Circuit Court for Baltimore County
Case No. 03-C-16-008404

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2541

September Term, 2017

7222 AMBASSADOR ROAD, LLC

v.

NATIONAL CENTER ON INSTITUTIONS AND ALTERNATIVES, INC.

Berger,
Friedman,
Gould,

JJ.

Majority Opinion by Berger, J.
Dissenting Opinion by Gould, J.

Filed: September 19, 2019

This is an appeal from a judgment entered by the Circuit Court for Baltimore County in favor of the National Center on Institutions and Alternatives, Inc., the defendant below. The underlying case arose from a dispute between 7222 Ambassador Road, LLC ("Landlord") and its former tenant, National Center on Institutions and Alternatives, Inc. ("Tenant") regarding a commercial lease.

Prior to trial, Tenant filed a motion to strike Landlord's witnesses due to Landlord's alleged failure to comply with the Maryland Rules regarding discovery. The circuit court granted Tenant's motion, after which the Landlord was unable to present its case at trial. Judgment was entered in favor of Tenant. On appeal, Landlord asserts that the circuit court abused its discretion by granting Tenant's motion to exclude Landlord's witnesses. Perceiving no error, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Tenant began leasing commercial office space from Landlord in 1998 and continued to lease office space from Landlord through December 31, 2015. The lease provided that Tenant would return the property to Landlord in "the same good repair, order and condition as at the beginning of the tenancy." Tenant leased the property from Landlord for seventeen years, during which Tenant paid Landlord over $3.5 million in rent. After Tenant vacated the property, Landlord asserted that Tenant had breached the lease by failing to properly maintain the property.

Tenant and Landlord attempted to resolve the dispute regarding the scope of necessary repairs, but the parties were unable to reach an agreement. On August 11, 2016,

Landlord filed the complaint that initiated the case before us on appeal. Landlord alleged that Tenant failed to perform maintenance and repair as required by the lease and failed to deliver the property "in the same good repair, order and condition as at the beginning of the tenancy." Landlord sought over $1,000,000.00 in damages.

The circuit court issued a scheduling order pursuant to Maryland Rule 2-504 on October 14, 2016. Pursuant to the scheduling order, Landlord was required to provide "Expert Reports or Md. Rule 2-402(g)(1) disclosures" by January 4, 2017. The scheduling order further provided that discovery was to be completed by March 20, 2017, that motions were due by April 4, 2017, and set a trial date of February 7, 2018.

Discovery ensued and included the exchange of written discovery requests and documents between the parties. Tenant also subpoenaed documents from non-parties. Landlord, however, failed to provide Tenant with a list of expert witnesses. On January 30, 2017, Tenant served Landlord with a "Second Set of Interrogatories to Plaintiff" (the "interrogatories").[1] The interrogatories asked Landlord to identify all lay and expert witnesses it intended to call at trial. The interrogatories further requested that Landlord, with respect to expert witnesses, identify the subject matter upon which the witness was expected to testify, the substance of the facts and opinions to which the witness was

[1] In its brief, Landlord asserts that its counsel did not receive the interrogatories until March 3, 2017. Landlord provides no citation to the record to support this assertion. The certificate of service attached to the interrogatories provides that the interrogatories were "served upon counsel for the Plaintiff via email/.pdf as agreed to by the parties" on January 30, 2017.

expected to testify, a summary of the grounds for each opinion, and the documents or other evidence upon which the witness would rely. Landlord did not respond.

On March 8, 2017, Tenant's prior attorney contacted Landlord's counsel via email advising that the "responses to discovery requests . . . are now overdue" and inquired as to when Tenant could expect to receive responses. Tenant received no response. On December 26, 2017, Cullen B. Casey, Esq. and Ariana K. DeJan-Lenoir, Esq. of the law firm Anderson, Coe & King, LLP were retained to take over the matter from Tenant's prior counsel. On January 8, 2018, Tenant's new attorney contacted counsel for Landlord via email and against asked for responses to the interrogatories. Landlord did not provide responses to the Interrogatories.[2] Tenant filed the motion that ultimately gave rise to this appeal on January 26, 2018. Tenant sought to exclude or limit the testimony of any fact or expert witness due to Landlord's alleged violations of the scheduling order and discovery rules. Landlord filed a response on February 2, 2018.

The circuit court heard argument on Tenant's motion on February 6, 2018, the date the case was scheduled for trial. The circuit court inquired about Landlord's failure to respond to Tenant's interrogatories in the following exchange:

> THE COURT: All right. So you have a Motion in limine regarding expert witnesses. Does the Plaintiff contend it has expert witnesses?

[2] In the email, Tenant's counsel referred to a motion to postpone that Tenant had filed. Landlord had sold the property while the lawsuit was pending without notifying Tenant of the sale and Tenant sought to postpone the trial and reopen discovery. Landlord opposed the motion to postpone and the request was denied.

> [COUNSEL FOR LANDLORD]: We have one expert witness, John [Mulcahy].
>
> THE COURT: And he was not timely designated?
>
> [COUNSEL FOR LANDLORD]: Excuse, excuse me?
>
> THE COURT: He was not timely designated?
>
> [COUNSEL FOR LANDLORD]: He was timely designated. Under the Scheduling Order, I have an obligation to either give them notice of his opinions and basis or provide them with a copy of his report. They were provided with a copy of his full report on numerous occasions, one of them --
>
> THE COURT: I don't know where you get that, I don't know why you say that you're not required to answer interrogatories. I can't imagine why you say that.
>
> [COUNSEL FOR LANDLORD]: Excuse me?
>
> THE COURT: They sent you an interrogatory.
>
> [COUNSEL FOR LANDLORD]: They did, and I --
>
> THE COURT: And you didn't answer it.
>
> [COUNSEL FOR LANDLORD]: I did not answer them and --
>
> THE COURT: Okay. Well, the rules require you to answer the interrogatory.

Counsel for Landlord argued that Tenant failed to file a motion for sanctions prior to the motions deadline in the scheduling order, and, therefore, the court should not consider Tenant's motion to strike or limit the testimony of Landlord's witnesses. Counsel for Landlord acknowledged that he "[d]id not formally answer" the interrogatories, but maintained that Tenant "had all of the substance of the response." The following exchange occurred:

> THE COURT: So, your position is, even though they properly served interrogatories and tried to get you to answer them by reminding you of them, that it was [incumbent] upon them to incur additional attorney's fees and expense and delay in filing a Motion to force you to do what the rules require you to do without a Motion?
>
> [COUNSEL FOR LANDLORD]: That's, put that way, Your Honor, I, I can't dispute your view of that.

Counsel for Landlord asserted that "there was no prejudice" because Tenant "had all of the information, they had the report, they had a full opportunity to depose him and had they had that answer in hand a year ago, nothing would have changed." Counsel further argued that it was "too late" for Tenant to seek sanctions now. Counsel for Tenant responded that "prejudice [had been] shown." Counsel for Tenant argued that although they "were in possession of numerous reports," they "didn't know what, which expert or which witnesses were going to be called. There was no proper designation by the deadline. There was no answer to the interrogatories on both, on lay witnesses and expert witnesses." Counsel for Tenant asserted that at the time of Mr. Mulcahy's deposition, Tenant was unaware that Landlord intended to call Mr. Mulcahy as an expert witness. At that point, Tenant asserted, they had "already designated [their] experts" and "prepared [their] defense of the case."

The circuit court issued its ruling, explaining as follows:

> I don't think I've had many attorneys come in and say I didn't do anything the rules require me to do, even doing it late, when I knew that there was a problem after the Motion in limine was filed, I still didn't do it and I think that that is acceptable. The [c]ourt is going to grant the Motion in limine, will not permit the presentation of the testimony by witnesses from the Plaintiff because of the failure to answer any interrogatories.

Counsel for Landlord informed the court that he "ha[d] no case to put on" and the circuit court entered judgment in favor of Tenant. This appeal followed.[3]

DISCUSSION

Landlord asserts that the circuit court abused its discretion by granting Tenant's motion and excluding testimony from Landlord's witnesses. Landlord averts that Tenant was not entitled to discovery sanctions because Tenant did not file a motion to compel or a motion for sanctions prior to the motions and discovery deadlines set forth the court's scheduling order. Landlord further contends that the circuit court's sanction constituted an abuse of discretion.

We review whether a discovery violation occurred applying the *de novo* standard of review. *State v. Graves*, 447 Md. 230, 240 (2016) (citation omitted). We review a trial court's decision to impose a particular discovery sanction for abuse of discretion. *Cole v. State*, 378 Md. 42, 56 (2003) ("Where a discovery rule has been violated, the remedy is, in the first instance, within the sound discretion of the trial judge. The exercise of that discretion includes evaluating whether a discovery violation has caused prejudice. Generally, unless we find that the lower court abused its discretion, we will not reverse.") (quotation and citation omitted); *Sindler v. Litman*, 166 Md. App. 90, 122 (2005) ("Maryland law is well settled that trial courts have broad discretion to fashion a remedy

[3] On May 20, 2019, Landlord filed a motion to supplement the record and record extract with two additional pages of an email exchange that otherwise appeared only in truncated form in the record. We granted Landlord's motion.

based on a party's failure to abide by the rules of discovery.") (quotation and citation omitted).

The Court of Appeals has explained:

> There is an abuse of discretion "where no reasonable person would take the view adopted by the [trial] court[ ]" . . . or when the court acts "without reference to any guiding rules or principles." An abuse of discretion may also be found where the ruling under consideration is "clearly against the logic and effect of facts and inferences before the court[ ]" . . . or when the ruling is "violative of fact and logic." In sum, to be reversed "[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable."

Wilson v. Crane, 385 Md. 185, 198-99 (2005) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312-13 (1997) (additional internal citations omitted)). The Court of Appeals has recently reiterated that the abuse of discretion standard applies when an appellate court reviews "a trial court's decision to impose, or not impose, a sanction for a discovery violation." *Elliot Dackman, et al. v. Daquantay Robinson, et al.*, ___ Md. ___ (Ct. of App. June 24, 2019), Slip Op. at 45.[4]

[4] When applying the abuse of discretion standard, we do not consider whether we would have reached the same conclusion as the trial court. Reasonable jurists can and do weigh factors differently and reach different conclusions. For example, the dissent weighs the prejudice factor quite differently than the majority. We undertake our analysis in this appeal cognizant of the applicable standard of review and consider only whether the circuit court's ruling constituted a decision so "well removed from any center mark" that it is "beyond the fringe of what the court deems minimally acceptable." *Wilson*, *supra*, 385 Md. at 199. As we shall explain, in the majority's view, the circuit court's ruling did not constitute an abuse of discretion.

I. The Effect of Tenant's Failure to File a Motion to Compel and/or for Sanctions Prior to the Close of Discovery

Landlord asserts that Tenant was not entitled to sanctions due to Landlord's failure to respond to interrogatories because Tenant failed to file a timely motion to compel discovery and for sanctions prior to the motions and discovery deadline in the scheduling order. As we shall explain, we are not persuaded.

Landlord cites Maryland Rule 2-434 for his assertion that "[t]he Maryland Rules require a party to file a timely Motion to Compel and for Sanctions within the discovery or motions deadlines to seek sanctions for an alleged discovery deadline." Contrary to Landlord's assertions, Maryland Rule 2-432(a) expressly provides that "[a] discovering party may move for sanctions under Rule 2-433 (a), **without first obtaining an order compelling discovery** under section (b) of this Rule, if a party . . . **fails to serve a response to interrogatories** under Rule 2-421." (Emphasis supplied.) A party's failure to serve a response to interrogatories "may not be excused on the ground that the discovery sought is objectionable unless a protective order has been obtained under Rule 2-403." The only reference to a deadline for filing a motion pursuant to Rule 2-432 is set forth in Rule 2-432(d), which provides that "a motion for an order compelling discovery or for sanctions shall be filed with reasonable promptness."

Maryland Rule 2-433 sets forth various sanctions that a circuit court may enter for failures of discovery. One of the sanctions available to the circuit court is the exclusion of evidence. Md. Rule 2-433)(2) ("Upon a motion filed under Rule 2-432 (a), the court, if it

finds a failure of discovery, may enter . . . [a]n order . . . prohibiting that party from introducing designated matters in evidence."

Landlord asserts that the circuit court "lack[ed] the power to impose discovery sanctions once the discovery and motions deadlines have concluded without any such motions." The scheduling order issued by the circuit court on October 14, 2016 provides that "[d]iscovery must be completed by" March 20, 2017 and that "[a]ll motions (excluding [m]otions in [l]imine) are due by" April 4, 2017. Maryland Rule 2-504 sets forth the required contents of scheduling orders and provides that "[a] scheduling order shall contain . . . a date by which all **dispositive motions** must be filed, which shall be no earlier than 15 days after the date by which all discovery must be completed." (Emphasis supplied.) Tenant's motion to strike or limit testimony from Landlord's witnesses was not a dispositive motion and is not the type of motion that was required to be filed prior to the deadline set forth in the scheduling order.[5]

Landlord further contends that Tenant failed to file its motion "with reasonable promptness" as required by Rule 2-432(d). The record reflects, however, that Tenant continued to make good faith efforts to resolve the discovery dispute prior to filing the motion giving rise to this appeal. Indeed, the record clearly establishes that Tenant contacted Landlord repeatedly regarding the missing interrogatory responses but received

[5] The dissent construes the motions deadline set forth in the circuit court's scheduling order differently and would hold that the Tenant's motion was barred by the deadline. Our reading of Rule 2-504 and the circuit court's scheduling order lead us to conclude that the motions deadline did not prohibit the filing of the Tenant's motion in this case.

no response. Landlord's argument that Tenant should have filed a motion to compel and/or for sanctions earlier is contrary to well-established policy encouraging parties to attempt to resolve discovery disputes whenever possible. *See, e.g.*, Md. Rule 2-431 ("A dispute pertaining to discovery need not be considered by the court unless the attorney seeking action by the court has filed a certificate describing the **good faith attempts to discuss with the opposing attorney the resolution of the dispute** and certifying that they are unable to reach agreement on the disputed issues. The certificate shall include the date, time, and circumstances of each discussion or attempted discussion.") (emphasis supplied); *Rodriguez v. Clarke*, 400 Md. 39, 63 (2007) (discussing the Court of Appeals' "commitment to the requirement of good faith efforts at resolution" of discovery disputes). Indeed, the circuit court aptly observed that requiring Tenant to file a motion to compel before seeking sanctions, after making good faith efforts to resolve the discovery dispute, would result in unnecessary expense to Tenant.

In its brief, Landlord discusses at length the case of *Food Lion v. McNeill*, 393 Md. 715 (2006). In our view, the relevant facts of *Food Lion* are readily distinguishable from the present case. In *Food Lion*, the Court of Appeals framed the issue as "whether the testimony of an expert may be excluded at trial on the basis of a disclosure, made during discovery in response to interrogatories, that has neither been claimed nor determined to be a discovery violation, but that is challenged at trial as deficient for failing to provide

information as required by Maryland Rule 2-402(f)(1)(A)." 393 Md. at 717.[6] In *Food Lion*, the appellant made an oral motion on the day of trial to preclude testimony from an expert witness, arguing that the expert's earlier interrogatory responses were insufficient. *Id.* at 725. The Court emphasized that the appellant "at no time, before or after the expiration of the discovery deadline . . . challenged the adequacy or the sufficiency of the appellee's response to [the relevant] interrogatory." *Id.* The Court of Appeals affirmed the circuit court's denial of appellant's motion, explaining that "[a] party who answers a discovery request timely and does not receive any indication from the other party that the answers are inadequate or otherwise deficient should be able to rely, for discovery purposes, on the absence of a challenge as an indication that those answers are in

[6] At the time, Maryland Rule 2-402(f)(1)(A) provided:

> (f) Trial Preparation – Experts.
>
> (1) Expected to Be Called at Trial.
>
> (A) Generally. A party by interrogatories may require any other party to identify each person, other than a party, whom the other party expects to call as an expert witness at trial; to state the subject matter on which the expert is expected to testify; to state the substance of the findings and the opinions to which the expert is expected to testify and a summary of the grounds for each opinion; and to produce any written report made by the expert concerning those findings and opinions. A party also may take the deposition of the expert.

Food Lion, *supra*, 393 Md. At 717 n.1. This language is now found in Maryland Rule 2-402(g)(1)(A).

compliance, and, thus not later subject to challenge as inadequate and deficient when offered at trial." *Id.* at 736.

In this case, unlike *Food Lion*, Landlord never responded to Tenant's interrogatories, nor did Tenant respond to Landlord's multiple attempts to communicate regarding the missing interrogatory responses. Unlike the appellee in *Food Lion* who had no reason to believe that the opposing party considered its discovery production to be deficient, Landlord was well aware of its failure to respond to interrogatories. Landlord's reliance on *Food Lion* is, therefore, misplaced.

The Court of Appeals has explained that there are two different types of discovery disputes. *Attorney Grievance Comm'n of Maryland v. Mixter*, 441 Md. 416, 435 (2015). The first type of discovery dispute "stems from good faith difference of opinion as to whether the requested discovery is appropriate." *Id.* The second type of discovery dispute, "lamentably, is when the party from whom discovery has been sought has simply ignored the discovery request or intentionally refused even to respond to it." *Id.* In this case, Landlord did not disagree with Tenant about the appropriate scope of interrogatory responses or claim that certain requested information was privileged in some way. Rather, Landlord simply failed to respond despite Tenant's repeated requests. Unlike *Food Lion*, this is not a case in which a party came to court prepared for trial with no reason to believe that the opposing party would move to exclude testimony on the basis of an alleged discovery violation. Tenant attempted to resolve the dispute and only sought court intervention after being unable to do so. This is consistent with the principles of discovery

under Maryland law. Under these circumstances, the circuit court was not precluded from considering Tenant's motion to strike or limit testimony from Landlord's experts because Tenant did not file an earlier motion.[7]

II. Whether the Circuit Court's Sanction Constitutes an Abuse of Discretion

After determining that a discovery violation has occurred, the following six factors inform the circuit court's determination of an appropriate discovery sanction:

> (1) whether the discovery violation was technical or substantial;
>
> (2) the timing of the ultimate disclosure;
>
> (3) the reason, if any, for the violation;
>
> (4) the degree of prejudice to the parties respectively offering and opposing the evidence;
>
> (5) whether any resulting prejudice might be cured by a postponement; and,
>
> (6) if so, the overall desirability of a continuance.

Taliaferro v. State, 295 Md. 376, 390-91 (1983). When reviewing a trial court's rulings, appellate courts "must assume that the [lower] court carefully considered all the various grounds" that the parties asserted. *Thomas v. City of Annapolis, et al.*, 113 Md. App. 440, 450 (1997). Furthermore, trial judges are presumed to know the law and correctly apply it

[7] The dissent reaches a different conclusion as to the reasonable promptness requirement, with which we respectfully disagree for the reasons stated above.

and a judge is "not required to set out in detail each and every step of his [or her] thought process." *Id.*[8]

In this case, the circuit court reasonably concluded that the exclusion of Landlord's witnesses was an appropriate sanction given the circumstances of the discovery violation. As we discussed *supra*, this is not a case in which two parties disagreed as to the sufficiency of a particular interrogatory response. Rather, Landlord simply failed to respond to interrogatories altogether. A party's "failure to answer interrogatories [is] a substantial, not a technical, discovery violation." *Warehime v. Dell*, 124 Md. App. 31, 48 (1998). Moreover, as to the "timing of the ultimate disclosure" factor, Landlord never ultimately provided interrogatory responses. As to the "reason, if any, for the violation" factor, Landlord was unable to provide any reason whatsoever for the failure to respond to interrogatories.

Landlord asserts that the failure to respond to interrogatories resulted in no prejudice to Tenant because Tenant was in possession of Mr. Mulcahy's expert report and had deposed Mr. Mulcahy. Tenant responds that although it had received the 2016 report prepared by Mr. Mulcahy, it had no reason to believe that Mr. Mulcahy would be Landlord's expert witness at trial. Tenant notes that it was in possession of numerous reports and estimates detailing differing levels of required repairs to the property. Tenant

[8] The dissent agrees that Tenant's motion was, in substance, a motion for sanctions, but asserts that the circuit court's failure to mention the *Taliaferro* factors mandates reversal. We disagree and presume that the trial judge knew and accurately applied the relevant law when determining an appropriate sanction for Landlord's failure to respond to interrogatories.

maintains that Landlord's "oral disclosure" of Mr. Mulcahy as an expert witness at the end of Tenant's deposition of Mr. Mulcahy was insufficient because it occurred two months after the expert witness designation deadline and seventeen days prior to the close of discovery. Tenant further asserts that the "oral disclosure" did not detail all of the information sought in the interrogatories.

In our view, there is evidentiary support for a conclusion that Tenant suffered prejudice due to Landlord's discovery violation. "The purpose of discovery is to eliminate, as far as possible, the necessity of any party to litigation going to trial in a confused or muddled state of mind, concerning the facts that gave rise to the litigation." *Warehime*, *supra*, 124 Md. App. at 48 (internal quotation omitted). By failing to respond to interrogatories, Landlord contributed to Tenant's muddled state of mind and acted in a manner inconsistent with the purpose of discovery.[9] Finally, with respect to whether any resulting prejudice might be cured by a postponement and the overall desirability of a continuance, we observe that Tenant had previously moved to postpone the case and reopen discovery on a different basis and Landlord opposed the postponement.

This case is unlike *Maddox v. Stone*, 174 Md. App. 489 (2007), in which we held that the circuit court abused its discretion by granting a motion to strike an expert witness. In *Maddox*, the sole alleged discovery violation was a witness's expert report that was not

[9] We do not suggest that a party must always prove actual prejudice in this context. Indeed, prejudice can be presumed in certain circumstances. *Hossainkhail*, *supra*, 143 Md. App. at 716 (2002) ("[P]ermitting a party to deviate from a court scheduling order, absent good cause, is on its face, prejudicial and fundamentally unfair to opposing parties.").

produced within the deadline set forth in the scheduling order. *Id.* at 500. However, the expert witness was specifically identified to opposing counsel two weeks before the scheduling order deadline, the expert witness report was faxed to defense counsel within 24 hours after it was received by counsel for the appellants, and the expert witness was made available for deposition. *Id.* at 500, 508. The trial court precluded the expert witness's testimony, but on appeal, we held that the circuit court had abused its discretion by granting a motion to strike the witness. *Id.* at 508. We emphasized that "there was no evidence of willful or contemptuous behavior on the part of either the plaintiffs or their counsel." *Id*. In contrast to *Maddox*, the record in this case reflects that Landlord was repeatedly made aware of its discovery violations, yet Landlord still refused to provide responses to Tenant's interrogatories. In *Maddox*, the issue was whether exclusion of an expert was an appropriate sanction when an untimely report was provided. Critically, in the present case, Landlord *never* ultimately provided interrogatory responses to Tenant.

The issue before us is not whether this Court, if sitting as the trial judge, would impose the same sanction imposed by the trial court in this case. This is a discretionary determination and different judges may weigh the relevant factors differently. Rather, the question before us is whether the sanction imposed constitutes an abuse of discretion, i.e., a decision that is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *Wilson*, *supra*, 385

Md. at 199.[10] In short, Landlord's discovery violation was substantial and never resulted in an ultimate disclosure. Indeed, Landlord never offered an explanation for its failure to respond to the Tenant's interrogatories. As a result, Tenant's ability to prepare a defense was prejudiced. Accordingly, we cannot say that the circuit court's ruling was an abuse of discretion.[11] We, therefore, affirm.[12]

[10] The Court of Appeals recently addressed whether a circuit court abused its discretion by denying a motion to exclude an expert's testimony and report on the basis of an untimely disclosure. *Dackman*, *supra*, Slip Op. at 43-51. The Court emphasized the significant discretion afforded to the trial court in this context, holding that the circuit court did not abuse its discretion by denying the motion despite the fact that, in a different case, the Court of Special Appeals affirmed the granting of a similar motion in a case with somewhat similar circumstances. *Id.* at 51 ("In any event, *Lowery* [*v. Smithsburg Emergency Med. Serv.*, 173 Md. App. 662, 678 (2007)] stands for the principle that addressing a discovery violation and imposing a sanction for such a violation are matters wholly within the trial court's discretion, and appellate review is limited to determining whether an abuse of that discretion occurred. Because the trial court in *Lowery* granted a motion *in limine* and excluded the expert does not mean that the same result was required in this case.").

[11] Furthermore, in its reply brief, Landlord briefly summarizes twenty-six cases which, Landlord sorts into three categories: (1) cases in which a party filed a motion to compel and what Landlord characterizes as a "timely" motion for sanctions; (2) cases in which there was no prior ruling, but no disclosures were made or depositions allowed or conducted; and (3) cases in which prejudice was analyzed. Landlord asserts that all of the cited cases "rely on factors not present in this appeal." To be sure, the determination of an appropriate sanction for a discovery violation is a fact-intensive inquiry and the cited cases each involve their own set of circumstances. As we explained, however, the *Taliaferro* factors as applied to the facts of the case *sub judice* demonstrate that the sanction imposed by the circuit court in this case did not constitute an abuse of discretion.

[12] Tenant presents an additional argument that Landlord's deviation from the scheduling order provides the basis for the trial court's sanction. In our view, the record reflects that the circuit court was most concerned about Landlord's failure to respond to Tenant's interrogatories. As we have explained, the sanction imposed by the circuit court for Landlord's failure to respond to interrogatories did not constitute an abuse of discretion.

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

Accordingly, we shall not address Tenant's alternate argument that the sanction would be a permissible sanction for the violation of the court's scheduling order.

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I respectfully dissent. I share the consternation that courts and rule-following litigants have when the other party refuses to play by the rules. Landlord was in the wrong when it failed to respond—by answering and/or objecting—to timely-propounded interrogatories. As a general matter, such a failure would open the door for immediate sanctions under Rule 2-432(a) without the necessity to secure an order compelling discovery first. Nevertheless, I believe the circuit court abused its discretion in granting the relief that, for all intents and purposes, served as the death knell to Landlord's case. Such sanctions are reserved for "persistent and deliberate violations that actually cause some prejudice, either to a party or to the court." Admiral Mortg., Inc. v. Cooper, 357 Md. 533, 545 (2000). This was not such a case.

Although the abuse of discretion standard typically applies to discovery-related rulings, the circuit court's legal rulings are reviewed de novo to determine whether the court's conclusions were "legally correct." Johnson v. Francis, 239 Md. App. 530, 542 (2018). In my view, the circuit court made fundamental legal errors on its way to sanctioning Landlord. For the reasons explained below, I would, therefore, reverse.

Maryland law requires a court reviewing a motion for sanctions to consider certain factors, including whether the moving party suffered any prejudice from the violations it alleged. Tenant failed to mention these factors, and the circuit court failed to mention or apply them. The majority has given this legal error a pass by affirming its result on an analysis of the required factors that the circuit court neglected to make.

The court also misconstrued the nature of Tenant's motion as a motion *in limine*, and not a motion for sanctions. The court wrongly believed that a motion for sanctions

was not required for a court to impose discovery sanctions and that a motion to compel was not required to force a recalcitrant party to answer discovery. The court overlooked the untimeliness of Tenant's motion by disregarding both the "reasonable promptness" requirement under Rule 2-432(d) and the court's own deadline for filing motions.

Because of these errors by the circuit court, as more fully explained below, I respectfully dissent.

DISCUSSION

I. The Circuit Court's Decision

A. Tenant's motion

The nature of a filing is determined by its substance, not its caption. Montgomery Cty., Maryland v. Fraternal Order of Police, Montgomery Cty. Lodge 35, Inc., 427 Md. 561, 569-70 (2012) (citations omitted). In substance, Tenant's motion was in part a motion for sanctions and in part a motion *in limine*. It was a motion for sanctions in two respects: (1) Tenant was seeking the exclusion of Landlord's expert witnesses because, according to Tenant, Landlord had failed to comply with the court's scheduling order's deadline for designating experts; and (2) Tenant was seeking the exclusion of Landlord's fact and expert witnesses pursuant to Maryland Rule 2-433 because Landlord had failed to respond to a set of interrogatories regarding these witnesses.[1]

[1] The motion was in part a motion *in limine* because Tenant challenged the admissibility of the substantive testimony it expected from Landlord's expert witness on grounds rooted in the Maryland Rules of Evidence. Reed v. State, 353 Md. 628, 634 (1999) ("the real purpose of a motion *in limine* is to give the trial judge notice of the movant's position so as to avoid the introduction of damaging evidence which may irretrievably

A motion must "state with particularity the grounds and the authorities in support of each ground." Md. Rule 2-311(c). Tenant did not cite any supporting cases in its motion; the only authority it cited was Rule 2-433, which empowers a court to sanction a party for discovery violations. Tenant also did not identify, let alone discuss, any of the factors enunciated in Taliaferro v. State, 295 Md. 376, 390-91 (1983) that courts must consider in reviewing a motion for sanctions. And Tenant did not even argue that it suffered any prejudice from the violations it alleged.

To the contrary, Tenant admitted that it had received the expert reports, that it had deposed Landlord's expert, John Mulcahy, and that Landlord's counsel represented on the record that Mr. Mulcahy would be offered as an expert witness at trial. Indeed, Tenant deposed Mr. Mulcahy on March 3, 2017, *within* the discovery period. Tenant knew enough about Mr. Mulcahy's proffered testimony to seek its exclusion on evidentiary grounds in addition to the discovery violation. It's not surprising, therefore, that Tenant failed to argue that it was prejudiced.

At the motions hearing, Tenant attempted to construct an argument of prejudice by contending that the designation of Landlord's expert at the deposition took place after Tenant had already designated its own expert witness and after it had prepared its defense. If Tenant had believed that its own expert designation did not adequately address Mr.

infect the fairness of the trial."). But since the circuit court did not exclude Landlord's expert on evidentiary grounds, no further analysis of the motion *in limine* portion of Tenant's motion is necessary.

Mulcahy's opinions, presumably the record would reflect Tenant's attempt to do something about it. But it does not. To the contrary, Tenant's expert designation was broad enough to cover the entire waterfall of potential issues that conceivably could have been raised by Landlord's expert.[2]

B. Landlord's response

Landlord's written response to the motion for sanctions was based on three basic contentions. First, Landlord argued that it complied with the scheduling order's deadline for expert disclosures. Landlord pointed out that the scheduling order imposed a January

[2] Tenant's expert designation stated:

> Both Mr. King and Mr. Harclerode are expected to testify that the alleged repairs sought by Plaintiff to the subject premises were beyond the scope of NCIA's responsibility as a tenant pursuant to the subject lease agreement, including that the landlord was responsible for the structural aspects of the subject premises. Both witnesses are also expected to testify that NCIA performed the necessary maintenance to preserve the subject premises in good condition. Furthermore, both witnesses are also expected to testify that there is evidence of significant damage to the subject premises due to leaks in the roof, which were the responsibility of the landlord to repair. Both witnesses are also expected to testify that the estimates relied on by Plaintiff in its baseless attempts to have the subject property renovated at NCIA's expense are unreasonable based on industry standards. Both witnesses are expected to refute the findings of any expert witness designated or yet to be designated by Plaintiff. Both witnesses base their conclusions upon an examination of the subject premises, an examination of the lease and related documents, and their experience and expertise in the industry, among other things. To the extent that additional information is produced or discovered regarding the condition of the subject property at the beginning of NCIA's tenancy, both witnesses may testify as to additional matters related to NCIA's fulfillment of its obligation to maintain the subject property in the condition at the beginning of its tenancy.

4, 2017 deadline for "Plaintiff's Expert Reports or Md. Rule 2-402(g)(1) Disclosures," and that it provided its expert report to Tenant prior to even filing the lawsuit. Because furnishing the expert report satisfied the deadline, Landlord argued that it had complied with the scheduling order.

Second, Landlord argued that Tenant's motion was in substance a motion for sanctions and not a motion *in limine*, and that Tenant failed to file the motion with "reasonable promptness," as required by Maryland Rule 2-432(d).[3]

Third, Landlord argued that Tenant suffered no prejudice: that "Defendant's ability to discover [the expert's] opinions, qualifications, and written report was unfettered in any way[]" and that Mr. Mulcahy "appeared for deposition and answered all questions within his knowledge."

C. <u>The circuit court's decision to exclude Landlord's fact and expert witnesses</u>

At the hearing, the circuit court granted Tenant's motion solely because Landlord failed to respond to the interrogatories.

In response to Landlord's argument that Tenant's motion was not timely under the "reasonable promptness" requirement, the court disputed whether this requirement existed, stating: "You want to cite that rule to me, I'll be happy to read it." Landlord's counsel recited verbatim Rule 2-432(d), yet the circuit court remained unconvinced, stating:

> So, your position is, even though they properly served interrogatories and tried to get you to answer them by reminding you of them, that it was [incumbent] upon them to [incur] additional attorney's fees and expense and

[3] At the hearing on the motion, Landlord also argued that the motion was untimely under the scheduling order.

> delay in filing a Motion to force you to do what the rules require you to do without a Motion?[4]

Landlord continued to argue that the "reasonable promptness" requirement applied, but the court then mischaracterized the nature of Tenant's motion as something other than a motion for sanctions:

> THE COURT: As you can see in the rule book, which you have before you, it does not say there is an exception to the rule requiring discovery if prejudice is not shown. You don't have to bother following the rules.
>
> LANDLORD'S COUNSEL: But there is a rule that says that to seek a sanction for failure, you, Motion must be --
>
> THE COURT: Well, I'm not going to award him attorney's fees because –
>
> LANDLORD'S COUNSEL: -- promptly filed.
>
> THE COURT: -- that fee, if he had filed that Motion, he would have been able to collect his attorney's fees from you.
>
> LANDLORD'S COUNSEL: Yes, he would have.
>
> THE COURT: For your failure to answer.
>
> LANDLORD'S COUNSEL: That's, yes, he would have.
>
> THE COURT: And so, he could have done that.
>
> LANDLORD'S COUNSEL: That would have been an appropriate sanction.

[4] The circuit court's response makes no sense and is based on an error of law. The record reflects that in response to the court's direct question, Landlord was merely informing the court of the rule that imposed the "reasonable promptness" requirement; Landlord was not arguing whether a motion to compel is required to, as the court stated, "force [Landlord] to do what the rules require [Landlord] to do without a Motion." In any event, the court's understanding of the applicable law was incorrect: if a party refuses to respond to discovery and the party seeking discovery wants to force the other party to respond, then a motion to compel is, indeed, necessary. Butler v. S & S P'ship, 435 Md. 635, 658-59 (2013). The discovering party is not permitted to sit back, do nothing about the opposing party's failure to respond, and then file a motion *in limine* at the 11th hour to exclude the evidence. That is not the law. Food Lion, Inc. v. McNeill, 393 Md. 715, 734-735 (2006).

> THE COURT: And he could have been sanctioned. You could tell your malpractice carrier you were sanctioned, but I don't think the rules require that he go through all that. So, that's more expense to his client. His client has already incurred the expense for them sending the interrogatories and now you want to add on to that expense by requiring a Motion to Compel as well. And the rules simply don't contemplate that you … always incur extra attorney's fees to get what the rule requires you to do.

After Tenant's counsel attempted to articulate prejudice resulting from Landlord's failure to respond to the interrogatories, both Landlord and the court came back to whether the "reasonable promptness" requirement applied to Tenant's motion, which the court again rejected by denying that Tenant's motion was a motion for sanctions:

> LANDLORD'S COUNSEL: No, that was the two questions on that, that's correct. And there were, there again, there is no prejudice, they're aware of the witnesses, they deposed Mr. Knott fully, that was almost a day. Again, the sanction would be inappropriate to exclude the witnesses at this time when the rule provides that if they want a sanction and a sanction would be to exclude the witness, that they need to promptly file a Motion. So, have we both --
>
> THE COURT: The rule does not say that you have to file a Motion.
>
> LANDLORD'S COUNSEL: If you want a sanction. Motion for Sanction[s] must be promptly filed.
>
> THE COURT: This is a Motion to exclude witnesses from trial.
>
> LANDLORD'S COUNSEL: That would be a sanction. That would be a sanction. The rule requires them to promptly file such a Motion. They can get fees for that Motion.
>
> THE COURT: Doesn't say it's the only way to get sanctions. Doesn't say that it's exclusive.

The circuit court then made its ruling:

> THE COURT: I don't think I've had many attorneys come in and say I didn't do anything the rules require me to do, even doing it late, when I knew that there was a problem after the Motion *in limine* was filed, I still didn't do it

> and I think that that is acceptable. The Court is going to grant the Motion *in limine*, will not permit the presentation of the testimony by witnesses from the Plaintiff because of the failure to answer any interrogatories.

To sum up, the court misunderstood Landlord's argument, mischaracterized the nature of Tenant's motion as a motion *in limine* (to exclude witnesses), and then determined (incorrectly, as shown below) that a court can exclude witnesses due to a discovery violation without a motion for sanctions. This reasoning allowed the court to side-step Landlord's contention that Tenant's motion was barred by the "reasonable promptness" requirement under Rule 2-432(d) as well as the motions deadline in the scheduling order which applied to all motions except motions *in limine*.

D. Applicable legal principles on which the circuit court erred

The law applicable here is rooted in Subtitle 4 of Title 2 of the Maryland Rules of Court. When a party flatly refuses to respond to interrogatories (as well other types of discovery), there are two potential pathways for the discovering party to obtain sanctions: (1) by filing a motion for immediate sanctions under Rule 2-432(a) which, if granted, permits the court to enter the sanctions in accordance with Rule 2-433(a); and (2) by filing a motion to compel responses under Rule 2-432(b), and, if the motion is granted but not complied with, following it up with a motion for sanctions under Rule 2-433(c). Butler, 435 Md. at 657-58 (citing Md. Rules Commentary, 341 (3d ed. 2003)).

The circuit court's misunderstanding of these rules was twofold. First, under Butler, a grievance about a discovery response (or lack thereof) is waived through inaction by the discovering party. 435 Md. at 656-660. Thus, Tenant's failure to file a motion constituted

waiver of its right to complain, and the court was legally incorrect in concluding that Tenant was not required to move to compel if it wanted to force Landlord to respond to discovery. See also Food Lion, 393 Md. at 734-35 (discovery violations should be raised and resolved during the discovery period).

Second, also under Butler, the circuit court is not permitted to sanction a party for a discovery violation in the absence of a motion for sanctions filed under the discovery rules. 435 Md. at 656-60. The Court of Appeals admonished:

> A circuit court may not, *sua sponte*, exclude an expert's report based on discovery violations found under Md. Rule 2-432, without a party first moving for an order to compel or filing a motion for discovery sanctions. When a discovery violation under that Rule has occurred, the issue must be before the trial judge before he or she may rule on it. "A court may award sanctions for failure of discovery, therefore, only when there is a discovering and moving party."

Id. at 658 (footnote omitted) (citing Hossainkhail v. Gebrehiwot, 143 Md. App. 716, 732 (2002)). In footnote 10 within the above passage, the Court elaborated on the point and concluded with this statement:

> Indeed, Maryland case law supports the notion that a trial judge has the discretion to impose the discovery sanctions he or she deems appropriate, *Rodriguez v. Clarke*, 400 Md. 39, 56, 926 A.2d 736, 746 (2009), but a party must raise the discovery violation by motion to compel or motion for discovery sanctions before that may occur.

Id. at 658, n.10.

Any way you look at it, the circuit court erred as a matter of law. If Tenant's motion was not a motion for sanctions, then under Butler, the court had no power to sanction Landlord for failing to respond to interrogatories. Alternatively, if Tenant's motion was a

motion for sanctions, then the court erred by: (1) not even considering whether good cause had been established to waive the "reasonable promptness" requirement in Rule 2-432(d) or the motions deadline in the scheduling order; and (2) failing to apply the Taliaferro factors, as explained below. Either way, the circuit court's ruling should be reversed.

II. The Majority's Opinion

A. The circuit court failed to apply the Taliaferro factors, and the majority improperly attempts to salvage the circuit court's result through its own analysis of those factors

A court must consider certain factors in considering a motion for discovery sanctions. Such factors—known as the "Taliaferro factors"—were identified by the Court of Appeals as follows: (1) whether the disclosure violation was technical or substantial; (2) the timing of the ultimate disclosure; (3) the reason, if any, for the violation; (4) the degree of prejudice to the parties offering and opposing the evidence, respectively; and (5) whether any resulting prejudice might be cured by a postponement and, if so, the overall desirability of a continuance. Taliaferro, 295 Md. at 390-91. Here, Tenant failed to mention the Taliaferro factors, and the circuit court failed to acknowledge, let alone apply, these factors.[5] The circuit court's failure to apply the Taliaferro factors requires a reversal here. Maddox v. Stone, 174 Md. App. 489, 502 (2007) ("we nevertheless will reverse a decision that is committed to the sound discretion of a trial judge if we are unable to discern

[5] Presumably this failure stems from the fact that the circuit court did not treat Tenant's motion as a motion for sanctions.

from the record that there was an analysis of the relevant facts and circumstances that resulted in the *exercise* of discretion") (emphasis in original).

The majority, however, gives the circuit court a pass by presuming the circuit court "knew and accurately applied the relevant law when determining an appropriate sanction for Landlord's failure to respond to interrogatories." Slip Op., n8. There are three problems with the majority's approach here. First, it is not enough to presume the trial judge knew and correctly applied the law, we must find that the record affirmatively shows that the trial judge understood and correctly applied the law. Maddox, 174 Md. App. at 502. In fact, that's our job. See Blackburn Ltd. P'ship v. Paul, 438 Md. 100, 108 (2014) ("If the trial court decision turns on a question of law, not a dispute of fact, we review the trial court's decision for legal correctness without deference.").

Second, the presumption is unwarranted here because the trial judge did not treat the motion as a motion for sanctions. On what basis, then, can we presume that the trial judge knew and applied the correct law? And, as explained above, the trial judge expressed a legally incorrect view of when discovery sanctions may be issued. This is not a situation where the claimed error lies in the circuit court's failure to "set out in detail each and every step of his [or her] thought process" as the majority contends. Slip Op. at 13-14. Rather, for the presumption to apply, the record must show that the trial judge's thought process aligned with the governing principles of law, even if the thought process itself was not fully explained. Here, the only information about the trial judge's thought process was the

hearing transcript, which demonstrates that the circuit court gave no consideration to the Taliaferro factors.

It is not our role to correct the circuit court's reversible error by furnishing an analysis that the circuit court *could have* used to arrive at the same result. As the Court of Appeals explained:

> We fully recognize that ruling on discovery disputes, determining whether sanctions should be imposed, and if so, determining what sanction is appropriate, involve a very broad discretion that is to be exercised by the trial courts. Their determinations will be disturbed on appellate review only if there is an abuse of discretion. That review, however, does not involve a search of the record for grounds, not relied upon by the trial court, which the appellate court believes could support the trial court's action. A "right for the wrong reason" rationale does not apply to the imposition of discovery sanctions as presented in the instant matter, because that rationale would have the appellate court exercising its discretion in the first instance. *See In re: Adoption/Guardianship No. 10935 in the Circuit Court for Montgomery County*, 342 Md. 615, 629-30, 679 A.2d 530, 537 (1996).

N. River Ins. Co. v. Mayor & City Council of Baltimore, 343 Md. 34, 47-48 (1996). This rule makes perfect sense because the discretionary nature of a decision generally means it could have been decided in more than one way. The majority ventured beyond its proper role by engaging in its own Taliaferro analysis to justify the result reached by the circuit court.

In any event, the majority's Taliaferro analysis is far too generous to Tenant. For example, the majority refers to Tenant's arguments, first made at the hearing, that it suffered prejudice. As summarized by the majority, those arguments were: (1) although "it had received the 2016 report prepared by Mr. Mulcahy, it had no reason to believe that Mr. Mulcahy would be Landlord's expert witness at trial"; (2) Tenant "was in possession

of numerous reports and estimates detailing differing levels of required repairs to the property"; (3) "Landlord's 'oral disclosure' of Mr. Mulcahy as an expert witness at the end" of his deposition "was insufficient because it occurred two months after the expert witness designation deadline and seventeen days prior to the close of discovery"; and (4) "the 'oral disclosure' did not detail all of the information sought in the interrogatories." The majority credits Tenant's unsupported contentions by concluding that Landlord's failure to respond to the interrogatories "contributed to Tenant's muddled state of mind and [that Landlord] acted in a manner inconsistent with the purpose of discovery." Slip Op. at 14-15.

None of Tenant's assertions of prejudice—made only at oral argument on the morning of the scheduled trial—have any merit. First, Tenant knew, because Landlord told Tenant on the record at the deposition taken close to one year before trial, that Mr. Mulcahy would be Landlord's expert. Tenant deposed Mr. Mulcahy, which alone demonstrates Tenant's understanding of his role in the case; but more importantly, the deposition provided Tenant with the opportunity to question him about the "numerous reports and estimates" regarding the necessary repairs. And, if Tenant did not know that Mr. Mulcahy would be serving as an expert, how could it have made a motion to exclude his opinions based on Rules 5-702, which applies only to expert testimony?

Second, Tenant's contention that the interrogatories covered more ground than the deposition (itself a dubious proposition) goes to the substance or sufficiency of a response. But here, the trial judge sanctioned Landlord because it provided *no* response; it was not

sanctioned for providing a deficient response. Any response to the interrogatories—even objections alone—would have taken Rules 2-432(a) and 2-433(a) out of play and forced Tenant to move to compel if it took issue with the substance of the responses. We can't speculate on the sufficiency of Landlord's response, had it given one. And we can't speculate on how the circuit court would have ruled if, unsatisfied with Landlord's response, Tenant had moved to compel a more complete answer. So, it simply cannot be said that but-for the mere failure to respond, Tenant would have had a more fulsome understanding of the expert's opinions.

The assertion that the interrogatory requested more information than the deposition is plainly wrong. At the deposition, both Landlord's counsel and Mr. Mulcahy stated that Mr. Mulcahy's expert testimony would be limited to the conditions of the properties as reflected in his 1997 and 2006 reports. The two reports were Exhibits 1 and 2 at the deposition. Mr. Mulcahy's CV was Exhibit 3. Mr. Mulcahy was questioned about both reports. Even a cursory review of the transcript from Mr. Mulcahy's deposition shows that he was asked about his education, experience, methodologies, and the factual basis for the statements made in the reports. Moreover, interrogatory responses regarding experts are typically drafted by attorneys to be broad and to encompass every possible opinion the designated expert might express. Tenant's expert designation is a case in point. See infra n.3. Here, there is not a single question that was asked in Tenant's interrogatories that could not have been asked at Mr. Mulcahy's deposition. Thus, Tenant's untimely and unsupported oral assertions of prejudice do not pass muster.

Third, Landlord relied solely on the *ipse dixit* of its counsel for its assertions of prejudice. Maryland Rule 2-311(c) requires that motions "state with particularity the grounds and authorities in support of each ground." See, e.g., Scully v. Tauber, 138 Md. App. 423, 431 (2001) (citing Surratt v. Prince George's Cty., 320 Md. 439, 469 (1990)). The rule goes on to require that the movant "attach as an exhibit. . . any document that the party wishes the court to consider in ruling on a motion" and that any "facts not contained in the record shall be supported by affidavit and accompanied by any papers on which it is based." Tenant made no assertion of prejudice in its written motion, let alone provided documents and affidavits supporting a claim of prejudice.

Finally, Tenant's assertion that the oral disclosure at the deposition was untimely because it came two months after the expert designation deadline and just 17 days prior to the close of discovery is unavailing. The scheduling order provided that Landlord must either provide "Plaintiff's Expert Reports or Md. Rule 2-402(g)(1) Disclosures by January 4, 2017." Landlord had complied with this requirement by producing the expert report even before it filed the lawsuit. Moreover, because Tenant waited until January 30, 2017 to serve the interrogatories at issue, Landlord's response was not due until three days *after* the deposition, on March 6, 2017.[6] Seen in that light, Tenant had all the information

[6] The certificate of service states that the discovery request was served by "email/pdf as agreed to by the parties. . ." Ordinarily, service by email is not recognized as a permissible means of service. Rule 1-321. Parties are, however, free to modify discovery procedures by "written stipulation." Rule 2-401(g). Other than Tenant's unilateral assertion in the January 30, 2017 certificate of service, I have not seen any indication that a written stipulation about changing the methods of permissible service was entered.

requested in the interrogatories *before* Landlord's responses to interrogatories were even due. So, Tenant had everything to which it was entitled when it deposed Landlord's expert.

At bottom, what the majority thinks or what I think about the prejudice factor doesn't matter. Only the circuit court's thought process matters. And since there is no indication that the circuit court even considered the prejudice issue, we have no reason to believe that it mattered to the circuit court.[7] But, Taliaferro and Maddox hold that it does matter.

B. The majority finds that Tenant's motion complied with the "reasonable promptness" requirement

The majority found that Tenant complied with the "reasonable promptness" requirement under Maryland Rule 2-432(d) because it first attempted to resolve the issue without filing the motion and filed the motion only when Landlord failed to respond. Slip Op. at 9.

Accordingly, the interrogatories should have been deemed served, if at all, by regular mail, which would have added three days to Landlord's time to respond pursuant to Rule 1-203(c). For this reason, the majority too quickly dismisses Landlord's assertion that it had not received the interrogatories. Technically, Landlord was not properly served. The certificate of service certifying service by email, and the email itself, proved only that Tenant's counsel emailed the interrogatories, not that Landlord's counsel received it. There are a host of reasons why the email may not have been received, getting snagged in a spam filter being one of them.

[7] In fact, we have reason to conclude that prejudice to Tenant did *not* matter to the circuit court based on its reflexive statement, made early in the hearing before Tenant's counsel even mentioned prejudice, that a witness not disclosed in interrogatory responses would not be permitted to testify.

The "reasonable promptness" requirement of Rule 2-432(d) is, of course, a subjective standard. Its subjectivity notwithstanding, the majority makes two fundamental errors in its finding of compliance.

First, the majority measures "reasonable promptness" against the January 8, 2018 email from Tenant's counsel requesting, if it had existed, a copy of the responses to interrogatories. That is the wrong reference point. The "reasonable promptness" standard should be measured against the timing of the discovery violation, not the informal attempts to resolve the issue. See Paul V. Niemeyer and Linda M. Schuett, Maryland Rules Commentary, 437 (3d. 2014) ("The motions permitted by this rule must be filed in compliance with Rule 2-311 and within a reasonably prompt time after the failure of discovery.").

Second, whatever else "reasonable promptness" may mean, at a bare minimum, it should mean that the motion can be fully briefed and decided prior to trial without short-changing the responding party's allotted fifteen days to respond under Rule 2-311(b). The bar cannot be set any lower than that. Yet here, with trial set to start on February 6, 2018, Tenant waited until January 31, 2018 to file its motion. And while Landlord chose to file its response before trial, it was not required to do so, and Landlord's decision to respond sooner does not retroactively make the timing of Tenant's motion reasonably prompt. Nor does it negate the fact that Tenant delayed its filing to the point that Landlord could have put on its case-in-chief *before* its response was even due.

The majority opines that finding non-compliance with the "reasonable promptness" requirement would undermine the "well-established policy encouraging parties to attempt to resolve discovery disputes whenever possible." Slip Op. at 9. This assertion does not square with the facts of this case. Discovery closed on March 20, 2017. The motions deadline was April 4. A settlement conference was scheduled on May 4, 2017. Tenant had plenty of time to move to compel or for sanctions within the scheduling order's deadlines. In fact, Tenant inquired about Landlord's overdue responses on March 8, but did not act until nearly one year later.

Tenant also had time to seek a reasonable modification of the scheduling order to file a discovery motion. On April 25, 2017, Tenant held a Rule 2-431 telephonic conference with Landlord about Landlord's failure to respond to the interrogatories. Notwithstanding its knowledge of Landlord's failure to respond and its effort to resolve the matter, Tenant chose not to file a motion.

That all changed when Tenant replaced its counsel, with new counsel entering an appearance on December 26, 2017, even though trial was scheduled to commence on February 6, 2018. On January 8, new counsel, in his effort to ensure he had a complete file, asked Landlord's counsel to provide a copy of its answers to interrogatories. New counsel then filed its motion to exclude on January 31, 2018, a week before trial.[8]

[8] The majority is also too generous when it credits Tenant with "continued efforts" or "reasonable promptness" because of the January 8th email. There is no explanation for Tenant's failure to file such a motion "reasonably promptly" after the first informal efforts had ended without success by April 26, 2017 at the latest. Even if the triggering event for the "reasonable promptness" requirement was the conclusion of the informal resolution

No one would dispute that parties should be encouraged to resolve discovery disputes informally. We must recognize, however, that sometimes those informal, good faith efforts leave the parties at loggerheads. At that point, the policy of encouraging informal resolutions has been satisfied, and another policy—the policy of promptly filing discovery motions—must then be satisfied. Here, once the informal efforts to resolve the dispute failed, Tenant had to decide whether to move to compel or move for sanctions. For whatever reason, Tenant chose not to do anything, and therefore by the time the case was ready to be tried, Landlord had every right to believe that it was no longer an issue. Simply put, Tenant had plenty of time to both seek an informal resolution and file a discovery motion within the scheduling order's framework. Waiting until a week before trial is, under any reasonable measure, untimely.

The majority is, in my view, too quick to dismiss the Landlord's contention that the discovery disputes should have been raised and resolved during the discovery period. On that issue, the Court of Appeals has stated:

> Discovery violations are cognizable by the trial court during the discovery process and, of course, are sanctionable when they are found. And, as we have seen, there are mechanisms in place for that to happen. It follows that discovery issues are best handled during the discovery period; that serves the interest of efficient trial administration. If, therefore, as the appellant maintains, the appellee's expert's report was a violation of discovery, and a substantial one, at that, it should have been, and could have been, addressed during the discovery process and, if determined to have been one, sanctioned as such.

efforts, a delay of over eight months before filing the motion is inexplicable and not within the realm of "reasonable promptness."

Food Lion, 393 Md. at 734-35.[9]

Under the majority's reasoning, an aggrieved party could defer triggering the "reasonable promptness" requirement, and hence gut its utility altogether, simply by deferring the initiation of a pre-motion dialogue. In fact, the motion could be deferred until after discovery closes and after the other party moves for summary judgment, thereby potentially mooting a properly-supported motion. That's not how the pretrial process is supposed to work.

C. The majority finds that Tenant's motion was not governed by the motions deadline in the scheduling order

The scheduling order imposed an April 4, 2017 deadline for "[a]ll motions (excluding motions *in limine*)." The majority correctly observes that Rule 2-504(b)(1)(E) requires a deadline for dispositive motions in a scheduling order, and from that premise concludes that Tenant's motion was "not a dispositive motion and is not the type of a motion that was required to be filed prior to the deadline set forth in the scheduling order." Slip Op. at 9. This reasoning is, I respectfully submit, flawed.

[9] The majority reads Food Lion too narrowly in its effort to distinguish it from the facts in this case. While it is true that in Food Lion the discovery issue raised at the last minute was the sufficiency of the interrogatory response as opposed to the failure to respond, its ultimate conclusion that the issue was untimely raised was merely an application of the general principle that discovery grievances will be deemed waived if not timely raised. I see no basis to exempt a complete failure to respond to discovery from that general principle. In fact, the rules make no such distinction: the "reasonable promptness" requirement under Rule 2-432(d) applies to all motions to compel as well as all motions for sanctions. The waiver principle discussed in Food Lion and in Butler, 435 Md. 635, therefore applies to all such motions.

Under Rule 2-504(a)(1), the entry of a scheduling order is required in every civil case unless the County Administrative Judge orders otherwise. Scheduling orders are construed in the same way as statutes, by looking first to the plain meaning of the words used. Butler, 435 Md. at 645-46. Construing the plain language chosen by the County Administrative Judge, the deadline for "[a]ll motions (excluding motions *in limine*)" was not limited to dispositive motions. Nor is this language limited by *any* of the provisions in Rule 2-504.

Rule 2-504(b)(1) and (b)(2) set forth mandatory and permissive contents for a scheduling order. Under Rule 2-504(b)(1)(E), the scheduling order must include a deadline for dispositive motions. Deadlines for other types of motions, including discovery-related motions, are permitted by Rule 2-504(b)(2). Here, the "all motions" deadline kills two birds with one stone by including both the mandatory deadline for dispositive motions and the permissive deadline for discovery motions.

In fact, the scheduling order has only one exception to the "all motions" deadline: motions *in limine*. Having chosen to expressly *exclude* motions *in limine* from the deadline, we should credit the County Administrative Judge with the intention to *include* discovery motions within that deadline. Simply put, the scheduling order means what it says: all motions except motions *in limine* were required to have been filed on or before April 4, 2017. That includes discovery-related motions.[10]

[10] It bears noting that here, the circuit court did not have the restrictive interpretation of "all motions" that the majority has adopted. The topic came up when the parties were arguing Landlord's motion to strike Tenant's jury demand. In response to Landlord's

CONCLUSION

Tenant's motion was a thinly-veiled and untimely motion for sanctions. Instead of treating it as such and applying the Taliaferro factors, the circuit court treated it as a motion *in limine* not subject to the time limitations under either Rule 2-432(d) or the scheduling order. This was a clear error of law that warrants reversal. It is not our job to scour the record to find a way to affirm the result on different grounds.

I therefore respectfully dissent.

counsel's contention that its motion to strike was not untimely under the motions deadline in the scheduling order, the circuit court disagreed, stating, "No, I think it's pretty clear. It says all Motions but Motions *in limine*." The court nevertheless granted the motion to strike jury demand under the premise that the court was permitted to take up the issue on its own.