Circuit Court for Baltimore County
Case No. C-03-CV-19-000282

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1064

September Term, 2020

BUILDING NO. 2, LLC

v.

STANLEY S. FINE, ET AL.

Kehoe,
Berger,
Ripken,

JJ.

Opinion by Berger, J.

Filed: October 12, 2021

This is an appeal from an Order entered by the Circuit Court for Baltimore County in favor of Rosenberg Martin Greenberg, LLP ("RMG"); Caroline L. Hecker ("Hecker"); and Stanley S. Fine ("Fine").[1] The underlying case arose from a dispute between Building No. 2, LLC ("Building No. 2") and Appellees regarding real property ownership and rights surrounding a developed property.

During pre-trial procedures, and one month after the close of discovery, Building No. 2 filed a motion to substitute an expert witness, alleging that its prior expert witness was no longer able to testify due to an alleged conflict of interest with Appellees' counsel. Appellees opposed the motion, arguing that Building No. 2 had not shown good cause to support its belated request. Further, Appellees filed a motion for summary judgment, contending that Building No. 2 could not provide any evidence of damages without the testimony of an expert witness. The trial court denied Building No. 2's motion to substitute an expert witness and granted summary judgment in favor of Appellees. Building No. 2 filed a motion to alter or amend the judgment or, for reconsideration of, the trial court's order. The trial court denied the motion. This timely appeal followed.

Building No. 2 presents three questions for our review,[2] which we have rephrased, for clarity, as follows:

[1] For clarity, we shall refer to RMG, Hecker, and Fine collectively as "Appellees" and individually as indicated above.

[2] Building No. 2's original questions presented are as follows:

I. Whether the trial court abused its discretion when it denied Building No. 2's motion to substitute an expert witness filed after the close of discovery.

II. Whether the trial court erred in granting Appellees' motion for summary judgment.

III. Whether the trial court abused its discretion when it denied Building No. 2's motion to alter or amend or, for reconsideration of, the trial court's order.

For the reasons stated herein, we shall affirm the judgment of the Circuit Court for Baltimore County.

FACTUAL AND PROCEDURAL BACKGROUND

Building No. 2 is a Maryland limited liability company that was formed by Edwin Hale, Sr. ("Hale"). Hale formed Building No. 2 for the purpose of managing and operating real properties in the neighborhood of Canton in Baltimore, Maryland. Hale also founded

1. Whether the trial court abused its discretion in denying Building No. 2's motion to substitute expert witness, where Building No. 2 demonstrated good cause for the substitution, lack of prejudice to the Appellees, and a complete lack of willful or contemptuous behavior on the part of Building No. 2 and counsel?

2. Whether the trial court erred in granting summary judgment on the sole basis that Building No. 2 did not have evidence of damages as a result of the trial court's errant order denying Building No. 2's substitution of its expert witness on damages?

3. Whether the trial court abused its discretion in denying Building No. 2's motion to alter or amend, where Building No. 2 demonstrated that the trial court failed to exercise its discretion properly?

Canton Crossing, LLC for the purpose of redeveloping a large area of Canton in conjunction with the 2001 enactment of the Canton Crossing Planned Unit Development ("CC PUD"). The CC PUD granted a plan for a 67.5-acre parcel of land in Canton to be redeveloped for various residential and commercial uses. Hale, through various business entities, owned several individual properties within the CC PUD.

The CC PUD was amended numerous times over the following fifteen years. From 2003 until early 2016, RMG, and specifically, Fine and Hecker, provided legal services to Hale and his entities with respect to litigation and amendments related to the CC PUD. Appellees advised Hale and his entities throughout the lengthy process.

Following the enactment of the CC PUD, Hale conveyed portions of his ownership of the properties within the CC PUD to other commercial developers and real estate owners. Beginning in 2009, an entity known as Corporate Offices Properties Trust ("COPT") began purchasing a number of properties from Hale and his entities. Building No. 2 retained ownership of all of its properties.

In 2009, COPT retained the legal services of RMG to represent COPT and its related entities with interests in the CC PUD. Several years later, COPT used the services of RMG to carry out its desire of further amending the CC PUD, which included making significant changes to the allocations of development rights among the properties that were a part of the CC PUD. During all of the relevant times, none of the Appellees terminated their representation of Hale or his entities, including Building No. 2. Appellees also did not limit their scope of representation.

While representing COPT's interests, RMG proposed an amendment that would reduce Building No. 2's development rights from 500 residential units to 350 units. The CC PUD amendment allocated 150 residential units to a COPT-owned entity. It is disputed whether RMG made Hale aware of the proposed changes. Hale acknowledged that RMG provided him documents which showed changes in density of the property owned by Building No. 2.

Through its original trial counsel, Building No. 2 filed a Complaint in the Circuit Court for Baltimore County against Appellees on February 28, 2019. Subsequently, Building No. 2 filed an Amended Complaint on March 6, 2019. Building No. 2 alleged claims for trespass to possessory interest, tortious interference with business relationships/interference with prospective advantage, conversion, and intentional misrepresentation/fraud.

RMG served a Request for Production of documents on Building No. 2 on April 15, 2019. On April 22, 2019, the trial court entered a scheduling order which fixed the following important dates:

> **July 22, 2019:** Deadline to designate Building No. 2's experts and file reports.
>
> **September 20, 2019:** Deadline to designate Appellees' experts and file reports.
>
> **October 20, 2019:** Deadline for all discovery.
>
> **November 19, 2019:** Deadline for all motions (excluding motions in limine).
>
> **December 19, 2019:** Settlement Conference.

Building No. 2 did not produce any documents. On June 17, 2019, RMG filed a motion to compel discovery. Subsequently, Building No. 2 produced some documents, but not all of those that were requested. RMG filed a supplemental motion to compel discovery on July 3, 2019. The trial court granted the motion to compel discovery and ordered Building No. 2 to produce all responsive documents on or before July 25, 2019. No documents were produced. On July 29, 2019, RMG filed a motion for sanctions, which the trial court granted on August 26, 2019.

Fine served a request for interrogatories on Building No. 2 on June 21, 2019. Building No. 2 did not file answers to the interrogatories. Fine filed a motion to compel on August 7, 2019. On September 6, 2019, the trial court granted the motion to compel and ordered Building No. 2 to file answers to the interrogatories on or before September 16, 2019. Building No. 2 did not file any answers. Fine filed a motion for sanctions on September 17, 2019. The trial court granted the motion on October 16, 2019.

On July 22, 2019, Building No. 2 filed its designation of expert witnesses with the trial court. In its designation, Building No. 2 named several experts including: Scott Dorsey, CEO of Merritt Properties; Stephen Weiss ("Weiss"), Senior Vice President at Lee & Associates; Edwin Hale; and the Honorable Joseph F. Murphy, Jr. The designation provided that Weiss would offer opinion testimony concerning Building No. 2's damages in this case related to the buying and selling of real property, the fair market value of dwelling units, and the management of commercial real estate.

On July 31, 2019, Building No. 2's original trial counsel withdrew his representation, and the trial court struck his appearance on August 8, 2019. Building No. 2's successor counsel, Jay Miller, Esquire ("Miller"), entered his appearance in the case on August 19, 2019.

Building No. 2's new counsel learned that the prior counsel had filed inadequate expert disclosures, including naming Judge Joseph F. Murphy, Jr. as an expert witness without the knowledge or consent of Judge Murphy. On August 29, 2019, Building No. 2 filed a motion to modify the existing scheduling order. On September 12, 2019, the trial court entered an order granting, in part, Building No. 2's motion to modify the scheduling order and extended all relevant deadlines by sixty days. The order further required that the Clerk reschedule the Settlement Conference. Accordingly, the new relevant deadlines were outlined as follows:

> **September 20, 2019:** Deadline to designate Building No. 2's experts and file reports.
>
> **November 19, 2019:** Deadline to designate Appellees' experts and file reports.
>
> **December 19, 2019:** Deadline for all discovery.
>
> **January 20, 2020:** Deadline for all motions (excluding motions in limine).
>
> **February 17, 2020:** Settlement Conference.

On September 20, 2019, Building No. 2 filed a supplemental designation of expert witnesses. In its supplemental designation, Building No. 2 named only one expert witness, Weiss. The supplemental designation provided that Weiss was expected to offer testimony

regarding his experience in all aspects of real estate transactions, the marketing of land to residential and commercial real estate developers, the value of the land owned by Building No. 2 within the CC PUD before and after the amendments, the effect of the re-allocation of the 150 residential dwelling units to another property, and the negative effect of the re-allocation on the marketability of Building No. 2's property.

The parties scheduled Weiss's deposition for December 17, 2019. On December 16, 2019, one day before the scheduled deposition, Weiss informed Building No. 2 and its counsel that he did not feel comfortable acting as the expert witness in the case due to a conflict of interest. In a written letter, Weiss stated:

> Because of a conflict of interest I have just learned of, I cannot act as your Expert Witness. I used Royston, Mueller, McClean & Reid, LLP as my Counsel when I sold my restaurant business and its corresponding real estate, and was extremely happy with their services. I am also contemplating engaging them again to sell my flooring products business over the next few months. During that time, I also had a work relationship for several years with my Counsel[']s wife and further conflicting me is the fact that his son now works as an attorney with my daughter at Miles & Stockbridge. I am extremely uncomfortable moving ahead under these circumstances.

By January 17, 2020, Building No. 2 had retained a substitute expert, Duane Robert Rhine ("Rhine"). On that date, almost one month after the close of discovery, Building No. 2 filed a motion to substitute an expert witness with the trial court. Building No. 2 argued that Rhine was an expert in the same field as Weiss and that his testimony would closely adhere to Weiss's own conclusions. Further, Building No. 2 noted that the case

had not yet been set for trial and that Building No. 2 would make Rhine available for deposition as soon as possible.

Appellees opposed the motion, arguing that there was no good cause shown for the relief requested and that they would suffer prejudice if the trial court were to grant the motion. Appellees moved for summary judgment on January 21, 2020, contending that because Building No. 2's expert witness had withdrawn from the case, Building No. 2 could not prove damages, an essential element to its case. The trial court held a hearing on the outstanding motions on August 19, 2020 before Judge C. Carey Deeley, Jr.

During the hearing, the trial court heard testimony from Weiss. Weiss confirmed that he had met with Building No. 2's counsel and Hale at Hale's office and discussed his opinions on the damages in this case. Weiss characterized his opinions as "Real Estate 101" and stated that if he were called as an expert witness, he would give his opinion on the difference in value between a project with 350 residential units versus one with 500 residential units. Weiss testified that Appellees' counsel, Royston, Mueller, McClean & Reid LLP ("RMMR"), had performed various legal work for him more than twenty-five years ago and that he was uncomfortable testifying as a result of that prior business relationship. Weiss explained that he was concerned that RMMR might have personal information related to his financial situation in its possession. Weiss also testified that his previous assertion regarding his daughter working with the son of an attorney at RMMR was not correct.

Weiss testified that he did not learn that RMMR was representing Appellees in the lawsuit until the day before he wrote the letter on December 16, 2019. Weiss explained that he had never reviewed the expert designations that were filed setting forth the opinions he was expected to provide at trial.

During the hearing, Appellees called Leanne Schrecengost ("Schrecengost"), the current managing member of RMMR, as a witness. Schrecengost explained that she had performed a conflicts check on Weiss and revealed one file that was opened and closed on the same day in 2000. Schrecengost testified that meant that no work had been performed, and that no legal fees were ever charged to Weiss. Schrecengost also testified that Weiss's business name did not return any results, nor were any documents located that indicated RMMR had prepared a will on Weiss's behalf.

The trial court denied Building No. 2's motion to substitute an expert witness. Initially, Judge Deeley noted that Building No. 2 had not filed an expert report for Weiss, nor any other documents that would "fall into the category of or identif[y] specifically as damage documents." Judge Deeley accepted Weiss's refusal to testify, but explained that he could not allow a substitution of an expert witness after the close of discovery. Critically, the trial court noted that the withdrawal letter was sent "some five months after [Weiss's] original designation," and "some three months after his re-designation."

In its analysis, the trial court analyzed Weiss's testimony during the hearing. While the trial court accepted Weiss's withdrawal from the case, it explained that the reasons articulated gave it pause and that "there [were] some blanks." Judge Deeley explained that

he did not believe that anyone had suggested that Building No. 2 or its counsel, Miller, had intentionally secured Weiss's withdrawal from the case. Notably, Judge Deeley explained that the withdrawal of the expert witness may have been avoided had the expert been vetted differently, and more thoroughly, earlier on in the litigation. Judge Deeley concluded that Weiss had not been properly vetted for potential conflicts.

Further, Judge Deeley found that Weiss was an "uncomfortable witness" and that he had not been prepared at all for his testimony. In weighing the reasons behind Weiss's withdrawal letter, Judge Deeley determined that there may have been "other things that made [Weiss] uncomfortable, including the prospects of being an expert [witness.]" Specifically, Judge Deeley explained that "[the conflict] doesn't rise to the level of a big deal to me. It's just that testimony didn't land with any great weight." In conclusion, Judge Deeley addressed Weiss directly, stating "I don't know what it was that pushed you away from this case, but it certainly wasn't because of some of the reasons given. It must've been something else, I just don't know what it was." While the trial court "respect[ed] [Weiss's] decision to get out of the case," it did not find that "his reasons were good reasons [that rose] to the level of good cause."

In considering Building No. 2's motion to substitute an expert witness, the trial court relied on the factors set out in *Taliaferro v. State*, 295 Md. 376 (1983). First, the trial court determined that the violation was substantial and not excusable. Judge Deeley characterized the violation as "a big deal," and that allowing such a violation would require the parties to essentially "start[] from scratch on damages experts." Next, the trial court

considered the timing of the ultimate disclosure. Here, Judge Deeley noted that the motion was filed almost one month after the close of discovery. In response to Building No. 2's contention that there was no harm because no trial date had been set, Judge Deeley acknowledged the history of discovery violations by Building No. 2 throughout the litigation. Critically, Judge Deeley determined "the defining standard on whether to permit an additional witness or not is not the question of whether a trial date has been established, it's more than that, it's [all of the *Taliaferro*] factors."

The next factor considered by the trial court was the reason, if any, for the violation. In examining this factor, the trial court noted that the reasons provided in Weiss's letter dated December 16, 2019 were at least partially incorrect. Further, Judge Deeley found that the reasons in the letter "just don't pass muster . . . they're not a big deal." The trial court also considered the degree of prejudice to both parties. With respect to Appellees, the trial court found there was prejudice because Appellees' counsel would have to "start from scratch with a new expert." Indeed, Judge Deeley noted that a new expert named by Building No. 2 may have been of "different or greater substance" than Weiss and that such a substitution would prejudice Appellees' position and their trial strategy. The trial court determined that there was "significant prejudice" to Appellees.

Next, the trial court considered whether the prejudice could be cured by postponement and the overall desirability of granting a continuance. While Judge Deeley recognized that he could postpone the case, he found that that was not "the be all and end all of [his] ruling." Judge Deeley emphasized the importance of determining whether a

postponement was fair to the parties. Finally, the trial court considered the parties' good faith compliance with the scheduling order. Specifically, Judge Deeley found that "there ha[d] not been compliance with the scheduling order . . . on a number of prior occasions, [including on] this occasion."

Considering the above and weighing all of the factors, the trial court denied Building No. 2's motion to substitute an expert witness. Based on this ruling, the trial court next considered Appellees' motion for summary judgment. Judge Deeley found that Building No. 2's case as to damages was "to be presented through an expert witness." As the trial court denied Building No. 2's motion to substitute an expert witness and accepted Weiss's withdrawal from the case, the trial court noted that there would be no testimony presented to prove Building No. 2's damages. Accordingly, the trial court granted Appellees' motion for summary judgment.

On August 31, 2020, Building No. 2 filed a motion to alter or amend the judgment of the trial court, or in the alternative, for reconsideration. In its motion, Building No. 2 relied on its contention that there was a lack of prejudice to Appellees. Further, Building No. 2 argued that the trial court, during its hearing on August 19, 2020, found no fault on the part of Building No. 2 or its counsel as to the reasons why Weiss withdrew his appearance as an expert witness. Appellees filed an opposition to Building No. 2's motion on September 9, 2020.

The trial court held a hearing to address Building No. 2's motion on October 28, 2020. During this hearing, Judge Deeley clarified his earlier ruling. Specifically, Judge Deeley explained:

> I found that [Building No. 2] fell short of the requisite requirements. I called [Building No. 2 and counsel] out in a respectful way, and I should explain.
>
> * * *
>
> I have no information at this point that suggests you[,] [Mr. Miller,] called Mr. Weiss and said, Mr. Weiss, I am not satisfied with your testimony. Mr. Weiss, I need you out of this case. And, Mr. Weiss, you need to figure out a way to get out. So let's come up with something. And then Mr. Weiss says, well, you know, maybe I will say I feel uncomfortable with the Hanley firm.
>
> I don't have any information to suggest such an exchange occurred.
>
> * * *
>
> That doesn't mean that I don't lay at [Building No. 2's] . . . doorstep the circumstances that bring us together here.
>
> The fault for this circumstance is not with [Appellees'] . . . [T]he discovery failures, the excuses offered by [Building No. 2's] witnesses, which [Building No. 2] chose . . . Those excuses are laid at [Building No. 2's] step.
>
> It's just not a step with Jay Miller's name on it. This case was previously lawyered by a different firm. It's now lawyered by current counsel.
>
> * * *
>
> I find no fault with [Appellees]. I find the fault with [Building No. 2]. That's not personal to [] Mr. Miller.

In its ruling, the trial court acknowledged that there was prejudice to Building No. 2 by excluding the damages expert "because it [was] the foundation upon which [the trial court] granted summary judgment. It was a case ending ruling." Critically, the trial court determined that this is not the only factor a trial court considers when deciding whether to deviate from a scheduling order. In relying on the *Taliaferro* factors, Judge Deeley determined that "[Building No. 2's] accumulated violations and lack of good cause justified the prior ruling and also support[ed] a denial of" Building No. 2's motion to alter or amend. Accordingly, the trial court denied Building No. 2's motion. Building No. 2 noted this timely appeal.

DISCUSSION

Standard of Review

We review a trial court's decision to impose, or not impose, a particular discovery sanction for an abuse of discretion. *Dackman v. Robinson*, 464 Md. 189, 231 (2019) (internal citation omitted); *Cole v. State*, 378 Md. 42, 56 (2003) (internal quotations omitted) ("Where a discovery rule has been violated, the remedy is, in the first instance, within the sound discretion of the trial judge . . . Generally, unless we find that the lower court abused its discretion, we will not reverse.").

The Court of Appeals has explained:

> There is an abuse of discretion "where no reasonable person would take the view adopted by the [trial] court[ ]" . . . or when the court acts "without reference to any guiding rules or principles." An abuse of discretion may also be found where the ruling under consideration is "clearly against the logic and effect of facts and inferences before the court [ ]" . . . or when

> the ruling is "violative of fact and logic." . . . In sum, to be reversed "[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable."

Wilson v. John Crane, Inc., 385 Md. 185, 198–99 (2005) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312–13 (1997) (additional internal citations omitted)).[3] Therefore, an abuse of discretion "should only be found in the extraordinary, exceptional, or most egregious case." *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 419 (2007) (internal quotations and citations omitted).

Pursuant to Maryland Rule 2-501(f), a motion for summary judgment should be granted if "there is no genuine dispute as to any material fact" and "the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). "In determining whether these conditions are met, a court ruling on a motion for summary judgment must review the entire record, 'drawing all reasonable inferences in favor of the party against whom summary judgment is sought.'" *Asmussen v. CSX Transp., Inc.*, 247 Md. App. 529, 557 (2020) (quoting *Shastri Narayan Swaroop, Inc. v. Hart*, 158 Md. App. 63, 71 (2004)).

[3] When applying the abuse of discretion standard, we do not consider whether we would have reached the same conclusion as the trial court. Reasonable jurists can, and often do, weigh factors differently and reach different conclusions. We undertake our analysis in this appeal cognizant of the applicable standard of review and consider only whether the trial court's ruling constituted a decision so "well removed from any center mark" that it is "beyond the fringe of what th[is] [C]ourt deems minimally acceptable." *Wilson, supra*, 385 Md. at 199.

In some cases, "a trial may be unnecessary because one party lacks the proof that would be needed to establish an essential element of his case to a jury." *Id.* Critically,

> [i]n such a situation, there can be "no genuine issue as to any material fact," [because] a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has a burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986). A trial court awards summary judgment when, based on the facts that would be admitted at trial, the evidence so "unmistakably favors one side" that no fair-minded jury could conclude to the contrary. *Seaboard Sur. Co. v. Richard F. Kline, Inc.*, 91 Md. App. 236, 244 (1992). The questions posed by a motion for summary judgment are questions of law, which we will review *de novo*, or without deference. *See Asmussen, supra*, 247 Md. App. at 558. Indeed, "we are ordinarily limited to considering the grounds relied upon by the [trial] court in granting summary judgment" when conducting our review. *Id.* at 558–59.

We review a trial court's decision to deny a motion to alter or amend a judgment under an abuse of discretion standard. *Reiner v. Ehrlich*, 212 Md. App. 142, 151–52 (2013) (internal citations omitted). "We will find an abuse of discretion only if the ruling either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective." *Berringer v. Steele*, 133 Md. App. 442, 472 (2000) (internal quotations and citations omitted). We also review a trial court's decision to deny a motion for reconsideration for an abuse of discretion. *Sydnor v.*

Hathaway, 228 Md. App. 691, 708 (2016). "[I]n appeals from the denial of a post-judgment motion, reversal is warranted [only] in cases where there is both an error and a compelling reason to reconsider the underlying ruling." *Schlotzhauer v. Morton*, 224 Md. App. 72, 85 (2015). Further, "[a]ppellate consideration of a denial of a motion to reconsider, or some similar post-trial revisiting of already decided issues, does not subsume the merits of a timely motion made during the trial." *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 484 (2002).

I. The trial court did not abuse its discretion in denying Building No. 2's motion to substitute an expert witness because, after weighing the *Taliaferro* factors, it reasonably concluded that Building No. 2 had not substantially complied with the scheduling order and that its failure to comply was not justified by good cause.

Building No. 2's motion to substitute an expert witness requires an analysis of the law regarding the modification of scheduling orders because "there is no substantive difference between a decision to modify (or adhere to) scheduling-order deadlines and a decision to admit (or strike) witnesses and other evidence designated or disclosed too late." *Asmussen, supra*, 247 Md. App. at 548 (citing *Shelton v. Kirson*, 119 Md. App. 325, 333 (1998)). Indeed, "[p]ermitting a party to rely on a witness untimely designated is a de facto modification of the scheduling order." *Id.* at 549.

"With certain exceptions, M[aryland] Rule 2-504(a)(1) requires Maryland's circuit courts to enter a scheduling order . . . [which] specif[ies], among other things, a deadline for the designation of expert witnesses expected to be called at trial . . . and a deadline for the completion of all discovery." *Id.* at 546. The expert witness designations are required

to include all information specified in Maryland Rule 2-402(g)(1), which includes the "anticipated subject matter of the expert's testimony, the substance of and grounds for the findings and opinions to which the expert will testify, and a copy of any written report made concerning those findings and opinions." *Id.* (citing Md. Rule 2-504(b)(1)(B)).

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." *Dorsey v. Nold*, 362 Md. 241, 255 (2001) (internal citation omitted). Scheduling orders "maximiz[e] the efficiency and fairness of the pretrial discovery process." *Asmussen, supra*, 247 Md. App. at 547. "[T]here is inherent power for the courts to 'enforce their scheduling orders through the threat and imposition of sanctions.'" *Maddox v. Stone*, 174 Md. App. 489, 507 (2007) (quoting *Manzano v. S. Md. Hosp.*, 347 Md. 17, 29 (1997)).

Although scheduling orders are not "unyieldingly rigid," "they should not be complaisantly lax either." *Naughton v. Bankier*, 114 Md. App. 641, 653 (1997); *Asmussen, supra*, 247 Md. App. at 548. Critically, we have held that trial courts "should demand 'at least substantial compliance, or, *at the barest minimum*, a good faith and earnest effort toward compliance' with the scheduling order's requirement[s]." *Asmussen, supra*, 247 Md. App. at 548 (quoting *Naughton, supra*, 114 Md. App. at 653 (emphasis in original)). "To permit parties to shirk scheduling-order deadlines without substantial compliance and good cause . . . would be, 'on its face, prejudicial and fundamentally unfair to opposing parties' and would 'decreas[e] the value of scheduling orders to the paper upon which they

are printed.'" *Id.* (quoting *Faith v. Keefer*, 127 Md. App. 706, 733 (1999)). Modification will only "prevent injustice" when the party unable to meet the necessary deadlines can show substantial compliance and good cause. *See id.*; Md. Rule 2-504(c).

In order to reverse the trial court's decision to deny Building No. 2's motion to substitute an expert witness, we must conclude that "no reasonable person would take the view adopted by the [circuit] court," that the court acted "without reference to any guiding principles," or that the court's ruling "is violative of fact and logic." *Livingstone v. Greater Washington Anesthesiology & Pain Consultants, P.C.*, 187 Md. App. 346, 388 (2009) (cleaned up). Further, "we may reverse the [trial] court 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.'" *Asmussen, supra*, 247 Md. App. at 552 (quoting *Livingstone*, *supra*, 187 Md. App. at 389).

As trial judges are entrusted with a large measure of discretion in applying sanctions for failure to comply with the rules relating to discovery, the "sound exercise of that discretion turns 'on the facts of the particular case.'" *Id.* at 550 (quoting *Taliaferro, supra*, 295 Md. at 390)). The Court of Appeals explained:

> [p]rincipal among the relevant factors . . . are whether the disclosure violation was technical or substantial, the timing of the ultimate disclosure, the reason, if any, for the violation, the degree of prejudice to the parties respectively offering and opposing the evidence, whether any resulting prejudice might be cured by a postponement and, if so, the overall desirability of a continuance. Frequently these factors overlap. They do not lend themselves to a compartmental analysis.

Taliaferro, *supra*, 295 Md. at 390–91.

We have acknowledged that two broader inquiries are at the center of the *Taliaferro* factors. *See Asmussen*, *supra*, 247 Md. App at 550. These inquiries are:

> First, has the party seeking to have the evidence admitted *substantially complied* with the scheduling order? This is increasingly less likely the later the disclosure and the less "technical" the violation at issue. Second, is there *good cause* to excuse the failure to comply with the order? This is more likely when the party seeking an accommodation has a good reason for noncompliance, where the prejudice he suffers from non-admission is great, and where the prejudice his opponent suffers from admission is less severe.

Id. at 550–51.

Based on the facts of this case, we hold that the trial court did not abuse its discretion in declining to permit Building No. 2 to substitute an expert witness after the close of discovery. For the reasons that we shall explain below, the trial court reasonably concluded that Building No. 2 had not substantially complied with the modified scheduling order, particularly in regard to its expert witness designations, and that its failure to meet the deadlines was not justified by good cause.

A. The trial court did not abuse its discretion in finding that Building No. 2 did not substantially comply with the discovery deadlines because the violation was substantial and the motion to substitute an expert witness was filed significantly past the deadline.

The first factor the trial court considered was "whether the discovery violation was technical or substantial." *Taliaferro*, *supra*, 295 Md. at 390–91. In weighing this factor, Judge Deeley found that Building No. 2's violation was substantial and "a big deal," as Weiss's withdrawal was on the eve of his deposition and days before the close of discovery. Further, the trial court acknowledged that very little information had been disclosed with

regard to the expert and it would "require[] essentially [that] the parties start[] from scratch on damages experts." In *Asmussen*, this Court considered a similar situation where little information regarding the expert witness in question was disclosed. *See Asmussen, supra*, 247 Md. App. at 552–53 ("Although Asmussen timely told CSX whom he intended to call as expert witnesses . . . [his] designation revealed nothing about the expected subject matter of the experts' testimony.").

Similar to *Asmussen*, the only information Building No. 2 provided regarding its expert witness's testimony was that it "might use [an] expert[] to establish essential elements of [its] claim and that any testimony ultimately used would have some proper basis." *Id.* at 553. This testimony from Weiss, or another damages expert, would be an essential basis of Building No. 2's case, and, therefore, the late-filed motion to substitute an expert witness was a substantial violation, not technical. *See Helman v. Mendelson*, 138 Md. App. 29, 43–44 (2001) (noting that over time, and under certain circumstances, a discovery violation can develop from technical to substantial).

Next, the trial court considered "the timing of the ultimate disclosure." *Taliaferro, supra*, 295 Md. at 391. As the trial court noted, the motion to substitute an expert witness was filed almost a month after the close of discovery. In his analysis of this factor, Judge Deeley acknowledged Building No. 2's argument that the delay caused "no harm, no foul" because of the lack of a trial date due to the coronavirus pandemic. Notably, Judge Deeley explained that whether a trial date is set is not the defining factor in determining whether to grant Building No. 2's motion to substitute an expert witness.

As Judge Deeley noted, Building No. 2 did not file its motion to substitute an expert witness until January 17, 2020. The deadline for Building No. 2 to designate expert witnesses was almost four months prior, on September 20, 2019. Further, discovery closed on December 19, 2019.[4] Building No. 2 would like us to rely on this Court's opinion in *Maddox*, but the timing of the ultimate disclosure in the instant case is readily distinguishable from that of *Maddox*. In *Maddox*, the appellant provided the name of an expert witness two weeks prior to the scheduled deadline. *Maddox*, *supra*, 174 Md. App. at 494. The expert's written report, however, was not provided until over a month after the scheduling order deadline. *Id.* at 494–95. Further, the expert witness was deposed by the appellees months before the trial date. *Id.* at 496. The appellees requested that the appellant's expert be stricken because of the belated filing of the report. *Id.* at 496–97. The trial court concluded that the appellants had not satisfied the requirements of the scheduling order and granted the motion to strike the expert. *Id.*

On review, this Court reversed the decision of the trial court in *Maddox* and held that the trial court abused its discretion in striking the appellants' expert witness. *Id.* at 505–07. In our reasoning, we explained that the trial court did not take into consideration any of the factors designated in *Taliaferro*, nor did it consider the fact that this violation was the sole discovery violation throughout the proceedings in the trial court. *Id.* at 494–95, 505. Further, we held that the trial court did not "exercise any discretion at all in

[4] These deadlines were already extended by sixty days from the original scheduling order when the trial court granted Building No. 2's motion to modify the original scheduling order.

making its decision." *Id.* at 506. Critically, we emphasized that our ruling in *Maddox* did not equate to saying "that trial counsel and litigants are free to treat scheduling orders as mere suggestions or imprecise guidelines for trial preparations. Scheduling orders must be given respect as orders of the circuit court, and the court may, under appropriate circumstances, impose sanctions upon parties who fail to comply with the deadlines in scheduling orders." *Id.* at 507.

Here, unlike the expert in *Maddox*, Weiss was never deposed, and neither was the proposed substitute expert witness. Further, Building No. 2 never provided an expert report to Appellees. Although a harsh sanction such as excluding an expert witness must be supported by circumstances warranting such a sanction, Judge Deeley did not abuse his discretion here by considering this factor and finding that the timing of the disclosure weighed in favor of denying Building No. 2's motion to substitute an expert witness. *See id.* at 501–02. Accordingly, the trial court did not abuse its discretion in finding that Building No. 2 did not substantially comply with the modified scheduling order due to the substantive nature of the violation and the ultimate timing of the disclosure. *See Livingstone*, *supra*, 187 Md. App. at 388–89 (noting that a trial court's decision will only be reversed 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").

B. The trial court did not abuse its discretion in weighing the factor of prejudice to Building No. 2 as low compared to Appellees' prejudice and the lack of good cause for the belated request for substitution.

Next, the trial court considered "the reason, if any, for the [discovery] violation." *Taliaferro*, *supra*, 295 Md. at 391. In its analysis, the trial court stated that "some of the reasons in [Weiss's] letter just don't pass muster," and were simply "not a big deal." Judge Deeley further explained: "It's not that Mr. Weiss is lying or committing fraud upon the Court, he just – he's doing what human beings do at times, they just wan[t] [to] get away from something, and they put the best excuse as they can up there." Further, Judge Deeley questioned whether Weiss had ever been properly vetted by counsel and if the supposed conflicts could have been identified sooner than one day before his scheduled deposition and three days before the close of discovery.

Building No. 2 asserts that there was good cause for the late substitution of an expert witness because there was no fault on the part of Building No. 2 or its counsel, but rather the fault was on Weiss's part. "[L]ack of diligence" on the part of a party or its counsel to properly vet an expert witness does not equate to good cause to allow for a modification of a scheduling order. *Asmussen*, *supra*, 247 Md. App. at 556.[5] While the harsh sanction imposed by the trial court is typically reserved for "'persistent and deliberate violations

[5] Weiss testified that he was not aware that RMMR was the counsel for Appellees until the day prior to him writing his withdrawal letter. Weiss also testified that he had not reviewed any expert designation or expert report throughout his preparation for this case. It was, therefore, within reason for the trial court to find that a lack of diligence on the part of Building No. 2 resulted in improper vetting of Weiss, causing the ultimate discovery violation.

that actually cause some prejudice," allowing a substitution of an expert witness a month after the close of discovery is not justified by a lack of diligence and proper vetting. *See id.* at 555–56 (quoting *Butler v. S & S P'ship*, 435 Md. 635, 650 (2013)).[6] Despite Building No. 2's contentions, the trial court was not required to find that Building No. 2 engaged in "opprobrious behavior" to impose the sanction that it did. *See id.* at 543, 556 (upholding the exclusion of an expert witness which resulted in a granting of summary judgment despite the possibility that the party's conduct did not rise to the level of opprobrious).

Next, the trial court considered "the degree of prejudice to the parties respectively offering and opposing the evidence." *Taliaferro*, *supra*, 295 Md. at 391. In considering this factor, the trial court noted that Appellees would face prejudice because their counsel would need to start from scratch with a new expert. Further, Judge Deeley opined that the new expert may have been a substantively better expert than the one who was originally slated to testify. Accordingly, Judge Deeley found that there was "significant prejudice" to Appellees.

It is no question that Building No. 2 suffered prejudice from the trial court's decision to deny Building No. 2's motion to substitute an expert witness. By denying this motion, the trial court effectively ended Building No. 2's case because it left Building No. 2 with

[6] Similar to the trial court, we want to make it clear that we are not placing the blame solely on the shoulders of Building No. 2's current counsel, Miller. As Judge Deeley noted, there is no fault with Appellees, the fault lies "at [Building No. 2's] step. It's just not a step with [Miller's] name on it." Building No. 2 was previously represented by a different firm, whose representation resulted in sanctions and discovery violations prior to both the arising of the issue before us and the entry of Miller's appearance in this case.

an inability to prove damages. *See Heineman v. Bright*, 124 Md. App. 1, 10–11 (1998). Notably, Building No. 2 argues that there could be no prejudice suffered by Appellees because there was no scheduled trial date. Critically, however, "the absence of a set trial date, in and of itself, does not necessarily equate with lack of prejudice." *Saxon Mortg. Servs., Inc. v. Harrison*, 186 Md. App. 228, 255 (2009) (citing *Warehime v. Dell*, 124 Md. App. 31, 49 (1998)).[7]

The trial court did not abuse its discretion in finding that Appellees suffered great prejudice. This legal matter is of public record and, due to the nature of the accusations by Building No. 2, "the longer the matter was allowed to drag on, the more prejudice resulted to the [Appellees]." *Helman, supra*, 138 Md. App. at 47. Further, there was evidence presented that the discovery-related litigation expenses faced by Appellees due to Building No. 2's dilatory discovery practices resulted in additional unfair prejudice to Appellees. *See id.* While we may disagree with the trial court's ultimate characterization as to which party faced greater prejudice, that is not our inquiry to make. *See Wilson, supra*, 385 Md. at 199. Accordingly, we hold that the trial court did not abuse its discretion in finding that Appellees suffered "significant prejudice." *See Helman, supra*, 138 Md. App. at 47.

Finally, the trial court considered "whether any resulting prejudice might be cured by a postponement; and, [ ] if so, the overall desirability of a continuance." *Taliaferro*, 295 Md. at 391. In his analysis, Judge Deeley acknowledged that he *could* postpone the case

[7] Indeed, we disagree Building No. 2's suggestion that it should somehow be entitled to reap a benefit of an extended discovery period from the closure of our state courts due the global coronavirus pandemic.

and "extend the discovery [ ] forever." Further, Judge Deeley explained that he needed to "look at the big picture and decide whether enough is enough." Critically, Judge Deeley noted that he needed to decide what was fair to the parties at that time. While the trial court could have ordered an extension of discovery and allowed a substitution of Building No. 2's expert witness, that extension would have resulted in further prejudice to Appellees. *See Asmussen, supra*, 247 Md. App. at 555.

Although "[w]e recognize the appropriateness of resolving cases on their merits and not sacrificing them on the altar of judicial efficiency[,]" we also must emphasize that "good faith compliance with scheduling orders is important to the administration of the judicial system and providing all litigants with fair and timely resolution of court disputes." *Helman, supra*, 138 Md. App. at 47. While the sanction imposed by the trial court was harsh, Building No. 2's need to substitute an expert witness almost one month after the close of discovery resulted from a number of factors that do not amount to good cause or an otherwise defensible reason. Based on the above reasons, we hold that the trial court did not abuse its discretion in finding that Building No. 2 did not have good cause to substitute its expert witness one month after the close of discovery. Therefore, we hold that the trial court did not abuse its discretion in denying Building No. 2's motion to substitute an expert witness.[8]

[8] Although we may have weighed the *Taliaferro* factors differently, that does not equate to an abuse of discretion on the part of the trial court. *See Heineman*, *supra*, 124 Md. App. at 11 ("Although in the case at bar we would weigh two of the five *Taliaferro* factors in [appellant's] favor, we cannot conclude that the trial judge abused his discretion

II. The trial court did not err in granting summary judgment in favor of Appellees, as the denial of Building No. 2's motion to substitute an expert witness resulted in the inability to prove damages, an essential element of Building No. 2's case.

A trial court awards summary judgment when, based on "the facts that *would be* admitted at trial, the evidence so unmistakably favors one side that no fairminded jury could conclude to the contrary." *Asmussen*, *supra*, 247 Md. App. at 558. If one party lacks the proof to establish an essential element of her case at trial, no trial is necessary and summary judgment should be granted. *Id.* at 557.

In its opinion issued from the bench, the trial court properly considered the relevant standard as to the granting of summary judgment. Specifically, Judge Deeley found that in this case, Building No. 2's case was presented as though damages were to be proven through the testimony of an expert witness. Further, Judge Deeley explained that once Weiss withdrew from the case, there was no damages expert and "[w]ithout a damages expert, there can be no testimony on damages[,] without testimony on damages, there can be no evidence from which the jury [ ] or fact-finder can glean damages, including nominal damages."

In this case, it is clear that Appellees were entitled to summary judgment in their favor. We held, *supra*, that the trial court properly denied Building No. 2's motion to substitute an expert witness. Without the testimony of Weiss, or another expert, to establish damages, Building No. 2 had no ability to prove damages during the presentation of its

when he determined that the balance of these factors weighed heavily in favor of excluding the two proffered witnesses.").

case. "Because [damages] is 'an element essential to [Building No. 2's] case, and on which [it would] bear the burden of proof at trial,'" Appellees were entitled to summary judgment as a matter of law. *Id.* at 559 (quoting *Celotex*, 477 U.S. at 317).[9]

III. The trial court did not abuse its discretion in denying Building No. 2's motion to alter or amend its judgment or, for reconsideration, as there was no legal error nor a compelling reason to reconsider the ruling.

In its motion to alter or amend or for reconsideration, Building No. 2 argued that the trial court failed to properly exercise its discretion in considering Building No. 2's motion to substitute an expert witness. Building No. 2 argued that the trial court improperly interpreted Weiss's testimony as to his opinions and reasons for withdrawing from testifying in this case. Further, Building No. 2 argued that there was a lack of prejudice to Appellees and that not having a damages expert was a "death knell" to Building No. 2's case. Building No. 2 also contended that there was no evidence of willful or contemptuous behavior on the part of Building No. 2 or its counsel. Finally, Building No. 2 asserted that Appellees' motion for summary judgment should have been denied if the trial court were to reconsider the earlier ruling on Building No. 2's motion to substitute an expert witness.

"With respect to the denial of a [m]otion to [a]lter or [a]mend . . . the discretion of the trial judge is more than broad; it is virtually without limit." *Steinhoff*, *supra*, 144 Md.

[9] Appellees offered additional grounds in the trial court to support their motion for summary judgment, but we need not consider them as the trial court granted summary judgment on the sole basis of the exclusion of the expert witness testimony and Building No. 2's lack of a damages expert. *See Asmussen*, *supra*, 247 Md. App. at 558–59. Indeed, "we are ordinarily limited to considering the grounds relied upon by the [trial] court in granting summary judgment" when conducting our review. *Id.*

App. at 484. Further, "a post-trial motion to reconsider is not a time machine in which to travel back to a recently concluded trial in order to try the case better with hindsight." *Id.* Indeed, those who lost in the trial court "do not enjoy *carte blanche*, through post-trial motions, to replay the game as a matter of right." *Id.* While a decision on the merits "might be clearly right or wrong . . . [a] decision not to revisit the merits is broadly discretionary." *Id.* The burden on this issue is "overlaid with an additional layer of persuasion." *Id.* "Above and beyond arguing the intrinsic merits of an issue, [an appellant] must also make a strong case for why a judge, having once decided the merits, should in his broad discretion deign to revisit them." *Id.* at 484–85. Critically,

> because the exercise of discretion under these circumstances depends so heavily upon the unique opportunity the trial judge has to closely observe the entire trial, complete with nuances, inflections, and impressions never to be gained from a cold record, it is a discretion that will rarely, if ever, be disturbed on appeal.

Titan Custom Cabinet, Inc. v. Advance Contracting, Inc., 178 Md. App. 209, 231 (2008) (internal quotations and citations omitted).

During the hearing in the trial court regarding the motion to alter or amend, Judge Deeley clarified his earlier statements regarding fault as to the expert witness' belated withdrawal. Specifically, Judge Deeley explained:

> I find no fault with the [Appellees]. I find the fault with [Building No. 2].
>
> * * *
>
> [T]here's no question that [Building No. 2] is at fault, Mr. Miller.

* * *

> All I know is that [Weiss] wasn't vetted. That is admitted. And he offered an excuse that made no sense to me. And the withdraw[al] from the case came after a significant number of failures of discovery that in concert with the cumulative effect caused me to rule the way I did.
>
> If the word is opprobrious . . . [the] behavior in this case, [and] the combined failures appear to be the equivalent of that.

In the instant case, after issuing a thoroughly detailed opinion from the bench which encompassed approximately twenty-two transcript pages, we find no abuse of discretion in the trial court's decision to deny the motion to alter or amend or for reconsideration of the trial court's earlier ruling. The trial court properly exercised its discretion in its original ruling by applying and analyzing the relevant *Taliaferro* factors and considering the appropriate outcome regarding Appellees' motion for summary judgment.

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