

Circuit Court for Prince George's County
Case No. CAL17-12570

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2979

September Term, 2018

CHANNELL HUFF, ET AL.

v.

MULTI-SPECIALTY HEALTHCARE, LLC,
ET AL.

Friedman,
Shaw Geter,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: July 7, 2020

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

Channell Huff filed a medical malpractice claim against Sung Chul Kim, D.C.; Gladys Guccione, D.C.; and their employer, Multi-Specialty Healthcare, LLC (collectively, “Multi-Specialty”).¹ During discovery, Huff timely designated Jamie Bassel, D.C. as an expert witness.² Later, after the time for identifying experts had ended, Huff filed an amended designation, identifying Dr. Raymond Jacob, a board-certified neurosurgeon, as a second expert witness. Huff did not provide an expert report from Dr. Jacob.

Multi-Specialty moved to strike the designation of Dr. Jacob, the second expert, as untimely. The Circuit Court for Prince George’s County granted the motion to strike. As a result, Huff didn’t have an expert witness capable of testifying to the essential question in this case, whether Multi-Specialty’s treatment had caused Huff’s alleged injuries. As a result, the trial court granted judgment for Multi-Specialty at the close of Huff’s case. In this appeal, Huff argues that the trial court abused its discretion in granting the discovery sanction of striking Huff’s expert witness. Finding no abuse of discretion, we affirm the judgment of the circuit court.

BACKGROUND

Huff was involved in a car accident and suffered a neck strain. She sought treatment at Multi-Specialty, a healthcare practice that includes chiropractic services. She was first treated by Dr. Kim, who performed several “heat and rub” treatments. She was later treated

¹ Drs. Kim and Guccione are Doctors of Chiropractic, licensed by the Maryland State Board of Chiropractic Examiners pursuant to MD. CODE, HEALTH OPERATIONS § 3-301 *et seq.*

² Dr. Bassel is a licensed Doctor of Chiropractic in New York.

by Dr. Guccione who performed a “manual chiropractic adjustment” on her neck. According to the allegations in Huff’s complaint, these chiropractic treatments caused damage to a spinal cord stimulator that Huff had previously had implanted in her neck.³

Huff sued Multi-Specialty for allegedly negligent treatment that resulted in damage to her spinal cord stimulator. The Circuit Court for Prince George’s issued a scheduling order, which we have reproduced:

IN THE CIRCUIT COURT FOR
PRINCE GEORGE’S COUNTY, MARYLAND

CHANNELL HUFF,
Plaintiff,

v. Case No.: CAL17-12570

[MULTI-SPECIALTY] ET AL.,
Defendants.

* * * * *

TRACK 5T SCHEDULING ORDER

THIS ORDER is the only notice of deadlines and required Court appearances that the parties will receive. It may not be modified except by Order of Court following the filing of a Motion to Amend Scheduling Order. Stipulations between counsel are not effective to change any deadlines in this Order. Failure to comply with all terms of this Order may result in the imposition of appropriate sanctions.

³ As we understand it, a spinal cord stimulator is a device implanted in the patient’s body that delivers low-level electrical stimulation to the spinal cord to relieve pain.

This case is assigned to Civil Track 5T and to Judge Leo E. Green, Jr. for management purposes until an Assigned Trial Judge is designated....

The following dates are established:

I. DISCOVERY

- | | |
|----------|---|
| 10/24/17 | Any party seeking to add an additional party must file the appropriate pleading and serve the additional party on or before this date (not more than 90 days from the date of this Scheduling Order). |
| 11/24/17 | Deadline for amending pleading without leave of court (not more than 120 days from the date of Scheduling Order). |
| 8/1/18 | Deadline for completion of all factual discovery. |
| 1/24/18 | Deadline for identification of each person expected to be called by the Plaintiff as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the findings and the opinions to which the expert is expected to testify, a summary of the grounds for each opinion, and the production of any written report made by the expert concerning those findings and opinions, pursuant to Maryland Rule 2-402(g). |
| 4/23/18 | Deadline for identification of each person expected to be called by the Defendant as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the findings and the opinions to which the expert is expected to testify, a summary of the grounds for each opinion, and the production of any written report made by the expert concerning those findings and opinions, pursuant to Maryland Rule 2-402(g). |

5/24/18 Deadline for identification of “rebuttal” experts and compliance with Md. Rule 2-402(g).

8/1/18 Deadline for completion of all depositions, including expert witnesses. If appropriate, the parties should promptly comply with Md. Rule 2-416(g).

II. DISPOSITIVE MOTIONS

8/15/18 Deadline for the filing of all Dispositive Motions; Opposition to be filed within 15 days. When a Dispositive motion or an Opposition is filed, send a letter to the Assigned Trial Judge.

* * *

Sheila R. Tillerson Adams,
Administrative Judge

by

/s/ LEO E. GREEN, JR., JUDGE

Dated: 8/29/17

Although the scheduling order required Huff to disclose her expert witnesses by January 24, 2018, at the parties’ request, the circuit court, by order, extended that deadline to February 15, 2018. On that date, Huff timely designated Jamie Bassel, D.C. as an expert witness. Dr. Bassel was deposed by Multi-Specialty on May 11, 2018. At some point, Huff learned that Dr. Bassel could not testify as to the causation element, i.e., that the chiropractic manipulation of Huff’s neck caused harm to the spinal cord stimulator. As a result, Huff filed an amended expert witness designation, adding Dr. Raymond Jacob, a

board-certified neurosurgeon who, Huff believed, would opine that Multi-Specialty's treatment caused the damage.⁴ Multi-Specialty, however, moved to strike Huff's designation of Dr. Jacob as an expert witness, because Huff designated Dr. Jacob almost two months after the February 15 deadline. Huff then filed a Motion for Leave to Amend her expert designation naming Dr. Jacob. The circuit court granted Multi-Specialty's motion to strike the designation of Dr. Jacob and denied Huff's motion for leave to amend the scheduling order. As a result, Dr. Jacob was not permitted to testify at trial.

Huff next filed a Motion to Postpone trial, which was denied by the trial court. At trial, the court found that Dr. Bassel lacked the experience and expertise to testify as an expert witness regarding spinal cord stimulators and could not opine as to whether Multi-Specialty had caused Huff's alleged injury.⁵ Without this key piece of testimony, Huff was unable to establish a *prima facie* case for medical malpractice and, at the close of her case, the circuit court granted Multi-Specialty's motion for judgment.

ANALYSIS

Huff challenges the circuit court's decision to preclude the testimony of Dr. Jacob in two respects. *First*, she argues that her designation of Dr. Jacob was not untimely because she had, in her timely designation of Dr. Bassel, generally reserved her right to supplement

⁴ It is difficult for us to even evaluate the basis for this opinion as Huff failed to provide Dr. Jacob's expert report, in violation of Maryland Rule 2-402 (g)(1)(A).

⁵ Dr. Bassel was, however, permitted to testify as to chiropractic treatment generally and whether the specialists at Multi-Specialty had deviated from the standard of care. *See* MD. RULE 5-702 (regarding admissibility of expert testimony).

the filing. *Second*, she argues that even if her reservation was ineffective and her designation untimely, the penalty imposed was disproportionate, and therefore, an abuse of discretion.

I. DISCOVERY VIOLATION

Huff first challenges, in effect, whether a discovery violation even occurred in this case. Her argument springs from the notation, made in her timely February 15, 2018, designation of Dr. Bassel, that:

This designation is deemed preliminary as factual discovery has not been completed. Therefore, [Huff] expressly reserves her right to withdraw, amend, supplement, or revise this Expert Witness Designation as circumstances may require and/or justify.

A unilateral reservation is not effective. Scheduling orders are orders of the court and may not be modified unilaterally by a party. Although it would be true even if it did not say so, the court’s scheduling order is crystal clear that it could not be modified “except by Order of Court following the filing of a Motion to Amend Scheduling Order.” As a result, there can be no question that Huff’s designation of Dr. Jacob was untimely. We hold that the trial court did not abuse its discretion in finding a discovery violation.

II. DISCOVERY SANCTION

Having found that a discovery violation occurred, the circuit court was required to determine the appropriate sanction. Here, the court decided to preclude the testimony of the late-designated expert witness. Huff asserts that the sanction was disproportionate because it resulted in the defeat of her lawsuit.

Once a discovery violation is established, Rule 2-433 identifies a list of possible sanctions, including, as relevant here, “[a]n order ... prohibiting [the violating] party from introducing designated matters in evidence.” MD. RULE 2-433(a)(2). Before entering such a sanction, however, trial courts are required to consider the following six factors:

whether the disclosure violation was technical or substantial, the timing of the ultimate disclosure, the reason, if any, for the violation, the degree of prejudice to the parties respectively offering and opposing the evidence, whether any resulting prejudice might be cured by a postponement, and if so, the overall desirability of a continuance.

Taliaferro v. State, 295 Md. 376, 390-91 (1983). None of these factors are dispositive. Many overlap and they do not lend themselves easily to “compartmental[ization].” *Id.* at 391; see *Attorney Grievance Comm’n v. Kent*, 447 Md. 555, 577-81 (2016) (applying the *Taliaferro* factors). Although it is helpful for our review when trial judges explain their application of these *Taliaferro* factors in an oral or written opinion, it is not a bar to our review when, as here, there is no record. *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 426 (2007) (“[E]ven in the absence of a verbal indication of having considered” the necessary factors, we presume that trial judges know the law and how to apply it.). Understanding that the trial court is primarily responsible for ensuring compliance with scheduling orders and setting sanctions for their violation, we are deferential in our review and will only reverse if the trial court abuses its wide discretion. *Dackman v. Robinson*, 464 Md. 189, 231 (2019).

We review the six *Taliaferro* factors in turn:

- As to the first *Taliaferro* factor, “whether the lateness was technical or substantial,” the violation was substantial. The

identification of an expert is a critical milestone in trial preparation. *See Lowery v. Smithsburg Emergency Med. Serv.*, 173 Md. App. 662, 675 (2007) (holding that failing to provide an expert report was a substantial violation). Moreover, even when Huff finally designated Dr. Jacob, she did not produce an expert report from him as was required both by the scheduling order and Maryland Rule 2-402(g)(1)(A).

- The second *Taliaferro* factor, “how late the disclosure was,” weighs heavily against Huff. This disclosure was not just a few hours or days—the designation of Dr. Jacob was made two months late.
- As to the third *Taliaferro* factor, “the reason for the lateness,” we note that Huff has offered no reason to explain her tardiness. *See Shelton v. Kirson*, 119 Md. App. 325, 332 (1998) (holding that the appellant’s failure to offer an explanation for the late designation of her expert witness justifies the trial court’s exclusion of that witness). Although cases and circumstances certainly vary, we note that plaintiffs often have substantial time pre-suit to investigate their cases, decide on their theories of the case, and line-up expert witnesses.
- The fourth *Taliaferro* factor examines “the degree of prejudice to the parties” and this cuts against Huff as well. Multi-Specialty points out that, because of the manner in which the scheduling order is structured, Huff’s tardiness cut into its time to prepare a defense. If the designation of Dr. Jacob was allowed to stand, Multi-Specialty would have had extremely limited time within which to prepare for and depose Dr. Jacob (and without a report to help it understand his opinion) and identify, if possible, an opposing expert to counter Dr. Jacob’s opinion. We are not particularly impressed by Huff’s counter argument that *some* time remained for Multi-Specialty to perform these tasks. We do not believe the trial court erred in finding that the violation caused prejudice to Multi-Specialty.

We are not unmindful that the decision to bar Dr. Jacob’s testimony had a significant harmful effect on Huff’s case. Without that testimony, she was unable to provide any evidence to suggest that Multi-Specialty caused the injuries that Huff alleges. But we know of no case that requires a trial judge to predict the future or that allows an appellate court to apply 20/20 hindsight to see what the effect of the ruling was. Rather, the trial court must evaluate the prejudice knowable to

it at the time.⁶ We are not persuaded that the trial court necessarily could or should have predicted the dire consequences.

- Finally, we consider the fifth and sixth *Taliaferro* factors together, as both concern postponement. Huff did file a motion to postpone trial, but she did so a mere twelve days before trial was set to begin, at which point the trial court had already denied her motion to amend her expert designation and struck the amended expert designation naming Dr. Jacob. We are not persuaded, given this timeline, that a postponement would have cured Huff’s failure to properly identify a causation expert.

In the end, we conclude that all of the *Taliaferro* factors point toward sanctioning Huff. Although we cannot know from the record exactly how the trial court conducted this calculus, we do know that it didn’t abuse its considerable discretion in coming to a similar conclusion.

Although *Taliaferro* does not explicitly require a review of the proportionality of the discovery sanction, we agree with Huff that this idea runs through the discovery sanctions jurisprudence. *Fisher v. McCrary Crescent City, LLC*, 186 Md. App. 86, 135 (2009) (“We note that sanctions must be proportionate to the misconduct.”). Under the circumstances of this case, the trial court’s decision to preclude the testimony of the expert

⁶ Although cases generally require expert testimony to establish the applicable standard of care and causation in a medical malpractice case, *see, e.g., Jacobs v. Flynn*, 131 Md. App. 342, 354-56 (2000), there are cases that recognize that medical expert testimony is not required in those cases where negligence is so obvious that common knowledge or experience of jurors is sufficient. *E.g., Holzhauer v. Saks & Co.*, 346 Md. 328, 338 (1997). Thus, it would not necessarily have been apparent to the trial judge that precluding Dr. Jacob from testifying would be fatal to Huff’s lawsuit.

witness was an appropriate and proportionate sanction for Huff's late designation and failure to produce an expert report.

**JUDGMENT OF THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**