UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2459

September Term, 2014

ROBERT HOROWITZ, *et ux.*

v.

SELZER, GURVITCH, RABIN, WERTHEIMER, POLOTT & OBECNY, P.C., *et al.*

Eyler, Deborah S.
Leahy,
Moylan, Charles, E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: September 27, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Robert and Cathy Horowitz ("Appellants") appeal from the Circuit Court for Montgomery County's ruling on cross-motions for summary judgment filed in the latest in a series of attorneys' fee and malpractice actions. Appellants filed the first malpractice and breach of fiduciary duty case, *pro se*, against their former attorney Philip B. Zipin of the Zipin Law Firm ("Zipin") in October 2012 after he had made a demand for unpaid legal fees. After some difficulty pursuing the case *pro se*, Appellants hired Bregman, Berbert, Schwartz & Gilday, LLC ("Bregman") and, later, Selzer, Gurvitch, Rabin, Wertheimer, Polott & Obecny, P.C., ("Selzer") (collectively the "Appellees"), to represent them in the malpractice action against Zipin.

With the advice of both Bregman and Selzer, Appellants entered into a settlement agreement with Zipin in November 2013 ("Settlement Agreement"). That agreement provided that each party would release all claims against the other; that Zipin's malpractice insurer would pay Appellants $125,000.00; and that Appellants would then pay Zipin $62,500.00. However, after receiving the contemplated payment of $125,000.00 from the insurer, Appellants refused to honor the terms of the settlement and refused to pay their own counsel, Selzer, the outstanding attorneys' fees Appellants accrued.

Selzer filed the underlying breach of contract action in the Circuit Court for Montgomery County, seeking payment of those fees on February 25, 2014. Appellants responded by filing a counterclaim against both Selzer and Bregman, alleging that both firms committed malpractice that resulted in Appellants entering into an unfavorable and illegal settlement agreement.

The circuit court heard argument on cross-motions for summary judgment filed by the parties and entered judgment in favor of Selzer and Bregman. Appellants filed a timely ten-day motion to alter or amend and, following the court's denial of that motion, filed a timely notice of appeal to this Court. Appellants present ten lengthy and extravagant questions—some containing multiple subparagraphs—that account for four pages of Appellants' brief.[1] However, Appellants' arguments fall within the following two broad issues:

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[1] Appellants' ten questions presented, which we have rephrased for brevity, are as follows:

1) Given the complexity of the legal malpractice counterclaim, did the trial court err in granting Appellees' motion to compress the scheduling order and in denying Appellants' motion to revise the scheduling order in conformance with Rule 2-504(b)(1)(B)?

2) Did the trial court err in granting summary judgment on the legal malpractice claims where there was a factual dispute regarding whether Appellants' expert was prepared by Appellees?

3) Did the trial court err in relying on un-cross-examined hearsay in granting summary judgment on the legal malpractice claims?

4) Did the trial court commit clear error in its factual determinations regarding the hearing judge's willingness to entertain certain motions?

5) Did the trial court err in granting summary judgment by making legally incorrect conclusions regarding the standard of care for legal malpractice?

6) Did the trial court err in approving Appellees' recommendation to Appellants that Appellants enter into the November 2013 settlement?

7) Did the trial court err in failing to recognize that an alleged kick-back provision in the November 2013 settlement violated the Md. Code Insurance Article § 27-212?

(continued…)

I. Did the circuit court abuse its discretion in denying Appellants' motion to extend the scheduling order?

II. Did the circuit court err in entering summary judgment in favor of Selzer and Bregman on Appellants' legal malpractice counterclaim?

For the reasons that follow, we hold that the circuit court properly exercised its discretion in denying Appellants' motion to modify the scheduling order in the interest of moving the case efficiently through the litigation process. We also hold that Appellants failed to present any dispute as to any material fact to preclude summary judgment on their malpractice claims against Selzer and Bregman, and that Appellants' acceptance of the full benefit of the Settlement Agreement waived their arguments as to that agreement's alleged illegality. Therefore, we hold the circuit court did not err in entering judgment as a matter of law on Appellants' malpractice counterclaims in favor of Selzer and Bregman. We affirm.

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8) Did the trial court err in deciding the legality of the kick-back without having the Zipin Continental Policy in the record?

9) Did the trial court err in determining that through the November 2013 settlement the Appellants' waived their right not to assign the part of their settlement for emotional distress and mental anguish despite the bar of such waiver under CJP § 11-504(b)(2)?

10) Did the trial court err in determining that the November 2013 settlement agreement was unexecuted by the Appellants?

BACKGROUND

A.

The Prior Litigation

For several years until 2008, Appellants relied on Ms. Horowitz's employee benefit plan to pay for their son's tuition at the McLean School of Maryland ("McLean School"), where Ms. Horowitz was employed. After learning of an error in its implementation of the tuition benefit plan, the McLean School notified employees that it would no longer offer the tuition benefit and demanded tuition payment for the upcoming school year along with a refund of previous benefits. On August 23, 2010, Appellants filed a *pro se* complaint against the McLean School, claiming breach of contract, promissory estoppel, and negligent misrepresentation. On February 2, 2011, Zipin entered his appearance in the action on behalf of Appellants.

On October 7, 2011, a jury returned a verdict, finding for Appellants on their promissory estoppel and negligent misrepresentation claims, but finding Appellants contributorily negligent on the latter claim. *See Horowitz, et ux. v. McLean Sch. of Md., Inc.,* No. 2221, Sept. Term 2011 (filed March 27, 2013).[2] The circuit court entered judgment, ordering the McLean School to pay Appellants $12,500.00 in damages for

[2] On appeal, we determined that the court erred when it approved a verdict sheet that allowed the jury to find that the Horowitzes were contributorily negligent; however, because the Horowitzes had claimed negligent misrepresentation without a sufficient basis, we held that any error placing contributory negligence on the verdict sheet was invited. *Horowitz*, No. 2221, slip op. at 9.

promissory estoppel. Both Appellants and the McLean School appealed that decision, which this Court affirmed in an unreported opinion. *Id.*

Sometime in late 2012, Zipin made a demand for unpaid legal fees incurred by Appellants for the McLean School case. Thereafter, on October 10, 2012, Appellants filed a *pro se* complaint against Zipin for legal malpractice and breach of fiduciary duty in the Circuit Court for Montgomery County. In response, Zipin filed a counter-complaint for breach of contract arguing that, pursuant to the terms of the retainer agreement between Zipin and Appellants, "[t]here is a total of $121,800.44 owed to the Firm from [Appellants] as of December 14, 2012."

In pursuing their malpractice case against Zipin, Appellants sought the advice of Professor Abraham Dash of the University of Maryland Francis King Carey School of Law. However, in or around January 2013, Professor Dash terminated his relationship with Appellants and informed Mr. Horowitz that he "was not in a position to be his expert." Nevertheless, on or about January 11, 2013, the deadline for designation of expert witnesses, Appellants filed a "Motion for Leave to Supplement the Pre-Scheduling Hearing Statement," which named Professor Dash as their expert. Appellants never filed an official designation of Professor Dash as their expert witness. Appellants, continuing to represent themselves, then made three failed attempts to substitute or designate attorney Douglas

Smith as their expert witness.[3] This left Appellants with no expert designated to support their malpractice claim.

On July 31, 2013, Appellants engaged Bregman to represent them in the suit against Zipin. On August 23, 2013, Appellants also retained Selzer to represent them as Bregman's co-counsel. The retainer agreement with Selzer required that Appellants "promptly" pay for legal services rendered, and provided that Appellants would pay interest of 1.5% per month on balances due and owing for more than 30 days.

On September 3, 2013, the court held a scheduling hearing and Bregman attorney Kevin Barker made his firm's first appearance in the case. Recognizing that Bregman had been recently retained, the court inquired:

> THE COURT: . . . Would mediation be helpful?
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> * * *
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> MR. BARKER: I don't know, your honor. My clients certainly wouldn't be opposed to it. We have not discussed that since new counsel. I know we're under an ADR order, and we have a deadline, so -- you know, we're going to comply with [the] court's order. I don't know how helpful it will be.
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> THE COURT: How much time do you need to get up to speed? In fairness to yourself, this things on jacket number six, but you haven't been here. So, I'm serious. What do you need? How much time do you need to get ready to talk turkey with folks? There's turkey, I mean, I'm trying to give you some slack.
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> MR. BARKER: I understand. Yes, your honor, I think that we are enlisting additional co-counsel, which is pending. So I think --

[3] On April 11, 2013, the circuit court struck Appellants' untimely designation of expert witness Douglas Smith. Appellants filed a motion for reconsideration of that ruling on April 24, which the court denied on May 16, 2013. On July 10, 2013, Appellants filed another motion for reconsideration. That motion was also denied on July 30, 2013.

> THE COURT: All for it.
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> MR. BARKER: So I know the mediation has a deadline as I understand it is October 3rd, I mean I think that we would be ready within two to three weeks to do that.

Thereafter, the parties confirmed that they would move forward with the scheduled trial date of December 9, 2013.

On November 12, 2013, the parties participated in mediation with a retired judge. In mediation, the parties resolved that they would each release all claims against each other; that Zipin's malpractice insurer would pay Appellants $125,000.00; and that Appellants would then pay Zipin $62,500.00. The parties entered a written Settlement Agreement, which provided in part:

> As consideration for the terms and conditions set forth in this Settlement Agreement, the PARTIES agree that ROBERT AND CATHY HOROWITZ will be paid $125,000.00 by check issued by CNA Insurance Co. on behalf of THE ZIPIN LAW FIRM, LLC; and that THE ZIPIN LAW FIRM will be paid $62,500.00 by ROBERT AND CATHY HOROWITZ, said payment to be made by check not later than 15 business days following receipt and deposit of CNA's $125,000.00 check by ROBERT AND CATHY HOROWITZ.

On December 9, 2013, Appellants, through counsel, filed a line of dismissal with prejudice in accordance with the terms of the settlement. However, Appellants later concluded, without counsel, that the payments to Zipin contemplated in the Settlement Agreement were illegal and should not be made. As a result, Appellants accepted the $125,000.00 check from Zipin's insurer but refused to pay the $62,500.00 owed to Zipin

pursuant to the Settlement Agreement. On January 27, 2014, Zipin filed a motion to reopen to enforce the settlement and for sanctions.

B.

The Underlying Case

i. Complaint for Attorneys' Fees

On February 5, 2014, Selzer filed a motion to withdraw entry of appearance of counsel for Appellants. Then, on February 25, 2014, Selzer filed a complaint in the Circuit Court for Montgomery County against Appellants for breach of contract, asserting that Appellants had paid the retainer fee and the first two monthly invoices in full and on time, but had since failed to pay "*any* portion of *any* of the[] monthly invoices" from October 2013 to January 2014. (Emphasis in original). On March 25, 2014, Selzer filed a "Motion to Modify Scheduling Milestones" requesting that the discovery deadline and the dispositive motions deadline both be moved forward by one week. When asked, Appellants' counsel refused to consent to moving the schedule forward, but did note "that he would readily consent to *extensions* of the currently pending dates[.]"

On March 27, 2014, Appellants filed an answer to Selzer's complaint. Appellants acknowledged that "[t]he Complaint's basis for seeking $61,897 in legal fees and expenses is for legal work to achieve a November 2013 Settlement Agreement" in their case against Zipin. However, Appellants did not aver an amount that they had paid Selzer. Rather, they argued that Selzer "were well paid by [the Appellants]." To support their apparent claim that Selzer should be paid no more for their work in the case, Appellant argued in their

statement of affirmative defenses that Selzer induced Appellants into signing the November 2013 Settlement Agreement by advising Appellants that because of the lack of an expert witness they "were unprepared to assert the claims and damages enumerated . . . and would likely recover nothing against Zipin[.]" Appellants asserted that "[t]hese inducements amount[ed] to fraud and duress[.]" Appellants also asserted that, because the settlement awarded payment to Appellants from Zipin's malpractice insurer *and* a payment from Appellants to Zipin, it amounted to an illegal insurance rebate and an illegal assignment. Appellants argued that the Settlement Agreement was "a coerced assignment back to Zipin of half of [Appellants'] legal malpractice cause of action."

Proceeding with discovery, Selzer served Appellants with interrogatories and requests for production of documents on April 22.

ii. Counterclaim for Legal Malpractice

On April 28, 2014, Appellants filed a counterclaim for legal malpractice against Selzer and Bregman. The counterclaim alleged that Bregman had threatened to withdraw from the Zipin litigation if the case did not settle and insisted on hiring outside trial counsel, resulting in Appellants' engagement of Selzer "under significant duress[.]" Appellants argued that both firms "were unprepared to discuss modifying the expert designation and discovery schedule" in the Zipin litigation at the September 2013 hearing. Appellants maintained that Selzer and Bregman had failed to work with and prepare Professor Dash to obtain his expert testimony in their case. We quote from paragraph 50 of Appellants'

counter-complaint summarizing the alleged breaches of the standard of care by Selzer and Bregman:

> A. Not working up the statutory emotional distress damages and attorney fee shifting statutes for the underlying case against the McLean School;
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> B. Not communicating with and preparing the qualified expert witness to ensure the [Appellants] meeting their burden of proof to avoid defense summary judgment; to obtain summary judgment for the [Appellants]; to achieve a reasonable settlement; and to prevail at trial.
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> C. Not being prepared to oppose Zipin's comprehensive motion for summary judgment on all counts and damages theories;
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> D. Fatally damaging arguments that needed to be made to the mediator, but that were already severely undermined by counterclaim defendants[‘] omissions and breaches of the standard of care, as evident in the Zipin motion for summary judgment filed before the mediation but not yet answered;
>
> E. Not being prepared to avoid a Rule 2-519 Motion for Judgment by defendant at trial.
>
> F. Failing in their fiduciary duty to the law of Maryland on unfair insurance claim practices and failing to advise the [Appellants] to not agree to and not sign a November 2013 Settlement Agreement with Zipin and his insurance company CNA that had unlawful terms as pleaded in the [Appellants] answer.
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> G. As to counterclaim defendant Selzer, asserting an unreasonable fee in violation of the Maryland Rules of Professional Conduct, in terms of Selzer knowing that the $62,500 net that the [Appellants] would collect on the November 2013 settlement with Zipin and his insurance company, approximately equated with the $61,897 final fee asserted against the [Appellants] by the Selzer firm.

Appellants' "demand[ed] judgment" against Selzer and Bregman "in an amount in excess of $75,000, and for all of these legal fees, costs and unrecovered damages described [in the

counterclaim], including full disgorgement of fees and costs previously paid to Bregman and Selzer, plus interest[.]"

iii. Discovery Issues: Expert Designation and Scheduling Order

On May 27, 2014, Selzer filed its answer to the counterclaim. Selzer generally denied the allegations set forth in Appellants' counterclaim and pleaded affirmative and negative defenses, including: failure to state a claim, payment, waiver, estoppel, and unclean hands.

A few days later, Appellants provided Selzer with a partial response to interrogatories. Regarding expert designation Appellants answered, "Objection to form at this time. Experts will be designated in a supplement." In response, Selzer wrote to Appellants (in accordance with Md. Rule 2-431) on June 3, requesting a complete response to the document requests and a response to interrogatory #2 regarding expert witnesses. Thereafter, on June 27, 2014, Selzer and Bregman filed a motion for sanctions for Appellants' failure to fully respond to interrogatories, designate any expert witness, and produce requested documents.

On July 9, 2014—one day before the discovery deadline per the scheduling order—Appellants filed a motion to modify the scheduling order requesting that the deadlines be extended approximately 3.5 months because the addition of their counterclaim complicated the case. Appellants also requested that they be given until August 15, 2014, to designate their expert witnesses. Selzer and Bregman both opposed this request.

On July 10, 2014, Selzer filed its expert designation, providing that John M. Quinn, Esq. would testify as to "the claims of legal malpractice contained [in Appellants' counterclaim], including as to the applicable standard of care, proximate cause and damages." Selzer also designated Maury S. Epner, Esq. to testify as an expert witness "concerning the fairness, reasonableness and necessity of the attorneys' fees charged [in the Zipin litigation]." That same day, discovery closed per the court's April 1, 2014 order.

On July 14, 2014, Appellants filed their opposition to the Selzer's June 27 motion for sanctions arguing, in part, that because Md. Rule 2-504(b)(1)(B) requires a specific scheduling order date for identification of experts that "[t]here [wa]s no expert designation or scheduling order in place . . . ." Appellants argued that Selzer was trying to use "an extremely minor discovery issue" to "complete[ly] bar [Appellants] from presenting *any* experts[.]" Appellants further argued that their pending motion to modify the scheduling order, filed July 9, 2014, mooted the request for sanctions.

Bregman answered Appellants' counterclaim on July 9, 2014, and asserted 18 boilerplate defenses, including failure to state a claim, laches, contributory negligence, estoppel, waiver, failure to mitigate damages, impermissible joinder, and fraud. Soon thereafter, on July 24, 2014, Bregman filed an opposition to Appellants' motion to modify the scheduling order and stated:

> The [Appellants] have had sufficient time not only to conduct discovery, but also to meet their discovery obligations *vis a vis* their legal malpractice counterclaim against [Bregman] and [Selzer]. . . . The central problem with the [Appellants'] current request is that the problem is entirely self-created and to the detriment of the counterclaim defendants.

> [Bregman] respectfully submits that the counter-claim against it ar[o]se out of the same transaction and occurrences as that of [Selzer] and that the common questions of law and fact allowed the [Appellants] the opportunity to conduct the necessary discovery for their legal malpractice [claim] against both counter-claim defendants as part of the scheduling order currently in place. The [Appellants] now attempt to manipulate the discovery schedule by waiting to serve [Bregman] for nearly two months after filing the counterclaim and then waiting to extend the scheduling order until the last day of discovery. . . . The [Appellants] had the opportunity to serve [Bregman] in April when the counterclaim was filed and pursue discovery, including naming expert witnesses, at any time between the filing of the counterclaim and the close of discovery. The [Appellants] fail to provide good cause to extend the scheduling order merely to remedy their own failure to comply with the discovery rules.

Selzer also filed an opposition to Appellants' motion to modify the scheduling order on the same day, adding that:

> The [Appellants] claim in their motion . . . that the pendency of their claim against [Bregman], a third-party defendant, somehow excuses their three month silence and warrants a lengthy extension of discovery. . . . It is apparent that the [Appellants] themselves manipulated the circumstances to which they now point in order to create the seeming imperative for more time by electing to postpone their service of process on third-party defendant [Bregman] from late April until mid-June. The [Appellants] should not be rewarded for their refusal to respond to timely and legitimate discovery requests served by [Selzer].
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> * * *
>
> [Selzer] served interrogatories and document requests on April 23, 2014, including specific requests for the [Appellants] to identify their experts and produce related documents. Rule 2-402(g) required that, faced with [Selzer]'s discovery requests, the [Appellants] disclose their experts. The [Appellants], however, seem to take the position that they had no obligation to disclose experts, even up through and beyond the close of discovery. This position is contrary to common sense, the scheduling order, and the Maryland Rules.

iv. Cross Motions For Summary Judgment And More Attempts to Designate Expert

On July 9, 2014, Selzer filed a motion for summary judgment on the counterclaim. Selzer argued that none of Appellants' legal arguments demonstrated that the November 2013 Settlement Agreement was illegal. According to Selzer, the insurer's payment to the Appellants was not an indirect payment to Zipin and could not be construed as a rebate in violation of Maryland Code (1997, 2011 Repl. Vol.) Insurance Article ("Ins.") § 27-212. Selzer argued that Appellants were incorrect in their assertion that Zipin's insurer, CNA, was operating as a third-party debt collector under Maryland Code (1975, 2013 Repl. Vol.) Commercial Law Article ("CL"), § 14-201. Selzer maintained that Appellants "point[ed] to no valid law prohibiting the settlement structure set forth in the [Settlement] Agreement, and indeed none exists." Further, Selzer argued that Appellants' malpractice claim must fail because they had not designated an expert witness and could not overcome the presumption that there was no breach of the standard of care.

Bregman filed their motion for summary judgment on July 24, 2014 arguing that the November 2013 Settlement Agreement was not illegal; that any claims Appellants might have had about illegality were barred by waiver; and that Appellants' malpractice claim should fail because Appellants had not designated any expert witnesses prior to the close of discovery.

On July 25, 2014, the circuit court held a pretrial hearing. Notably, Appellants filed a pretrial statement, which provided in part that "[e]xpert witnesses on legal malpractice standard of care to be designated according to scheduling order." Appellants also filed a

cross-motion for summary judgment against Selzer on the fee claim arguing that "all the fees sought were to achieve an unlawful result embodied in the November 2013 Settlement[,]" and contending that the settlement agreement contained no express consideration for the $62,500.00 payment to Zipin.

Thereafter, the court heard argument on Appellants' motion to modify the schedule. The court ruled:

> Motion to amend the scheduling order is denied. I do have the benefit of some history on this case, since I was the trial judge in the underlying trial of the [Appellants]. And so the motion to amend the scheduling order is denied, so we'll set a trial date. And we can set a motions date too?

Subsequently, with the agreement of all counsel, a motions hearing was set for September 9, 2014 and the trial was set for December 15, 2014.[4]

On August 19, 2014, Appellants filed an opposition to Selzer's motion for summary judgment, a cross-motion for summary judgment, and—apparently disregarding the trial court's ruling on the scheduling order—a late designation of expert witness Douglas R. Smith, Esq. In their cross-motion on the malpractice counterclaims, Appellants argued that

[4] Three day later, however, on July 28, 2014 Appellants filed a motion for extension of time to respond to Selzer's and Bregman's motions for summary judgment. Selzer responded by filing a consolidated reply in support of its motion for summary judgment and in opposition to Appellants' motion for summary judgment on August 11, 2014. On August 13, 2014, Appellants again filed a motion requesting an extension of time to file an opposition to Selzer's and Bregman's motions for summary judgment. Selzer filed its opposition to Appellants' request for extension on August 15, 2014**,** arguing that the court refused to modify the scheduling order after a lengthy hearing on July 25; that no additional discovery was permitted; and, therefore, Appellants' claim that they were waiting for additional discovery documents to prepare their briefing was inapposite.

this Court's decision in *Horowitz*, *supra*, No. 2221, "highlight[ed] the opportunity missed by Zipin from failing to find the right law arising out of statute violations[.]" Appellants also alleged that Selzer and Bregman failed to obtain and study the full CNA Insurance policy, and reiterated their claims that the November 2013 Settlement Agreement was illegal and that Selzer and Bregman had a fiduciary duty not to "steer[] [Appellants] into an unlawful agreement." Therefore, they maintained, there was no dispute that Selzer and Bregman had breached the standard of care for a law firm representing clients under the circumstances.

A few days later, on August 22, Bregman filed a motion to strike Appellants' cross-motion for summary judgment observing that Appellants "failed to file their dispositive motion on or before the dispositive motion's deadline of July 25, 2014." Additionally, Bregman filed a motion to strike Appellants' expert designation stating that the "designation should be stricken as a sanction due to [Appellants'] defiance of [the circuit court's] July 25, 2014 Order precluding further discovery in this case, as well as the underlying Scheduling Order." Moreover, Bregman noted that Appellants also failed to designate any expert before the deadline to respond to the motions for summary judgment which were, in part, based on the lack of an expert witness. They argued that as counter-defendants Selzer and Bregman were prejudiced by Appellants' untimely expert designation. That same day, Selzer filed motions making substantially the same arguments.

On September 9, 2014—the date originally set for a hearing on dispositive motions[5]—Appellants filed a motion for extension to respond to Selzer's and Bregman's motions to strike their expert designation and cross-motions for summary judgment. Appellants then filed a consolidated opposition to the motions to strike their expert and to strike their cross-motions for summary judgment six days later, on September 15. Appellants argued that (1) "[t]his case has never contained a scheduling order deadline for party designation of expert witnesses"; and (2) that because their expert witness had not permitted his identity to be disclosed prior to August 12, 2014 "the [Appellants] were not equipped to file any summary judgment type motion for their legal malpractice defense and counterclaim until August 19, 2014." Thus, Appellants argued that they were not in direct violation of any scheduling order deadline for the designation of expert witnesses; that "[n]o rule or case law prevents a party from responding to a motion for summary judgment with their own cross-motion[]"; and the "extreme remedy" of striking their cross-motion was unwarranted.

On October 6, 2014, Bregman filed another reply in support of the motion to strike Appellants' cross-motion, which stated: "The [Appellants] fail to provide good cause for the delay in filing their Motion for Summary Judgment. Again, the [Appellants] blame the Court's denial of their motion to extend time as the reason that their dispositive motion was not filed until August 19, 2014."

[5] The docket entries show that as of August 19, 2014, the hearing date on these motions was changed to October 29, 2014.

v. The Hearing

The circuit court held a motions hearing on October 29, 2014.[6] Regarding its summary judgment motion, Selzer argued that, even if the late-designated expert were accepted, Appellants claim would fail as a matter of law because the expert report showed that the expert's conclusions were not proper expert opinions and were contrary to

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[6] At the hearing, the court also addressed Appellants' motion to transfer venue to Prince George's County filed just a few days prior on October 24 arguing that

> [t]he [Appellants] cannot obtain a fair trial in this County. The [Appellants] also deserve to defend themselves with a clean slate, unaffected by Judges in this Court who presided over and made ruling in the *Horowitz v. Zipin* and *McLean School v. Horowitz* cases.

Appellants argued that the large number of judges in the county who recused themselves from the case (10 of 19) evidenced that they could not receive a fair trial in Montgomery County. Counsel stated, "that's an unusually high number, and I have in an abundance of caution, and to make a record, we filed a motion to transfer. We're not concerned with the Court's fairness, this particular judge, but . . . ." The court stated:

> Let me just stop you for a second because unless you're concerned with this Court's fairness, by rule you wouldn't be entitled to remove it to another county. I mean, by Rule 2-505, I can read it to you, it requires . . . that the party must allege that they cannot receive a fair and impartial trial in the county [in] which the action is pending.
>
> And then if you want to remove it from that county, and there's more than one judge, it says, in any action in which all of the judges of the court of any county are disqualified, then you shall have the right to remove.
>
> So, you basically wouldn't be able to remove it to Prince George's County, unless you could demonstrate that you cannot receive a fair and impartial trial in the county, and you start off by telling me you don't have any reservations about my ability to be fair and impartial.
>
> I mean, how do you even fall within the rules?

Appellants' counsel immediately withdrew the motion to transfer venue.

Maryland law. Analyzing Appellants' claim that the November 2013 Settlement Agreement was illegal the circuit court observed in its ruling:

> [T]he agreement in this case has not been fully executed, as between the parties. The [Appellants] have the benefit of the $125,000, but as part of the agreement, they were to release the claim against Zipin, which they have not done. So the agreement is not a fully executed agreement, and in this case, for them to retain the monies on the one hand, the benefit of the agreement, and then on the other to claim that it is an illegal agreement, in the court's view, they cannot do, that would, in fact, constitute a waiver.

The circuit court also found that "there was nothing about the agreement that . . . is illegal within the insurance commission statute." Further, the court determined that there was no competent evidence that either firm deviated from the standard of care. The court explained why it found no material fact in dispute that would preclude summary judgment:

> The only dispute of material facts, allegedly, is one, that the agreement was illegal and I've already disposed of that argument; two, that there are claims of malpractice that exist a setoff, and I've disposed of that argument, and the final dispute arises as a result of the affidavit from Mr. Horowitz, where basically, for reasons he sets forth therein, he says that the fees were, at times, he believes unnecessary and certainly excessive in light of the result that was achieved.
>
> But I believe that we can all agree that the law is clear with respect to the reasonableness and necessity of the attorney's fees, that requires expert testimony. Mr. Horowitz is not competent to express those opinions, and therefore there is no evidence of any material dispute of fact with respect to [Selzer's] claim for fees and costs.

Accordingly, the circuit court granted Selzer's motion for summary judgment on its fee claim and granted the third-party defendant Bregman's summary judgment motion. The court denied Appellants' cross-motions, stating: "I believe that . . . renders all other motions in the case moot, and the Court need not address any of them, because this would operate

as a final judgment with respect to all disputes between the parties." On November 3, 2014, the court entered its written order reflecting the rulings from the hearing.

On November 13, 2014, Appellants filed a motion to alter or amend, arguing, *inter alia*, that critical facts were misunderstood by the court because it may have relied on a truncated transcript and that the court's factual findings actually support the contention that the Settlement Agreement was unlawful. On November 14, Selzer requested a writ of garnishment against Appellants as to bank accounts, real property, and personal property, and that request was granted on November 19. The court denied Appellants' motion to alter or amend on December 24, 2014. Appellants' filed timely notice of appeal on January 21, 2015.

Additional facts will be provided as the discussion requires.

DISCUSSION

I.

Motion to Modify the Scheduling Order

Appellants argue that the circuit court abused its discretion in refusing "a reasonable modification of the scheduling order" in "a complicated legal malpractice counterclaim with thousands of pages of documents from the underlying cases[.]" Appellants maintain that the record contains "no [] rationale for this abrupt ruling" beyond the inference that the motions judge denied the motion "for the mere reason that [he] was the trial judge in the Horowitz v. McLean School case." Additionally, Appellants argue that, because the original scheduling order in this case failed to contain a specific deadline for the

designation of expert witnesses prior to the close of all discovery, the court erred by not *sua sponte* modifying the scheduling order when Appellants' malpractice counterclaim was added.

Selzer argues the circuit court properly considered Appellants' arguments and "found that there was no justification for the requested extension[.]" Selzer also points out that Appellants "do not aver that they were in substantial compliance with the scheduling order[.]"

Bregman argues that Appellants' request to modify the scheduling order was untimely. And that Appellants waited until June 18, 2014 to serve Bregman with the counterclaim despite the discovery of July 10, 2014, and, even then, Appellants did not request a change to the scheduling order at that time. Bregman points out that Appellants waited until one day before the close of discovery, July 9, to request a change to the scheduling order. Thus, Bregman maintains that "[i]n light of [Appellants'] delay tactics . . . the Circuit Court was wholly within its discretion to deny [Appellants'] Motion to Modify Scheduling Order."

Maryland Rule 2-504(c) provides that "[t]he scheduling order controls the subsequent course of the action but shall be modified by the court to prevent injustice." "The principal function of a scheduling order is to move the case efficiently through the litigation process by setting specific dates or time limits for anticipated litigation events to occur." *Dorsey v. Nold*, 362 Md. 241, 255 (2001) (citing *Tobin v. Marriott Hotels,* 111 Md. App. 566, 572-73 (1996)). This Court has long recognized that "[t]his rule reposes in

the trial judge a great deal of discretion." *Eagle-Picher Indus., Inc. v. Balbos*, 84 Md. App. 10, 26 (1990), *aff'd in part, rev'd in part on other grounds,* 326 Md. 179 (1992) (citing *Wong v. DiGrazia,* 386 P.2d 817, 829 (1963)). "A trial court's discretionary rulings will be disturbed only upon a finding of an abuse of discretion." *Livingstone v. Greater Washington Anesthesiology & Pain Consultants, P.C.,* 187 Md. App. 346, 388 (2009) (citing *Wilson v. Crane,* 385 Md. 185, 199 (2005)). "There is an abuse of discretion where no reasonable person would take the view adopted by the [trial] court[ ] . . . or when the court acts without reference to any guiding principles." *Id.* (citations and internal quotation marks omitted) (alterations in *Livingstone*).

In the present case, the scheduling order was put in place on April 1, 2014. Appellants filed their counterclaim for legal malpractice against Selzer and Bregman on April 28, 2014. At that time they did not seek to modify the scheduling order or in any way alert the court that they would face difficulties adhering to the set schedule. Rather, as Selzer and Bregman pointed out at the July 25, 2014 motions hearing, Appellants' first attempt to serve Bregman was not until June 16, 2014, and they did not do so successfully until June 18, 2014—making July 18, 2014, the deadline for Bregman's answer under Maryland Rule 2-321. Then, Appellants waited until July 9— the day before the close of discovery— to even attempt to modify the scheduling order.

In their motion for modification of the scheduling order, Appellants argued that the July 18 deadline for Bregman's answer, as well as the deadlines for certain discovery requests made to Selzer and Bregman, required a change to the scheduling order. However,

as the circuit court was well aware, it was Appellants' failure to attempt to serve Bregman until June 16 that placed those deadlines beyond the close of discovery. Appellants point to no circumstance beyond their own delay and failure to disclose their expert witness to necessitate a change to the scheduling order. We cannot say, therefore, that the circuit court acted without reference to any guiding principles or otherwise abused its discretion in denying the motion to modify. Moreover, we note that, because the Appellants lost the motion for summary judgment as a matter of law, additional time for fact discovery or dispositive motions would have made no difference to the determination of the legal question. The circuit court in this case properly exercised its discretion "to move the case efficiently through the litigation process by setting specific dates or time limits for anticipated litigation events to occur." *See Dorsey*, 362 Md. at 255 (citation omitted).

II.

Summary Judgment on Appellants' Malpractice Claims

Appellants argue that the circuit court erred in granting Selzer's and Bregman's motions for summary judgment on Appellants' malpractice counterclaim. Appellants maintain that a dispute of material fact remained as to whether Selzer and Bregman had sufficiently prepared their expert witness, Professor Dash. Appellants argue that the circuit court erred in not awarding summary judgment in their favor because Selzer and Bregman counseled Appellants to enter into the Settlement Agreement, "which included the carve-out and payment to Zipin of part of their emotional distress damages[.]" Appellants' also restate their arguments that the November 2013 Settlement Agreement was an illegal

insurance rebate, that Zipin's insurer had acted as an unlicensed third-party debt collector, and that Selzer and Bregman breached their duty not to counsel Appellants to enter into an illegal agreement.

In riposte, Selzer says that Appellants failed to put forth any evidence that Selzer should have recommended rejection of the Settlement Agreement or that it would have received a more favorable settlement award or a more favorable trial judgment. Selzer maintains that the measure of damages in such as case is the difference between the potentially more favorable settlement or result and the settlement actually obtained. Appellants failed to offer any evidence of the prospect of a better settlement. Selzer also maintains that the circuit court was correct in its determination that Appellants waived their right to challenge the legality of the Settlement Agreement by accepting its benefits.

Bregman agrees that the circuit court correctly found that Appellants had waived any argument that the Settlement Agreement was illegal. Bregman adds that Appellants failed to demonstrate that execution of the Settlement Agreement caused them any specific injury. Regarding Appellants' arguments that the involvement of insurer CNA or the payment to Zipin were illegal, Bregman asserts that Appellants "could easily have objected to the settlement term requiring them to pay Zipin, but they failed to do so. Instead, they signed the [Settlement] Agreement and reaped the benefits of the bargain by accepting and depositing the check from CNA." Both Selzer and Bregman argue, in the alternative, that the Settlement Agreement was neither an illegal insurance rebate nor was it otherwise illegal.

Our review of an order granting summary judgment "'begins with the determination [of] whether a genuine dispute of material fact exists; only in the absence of such a dispute will we review questions of law.'" *James G. Davis Const. Corp. v. Erie Ins. Exch.*, 226 Md. App. 25, 34 (2015) (quoting *D'Aoust v. Diamond,* 424 Md. 549, 574 (2012)), *reconsideration denied* (Dec. 31, 2015), *cert. denied sub nom. Erie Ins. Exch. v. James G. Davis Const.*, 446 Md. 705 (2016)) (alteration in *Davis*). "The standard of review of a trial court's grant of a motion for summary judgment on the law is de novo, that is, whether the trial court's legal conclusions were legally correct." *D'Aoust,* 424 Md. at 574.

"Courts look with favor upon the compromise or settlement of law suits in the interest of efficient and economical administration of justice and the lessening of friction and acrimony." *Calabi v. Gov't Employees Ins. Co.*, 353 Md. 649, 653 (1999) (citation and internal quotation marks omitted). Nevertheless, the Court of Appeals in *Thomas v. Bethea,* determined that a former client may have an action against an attorney for negligently counseling the client to enter into a settlement agreement if the client can prove (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) loss to the client proximately caused by that neglect of duty. *Thomas v. Bethea*, 351 Md. 513, 528-29 (1998) (citations omitted). In *Thomas*, the Court of Appeals discussed this Court's decision in *Prande v. Bell*, 105 Md. App. 636 (1995), with approval, observing that

> unlike other failings that have been held to constitute malpractice—missing a statute of limitations, failure to do adequate research and preparation, missing a deed, mortgage, or judgment in searching a title, for example—recommendations as to settlement involve judgment calls, for which there are no bright lines, the [*Prande*] court concluded that there was a range for honest differences of opinion in making settlement recommendations, and

> that, accordingly, "[a] recommendation to settle or not to settle on particular terms is not malpractice simply because another lawyer, or even many other lawyers, would not have made the same recommendation under the alleged circumstances."

Id. at 520 (quoting *Prande*, at 656). *Thomas* recognized that the common approach to determining whether and to what extent an attorney's negligent counsel to enter a settlement agreement resulted in damage to the client is "a trial within a trial." *Id.* at 533. Such a "trial within a trial" allows the court to "resolv[e] the issues involved in the underlying proceeding in a legal malpractice action and avoid[] speculation by requiring the plaintiff to bear that burden of producing evidence that would have been required in the underlying action." *Id.*

In the present case, although Appellants' counterclaim avers that Appellants and their attorneys had at various points valued the claims against Zipin from $175,000.00 to $600,000.00, Appellants failed to designate any expert witness in the instant case until August 19, 2014—well after the discovery deadline had passed. Even then Appellants' expert failed, in his affidavit filed August 19, to opine as to the value of the underlying claim against Zipin.

Moreover, we note that Appellants' principal allegation regarding a dispute of material fact—that Selzer and Bregman neglected their reasonable duty to prepare expert witness Professor Dash—is belied by the uncontradicted facts in the record before the circuit court. According to his own deposition testimony on October 29, 2013, Professor Dash informed Appellants that he "was not in a position to be [their] expert[,]" in the case against Zipin. Nevertheless, on or about January 11, 2013, more than six months before

retaining Bregman, the deadline for designation of expert witnesses in that case passed without any actual designation of Professor Dash as Appellants' expert. In his affidavit, dated September 4, 2014, attorney Douglas M. Bregman averred that, upon finding that no formal expert designation was pending with the circuit court, he contacted Professor Dash and convinced him to agree to serve as Appellants' expert witness. Bregman stated, however, that even after lengthy conversation regarding Appellants' claims Professor Dash

> noted the limited scope of his testimony, which excluded testimony regarding the standard of care by failing to plead or investigate causes of action under the Maryland Consumer Protection Act, Maryland Consumer Debt Collection Act, and wrongful discharge, due to his limited knowledge pertaining to those statutes and legal theories. Instead, Professor Dash reiterated that his testimony would focus on violations of the Maryland Lawyers' Rules of Professional Conduct committed by the Defendants and the related breaches of the applicable standard of care.

Plainly, Bregman sought out and attempted to prepare the only expert witness for whom Appellants could credibly argue was timely designated in the Zipin litigation.

Regarding Appellants' claims that the November 2013 Settlement Agreement was illegal, we agree with the circuit court. Appellants cannot accept the full benefit of that agreement while simultaneously relying on its provisions (1) to fail to honor their own obligations under the agreement and (2) to justify non-payment of the legal fees incurred. Indeed, "if a party, knowing the facts, voluntarily accepts the benefits accruing to [it] under a judgment, order, or decree, such acceptance operates as a waiver of any errors in the judgment, order, or decree and estops that party from maintaining an appeal therefrom." *Fry v. Coyote Portfolio, LLC,* 128 Md. App. 607, 616 (1999). Because Appellants have

accepted the full benefit of the Settlement Agreement, they have recognized the validity of the agreement and waived their arguments based on alleged illegality.

Accordingly, Appellants failed to present any dispute as to any material fact to preclude summary judgment. Appellants also failed to present evidence that, when viewed in the light most favorable to Appellants, would sufficiently establish "the attorney's neglect of a reasonable duty, and [] loss to the client proximately caused by that neglect of duty." *See Thomas*, 351 Md. at 528. The circuit court did not err in entering judgment as a matter of law on Appellants' malpractice counterclaims in favor of Selzer and Bregman.[7]

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED.

COSTS TO BE PAID BY APPELLANTS.

[7] Appellants present no argument on appeal that the circuit court erred in granting summary judgment in favor of Selzer on the grounds that "there is no evidence of any material dispute of fact with respect to [Selzer's] claim for fees and costs."