UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1944

September Term, 2014

REHAB AT WORK CORP.

v.

DRINKER BIDDLE & REATH LLP

Krauser, C.J.,
Wright,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: June 28, 2016

Oscar Wilde once said that "[a] man who pays his bills on time is soon forgotten." If that is true, appellant Rehab at Work Corp. ("RAW") will not soon be forgotten by appellee Drinker Biddle & Reath LLP ("DBR"). In this appeal, RAW assigns error to the Circuit Court for Montgomery County's grant of judgment in favor of DBR for its claim for unpaid attorney's fees.

RAW presents two questions for our review, which we have re-formulated and reordered as follows:

1. Did the circuit court err in granting DBR's oral motion *in limine* excluding the testimony of Ronald J. Drescher, Esq. ("Mr. Drescher")?
2. Did the circuit court err in granting DBR's motion for judgment during trial, before RAW had finished presenting its evidence?

In its cross-appeal DBR asks that we reexamine the July 30, 2014 denial of its motion for summary judgment "in the event that this Court finds in favor of RAW."

For the reasons that follow, we affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Some time in the 1990s, Raymond Howar ("Mr. Howar"), a shareholder[1] and then-vice-president of RAW, engaged Allen V. Farber, Esq. ("Mr. Farber") and his firm Green, Stewart & Farber to provide legal services to RAW on an hourly rate basis; it was agreed that RAW would pay those fees, in addition to any expenses incurred on its behalf, within thirty days of receiving monthly invoices.[2] This arrangement continued

[1] Mrs. Howar owned eleven of the twenty shares of RAW and Mr. Howar owned the remaining nine shares, which are now the property of Mr. Howar's bankruptcy estate.

[2] Mr. Farber stated in an affidavit that "to the best of his knowledge" there was a written agreement between the parties, but no written agreement had been located.

until 2013. During that period, Mr. Farber moved to several different law firms[3] and Mr. Howar ended his active participation in the company in 2006.[4] Over the years, DBR represented RAW in ordinary business matters including reviewing the RAW website and bylaws; advising RAW regarding collection matters; drafting employment agreements, notices of stockholder meetings, and cease and desist letters; researching copyright issues; and reviewing contracts. In addition, DBR represented RAW in litigation matters, including the litigation between RAW and Mr. Howar. Because that litigation is the contextual backdrop for this appeal, we discuss it in some detail.

The Mr. Howar v. Mrs. Howar and RAW Litigation

On November 27, 2006, Mr. Howar sued RAW and Mrs. Howar in the Circuit Court for Montgomery County alleging, among other things, that he had been deprived of his salary and profit distributions.[5] He claimed damages exceeding seven million dollars and requested injunctive relief. Mr. Farber represented RAW, and on the advice of Mr. Farber, Mrs. Howar engaged Brown & Gould, LLP to represent her individually in light of a potential conflict of interest.[6] In late 2008, Mr. Howar's counsel sought Mr. Farber's consent to a dismissal without prejudice. Mr. Farber denied counsel's request, and

[3] After the initial agreement, Mr. Farber moved from Green, Stewart & Farber to Akin Gump; he later moved from Akin Gump to Gardner, Carton & Douglas, which later merged with Drinker, Biddle, & Reath LLP.

[4] Mr. Howar remained an officer of RAW until 2009, but his active participation ended in 2006.

[5] Mr. Howar also filed a divorce action about the same time.

[6] Brown & Gould, LLP also represented Mrs. Howar in the divorce action.

opposed the motion. After a hearing, the circuit court granted the motion on November 20, 2008.

Mr. Howar filed a second complaint against Mrs. Howar and RAW in October 2010. Mrs. Howar again engaged DBR on behalf of RAW and Brown & Gould, LLP on her individual behalf in that litigation. According to Mr. Farber, he and Mr. Gould did "everything [they] could to get that complain[t] thrown out as quickly as possible so [they] didn't have to go through discovery and other things once again." Unable to "dissuade" Mr. Howar's counsel from continuing with the suit, they filed a motion to dismiss or, in the alternative, for summary judgment on January 10, 2011. The circuit court granted the motion to dismiss with leave to file an amended complaint with respect to certain claims that included Mr. Howar's statutory rights as a shareholder to review corporate documents and RAW's alleged failure to disclose those documents.

In a continuing effort to terminate the litigation as quickly as possible, "Mr. Gould, Mrs. Howar, and [Mr. Farber] decided that it was important to do what [they] could to defuse or undercut any [disclosure] argument if it was made in an amended complaint because [they] could see where a Court could perhaps say there were issues of material fact regarding disclosures or not disclosure." To that end, DBR invited Mr. Howar's counsel "to come get whatever he wanted to get" from RAW. Mr. Howar's counsel declined that invitation and, on March 7, 2011, filed an amended complaint. Counsel for Mrs. Howar and RAW responded with a motion to dismiss or, in the alternative, for summary judgment.

On March 31, 2011, while that motion was pending, Mr. Howar petitioned for chapter 7 bankruptcy in the United States Bankruptcy Court for the District of Maryland, Southern Division.[7] The circuit court stayed the proceedings in its case to enable the bankruptcy trustee, Merrill Cohen ("Trustee"), to intervene on behalf of the bankruptcy estate. On June 13, 2011, counsel for the Trustee, Nelson Cohen ("Mr. Cohen"), entered his appearance and filed a notice to remove the circuit court case to the bankruptcy court.[8]

Mr. Farber and Mr. Gould believed that RAW and Mrs. Howar would be "best served by being in [the circuit court] because [the circuit court] had some knowledge and background with the proceedings" from the previous litigation including the Howars' divorce case. After consulting with Mrs. Howar, they moved to remand back to the circuit court. Mr. Farber successfully argued that motion in the bankruptcy court, and the case was remanded on August 25, 2011.

The circuit court permitted the Trustee to file a supplemental opposition to the pending motion to dismiss or, in the alternative, for summary judgement, and gave Mr.

[7] Mrs. Howar retained James A. "Jim" Vidmar, Esq., of Yumkas, Vidmar & Sweeney, LLC to represent her in those proceedings.

[8] The United States Code allows for removal of state court proceedings related to the bankruptcy case:

> (a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

28 U.S.C. § 1452 (2012).

Farber and Mr. Gould the opportunity to reply. On November 18, 2011, the circuit court held a hearing and granted the motion to dismiss, without prejudice to the Trustee's right to bring an action for acts occurring after the Trustee "took title to the assets of the estate." In doing so, the court explained:

> So for all of those reasons, [RAW's and Mrs. Howar's] motions herein are granted, and the complaint is dismissed, or otherwise judgment is entered on all counts.
>
> Okay, and this is obviously without prejudice to the trustee's ability to bring any action for acts going forward once the trustee took title to the assets of the estate. So to the extent that there are distributions owing going forward and those are not paid to the trustee, it's without prejudice to the trustee to assert that claim.

The Notice of Dismissal, mailed to the parties on November 30, stated:

> The above captioned case having been set for a hearing . . . on November 18th 2011, the court dismissed the case on that date as follows: COURT . . . DISMISSES COMPLAINT WITHOUT PREJUDICE TO THE TRUSTEES ABILITY TO BRING ANY ACTION FOR ACTS GOING FORWARD ONCE THE TRUSTEES TOOK TITLE TO THE ASSETS OF THE ESTATE.

The Trustee noted an appeal of that order to this Court on December 14, 2011, but later dismissed that appeal.

On December 30, 2011, the Trustee filed motions in the bankruptcy court for relief under rule 2004 of the Federal Rules of Bankruptcy Procedure to determine the value of certain assets in the bankruptcy estate including Mr. Howar's minority shares in RAW and any distributions that might be owed to him.[9] The motions included requests for the depositions of both Mrs. Howar and RAW and for all relevant documents from 2006 (the

[9] Federal Rule of Bankruptcy Procedure 2004(a) provides: "On motion of any party in interest, the court may order the examination of any entity."

year Mr. Howar's active participation in RAW ended) to 2011.[10] Before Mr. Gould and Mr. Farber could file an opposition, the bankruptcy court granted the motions. When Mr. Gould emailed Mr. Cohen to ask if he would "consent to a motion to vacate the orders and give [Mrs. Howar and RAW] more time to respond," Mr. Cohen indicated that orders for rule 2004 examinations "are entered routinely," and denied that request.

On January 13, 2012, Mr. Farber and Mr. Gould filed a joint motion to vacate the rule 2004 orders and requested additional time to respond to the Trustee's motions for relief under rule 2004. Prior to filing, they discussed with Mrs. Howar their intent to limit the scope of the Trustee's inquiry because, even though such requests are typically routine, "in this particular circumstance, the approach taken by the trustee and his counsel was an abusive attempt to circumvent the ruling by [the circuit court]."

A hearing was held in the bankruptcy court on March 7, 2012. Mr. Farber, on behalf of RAW,[11] asserted that the "whole purpose in filing that comprehensive, excessive, abusive [rule 2004 examination] request is to extract a settlement from Mrs. Howar and Rehab at Work" and that the request for such historical information had been "foreclosed" by the prior ruling in the circuit court. Mr. Cohen responded that "from day one of [his] involvement in [the] case [he had] asked for documents and records . . .

[10] Federal Rule of Bankruptcy Procedure 2004(b) provides: "The examination of an entity under this rule . . . may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge."

[11] Brown & Gould, LLP associate Jesse D. Stein, Esq., as counsel for Mrs. Howar, stated on the record that Mrs. Howar was "adopting Mr. Farber's argument as well."

primarily informally" and he had not received "the first piece of paper." He took issue with Mr. Farber's interpretation of the circuit court's ruling stating: "That is not the way I read [that] ruling," and that, as he interpreted the order, "we would be able to assert claims subsequent to claims that arose subsequent to the divorce action."

At the bankruptcy court's suggestion, Mrs. Howar and RAW agreed to provide "appropriate financial records" for 2010 and 2011 within thirty days. The bankruptcy court granted Mrs. Howar and RAW additional time to brief the issue. On May 8, 2012, the court entered an order granting the motion to vacate in part, but required that Mrs. Howar and RAW produce relevant documents beginning in 2008. To that end, DBR began working with Mrs. Howar on document production and "followed up with [her] fairly regularly as to the documents" to be produced. Several times during that process it was represented to DBR that RAW "had provided what [it] was able to find and [that was] responsive and that [it] would continue to look." At some point, RAW authorized DBR to inform the bankruptcy court that it "had produced all responsive documents that could be located."

Unsatisfied with RAW and Mrs. Howar's document production, Mr. Cohen filed a motion for contempt and sought sanctions, costs, and other relief. Mrs. Howar and RAW filed a joint opposition to the Trustee's motion and a hearing was held on September 19, 2012. Events surrounding that motion are particularly relevant to RAW's defense of DBR's claim for fees.

At the hearing, the Trustee contended that "by looking at what was produced and clearly what was not produced, the order ha[d] been violated." Therefore, as Trustee he was harmed by the need to make the motion and appear for the hearing and the resulting delay in "investigat[ing] and processing and administrat[ing] . . . the estate." Mr. Farber responded that "it [was] his understanding, based on information that [he had] obtained, that the totality of responsive documents which RAW ha[d] ha[d] been produced."[12] As Mr. Farber explained in his deposition in the case now before us, he "did not represent [to the bankruptcy court that] the complete production had been made" because of his concern about whether RAW "was less than forthcoming" with its document production. That concern was based on the "dearth of financial information and records" that RAW had provided in response to the requests. Therefore, in order to "minimize the risk for both the corporation and [Mrs.] Howar personally," he "instructed Mrs. Howar not to come" to the hearing because, if the bankruptcy judge "put [her] on the witness stand," he "was not satisfied that [she] would withstand that examination at that time."

The bankruptcy court, because there was no one that could be "put . . . on the stand and say she doesn't have the documents," decided to "reserve" on the issue of contempt until after the Trustee's rule 2004 examination of Mrs. Howar. In the court's view, it could not "order [RAW and Mrs. Howar] to do something unless [it] really [knew] that they [had] violated the order and [had] not produced everything."

[12] Counsel for Mrs. Howar also stated, on the record, that "as I understand it, as well, Ms. Howar has produced that which she had that was responsive to the request. And I do not understand there to be any other documents out there, as well."

During preparation for her rule 2004 examination, Mrs. Howar was informed that the DBR associate attorney who had worked with her on the document production would represent RAW at the examination. She, in turn, asked that attorney not to appear because she wanted "someone that was [more] experienced to be there by [her] side." She did not, however, contact Mr. Farber regarding her reservations with being represented by the DBR associate and did not ask him to attend the examination. Instead, she retained Ronald J. Drescher, Esq., for representation in the matters related to the rule 2004 examination. From that date forward, apart from a few email exchanges, Mrs. Howar and RAW no longer consulted with Mr. Farber regarding the rule 2004 examination and document production requests.

It was only after Mr. Farber and DBR moved to withdraw from representing RAW in regard to the rule 2004 examination aspect of the bankruptcy proceeding on March 15, 2013, that Mrs. Howar asked Mr. Farber and DBR to continue their representation of RAW, but no opposition to the motion to withdraw was filed. The bankruptcy court granted DBR's motion on April 8, 2013.

After the rule 2004 examination of Mrs. Howar, a second hearing on the contempt issue was held in the bankruptcy court on January 28, 2013. Referring to Mr. Farber's earlier representations concerning document production, the court stated:

> It was—I did not like the way it was—let's put it this way, and it was not appreciative of the way it was worded, It sounded as if maybe an inquiry had not been made, and that was pretty much confirmed that counsel had not done much to inquire . . . because of that misrepresentation—if it was a misrepresentation I was not—I was reserving.

Before the bankruptcy court issued a ruling on the contempt issue, the parties agreed to mediation upon certain terms.[13]

The DBR v. RAW Litigation

After the bankruptcy court granted DBR's motion to withdraw as counsel on April 8, 2013, the parties continued to correspond by letter and email regarding RAW's outstanding legal fees and related matters, but DBR was no longer rendering legal services to RAW.[14] In an April 29 letter, Mrs. Howar asked to "sit and review the bills" with Mr. Farber to address her "concerns." In the meantime, however, she intended "to work on [paying DBR's] bill but because of the additional expenses that have occurred related to [Mr. Farber's] participation [in the rule 2004 examination proceedings] it probably is not at the speed that [he] want[ed]."

In a July 23, 2013 email, Mrs. Howar stated that "since [DBR's] last email in June, RAW [had] in fact ma[d]e a payment in full for one of DBR's invoices . . . I am not sure how one could say that RAW is completely ignoring its obligations." She again asserted that DBR's "actions [with respect to the rule 2004 examination had] increased [RAW's] bill." In a September 11, 2013 email, which was in response to "communications" from DBR[15] indicating that it was going to file suit, Mrs. Howar reiterated DBR's failure to answer her "billing concerns."

[13] As of May 23, 2016, the bankruptcy proceeding was ongoing.

[14] The date of the last service billed to RAW was March 28, 2013.

[15] The September 2013 email was addressed to Chris D. Douglas, the individual assigned to account collections in Drinker, Biddle, & Reath LLP's main office in Philadelphia.

On September 18, 2013, DBR filed a complaint for breach of contract seeking $162,454.34,[16] plus interest, alleging that "[DBR] and RAW entered into and had an ongoing contractual relationship. RAW promised and agreed to pay the bills submitted to it by [DBR] for legal services on its behalf. RAW has paid a portion, but not the full amount due and owing. . . . [And, i]n failing to pay [DBR] amounts owed, RAW has breached its contract with and its contractual obligations to [DBR]."

RAW answered on December 9, 2013. It denied the allegations in DBR's complaint and asserted several affirmative defenses. On January 8, 2014, RAW filed a "Counter-Complaint" for breach of contract alleging that DBR's "abrupt and unilateral discontinuance of representation of RAW, as well as demand for immediate payment constitutes a material breach of the contract that was formed through the course of dealings and course of performance of the parties." It sought a declaratory judgment that "[t]he fee charged by [DBR] is unreasonable" and that "RAW is under no duty to pay the unreasonable fee." DBR filed its answer to the Counter-Complaint on January 28, 2014, and asserted five defenses.[17]

[16] A mistake in DBR's internal accounts related to a $5000 credit given to RAW resulted in a final judgment of $157,454.34.

[17] DBR asserted the following: (1) "The Counter-Complaint fails to state a claim upon which relief may properly be entered."; (2) "RAW is estopped from asserting or prevailing upon the claims in the Counter-Complaint."; (3) "RAW has waived the claims set forth in the Counter-Complaint."; (4) "RAW's claims are barred by the doctrine of laches."; and (5) "RAW's claims are barred by reason of acknowledgement of its obligations and by partial payment."

Discovery included interrogatories from DBR requesting, among other things, that RAW: (1) "[i]dentify each person RAW expects to call as an expert witness at trial and, as to each person so identified, state the specific subject matter of his/her anticipated testimony, the precise facts as to which the expert is expected to testify, the opinions to be presented, and the basis for each such opinion;" (2) state the factual basis for each of its affirmative defenses; and (3) indicate "how much of the [total amount] claimed in the Complaint" RAW owed to DBR.

Mrs. Howar was deposed—in both her personal and representative capacity—on May 16, 2014. In response to DBR's inquiry about damages, she testified that the methodology used to calculate damages, the witnesses testifying regarding damages, and the amount of damages would "be determined as we go forth." The deadline for RAW to identify its expert witnesses was February 18, and the close of discovery was June 2, 2014. RAW failed to provide the requested information at any time.

On June 13, 2014, DBR filed a motion to strike RAW's affirmative defenses or, in the alternative, for summary judgment in addition to a separate motion for summary judgment. DBR contended that: (1) RAW could not prove any of its affirmative defenses; (2) could not present "credible expert testimony in this matter as to the reasonableness or unreasonableness of DBR's legal work for RAW . . . or the rates charged by DBR for [that] work;" and (3) RAW "essentially alleges professional malpractice by DBR[, but] has not designated an expert for any purpose in this case," and that the deadline to "designate an expert has long since passed." DBR, on the other hand, had named Mr.

Farber as an expert witness on December 19, 2013, and provided invoices for the amounts owed. Therefore, DBR asserted that it had proved all the elements of breach, whereas "RAW [could not] even identify the dollar amount it is seeking," which was a necessary element of its claim.

RAW responded that DBR had "not proved the existence of a contract . . . and the existence of any such agreement remains in question;" that it had not proved breach because it "failed to prove the terms of the contract;" and it had not proved damages because it "failed to prove that the damages it has claimed are in fact accurate to any degree of reasonable certainty." RAW also asserted that it had "raised numerous questions," to which DBR has failed to respond, that "resulted in the reduction of the amount alleged as outstanding," and that summary judgment was not appropriate on the counter claims because expert testimony is not required to prove those claims, nor is the "failure to plead specific damages . . . grounds for summary judgment." DBR replied on July 16, 2014 "to highlight the various factual matters of which there is no dispute between the parties, and to respond to several factual and legal mischaracterizations put forward by RAW in its opposition."

At a hearing in the circuit court on July 30, 2014, DBR addressed each of RAW's remaining defenses and argued that it was entitled to summary judgment because it had proved its breach of contract claim and RAW could not prove its declaratory judgement counts without an expert. RAW responded by alleging questions of material fact that remained:

> There are many questions of material fact at issue here in this case. Does RAW have to pay for invoices outside the scope of the statute of limitations or were the alleged promises to pay those particular invoices sufficient to toll the statute of limitations?[18] Does RAW have to pay DBR to create a toxic relationship with Nelson Cohen, trustee for the bankruptcy or counsel for the bankruptcy trustee and engage in a quixotic quest to challenge the Rule 2004 examination? Does RAW have to pay for an attorney to lie to a federal judge, as was stated by that judge?
>
> The court ruled from the bench:
>
> > I don't know what the ultimate result is going to be and it may be that Mr. Farber, you know is right about most of what he's saying or everything that he's saying for that matter because it does seem like it's pretty farfetched, but I don't feel that this is an appropriate case for summary judgment. . . . I do find that there are material issues of fact that could've been raised more clearly and more specifically, but I think given the nature of everything that there are issues of material fact in terms of exactly what the contract is or was, what the scope was, what the times are. You know exactly how all the legal defenses play out, I think are going to be somewhat dependent on factual issues that somebody's going to have to decide.
> >
> > So, I am going to deny both motions.

A three day bench trial began on October 27, 2014. During opening statement, RAW stated that it wanted "to know why [DBR] refused to discuss pertinent billing issues." RAW enumerated its issues with DBR's services, which included, but were not limited to, DBR's "failure to get clarification of [the circuit court's] order of

[18] During argument in favor of the motion for judgment on the third day of trial, DBR contended that there was "no bar on the statute of limitations because the evidence is uncontested that [RAW] has been making payments on a regular basis on those amounts' and the debt has been otherwise acknowledged." In opposition, RAW stated that the only issue remaining was the reasonableness of DBR's fees. RAW failed to respond DBR's statute of limitations argument or to otherwise indicate for which fees collection was foreclosed by the statute of limitations. In addition, Mrs. Howar previously acknowledged RAW "did pay [DBR's] bills when funds were available."

November 18, 2012;"[19] DBR's decision to expend a significant amount of time challenging the rule 2004 examination "when those . . . are routinely granted;" and DBR's decision to "abandon RAW at a critical moment in the proceedings." DBR objected to the extent that "opening statement is about the evidence that you're going to produce at trial. It's not about raising questions," and renewed its motion for summary judgment. The court did not address DBR's renewal of its motion for summary judgment, stating "[n]ow is not the time. We don't have opening statement rebuttal, all right? And I won't be taking a look at whatever this motion for summary judgment was during the lunch hour, so we're going to go from here."

The circuit court agreed that opening statement is "supposed to be a brief outline of what you intend to prove in your case in chief." And, RAW ended its opening with a proffer of the evidence it intended to enter at trial, which included DBR's decision to challenge a "Rule 2004 Exam [which] is essentially a Quixotic Quest" that "cost RAW a lot of money;" DBR's failure to "meet and confer" with Trustee's counsel prior to when

[19] At his deposition, Mr. Farber stated that, although he did not believe RAW could defeat the rule "2004 examination in its entirety," he believed RAW "had a good chance of success in opposing the Rule 2004 examination" because the circuit court had foreclosed any issues that occurred before "the trustee took title to the assets of the estate." In his view, when the circuit court said "'[t]hese issues are foreclosed,' you should be able to go to a sitting Federal judge, whether in Bankruptcy Court or otherwise, and say, 'State Court Judge has ruled X. He should not be taking discovery as to that X.'" Mrs. Howar stated in her deposition that the circuit court's judgment was "not clear enough to prevent further cases from coming against [RAW]" and contended that "Mr. Farber and Mr. Gould should have gone back to [the circuit court] on the heels of winning the motions argument and told [the court] through some filing that [it] hadn't entered the ruling appropriately."

he filed the motion for contempt; DBR's "abandon[ment of] RAW at a critical moment in the proceedings;" and DBR's inclusion of invoices for claims precluded by the statute of limitations in its complaint.

During its case-in-chief, DBR called Mr. Farber, Mr. Gould, and Brown & Gould, LLP attorney Mr. Stein, to testify regarding their representation of RAW and Mrs. Howar.[20] For witness convenience, Mr. Farber's direct and cross examinations were interrupted for the testimony of Mr. Stein and Mr. Gould. Mr. Gould, who had represented Mrs. Howar individually, testified that he felt that DBR's attorneys were qualified to perform the work that they engaged in, and that Mr. Farber was an "exceptionally competent attorney." He also believed that none of the work performed by DBR was "unnecessary." Mr. Stein testified regarding his recollection of a meeting in which Mrs. Howar claimed that Mr. Farber had asked her to refer Mr. Cohen to bar

[20] For clarification, the three day trial in this case did not proceed in the usual manner; a chronology of the events is included below:
DAY ONE: DBR's Opening Statement → RAW's Opening Statement → Beginning of DBR's case-in-chief; direct examination of Mr. Farber → Interruption of Mr. Farber's direct examination; direct examination and cross examination of Mr. Gould.
DAY TWO: Direct examination of Mr. Farber resumed → Interruption of Mr. Farber's testimony; direct examination and cross examination of Mr. Stein → Cross examination, redirect examination and re-cross examination of Mr. Farber → Reading of Deposition excerpts from Mrs. Howar's deposition → DBR's case-in-chief interrupted for convenience of RAW witnesses and the beginning of RAW's case-in-chief → DBR's motion *in limine* to exclude RAW witnesses, granted in part → Direct examination, cross examination, redirect examination, and re-cross examination of Mr. Cohen.
DAY THREE: DBR's case-in-chief resumed, reading of Mrs. Howar's deposition by DBR's counsel → Reading of transcript completed by court in chambers → DBR closes its case-in-chief; DBR motion for judgment, argument in favor of motion → RAW argument in opposition to the motion that included Mrs. Howar's intention to take the stand to testify → Court's ruling.

counsel, stating that he did not remember such a request. He also testified on cross that he had no recollection of any informal document requests from Mr. Cohen.

Mr. Farber's cross examination resumed after Mr. Stein's testimony and counsel for RAW attempted to introduce the language of Maryland Lawyers' Rule of Professional Conduct 1.5 regarding the reasonableness of fees charged. When DBR objected, the court inquired of RAW's counsel:

> [W]here is the dispute? Where is the correspondence from your client as to the basis for the unreasonableness of the fee? Where is the notification of counsel that after 15 years or whatever it is that he's not qualified to charge what the hourly rate is or he doesn't have the specific skill required for this area of law and knowledge?

So prompted, counsel for RAW indicated that he would get to "that evidence now" and introduced into evidence an email from Mr. Farber to Mrs. Howar stating "I'm not a bankruptcy attorney and do not purport to know the ins and outs of bankruptcy law and how one can go about settling matters, what is permitted and not permitted. I assume that [Mr. Vidmar] will give you guidance on such matters." Mr. Farber explained on cross examination that the email referred to a possible "settlement between a trustee claimant and the corporation" and that he was referring to his lack of familiarity with the "rules and procedures in the bankruptcy court," regarding such a settlement, which was "an entirely different bankruptcy matter" than the rule 2004 examination discovery issues that he was handling. He also stated that had he been actively involved in the bankruptcy case beyond the rule 2004 examination issues, the bankruptcy partner at his firm, Kristin Going, Esq., would "have been assisting [him] on that." After Mr. Farber's testimony,

DBR moved to admit several segments from Mrs. Howar's deposition, which were admitted and read aloud by counsel for DBR.

DBR's case-in-chief was again interrupted during the reading of Mrs. Howar's deposition to permit RAW to call several witnesses who had been asked to appear on that date. RAW indicated that it would call Mr. Cohen and the Trustee to testify regarding the informal discovery requests allegedly made prior to the motion for contempt in the bankruptcy court and its intent to call Mr. Drescher, the attorney hired by Mrs. Howar just prior to the rule 2004 examination, to testify about "the situation that he was left with by Mr. Farber" and the legal expenses RAW incurred as a result of Mr. Farber's failure to end the litigation, even though he had "numerous opportunities" to do so.

DBR moved to exclude the testimony of the Trustee and Mr. Cohen asserting that there was no allegation that the Trustee had "called up Mr. Farber and asked" for information in discovery nor a proffer that he "had made [such] document requests;" and there was no indication that Mr. Cohen had information "as to whether or not Mrs. Howar[] had conducted an adequate document search" following the stipulation to produce documents. DBR moved to exclude Mr. Drescher because he had "no fact[ual] information relevant to the dispute at issue,"[21] and he had not "been proffered as an expert witness." In addition, RAW had not provided any information regarding damages during discovery.

[21] The transcript attributed this statement to David A. Hall, Esq. the trial attorney for RAW, but based on the context and content of the statement, it appears to have actually been made by Mark H. M. Sosnowsky, Esq., attorney for DBR.

The court granted the motion with respect to the Trustee because it "didn't even get a proffer as to what he was to have to say." The court also granted the motion with respect to Mr. Drescher, stating:

> I'm not going to let Mr. Drescher testify unless you can come up with something that shows that you told them what Mr. Drescher was going to say he incurred, or billed his client for with respect to work that wasn't done by Mr. Farber or by work he had to do, because Mr. Farber didn't do his job.

The court denied the motion with respect to Mr. Cohen, stating, "I'm still not sure what it is that [he is] going to testify about that's a defense to this billing, but I'll listen." Mr. Cohen then testified regarding informal document requests made to Mr. Farber in his capacity as counsel for RAW, Mrs. Howar's bar complaint against him, the contempt motion in the bankruptcy case, and his interpretation of the November 18, 2011 order dismissing the suit brought by Mr. Howar.

After Mr. Cohen's testimony, RAW stated that the remainder of its case consisted of the testimony of Mrs. Howar and excerpts from the deposition of DBR bankruptcy attorney Kristin Going. DBR then continued with its case and the reading of segments of Mrs. Howar's deposition.

On the third day of trial, after the court took a recess to finish reading the excerpts of Mrs. Howar's deposition in chambers, the proceedings resumed, and DBR rested its case. Commenting that Mrs. Howar had "essentially agree[d] in her deposition with everything that [had] been testified to by Mr. Farber," and that there was "no question that there was a contract;" "no question that consideration was provided;" "no question

that she never objected to any of the fees;" "no question that the fees were laid out;" and "no dispute that they sat down before th[e] challenge to the request for the rule . . . 2004 [examination]" to discuss that approach with her; the court asked if DBR "[had] a motion," and DBR then moved "for judgment" on the grounds that it was "uncontested that [DBR] is owed [legal fees]." In support, DBR pointed out that it had "produced the bills, the time records. None of [which had] been contested," and asserted that "there's been no issue brought before the Court by [RAW] that would preclude judgment."

Throughout RAW's response, the court attempted to crystalize RAW's position on DBR's motion by asking "[w]hat's in dispute?" and "why shouldn't I direct a verdict in favor of [DBR]" for all of the fees unrelated to the bankruptcy proceedings? RAW responded that Mr. Farber did not charge a reasonable fee "[f]or the services performed in bankruptcy court. And the services performed in connection with the R[ay] Howar chapter 7 bankruptcy proceedings," and that Mr. Farber's actions "concerning [the T]rustee's request to settle the case and to get documents" led to additional proceedings in the bankruptcy court. Counsel for RAW also pointed out that "DBR's bill [was] six times as much" as the bill for Brown & Gould, LLP, and stressed that RAW "did not have a chance to review [the bills] until they caught up" on their payments, but once it did, it began to question Mr. Farber's actions. Counsel also indicated that Mrs. Howar would testify that "Mr. Farber plainly stated he does not know how to settle matters in bankruptcy court. And that lack of experience lead [sic] to hundreds of thousands of dollars in additional legal expenses."

The court responded that it would not allow Mrs. Howar to testify regarding the reasonableness of the fees because she is "not an attorney;" she "authorized them to do" the work; and she "knew what [Mr. Farber's] hourly rate was." The court then read into the record excerpts from Mrs. Howar's deposition testimony that appeared to contradict her proffered testimony that the bills "weren't fair" and "weren't reasonable," and noted her failure to contemporaneously object to any bills and her decision to retain Mr. Farber throughout his movement to different law firms. The court stated her "deposition is an affirmance of everything that Mr. Farber spent a day and a half testifying about."

The court further explained:

> The Court finds, for all of the reasons articulated on the record, and the Court went to great length to indicate why the Court believed this not to be an issue based on [Mrs. Howar's] testimony under oath, on behalf of RAW, at her deposition on May 16th, 2014, basically agreeing with and admitting everything that Mr. Farber has testified to at great length in this trial. . . .
>
> The Court does not believe that in any way, shape, or form, they have raised, that is [RAW has] raised, any unreasonableness with respect to Mr. Farber's fees. Forgetting the fact that they don't have an expert to testify as to any of that, Mr. Farber went to great lengths to explain his expertise, both with respect to bankruptcy law and with respect to corporate litigation. . . .
>
> The Court finds on its own that the billings of Mr. Farber are fair and reasonable in light of his expertise, the amount of work that he did in this case, and the amount of work that the associates did. . . . Based on Mr. Farber's expertise he's testified to, the Court finds his bills and the billings of [DBR] to be fair and reasonable in this case, regardless of the fact that there's no expert witness. And [RAW or Mrs. Howar] certainly does not have the ability and the qualifications to do that.
>
> There's absolutely no evidence produced in the deposition prior to trial or anywhere else that any of these fees were unreasonable with respect to services performed in the bankruptcy court.

The court "enter[ed] a judgment in this case in the full amount that was requested" in favor of DBR. With respect to the counter claim/declaratory judgment action, it denied that "in its entirety with prejudice" stating RAW's "counter-complaint seeking a declaratory judgment that there was a violation of the rules of professional conduct, and that therefore, there's no obligation to pay, is denied . . . . As to Count 2, breach of contract. That there was a breach of an agreement to pay over[]time. That's also denied, as well."

Orders reflecting the oral ruling and a Notice of Judgment against RAW were docketed on November 10, 2014. RAW entered its appeal the same day. Notice of Cross-Appeal of the court's denial of DBR's June 13, motion for summary judgment was docketed on November 26, 2014.

Although the docket entries indicate that the circuit court dismissed RAW's counterclaim with prejudice, the court failed to enter a declaratory judgment on the record. Neither party raises the circuit court's failure to do so. It is well settled that a trial court must enter a declaratory judgment when an action is appropriate for resolution by declaratory judgment, and it is error for a trial court to dispose of such an action with oral rulings and a grant of judgment. *Harford Mut. Ins. Co. v. Woodfin Equities Corp.*, 344 Md. 399, 414 (1997). "The fact that the side which requested the declaratory judgment did not prevail in the circuit court does not render a written declaration of the parties' rights unnecessary." *Id.* The failure, however, to enter a declaratory judgment is not jurisdictional. As the Court of Appeals, in *Bushey v. N. Assurance Co. of Am.*, 362 Md.

626, 651 (2001) stated, an appellate court "may, in its discretion, review the merits of the controversy and remand for the entry of an appropriate declaratory judgment by the circuit court." We will do so in this case.

Discussion

Motion *in Limine*

RAW contends that "the circuit court abused its discretion in excluding the testimon[y] of Rehab at Work's witness Ron Drescher" because he would "rebut" the testimony of Mr. Farber and because his testimony regarding "counterclaim damages and countering DBR's accusations [was] clearly relevant." It further contends that it disclosed Mr. Drescher and damages information in discovery and that DBR did not "request information or object to a lack of information about counterclaims in discovery."

DBR responds that RAW's argument should be immediately rejected because RAW "failed to establish that Mr. Drescher's exclusion [as a witness] affected the outcome of the case." In addition, DBR contends that "RAW failed to make an adequate proffer in the Circuit Court regarding the specific testimony Mr. Drescher would have provided," and thus, failed to "establish the relevancy of the testimony." In its view, Mr. Drescher could provide "no relevant information concerning DBR's contract with RAW, DBR's billing practices, or DBR's work in representing RAW."

Standard of Review

Evidence is relevant if it tends to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it

would be without the evidence." Md. Rule 5–401. A circuit court's conclusion that evidence is not "of consequence to the determination of the action" is one of law, subject to the de novo standard of review. *See Parker v. State,* 408 Md. 428, 436-37 (2009).

Trial courts may lack discretion to admit irrelevant evidence, but they "generally ha[ve] 'wide discretion' when weighing the relevancy of evidence." *State v. Simms*, 420 Md. 705, 724 (2011) (quoting *Young v. State*, 370 Md. 686, 720 (2002)). In addition, and relevant in this case, "a trial court has broad discretion to fashion a remedy based on a party's failure to abide by the rules of discovery," *Bartholomee v. Casey*, 103 Md. App. 34, 48 (1994), and in the admission of "lay opinion testimony," *see Thomas v. State*, 183 Md. App. 152, 174 (2008), *aff'd*, 413 Md. 247 (2010). A trial court's exercise of that discretion "will be affirmed on appeal unless the reviewing court is persuaded that the trial court abused its discretion." *Hill v. Wilson*, 134 Md. App. 472, 489 (2000); *Thomas*, 183 Md. App. at 174. We only reverse when "the trial judge's determination was both manifestly wrong and substantially injurious," *MEMC Elec. Materials, Inc. v. BP Solar Int'l, Inc.*, 196 Md. App. 318, 342 (2010) (quoting *Lomax v. Comptroller of Treasury*, 88 Md. App. 50, 54 (1991)), or likely affected the verdict below. *Brown v. Daniel Realty Co.*, 409 Md. 565, 584 (2009).

Contentions

Mr. Drescher was retained to represent RAW in the rule 2004 discovery proceedings sometime prior to the rule 2004 examination. According to RAW, Mr. Drescher would "testify to what he did at his part of the case" in addition to "the work

that was paid for" by RAW that resulted from DBR's prior involvement in the rule 2004 examination opposition.

DBR countered that, as the attorney who succeeded Mr. Farber, Mr. Drescher had "no fact information relevant to the dispute at issue here," which centered generally on whether there was a contract for legal services between DBR and RAW, whether DBR charged reasonable fees for those services, and whether RAW's failure to pay for those services breached the contract. According to DBR, RAW did not designate any experts prior to trial and did not introduce any evidence suggesting that any actions by Mr. Farber were improper, unauthorized, or led to additional legal expenses. In addition, DBR pointed out that Mr. Farber was not engaged to handle the overall bankruptcy; his only involvement related to the rule 2004 discovery matters.

Analysis

We are not persuaded that the circuit court abused its discretion by excluding Mr. Drescher's testimony. The challenge to the professional appropriateness and quality of Mr. Farber's services in the rule 2004 discovery dispute and its relation to the fees charged is essentially a claim of professional malpractice. Without expert testimony or other competent evidence establishing that Mr. Farber's prior representation generated the need for his services, Mr. Drescher's proffered testimony was not "of consequence to the determination of the action." Md. Rule 5-401; *see Brethren Mut. Ins. Co. v. Suchoza*, 212 Md. App. 43, 57 (2013) (excluding evidence that partial payments on medical bills

were accepted as full payments because that information did not assist the trier of fact in determining the value of those services).

If RAW intended to call Mr. Drescher as an expert witness, his designation as such and a proffer of his testimony should have been provided in discovery. The purpose of discovery in civil cases, as the circuit court pointed out, is to avoid surprise and allow opposing parties to "see what are your damages, what is our exposure, should [w]e resolve this, should [w]e mediate this." Scheduling orders further those policy objectives by setting deadlines for identification of experts, in this case, "02/18/2014;"[22] written discovery, "04/17/2014;" and completion of discovery, "06/02/2011." To ensure compliance, the order warns that "failure to . . . comply with all requirements may result in dismissal, default judgment, exclusion of witnesses and/or exhibits."

The pretrial designation of Mr. Drescher as a lay witness did not permit him to testify regarding DBR's entitlement to fees and the reasonableness of the claimed fees. Lay witness testimony "is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Md. Rule 5-701. It is testimony that "derive[s] from personal knowledge," *Rosenberg v. State*, 129 Md. App. 221, 255 (1999), and a "witness may not testify to a matter unless evidence is introduced

[22] The scheduling order in this case provides "in countercomplaints, counter-experts shall be disclosed within 30 days of the filing of the countercomplaint."

sufficient to support a finding that the witness has personal knowledge of the matter," Md. Rule 5-602.

Although he might have done things differently, Mr. Drescher would have no personal knowledge of DBR's representation of RAW generally or the reasons behind the strategy decisions related to the rule 2004 examination. Any testimony of Mr. Drescher's that might have had some relevance to the claimed defense would have been in the nature of expert testimony. Therefore, we perceive no abuse of discretion in the court granting DBR's motion *in limine* to exclude his testimony.

Prior to trial, DBR repeatedly requested that RAW disclose information related to the fees and amounts in dispute. In its interrogatories, DBR requested that RAW "[i]dentify each person RAW expects to call as an expert witness at trial," state the subject and basis of that person's testimony, and indicate "how much of the [total amount] claimed in the Complaint" RAW owed to DBR. At the May 16, 2014, deposition of RAW's corporate representative, Mrs. Howar, DBR inquired about how much "RAW is claiming as damages?"; what methodology RAW will be using to calculate damages?; and "who is going to testify to the damages?" RAW declined to provide any of the requested information. Nor did RAW supplement its responses prior to the close of discovery, or any time thereafter. In fact, the only information that RAW provided relating to its alleged damages were profit and loss statements that simply included "the figure of how much [it] spent on legal expenses" during DBR's representation.

It is clear from the record that the circuit court understood that RAW claimed that certain actions by DBR, including its decision to challenge the rule 2004 examination and its handling of the contempt hearing, led to additional legal expenses, but, in the absence of some expert testimony of professional negligence, the issue that remained was reasonableness of the claimed fees. In short, RAW has failed to demonstrate how the exclusion of Mr. Drescher's testimony in any way affected the circuit court's verdict in this case.

The Motion: Summary Judgment Md. (Rule 2-501) or Motion for Judgment (Md. Rule 2-519)

Contentions

The motion offered by DBR, and granted by the circuit court, ended the proceedings. Was it a motion for summary judgment or a motion for judgment? The parties disagree.

RAW contends that "based on the language spoken by the Circuit Court on October 29, 2014 and language within the Circuit Court's written orders from November 5, 2014, it is clear that the Circuit Court was ruling on a Rule 2-519 motion" and not a Rule 2-501 motion. Therefore, it argues "the case should be remanded to the Circuit Court because the circuit court granted a motion for judgment . . . against [RAW] before it could complete its case-in-chief against the Complaint" and its case-in-chief in favor of the counter-complaint, including not permitting RAW to rebut Mrs. Howar's deposition testimony that DBR admitted into evidence. In RAW's view, the circuit court

violated Maryland Rule 2-519,[23] Maryland Rule 2-419(e),[24] and the Due Process Clause of the Fifth Amendment to the Constitution, as incorporated by Fourteenth Amendment, by declining to permit Mrs. Howar to rebut the DBR-introduced deposition excerpts before granting DBR's motion.

DBR counters that the motion it offered was a motion for summary judgment that "can be made at any time," and "[a]lthough DBR did move for 'judgment' at the close of its case, both the Court—and RAW's counsel—properly understood the motion as a motion for summary judgment pursuant to Maryland Rule 2-501, consistent with DBR's motion at the beginning of trial." DBR also asserts that RAW "insisted that the Court improperly entertained a Motion for Judgment under Rule 2-519," and "never argued that the Circuit Court's judgement under the summary judgment standard was in error." Therefore, that "issue is not properly before the Court." DBR also contends that RAW's due process argument is "meritless" because RAW had notice of DBR's claims, was represented by counsel at trial, and "was given a significant opportunity to be heard" on the issues.

[23] The relevant portion of Md. Rule 2-519(a) provides: "A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party."

[24] Md. Rule 2-419(e) provides:

> A party does not make a person that party's own witness by taking the person's deposition. The introduction in evidence of all or part of a deposition for any purpose other than as permitted by subsections (a)(1) and (a)(2) of this Rule makes the deponent the witness of the party introducing the deposition. At a hearing or trial, a party may rebut any relevant evidence contained in a deposition, whether introduced by that party or by any other party.

In our view, the motion offered by DBR was understood by the court to be a motion for judgment, but, rejecting DBR's preservation argument, we will analyze the circuit court's grant of the motion under both Rule 2-519 and Rule 2-501. Under either analysis, we reach the same result.

Motion for Judgment

Standard of Review

We review the grant of a Md. Rule 2-519 motion for judgment under Md. Rule 8-131(c), which provides for "review [of] the case on both the law and the evidence." We "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." *Id.* In other words, we conduct "the same analysis as the trial judge." *Thomas v. Panco Mgmt. of Md., LLC*, 423 Md. 387, 394 (2011).

Analysis

Motions for judgment are permitted "on any or all of the issues in any action at the close of the evidence offered by an opposing party." Md. Rule 2-519. RAW's interpretation of DBR's motion as a motion for judgment under Md. Rule 2-519, is supported by the language of the orders;[25] the court's question to RAW: "why shouldn't I

[25] The orders provide, in part "Based upon the findings of fact and conclusions of law and the Court's statements on the record, it is hereby, by the Court: ORDERED AND ADJUDGED that Rehab at Work's Counterclaim be and hereby is dismissed with prejudice." and "Based upon the findings of fact and conclusions of law and the Court's statements on the record, it is hereby, by the Court: ORDERED AND ADJUDGED that judgment is hereby entered for Drinker Biddle on its Complaint against Rehab at Work . . . ."

direct a verdict in favor of [DBR];" and its oral ruling: "The Court is going to enter judgment."

In RAW's view, the evidence was not closed when the motion was offered by DBR. As noted above, DBR's case was suspended for the purpose of accommodating certain RAW witnesses, which effectively opened RAW's case. On the second day of trial, RAW proffered its intent to read, during its case-in-chief, "portions in the transcript" of Kristin Going's deposition. The relevance of that testimony was explained as follows: "Mr. Farber has stated he's not a bankruptcy expert, and he referred to Ms. Going numerous times. So, in her deposition, it came up that she didn't have a lot of recollection of the events that transpired." But, during cross examination, Mr. Farber testified that his involvement in the bankruptcy case only related to the rule 2004 discovery issues. Therefore, Ms. Going's minimal involvement in those matters would not be material to the reasonableness of the fees. RAW also indicated its intent to call Mrs. Howar "to testify to the facts surrounding the events" from which the court "as the trier will be able to determine whether or not these fees were reasonable." But, as RAW conceded during its argument in opposition to DBR's motion, the reasonableness of the fees was the only issue "in dispute."[26] Because the court would not permit her to testify to the reasonableness of the fees RAW had presented all the admissible evidence that it

[26] At the beginning of his argument in opposition to the motion for judgment, counsel for RAW conceded that "what's in dispute is whether or not Mr. Farber and Drinker, Biddle and Reath charged a non-reasonable fee."

could offer. In other words, DBR's motion was made "at the close of [RAW's] evidence."

As the party seeking legal fees based on a breach of contract, DBR bore the burden of proving those fees. *Taylor v. NationsBank, N.A.*, 365 Md. 166, 175 (2001) ("To prevail in an action for breach of contract, a plaintiff must prove that the defendant owed the plaintiff a contractual obligation and that the defendant breached that obligation."). Although not directly on point, *Maxima Corp. v. 6933 Arlington Dev. Ltd. P'ship*, 100 Md. App. 441, 453-54 (1994) involved a dispute regarding legal fees, and is instructive as to how a claim for attorney's fees may be proven:

> The overwhelming authority holds that (a) the party seeking the fees, whether for him/herself or on behalf of a client, always bears the burden of presenting evidence sufficient for a trial court to render a judgment as to their reasonableness; (b) an appropriate fee is always reasonable charges for the services rendered; (c) a fee is not justified by a mere compilation of hours multiplied by fixed hourly rates or bills issued to the client; (d) *a request for fees must specify the services performed, by whom they were performed, the time expended thereon, and the hourly rates charged;* (e) it is incumbent upon the party seeking recovery to present detailed records that contain the relevant facts and computations undergirding the computation of charges; (f) without such records, the reasonableness, *vel non,* of the fees can be determined only by conjecture or opinion of the attorney seeking the fees and would therefore not be supported by competent evidence.

(Emphasis in original).

The Maryland Lawyers' Rules of Professional Conduct, Rule 1.5, guides a reasonableness analysis:

> The factors to be considered in determining the reasonableness of a fee include the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment of the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.

A court, however, "does not need to evaluate each factor separately[.]" *SunTrust Bank v. Goldman*, 201 Md. App. 390, 402 (2011).

During its case-in-chief, DBR offered considerable evidence demonstrating that a contract existed,[27] that RAW breached that contract, and that DBR's claimed fees were reasonable. Mr. Farber testified that he "first came to know RAW in the mid-90s" when he met with Mr. Howar in his office, and Mr. Howar stated he would "like to engage [him] as [RAW's] counsel." They discussed the terms of the engagement, and, to the best of his recollection, they signed an engagement letter. In any event, Mr. Farber began providing services according to those terms and billing for the services "on a monthly basis." In addition, DBR read excerpts from Mrs. Howar's deposition confirming that "RAW continued the relationship of its own volition after Mr. Farber became a partner at [DBR]."

[27] RAW, in its Counter-Complaint, acknowledged a contract "that was formed through a course of dealings and course of performance of the parties."

DBR introduced into evidence numerous invoices for the work performed during its representation of RAW.[28] Each monthly invoice was sent with a cover letter stating "[i]f you have any questions about this invoice or any other matter, please let me know;" a remittance page indicating that month's balance for legal fees, that month's balance for expenses, and a summary of accounts receivable; and a detailed summary of professional services rendered, which included the date those services were performed, who performed those services, the time devoted to those services, and the amount incurred for those specific services. Excerpts from Mrs. Howar's deposition, introduced by DBR, and read by the court both in chambers and on the record, indicated that RAW was not "current with [DBR]."

In addition, Mr. Farber, who was designated as an expert to testify to "the reasonableness of the fees and expenses charged to RAW by [DBR] and on the reasonableness of the work that was done on RAW's behalf," testified to his extensive experience as a litigator, the materials he reviewed while representing RAW, his thought process behind certain strategic decisions, and the favorable results he obtained, which included the circuit court's decision to limit claims by the Trustee to the period after Mr. Howar filed bankruptcy. DBR also introduced deposition excerpts wherein Mrs. Howar admitted that an exhibit depicting an email she previously wrote, which stated "I'm very

[28] The invoices indicated that "[p]ayment for legal services [was] due within 30 days of invoice date."

appreciative of your hard work that you have done for my company and myself over the years," was a "true and correct" copy.

RAW, on the other hand, offered no evidence to show that the fees charged were not reasonable.[29] To the extent RAW's unreasonableness claim rested on professionally

[29] In fact, the court, in rendering its decision, read several excerpts from Mrs. Howar's deposition into the record that tended to show DBR's fees were reasonable, including the following:

> [Q:] Can you point me to any question that R.A.W. raised in 2008 with respect to any [DBR] invoice, or any entry on any [DBR] invoice?
> [A:] R.A.W. did not bring any issue to you regarding your 2008 invoices in 2008.
> [Q:] Isn't it correct that R.A.W. did not raise any questions or issues with respect to any 2009 invoice, or entry there on in 2009?
> [A:] Correct.
> [Q:] Isn't it true that R.A.W. did not raise any question or issue with respect to any [DBR] invoice, or entry thereon in 2010?
> [A:] I did not bring those concerns to you in 2010.
> [Q:] In 2011, did R.A.W. raise any issue with respect to any invoice, or any entry on any invoice that had been submitted to it by [DBR] in 2008, 2009, or 2010?
> [A:] I do not believe so for those dates.
>
> * * * *
>
> [Q:] Mr. Farber and [DBR] were authorized on behalf of RAW to represent to the [bankruptcy] court [DBR's] understanding that RAW had produced all responsive documents that could be located. Isn't that correct?
> [A:] Yes.
>
> * * * *
>
> [Q:] then there came a time that you instructed Mr. Roach not to appear to defend. Isn't that right?
> [A:] that is true.
> [Q:] did you pick up the phone and call Mr. Farber and [say], I prefer that Mr. Roach not attend and I insist that you attend?
> [A:] I believe that I told Mr. Roach that he did not need to come. I did not call [Mr. Farber]. I knew [he was] not available that date because [he] had informed [RAW that he] would be working on another case in [his] office and not be coming to the deposition.

inappropriate or unnecessary actions in the rule 2004 discovery matters, it is well settled that RAW would "bear[] the burden of overcoming the presumption that due skill and care were used." *Crockett v. Crothers,* 264 Md. 222, 224 (1972). If a claimant "presents no such evidence, the trial 'court may rule, in its general power to pass upon the sufficiency of the evidence, that there is not sufficient evidence to go to the [trier of fact].'" *Schultz v. Bank of Am., N.A.*, 413 Md. 15, 29 (2010) (alteration in original) (quoting *Rodriguez v. Clarke*, 400 Md. 39, 71 (2007)). In our view, the alleged unreasonableness of the fees that were related to the rule 2004 discovery matters could not be determined without expert testimony.

RAW's sole witness, Mr. Cohen, did not testify regarding the reasonableness of DBR's fees. The only instance in which his testimony even tangentially related to the reasonableness of Mr. Farber's conduct or DBR's fees was his statement that:

> had there been informal discussions early on in the case where Mr. Farber and Mr. Gould would have made a good faith effort to educate me and my client regarding the history of this case, and the nature, their responses to the nature of our claims, then it is very conceivable that a lot of what has gone on in this case would not have had to go on.

At best, RAW revealed one billing error during re-cross examination that occurred "when Mr. Farber and DBR gave RAW a $5,000 credit on its November 2012 invoice to help accommodate RAW during its difficult financial time, [but which] was not correctly noted in DBR's internal accounts." A credit of this nature, however, does not demonstrate

that the fees were unreasonable, but rather an accommodation to a long-time client, and DBR modified its damage claim to reflect the billing error.[30]

To be sure, the circuit court did not allow Mrs. Howar to testify in response to the excerpts from her deposition. At trial, "a party may rebut any relevant evidence contained in a deposition, whether introduced by that party or by any other party." Md. Rule 2-419(e). But, again, the only issue remaining at that point in the trial, as conceded by RAW, was whether the fees charged by DBR were reasonable. Because Mrs. Howar was not qualified to testify to the reasonableness of the attorney's fees, any testimony she might have given to rebut DBR's evidence on the issue of reasonableness was not relevant. *See Suchoza*, 212 Md. App. at 57.

Summary Judgment

Standard of Review

"In reviewing a grant of summary judgment under Md. Rule 2–501, we independently review the record to determine whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law." *Haas v. Lockheed Martin Corp.*, 396 Md. 469, 479 (2007) (quoting *Myers v. Kayhoe*, 391 Md. 188, 203 (2006)). "[I]n determining whether there is a genuine dispute of material fact, [we] must resolve all inferences against the moving party." *Clark v. O'Malley*, 434 Md. 171, 195 (2013). "Our review over a circuit court's decision on

[30] A review of the invoices introduced into evidence by DBR indicated that it made several billing accommodations to RAW including a credit that exceeded $17,000.

summary judgment is plenary." *Carter v. Aramark Sports & Entm't Servs., Inc.*, 153 Md. App. 210, 224 (2003).

Analysis

At the time of the circuit court's ruling, Maryland Rule 2-501(a) provided that "[a]ny party may make a motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law." The rule also provided that "[t]he 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." Md. Rule 2-501(f) (2014). Notably, "[t]he rule d[id] not contain any language which would require a written motion." *Beyer v. Morgan State Univ.*, 369 Md. 335, 359 (2002).

The Court of Appeals and the Court's Standing Committee on Rules of Practice and Procedure was concerned that "an oral motion for summary judgment, . . . may raise potential due process considerations*." Beyer v. Morgan State Univ.*, 369 Md. at 359 n.16; 2015 MARYLAND COURT ORDER 0002 ("C.O. 0002") Committee Note to Rule 2-501. Specifically, the Court commented that "the context and chronology of the particular circumstances of such a motion may implicate issues of fair notice and opportunity to defend for the nonmoving party." *Beyer*, 339 Md. at 359 n.16. RAW contends that due process concerns are implicated in this case. We are not persuaded.

In *Wagner v. Wagner,* 109 Md. App. 1, 23–24 (1996) (internal citations omitted), this Court stated:

> Just what process is due is determined by an analysis of the particular circumstances of the case . . . . Due process, however, does not mean that a litigant need be satisfied with the result. . . . Indeed, it is sufficient if there is at some stage an opportunity to be heard . . . . Moreover, with respect to legal issues, due process does not even necessarily require that parties be given an opportunity to present argument.

In this case, RAW opposed the first motion for summary judgment at the July 30, 2014 motions hearing. At trial, RAW proffered the testimony of Mrs. Howar, Mr. Drescher, and the Trustee and was given the opportunity to call Mr. Cohen as a witness and to cross-examine DBR's witnesses. At the end of its case, and after RAW had, in effect,[31] presented all of its evidence, DBR "ask[ed] for judgment [to] be entered" on the grounds that

> [i]t's uncontested that [DBR] is owed [legal fees]. [DBR has] produced the bills, the time records. None of those have been contested, Your Honor. There's no bar on the statute of limitations because the evidence is uncontested that [RAW] has been making payments on a regular basis on those amounts; and the debt has been otherwise acknowledged. And we think that there's no issue, there's been no issue brought before the Court by defendants that would preclude judgment, Your Honor.

The court then allowed RAW the opportunity to respond.

[31] At the time the motion was granted, RAW stated its intention to introduce excerpts from the deposition transcript of Kristin Going, and to call Mrs. Howar "to testify to the facts surrounding the events." The court, however, would not "let [Mrs. Howar] testify" to reasonableness of Mr. Farber's fees and Kristin Going stated that she had limited involvement in DBR's decision to challenge to the rule 2004 examination. Thus, the proffered evidence was not relevant to the reasonableness issue.

DBR's motion complied with the formal requirements of the then current Maryland Rules for summary judgment, *see* Md. Rule 2-501 (2014); Md. Rule 2–311(a) ("An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, and shall set forth the relief or order sought."). Moreover, none of the due process considerations contemplated by the Court or the Rules Committee were implicated. *See* C.O. 0002 Committee Note to Rule 2-501. Therefore, the only issue that remains is whether the court's decision was legally correct.

In that analysis, the focus is, again, on the issue of reasonableness of the fees claimed. That is because after DBR "ask[ed] for judgment [to] be entered," RAW acknowledged, on the record, that the only issue "in dispute [was] whether or not Mr. Farber and [DBR] charged a non-reasonable fee." The admissible evidence, as discussed more fully above, demonstrated that when the court granted DBR's motion on the final day of trial there remained "no genuine dispute as to any material fact" on that issue and that DBR was "entitled to judgment as a matter of law."

Cross Appeal

Based on our conclusion that the circuit court did not err or abuse its discretion when it granted DBR's motion at trial, it is not necessary to address the question raised by DBR in its cross appeal. It is more than enough to say that ordinarily a circuit court "possess[es] discretion to refuse to pass upon, as well as discretion to affirmatively deny, a summary judgment request in favor of a full hearing on the merits; and this discretion exists even though the technical requirements for an entry of such a judgment have been

met." *Dashiell v. Meeks*, 396 Md. 149, 164 (2006) (quoting *Metro. Mortg. Fund, Inc. v. Basiliko*, 288 Md. 25, 28 (1980)). For that reason, courts rarely find that a circuit court abused its discretion by denying a motion for summary judgment.

JUDGMENTS AFFIRMED. CASE REMANDED TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY FOR ENTRY OF A DECLARATORY JUDGMENT IN ACCORDANCE WITH THIS OPINION. COSTS TO BE PAID BY APPELLANT.