompetent, that person shall file his action within the lesser of three years or the applicable period of limitations after the date the disability is removed.").

Kerpelman filed a lawsuit against Roger Hewitt, the landlord of the Payson Street home, on April 24, 2013. On April 30, 2014, Kerpelman hired Elite Professional Services, Inc. to serve Mr. Hewitt. The process server attempted service on Mr. Hewitt seventeen different times, at several different addresses, but none of the attempts was successful.

On August 15, 2014, the circuit court issued a Md. Rule 2-507 notice of dismissal for lack of prosecution.[2] The notice stated:

[2] Md. Rule 2-507(c) provides, in part, that "[a]n action is subject to dismissal for lack of prosecution at the expiration of one year from the last docket entry."

> Pursuant to Maryland Rule 2-507 this proceeding will be "DISMISSED FOR LACK OF PROSECUTION WITHOUT PREJUDICE," 30 days after service of this notice, unless prior to that time a written motion showing good cause to defer the entry of an order of dismissal is filed.

On September 10, 2014, Kerpelman filed a motion to suspend Rule 2-507, stating that Roger Hewitt was evading service and requesting that the court issue a scheduling order. On October 14, 2014, the court issued an order deferring dismissal until December 23, 2014, but stating that, "if this case has not been finally disposed of by the deferred date, the clerk shall enter on the docket 'Dismissed for lack of prosecution without prejudice.'"

Appellant alleges that, in July 2015, after repeated, unsuccessful attempts to contact Kerpelman, he contacted another attorney. The attorney advised him that his case against Mr. Hewitt was dismissed for lack of prosecution, and that he could no longer bring a claim against Mr. Hewitt because the statute of limitations had expired.[3]

The Malpractice Case

On February 23, 2017, appellant filed a complaint against Kerpelman, alleging that Kerpelman was negligent in its representation of him in his lead paint case. On June 14, 2018, the circuit court issued a pre-trial scheduling order, providing that discovery be completed by October 14, 2018. Appellant's initial deadline to identify his experts was July 29, 2018.

[3] The case was dismissed on January 13, 2015. The court's order provided that, because "the terms of the Order deferring dismissal not having been satisfied within the time set forth therein, and no further motion pursuant to Maryland Rule 2-507(e) having been filed[,]" the case was dismissed for lack of prosecution.

The court issued a revised order on July 27, 2018, based on a consent motion to extend discovery deadlines. Under the new scheduling order, appellant's expert identification was due on August 28, 2018, Kerpelman's expert identification was due on October 12, 2018, and discovery was to be completed by November 13, 2018.

Appellant filed a preliminary designation of expert witnesses on August 28, 2018. The designation named two experts: (1) a certified lead risk assessor, who would testify that appellant was "more likely than not" exposed to lead paint at the Property; and (2) an expert in psychology and neuropsychology. It also referenced three additional unnamed experts, including a clinical practitioner in pediatrics, an expert in vocational rehabilitation, and a lawyer.

On September 4, 2018, Kerpelman advised appellant that his designation of expert witnesses was deficient, and it would object and move to strike any expert "not properly identified." On September 14, 2018, appellant filed a motion for leave to designate additional expert witnesses and a supplemental designation of expert witnesses, naming a pediatric expert and a vocational rehabilitation expert. Appellant still did not name a legal standard of care expert, but instead, he filed a motion for summary judgment alleging that there was no dispute of material fact that Kerpelman deviated from the standard of care. Appellant alleged that Kerpelman's "deviations from the applicable legal standards of care in this case [are] so obvious that any lay person would understand and therefore expert testimony is not required and Plaintiff's motion for summary judgment must be granted."

On September 27, 2018, Kerpelman filed a motion to strike appellant's designation of experts as inadequate and his supplemental designation of expert witnesses as untimely. That same day, Kerpelman filed a motion for summary judgment, asserting that appellant needed a standard of care expert in this "lead paint case involving contradictory evidence of Plaintiff's residential history and a landlord who likely had no insurance[,]" and his failure to designate a standard of care expert, as well as an expert who could testify to the nexus between exposure to lead and damages, warranted summary judgment in its favor.

On November 1, 2018, more than two months after the deadline to designate experts, appellant, represented by a different attorney from the same firm, filed a second supplemental designation of expert witnesses. This designation named a standard of care expert, a trial attorney, who would testify that Kerpelman breached the acceptable standard of professional care, which proximately caused appellant's injury.

The next day, November 2, 2018, the court held a hearing on the pending motions. The court stated that the first issue was whether appellant "should be allowed to designate additional experts two weeks after the final deadline [set by] the scheduling order." And then the issue was whether appellant could prove his case if he did not designate the appropriate expert.

Counsel for appellant argued that "the negligence on the legal side was so clear" that a legal expert was not necessary. He noted, however, that he had recently named a legal expert. The following then occurred:

> THE COURT: Why should I allow you to blatantly violate the scheduling order?

> [COUNSEL FOR APPELLANT]: Your Honor, as you pointed out in the Maddox and the progeny of those cases, it's well within your discretion to allow us time to – or, you know, extend these deadlines and not dismiss the case not – when there's not extreme prejudice on behalf of the Defendants.

The court asked why it should exercise its discretion, and counsel stated: "I don't know why these things – I wish I knew. I wish I could say – I could look into my predecessor's head and say why he did these things. But I don't know. All I know is I'm trying to fix them[.]"

Counsel for Kerpelman argued that there was no good faith showing from appellant for why he failed to meet his deadline, and there was not substantial compliance. He stated that counsel for appellant inherited "an egregious violation of the [c]ourt's scheduling order." Counsel also stated that saying: "You didn't serve him, aha, it's malpractice" was incorrect, and there needed to be an expert regarding how many attempts at service, and what methodology, was appropriate, especially in this case with questions regarding whether appellant lived at the premises and whether any judgment was collectable.

At the end of the hearing, the court stated that it would issue a written decision. It stated, however, that it would be granting Kerpelman's motion for summary judgment.

On November 14, 2018, the court issued its memorandum and order. The court stated, in pertinent part, as follows:

> In the current case, Plaintiff Justin Prestia must prove by a preponderance of the evidence that but for Defendant's negligence, he probably would have prevailed in the underlying lead paint case. In order to prevail in a lead paint case, a litigant is required to designate an expert that could prove a causal link between the lead paint and the medical condition. *Rochkind v. Stevenson*, 454 Md. 277, 294 (2017). This would require Plaintiff to designate an expert witness.

Maryland Rule § 2-504(b)(1)(B) addresses the requirements for the designation of expert witnesses in a scheduling order and provides that, "a scheduling order shall contain . . . 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)." Md. Rule § 2-402(g)(1) provides that a party is required to, "disclose the name and address of any witness who may give an expert opinion at trial, whether or not that person was retained in anticipation of litigation or for trial." This [c]ourt finds that Plaintiff's attempt at designating a medical causation expert in their Preliminary Designation of Expert Witnesses failed to meet the requirements of Md. Rule § 2-402(g)(1) because Plaintiff did not identify the expert by name with any degree of specificity.

Seventeen days after the scheduling order deadline to submit Plaintiff's expert designations, Plaintiff filed a Supplemental Designation of Expert Witnesses that identified Dr. Paul T. Rogers as the pediatric expert who could testify to medical causation. . . . At the motions hearing held on November 2, 2018, Plaintiff did not state a reason for the late filing and no good faith reason was offered for the failure. The Court of Special Appeals explained in *Faith v. Keefer*, 127 Md. App. 706 (1999) that permitting a party to deviate from a scheduling order without a showing of good cause, "would be, on its face, prejudicial and fundamentally unfair to opposing parties, and would further contravene the very aims supporting the inception of Rule 2-504 by decreasing the value of scheduling order[s] to the paper upon which they are printed." *Id*. at 733.

This [c]ourt finds that Defendant would be prejudiced if Plaintiff's late Supplemental Designation of Expert Witnesses were admitted as Defendant's expert designations would be in response to Plaintiff's inadequate and legal insufficient Preliminary Designation of Expert Witnesses. Plaintiff failed to provide any showing of good cause and gave no reason for the late filing at the November 2, 2018 hearing. Accordingly, this [c]ourt **GRANTS** Defendant's Motion to Strike and **DENIES** Plaintiff's Motion [for] Leave to Designate Additional Expert Witnesses.

Plaintiff cannot prove Defendant's action[s] were negligent without a legal standard of care expert as a matter of law. Plaintiff cannot prove that any lead paint was a cause of Plaintiff' medical condition without a medical causation expert. Therefore, this [c]ourt **DENIES** Plaintiff's Motion for Summary Judgment and **GRANTS** Defendant's Motion for Summary Judgment.

This appeal followed.

DISCUSSION

I.

Striking Additional Expert Witnesses

Appellant contends that the circuit court abused its discretion in striking his expert witnesses "when there had been substantial compliance with discovery to date and discovery was still open at the time of the dispositive motions hearing." He asserts that scheduling orders are not "unyieldingly rigid," quoting *Naughton v. Bankier*, 14 Md. App. 641, 654 (1997), that appellant's initial counsel had "made a good faith effort" to comply with the scheduling order, and there was limited prejudice to Kerpelman because "trial was still 20 weeks away."

Kerpelman contends that the circuit court "correctly struck the [a]ppellant's expert witnesses because the expert designation did not substantially comply with the scheduling order, and [a]ppellant offered no good faith justification for failing to comply with the order." It asserts that Maryland courts "routinely" exclude expert witness testimony when the required information is not disclosed during the period set out in the scheduling order. Kerpelman argues that counsel's statement at the hearing showed that there was no good cause for the violation of the scheduling order, and therefore, the circuit court properly exercised its discretion in striking the late disclosure of experts.

The "appropriate sanction for a discovery or scheduling order violation is largely discretionary with the trial court." *Admiral Mortgage v. Cooper*, 357 Md. 533, 545 (2000).

Accord Dackman v. Robinson, 464 Md. 189, 231–32 (2019). An abuse of discretion occurs when a decision is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *King v. State*, 407 Md. 682, 697 (2009) (quoting *North v. North*, 102 Md. App. 1, 14 (1994)). Appellate review pursuant to an abuse of discretion standard is highly deferential; it "will not be reversed simply because the appellate court would not have made the same ruling." *Id.* (quoting *North*, 102 Md. App. at 14).

Maryland Rule 2-504(a) provides that, absent certain exceptions, the circuit court shall enter a scheduling order in every civil case. The scheduling order shall specify, among other things, the date by which the litigants must identify any expert witnesses who will testify at trial, including all information specified in Rule 2-402(g)(1). Md. Rule 2-504(b)(1)(A)-(H).[4]

The purpose of the rule is "to maximize judicial efficiency and minimize judicial inefficiency." *Naughton,* 114 Md. App. at 653. *Accord Maddox,* 174 Md. App. 489, 498 (2007) (The purpose of scheduling orders is to "move the case efficiently through the litigation process by setting specific dates or time limits for anticipated litigation events to

[4] Md. Rule 2-402(g)(1) provides, in part, as follows:

> A party by interrogatories may require any other party to identify each person, other than a party, whom the other party expects to call as an expert witness at trial; to state the subject matter on which the expert is expected to testify; to state the substance of the findings and the opinions to which the expert is expected to testify and a summary of the grounds for each opinion; and to produce any written report made by the expert concerning those findings and opinions.

occur."). "Scheduling orders must be given respect as orders of the circuit court, and the court may, under appropriate circumstances, impose sanctions upon parties who fail to comply with the deadlines in scheduling orders." *Id*. at 507. Scheduling orders serve the important purpose of giving opposing counsel time to "pursue further discovery" after receiving initial expert disclosures. *Maddox*, 174 Md. App. at 500.

Although it may not always be possible to achieve absolute compliance, "we think it quite reasonable for Maryland courts to demand at least substantial compliance, or, *at the barest minimum*, a good faith and earnest effort toward compliance." *Naughton*, 114 Md App. at 653 (1997). *Accord Maddox*, 174 Md. App. at 499 ("[L]itigants must make good faith and reasonable efforts to substantially comply with the court's deadlines."). To allow a party to deviate from a scheduling order without showing good cause is, "on its face, prejudicial and fundamentally unfair to opposing parties," and it would diminish the value of scheduling orders. *Naughton*, 114 Md. App. at 654.

Here, appellant named only two experts by the August 28, 2018, deadline, a deadline that already had been extended with the consent of opposing counsel. When the court asked counsel why it should exercise its discretion to allow appellant to designate experts in violation of the scheduling order, including one expert named more than two months after the deadline and one day before the hearing, counsel was unable to proffer a good faith effort to comply with the order. As indicated, counsel's response to the court's question was: "I don't know why these things – I wish I knew. I wish I could say – I could look into my predecessor's head and say why he did these things. But I don't know. All I

know is I'm trying to fix them." Under these circumstances, we cannot conclude that the circuit court abused its discretion in excluding the expert witnesses named after the deadline set forth in the scheduling order.

II.

Legal Standard Expert

After ruling that appellant could not call experts relating to medical causation or the legal standard of care, the circuit court granted summary judgment in favor of Kerpelman, stating that appellant could not prove that Kerpelman was negligent without a legal standard of care expert. Appellant contends that a legal standard of care expert was not required in his legal malpractice case because the negligence was so obvious that the trier of fact could understand it without an expert. He asserts that his claim was that Kerpelman "should have served the [landlord] in the time limit established by the [c]ourt, or should have told their client to find another lawyer who could."

Kerpelman contends that "[a]ppellant's lack of a medical causation or standard of care expert is fatal to his claim because causation is an element of the underlying claim, and the alleged misconduct is not so obvious to a lay person such that they could understand the proper conduct without expert testimony." It asserts that, to prevail on his malpractice claim, appellant had to show that he would have prevailed in the underlying lead paint case but for Kerpelman's negligence, and he suffered harm because of Kerpelman's acts of omissions. Kerpelman argues that, without a medical causation expert, appellant could not show that lead exposure at the property injured him. As to the legal standard of care,

Kerpelman asserts that appellant "fails to address the full scope of [Kerpelman's] efforts to prosecute the underlying lead paint claim in favor of making it a service of process question," and an expert's testimony was "absolutely necessary to explain what should have been done differently according to the standard of care which governs attorneys' conduct in Maryland."

Maryland Rule 2-501(f) governs motions for summary judgment and states that a trial court "shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." *See Fox v. Fidelity First Home Mortg. Co.,* 223 Md. App. 492, 507–08, *cert. denied,* 445 Md. 20 (2015). "A material fact is 'one that will somehow affect the outcome of the case."' *Id*. at 508 (quoting *Commercial Union Ins. Co. v. Harleysville Mut. Ins. Co*., 110 Md. App. 45, 51 (1996)). "We review a grant of summary judgment without deference, and construe the facts, and any reasonable inferences that may be drawn from them, in the light most favorable to the non-moving party." *Calvo v. Montgomery County*, 459 Md. 315, 323 (2018). Thus, we review without deference the court's decision that, without a legal standard of care expert, appellant could not prove his negligence claim and Kerpelman was entitled to summary judgment.

To prove legal malpractice, a plaintiff must show "(1) the attorney's employment; (2) his neglect of a reasonable duty; and (3) loss to the client proximately caused by that neglect of duty." *Hooper v. Gill*, 79 Md. App. 437, 440–41, *cert. denied*, 317 Md. 510

(1989), *cert. denied*, 110 S.Ct. 2588 (1990). *Accord Supik v. Bodie, Nagle, Dolina, Smith & Hobbs, P.A*, 152 Md. App. 698, 717 (2003), *cert. denied*, 379 Md. 225 (2004). The appellate courts have explained that, generally, allegations of professional malpractice require expert testimony, stating,

> [i]n an action against a professional man for malpractice, the plaintiff bears the burden of overcoming the presumption that due skill and care were used. Although there may be instances in which the negligence is so gross or that which was done so obviously improper or unskillful as to obviate the need for probative testimony as to the applicable standard of care, (and here we proceed on the assumption that this is not such a case), generally there must be produced expert testimony from which the trier of fact can determine the standard of skill and care ordinarily exercised by a professional man of the kind involved in the geographical area involved and that the defendant failed to gratify these standards.

Carter v. Arent Fox, LLP, 212 Md. App. 685, 720 (quoting *Crockett v. Crothers*, 264 Md. 222, 224–25 (1972)), *cert. denied*, 435 Md. 502 (2013).

The circuit court found that a standard of care expert was required in this case to determine whether Kerpelman neglected a reasonable duty. We agree that, unlike the cases cited by appellant, the breach of duty in this case was not obvious. For example, this case is not analogous to *Suburban Hosp. Ass'n, Inc. v. Hadary*, 22 Md. App. 186 (1974), where a doctor used a non-sterile needle to perform a liver biopsy, a situation where a reasonable jury understands the need to use sterile needles and the consequences of the failure to do so. Rather, here, the issue was whether a reasonable attorney would have continued to seek service on a defendant who was evading service, after 17 attempts, in a case where liability was unclear, and the facts indicated that a judgment would not be collectable. We agree

that this was not obvious but was something that required expert testimony on the standard of care.[5]

Thus, the circuit court properly found that a legal standard of care expert was necessary for appellant to show that Kerpelman breached a reasonable duty. Because appellant did not have such an expert, the circuit court did not err in granting summary judgment for Kerpelman.[6]

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

[5] For example, an expert witness could have explained the availability of alternate service. *See* Md. Rule 3-121(b) ("When proof is made by affidavit that a defendant has acted to evade service, the court may order that service be made by mailing a copy of the summons, complaint, and all other papers filed with it to the defendant at the defendant's last known residence and delivering a copy of each to a person of suitable age and discretion at the place of business of the defendant."). The circuit court's comment that its law clerk was not aware of the option to file a motion for alternative service illustrates that this is not a concept likely to be familiar to lay jurors.

[6] We also note that the circuit court ruled that appellant had to show that any negligence by Kerpelman was a proximate cause of appellant's injury, i.e., that he otherwise would have prevailed in the underlying lead paint claim, and to do that, appellant needed an expert, which he did not have, to testify that lead exposure caused his injury. Appellant does not challenge this ruling, which we conclude would be another basis to grant summary judgment.