

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 921

September Term, 2017

SHERRIE SALSER

v.

MICHAEL SALSER

Meredith,
Berger,
Arthur,

JJ.

Opinion by Berger, J.

Filed: February 13, 2018

This appeal arises from a divorce proceeding before the Circuit Court for Frederick County, Maryland. Michael Salser (“Husband”), appellee, filed for a limited or absolute divorce from Sherrie Salser (“Wife”), appellant. In response, Wife filed a counterclaim seeking alimony and a distribution of marital property. After Wife failed to comply with a discovery order, the circuit court struck Wife’s pleadings and barred her from seeking affirmative relief. The circuit court subsequently granted Husband an absolute divorce with no award of alimony or distribution of marital property.

Wife presents one question for our review on appeal, which we have rephrased as follows:

Whether the circuit court abused its discretion in striking Wife’s pleadings and barring her from seeking affirmative relief against Husband as a sanction for her discovery failures.

For the reasons explained herein, we shall reverse the judgment of the circuit court.

FACTS AND PROCEEDINGS

Husband and Wife were married on October 19, 1991 in Jacksonville, Florida. The couple have one natural child, now emancipated, and one adopted child. The adopted child, Kaylie, was born on August 24, 2005. The couple separated in October or November of 2015 and have lived apart ever since.

Husband, a registered nuclear medicine technologist, works at the U.S. Department of Veterans Affairs Hospital in Albany, New York. According to his pre-trial statement, Husband’s income is \$6,300 a month. According to his statement of marital and non-marital property, Husband has \$42,539.05 in a Thrift Savings Plan account.

Wife currently makes \$150 a week as a babysitter. Prior to 2002, Wife worked as a pharmacy technician in Harrisonburg, Virginia.¹ Wife suffers from chronic pain and has applied for disability benefits through Social Security. She was found fit to work, and her application was denied. Wife has a retirement account, but its value is not reflected in the record.

On June 24, 2016, Husband filed a complaint in the Circuit Court for Frederick County seeking, *inter alia*, a limited or absolute divorce, joint custody of Kaylie, a determination of marital property, and a marital award. Wife filed a counterclaim seeking, *inter alia*, a limited or absolute divorce, sole custody of Kaylie, child support, alimony, a determination of marital property, a marital award, and 50% of the marital portion of Husband's pension.

On August 26, 2016, Wife was served with a set of interrogatories and a request for production of documents. Wife did not respond. Husband sent three separate letters to Wife -- dated November 4, November 21, and December 14, respectively -- requesting a response. On December 20, 2016, Wife responded with answers to the interrogatories and six pages of documents, including a medical bill and two bank statements.

On December 22, 2016, Husband sent a letter to Wife alleging numerous deficiencies in her production of documents. More specifically, Husband complained that

¹ Wife's income as a pharmacy technician is disputed. Wife claims that she never made more than \$26,000 a year; Husband testified that her income was \$35,000 to \$40,000 a year.

Wife had given incomplete answers to five interrogatories and had failed to respond to nine document requests.² Husband warned that he would file a motion to compel if the deficiencies were not cured within fourteen days. Wife did not respond. On January 17, 2017, Husband sent a second letter asking Wife to cure the deficiencies by January 27. Again, Wife failed to respond.

On February 17, 2017, Husband filed a motion for an order compelling discovery and an award of attorney's fees and costs ("the Motion to Compel"). Additionally, Husband requested in his motion the following sanction:

That if the Defendant/Counter-Plaintiff fails to comply with the Court's Order, her pleadings be stricken and that she not be permitted to pursue affirmative relief in this matter[.]

Wife did not file an opposing motion. On March 13, 2017, the circuit court issued an order ("the Discovery Order") compelling Wife to provide the requested discovery within ten days. As Husband requested, the circuit court ordered that

if the Defendant/Counter-Plaintiff fails to comply with this Order, her pleadings shall be stricken and she shall not be permitted to pursue affirmative relief in this matter[.]

The circuit court also awarded Husband \$500 in attorney's fees and costs.

² For the purposes of this appeal, Husband is particularly concerned that Wife provided no supporting documentation for her financial statement and failed to disclose the existence and value of her retirement account.

Wife never provided the requested discovery. On April 12, 2017, Wife's counsel moved -- apparently at Wife's request -- to strike his appearance.³ The motion was granted on May 2, 2017. Wife did not attend the pre-trial conference, nor did she send a representative in her absence. On May 15, 2017 -- twenty-two days before trial -- Wife requested a postponement, citing her lack of counsel and "driving restrictions due to health reasons." The circuit court denied Wife's motion.

The trial was held on June 27, 2017. At trial, Wife asked for a continuance so that she could obtain new counsel. Wife made the following representation to the court:

I lost my attorney recently, through no fault of my own really close to the hearing date. I was unable to pay for his services. After contacting Legal Aid, I found they would need 45 to 60 days just to assign someone for a merits hearing for me.

Wife also claimed that health issues had made it challenging to prepare for trial:

Also, my second issue is that I've had health issues both in November of 2016, and as recently as May 1st of this year. I suffered seizure episodes, and it's delayed my ability to be able to properly defend myself in this matter, and, also, as far as that, the Maryland, the Department of Motor Vehicles makes a strong recommendation that it's 90 days post-seizure that you are not to drive; that also has limited my ability to prepare for this case.

Wife noted that her medical condition had not yet "stabilized" and that she was taking anti-seizure medication. Wife acknowledged, however, that the medication did not interfere

³ In a letter to Wife dated April 6, 2017, Wife's attorney wrote, "Per your request, this is a formal notice, pursuant to Rule 2-132 of the Maryland Rules of Procedure, of my intent to file a Motion for Strike Appearance [sic] to cease further representation of you in the above-referenced matter."

with her ability to understand or make decisions about her case. The trial judge denied Wife's request for a continuance, stating that "Ms. Salser has had an appropriate amount of time to gain new counsel, and she has not."

The trial judge also barred Wife from seeking alimony or a distribution from Husband's retirement funds. After confirming that Wife had not complied with the Discovery Order, the trial judge ruled that "Ms. Salser's pleading shall be stricken, and she shall not be permitted to pursue affirmative relief in this matter." The trial proceeded on the issues of divorce, child custody and visitation, and child support. At the conclusion of the trial, the circuit court granted Husband an absolute divorce and ruled that the parties would share joint legal custody of Kaylie. The circuit court also established a visitation schedule and ordered Husband to pay \$810 per month in child support. Wife timely appealed.

Additional facts will be discussed *infra* as they become relevant.

DISCUSSION

I. Standard of Review

We review a trial court's decision to impose discovery sanctions under an abuse of discretion standard. *Sindler v. Litman*, 166 Md. App. 90, 123 (2005) (citing *Warehime v. Dell*, 124 Md. App. 31, 44 (1998)). As we explained in *Sindler v. Litman*,

[o]ur review of the trial court's resolution of a discovery dispute is quite narrow; appellate courts are reluctant to second-guess the decision of a trial judge to impose sanctions for a failure of discovery.

Id. (citing *Warehime v. Dell*, 124 Md. App. 31, 44 (1998)); *quoted in Valentine-Bowers v. Retina Grp. of Washington, P.C.*, 217 Md. App. 366, 378 (2014); *see also Butler v. S & S P'ship*, 435 Md. 635, 650 (2013) (stating that “the appropriate sanction for a discovery or scheduling order violation is largely discretionary with the trial court”). “Even when the ultimate penalty of dismissing the case or entering a default judgment is invoked, it cannot be disturbed on appeal without a clear showing that [the trial judge’s] discretion was abused.” *Id.* (quoting *Mason v. Wolfing*, 265 Md. 234, 236 (1972)).

A trial court abuses its discretion when it adopts a view that “no reasonable person would take” or “acts without reference to any guiding rules or principles.” *Hanover Investments, Inc. v. Volkman*, 455 Md. 1, 33 (2017) (quoting *Wilson v. John Crane, Inc.*, 385 Md. 185, 198-99 (2005)). A trial court also abuses its discretion when it issues a ruling that is “clearly against the logic and effect of facts and inferences before the court, or when the ruling is violative of fact and logic.” *Id.* Under this standard, an appellate court may not reverse the trial court’s decision unless it was “well removed from any center mark imagined by the reviewing court.” *Santo v. Santo*, 448 Md. 620, 626 (2016) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 313 (1997)).

II. The Circuit Court Abused Its Discretion In Dismissing Wife’s Claims for Alimony and a Distribution of Marital Property.

Wife argues that the circuit court failed to make the necessary findings prior to striking her counterclaim and barring her from seeking affirmative relief. She further argues that the record was inadequate to sustain such findings because the Motion to Compel did not include the relevant discovery requests and responses. Husband argues

that the circuit court “carefully weighed its decision” and that Wife’s actions clearly warranted the ultimate sanction. In light of the perfunctory manner in which the sanction was imposed, we hold that the circuit court did not clearly exercise discretion in dismissing Wife’s affirmative claims. Accordingly, we shall reverse the judgment of the circuit court.

Although a trial court has broad discretion in imposing sanctions, “the trial court must have actually exercised discretion.” *Schneider v. Little*, 206 Md. App. 414, 436 (2012) (citing *Scully v. Tauber*, 138 Md. App. 423, 430-31 (2001)), *rev’d on other grounds*, 434 Md. 150 (2013). “The exercise of discretion must be clear from the record, and when it is not clear that the trial court exercised discretion, reversal is required.” *Id.* The record of the trial court’s deliberation is especially important when the sanction imposed is dismissal, because “[t]he rules and the courts ‘do not favor imposition of the ultimate sanction absent clear support.’” *Weaver v. ZeniMax Media, Inc.*, 175 Md. App. 16, 46 (2007) (quoting *Holly Hall Publ’ns, Inc. v. Cnty. Banking and Trust Co.*, 147 Md. App. 251, 267 (2002)). When deciding whether to impose a discovery sanction, a trial court should be guided by the following factors (“the *Taliaferro* factors”):

- (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.

Hossainkhail v. Gebrehiwot, 143 Md. App. 716, 725-26 (2002) (citing *Taliaferro v. State*, 295 Md. 376, 390-91 (1983)); *quoted in Valentine-Bowers, supra*, 217 Md. App. at 378.

We give trial courts “considerable latitude” in imposing sanctions for discovery violations. *Sindler, supra*, 166 Md. App. at 123 (quoting *Warehime v. Dell*, 124 Md. App. 31, 44 (1998)). Dismissal of a claim, however, “is warranted only in cases of egregious misconduct such as willful or contemptuous behavior, a deliberate attempt to hinder or prevent effective presentation of defenses or counterclaims, or stalling in revealing one’s own weak claim or defense.” *Weaver, supra*, 175 Md. App. at 46-47 (internal quotation marks omitted) (quoting *Manzano v. S. Md. Hosp., Inc.*, 347 Md. 17, 29-30 (1997)); *see also Fisher v. McCrary Crescent City, LLC*, 186 Md. App. 86, 125 n.24 (2009) (stating that dismissal “usually is appropriate when the noncomplying party engaged in contumacious or dilatory conduct, or disobeyed a direct order of the court”) (citing *Williams v. Williams*, 32 Md. App. 685, 695 (1976)).

As a preliminary matter, we note that the primary issue in this case -- the appropriateness of the sanction imposed upon Wife -- has been preserved for our review. Ordinarily, we will not decide an issue “unless it plainly appears by the record to have been raised in *or decided by the trial court.*” Md. Rule 8-131 (emphasis added). In this case, Wife never challenged the Discovery Order or the subsequent dismissal of her claims at the trial level. Nevertheless, in dismissing Wife’s claims, the circuit court necessarily decided such a sanction was “just” under the circumstances. *See* Md. Rule 2-433(c). Accordingly, we may inquire into the appropriateness of the sanction under the circumstances of this case.

A. *It Is Not Clear That the Pre-Trial Judge Exercised Discretion In Dismissing Wife's Claims.*

In granting the Motion to Compel, the pre-trial judge did little more than rubber-stamp a perfunctory motion. Maryland Rule 2-342(b)(2) provides that a motion for an order compelling discovery “shall set forth: the question, interrogatory, or request; and the answer or objection; and the reasons why discovery should be compelled.” Here, Husband failed to include the relevant document requests or Wife’s responses.⁴ Husband correctly points out that a motion for an order compelling discovery need not set forth the interrogatories or requests “when no response has been served.” Md. Rule 2-342(b)(2). It is undisputed, however, that Wife did serve a response, even if that response was, in Husband’s view, inadequate. Notwithstanding the motion’s technical deficiencies, the judge appears to have simply signed a draft order provided by Husband.⁵

Husband contends that Wife’s response was so inadequate as to be, in effect, a failure to respond. We disagree. To be sure, Maryland Rule 2-432(b)(2) specifies that “an evasive or incomplete answer is to be treated as a failure to answer.” It does not follow, however, that an evasive or incomplete answer should be treated as a failure to respond.

⁴ Attached to the Motion to Compel was a letter, dated December 22, 2016, which included the interrogatories and Wife’s allegedly deficient answers. The letter did not, however, include the document requests or Wife’s responses to them, beyond noting that, for four of the requests, no documents were produced.

⁵ The Motion to Compel and the Discovery Order are alike in font, formatting, and pagination. The Discovery Order has blanks for the date, the amount of attorney’s fees awarded, and the judge’s signature, which were filled in by hand. The relief granted by the Discovery Order is taken verbatim from the Motion to Compel.

Indeed, it would be difficult to accurately determine whether a party's response is evasive or incomplete when that response has not been included, along with the corresponding request, in the motion to compel discovery.

Furthermore, the manner in which the sanction was imposed makes it impossible to say at what point the circuit court exercised discretion or, indeed, if it exercised discretion at all. Critically, the circuit court did not immediately dismiss Wife's claims.⁶ Instead, the circuit court ordered that Wife's claims would be dismissed if she failed to comply with the Discovery Order. The circuit court evidently had not determined, as of March 10, 2017, that Wife's actions up to that point warranted the ultimate sanction. Consequently, the circuit court needed to revisit the issue at some point prior to imposing the sanction, preferably after Wife failed to comply with the Discovery Order. The circuit court did not revisit the issue, however, because the Discovery Order provided that the sanction would be imposed *automatically* upon Wife's non-compliance. At no time, therefore, did the circuit court clearly make a discretionary determination, guided by the *Taliaferro* factors, that the ultimate sanction of barring Wife's claims was warranted under the circumstances.

Husband maintains that, in issuing the Discovery Order, the judge found that Wife's hypothetical failure to comply would warrant dismissal. Such a procedure is inconsistent, however, with a proper consideration of the *Taliaferro* factors. In the ten days after the Discovery Order was issued, Wife might have advanced any number of factual allegations

⁶ The only immediate sanction imposed was \$500 in attorney's fees and costs.

or legal arguments that would have helped the court determine the reason for the violation, the degree of prejudice Wife would suffer as a result of the sanction, and the desirability of postponement as an alternative.⁷ The factual situation could change over time, moreover, in ways that would affect the court's analysis. A change in either party's financial position, for example, could alter the court's assessment of prejudice under *Taliaferro*. Without knowing the future, the circuit court could not reasonably determine ahead of time whether Wife's conduct would warrant dismissal.

A closer look at the Maryland Rules governing sanctions further undermines our confidence that the circuit court properly exercised its discretion. For most discovery failures, the discovering party must move for an order compelling discovery before she can move for sanctions.⁸ Md. Rule 2-432. If the opposing party fails to comply with the order, the trial court may impose a sanction “*upon motion of a party* and reasonable notice to other parties and all persons affected.” Md. Rule 2-433(c) (emphasis added).

Here, Husband filed -- and the circuit court granted -- a single motion requesting both an order compelling discovery and a sanction in the event that Wife failed to comply

⁷ It does not matter that Wife never, in fact, responded to the Discovery Order. We judge the reasonableness of the circuit court's decision in light of what the court knew at the time. Furthermore, by foreclosing the possibility that a response from Wife might alter its analysis, the circuit court improperly constrained its discretion.

⁸ Immediate sanctions may be imposed “if a party or any officer, director, or managing agent of a party or a person designated under Rule 2-412 (d) to testify on behalf of a party, fails to appear before the officer who is to take that person's deposition, after proper notice, or if a party fails to serve a response to interrogatories under Rule 2-421 or to a request for production or inspection under Rule 2-422, after proper service.” Md. Rule 2-432(b)

with that order. In essence, the circuit court collapsed a multi-step process into a single step. In doing so, the circuit court bypassed an opportunity to make a proper discretionary determination. Ideally, Husband would have been required to file a new motion for sanctions after Wife failed to comply with the Discovery Order. This would have given the circuit court a chance to determine, in light of the circumstances present *at that time*, whether Wife's failure to comply with the Discovery Order warranted the ultimate sanction. As it happened, the circuit court made no further inquiry into the matter until the trial.

Husband argues that when a party fails to comply with an order to compel, the court may impose a sanction without receiving a separate motion for sanctions. In support of this position, Husband cites *Butler v. S&S P'ship*, wherein the Court of Appeals stated that "a trial judge does not have the inherent authority to order discovery sanctions under Md. Rule 2-433 without a party moving for such an action, either by a motion to compel or a motion for discovery sanctions." *Supra*, 435 Md. at 661 (citing *Hossainkhail, supra*, 143 Md. App. at 730). We are not convinced, however, that the Court of Appeals implied in the quoted passage that a motion to compel is *sufficient* to authorize the imposing of a sanction under Maryland Rule 2-433(c).⁹ Assuming *arguendo* that the circuit court's

⁹ Such a conclusion would contradict the plain language of Maryland Rule 2-433(c), which provides that, when a party has failed to comply with an order compelling discovery, the court may impose sanctions "upon motion of a party." This language would be unnecessary if the motion to compel were, in itself, sufficient to authorize a sanction for failure to comply. *See also Hossainkhail, supra*, 143 Md. App. at 732 ("When a motion to compel discovery is granted and then violated, a court may award sanctions pursuant to [Rule 2-433(c)] 'upon motion of a party.'"). Husband has not provided a single case -- and

actions did not violate the letter of the Maryland Rules, we conclude, nonetheless, that the circuit court's decision to forego the additional step of a new motion for sanctions, combined with the other irregularities we have discussed, makes it impossible to determine whether the circuit court exercised discretion in dismissing Wife's claims.

B. It Is Unclear From This Record That the Trial Judge Exercised Discretion In Dismissing Wife's Claims.

Turning to the trial, it is not clear that the trial judge made an independent determination, guided by the *Taliaferro* factors, that Wife's actions warranted the ultimate sanction. The entirety of the trial judge's analysis, as reflected in the record, is as follows:

Also going to note that per Judge Solt's prior order, Judge Solt has awarded \$500 in favor of Husband against Wife, and I see no further responses to discovery. Therefore, Wife's pleading shall be stricken, and she shall not be permitted to pursue affirmative relief in this matter.

When Wife attempted to raise the issue of spousal support, the trial judge explained that she was precluded from doing so by the Discovery Order:

QUESTION: Well, you didn't comply with discovery. And, by order of Judge Solt, and I know I've looked at it a couple times --

ANSWER: Right. But I, I --

QUESTION: -- she indicated that --

ANSWER: -- I never knew where or how, in this proceeding, to address those issues, unless that's something to be brought up on appeal. Is that, that what I need to do at this point?

we know of none -- in which a Maryland appellate court has given its approval to a sanction imposed under Maryland Rule 2-433(c) without a separate motion for sanctions filed *after* the failure to comply.

QUESTION: What we need to do at this point is finish this trial.

ANSWER: Right. That's been --

QUESTION: Her order was March 10th. "Her pleading shall be stricken, and she shall not be permitted to pursue affirmative relief in this matter."

The trial judge proceeded to hear testimony on the issues of divorce and child support. Critically, the trial judge refused to make a determination of marital property even though Husband had requested such a determination in his complaint for a limited or absolute divorce.

As the transcript demonstrates, the trial judge made no inquiry on the record into the *Taliaferro* factors.¹⁰ In preventing Wife from seeking alimony or a division of marital property, the trial judge was merely following the pre-trial judge's Discovery Order. The trial judge did not make an independent finding that such a sanction was warranted under the circumstances. In particular, the trial judge made no findings on the record concerning the gravity of Wife's violation, the reason for the violation,¹¹ or the degree of prejudice

¹⁰ We do not suggest that a trial court is obliged in every case to make findings on the record prior to imposing the ultimate sanction. Explicit findings may be unnecessary when a motion for sanctions is unopposed. *See Warehime, supra*, 124 Md. App. at 51. Nevertheless, it must be clear from the record that the trial court exercised its discretion, especially when the trial court departs from the normal procedures in dismissing a party's claims.

¹¹ Dismissal may not be justified, for example, where the discovery failures were caused by a party's counsel. *See Hart v. Miller*, 65 Md. App. 620, 628 (1985) ("In the case *sub judice* there is not a scintilla of evidence that the plaintiff was responsible for or aware of the delay in failing to respond to Interrogatories."); *but see Valentine-Bowers, supra*, 217 Md. App. at 380-81.

that either party might suffer as a result of imposing or withholding the sanction. The trial judge merely confirmed that Wife had not complied with the Discovery Order.

Before striking Wife's counterclaims and barring her from seeking affirmative relief, the circuit court was required to make a discretionary determination, guided by the *Taliaferro* factors, that such a sanction was warranted under the circumstances. It is not clear, however, that the circuit court exercised any discretion in imposing the ultimate sanction on Wife. We see no reason to prevent a spouse of twenty-five years from seeking alimony or a distribution of marital property on the basis of an order issued upon a perfunctory motion, especially where the issue of marital property was independently raised by the other spouse. We hold, therefore, that the circuit court abused its discretion in striking Wife's counterclaim and in barring her from seeking alimony and a distribution of marital property.¹²

Although the parties do not dispute the circuit court's judgment with regard to child support, the calculation of child support may be affected by an award of alimony. Md. Code (1984, 2012 Repl. Vol., 2016 Supp.), § 12-204 of Family Law Article ("Fam. Law"); Fam. Law § 12-201; *see also Malin v. Mininberg*, 153 Md. App. 358, 412 (2003) (holding that the circuit court erred in failing to consider alimony in calculating child support). Accordingly, we vacate the circuit court's award of child support so that, on remand, it can be re-calculated as needed. Pursuant to Maryland Rule 8-604(b), we shall affirm the severable part of the judgment by which Husband was granted an absolute divorce from

¹² Because the circuit court did not exercise discretion, we need not decide whether Wife's discovery failures did, in fact, warrant dismissal of her claims.

Wife, as well as the determination of custody and visitation rights. *See Tydings & Rosenberg, LLP v. Zorzit*, 422 Md. 582, 596 (2011) (affirming the circuit court's grant of absolute divorce and remanding for further proceedings on the remaining issues).

**JUDGMENT OF THE CIRCUIT COURT FOR
FREDERICK COUNTY REVERSED IN PART,
VACATED IN PART, AND AFFIRMED IN PART;
JUDGMENT STRIKING APPELLANT'S
PLEADINGS REVERSED; JUDGMENT
GRANTING CHILD SUPPORT VACATED; ALL
OTHER JUDGMENTS AFFIRMED; CASE
REMANDED FOR FURTHER PROCEEDINGS
NOT INCONSISTENT WITH THIS OPINION.
COSTS TO BE PAID BY APPELLEE.**