Circuit Court for Baltimore County
Case No. C-03-CV-22-003241

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2209

September Term, 2023

MELISSA JERRO HENCKEN

v.

RICHARD B. JACOBS, ET AL.

Shaw,
Tang,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw, J.

Filed: January 23, 2025

Appellant Melissa Jerro Hencken, brought a legal malpractice action in the Circuit Court for Baltimore County against her two divorce attorneys, Donald D. Hecht and Richard B. Jacobs (collectively "Appellees"). The initial complaint alleged three causes of action against both Appellees: breach of contract, fraud, and negligence. Appellees filed motions for summary judgment and dismissal of the actions. Following a hearing, the circuit court granted summary judgment based on *res judicata* and collateral estoppel for all counts in favor of Mr. Hecht and dismissed the fraud count against Mr. Jacobs with prejudice for failure to state a claim with particularity. At the conclusion of a separate hearing, the circuit court granted Mr. Jacobs' motion for summary judgment on the remaining counts because of Ms. Hencken's failure to disclose any expert witnesses. Appellant presents three questions for our review, which we have reordered:

1. Did the trial court err in granting summary judgment in favor of Appellee Donald D. Hecht on collateral estoppel/*res judicata*?

2. Did the trial court err in dismissing the allegations of fraud from the complaint with prejudice?

3. Did the trial court err in granting summary judgment in favor of Appellee Richard B. Jacobs due to Appellant's alleged failure to timely designate an expert witness?

We hold that the circuit court did not err. Accordingly, we affirm the judgments.

BACKGROUND

Ms. Hencken hired Mr. Jacobs in September 2017 to represent her in her divorce. Thereafter, Ms. Hencken and Mr. Jacobs disagreed over legal strategy, and Ms. Hencken expressed her frustration with his services. After approximately two years of

representation, Mr. Jacobs informed Ms. Hencken that he planned to withdraw his appearance from her case. She asked him not to immediately withdraw and Mr. Jacobs agreed not to withdraw until she found his replacement. Mr. Jacobs withdrew his appearance on August 19, 2019 and Mr. Hecht entered his appearance on the same day.

Mr. Hecht represented Ms. Hencken in her divorce and custody merits hearing which lasted five days. During that time, the two had disagreements over Mr. Hecht's trial preparation and strategy that included his knowledge of the facts of the case and the quality of his closing argument. On March 13, 2020, the court issued its decision. Shortly after, Ms. Hencken stopped making payments and, as a result, Mr. Hecht told her that he would no longer represent her. Ms. Hencken expressed many of the same frustrations with Mr. Hecht that she previously had with Mr. Jacobs and complained that she did not have a *pendente lite* hearing.

On March 30, 2020, two weeks after the court issued its opinion in the divorce and custody case, Mr. Hecht filed a complaint in the district court for unpaid legal fees amounting to $15,000. A bench trial was conducted on April 19, 2021, where Ms. Hencken had the opportunity to present her own defense and to cross-examine Mr. Hecht. Ms. Hencken appeared without counsel. During the trial, she questioned Mr. Hecht about the legal decisions he made, including his decision not to pursue a *pendente lite* hearing, his decision not to hire a CPA to help with the financial aspects of the case, and his decision not to have her doctor testify at trial. Ms. Hencken made numerous comments throughout

the trial critiquing Mr. Hecht's perceived inadequate service, like "I felt like Mr. Hecht wasn't properly prepared for trial[.]"

Towards the end of the trial, the district court judge explained Ms. Hencken's possible paths going forward. The judge asked Mr. Hecht: "And if she's not happy with your services, she has other legal recourse she could take against you, correct?" To which, Mr. Hecht responded: "Correct." The judge stated to her, "Not the quality of the representation because if you don't think he represented you well, there's action you can take[,]" "if you think he's been overcharging you, you can bring that up in another civil case[,]" and "[i]f you don't think he did a good job, you have other options you can take." At the conclusion of the trial, the judge stated that "there was a retainer to be done and that there would be a bill at the end of each month showing the work to be done." The judge then stated that Mr. Hecht "performed these services" and "he did the work and he deserves to get paid for it." The district court then entered judgment in favor of Mr. Hecht.

Ms. Hencken was advised of her right to appeal and she did appeal the district court's decision. She requested the circuit court extend the time for her to file a Rule 7-113 memorandum because she had "been diligently looking for counsel that practices professional malpractice relating to [] family law matters" but had been unable to do so. The circuit court denied her request, and, subsequently, granted Mr. Hecht's motion to dismiss after Ms. Hencken failed to file her memorandum in the required timeframe.

On August 15, 2022, Ms. Hencken filed a legal malpractice claim in the circuit court for Baltimore County against Appellees, alleging breach of contract, fraud, and negligence.

Mr. Hecht filed a motion to dismiss the case based on a failure to state a claim under Maryland Rule 2-322(b). He moved for summary judgment based on *res judicata* and collateral estoppel. Mr. Jacobs filed a motion to dismiss, claiming that Appellant failed to sufficiently plead the breach of contract and fraud claims. A motions hearing was scheduled for March 9, 2023. Two days prior to the hearing, at 11:44 p.m., Ms. Hencken's amended complaint was docketed by the clerk's office. On the day before the hearing, the amended complaint was marked as a deficient filing. Nevertheless, the court held a hearing on the motions.

Regarding Mr. Hecht's motion for summary judgment based on *res judicata* and collateral estoppel, the judge granted it after reviewing the record and considering the arguments from both parties. The judge emphasized that the two parties had a trial in the district court, involving unpaid legal fees, and in that trial, Ms. Hencken argued that because of Mr. Hecht's "inadequate representation," he was not entitled to the unpaid legal fees. The judge found that there was a final decision in favor of Mr. Hecht, an appeal, and that Ms. Hencken "had the opportunity to raise those issues" relating to the adequacy of his representation.

The judge also granted Mr. Jacobs' motion to dismiss the fraud count with prejudice. Appellees argued:

> There is nothing that has been either pled or said here by the Plaintiff that would constitute a fraudulent misrepresentation, a statement – alleged statement of fact made for the purpose of inducing someone to do something that they otherwise wouldn't have done with damage directly or proximately caused to them.

The judge agreed and noted that she did not "see anything that comes even close to what is necessary to be pled with specificity as it relates to a cause of action for fraud." She dismissed the fraud claim with prejudice and allowed Ms. Hencken to amend her breach of contract claim.

Ms. Hencken filed a second amended complaint on March 24, 2023, and Mr. Jacobs moved to strike the second amended complaint or, in the alternative, to dismiss. After a hearing, the court gave Ms. Hencken permission to amend her complaint again while cautioning her to have "a very careful reading of the rules. You may well wish to consult with counsel in this matter."

Ms. Hencken filed her third and final amended complaint on June 26, 2023. Mr. Jacobs responded on July 6 with a motion for summary judgment stating that Ms. Hencken "failed to identify an expert witness in this matter, which is necessary for claims of legal malpractice." The scheduling order for the case stipulated "Plaintiff's Expert Reports or Md. Rule 2-402(g)(1) Disclosures" were due April 24, 2023, and that all "[d]iscovery must be completed by . . . July 23, 2023." Ms. Hencken had not retained an expert witness or informed Mr. Jacobs of any expert witness that she planned to use by the time of the hearing on October 24, 2023.

During the hearing, the judge remarked that Ms. Hencken's allegations required, "expert testimony as to the standard of care required of a reasonable attorney. The average layman cannot discern the reasonableness of fees, the appropriateness of substitution of counsel, the effective presentation of issues, the adequacy and frequency of

communications, the effectiveness of advocacy of the ability to locate experts." The court commented that Ms. Hencken "acknowledges that she does not have an expert required for her claims to survive" after she missed the deadline for naming an expert. The court granted summary judgment in favor of Mr. Jacobs on the remaining counts.

Ms. Hencken filed a motion for reconsideration, which was denied by the court. She timely filed the present appeal.

STANDARD OF REVIEW

Appellate courts review grants of summary judgment *de novo*. *Bd. of Cnty. Comm'rs of St. Mary's Cnty. v. Aiken*, 483 Md. 590, 616 (2023); *Dashiell v. Meeks*, 396 Md. 149, 163 (2006). If "there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law[,]" then a motion for summary judgment will be granted. Md. Rule 2-501(a); *see also Okwa v. Harper*, 360 Md. 161, 178 (2000); *Supik v. Bodie, Nagle, Dolina, Smith & Hobbs, P.A.*, 152 Md. App. 698, 709–10 (2003). We will affirm a grant of summary judgment if it was properly decided upon undisputed fact and law. *Frederick Road Ltd. P'ship v. Brown & Sturm*, 360 Md. 76, 93 (2000).

Motions to dismiss for failure to state a claim upon which relief can be granted, like motions for summary judgment, are reviewed *de novo*. *Pinner v. Pinner*, 240 Md. App. 90, 113 (2019); *Unger v. Berger*, 214 Md. App. 426, 432 (2013). On appeal, we must interpret all facts and reasonable inferences in favor of the plaintiff. *Adamson v. Corr. Med. Servs., Inc.*, 359 Md. 238, 246 (2000). Our role is to analyze "whether the trial court was legally correct in its decision to dismiss." *Id.*

DISCUSSION

I. The circuit court did not err in granting summary judgment based on *res judicata* and collateral estoppel.

Ms. Hencken argues the circuit court erred in granting summary judgment. First, she contends that Mr. Hecht should be estopped from using *res judicata* and collateral estoppel because both he and the district court wrongly informed her that she would have other options for pursuing her legal malpractice action. Second, Ms. Hencken asserts that, following the precedent of *Rowland v. Harrison*, the circuit court should not have granted summary judgment on *res judicata* or collateral estoppel because she did not have the opportunity to fully litigate her legal malpractice defense. She argues that the court cut off her defense and that she also did not have her full case file to argue her case. As a result, Ms. Hencken contends that the district court did not make a final judgment on the issue of legal malpractice.

Mr. Hecht argues the circuit court did not err. He points to the lengthy district court proceeding to dispute Ms. Hencken's argument that she did not have an opportunity to fully argue her legal malpractice defense. He argues that the doctrine of judicial estoppel is inapplicable to the current case because there is not an inconsistent factual position.[1] He contends that *Felger v. Nichols* is controlling here and that all of the elements of *res*

[1] Ms. Hencken clarified in her reply brief that she used judicial estoppel "widely." She argued that "Hecht's agreement with the district court" led her to believe that she would "have to wait" to bring her legal malpractice action.

judicata and collateral estoppel are satisfied because Ms. Hencken argued her legal malpractice defense below.

Judicial estoppel precludes a party from taking a position in court that is inconsistent with a position that they previously relied on in a different proceeding. *Underwood-Gary v. Matthews*, 366 Md. 660, 667 n. 6 (2001) (citing *WinMark Ltd. P'Ship v. Miles & Stockbridge*, 345 Md. 614 (1997)). This doctrine protects the courts and parties from an individual "attempting to gain an unfair advantage over another party by manipulating the court system." *Dashiell*, 396 Md. at 171. "The party relying on estoppel has the burden to prove the facts that create it." *Olde Severna Park Improvement Ass'n v. Barry*, 188 Md. App. 582, 596 (2009).

> [T]o assert a claim of judicial estoppel, a party must show that three circumstances exist: "(1) one of the parties takes a factual position that is inconsistent with a position it took in previous litigation, (2) the previous inconsistent position was accepted by a court, and (3) the party who is maintaining the inconsistent position must have intentionally misled the court in order to gain an unfair advantage."

Kamp v. Dep't of Hum. Servs., 410 Md. App. 645, 673 (2009) (quoting *Dashiell*, 396 Md. at 171). The targeted position must be factual, not legal. *Montgomery Cnty. Pub. Schs. v. Donlon*, 233 Md. App. 646, 675 (2017).

Judicial estoppel does not apply to the facts of this case. As to the first element, there is no allegation here that Mr. Hecht has taken a factually inconsistent position. Ms. Hencken contends that both Mr. Hecht and the district court itself, made inconsistent statements that she relied on to her detriment. For example, the district court prompted Mr. Hecht "if she's not happy with your services, she has other legal recourse she can take

against you, correct?" Mr. Hecht replied that was "[c]orrect." The district court also stated "did he represent you at trial? Not the quality of the representation because if you don't think he represented you well, there's action you can take[,]" "I'll deny that because there's nothing to contest that. And if you think he's been overcharging you, you can bring that up in another civil case[,]" "[i]f you don't think he did a good job, you have other options you can take[,]" and "then that can be for another judge or another day and another trial."

These, however, are not factual statements, but rather, legal arguments. *Donlon*, 233 Md. App. at 675 ("It doesn't matter whether a party takes an inconsistent position compared to one taken in previous litigation. Legal arguments are not judicially estopped."). Moreover, it is clear from both the transcript and the above quoted statements that the district court did hear Ms. Hencken's legal malpractice defense. She argued during the trial that Mr. Hecht should have contacted a CPA to better address the financial implications of her case. She questioned his decision not to have her doctor present as an expert during the trial. She critiqued him for not getting her a *pendente lite* hearing. Ms. Hencken argued the sufficiency of Mr. Hecht's representation and the court told her that she would have to make these arguments elsewhere because it had already heard her defense.

As to the third element, Ms. Hencken did not rely on these statements to her detriment. Ms. Hencken had the opportunity to present her own defense and to cross-examine Mr. Hecht. She thoroughly discussed the adequacy of his services and the fairness of his fees. She also had other legal recourse, as Mr. Hecht suggested, a possible appeal.

Ms. Hencken did appeal, and on appeal, she asked for an extension to file her memorandum because she was searching "for counsel that practices professional malpractice relating to [] family law matters." She had the chance and the intention of further arguing legal malpractice on appeal, but she failed to do so because she missed her deadline to file her memorandum. Mr. Hecht did not seek or gain an unfair advantage by answering "[c]orrect" to one of the court's questions.

Res judicata prevents a party from relitigating a claim after the claim has been fully and fairly adjudicated. *Anne Arundel Cnty. Bd. of Educ. v. Norville*, 390 Md. 93, 107 (2005). A party invoking *res judicata* must prove its elements:

> 1) that the parties in the present litigation are the same or in privity with the parties to the earlier dispute; 2) that the claim presented in the current action is identical to the one determined in the prior adjudication; and 3) that there was a final judgment on the merits.

Colandrea v. Wilde Lake Cmty. Ass'n, 361 Md. 371, 392 (2000). Under the defense of *res judicata*, "a judgment . . . is a final bar to any other suit upon the same cause of action and is conclusive, not only as to all matters decided in the original suit, *but also as to matters that could have been litigated in the original suit*." *Id.* at 392 (emphasis in original).

Collateral estoppel prevents a party from relitigating a fact or legal issue that has been "actually litigated." *Bank of N.Y. Mellon v. Georg*, 456 Md. 616, 625–26 (2017). Collateral estoppel has a four-part test:

> 1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
>
> 2. Was there a final judgment on the merits?

> 3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
>
> 4. Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

Id. at 626 (citing *Colandrea*, 361 Md. at 391). To apply the defense of collateral estoppel, the issues in the previous action must have been "actually litigated, or facts necessary to resolve the pertinent issues were adjudicated in that action." *Colandrea*, 361 Md. at 391.

Maryland has a permissive counterclaim rule, Maryland Rule 2-331, but there are exceptions where *res judicata* and collateral estoppel may prohibit a subsequent claim. *See Rowland v. Harrison*, 320 Md. 223, 231–37 (1990) (analyzing Maryland's permissive counterclaim rule and § 22 of the Restatement (Second) of Judgments (1982) in the context of *res judicata* and collateral estoppel). In an example provided by the Court in *Rowland*, a party would be blocked from bringing a subsequent malpractice claim if they argued malpractice as a defense in a collections case and that court found no negligence. *Id.* at 234–35. Additionally, the Court in *Rowland* determined that if a second action "would nullify the initial judgment or would impair rights established in the initial judgment" then *res judicata* would bar the second action. *Id.* at 236; *see also Chesley v. Goldstein & Baron, Chrtd.*, 145 Md. App. 605, 625 (2002) (applying the rule adopted in *Rowland*).

In *Felger v. Nichols*, an attorney sued a client for unpaid legal fees. 35 Md. App. 182, 182 (1977). At trial, the client offered evidence "that the legal services were inadequately performed and, therefore, the fee was unreasonable." *Id.* at 185. The client appealed, but later dismissed his appeal after he filed a separate legal malpractice suit. *Id.*

at 182. The circuit court granted summary judgment on the legal malpractice action. *Id.* On appeal, our Court affirmed, finding the "adequacy of the attorney's performance in the client's divorce proceedings having been litigated and determined, the District Court's final judgment in the legal fee suit bars that matter from being litigated in the present legal malpractice suit between the same parties." *Id.* at 185.

In *Rowland*, the petitioner boarded her horse with a veterinarian and the veterinarian provided health services to the horse. *Rowland*, 320 Md. at 225. The horse later died of health complications after the horse was retrieved from the veterinarian. *Id.* Rowland alleged the horse's death occurred because of the veterinarian's negligence and malpractice. *Id.* The veterinarian sued Rowland for boarding fees and the health services that he provided. *Id.* Rowland countered in her defensive pleadings that the veterinarian's negligence should set off the debt action. *Id.* Rowland then filed a malpractice claim against the veterinarian and sought to consolidate the two cases. *Id.* at 226. The circuit court denied Rowland's request and Rowland then filed a counterclaim against the veterinarian in the debt collection case for malpractice. *Id.*

At trial, Rowland asked for a postponement on her counterclaim because "she had not had adequate time for discovery in her malpractice action; and was not then in a position to present expert witness testimony." *Id.* The circuit court denied her request and Rowland asked, after the presentation of evidence, for a voluntary dismissal of her counterclaim without prejudice because "she could not go forward on her counterclaim without the

availability of expert witnesses and had not had adequate time for discovery." *Id.* at 226–27. The court granted the dismissal without prejudice. *Id.* at 227.

As to the original claim, the court held that Rowland owed the veterinarian for the fees from the boarding and health services. *Id.* The court stated that its decision was based on evidence "which showed that the services were rendered at Rowland's request and that payment had not been made." *Id.* It confirmed, however, that its decision was based "strictly on the debt due" and not on "whether or not there was negligence, because there is just not evidence here sufficient to make that kind of judgment." *Id.*

The Supreme Court of Maryland, in examining the issue of *res judicata*, found that the record did not "show that the issue of negligence was either litigated or determined by [the judge] in the debt action." *Id.* at 230. The negligence issue was not argued or decided in the circuit court. *Id.* at 230–31. The Court distinguished its facts from *Felger v. Nichols*, stating:

> In that case, the plaintiff sued his lawyer for malpractice. Previously, the lawyer had sued the client for a fee and the client had defended on grounds of the lawyer's excessive fees and inadequate service. Because the lawyer's skill, fidelity, and diligence were at issue and litigated in the fee suit, the court's determination in the earlier suit barred the latter suit for inadequate legal representation dependent on those same determinations. Unlike *Felger*, the question of negligence in the present case, although raised in a defensive pleading, was not litigated and determined.

Id. at 231.

In the case at bar, contrary to Ms. Hencken's assertions, she had a full and fair opportunity to litigate her legal malpractice defense like the individual in *Felger*. During her cross-examination of Mr. Hecht, she questioned Mr. Hecht's "skill, fidelity, and

diligence" just like the attorney in *Felger* by critiquing many of his legal strategies and the fairness of his fees on the record. Unlike *Rowland,* Ms. Hencken argued a legal malpractice defense beyond the pleadings at trial. She asserted that he was not prepared for the case and was not aware of all the pertinent facts necessary for the hearing. She challenged his alleged failure to present her doctor as an expert witness in her case. She claims that the district court judge cut her off and that she did not have access to her full legal file, however, she extensively argued her legal malpractice defense during the trial. As we see it, Ms. Hencken had the opportunity to argue that the district court failed to fully consider her legal malpractice defense on appeal, however, she did not do so. We hold that the circuit court judge did not err in finding that *res judicata* and collateral estoppel barred a separate claim in the circuit court.

II. The circuit court did not err in granting summary judgment based on a failure to timely designate an expert witness.

The trial court granted Mr. Jacobs' motion for summary judgment for failure to designate an expert witness as required for her claims of legal malpractice. Ms. Hencken gives us eight reasons why the court erred. Mr. Jacobs responds to each reason in turn.

First, Ms. Hencken argues Rule 2-402(g)(1)(A) and (1)(B) are unclear. Ms. Hencken says that she, as a pro-se litigant, read the rules to mean that she did not have to produce an expert unless an interrogatory was made. She asserts that this is a reasonable assumption for a pro-se litigant to make. Mr. Jones responds that the scheduling order clearly listed April 24, 2023, as the deadline to disclose her experts. Furthermore, Mr. Jacobs cites to *Tretick v. Layman* and *Department of Labor, Licensing & Regulation v.*

Woodie to say that pro-se litigants are held to same standard for following procedural rules as represented parties. 95 Md. App. 62, 68 (1993); 128 Md. App. 398, 411 (1999).

Second, Ms. Hencken contends that she chose an expert witness at trial, and this put her in substantial compliance with the scheduling order. She cites to two cases to defend her position. *Naughton v. Bankier*, 114 Md. App. 641, 653 (1997); *Swann v. Prudential Ins. Co. of Am.*, 95 Md. App. 365, 382 (1993). Mr. Jacobs disagrees that she was in substantial compliance because she missed the deadline by six months. He also points out that she had notice of the issue because he filed the motion for summary judgment in July which still gave her three months to produce an expert. Mr. Jacobs then takes issue with Ms. Hencken's designation of Mr. Hecht as her expert witness because, among other issues, she stated in the motion for summary judgment hearing that Mr. Hecht would be a fact witness.

Third, Ms. Hencken cites to *Wormwood v. Batching Systems Incorporated* to suggest Mr. Jacobs suffered no prejudice because there was not a trial date set in the scheduling order. 124 Md. App. 695 (1989). Mr. Jacobs counters that a trial date was set on September 21, 2023, for January 19, 2024, a month before their hearing in October. He argues that this was prejudicial because he had to continue bearing the expense of costly litigation, and he had to submit a Pre-Trial statement where he had to commit to a trial strategy without knowing her expert witness.

Fourth, Ms. Hencken argues that Mr. Jacobs' decision not to compel discovery of her witness was a discovery violation. She cites to Maryland Rule 2-403 and 2-432(b) to

support this argument. Mr. Jacobs responds that he was under no obligation to compel her to disclose her expert witness and that those rules are inapplicable to the current case. He adds that she had the "affirmative duty to comply with the Scheduling Order."

Fifth, Ms. Hencken contends that her retainer letter from Mr. Hecht in 2019 was an expert report. She submits that this expert report puts her in substantial compliance with the scheduling order. Mr. Jones gives four reasons why this argument does not work. One, Mr. Hecht is an opposing party and not an expert witness. Two, the letter was from 2019, roughly three years before the initial complaint. Three, the letter is a contract for legal services. Four, the contract does not have expert opinions within it and it is based solely on Mr. Hecht's conversations with Ms. Hencken.

Sixth, Ms. Hencken cites *Gonzales v. Boas* to state "discovery rules in particular are to be liberally construed in order to effectuate their purpose." 163 Md. App. 344 (2005). Presumably, Ms. Hencken says this to suggest that she should have been given more grace and time to disclose her expert witness so that both parties could go to a full trial on the merits. Mr. Jacobs argues that a liberal construction of the rules does not apply here because she missed the deadline by many months and never disclosed her witness.

Seventh, Ms. Hencken argues that Mr. Jacobs did not comply with discovery requests or scheduling order deadlines. She says that dismissal of her case is an unfair double standard because she is being punished while Mr. Jacobs is not. Mr. Jacobs maintains that there is no basis for Ms. Hencken's assertion on the record, or elsewhere, that he did not comply with any rules or deadlines.

Eighth, Ms. Hencken argues that dismissal of her claim is a draconian sanction. Ms. Hencken uses *Manzano v. Southern Maryland Hospital* and *Lakewood Engineering & Manufacturing v. Quinn* to say that dismal of a case is reserved for the most serious discovery violators. 347 Md. 17 (1997); 91 Md. App. 375 (1974). Mr. Jacobs points out that this issue was decided on a motion for summary judgment and not a discovery sanction. He also points out that Ms. Hencken was never in substantial compliance. Mr. Jacobs says *Manzano* does not apply because that case involved a one-week delay unlike the six months of noncompliance involved here. *Manzano*, 347 Md. at 30. Moreover, Mr. Jacobs argues that *Lakewood* should not apply at all because that "case does not address the issue of a party's failure to name expert witnesses." *Lakewood Eng'g & Mfg. v. Quinn*, 91 Md. App. 375 (1974).

To start, the circuit court dismissed the remaining two claims against Mr. Jacobs via a motion for summary judgment; the court did not dismiss the claims as a discovery sanction. To survive a motion for summary judgment, there must be genuine issues of material fact for the trier of fact to resolve. *Frederick Road Ltd. P'ship*, 360 Md. at 92–93.

Ms. Hencken had the burden, as the plaintiff, of producing material facts to support her action for legal malpractice against Mr. Jacobs. Maryland case law requires plaintiffs in a legal malpractice action to 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). The plaintiff must also prove

duty, breach, causation, and damages. *Supik v. Bodie, Nagle, Dolina, Smith & Hobbs, P.A.*, 152 Md. App. 698, 717 (2003). The standard of care in a legal malpractice case is that of a reasonable attorney. *Id.*

Expert testimony is generally required in legal malpractice claims with the "limitation on the requirement for expert testimony [being] cases where the common knowledge or experience of laymen is extensive enough to recognize or infer negligence from the facts." *Fishow v. Simpson*, 55 Md. App. 312, 318–19 (1982); *Schultz v. Bank of Am., N.A.*, 413 Md. 15, 29 (2010). We generally require expert testimony because the standard is "beyond the ken of the average layman." *Schultz*, 413 Md. at 28.

The circuit court below laid out the allegations for legal malpractice:

I. Defendant charged plaintiff excessive and unreasonable fees.

II. Defendant should not have withdrawn from the case or withdrew prematurely.

III. Defendant failed to adequately address safety issues regarding her minor children during her divorce action.

IV. Defendant did not sufficiently consult with Plaintiff.

V. Defendant failed to properly or effectively communicate with Plaintiff.

VI. Defendant failed to remember important communications with Plaintiff.

VII. Defendant failed to effectively advocate for Plaintiff with the Best Interest Attorney.

VIII. Defendant failed to locate an expert witness.

The circuit court concluded that "these allegations require expert testimony as to the standard of care required of a reasonable attorney." It further found that Ms. Hencken failed to meet the deadline to disclose an expert and that "[w]ithout that expert, there is no genuine dispute as to any material fact and the Defendant is entitled to judgment as a matter of law."

We agree. The scheduling order clearly states in unequivocal terms: "Plaintiff's Expert Reports or Md. Rule 2-402(g)(1) Disclosures" were due April 24, 2023. It is equally clear that allegations related to attorney's fees, proper attorney-client communication, advocacy with Best Interest Attorneys, and expert witness strategy all require expert opinions. In sum, Ms. Hencken needed an expert witness to support her many allegations of legal malpractice but failed to produce one. Without evidence from an expert witness in this case, there would be no genuine dispute of material fact, and the case would have to be resolved in Mr. Jacobs' favor.

Ms. Hencken argues that she is a pro-se litigant, unaware of the rules, and that the court should afford her some grace. However, the case law is clear. Pro-se litigants are to be treated like represented parties when it comes to following the procedural rules of discovery. *Woodie*, 128 Md. App. at 411 ("It is a well-established principle of Maryland law that *pro se* parties must adhere to the procedural rules in the same manner as those represented by counsel."). While we understand that Ms. Hencken may have misunderstood the rules, she must still be held to the same standard as represented parties.

We also reject Ms. Hencken's argument that she was in substantial compliance with the rules through her "selection" of an expert at the hearing or through Mr. Hecht's 2019 retainer. The scheduling order set April 24 as the deadline for her disclosure of her expert witnesses. The scheduling order set July 23 as the close of all discovery. She missed both deadlines by months and she had more than adequate notice of the issue. Mr. Jacobs filed his motion for summary judgment in July, long before the November hearing. Her choice of Mr. Hecht at trial, whether or not he could actually be considered an expert witness for this matter, was untimely. In addition, a retainer letter is not an expert report. The retainer agreement here contained no expert opinions. While the letter stated, "I am amazed that your case has been going on for over 2 years and there hasn't been a *pendente lite* hearing on the issues of child support and custody," this comment did not constitute an expert analysis of the issue. Ultimately, Ms. Hencken never produced an expert witness. She was not in compliance or substantial compliance.

She cites *Naughton v. Bankier* and *Swann v. Prudential* to argue that she was in compliance, but these cases are inapplicable. 114 Md. App. 641 (1997); 95 Md. App. 365 (1993). *Naughton* contradicts her argument because our Court overturned the trial court's decision to allow an expert to testify when the party failed to disclose the witness for "more than one year past the expiration of the court-ordered disclosure period." *Naughton*, 114 Md. App. at 653–54. "While absolute compliance with scheduling orders is not always feasible from a practical standpoint, we think it quite reasonable for Maryland courts to demand at least substantial compliance, or, *at the barest minimum*, a good faith and earnest

effort toward compliance." *Id.* at 653 (emphasis in the original). *Swann* does not apply because our Court in that case ruled on discovery sanctions and ultimately found that there was no prejudice. *Swann*, 95 Md. App. at 382. This case involves a motion for summary judgment, not a discovery sanction, and there was prejudice.

Ms. Hencken contends that there has not been any prejudice to Mr. Jacobs. The facts do not support her assertion. Mr. Jacobs has had continuing costs because of the litigation. An expert witness could potentially mean a deposition, more legal fees, a change in trial strategy and witnesses. Allowing Ms. Hencken to deviate from the scheduling order without any showing of good cause would be prejudicial to Mr. Jacobs. *Naughton*, 114 Md. App. at 654.

Ms. Hencken's use of *Wormwood v. Batching Systems Incorporated* to argue that "substantial compliance will be deemed sufficient where the opposing party suffers no prejudice" misses the mark because she has failed to show that there is no prejudice in this case. Moreover, *Wormwood* does not involve a scheduling order and the appellee in that case "made no showing of prejudice." *Id.* at 705. Our present case involves a scheduling order, and Mr. Jones has shown that he would suffer prejudice.

Ms. Hencken makes the argument that Mr. Jacobs had a duty to send her interrogatories for her expert and that Mr. Jacobs also violated discovery rules. First, Mr. Jacobs had no obligation to compel Ms. Hencken to disclose her expert witness. Second, the court's ruling was not a discovery sanction, but rather the court granted a motion to

dismiss as mentioned previously. The court did not wrongly impose a double standard, it dismissed the case because Ms. Hencken failed to meet her burden.

Ms. Hencken asks us to liberally construe the rules to avoid draconian sanctions. She cites *Manzano* which does not apply because there the party missed the deadline by a week. *Manzano*, 347 Md. at 30. Here, she missed the deadline by six months. *Lakewood* is inapplicable. It involves a default judgment because of a failure to comply with a discovery order. *Quinn*, 91 Md. App. at 375. Here, the court's determination was not a draconian sanction but rather a proper granting of a motion for summary judgment. Ms. Hencken failed to meet her burden for the case. The decision of the circuit court to dismiss for failure to disclose an expert witness is affirmed.

III. The circuit court did not err in dismissing the fraud counts with prejudice.

Ms. Hencken argues that the circuit court should not have dismissed her "extremely comprehensive" fraud pleadings because the court was required to assume the truth of her allegations. Mr. Jacobs disagrees and contends that Ms. Hencken failed to state her claim with the required specificity. In the original complaint, Mr. Jacobs argues that Ms. Hencken did not identify specific statements allegedly made by Mr. Jacobs, how and when the statements were communicated, or why any such statements were false. In the amended complaint, which was marked deficient before the hearing, Mr. Jacobs argues that Ms. Hencken "did not cure the deficiencies" of the original complaint. Instead, he contends that Ms. Hencken's amended complaint relied upon general conclusory allegations or opinions which were insufficient.

Fraud, or intentional misrepresentation has five elements:

> (1) [T]he defendant made a false representation to the plaintiff, (2) the falsity of the representation was either known to the defendant or the representation was made with reckless indifference to its truth, (3) the misrepresentation was made for the purpose of defrauding the plaintiff, (4) the plaintiff relied on the misrepresentation and had the right to rely on it, and (5) the plaintiff suffered compensable injury as a result of the misrepresentation.

Hoffman v. Stamper, 385 Md. 1, 28 (2005); *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 334 (2013); *Everett v. Balt. Gas & Elec. Co., et al.*, 307 Md. 286, 300 (1986). "Maryland courts have long required parties to plead fraud with particularity." *McCormick v. Medtronic, Inc., et al.*, 219 Md. App. 485, 527 (2014). The particularity requirement requires plaintiffs to make specific allegations:

> The requirement of particularity ordinarily means that a plaintiff must identify who made what false statement, when, and in what manner (i.e., orally, in writing, etc.); why the statement is false; and why a finder of fact would have reason to conclude that the defendant acted with scienter (i.e., that the defendant either knew that the statement was false or acted with reckless disregard for its truth) and with the intention to persuade others to rely on the false statement.

Id. at 528. Courts have the discretion to dismiss allegations of fraud with prejudice if the allegations "fail to state claim that could afford relief." *See Pulte Home Corp. v. Parex, Inc.*, 174 Md. App. 681, 727 (2007); *Beyond Sys., Inc. v. Realtime Gaming Holding Co., LLC*, 388 Md. 1, 29 (2005).

We hold that Ms. Hencken failed to state her claim of fraud in the original complaint with specificity. Her claim of fraud contains such general statements as "Jacobs intentionally and maliciously made fraudulent representations to the plaintiff that included . . . [m]isrepresenting to the plaintiff that he would name experts in the case then failing to

do so." We hold that her averments were insufficient because they failed to tell the court what was said, when and how the statements were communicated, or how those statements demonstrated the requisite scienter for fraud.

As another example, Ms. Hencken alleges that "Jacobs and Hecht's conduct was oppressive, fraudulent, malicious and constitutes despicable conduct in conscious disregard for the plaintiff's rights." This allegation, likewise, is a conclusory opinion devoid of the particular facts that the court could rely on to sustain a claim of fraud. In essence, fraud claims must be stated with particularity.

The record reflects that the amended complaint was deemed deficient prior to the hearing, but even if considered, the allegations of fraud are not pled with particularity. As Mr. Jacob notices, 24(a)-(i) from the original complaint and 33(a)-(i) from the amended complaint are identical and these allegations do not meet the pleading requirements.

Ms. Hencken added in 33(j), a lengthy allegation of legal malpractice against Mr. Jacobs that highlights the financial strain she felt as a result of the legal fees. However, this section within her amended complaint still does not provide a specific fraudulent statement from Mr. Jones. Instead, Ms. Hencken makes general accusations, stating that Mr. Jacobs "repetitively promised [a] PL hearing" from the time he was hired in 2017 through 2019, when he withdrew. Ms. Hencken alleges that Mr. Jacobs "kept [her] unjustly paying Jacobs for something that Jacobs knew wasn't going to happen." Again, this is a general allegation of legal malpractice without a specific allegation as to Mr. Jacobs' fraudulent intent, which is necessary for a claim of fraud.

The circuit court judge stated in the hearing, "I just don't see anything that comes even close to what is necessary to be pled with specificity as it relates to the cause of action for fraud." We agree and hold that the court did not err.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.