Circuit Court for Montgomery County
Case Nos. 434214V & 436584V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1396

September Term, 2019

K. DAVID MEIT

v.

ANETA M. KONDRATOWICZ,
ET AL.

Fader, C.J.,
Graeff,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: November 6, 2020

We consider the Circuit Court for Montgomery County's entry of judgment against K. David Meit, the appellant, as a sanction for discovery failings. Mr. Meit contends that his former attorney was entirely to blame for the discovery failings and that the circuit court abused its discretion when it failed to recognize that it could take Mr. Meit's relative lack of fault into account in determining an appropriate sanction. Contrary to the position they took in the circuit court, Aneta M. Kondratowicz and Real Estate Services Systems, LLC ("RESS"), the appellees, now correctly acknowledge that the circuit court could have taken the relative fault of Mr. Meit and his attorney into account. They now argue, however, that the circuit court did not abuse its discretion because it recognized that it could consider relative fault but decided not to do so. Because the circuit court's statements in ruling on the motions for sanctions indicate that the court believed it could not consider the relative fault of Mr. Meit and his former attorney in determining an appropriate sanction, we will vacate the judgment and remand for further proceedings.

BACKGROUND

Ms. Kondratowicz and Mr. Meit were co-owners of RESS, with 65 and 35 percent respective ownership shares. In July 2017, Mr. Meit sued Ms. Kondratowicz and three other parties over claims related to RESS.[1] In September, Ms. Kondratowicz filed counterclaims, and RESS brought a separate action against Mr. Meit. The circuit court subsequently consolidated the two actions.

[1] As we will explain in Part I below, the claims against the three other parties are not at issue in this appeal. For simplicity, our discussion of the procedural background will focus only on the claims between Mr. Meit, on the one hand, and Ms. Kondratowicz and RESS, on the other.

Early Procedural History

The circuit court scheduled the consolidated actions for a ten-day jury trial, to be held in October 2018, and issued a scheduling order that required written discovery to be served by February 15 and completed by April 2, 2018. The scheduling order contained the following warnings:

> THIS ORDER IS YOUR OFFICIAL NOTICE OF CASE DEADLINES AND HEARINGS REQUIRING APPEARANCES. FAILURE TO APPEAR AT HEARINGS OR COMPLY WITH ALL REQUIREMENTS MAY RESULT IN DISMISSAL, DEFAULT JUDGMENT, EXCLUSION OF WITNESSES AND/OR EXHIBITS, ASSESSMENTS OF COSTS AND EXPENSES, INCLUDING ATTORNEY FEES, OR OTHER SANCTIONS.
>
> . . .
>
> **ANY MODIFICATIONS OF THIS SCHEDULING ORDER MUST BE REQUESTED BY WRITTEN MOTION FILED IN ADVANCE OF THE DEADLINES OR HEARING DATES SOUGHT TO BE MODIFIED, PROVIDING GOOD CAUSE TO JUSTIFY ANY MODIFICATION THEREOF**.

Mr. Meit filed expert witness designations naming two experts, one of whom was Mr. Meit himself. In November 2017, Ms. Kondratowicz moved to strike the designations on the ground that they did not comply with Rule 2-402. *See* Md. Rule 2-402(g)(1)(A).

Ms. Kondratowicz filed a motion to dismiss, which the court granted on January 19, 2018. The court granted Mr. Meit leave to file an amended complaint by February 20. After business hours on February 20, Mr. Meit's then-counsel, Mitchell J. Rotbert, deposited an amended complaint in the court's night-box. The following day, Mr. Rotbert

learned that his filings had been rejected because "the case [was] closed."[2] Mr. Rotbert later attested that he "spent over an hour" on February 21 unsuccessfully attempting to persuade the clerk to accept the filing. He also attested that he attempted unsuccessfully to reach the circuit court judge's chambers by phone on February 21. In its written opinion imposing sanctions, the court expressed skepticism of that claim. Regardless, after February 21, Mr. Rotbert never again attempted to file the amended complaint. He did, however, mail a service copy of the amended complaint, which Ms. Kondratowicz's counsel, Matthew J. Pavlides, received on February 27.

The Discovery Violations and the Sanctions Motions

Throughout the early part of 2018, Mr. Meit failed to participate in discovery. Mr. Rotbert sought, and Mr. Pavlides agreed to, extensions of deadlines to respond to Ms. Kondratowicz's interrogatories and requests for production of documents. No responses were forthcoming.

On March 7, Ms. Kondratowicz filed three motions: (1) a motion to strike Mr. Meit's proposed amended complaint; (2) a motion to dismiss the amended complaint; and (3) a motion for discovery sanctions based on Mr. Meit's failure to respond to outstanding discovery or to provide proper expert designations. The motion for sanctions also asserted—although without a supporting affidavit—that "Mr. Meit ha[d] threatened as a part of this litigation to force Ms. Kondratowicz to spend all of her resources defending

[2] Apparently, at some point before February 20, the clerk's office erroneously closed the case, even though time still remained for Mr. Meit to file an amended complaint and Ms. Kondratowicz's counterclaims remained pending.

his allegations against her." As sanctions, Ms. Kondratowicz asked that the court strike Mr. Meit's answer to her counterclaim, enter a default judgment in her favor, bar Mr. Meit from introducing evidence to support any defenses, and order him to pay her reasonable attorneys' fees and expenses incurred in connection with her motion for sanctions.

On March 22, Ms. Kondratowicz filed two additional motions. First, she filed a motion to compel Mr. Meit's deposition, in which she alleged that Mr. Rotbert had failed to provide dates when Mr. Meit could be deposed. Second, Ms. Kondratowicz filed a supplement to her motion to strike Mr. Meit's expert witness designations, in which she asserted that Mr. Meit had taken no action to supplement his designations since she had filed her motion to strike the previous November.

Also on March 22, RESS, which was also represented by Mr. Pavlides, filed a motion for sanctions that substantively duplicated Ms. Kondratowicz's previously filed sanctions motion.

Mr. Meit did not respond to any of these motions. Indeed, the sole filing he made during this period was a notice of service of a subpoena on RESS's bank. Ms. Kondratowicz and RESS filed a joint motion to quash that subpoena. Mr. Meit did not respond.

The April 20, 2018 Status Hearing

On April 20, the court held a status hearing. Mr. Rotbert, Mr. Pavlides, and Ms. Kondratowicz all attended; Mr. Meit did not. At the hearing, Mr. Rotbert described his unsuccessful attempt to file the amended complaint two months earlier and acknowledged that Mr. Meit "owe[d] discovery." Mr. Rotbert asserted that his client

"ha[d] a great deal of material to produce," and he "suspect[ed]" that he could "get all of that to [Ms. Kondratowicz and RESS] within the week." He also suggested "mov[ing] the pretrial events to a time that [was] more consistent with meeting [the] trial obligation in October," and asked the court to postpone the discovery deadline "so that all discovery [would be] completed at the end of June." Mr. Pavlides objected to any extension.

The court expressed frustration that Mr. Rotbert had cavalierly ignored the scheduling order's requirement that "any modifications must be requested by written motion in advance of the deadline," and suggested that Mr. Rotbert promptly file a motion to amend the scheduling order.

Despite Mr. Rotbert's statement that he thought he could produce discovery "within the week," so far as the record reflects, he never did so.

The Briefing on the Sanctions Motions

Mr. Rotbert filed a motion to amend the scheduling order the week after the status hearing. To explain the discovery failures to date, the motion relied primarily on an affidavit from Mr. Rotbert and a letter he had sent to a federal judge in a different case, which Mr. Rotbert attached as an exhibit to his affidavit. In those documents, Mr. Rotbert identified a number of personal and professional issues he contended had interfered with his legal practice in the preceding seven months, including: (1) his niece had "died unexpectedly and inexplicably," which caused him to spend "many weeks arranging and then attending [her] funeral" in Sweden; (2) upon returning to the country, Mr. Rotbert fell seriously ill, "had no energy," and could not work more than four hours a day; (3) his only paralegal, "who had not calendared [Mr. Meit's] case in our case tracking system,"

resigned without notice; (4) Mr. Rotbert had been working with two new lawyers at his firm while still "carrying a relatively heavy case-load"; (5) he had been diagnosed with cancer; and (6) he had been operating "from the premise that, because trial in this action [was] scheduled to occur on October 1, 2018, the pretrial schedule should reflect dates that closed discovery closer to trial." As a result, Mr. Rotbert claimed, he had missed the deadline to seek to amend the scheduling order "because of [his] mistaken understanding that the parties had several months to get ready for trial." Mr. Rotbert's explanations did not implicate any conduct of Mr. Meit.

Ms. Kondratowicz and RESS filed an opposition to the motion to amend the scheduling order in which they detailed the discovery failures and urged the court to enter a default judgment or prohibit Mr. Meit from introducing any evidence to oppose their claims.

The Order Granting the Sanctions Motions

On May 18, 2018, the court entered orders that: (1) denied Mr. Meit's motion to amend the scheduling order; (2) granted Ms. Kondratowicz's motion to strike Mr. Meit's expert witness designations, her motion for discovery sanctions, and RESS's motion for discovery sanctions; (3) denied as moot Ms. Kondratowicz's motion to strike Mr. Meit's amended complaint, her motion to dismiss the amended complaint, and her and RESS's joint motion to compel Mr. Meit's deposition; and (4) entered judgment by default against Mr. Meit on all of Ms. Kondratowicz's and RESS's claims against him. The court also ordered that the trial scheduled for October 2018 be removed from the docket and directed that a hearing on damages and attorneys' fees be scheduled within 60 days.

The court explained its rulings in an accompanying memorandum opinion. In determining the proper sanction for Mr. Meit's noncompliance, the court engaged in a thorough and well-reasoned review of the five factors set forth in *Taliaferro v. State*, 295 Md. 376, 390-91 (1983):

> [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.

Warehime v. Dell, 124 Md. App. 31, 45 (1998) (applying those factors in the context of discovery sanctions under Rule 2-433) (quoting *Taliaferro*, 295 Md. at 390-91). The court found that:

- The violations were substantial, not technical, because "there has been a complete failure to provide discovery despite repeated attempts by opposing counsel to obtain both supplementations to expert designations and answers to their requests for documents and answers to interrogatories";

- The "timing of the ultimate disclosure" weighed heavily in favor of sanctions because, at the time of the status hearing, there had been no disclosures at all;

- No sufficient justification for the discovery violations had been provided; and

- The degree of prejudice and whether such prejudice could be cured by a postponement both weighed in favor of sanctions because although Ms. Kondratowicz had engaged in reasonable efforts to litigate the case, "Meit has completely failed to engage in the discovery process." As a result, Ms. Kondratowicz lacked information to prepare for trial. The court also noted Ms. Kondratowicz's allegation "that from the beginning Plaintiff Meit has stated his intent to use this litigation to drain her personal resources as well as those of RESS," and concluded that "[i]t would be contrary to public policy and the efficient administration of justice to reward Plaintiff Meit with a postponement of the scheduling order for his flagrant violations of the deadlines set forth by the Court and the Maryland Rules relating to discovery."

The court determined that the appropriate sanction was to enter a default judgment against Mr. Meit on all of Ms. Kondratowicz's and RESS's claims against him, and also awarded Ms. Kondratowicz and RESS the reasonable attorneys' fees they had incurred "for the litigation of motions to obtain discovery."

The Motion to Vacate

On June 15, Mr. Meit, then represented by new counsel, filed a motion to vacate the court's May 18 order. Mr. Meit contended that Mr. Rotbert had been responsible for all of the discovery failures and argued "that he, as a party, should not be punished with such an extreme sanction as default judgment for the errors of his prior counsel." In an attached affidavit, Mr. Meit averred that he had provided Mr. Rotbert with everything that he was aware had been requested of him, and that in spite of Mr. Meit's own diligence, Mr. Rotbert had failed to apprise him of the status of the litigation, leaving Mr. Meit entirely unaware that he had unfulfilled discovery obligations. Specifically, Mr. Meit averred that: (1) he had "diligently checked in" with Mr. Rotbert throughout the case, at least monthly; (2) he was nonetheless unaware of the two sets of interrogatories that had been served on him; (3) he "was generally aware" that documents had been requested, although he had not seen the requests; (4) he had "worked diligently" to collect and provide Mr. Rotbert with all potentially relevant documents; (5) Mr. Rotbert had never informed him that discovery requests existed, much less that they were overdue; (6) Mr. Rotbert had not informed him of the motions for sanctions, even though they had lunch together in early May 2018; (7) he had only learned about the outstanding discovery and sanctions motions after Mr. Rotbert forwarded him the court's order granting the sanctions motions and entering judgment

against him; and (8) he had always "been willing . . . to fulfill my discovery obligations in this matter."

Along with the motion to vacate, Mr. Meit's new counsel served responses to Ms. Kondratowicz's and RESS's discovery requests.

Ms. Kondratowicz and RESS opposed Mr. Meit's motion to vacate. They argued that the court "was well within its discretion in issuing sanctions against Mr. Meit himself." They also asserted that the appropriate proceeding "to assess the evidence regarding how much blame is to be placed [on] counsel as opposed to Meit" would be a legal malpractice action filed against Mr. Rotbert, and that "*[s]uch an analysis is simply not appropriate in the context of a Motion to Vacate a sanctions order*." Ms. Kondratowicz and RESS also pointed out that Mr. Meit was not a stranger to litigation, but, instead, "a sophisticated businessman who h[eld] himself out as a litigation expert in real estate matters."

At the conclusion of a hearing on the motion to vacate, the court ruled from the bench. Although the court observed that "Mr. Rotbert is the one who's primarily the actor here," it concluded that "the parties are kind of stuck with [their lawyer's performance] one way or the other. That's just the way the system works." The court then likened the situation before it to a criminal case, in which the remedy for an attorney's deficient performance lies in a separate post-conviction proceeding, and suggested that Mr. Meit's remedy for Mr. Rotbert's performance would similarly lie in a separate malpractice case. The court explained further that a party who voluntarily chose an attorney for a civil case "can't now avoid the consequences of the acts or omissions of this freely selected agent.

Any other notion would be wholly inconsistent with our system of representative litigation . . . . So, that seems to be the law. I don't know any other way around that law."

As we will discuss further below, the court then stated that holding "a mini-trial or . . . an evidentiary hearing" to determine relative fault would be unfair to Ms. Kondratowicz and RESS because it would be "essentially a malpractice trial within this trial." As a result, the court opined that relative fault could be considered only where "the facts [regarding fault] are uncontested or they were so egregious or so blatant that it was obvious that it was the attorney[']s fault.]" The court denied the motion to vacate in a separate written order.

The case proceeded to a damages hearing before a different judge on the default judgment against Mr. Meit. After that hearing, the court entered a judgment of $131,250.00 against Mr. Meit and in favor of Ms. Kondratowicz and RESS, jointly and severally, and awarded Ms. Kondratowicz and RESS attorneys' fees of $59,566.00. Mr. Meit timely appealed.

DISCUSSION

Mr. Meit challenges the court's sanctions orders, its damages award, and its award of attorneys' fees. Because we will vacate the sanctions imposed on Mr. Meit and remand for further proceedings, we need not address his other claims of error. Before reaching the merits, however, we must first turn to a preliminary issue of appealability.

I. WE WILL EXERCISE OUR DISCRETION TO ENTER PARTIAL FINAL JUDGMENT PURSUANT TO RULE 8-602(G)(1)(C).

Shortly before oral argument, the parties filed a joint motion to enter partial final judgment pursuant to Rule 8-602(g)(1)(C). In their motion, the parties identified a concern that the judgment might not be final as to all claims against all parties because Mr. Meit's claims against three parties who were originally named as defendants—Donald N. Hoffman, The Prosperity Consulting Group, LLC ("Prosperity"), and Linda Stapf—had been dismissed without prejudice. We agree with the parties' concern, commend them for raising it ahead of argument, and will enter the judgment they jointly request.

In his initial complaint, Mr. Meit sued not only Ms. Kondratowicz, but also Mr. Hoffman, Prosperity, and Ms. Stapf. In response, (1) Mr. Hoffman and Prosperity filed a motion to dismiss for failure to state a claim, and (2) Ms. Stapf filed an answer. The court granted Mr. Hoffman and Prosperity's motion to dismiss, but afforded Mr. Meit leave to file an amended complaint against them by February 20. Mr. Meit did not do so. Instead, on February 20, he attempted (albeit unsuccessfully, as discussed above) to file an amended complaint containing claims only against Ms. Kondratowicz. At the same time, he tried (also unsuccessfully) to file a stipulation of dismissal without prejudice of his claims against Mr. Hoffman and Prosperity.

A few days before Mr. Meit's unsuccessful attempt to dismiss his claims against Mr. Hoffman and Prosperity, he had successfully filed a voluntary stipulation of dismissal without prejudice of his claims against Ms. Stapf. Neither Mr. Meit nor the court took any

further action regarding the claims against Mr. Hoffman, Prosperity, or Ms. Stapf, nor did those parties participate further in the case.

This case presents two different appealability issues. With respect to the claims against Mr. Hoffman and Prosperity, the appealability issue arises because no action was taken after the court granted Mr. Meit leave to file an amended complaint against them. Unlike an unqualified dismissal, "an order which dismisses a complaint, but which expressly provides leave to amend the complaint or to file an amended complaint, is not a final judgment and therefore is not appealable." *Moore v. Pomory*, 329 Md. 428, 431 (1993). "The rationale for this principle is that 'the express provision for amendment shows that the . . . order . . . was not intended finally to dispose of the case.'" *Id.* (quoting *Makovi v. Sherwin-Williams Co.*, 311 Md. 278, 281 (1987)). Moreover, "[i]f leave to amend is granted and the plaintiff fails to file an amended complaint within the time prescribed, the court, on motion, may enter an order dismissing the action." Md. Rule 2-322(c). In other words, "[i]f an amended complaint is not filed within the time allowed by the court or by the rule, an additional order must be entered to effect dismissal of the action." *Mohiuddin v. Doctors Billing & Mgmt. Sols.*, 196 Md. App. 439, 456 (2010) (quoting Paul V. Niemeyer & Linda M. Schuett, *Maryland Rules Commentary* 190 (2d ed. 1992)). Otherwise, "the case remains pending in the trial court." *Moore*, 329 Md. at 431. Here, the court never entered an order finally dismissing the claims against Mr. Hoffman and Prosperity.

With respect to the claims against Ms. Stapf, the appealability issue is that Mr. Meit's stipulation of dismissal was without prejudice. As the parties note in their joint

motion, "the general rule is that a plaintiff cannot appeal from the dismissal of some claims when the balance of his or her claims have been voluntarily dismissed without prejudice." *Collins v. Li*, 158 Md. App. 252, 267 (2004) (quoting *Smith v. Lincoln Meadows Homeowners Ass'n*, 678 N.W.2d 726, 731 (Neb. 2004)). The rationale behind that rule is that "a plaintiff who is permitted to appeal following a voluntary dismissal without prejudice will effectively have secured an otherwise unavailable interlocutory appeal." *Id.* The rule is thus designed to prevent a party from manufacturing appellate jurisdiction to secure review of an interlocutory order. An *involuntary* dismissal, conversely, is generally a final appealable judgment, "regardless of whether the dismissal was with prejudice or was without prejudice." *Moore*, 329 Md. at 432.

In considering whether the voluntary dismissal of the claims against Ms. Stapf presents an impediment to our appellate jurisdiction, we are mindful that the purpose of the rule is to prevent parties from voluntarily dismissing claims to secure appellate jurisdiction over an interlocutory ruling. We thus find it particularly notable that the voluntary dismissal of the claims against Ms. Stapf was filed at a time when Mr. Meit was continuing to pursue claims against Ms. Kondratowicz and to defend claims brought by Ms. Kondratowicz and RESS. In other words, it is apparent that Mr. Meit's dismissal without prejudice of the claims against Ms. Stapf was not in any way intended to manufacture appellate jurisdiction over an otherwise interlocutory appeal. It was, instead,

an abandonment of those claims at the same time Mr. Meit was attempting to continue his litigation with other parties in the trial court.[3]

Ultimately, we agree with the parties that, to the extent there is a final judgment problem, (1) the circuit court had discretion under Rule 2-602(b)(1) to "direct . . . the entry of a final judgment" as to all of the claims between Mr. Meit, on the one hand, and Ms. Kondratowicz and RESS, on the other hand; and (2) we, in turn, have discretion to enter a final judgment on those same claims under Rule 8-602(g)(1). Specifically, we conclude that there is no just reason for delay in resolving the issues raised in this appeal. To the contrary, where proceeding will not prejudice the rights or interests of any interested persons or of the courts, a delay at this point would result in a gross waste of judicial and party resources and thus have a "harsh economic effect."[4] *See Doe v. Sovereign Grace Ministries*, 217 Md. App. 650, 667 (2014) (quoting *Canterbury Riding Condo. v Chesapeake Investors*, 66 Md. App. 635, 652 (1986)) (identifying "a harsh economic effect" as an important factor in determining whether an appellate court should enter a judgment under Rule 8-602(g)). Moreover, there appears to be no danger that the same

[3] It is also notable that the court's involuntary dismissal of the claims against Mr. Hoffman and Prosperity was on grounds that seemingly would have applied equally to the claims against Ms. Stapf, who had not moved to dismiss. It was, therefore, just a matter of time before the court could be expected to make the same ruling with respect to those claims.

[4] We view the issues raised here as the type of "more or less technical one that was overlooked by the appellant when the appeal was noted and which, if spotted then, would likely have been corrected[.]" *Smith v. Lead Indus. Ass'n*, 386 Md. 12, 26 (2005). As a result, it is among the rare exceptions under which this Court may enter a judgment pursuant to Rule 8-602(g). *See id.*

issues will need to be considered in successive appeals, no possibility that any issues left unresolved might moot the issues now on appeal, and no possibility that our resolution of this appeal will interfere with questions still pending before the circuit court (of which there are none). *See Sovereign Grace Ministries*, 217 Md. App. at 667 (identifying other factors an appellate court should consider in determining whether an appellate court should enter a judgment). Therefore, we will grant the joint motion and enter a final judgment under Rule 8-602(g)(1).

II. THE MOTIONS COURT HAD DISCRETION TO CONSIDER THE RELATIVE FAULT OF MR. MEIT AND HIS FORMER COUNSEL IN DETERMINING THE APPROPRIATE SANCTION FOR DISCOVERY FAILURES.

A. Rule 2-433 Authorizes the Imposition of "Just" Sanctions for Discovery Failures; a Sanction of Entry of a Default Judgment Is Disfavored Except in the Most Egregious Circumstances.

Rule 2-433 authorizes the imposition of sanctions for violations of the discovery rules. Subsection (a) provides in pertinent part:

> [T]he court, if it finds a failure of discovery, may enter such orders in regard to the failure as are just, including one or more of the following:
>
> > (1) An order that the matters sought to be discovered, or any other designated facts shall be taken to be established for the purpose of the action in accordance with the claim of the party obtaining the order;
> >
> > (2) An order refusing to allow the failing party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; or
> >
> > (3) An order striking out pleadings or parts thereof, or staying further proceeding until the discovery is provided, or dismissing the action or any part thereof, or entering a judgment by default that includes a determination as to liability and all relief sought by the moving party against the failing party if the court is satisfied that it has personal jurisdiction over that party.

. . . .

> Instead of any of those orders or in addition thereto, the court, after opportunity for hearing, shall require the failing party or the attorney advising the failure to act or both of them to pay the reasonable costs and expenses, including attorneys' fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of costs and expenses unjust.

"An appellate court reviews for abuse of discretion a trial court's decision to impose, or not impose, a sanction for a discovery violation." *Dackman v. Robinson*, 464 Md. 189, 231 (2019). "An abuse of discretion occurs 'where no reasonable person would take the view adopted by the [trial] court,' 'when the court acts without reference to any guiding rules or principles,' or when the court's 'ruling is clearly against the logic and effect of facts and inferences before the court.'" *State v. Alexander*, 467 Md. 600, 620 (2020) (quoting *Alexis v. State*, 437 Md. 457, 478 (2014)). In addition, "[a] failure to exercise discretion—for whatever reason—is by definition not a proper exercise of discretion." *Alexander*, 467 Md. at 620. Thus, "the court's exercise of discretion must be clear from the record." *Id.*; *cf. N. River Ins. v. Mayor & City Council of Baltimore*, 343 Md. 34, 48 (1996) ("A 'right for the wrong reason' rationale does not apply to the imposition of discovery sanctions . . . because that rationale would have the appellate court exercising its discretion in the first instance.").

In weighing the appropriate sanction in this case, the circuit court applied the well-established factors identified in *Taliaferro v. State*, 295 Md. 376 (1983):

> 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.

Id. at 390-91. In *Taliaferro*, the Court of Appeals observed that "[f]requently these factors overlap" and, therefore, "do not lend themselves to a compartmental analysis." *Id.* at 391. The Court more recently has held that a circuit court exercising its discretion "to impose, or not impose, a sanction for a discovery violation . . . 'should weigh (1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility of curing any prejudice; and (4) any other relevant circumstances.'" *Dackman*, 464 Md. at 231-32 (quoting *Beka Indus. v. Worcester County Bd. of Educ.*, 419 Md. 194, 232 (2011)). This Court has even more recently identified that "two broader inquiries lie at the heart of the *Taliaferro* factors": (1) whether "the party seeking to have the evidence admitted [has] *substantially complied* with the scheduling order"; and (2) whether there is "*good cause* to excuse the failure to comply with the order." *Asmussen v. CSX Transp.*, 247 Md. App. 529, 550-51 (2020).

Regardless of how, exactly, the relevant factors are framed, "[o]rdinarily, a court will 'impose the least severe sanction that is consistent with the purpose of the discovery rules.'" *Beka Indus.*, 419 Md. at 232 (quoting *Thomas v. State*, 397 Md. 557, 571 (2007)). "Dismissal is clearly the ultimate sanction and there is always 'a preference for a determination of claims on their merits.'" *Weaver v. ZeniMax Media*, 175 Md. App. 16, 46 (2007) (quoting *Holly Hall Publ'ns v. County Banking & Tr. Co.*, 147 Md. App. 251, 267 (2002)). Because "[t]he dismissal of a claim . . . is among the gravest of sanctions," it generally "is warranted only in cases of egregious misconduct such as 'wil[l]ful 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.'" *Manzano v. S. Md. Hosp.*, 347 Md. 17, 29-30 (1997) (quoting *Rubin v. Gray*, 35 Md. App. 399, 400-01 (1977)). Although "not limited to instances where [the conduct] is willful or contumacious," *Kipness v. McManus*, 14 Md. App. 362, 364 n.1 (1972), dismissal is "only appropriate in the unusual situation where it is justified by the conduct of the offending party and the necessity to afford effective relief to the moving party," *Hossainkhail v. Gebrehiwot*, 143 Md. App. 716, 731 (2002).

B. A Circuit Court May Consider the Relative Fault of an Attorney and a Client in Determining an Appropriate Sanction for a Discovery Violation.

In their appellate briefs, both parties acknowledge that a circuit court *may* consider the relative fault of an attorney and client in determining an appropriate sanction for a discovery violation. Before the circuit court, however, Ms. Kondratowicz and RESS took the position that any such consideration would be appropriate only in a future malpractice action between Mr. Meit and Mr. Rotbert. We agree that a circuit court has discretion to take relative fault into account in determining an appropriate sanction for discovery noncompliance, especially when a court is considering the ultimate sanction of a default judgment.

As an initial matter, Rule 2-433(a) itself authorizes a court that "finds a failure of discovery" to "enter such orders in regard to the failure as are just." The Rule thus necessarily authorizes a circuit court to consider the relative fault of an attorney and client when doing so is necessary to identify and impose a "just" sanction. *See TransAm. Natural*

Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991) (interpreting identical language in Texas's discovery rules to require that "the sanction should be visited upon the offender," such that the "court must at least attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both").

Moreover, after identifying a non-exhaustive list of available case-specific sanctions, the Rule then provides that, "[i]nstead of . . . or in addition" to such sanctions, the court shall issue an order "requir[ing] the failing party or the attorney advising the failure to act or both of them to pay the reasonable costs and expenses, including attorneys' fees, caused by the failure[.]" Md. Rule 2-433(a). In requiring the court to choose between imposing such costs and expenses on the attorney, the client, or both, the Rule necessarily contemplates an assessment of the relative fault of each.

Furthermore, when reviewing discovery sanctions imposed under Rule 2-433, this Court has considered the relative fault of litigants and their attorneys. For example, in *Williams v. Williams*, 32 Md. App. 685 (1976), we held that the trial court abused its discretion in dismissing the plaintiff's complaint as a sanction for her failure to attend her deposition. *Id.* at 697. Among other things, we reasoned that "[t]here was no record of delay or contumacious conduct on the part of the plaintiff. She was not herself involved in the earlier postponements of her deposition." *Id.* at 695. Based in part on the consideration that "[t]here [wa]s simply no indication of any 'unwarranted refusal to depose'" on the part of the plaintiff herself, we held that dismissal was inappropriate. *Id.* at 696 (quoting *Pappalardo v. Lloyd*, 250 Md. 121, 124 (1968)).

In *Hart v. Miller*, 65 Md. App. 620 (1985), we held that the trial court abused its discretion in dismissing the plaintiff's case as a sanction "for counsel's failure to answer interrogatories in a timely manner." *Id.* at 621. There, even though the trial court had expressly found an absence of contumacious conduct, it had determined that dismissal was necessary for consistency with decisions the court had reached in other cases. *Id.* at 624-25. We found that notion to be inconsistent with the concept of discretion itself. *Id.* at 626. In imposing sanctions, we held, a trial court must "consider every aspect of the case and then choose the most appropriate remedy" for the particular situation from among the multiple available alternatives. *Id.* A court's "[f]ailure to exercise choice in a situation calling for choice is an abuse of discretion, because it assumes the existence of a rule that admits of but one answer." *Id.* at 627.

Comparing the situation in *Hart* to our earlier decision in *Williams*, we concluded that "there [was] not a scintilla of evidence that the plaintiff was responsible for or aware of the delay in failing to respond to Interrogatories." *Id.* at 628. We also found it important that the failure to respond to interrogatories had not prevented the parties from otherwise preparing for trial. *Id.* In light of the advanced status of the case, "together with the lack of wrongful conduct on the part of appellant Hart, and the realization that the statute of limitations had run on this course of action, we h[e]ld that it was an abuse of discretion to dismiss the case." *Id.* Although we did not doubt that "[s]ome sanction as to counsel was appropriate; dismissal was not." *Id.* We therefore reversed the judgment and remanded "in order that the trial judge may consider and impose an appropriate sanction, short of dismissal." *Id.*

In *Scully v. Tauber*, 138 Md. App. 423 (2001), we reversed a default judgment that had been entered as a sanction for the defendant's failure to attend his deposition in circumstances in which neither the defendant nor his attorney bore any fault. *Id.* at 431. Although *Scully* is therefore not directly applicable here, we nonetheless find instructive its discussion regarding the defendant's lack of fault. In *Scully*, before the deposition date, the defendant's attorney had told the plaintiff's attorney that the "deposition would have to be rescheduled because [the defendant's attorney] was being admitted to Suburban Hospital" around that time "for an operation to remove [a] tumor." *Id.* at 425. The plaintiff, however, did not reschedule. *Id.* at 426. When the defendant and his attorney failed to appear, plaintiff's counsel called the defendant's attorney's office "and was advised that [the attorney] was unavailable for the deposition because he was in the hospital and, as a consequence, neither [the attorney] nor [the defendant] would appear at the deposition." *Id.* Plaintiff's counsel then moved "for immediate sanctions against [the defendant] based on the fact that neither [the defendant] nor his counsel had appeared for the . . . deposition." *Id.* The trial court granted the motion and entered a default judgment. *Id.* at 427.

This Court held that the trial court had abused its discretion in imposing the sanction. We emphasized that not only did the defendant and his attorney "ha[ve] an exceptionally meritorious reason why they did not appear at the deposition," but also "the defendant had done nothing personally that would justify a default sanction." *Id.* at 431. We cited *Hart* and *Williams* as examples of cases in which Maryland's "appellate courts . . . ha[d] overturned the imposition of the ultimate sanction of dismissal against a plaintiff or a default judgment against a defendant when there was no record of inordinate delay or

contumacious conduct on the part of *the party* against whom sanctions were sought." *Scully*, 138 Md. App. at 432-33 (emphasis added). Recalling that "[d]ismissal runs counter to valid societal preference for a decision on the merits," *id.* at 434 (quoting *Hart*, 65 Md. App. at 628), we reasoned that, as in *Hart*, the court's "failure to set aside entry of a default judgment against [the] defendant . . . was likewise an abuse of discretion," *Scully*, 138 Md. App. at 435. Because "[n]either [the defendant] nor his attorney had done anything wil[l]fully to delay discovery, and neither had acted contumaciously," *no* sanction was appropriate.[5] *Id.*

Ms. Kondratowicz and RESS point us to other cases in which our appellate courts have upheld the imposition of case-ending sanctions for discovery failures, but those decisions either expressly found that the client bore some responsibility for the failures at issue or did not discuss that issue at all. Ms. Kondratowicz and RESS rely particularly on *Valentine-Bowers v. Retina Group of Washington, P.C.*, 217 Md. App. 366 (2014), and *Warehime v. Dell*, 124 Md. App. 31 (1993).

In *Valentine-Bowers*, "[t]he trial court dismissed the case because counsel for [the plaintiff] had failed repeatedly to comply with discovery deadlines, including orders of the court," and we affirmed. 217 Md. App. at 369. There, however, the trial court had "placed fault 'squarely' on [the plaintiff's] own shoulders" for her failure to appear at her

[5] We do not mean to suggest that this case is "on all fours" with *Hart*, *Williams*, or *Scully*. In particular, the discovery failures at issue here appear to have been more pervasive, and the conduct of counsel more egregious, than in those cases. But those differences are irrelevant to the question presented here, which is whether the court may consider relative fault in determining an appropriate sanction.

deposition. *Id.* at 379. For that reason, among others, we held that the trial court had not abused its discretion in denying a postponement and dismissing the case. *Id.* at 387.

In *Warehime*, as relevant here, we upheld the dismissal of the plaintiffs' complaint against one of nine defendants in the case when the plaintiffs had failed to respond to (1) interrogatories propounded by that defendant and (2) a subsequent motion for sanctions. 124 Md. App. at 35-36. From our decision, however, it does not appear that either party raised the relative fault of the plaintiffs and their attorney for the discovery failure. To the contrary, we noted that "[e]ven after dismissal of the suit," the plaintiffs "failed to present the court with a viable excuse for what had transpired." *Id.* at 51. "In light of [the plaintiffs]' initial, unexplained disregard of outstanding interrogatories, and their subsequent inadequate explanation for their failure to answer the interrogatories," we held that "the trial court did not abuse its discretion in imposing the 'ultimate sanction' of dismissal." *Id.* Neither *Valentine-Bowers* nor *Warehime* stand for the proposition that a trial court may not consider the relative fault of attorney and client when determining whether to impose a case-ending sanction for discovery failures.

In sum, in exercising its discretion to identify an appropriate sanction for discovery failures, especially the ultimate sanctions of dismissal or entry of a default judgment, a court may consider the relative fault of lawyer and client and, in some cases, will abuse its discretion in not doing so.[6]

[6] In reviewing sanctions imposed for noncompliance with discovery, federal courts generally consider "the extent of the client's blameworthiness" and "seldom dismiss claims against blameless clients." *See, e.g., Rangarajan v. Johns Hopkins Univ.*, 917 F.3d 218,

C. The Circuit Court Was Not Precluded from Considering the Relative Fault of Mr. Meit and Mr. Rotbert in Selecting an Appropriate Sanction.

As we have already noted, Ms. Kondratowicz and RESS argued before the circuit court that a consideration of the relative fault of Mr. Meit and his attorney was inappropriate in weighing the imposition of discovery sanctions and had to be reserved for

226 (4th Cir. 2019) (quoting *United States v. Shaffer Equip.*, 11 F.3d 450, 462 (4th Cir. 1993)); *Hillig v. Comm'r of Internal Revenue*, 916 F.2d 171, 174 (4th Cir. 1990) (in reviewing sanctions imposed under Tax Court Rule 104(c)(3)—which the court deemed "analogous to Federal Rule of Civil Procedure 37(d)"—holding that "[a] dismissal sanction is usually inappropriate when it unjustly penalizes a blameless client for the attorney's behavior"). Other state courts have taken a similar approach. *See, e.g.*, *Locasto v. City of Chicago*, 6 N.E.3d 435, 442 (Ill. App. Ct. 2014) (stating that "in deciding whether the time has come to impose default or dismissal" for discovery violations, a court "should weigh . . . the degree of the party's personal responsibility for the noncompliance") (quoting *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 868 (3d Cir. 1984)); *Green v. Lisa Frank, Inc.*, 211 P.3d 16, 32 (Ariz. Ct. App. 2009) ("[B]efore exercising the inherent power to dismiss a case, a court must consider . . . the extent of the client's blameworthiness if the wrongful conduct is committed by its attorney[.]" (quoting *Shaffer Equip.*, 11 F.3d at 462)); *Stender v. Vincent*, 992 P.2d 50, 58-59 (Haw. 2000) ("[T]he trial court should bear in mind the culpability of the client in imposing sanctions for the attorney's conduct, particularly the ultimate sanction of dismissal or default judgment."); *Pierce v. Heritage Props.*, 688 So. 2d 1385, 1389 (Miss. 1997) ("[D]ismissal may be inappropriate when neglect is plainly attributable to an attorney rather than a blameless client, or when a party's simple negligence is grounded in confusion or sincere misunderstanding of the court's orders." (quoting *Batson v. Neal Spelce Assocs.*, 765 F.2d 511, 514 (5th Cir. 1985))); *Horton v. McCary*, 635 So. 2d 199, 203 (La. 1994) ("Dismissal and default are generally reserved for those cases in which the client, as well as the attorney, is at fault. . . . Since there is no evidence that the clients here participated in violating the trial court's discovery orders, the trial court erred in granting a default judgment on liability."); *Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 1993) (requiring courts to consider "whether the client was personally involved in the act of disobedience" when imposing sanctions, and stating that "if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative"); *Powell*, 811 S.W.2d at 917 ("[A] party should not be punished for counsel's conduct in which it is not implicated apart from having entrusted to counsel its legal representation.").

a future malpractice claim against Mr. Rotbert. In explaining the rationale for its denial of Mr. Meit's motion to vacate the imposition of sanctions, the court appeared to agree, at least in the circumstances presented. Notably, the court did not identify any fault resting with Mr. Meit, as opposed to Mr. Rotbert. To the contrary, the court found that "Mr. Rotbert is the one who's primarily the actor here. I mean, that's just the way it works in litigation unless you represent yourself." The court then stated:

> That's what your attorney does for better or worse and hopefully it's for better but obviously there are cases where attorneys do a better job or a not so good job. And that's unfortunately, I think the parties are kind of stuck with it one way or the other. *That's just the way the system works.*
>
> Whether it's a criminal case, I'm sure a lot of people sitting in prison who are unhappy with their attorneys and it's like well, it's kind of tough luck. Well then you file a post-conviction petition. And then in a civil case typically the remedy is a malpractice case. It's unfortunate that parties have to do all this because it's just time and money that they are spending *when it's the attorney's fault*.
>
> But it seems to me that the *Bland v. Hammond* case again,[7] it's not on point in terms of exactly the scenario factually but I think it does represent what I've always thought of as the kind of the rules we play by. And that's

[7] In *Bland v. Hammond*, 177 Md. App. 340 (2007), after the plaintiff's lawyer completely failed to participate in discovery for months on end (allegedly unbeknownst to the plaintiff), "the court dismissed [the] suit, without prejudice, as a sanction." *Id.* at 345. Three years later, the plaintiff moved to vacate the dismissal pursuant to Rule 2-535(b) and § 6-408 of the Courts Article, asserting that her lawyer's abandonment of her case "entitled her to set aside the . . . judgment." *Bland*, 177 Md. App. at 346. The trial court denied the motion, and we affirmed.

The issue in *Bland* was whether the plaintiff could be excused from the usual rule that a motion to alter the judgment must be brought within a "30 day revisory window." *Id.* at 347 (citing Courts § 6-408 and Md. Rule 2-535). Noting that "[t]he purpose of the rule is to ensure the finality of judgments," *id.* at 347-48, and that the plaintiff had not "satisf[ied] her duty to keep herself informed of the status of her case," we agreed that she had not exercised "ordinary diligence" in moving to vacate, and denied her motion, *id.* at 357-59.

> the issue of you're bound by your attorney's actions because the attorney is your agent. This even gets into the issue of keeping yourself informed what's going on. Yes, I agree typically whether it's a criminal defendant or a civil plaintiff or a civil defendant, you should be able to rely on your attorney telling you what's going on.
>
> But the case here and of course citing the Supreme Court case in *Link v. Wabash Railroad*.[8] Here it's like well, you voluntarily chose this person *and you can't now avoid the consequences of the acts or omissions of this freely selected agent*. *Any other notion would be wholly inconsistent with our system of representative litigation in which each party is being bound by the actions of his lawyer-agent*.
>
> . . . .
>
> *So, that seems to be the law. I don't know any other way around that law.*

(Emphasis added). The court proceeded to identify several instances of Mr. Rotbert's conduct that it found inexcusable and ultimately denied the motion to vacate sanctions.

Taken as a whole, these comments indicate that the motions court believed that it lacked the discretion to engage in an analysis of the relative fault of Mr. Meit and Mr. Rotbert when determining the most appropriate discovery sanction. As explained above, however, the court maintained the discretion to consider the relative fault of Mr. Meit and Mr. Rotbert in determining the appropriate discovery sanction. Such a consideration can be particularly important when a court is considering the ultimate sanction of a default judgment.

[8] In *Link v. Wabash Railway Co.*, the trial court had dismissed the plaintiff's case after the lawyer for the plaintiff missed a pretrial conference and failed to provide what the court considered to be an adequate excuse. 370 U.S. 626, 635 (1962). The Supreme Court affirmed. While the Court in *Link* did state that the plaintiff could be held responsible for the misconduct of his lawyer, *id*. at 633-34, it did not hold that a court cannot or should not consider the degrees of relative fault between the lawyer and the client in determining an appropriate sanction.

Immediately following the passage quoted above, the motions court proceeded to state that it would be unfair to Ms. Kondratowicz and RESS to hold proceedings to determine the relative fault of Mr. Meit and Mr. Rotbert. The court stated:

> And I think it is unfortunate for Mr. Meit that he's stuck with it but I don't believe that under the facts of this case that it's like *Scully* or like any other case. And I don't think it's fair to the defendant to try to hold a mini-trial or hold an evidentiary hearing on well, what did – I don't even know how you would do it. I mean you know, you'd have to get the attorney in here and get Mr. Meit let alone whatever else the defendant might want to put on. And then we'd have a hundred emails and all the rest of it. So, we'd have essentially a malpractice trial within this trial. So, I don't think that's fair to the defendant. And I think the cases like *Scully* either the facts are uncontested or they were so egregious or so blatant that it was obvious that it was the attorney['s fault.[9]]

Ms. Kondratowicz and RESS argue that this passage indicates that the motions court recognized that it could consider the relative fault of Mr. Meit and Mr. Rotbert, but that it concluded that doing so would be unfairly prejudicial to Ms. Kondratowicz and RESS. For several reasons, that passage does not alter our conclusion that this case should be remanded. First, the passage followed multiple statements in which the court expressed that it could not consider whether Mr. Meit bore fault for the discovery failures. Second, to the extent the court held open the possibility that consideration of relative fault might be a possibility in some circumstances, it appeared to limit that to cases in which it is uncontested that the client bore no fault. We do not think a trial court's discretion to consider relative fault is so limited. Third, in any event, it is not apparent from the record

[9] The court also acknowledged that appellate decisions have held that trial courts abuse their discretion in imposing the ultimate sanction for violations of discovery rules when the faultless party is a minor. *See, e.g.*, *Berrain v. Katzen*, 331 Md. 693, 710-11 (1993). As the court correctly recognized, those cases are not applicable here.

that a genuine dispute existed regarding relative fault. Mr. Meit testified by affidavit that he lacked knowledge of the discovery at issue in spite of diligent efforts to stay updated and Mr. Rotbert's affidavit and supporting documentation appeared fully to support Mr. Meit's claims. In contrast, there was no evidence before the trial court to contradict those affidavits or to suggest any fault on Mr. Meit's behalf.[10] Although the court was certainly not bound to accept untested averments of a lack of fault by Mr. Meit, in the absence of evidence to contradict his affidavit, the record does not indicate that a mini-malpractice trial would necessarily be required to resolve that issue.

As a cautionary note, we observe that in holding that the motions court could have considered the relative fault of lawyer and client in determining an appropriate sanction here, we do not disregard the general rule that "[t]he actions of an attorney within the scope of [] employment are binding upon [a] client under the ordinary principles of agency." *4900 Park Heights Ave. LLC v. Cromwell Retail 1, LLC*, 246 Md. App. 1, 20 (2020) (quoting *Salisbury Beauty Sch. v. State Bd. of Cosmetologists*, 268 Md. 32, 45 (1973)). In appropriate circumstances, a court may indeed "visit the sins of the lawyer upon [the]

[10] In its initial sanctions ruling, the motions court cited an assertion that Mr. Meit had previously told Ms. Kondratowicz that he "inten[ded] to use this litigation to drain her personal resources as well as those of RESS." That assertion was made by Mr. Pavlides in Ms. Kondratowicz's motion for sanctions. Because the assertion was not supported by affidavit and there is no indication that it was based on Mr. Pavlides's personal knowledge, however, its inclusion in the motion may have been in violation of Rule 2-311(d), which mandates that "[a] motion . . . that is based on facts not contained in the record shall be supported by affidavit and accompanied by any papers on which it is based." In the absence of sworn testimony, a statement of counsel with personal knowledge, or admissible documentary support, Mr. Meit's alleged assertion was not evidence. *See Scully*, 138 Md. App. at 431 (stating that the only facts appropriately considered by the motions court were those set forth by affidavit or made by counsel upon personal knowledge).

client." *Taylor v. Illinois*, 484 U.S. 400, 416 (1988). For example, sometimes "the reasons why the disclosure was not made" will be so egregious, or the "prejudice to the opposing party" so extreme, *Dackman*, 464 Md. at 231-32 (quoting *Beka Indus.*, 419 Md. at 232), that a case-dispositive sanction will be warranted regardless of the attorney's primary responsibility for the violation. Other times, an inquiry into the lawyer's responsibility may be too "costly and burdensome to third persons and to the judicial system, delay resolution of the main dispute, encounter complications concerning the attorney-client privilege, [or] create conflicts of interest between client and lawyer." Restatement (Third) of the Law Governing Lawyers § 29 cmt. d (2000). We leave the identification of such circumstances to "the circuit court's sound discretion." *Maryland Bd. of Physicians v. Geier*, 451 Md. 526, 544 (2017). For today's purposes, we hold only that in exercising their discretion to impose sanctions for discovery failures, trial courts may consider a litigant's personal culpability, and that such a consideration is particularly appropriate when considering case-ending sanctions.

In light of our decision to remand for further proceedings so that the motions court may reconsider its ruling on the motion to vacate, we need not consider Mr. Meit's alternative claims that: (1) in the context of this case, the motions court abused its discretion in imposing the ultimate sanction of a default judgment; (2) the trial court erred in awarding damages; and (3) the trial court erred in its final award of attorneys' fees. Because the trial court's decision on remand regarding the motion to vacate may moot some or all of those issues, we decline to reach them here.

JOINT MOTION TO ENTER JUDGMENT PURSUANT TO RULE 8-602(G)(1) WITH RESPECT TO ALL CLAIMS BETWEEN K. DAVID MEIT, ON THE ONE HAND, AND ANETA M. KONDRATOWICZ AND REAL ESTATE SERVICES SYSTEMS, LLC, ON THE OTHER HAND, GRANTED.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY VACATED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEES.