Circuit Court for Baltimore City
Case No. 24-C-17-001942

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 351

September Term, 2018

IN RE: SCOTT MILLER-PHOENIX

Kehoe,
Leahy,
Salmon
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: August 2, 2019

This appeal arises from the unusual circumstance in which a party's expert witness disappeared prior to trial. Scott Miller-Phoenix ("Appellant") filed a workers' compensation claim with the Workers' Compensation Commission ("WCC") against his employer, the Mayor and the City Council of Baltimore, ("Appellee" or "Employer"), claiming benefits for Post-Traumatic Stress Disorder ("PTSD"). The WCC found that Appellant "did not sustain an occupational disease of [PTSD] arising out of and in the course of employment[.]" Appellant appealed the decision of the WCC in the Circuit Court for Baltimore City, and, pursuant to Maryland Code (1991, 2016 Repl. Vol.), Labor and Employment Article ("LE"), § 9-745(d), requested a jury trial.

The circuit court issued a pre-trial scheduling order ("the Scheduling Order") on May 4, 2017, which, among other things, established deadlines for discovery and expert witness designations for each party in the case. A jury trial was set for January 17, 2018. Two months after the June 18, 2017 deadline for expert designations, Appellant identified his expert in answers to interrogatories on August 28, 2017. Counsel for Appellant began trying to contact the expert again in November 2017, and after experiencing difficulties in locating Appellant's expert witness, requested a postponement of the trial on January 11, 2018 (six days before the originally scheduled trial date). The court granted a postponement until February 22, 2018.

Appellant identified an entirely new expert witness 14 days before trial and disclosed his expert's report three days before trial. Employer moved to strike the expert testimony on the basis of prejudice and Appellant's scheduling order violations. After hearing the parties' arguments on the motion at the beginning of trial on February 22, 2018,

the circuit court granted Employer's motion to strike. Stating on the record that his case could not proceed without his expert, Appellant's counsel requested an "immediate appeal." On March 2, 2018, the circuit court entered an order granting Employer's motion to strike the expert testimony and affirming the WCC's decision denying Appellant benefits. Three days later, Appellant filed a motion to alter the circuit court's judgment, which the court denied without a hearing, on April 4, 2018.

Appellant presents three questions on appeal, which we have recast and consolidated as two questions:[1]

1. Did the circuit court abuse its discretion in granting Employer's Motion to Strike the testimony of Appellant's expert?

[1] In its brief, Appellant phrases his questions as follows:

1. "Did the Court abuse its [discretion] in granting Appellee's Motion to Strike Appellant's expert witness when the Motion was tantamount to a Motion *In Limine* and a) was not filed in Court and b) was filed past the date of the Scheduling Order, when the substance of Appellee's Motion was that Appellant had not identified his expert witness pursuant to the Scheduling Order?"

2. "Did the Court abuse its discretion in granting Appellee's Motion to Strike Appellant's expert witness when Appellant's failure was not a matter under his control—his original expert had disappeared and when the Court had previously postponed the matter, for the sake of the Appellant to find a new expert, not for the sake of the parties' being prepared for trial?"

3. "Did the Court err when it conflated the standard for review of administrative decisions with the nature of appeals of Workers' Compensation decisions?"

2. Did the circuit court apply the incorrect standard of review in affirming the decision of the WCC denying benefits to Appellant?

For the reasons explained herein, we hold that the circuit court abused its discretion in granting Employer's motion to strike Appellant's expert's testimony. In light of our holding, we need not address the second issue on appeal. Accordingly, we shall vacate the judgment of the circuit court and remand the case for further proceedings consistent with this opinion.

BACKGROUND

Appellant worked for Employer as a Baltimore City public school teacher. On December 28, 2016, Appellant filed a workers' compensation claim with the WCC against Employer, claiming that he suffered from PTSD as a result of "long term exposure to [a] harmful school env[i]ronment caused by school violations of civil rights and of employment contracts." The WCC ruled that Appellant did not sustain an occupational disease of PTSD arising out of and in the course of his employment and, therefore, denied his claim. On April 12, 2017, Appellant filed an appeal in the Circuit Court for Baltimore City, and requested a jury trial.

The Scheduling Order

The circuit court issued the Scheduling Order on May 4, 2017. Pertinent to this appeal, the Scheduling Order required that: Appellant identify experts by June 18, 2017; Employer identify experts by August 4, 2017; "[e]xpert designations [] include all information specified in Md. Rule 2-402(g)(1)(A)(B); all discovery be completed by September 3, 2017; any dispositive motions, including motions to exclude expert

testimony, be filed by October 3, 2017; and any motions *in limine* be filed "no later than 20 days before trial." The Scheduling Order provided the following with respect to motions for modification:

> This order is subject to modification, including the scheduling of the pre-trial and settlement 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. . . .

The court also scheduled the jury trial to begin on January 17, 2018.

The Expert Witness Dilemma

On August 28, 2017, almost two months after his expert designation deadline (June 18, 2017), Appellant filed his answers to interrogatories. In response to an interrogatory requesting Appellant to identify the experts he expected to call at trial, he answered that he expected to call Dr. Judith Ward as an expert witness at trial to testify that he suffered from PTSD as a result of his employment with Employer. He also answered in response to an interrogatory requesting, among other things, Appellant to identify any reports relevant to his case, that "Doctors' Reports [were] coming."[2]

[2] The record contains a certification that Employer noticed Dr. Ward's deposition on August 7, 2017. There is nothing in the record to indicate that a deposition of Dr. Ward ever took place. The record also shows that on September 8, 2017, Appellant sent Employer's counsel a copy of "medical records" compiled by Dr. Ward. These "medical records" consisted of Dr. Ward's progress notes from therapy sessions with Appellant and her psychological assessment of Appellant dated July 15, 2016.

On January 11, 2018—six days before the original trial date—Appellant requested a postponement of the trial, asserting that Dr. Ward had "disappeared." The court granted the request and postponed the trial until February 22, 2018. Seven days later, on January 18, 2018, Appellant filed a motion to modify the Scheduling Order on the basis of Dr. Ward's disappearance, requesting a new expert discovery deadline and another trial date so that he could have more time to find a new expert witness.[3]

While the motion was pending, Appellant's counsel notified Employer's counsel on February 8, 2018, of Appellant's new expert, Dr. Tali Shokek, and sent Employer copies of Dr. Shokek's progress reports from her initial therapy sessions with Appellant. The next day, counsel also forwarded a copy of the "Intake and Treatment Plan" that Dr. Shokek had completed for Appellant as part of a formal intake procedure.

On February 15, 2018, the circuit court denied Appellant's motion to modify the Scheduling Order, ruling that Appellant had already obtained one prior postponement due to the disappearance of his expert witness and that he failed to assert good cause for "a much longer postponement to permit retention of *an entirely new expert witness*." (Emphasis added). Three days before trial, Appellant's counsel sent Employer's counsel a copy of Dr. Shokek's expert report, dated February 19, 2018.

Trial *De Novo*

The parties appeared before the circuit court for a jury trial on February 22, 2018.

[3] Employer's counsel declined to consent to the motion for a modification and opted, instead, not to file an opposition.

In its "Self-Insured Employer's Motion to Strike Testimony of Dr. Tali Shokek, Psy. D.," Employer raised three grounds for striking Dr. Shokek's expert witness testimony and barring "reference to any evidence and/or arguments related to Dr. Shokek's evaluation or opinion" at trial. First, Employer argued that Appellant had failed to file any expert witness designations in the case, including one naming Dr. Shokek as an expert witness. According to Employer, Appellant only identified Dr. Ward—his first expert witness—in discovery responses as a potential expert. Second, Employer asserted that it received Dr. Shokek's initial treatment reports on February 8 and 9, 2018, leaving insufficient time for its own expert psychiatrist to review the reports in preparation for trial. Lastly, Employer argued that because Dr. Shokek was a psychologist and not a medical doctor, she was not qualified to render an expert opinion on Appellant's workers' compensation claim for PTSD. Appellant did not file a written opposition to Employer's motion to strike. At the court's invitation, Appellant's counsel explained that he "just got it yesterday, so[]" he had planned to orally oppose the motion. The court then heard the parties' arguments on Employer's motion to strike. [4]

The court asked about the materiality of Dr. Shokek's expert testimony, to which Employer's counsel responded that a compensation claim for PTSD requires expert medical testimony and Dr. Shokek was Appellant's only expert witness. Counsel

[4] The docket does not reflect an entry for Employer's motion to strike. At the beginning of trial, however, the court stated on the record: "Now I am aware that there is a motion, . . . that [Employer] ha[s] filed and I am going to consider that." Appellant acknowledged on the record that he had received Employer's motion the day before trial.

explained further that she received Dr. Shokek's "initial reports" on February 8 and 9, 2018, but did not receive her "causal relationship opinion," dated February 19, 2018, until February 19 or 20. Employer's counsel acknowledged that a postponement would give Employer additional time to prepare for trial, but emphasized the significance of Appellant's procedural violation and the tactical disadvantage it caused to Employer's defense.

The court asked Appellant's counsel about his efforts to secure Dr. Ward, to which counsel responded by explaining that he "began looking for Dr. Ward" around the end of November 2017 by contacting her place of work. After some unsuccessful attempts, counsel hired a private investigator, who identified Dr. Ward's residential address; counsel averred that he sent a letter to that address in December of 2017 and never got a response. When asked by the court if he had a copy of the private investigator's report and the letter he sent to Dr. Ward's home, counsel responded that he did not have those documents with him in court. Appellant's counsel then explained that he requested a postponement because he expected to hear from Dr. Ward eventually. Regarding his efforts to locate Dr. Ward after the court granted the postponement, counsel explained:

> After I was granted the postponement from the court I no longer attempted to contact Dr. Ward. Instead I had my client contact a new psychologist and we in fact found a new psychologist, a Dr. Shokek. And it's Dr. Shokek that we're using and as soon as I got the reports I sent them over.

Dr. Shokek first met with Appellant on January 18, 2018. Appellant's counsel acknowledged the importance of Dr. Shokek's expert testimony to his case and stated that "if we couldn't find somebody we'd be dead[.]" With regard to Dr. Shokek's qualification

as an expert, Appellant's counsel argued that Employer would be free to cross-examine Dr. Shokek about her qualifications.

Ultimately, the court granted Employer's motion to strike Dr. Shokek's expert testimony. In reaching the ruling, the court recognized that it had the discretion to impose a sanction for scheduling order violations and that it had to consider the parties' good faith adherence to the scheduling order and the factors from *Taliaferro v. State*, 295 Md. 376 (1983). The court acknowledged that "the more draconian sanctions. . . such as dismissing a claim or precluding the evidence necessary to support a claim, are normally reserved for persistent deliberate violations that actually cause some prejudice[,] either to a party or the court." Accordingly, the court found that a consideration of all of those factors "le[d] to the conclusion that the motion to strike Dr. Shokek should be granted[.]"

After the court excluded Dr. Shokek's testimony, Appellant's counsel stated, "[w]ithout my expert witness I cannot proceed." When the court asked what Appellant wished to do with his case, he responded: "I wish to take an immediate appeal." Appellant's counsel did, however, inquire with the court as to whether Employer's decision to file the motion to strike "one day before trial," despite the Scheduling Order's deadline requiring motions *in limine* to be raised 20 days before trial, changed the court's determination. In response, Employer's counsel asserted that she did not file a motion *in limine* but rather a motion to strike, which she would not have had any basis to file until she received the causal relationship report on February 19. The court ruled that Appellant's additional argument did not change her determination.

On March 2, 2018, the circuit court entered an order and an accompanying Memorandum and Opinion in which the court explained its ruling granting Employer's motion to strike Dr. Shokek's testimony and affirming the WCC's decision denying Appellant benefits. The court found that Appellant committed a "substantial violation" of the Scheduling Order because of the materiality of expert testimony to his case. The court noted that Appellant notified Employer of his plans to designate Dr. Shokek "only a few weeks before trial," and that Employer received Dr. Shokek's causal- relationship report just three days before trial. In the court's view, "the timing of this disclosure prejudiced Employer in preparing its defense." In considering the effect of a curative postponement, the court noted that it had already postponed the matter due to Appellant's difficulties in locating his expert. The court specified that "Appellant knew of the difficulties of locating Dr. Ward in November of 2017 and waited until January 11, 2018 to request a postponement." Accordingly, the court concluded that "additional postponement would [not] adequately address" Appellant's violations of the Scheduling Order. The court also observed that "[a]ssuming, without deciding, that Employer's Motion to Strike was in fact a motion in limine, Employer could have raised its objection to Dr. Shokek at trial" pursuant Md. Rule 2-517(a). The circuit court did not address Employer's argument with regard to Dr. Shokek's qualifications to render expert medical testimony.

Finally, the court applied the "substantial evidence" standard of review for appeals from administrative decisions and found that because Appellant "declined to proceed to trial following this [c]ourt striking the testimony of its expert witness . . . no testimony or evidence was taken contradicting the findings made by the [WCC]." The court, therefore,

concluded that there was substantial evidence in the record to support the WCC's decision, and affirmed.

Appellant filed a motion to alter the circuit court's judgment pursuant to Md. Rule 2-534 on March 5, 2018. On April 4, 2018, the circuit court denied Appellant's motion to alter the judgment without a hearing. Appellant noted his timely appeal to this Court on April 17, 2018. We shall furnish additional facts as necessary throughout our discussion.

DISCUSSION

I.

Motion to Strike Expert Witness

Before this Court, Appellant complains that the circuit court abused its discretion in striking his expert witness for two reasons: (1) the motion to strike was not properly or timely raised and (2) the *Taliaferro* factors weigh against the exclusion of Dr. Shokek.

We review the trial court's exclusion of an expert witness as a sanction under an abuse of discretion standard. *Butler v. S&S P'ship*, 435 Md. 635, 650 (2013).

A. Propriety of Employer's Motion to Strike

As an initial matter, we must determine whether Employer properly and timely raised the motion to strike Dr. Shokek's testimony. Appellant contends that Employer's motion to strike "was not filed in [c]ourt" and that the circuit court failed to consider that the motion was "tantamount to a Motion [*i*]*n limine*" and, therefore, violated the Scheduling Order's deadline for such motions. To the contrary, Employer avers that because it filed a motion to strike, and not a motion *in limine*, it did not violate the Scheduling Order. Even if the motion was tantamount to a motion *in limine*, Employer

argues that it could not have complied with the Scheduling Order's deadline because it received Dr. Shokek's causal relationship report just three days before trial and that, regardless, Employer could have raised a motion *in limine* at trial pursuant to Rule 2-517(a).

1. Preservation

We may decide, *sua sponte*, whether Appellant's contention that the motion to strike was not filed with the circuit court pursuant to Maryland Rule 1-323, has been preserved. *See Haslup v. State*, 30 Md. App. 230, 238-39 (1976) (raising *sua sponte* an unpreserved issue of admissibility). Pursuant to Maryland Rule 8-131(a), this Court will ordinarily "not decide any [] issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Appellant neither raised this issue before the circuit court[5] nor objected to the court's decision to hear the parties' arguments on Employer's motion to strike. In fact, the court stated on the record that the motion had been filed and that it planned to address the motion as a preliminary matter. Accordingly, we conclude that Appellant's contention that the motion to strike "was not filed in [c]ourt" is not properly before us.

[5] Appellant raised this issue for the first time in his post-judgment motion to alter the judgment, in which Appellant argued that although he received the motion to strike by email, the motion "did not contain a Certificate of Service and was not accepted for filing by the [c]ourt" pursuant Md. Rule 1-323. This Court, however, has held that "[a] party who does not raise an issue at trial, and later pursues the point in a post-trial motion, is precluded from raising the substantive issue on appeal." *Brown v. Contemporary OB/GYN Assocs.*, 143 Md. App. 199, 248 (2002); *see also Kraus Marine Towing Corp. v. Ass'n of Maryland Pilots*, 205 Md. App. 194, 223 (holding that because appellant failed to raise an equal protection argument before the trial court, he waived this contention as a basis for challenging on appeal the trial court's grant of a motion for judgment).

Even assuming that this contention has been properly preserved, and that there is a procedural violation due to the absence of a certificate of service, the procedural due process concerns underlying Rule 1-323 are not implicated in this case. The circuit court expressly referenced that Employer's motion to strike had been filed and Appellant's counsel acknowledged, on the record, that he had received Employer's motion the day before trial. Noting that Appellant had not filed a written opposition to the motion, the court inquired if Appellant's counsel was going to rely on his oral arguments, to which Appellant responded, "[t]hat is exactly correct," then argued his opposition to the motion before the court. Thus, although the record does not contain a certificate of service for Employer's motion to strike, the purpose of Rule 1-323 was fulfilled because Appellant received actual notice of the motion to strike prior to trial and argued his opposition to the motion before the circuit court. *Cf. Bush v. Public Service Comm'n of Maryland*, 212 Md. App. 127, 141 (2013) (holding that, under the facts and circumstances before the Court, "[e]ven if a procedural violation is presumed, actual notice cures the deficiency in the context before us"); *see also State v. Andrews*, 227 Md. App. 350, 370 (2016) (holding that there was no dispute that the notice of appeal was served on appellant's counsel and, therefore, appellant was not prejudiced by the violation of Rule 1-323). Accordingly, we see no error.

2. Timeliness of Motion

Appellant also contends that Employer's motion to strike "was tantamount to a motion *in limine*" and was, therefore, in violation of the Scheduling Order's requirement that such motions be filed no later than 20 days before trial. Appellant fails to cite to any

legal authority, nor are we aware of any, to support the proposition that this Court must construe Employer's motion to strike as a motion *in limine.* In any event, we agree with the trial court that Employer "could have raised its objection to Dr. Shokek at trial" pursuant to Rule 2-517(a), which provides that "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent." In sum, we conclude that the circuit court did not err in considering the motion to strike.

B. The Exclusion of Dr. Shokek's Testimony

Appellant posits that the *Taliaferro* factors weigh against the exclusion of Dr. Shokek's testimony and that because there was an absence of "willful or contemptuous or otherwise opprobrious behavior" on his part, "[d]iscretion called for postponement" and not the exclusion of "fundamental and essential evidence" as a sanction for violating the Scheduling Order. Appellant seems to argue that the violation of the Scheduling Order was only technical because the basis of Dr. Shokek's expert report had already been disclosed to Employer through medical records submitted at the workers' compensation hearing, Appellant's answers to interrogatories, and the expert report of Dr. Ward, his first expert. Moreover, Appellant argues that the untimely disclosure of Dr. Shokek's report was due to the unanticipated disappearance of Dr. Ward and Dr. Shokek's report was "submitted timely as prepared." With regard to the degree of prejudice to Employer, Appellant insists that it was minimal because Employer could have, but declined to, consent to his motion to modify the Scheduling Order.

Not surprisingly, Employer argues that the *Taliaferro* factors support the court's exclusion of Dr. Shokek's testimony. Employer insists that Appellant's late disclosure was a substantial violation because Appellant "waited more than seven months after the designation deadline to even identify Dr. Shokek, and he did not disclose her opinion until just three days before trial." According to Employer, "the [11]th-hour disclosure of Dr. Shokek's causal relationship opinion gave [it] virtually no time to prepare an expert rebuttal witness." And that, although a postponement may have provided the time necessary to mount a defense, it would not have redressed the prejudice suffered by the court as a result of Appellant's violation. In any event, Employer argues, the exclusion of Dr. Shokek was proper because Dr. Shokek is not qualified to render an expert opinion on PTSD because she is a psychologist, not a psychiatrist.

1. *Taliaferro* Factors

Pre-trial scheduling orders are governed by Maryland Rule 2-504. *Dorsey v. Nold*, 362 Md. 241, 255 (2001). "The principal function of a scheduling order is to move the case efficiently through the litigation process by setting specific dates or time limits for anticipated litigation events to occur." *Id*. (internal quotations and brackets omitted). In general, Rule 2-504 "[w]ith certain exceptions, [] requires the circuit courts to enter a scheduling order in every civil action and sets forth provisions that either must or may be included in such an order." *Id*; Md. Rule 2-504(a)(1). Pertinent to the instant appeal, Rule 2-504(b)(1)(B) requires a scheduling order to contain "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)[.]" As the Court of Appeals

enunciated in *Dorsey*, "Rule 2-504 is *not* a discovery rule." 362 Md. at 256 (emphasis added). "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." *Id.*

However, "[j]ust 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." *Id*. The decision to impose a sanction is committed to the sound discretion of the trial court. *Butler*, 435 Md. at 650. Although the abuse of discretion standard is highly deferential, "we nevertheless will reverse a decision that is committed to the sound discretion of a trial judge if we are unable to discern from the record that there was an analysis of the relevant facts and circumstances that resulted in the exercise of discretion." *Maddox v. Stone*, 174 Md. App. 489, 502 (2007) (emphasis omitted) (citation omitted). In deciding whether to exclude evidence, a court must consider the factors announced in *Taliaferro*:

> Principal among the relevant factors which recur in the opinions are [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, [5] whether any resulting prejudice might be cured by a postponement and, if so, the overall desirability of a continuance. Frequently these factors overlap. They do not lend themselves to a compartmental analysis.

295 Md. at 390-91. The court must also consider the parties' good faith compliance, or lack thereof, with the scheduling order. *Butler*, 435 Md. at 650; *see Naughton v. Bankier*, 114 Md. App. 641, 653 (1997) ("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.").

With regard to the type or severity of sanctions that the court may impose for a scheduling order violation, this Court is guided by

> the governing principle that the appropriate sanction for a discovery or scheduling order violation is largely discretionary with the trial court, and that the more draconian sanctions, of dismissing a claim or precluding the evidence necessary to support a claim, are normally 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) (citations omitted). Thus, "the imposition of a sanction that precludes a material witness from testifying, and, consequently, effectively dismisses a potentially meritorious claim without a trial, . . . should be supported by evidence of willful or contemptuous or otherwise opprobrious behavior on the part of the party or counsel." *Maddox*, 174 Md. App. at 507 (citing *Manzano v. Southern Maryland Hosp. Inc.*, 347 Md. 17, 29 (1997)). These sanctions "should be reserved for egregious violations of the court's order[.]" *Id*.

This Court in *Maddox* found an abuse of discretion in the circuit court's decision to exclude the appellant's sole expert witness for disclosing her expert's report 34 days after the deadline in the scheduling order. 174 Md. App. at 508. Maddox brought a negligence claim against Stone Electrical Contractors ("Stone") for personal injuries sustained from an electrical fire at her rental home. *Id*. at 493-94. Under the court's scheduling order, Maddox was to designate her expert witnesses and "all information specified in Md. Rule

2-402(f)(1)(A)" by March 24, and Stone's designations were due by April 24, 2006. *Id*. at 494. The close of discovery was scheduled for May 24, and trial was scheduled for July 24, 2006. *Id*. Maddox timely disclosed the names of her proposed experts, which included Mr. Wald, by the March 24 deadline. *Id*. at 495. However, Maddox did not disclose Mr. Wald's causation report, dated April 26, until April 27. *Id*. at 495. On May 1, Stone's counsel contacted counsel for Maddox, requesting that Maddox consent to its retention of an expert in light of its receipt of Mr. Wald's report. *Id*. at 496. That same day, Stone also moved to strike Mr. Wald, arguing that the late disclosure of Mr. Wald's report prevented its "ability to counter the new opinion by [] [Maddox's] expert." *Id*. In the alternative, Stone requested that the court extend its expert witness designation deadline and postpone the trial date. *Id*. While the motion was pending before the circuit court, Stone deposed Mr. Wald. *Id*.

At the motions hearing, the circuit court found that Mr. Wald's report was disclosed "a month and two days after the deadline" and, on that basis, granted Stone's motion to strike Mr. Wald's testimony. *Id*. at 496-97. After the court excluded Mr. Wald, Maddox's other causation expert passed away, prompting Maddox to request the court for permission to substitute Mr. Wald for the deceased expert. *Id*. at 497. The court denied Maddox's request. *Id*. Stone moved for summary judgment, arguing that Maddox could not prove causation without an expert. *Id*. Maddox conceded, and the court granted summary judgment for Stone. *Id*.

On appeal to this Court, we held that the circuit court abused its discretion in excluding the expert on two bases. *Id*. at 506-09. First, we reasoned that the record did

not reflect the court's consideration of any of the *Taliaferro* factors or the "exercise [of] any discretion at all in making its decision to exclude a material witness[.]" *Id*. at 506. Even if the court had exercised any discretion, "we fail[ed] to see how an order precluding the testimony of such witness would have been an appropriate exercise of discretion" in the absence of any "evidence of willful or contemptuous behavior on the part of" Maddox or her counsel:

> The names of experts were timely provided, and even though the specific opinions of [Mr.] Wald were not disclosed until 34 days after the scheduling order's deadline for providing the information required by Rule 2-402(f)(1)(A), the expert's detailed report was faxed to defense counsel within 24 hours after it was received by counsel for the appellants. Counsel cooperated in scheduling a deposition of the expert on a mutually agreed date that was prior to the date specified in the scheduling order for the close of discovery.

Id. at 508. We further explained that "[t]o exclude a key witness under such circumstances for the simple reason that there was only substantial compliance, rather than strict compliance, with the court's scheduling order appears to us to be an instance of allowing the tail to wag the dog." *Id*. Accordingly, we vacated the judgment of the circuit court and remanded the case. *Id*. at 508-09.

In the instant case, there is no contention that the circuit court did not exercise its discretion in granting Employer's motion to strike. The issue is, therefore, whether the court abused its discretion in granting the motion. Because the *Taliaferro* factors "frequently overlap[,]" as is the case here, and "do not lend themselves to a compartmental analysis," 295 Md. at 390-91, we will address them collectively.

It is undisputed that Appellant designated Dr. Shokek after the deadline for expert disclosures set by the Scheduling Order[6] and that Appellant's case relied substantially on expert witness testimony. We nevertheless reject Employer's reliance on this Court's decisions in *Lowery v. Smithsburg Emergency Medical Serv.*, 173 Md. App. 662 (2007); *Heineman v. Bright*, 124 Md. App. 1, 8-9 (1998); and *Naughton*, 114 Md. App. at 653-54; to support its proposition that Appellant's disclosure "was substantial and . . . unreasonably late." All three of these decisions are factually inapposite because none of the cases dealt with an untimely disclosure of an expert witness due to the unanticipated disappearance of the party's first, named expert, as was the case here.

We recognize as well that while Dr. Shokek was Appellant's only expert witness present in court to testify as to the causal relationship between Appellant's claimed PTSD and his employment, it would have been extremely difficult for Employer to have deposed Dr. Shokek on her expert opinion and have its defense expert adequately review and respond to the report in the three days before trial. *See, e.g.*, *Lowery*, 173 Md. App. at 676 ("The delay in obtaining the expert report did not allow appellees sufficient time to prepare their defense and was therefore prejudicial."). As discussed, however, this Court has made clear that the draconian sanction of excluding a key witness "should be reserved for egregious violations of the court's scheduling order, and should be supported by evidence

[6] Appellant's counsel did not identify Dr. Shokek until February 8, 2018, which was well past the discovery deadline, and disclosed Dr. Shokek's expert report on February 19, 2018, just three days before trial.

of willful or contemptuous or otherwise opprobrious behavior on the part of the party or counsel." *Maddox*, 174 Md. App. at 507. In this case, the record is barren of any such evidence. Appellant, initially, designated Dr. Ward as his expert in answers to interrogatories and disclosed Dr. Ward's expert report to Employer on September 8, 2017.[7] Although both of these disclosures occurred after the Scheduling Order's deadlines for expert designation and discovery, they were, nevertheless, well in advance of the originally scheduled trial date. There is also no evidence of Appellant's noncompliance with other discovery requests regarding Dr. Ward; in fact, she was never even deposed by Employer. Ultimately, Appellant explained to the court that his untimely disclosure of an entirely new expert witness, Dr. Shokek, in violation of the Scheduling Order was due to the unanticipated disappearance of Dr. Ward. There is nothing in the record to suggest that Dr. Ward did *not* disappear. Further, the record reveals that Appellant's counsel made several attempts to locate Dr. Ward before deciding to retain Dr. Shokek as a replacement.

Although in *Maddox*, the expert's report was disclosed prior to the close of discovery, in the instant case, Appellant could not have possibly complied with the expert designation and discovery deadlines in the Scheduling Order given that Dr. Ward unexpectedly disappeared *after* the close of discovery. *Compare Helman v. Mendelson*, 138 Md. App. 29, 44-45 (2001) (holding that exclusion of appellant's expert report was not an abuse of discretion because it was disclosed two months after the close of discovery in the scheduling order with no good cause for the delay, appellant's case rested entirely on

[7] At oral argument before this Court, Appellant stated, and Employer did not contest, that Dr. Ward's report was disclosed to Employer on September 8, 2017.

expert testimony, *and she had* "*during the entire course of this litigation, continually delayed providing appellees with the information necessary to prepare a defense*") (emphasis added); *Heineman*, 124 Md. App. at 8-9 (holding that exclusion of appellant's expert witness was not an abuse of discretion because appellant failed entirely to respond to discovery requests regarding her witnesses and instead, named her first witness two months after the close of discovery and her second witness two years after the close of discovery).

We are not persuaded by Employer's argument that Appellant was somehow dilatory in in failing "to even attempt to depose Dr. Ward" a few months before trial. We are unaware of any Maryland law requiring a party to depose his or her own expert witness.

Accordingly, in the absence of any evidence of "persistent and deliberate violations that actually cause[d] some prejudice" to Employer or the court, *Admiral Mortg., Inc.*, 357 Md. at 545 (citations omitted), it was an abuse of discretion for the circuit court to exclude Appellant's key witness as a sanction for his scheduling order violation.

2. Qualification to Testify

We shall next briefly address Employer's argument that Dr. Shokek, as a psychologist, was not qualified to testify. Employer cites to *State v. Williams*, 278 Md. 180 (1976), and argues that "a psychologist is not a *medical* doctor and, thus, is not qualified to provide expert medical testimony." Appellant does not address Employer's contention in this regard.

Employer's argument is without merit. The Court of Appeals has explained that "[p]rior to 1978, only a licensed psychiatrist was permitted to make a diagnosis as to

whether an individual was suffering from, or suffering a relapse of, a mental illness because the making of such a diagnosis constituted the practice of medicine." *In re Yve S.*, 373 Md. 551, 614 (2003) (citing *Williams*, 278 Md. at 184, 187) (additional citations omitted)). However, "[w]ith the passage of Chapter 481 of the Acts of 1978, now codified at [Maryland Code (1974, 2013 Repl. Vol.), Courts and Judicial Proceedings Articles ("CJP"),] § 9-120, *psychologists were allowed to give a mental diagnosis*." *Id*. at 614 (citations omitted) (emphasis added). Section 9-120 provides that "a psychologist licensed [in Maryland] and qualified as an expert witness may testify on ultimate issues, including insanity, competency to stand trial, and matters within the scope of that psychologist's special knowledge, in any case in any court or in any administrative hearing." CJP § 9-120.

In the instant case, the circuit court never addressed the issue of whether Dr. Shokek, as a psychologist, was qualified to render an expert opinion on Appellant's claimed PTSD. As Employer points out, however, this Court "may affirm a trial court's decision on any ground adequately shown by the record." *Castruccio v. Estate of Castruccio*, 239 Md. App. 345, 377 n.12 (2018) (citing *Offut v. Montgomery Cty. Bd. of Educ.*, 285 Md. 557, 564 n.3 (1979)). Section 9-120 of CJP belies Employer's argument because, as a licensed psychologist, Dr. Shokek is "allowed to give a mental diagnosis." Accordingly, to the extent that Employer contends Dr. Shokek's "lack of *medical* expertise" was "another basis for excluding her testimony," we disagree and, therefore, decline to affirm the circuit court's decision to exclude Dr. Shokek's testimony on this basis.

For the foregoing reasons, we vacate the judgment of the circuit court and remand the case for proceedings consistent with this opinion.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE MAYOR & CITY COUNCIL OF BALTIMORE.