Circuit Court for Baltimore City
Case No. 24C15003444

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1725

September Term, 2016

JOHN J. WALTON, JR.

v.

JAMES R. LOGAN, *et al.*

Eyler, Deborah S.
Berger
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: December 5, 2017

On June 29, 2015, appellant John J. Walton ("Walton") filed a legal malpractice claim in the Circuit Court for Baltimore City against his former attorney, appellee James R. Logan ("Logan") and his law firm, James R. Logan, P.A. ("Logan, P.A.").[1] Walton's allegations stemmed from Logan's filing of a bankruptcy petition on Walton's behalf, after which adversary proceedings were brought against Walton for failing to disclose certain income and legal proceedings in his petition. After multiple motions hearings and pre-trial orders, the circuit court granted summary judgment in favor of Logan. The circuit court concluded, after Walton failed to timely designate an expert for his case in chief, that Walton could not prevail without expert testimony to establish the standard of care.

On appeal to this Court, we review the trial court's rulings to address two key questions: (1) whether the circuit court abused its discretion in denying Walton's motion to modify the scheduling order to permit his designation of an expert witness after the deadline; and (2) whether the circuit court erred in granting Logan's motion for summary judgment based on Walton's inability to establish, through expert testimony, that Logan breached the requisite standard of care.

BACKGROUND AND PROCEDURAL HISTORY

Walton alleged in his complaint that, as a result of Logan's failure to advise Walton of discrepancies and missing information in his petition, the United States Trustee filed an

[1] We refer to Logan and Logan, P.A. collectively as "Logan" throughout this opinion, except where it is necessary to distinguish the two.

adversary proceeding[2] against Walton delaying his bankruptcy case and requiring additional counsel fees to correct the omissions and discrepancies.[3] Walton claimed that the delay in the proceedings and the need to hire separate counsel to represent him ultimately caused more than $100,000 in damages. Walton's bankruptcy case ultimately closed in August of 2013.

After Walton filed a complaint against Logan on July 9, 2015, the circuit court entered a pre-trial scheduling order ("scheduling order") on October 8, 2015, which included a standard track timeline for the completion of discovery and the filing of all pre-trial motions. Three deadlines in the scheduling order are especially pertinent to this case: First, Walton was required to designate an expert witness for his case in chief by January 8, 2016; second, Logan was to designate an expert witness for his defense by April 8, 2016; and third, Walton was to designate any rebuttal expert witnesses by May 9, 2016. Additionally, the scheduling order required that all discovery issues, including the resolution of any discovery disputes, were to be completed by June 8, 2016, and any motions for summary judgment were to be filed by July 9, 2016. Finally, a jury trial was to begin on September 22, 2016.

[2] The term "adversary proceeding," which is governed by Part VII of the Federal Rules of Bankruptcy Procedure, includes multiple types of bankruptcy proceedings related to the bankruptcy petitioner's assets. These proceedings are described under Rule 7001, and they include "a proceeding to recover money or property," and a proceeding to determine the dischargeability of a debt. Fed. R. Bankr. P. 7001(1), (6).

[3] Walton's complaint indicated that the trustee filed the adversary proceeding against Walton on October 1, 2012.

Walton did not designate an expert witness for his case in chief by January 8, 2016 as the scheduling order required. Approximately a month after the deadline, Walton's attorney contacted Logan's attorney and requested that Logan consent to a modification of the scheduling order. Logan's attorney informed Walton's attorney that Logan would not be willing to consent to a modification, however, and that Logan had already started the process of designating expert witnesses for his defense. Some time later, Walton's attorney confirmed the substance of the conversation in a letter to Logan's attorney, dated March 29, 2016, which said:

> This is [to] confirm our discussion a month or so ago, wherein I requested whether or not Mr. Logan would consent to a motion to modify the scheduling order to permit Mr. Walton to designate an expert after January 8, 2016. You indicated that Mr. Logan would not consent. However, you also indicated that Mr. Logan was in the process of identifying an expert witness, which he planned to designate. In addition, Mr. Logan stated in his interrogatory answers that he would disclose an expert witness, presumably by April 8, 2016. If Mr. Logan has changed his mind, please inform me as soon as possible, because Mr. Walton may want to designate an expert even if Mr. Logan does not.

On April 8, 2016, Logan filed his designation of two experts as required by the scheduling order. Then, on May 9, 2016, Walton mailed a "Plaintiff's Designation of Experts" to Logan's attorney, which included the name of the expert witness, Marc Kivitz, his address, a statement indicating his curriculum vitae was attached, and that he "will testify regarding breach of the applicable standard of care and associated negligence and damages." On July 5, 2016, Walton's attorney mailed a copy of "Plaintiff's Supplement to Plaintiff's Expert Witness Designation," which included Kivitz's expert report. Nowhere

in the filing did Walton indicate that the expert would testify as a rebuttal witness only. Logan filed a motion to strike Walton's expert witness on June 8, 2016, and the circuit court held a hearing on the matter on August 4, 2016.

During the hearing, the court inquired into the circumstances of Walton's designation, whether he intended to call Kivitz as a rebuttal witness only, and the reason Walton's attorney had not included all of the information required under Md. Rule[4] 2-402(g)[5] with the designation. The court gleaned primarily two arguments made by Walton's attorney in response to its inquiries and noted the following:

> I've been the discovery judge here for a while. And so I'm not big about pointing and saying[,] but his stuff didn't have the same information. This is here on the motion that has been filed with respect to Mr. Kibitz. And whether in fact you had violated the scheduling order by not identifying this expert on time and by not providing the information that is required under 2-402. Your response to that is, he's a rebuttal witness. I think that's what you're telling me. Although you did use his affidavit, or report, or something on a Motion for Summary Judgment[.] [. . .] And then B) . . . you're saying to me, I think, that Judge, the Defendants, when they identified their experts, they didn't comply with 2-402. Well, that other argument is a little too late, because you didn't file a motion with respect to that.

[4] All references to Rules refer to the Maryland Rules.

[5] Rule 2-402(g)(1) permits a party to require by interrogatories that the other party "identify each person . . . whom the other party expects to call as an expert witness . . . ." Further, the Rule permits the requesting party to require a statement of the findings and opinions of any expert whom the other party expects to testify at trial and "any written report made by the expert concerning those findings and opinions." Md. Rule 2-402(g)(1)(A).

The court went on to consider various factors in determining whether to grant the motion to strike Walton's expert witness, including the prejudice to the Defendants in permitting the rebuttal witness to testify in Walton's case in chief, how to cure the prejudice caused by the delay, the importance of the expert's testimony, whether there was any bad faith on Walton's behalf, among other relevant facts. Ultimately, the court denied the motion to strike, explaining, "I am going to deny the Motion to Strike the Plaintiff's expert witness designation and I am permit[ing] the Defendants to depose Plaintiff's expert, Mark Kibitz, at a mutually agreed upon time and location prior to August 29th of 2016." At the end of the hearing, Logan's attorney asked the court to clarify whether the expert's testimony would be limited to rebuttal only. The court indicated that it was denying the motion to strike with the understanding that Walton was calling the witness only as rebuttal and that the order would therefore include language to that effect.

On June 23, 2016, which was prior to the hearing on Logan's motion to strike Walton's expert witness, Walton filed a consent motion to modify the scheduling order. In it, he requested, "to the extent that it may be necessary, to modify the scheduling order solely to extend the time by which to provide expert reports and to depose experts."[6] On August 29, 2016, the circuit court held a hearing on the motion, during which the circuit court asked Walton's attorney, numerous times, why he had not requested an extension of the deadline to designate an expert for his case in chief prior to the deadline to do so.

[6] Further, Walton observed "[i]t would be extremely wasteful use of judicial resources and the time and costs of litigants, to proceed to trial in a case where the Plaintiff would be required to elicit expert testimony, but could not do so."

After hearing the arguments of both parties during a lengthy conference at the bench,[7] the court gave the following order:

> I'm denying the request to modify the scheduling order. The request, which was filed on June 23rd, is requesting me to modify something that ended back in January. And the case has proceeded along under the current scheduling order and I [cannot], at this point, modify something that ended in January. There is prejudice to the Defendants. And so I'm denying the request for modification and the case will proceed to trial . . . September 22nd.

On July 8, 2016, Walton and Logan both filed motions for summary judgment. Walton attached to his motion his rebuttal expert's report. At the hearing on September 16, 2016, which focused primarily on Logan's summary judgment motion, Walton's primary argument was that the trial could proceed without an expert for Walton's case in chief because Logan's alleged malpractice was so obvious that expert testimony was unnecessary. The court took the arguments under advisement and, on September 21, 2016, granted summary judgment in favor of Logan and James R. Logan, P.A. In its written opinion and order, the court explained its rationale:

> In argument before me, counsel for the Plaintiff proffered . . . he intended to adduce evidence concerning such things as the Defendant's performance at a "341" hearing, in filling our various schedules required by federal bankruptcy laws, and the difference between and effects of proceeding under Chapter 7 and 11 of the federal bankruptcy laws. Not withstanding the esoteric nature of such matters when viewed through the eyes of a lay person, counsel felt that no expert testimony was substantively needed to proceed. This Court respectfully disagrees.

[7] The parties' arguments and the court's inquiries articulated during the bench conference are recited in further detail in our analysis.

> The bankruptcy process requires a specialized knowledge of the pertinent law that is beyond the ken of many, many experienced legal practitioners, much less the public at large. Calling on expert testimony to opine about the adequacy of the Defendant's representation is therefore a *sine qua non* to the Plaintiff's prosecution of this matter. Inasmuch as no such evidence will be adduced at the impending trial on the merits of this matter, the Defendant's Motion for Summary Judgment . . . is hereby GRANTED . . . . [8]

Walton timely appealed to this Court.

DISCUSSION

I. The Circuit Court Did Not Abuse Its Discretion in Denying Walton's Motion to Modify the Scheduling Order.

First, we address Walton's argument that

> the trial court should not have . . . denied Mr. Walton's motion to modify the scheduling order, without considering all of the relevant factors, and instead basing its decision solely on a finding of prejudice to the Defendants, especially since the prejudice to Defendants could have easily been cured.

By "all of the relevant factors," we assume Walton refers to the factors that we cited in *Dorsey v. Nold*, 130 Md. App. 237, 258 (2000), *rev'd*, 362 Md. 241 (2001).[9] For these

[8] The circuit court's order contained the following language: "the Defendant's Motion for Summary Judgment is hereby GRANTED; and it is further ORDERED that this matter is hereby DISMISSED without prejudice." During oral argument, Walton's attorney suggested that the language "without prejudice" permitted Walton to refile his case on the same set of facts. Although the court's language is peculiar, the circuit court's grant of summary judgment was a final disposition of the case on all claims for all parties. *See Moore v. Pomory*, 329 428, 432 (1993) (Citation omitted) ("[A] dismissal of the plaintiff's entire complaint 'without prejudice' does not mean that . . . the plaintiff may amend his complaint or file an amended complaint in the same action.").

[9] Walton cited our opinion in *Dorsey*, and the factors we recited there, within his argument on this point. In *Dorsey*, which was reversed on other grounds, we listed five factors appellate courts consider in determining whether a circuit court abused its discretion

reasons, he argues that the circuit court "erred and/or abused its discretion by refusing to allow Mr. Walton to present expert testimony for his case in chief, by denying Mr. Walton's Motion to Modify the Scheduling Order." There is no dispute, however, that Walton did not designate an expert prior to the January 8, 2016 deadline listed in the scheduling order and did not request an extension of that deadline from the court until he moved the court to modify the scheduling order on June 23, 2016.

Pursuant to Maryland Rule 2-504(a)(1), "the court shall enter a scheduling order in every civil action . . . ." Subsection (b)(1) of this Rule provides that the scheduling order include "one or more dates by which each party shall identify each person whom the party expects to call as an expert witness at trial, including all information specified in Rule 2-402(g)(1)," and "a date by which all discovery must be completed." *See* Rule 2-504(b)(1)(B), (D).

Regarding the court's ability to modify the timing prescribed by a Rule or order of the circuit court, Rule 1-204(a) provides in pertinent part:

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in excluding key testimony because of the proponent's violation of discovery rules. Those factors include the following:

> (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 respectively offering and opposing the evidence; and (5) whether any resulting prejudice might be cured by a postponement and, if so, the overall desirability of a continuance."

130 Md. App. at 258 (quoting *Eagle-Picher Indus., Inc. v. Balbos*, 84 Md. App. 10, 19, 578 A.2d 228, 232 (1990), *aff'd in part*, *rev'd in part*, 326 Md. 179 (1992)).

> When these rules or an order of court require or allow an act to be done at or within a specified time, the court, on motion of any party and for cause shown, may (1) shorten the period remaining, (2) extend the period if the motion is filed before the expiration of the period originally prescribed or extended by a previous order, or (3) on motion filed after the expiration of the specified period, permit the act to be done if the failure to act was the result of excusable neglect.

Md. Rule 1-204(a) (Emphasis added).

Therefore, when a party files a motion after the expiration of the period during which a particular filing was required, the Rule provides the circuit court with the discretion to decide whether to permit the filing "if the failure to act was the result of excusable neglect." *Id.* "Excusable neglect," although not defined expressly by Rules, requires something more than a party's mistaken belief that a filing may be made at a later date than required by the Rules or an order of the court. *See HI Caliber Auto & Towing, Inc. v. Rockwood Cas. Ins. Co.*, 149 Md. App. 504, 508 (2003).

We review a trial court's discretionary rulings -- including the decision whether to modify a scheduling order after a pertinent deadline -- under an abuse of discretion standard. *See Livingstone v. Greater Washington Anesthesiology & Pain Consultants, P.C.*, 187 Md. App. 346, 388 (2009). In doing so, we must determine that "the judge exercised discretion and did not simply apply some predetermined position." *Maddox v. Stone*, 174 Md. App. 489, 502 (2007). Where the decision is within the circuit court's discretion, we will not disturb its ruling "except on a clear showing of abuse of discretion[,] [that is, discretion] manifestly unreasonable, or exercised on untenable grounds, or for untenable

reasons." *State v. Wilkins*, 393 Md. 269, 279 (2006) (quoting *Gunning v. State*, 347 Md. 332, 351-52 (1997)).

In addition to specifying January 8, 2016 as the date by which Walton was to designate an expert witness, the scheduling order included the following language:

> This order is subject to modification, including the scheduling of the pretrial conference and trial, upon a written motion for modification filed within 15 days of the date of this order. Thereafter, **this order may be modified only upon a written motion for modification setting forth a showing of good cause that the schedule cannot reasonably be met despite the diligence of the parties seeking modification.**

(Emphasis added).

We note, preliminarily, that the circuit court's denial of a motion to modify the scheduling order is not a *per se* "discovery violation sanction." Instead, the court decided not to modify its previous order to retroactively permit Walton's late expert witness designation. The Court of Appeals in *Dorsey*, reversing our prior holding in that case,[10] explained:

> Rule 2–504 is not a discovery rule. It is not included in the Title 2, Chapter 400 rules on discovery . . . . Its function, to the extent it references discovery in § (b)(1), is to provide for the setting of time limits on certain discovery events; it is, in that regard, a rule of timing, not of substance.

362 Md. at 256 (Footnote omitted).

Here, the circuit court exercised its discretion not to modify its original scheduling order to retroactively extend the deadline by which Walton could designate an expert

[10] *See Dorsey*, 130 Md. App. 237.

witness to May 9, 2016 -- the date by which Walton was to designate his rebuttal expert witness. That decision was based on Walton's failure to comply with the timing requirements of the scheduling order.[11] The Court of Appeals explained in *Dorsey*:

> Just as there are sanctions for the violation of the discovery rules, sanctions are available for the violation of directives in scheduling orders, although they are not specified in any rule. *See Manzano v. Southern Md. Hospital*, 347 Md. 17, 29, 698 A.2d 531, 536 (1997). The offense justifying such a sanction is not just the non-disclosure itself, but the non-disclosure within the time set by the court for disclosure to occur. Apart from any actual prejudice that may be suffered by the party in not receiving the information in a timely fashion, or that may be suffered by the court if trial has to be postponed, the court is demeaned by noncompliance with its order.

Id. at 256-57 (Citation omitted).

We have explained that, "[i]n looking at the propriety of a sanction for a violation of a scheduling order, the reasons given for noncompliance, and the need for an exemption from the time deadlines imposed, are significant." *Livingstone*, 187 Md. App. at 388. We noted in *Livingstone* that we have,

> upheld a trial court's ruling excluding expert testimony when the expert was not identified until after the deadline set in the scheduling order. *See Shelton v. Kirson*, 119 Md. App. 325, 332, 705 A.2d 25 (no abuse of discretion in excluding

[11] The circuit court considered the principal factors articulated in *Taliaferro v. State*, 295 Md. 376, 391 (1983) when it denied Logan's motion to strike Walton's expert witness. The factors applied in the seminal case, *Taliaferro*, are the same factors we recited by this Court in *Dorsey*, 130 Md. App. at 258, which Walton cites as support for his argument that the circuit court did not consider all of the "required factors" in denying Walton's motion to modify the scheduling order. By including language permitting Walton's expert to testify as a rebuttal witness only, however, that decision had the same effect as a decision to strike Walton's case in chief expert. Walton does not appeal the circuit court's decision to limit his expert's testimony to rebuttal only; instead, Walton appeals the court's decision not to modify its scheduling order after the deadline for designating his expert witness.

> testimony of expert designated 12 months after the deadline), *cert. denied*, 349 Md. 236, 707 A.2d 1329 (1998).
>
> * * *
>
> A party's "good faith substantial compliance with a scheduling order is ordinarily sufficient to forestay" the exclusion of "a key witness because of a party's failure to meet the deadlines in its scheduling order." *Maddox*, 174 Md. App. at 501. Ultimately, however, "the appropriate sanction for a discovery or scheduling order violation is largely discretionary with the trial court." *Id.*

Id. (Internal quotation marks omitted).

In *Naughton v. Bankier*, we articulated a "barest minimum" standard that ensures the utility and practical certainty of a scheduling order:

> Indeed, 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.

114 Md. App. 641, 653 (1997) (Citation omitted). There, we held that a circuit court abused its discretion where it "permit[ted] a party to deviate from a scheduling order without a showing of good cause." *Id.* at 654.

At the August 29, 2016 hearing on Walton's motion to modify the scheduling order, the court considered the reasons given by Walton's attorney for Walton's delay in designating an expert, as well as the potential prejudice to Logan's defense caused by the delay. During a bench conference that lasted over fifteen minutes, the court sought from Walton's attorney some good cause justification for his and his client's delay in designating an expert and for failing to request an extension or modification of the scheduling order prior to the deadline for designating an expert.

The circuit court provided Walton's attorney ample opportunity to proffer some basis for the court to find that Walton's delay was the result of "excusable neglect." During the bench conference, the court implored Walton's attorney, "So, why didn't you designate an expert witness . . . before the deadline?" After Walton's attorney responded that Mr. Walton was undergoing cancer treatment, the court asked, "Why didn't you ask for an extension then?" Walton's attorney responded with the same explanation, and the court asked again, "So why didn't you ask for more of an extension . . . ?" Walton's attorney returned to his explanation that his conversation with Logan's attorney in February led him to believe he could still designate an expert. The court continued to give Walton's attorney a chance to explain: "You said you agreed with [Logan's attorney] about something. My question is, what was the agreement?" Walton's attorney responded:

> My understanding -- well, perhaps it wasn't an agreement. The understanding was that he had already retained experts, so they were going to use expert testimony in the case. So based upon that, I understood that; okay, if there's going to be expert testimony in this case where there might not need to be, right? If there's going to be expert testimony in this case, now I understood this at this point in time -- [t]hen we'll designate an expert witness.

Dissatisfied with his answer, the court explained the following:

> Sir, that doesn't make any sense . . . . It's not his case, it's your case. You're the moving party. You're the one that determines what you need and who you need to testify in your case. This has nothing -- he can call whoever he wants, the man on the moon. [. . .] I don't understand why from the very beginning you didn't designate an expert in this case . . . or request an

> extension of the time that you have to designate . . . an expert because he was undergoing treatments.[12]

One last time, the court asked Walton's attorney why the court should modify the scheduling order after the deadline, which resulted in the following exchange:

> [WALTON'S COUNSEL]: [B]ecause when it came time to designate an expert for our case in chief and he was having trouble getting that done, he thought about, okay, do I need to extend the deadline for this. And in good faith, I contacted [Logan's attorney] about it. And he indicated that . . . they've already started retaining their experts. [. . .] [A]t the time I understood that he still had time to designate an expert, because --
>
> THE COURT: How would you understand that? You had the scheduling order, didn't you?
>
> [WALTON'S COUNSEL]: Because of the . . . yeah, because the scheduling order provided a deadline by which to designate an expert.
>
> THE COURT: And it was what?
>
> [WALTON'S COUNSEL]: And it was May 9th . . .
>
> THE COURT: For your case in chief, when was your deadline? [Logan's counsel answered that the correct date was January 8, 2016] So you knew that you couldn't get it done by January 8th, so you should have requested an extension of time back in January or December. That's the part I'm so confused about. [. . .] I mean, clearly it says Plaintiff shall designate

[12] Walton's attorney argues on appeal, as he did during the hearings before the circuit court, that Walton's delay in designating an expert for his case in chief was caused by his need to undergo medical treatment for cancer, which began soon around the time of the deadline or soon after. As the circuit court noted during the hearing, the court may have considered Walton's financial and medical circumstances relevant, had Walton filed a motion to extend the deadline prior to January 8, 2016. He did not do so, however, and he apparently did not contact Logan's attorney until almost two months after the deadline had passed.

> experts three months from the date of this order, which was January 8th, 2016. And you never did that and you never requested extra time to do it.
>
> [WALTON'S COUNSEL]: And I understood that if he designated his expert on the deadline for designating a rebuttal expert, that he would have to --
>
> THE COURT: No, . . . you had til May 9th to designate any rebuttal experts.
>
> [WALTON'S COUNSEL]: Right. Which he did. And so unfortunately now . . . they're turning this timing of it from case in chief to rebuttal into a way to try to say; oh, now your case should be dismissed in its entirety . . .
>
> THE COURT: [. . .] They're not twisting anything, this is very clear. I don't understand what -- I don't understand your argument.
>
> [WALTON'S COUNSEL]: Well -- which -- well, any part of the argument or what part of the argument?
>
> THE COURT: I don't understand any part of the argument. [. . .] I don't understand why you wouldn't have requested additional time to designate your case in chief. And I just don't understand that. [. . .] You waited so long after the deadline in January to try to designate an expert witness.
>
> [WALTON'S COUNSEL]: I understand that, Your Honor. But let me just -- I don't know how I can say this other than to say that I thought that I was [ahead] of the situation by communicating with [Logan's Counsel].
>
> THE COURT: That doesn't make any sense, to communicate with him in March when you were supposed to have designated your experts by January 8th.

By the end of the bench conference, Walton's attorney had not pointed to any showing of a "good faith [or] earnest effort toward compliance" with the scheduling order. *See Naughton*, 114 Md. App. at 653. Instead, Walton's attorney tried, repeatedly, to

explain the delay in requesting a modification by referring to a conversation he initiated with Logan's attorney, which occurred *after* the designation was due. Even so, Walton was not permitted to wait and see if Logan designated experts for his defense before deciding whether an expert would be necessary. When that argument did not satisfy the court, Walton's attorney returned to his contention that he believed Walton could designate an expert prior to the rebuttal expert deadline and then rely on that witness to establish Walton's case in chief. But a mistaken understanding of the Rules is not a basis for finding "excusable neglect." *See HI Caliber Auto & Towing*, 149 Md. App. at 508.

As we explained in *Naughton*,

> [f]or a trial court to permit a party to deviate so from a scheduling order without a showing of good cause is, on its face, prejudicial and fundamentally unfair to opposing parties, and would further contravene the very aims supporting the inception of Rule 2-504 by decreasing the value of scheduling orders to the paper upon which they are printed.

114 Md. App. at 654.

Walton failed to file a motion to modify the scheduling order until almost five months after his deadline for designating a case in chief expert, and only two days before the date prescribed in the original order for the close of all discovery. It is clear from the record that the circuit court considered whether Walton had provided some showing of good cause for his failure to comply with the scheduling order and could find none. For these reasons, we hold that the circuit court did not abuse its discretion in denying Walton's motion to modify the scheduling order.

Ii. The Circuit Court Did Not Err in Granting Summary Judgment in Favor of the Appellee for the Appellant's Failure to Produce Evidence of the Duty of Care and the Breach of the Duty of Care.

Walton's second argument is that, even if the circuit court did not abuse its discretion in denying his motion to modify the scheduling order, the court erred in later granting Logan's motion for summary judgment based on Walton's failure to produce expert testimony. Although expert testimony is typically required to establish the standard of care in professional malpractice cases,[13] Walton argues that it was not necessary in this case because "the facts . . . are so egregious that this case represents an exception to the general rule that expert testimony would be required . . . ." We disagree.

A trial court "shall enter judgment in favor of" the movant "if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f); *see also USA Cartage Leasing, LLC v. Baer*, 202 Md. App. 138, 173, *aff'd*, 429 Md. 199 (2012) (Citations omitted). A fact is "material" when it "will somehow affect the outcome of the case." *USA Cartage Leasing*, 202 Md. App. at 174. We review the circuit court's decision to grant summary judgment in favor of the movant *de novo*. *See Columbia Ass'n, Inc. v. Poteet*, 199 Md. App. 537, 546 (2011) (citing *Walk v. Hartford Cas. Ins. Co.*, 382 Md. 1, 14 (2004)). Our inquiry is "whether the circuit court's grant of the motion was legally correct." *Sierra Club v. Dominion Cove Point LNG, L.P.*, 216 Md. App. 322, 330 (2014) (Citations omitted). Further, "we review the record in the light most favorable to

[13] See our discussion of the general rule requiring expert testimony in legal malpractice cases below.

the non-moving party and construe any reasonable inferences . . . against the moving party." *USA Cartage Leasing*, 202 Md. App. at 174 (Citation omitted) (Internal quotation marks omitted).

The plaintiff in a professional malpractice case bears the burden of establishing the same sequence of elements as is required in any other negligence action -- that is, duty, breach, causation and damages. *See Supik v. Bodie, Nagle, Dolina, Smith & Hobbs, P.A.*, 152 Md. App. 698, 717 (2003). In a legal malpractice case, these elements are described as: "(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." *Suder v. Whiteford, Taylor & Preston, LLP*, 413 Md. 230, 239 (2010) (quoting *Thomas v. Bethea*, 351 Md. 513, 528-29 (1998)). A defendant may prevail on a motion for summary judgment where the plaintiff cannot point to facts in the record that reasonably support each element. *See Supik*, 152 Md. App. at 717 ("The absence of any one of those elements will defeat a cause of action in tort."); *see also id.* at 717-18 (quoting *Owens-Illinois v. Armstrong*, 326 Md. 107, 121 (1992)) ("[A] cause of action arises 'when facts exist to support each element.'").

In a professional malpractice trial, the jury typically must determine whether the professional breached his or her duty by comparing the defendant's actions to the standard of care exercised by his or her "similarly skilled peers." *See Davis v. Armacost*, 234 Md. App. 71, 88 (2017) (holding that the trial court erred by permitting the jury to assess a health care provider's actions based on a "reasonable person" standard, rather than contemplating reasonable practices among practitioners in the same professional field). The defendant in a professional malpractice case is presumed to have exercised the

requisite care and skill, however, and it is therefore the plaintiff's burden to plead and show otherwise. *See Catler v. Arent Fox*, LLP, 212 Md. App. 685, 720 (2013) (quoting *Crockett v. Crothers*, 264 Md. 222, 224-25 (1972)) ("[T]he plaintiff bears the burden of overcoming the presumption that due skill and care were used.").

Thus, once a client has employed an attorney, he or she is entitled to the attorney's reasonable exercise of diligence, knowledge and skill. *See Taylor v. Feissner*, 103 Md. App. 356, 371 (1995); *see also Fishow v. Simpson*, 55 Md. App. 312, 318 (1983) (quoting *Caltrider,* 147 Md. at 340)) ("The law implies a promise on the part of attorneys that they will execute the business entrusted to their professional management with a reasonable degree of care, skill and dispatch."). Rather than the traditional duty to act with reasonable care, an attorney's duty to a client is to provide at least the minimum degree of care and skill that a reasonable attorney would provide under the circumstances. *See Taylor*, 103 Md. App. at 371.

To establish the requisite duty of care and to show that the defendant failed to meet that standard, the plaintiff must typically rely on expert testimony. *See Catler*, 212 Md. App. at 720 (quoting *CIGNA Prop. & Cas. Cos. v. Zeitler*, 126 Md. App. 444, 464 (1999)); *see also Franch v. Ankey*, 341 Md. 350, 361 (1996) ("Expert testimony of attorneys is admissible in attorney malpractice cases . . . for the purpose of establishing the standard of care for a reasonable, prudent lawyer in a particular situation." The Court of Appeals, in *Crockett*, explained the general rule requiring expert testimony in the following way:

> [G]enerally there must be produced expert testimony from which the trier of fact can determine the standard of skill and care ordinarily exercised by a professional . . . of the kind

> involved in the geographical area involved and that the defendant failed to gratify these standards.

264 Md. 222, 224-25 (1972) (Citations omitted). Explaining the role of expert testimony in legal malpractice cases in *Catler*, we said, "[a]lthough the existence of a legal duty is a question of law for the court, here the duty owed had to be established by expert testimony[,] [and] . . . whether or not a party satisfied its duty is reserved for the jury." 212 Md. App. at 722-23 (Citations omitted) (Footnote omitted).

A case may present an exception to the general rule requiring expert testimony to establish professional malpractice, however, "when the alleged negligence is so obvious that the trier of fact could easily recognize that such actions would violate the applicable standard of care." *Jones v. State*, 425 Md. 1, 26 (2012) (quoting *Shultz v. Bank of Amer.*, N.A., 413 Md. 15, 29 (2010)). As the Court of Appeals explained in *Schultz*, those cases involve circumstances that are within "the ken of the average lay[person]." 413 Md. at 29 (quoting *Saxon Mortg. Servs., Inc. v. Harrison*, 186 Md. App. 228, 290-91 (2009)). As the Court of Appeals explained in *Crockett*, "[T]here may be instances in which the negligence is so gross or that which was done so obviously improper or unskillful as to obviate the need for probative testimony as to the applicable standard of care . . . ." 264 Md. at 224 (Citations omitted). Thus, where the alleged conduct is so egregious, the finder of fact can rely on its own "common knowledge or experience" to "infer negligence from the facts." *See Central Cab Co. v. Clarke*, 259 Md. 542, 551 (1970) (quoting *Butts v. Watts*, 290 S.W.2d 777, 779 (Ky. 1956)); *see also Hooper v. Gill*, 79 Md. App. 437, 443 (1989) (explaining the exception to the general rule requiring expert testimony).

For instance, in *Central Cab Co.*, the Court of Appeals held that expert testimony was not necessary to establish a breach in the attorney's duty of care where the attorney failed to notify his clients that he was withdrawing from the case. 259 Md. 542. There, the client's were left without an attorney to appear on their behalf, resulting in a default judgment. *Id.* at 551. The Court held that the attorney's neglect was "such a clear violation of [the attorney's] duty as an attorney that the trial court should have ruled this as a matter of law." *Id.* The Court concluded that the situation was "analogous to cases involving medical malpractice in which a dentist pulled the wrong tooth," or where physicians "amputate the wrong arm, or negligently leave a sponge in a patient's body." *Id.*[14]

Other instances in which expert testimony was not necessary in medical malpractice cases include a doctor's use of a non-sterile needle to perform a liver biopsy where the hospital kept sterile and non-sterile needles in the same cabinet. *Suburban Hosp. Ass'n v. Hadary*, 22 Md. App. 186 (1974). Similarly, expert testimony was not required where an on-call emergency room physician failed to attend to a patient at all, even after being informed that the patient was hit by an automobile and exhibited obvious signs of life-threatening injuries. *Thomas v. Corso*, 265 Md. 84 (1972). The Court of Appeals in *Thomas* explained that expert testimony is unnecessary to explain that a "[f]ailure

[14] In another legal malpractice case, this Court held that expert testimony was not required where the attorney's "failure to inform [his client] of his impending financial interest in [his client's business transaction] was a clear violation of his fiduciary duty as [the client's] attorney, [and] was easily recognizable as such by a layperson." *Homa v. Friendly Mobile Manor, Inc.*, 93 Md. App. 337, 351 (1992).

altogether attend to a patient" falls below the physician's duty of care, "when common sense indicates that without attention the consequences may be serious." *Id.* at 98.

Other jurisdictions that follow the same general rule requiring expert testimony in legal malpractice cases have similarly held in only exceptional cases that expert testimony was not necessary to establish a breach of the professional standard of care. The most typical cases have involved allegations that the attorney failed to appear in court on his or her client's behalf, *see, e.g.*, *Bowman v. Doherty*, 686 P.2d 112, 120 (Kan. 1984), failed to file pleadings within the pertinent statute of limitations period, *see, e.g.*, *George v. Caton*, 600 P.2d 822, 829 (1979), failed to notify client of significant developments in his or her case, *see Guyton v. Hunt*, 61 So.3d 1085, 1090 (Ct. Civ. App. Ala 2010), or failed to take any significant action on the client's behalf, *see Wagenmann v. Adams*, 829 F.2d 196, 219-20 (1st Cir. 1987) (relying on Massachusetts law, expert testimony was not necessary where the attorney did "almost nothing to protect his client").

Notwithstanding these rare exceptions, Maryland courts typically adhere to the general principle that "the intricacies of professional disciplines generally are beyond the ken" of most laypersons. *Catler*, 212 Md. App. at 720; *see also Fishow*, 55 Md. App. 312 (Expert testimony was required to establish legal malpractice where the plaintiff's allegations involved the attorney's alleged failure to elicit certain testimony and introduce particular evidence at trial); *Taylor*, 103 Md. App. 356 (Expert testimony was required on remand where the attorney failed to properly assess the merits of a particular legal theory for an age discrimination claim); *Franch*, 341 Md. 350 (holding expert testimony was required, and thus, the trial court's exclusion of the plaintiff's experts rendered her unable

to establish her case alleging her attorney negligently advised her not to appeal the Workers' Compensation Commission's ruling terminating her benefits); *see also Royal Ins. Co. of Amer. v. Miles & Stockbridge, P.C.*, 133 F.Supp. 2d 747, 761 (D. Md. 2001) ("In this case, a jury would not be able to infer negligence from [the attorney's] decision not to file third-party claims based solely on the jury members' common experiences. Expert testimony is therefore required."); *Hall v. Sullivan*, 272 Fed. Appx. 284, 288-89 (4th Cir. 2008) (concluding that expert testimony was required under Maryland law where the plaintiff alleged the attorney incorrectly structured a franchise transaction and listed the wrong name as the franchisee).

In this case, the basis of the trial court's decision to grant summary judgment was its conclusion that Walton could not establish that Logan "neglect[ed] a reasonable duty" as Walton's attorney in his bankruptcy proceedings.[15] *See Suder*, 413 Md. at 239. Walton alleged in his complaint one count ("Tort") of legal malpractice.[16] The factual allegations

[15] In addition, Logan argued in his motion for summary judgment that Walton could not establish that the alleged malpractice was the proximate cause of the adversary proceedings against him, and that he was unable to prove the amount of damages caused with any reasonable certainty. As the circuit court did not base its order of summary judgment on this issue, we need not address it here.

[16] Under "Count I," Walton alleged that Logan and Logan, P.A. "breached their contractual duty and their legal duty of care to provide competent legal advice and representation, by failing to properly advise Client that his Bankruptcy Petition would need to include the Missing Information." It is well-established that whether a plaintiff alleges malpractice under a theory of breach of contract or breach of a professional duty of care, the standard is the same – that an attorney has a contractual duty to discharge his or her duties "with a reasonable degree of care, skill and dispatch." *Fishow*, 55 Md. App. 312, 318 (quoting *Caltrider v. Weant*, 147 Md. 338, 340 (1983)).

of misconduct were that Logan "failed to properly advise [Walton] that his Bankruptcy Petition would need to include information regarding a lease agreement . . . , information regarding his 2011 income, and information regarding lawsuits in which [Walton] was involved." As a result of Logan's alleged failure to properly advise Walton, Walton's bankruptcy petition omitted certain necessary information, which led the United States Trustee to file an adversary proceeding against him, delaying the conclusion of his bankruptcy case.

Walton's pre-trial statement detailed the allegations with more particularity, asserting that Logan "failed to advise" Walton in four ways: (1) That adversary proceedings could be filed against him if he did not disclose his rental income; (2) that the filing itself was contradictory – i.e., that Walton disclosed that he was paying thousands for a mortgage but indicated that he only received a few hundred dollars of income; (3) that publicly available information indicated Walton was involved with several lawsuits, but those lawsuits were not disclosed in the petition; and (4) that his rental income may have to be turned over. Walton also alleged Logan failed to assist him during the "341 hearing"[17] to clear up the missing information.

Throughout Walton's allegations, he contends that Logan should have conducted a more thorough investigation of Walton's financial circumstances, and that he should have advised him that the information he provided contained errors and omissions. It is telling,

[17] A "341 hearing," which is required by Section 341 of the U.S. Bankruptcy Code, is a "meeting of creditors" convened and presided over by the trustee assigned to the debtor's case, during which the trustee orally examines the debtor. *See* 11 U.S.C.A. § 341.

however, that Walton can point to no authority holding that an expert's testimony was not required where the malpractice claim stems from an attorney's allegedly inadequate legal advice. The absence of such caselaw is likely due, in part, to the nature of an attorney's role in advising laypersons in navigating complicated legal proceedings. Moreover, the realm of bankruptcy law, as the circuit court aptly observed, "is beyond the ken of many, many experienced legal practitioners, much less the public at large."

The alleged breach of duty in this case is unlike those instances in which a physician amputates the wrong leg. *See Central Cab Co.*, 259 Md. at 551. Indeed, a conscious patient in such circumstances would certainly stop the procedure to point out the physician's error. The same holds true for a patient who discovers that a physician is using a needle stored with non-sterile needles, *see Suburban Hosp. Ass'n*, 22 Md. App. at 186 -- no professional training is necessary to understand the need to use sterile needles or the consequences of not doing so. In this case, Walton's contention that Logan failed to advise him that excluding certain income from his bankruptcy petition could lead to adversary proceedings brought by the trustee assigned to his case does not fall within the common understanding of laypersons.

Moreover, Walton's allegations do not resemble cases in which the attorney failed to file a claim within the applicable statute of limitations period or failed to appear in court. This case is more complicated. Walton alleged that Logan should have discovered certain discrepancies in the information that Walton provided for his bankruptcy petition, and that he should have advised Walton of the consequences of not disclosing certain financial circumstances. Assuming a reasonable attorney would have conducted a more thorough

investigation and advised Walton differently, Walton carried the burden of establishing that standard with adequate expert testimony. Accordingly, the circuit court did not err in granting summary judgment in favor of Logan.

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