

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1150

September Term, 2014

IFEYINWA OBIANAGHA

v.

DARERIA SHANAE M. JOHNSON

Woodward,
Berger,
Arthur,

JJ.

Opinion by Woodward, J.

Filed:

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

The instant appeal arises from a personal injury action filed in the Circuit Court for Prince George’s County resulting from a motor vehicle collision between appellant, Ifeyinwa Obianagha, and appellee, Dareria Johnson. The parties stipulated as to appellee’s liability and agreed that the case would proceed on damages only during a one-day jury trial scheduled for February 18, 2014. After multiple discovery disputes, the trial court granted appellee’s motion for sanctions for appellant’s failure “to provide a deposition,” precluding appellant “from supporting her claims in accordance with Md. Rule 2-433(a)(2).” The trial court subsequently granted appellee’s motion to dismiss the case, because appellant’s claim for damages could not survive without her testimony.

Appellant presents three questions for our review, which we have slightly rephrased:

1. Did the trial court fail to exercise its discretion when it issued discovery sanctions against appellant without considering any circumstances of the case or evaluating any alternatives?
2. Did the trial court err in issuing sanctions against appellant for failure to provide a deposition when appellant had not been served a Notice of Deposition and when she had been present, ready, and willing to be deposed on her first scheduled deposition to which appellee failed to show up or provide timely notice of cancellation?
3. Did the trial court err in denying all motions filed by appellant and granting all motions filed by appellee?

Because we answer the second question in the affirmative, we shall reverse the judgment of the circuit court and remand the case for further proceedings. Accordingly, we need not address the first and third questions.

BACKGROUND

On November 8, 2012, appellant filed suit in the circuit court alleging negligence on the part of appellee as the result of a motor vehicle collision occurring on August 11, 2010.¹ On April 1, 2013, the court issued a scheduling order governing the discovery deadlines for the case. At a hearing on April 26, 2013, the parties agreed to stipulate as to appellee's liability and to proceed with a one-day jury trial on damages only. The parties further agreed that appellant would limit the amount of damages requested to \$20,000, and proceed under Section 10-104 of the Courts and Judicial Proceedings Article, which provides for the admissibility of medical records and bills without supporting testimony by the health care provider. *See* Md. Code (2006, 2013 Repl. Vol.), § 10-104 of the Courts & Judicial Proceedings (II) Article. On June 18, 2013, appellant filed a notice of intention to offer medical records under Section 10-104.

On August 29, 2013, a pre-trial conference was held, at which the trial court scheduled the trial for February 18, 2014. On September 10, 2013, a notice of deposition was mailed to appellant's counsel, informing appellant that her deposition would take place on December 2, 2013 at 10:00 AM at the Prince George's County Bar Association at 14430 Old Marlboro Pike in Upper Marlboro, Maryland. On November 22, 2013, appellee mailed to appellant's counsel an amended notice of deposition, changing the time to 2:00 PM.

¹ The original action included an additional plaintiff and defendant, both of whom were dismissed from the case and are not parties to this appeal.

On December 2, appellant and her counsel traveled to the scheduled deposition only to find that the address specified in the notice was the wrong address. In a motion for sanctions filed on December 13, 2013, appellant alleged that, when she and her counsel located the correct address, neither appellee nor her counsel were present; the deposition thus did not take place. Appellant's counsel later learned that appellee's counsel had called appellant's counsel's office at 1:55 PM to cancel the deposition. Appellant requested in her motion that appellee be ordered to pay for appellant's loss of income for taking the day off of work for the deposition, as well as her attorney's fees.

On December 18, 2013, appellee filed an opposition to the motion for sanctions, asserting that the address for the deposition had been mistyped as 14430 instead of 14330, that the incorrect address was only one block away from the correct address, and that the address of the Prince George's County Bar Association was widely known to all attorneys who practiced in Prince George's County. Appellee's counsel stated that due to "an inadvertent scheduling error," she was out of state and could not attend the deposition. When appellee's counsel realized the conflict, she had her secretary contact appellant's counsel's office, but he had already left for the deposition. The secretary then left a message at the Prince George's County Bar Association for appellant's counsel to contact appellee's counsel's office. When appellant's counsel called, an attorney in the office of appellee's counsel apologized for the scheduling error. Appellee's counsel claimed that upon her return to Maryland, she attempted to reach appellant's counsel by calling five times over the next

two weeks, but was unable to reach appellant's counsel. Appellee further stated that appellant's counsel then refused to reschedule the deposition, because he planned to be in Nigeria until March 2014, although the trial was scheduled for February 18, 2014. Appellant filed a "rebuttal," making essentially the same arguments as in her motion for sanctions, but disputing the claim that her counsel would be in Nigeria until March 2014, explaining that he merely had a busy schedule that included a trip to Nigeria.

On December 18, 2013, appellee also filed a motion for a continuance, requesting that the trial be continued because it appeared that appellant's deposition would not be taken before trial, and such deposition was a necessary part of appellee's case. On January 6, 2014, the trial court granted appellee's motion to continue, rescheduling the trial for March 17, 2014. On January 27, 2014, the trial court denied appellant's motion for sanctions.

On February 3, 2014, appellee mailed to appellant's counsel a second amended notice of deposition. The notice provided that appellant's deposition would take place on February 11, 2014, at 3:00 PM at Merrill LAD Reporting, located at 6301 Ivy Lane, Suite 610, in Greenbelt, Maryland. On February 10, 2014, the day before appellant's deposition was to take place, appellant's counsel sent a fax to appellee's counsel, explaining that appellant had a family emergency and would not be able to attend the deposition. In the fax, appellant's counsel also indicated that he would call appellee's counsel to reschedule the deposition.

On February 24, 2014, appellant’s counsel filed a motion to strike his appearance. The following day, appellee filed a motion for sanctions pursuant to Maryland Rule 2-432(a). Appellee alleged that appellant’s counsel never called to reschedule the deposition, and that appellee, through counsel, called appellant’s counsel four times and sent a letter with available dates for the deposition, but that appellant’s counsel did not respond. Appellee requested relief in the form of an order prohibiting appellant from introducing evidence in support of her claim for damages, or in the alternative, dismissing the action.

Appellant, through counsel, filed a response to the motion for sanctions on March 5, 2014. Appellant’s counsel explained that he had notified appellant of his intent to withdraw his appearance via letter on February 12, 2014, and notified appellee’s counsel on February 20, 2014. Therefore, appellant’s counsel explained, he could not reschedule appellant’s deposition. Appellant also filed a motion to continue the trial in order to allow her more time to find another attorney.

On March 14, 2014, after a phone conference between the trial judge and counsel, the court denied appellant’s motion for continuance, citing as reasons for the denial: “(1) motion extremely late; (2) motion for sanctions pending; (3) motion to strike appearance pending; (4) may reargue in open court.” On March 21, 2014, the court denied the motion to withdraw, “as withdrawal at this time would cause undue prejudice in light of [appellee’s] pending Motion for Sanctions, filed February 25, 2014, and for failure to comply with Maryland Rule 2-132(b).”

Notwithstanding the trial court’s order denying the motion to continue, the courthouse was closed on the day of trial, March 17, 2014, due to inclement weather. As a result, the court filed an order on April 2, 2014, rescheduling the trial for July 15, 2014.

On May 6, 2014, the trial court, without holding a hearing, issued an order granting in part appellee’s motion for sanctions. The court ordered that “[appellant] has failed to provide a deposition,” and that “[appellant] is precluded from supporting her claims in accordance with Md. Rule 2-433(a)(2).” On May 15, 2014, appellee filed a motion to dismiss, arguing that, based on the court’s May 6 ruling, “[appellant] will be unable to present evidence to substantiate her claim against [appellee]”; any trial thus would be moot. On May 27, 2014, appellant filed a motion to reconsider the court’s order granting sanctions because, with a July 15 trial date, there was adequate time to reschedule the deposition. Appellant also filed an opposition to the motion to dismiss on the same day, arguing that such motion was premature in light of her motion to reconsider. Both parties filed additional responses, but neither requested a hearing. On June 10, 2014, the court denied appellant’s motion to reconsider.²

On July 15, 2014, the parties appeared in the circuit court. Appellant first asked for another continuance of the trial, which the court denied. The court then heard argument on appellee’s motion to dismiss. Appellant argued that, although she was precluded by the order

² The court mailed the order to both parties, but the order was not docketed until July 24, 2014.

granting sanctions from presenting her own testimony, “the order does not contemplate the admission of medical special [sic], so that we submitted 10-104 in court here earlier last year.” The court disagreed, noting that, even if the medical records were admitted under Section 10-104, appellant’s testimony would still be necessary in order for the fact finder to assess the non-economic damages. Because appellant was precluded from testifying as a result of the order granting sanctions, the court granted appellee’s motion to dismiss. Appellant filed a notice of appeal on August 6, 2014.

DISCUSSION

We review a trial court’s finding of a discovery violation to determine whether it is clearly erroneous. *Schneider v. Little*, 206 Md. App. 414, 432 (2012), *rev’d on other grounds*, 434 Md. 150 (2013). “Our scope of review is narrow and our function is not to substitute our judgment for that of the fact finder, even if we might have reached a different result.” *Klupt v. Krongard*, 126 Md. App. 179, 193, *cert. denied*, 355 Md. 612 (1999) (citations and internal quotation marks omitted). Rather, we decide “only whether there was sufficient evidence to support the trial court’s findings. In making this decision, we must assume the truth of all the evidence, and of all the favorable inferences fairly deducible therefrom, tending to support the factual conclusions of the lower court.” *Id.* (citations and internal quotation marks omitted).

In the instant case, appellant argues that the trial court erred in granting appellee’s motion for sanctions, because there was no discovery violation. Appellant contends that she

did not violate the discovery rules, because the alleged violation was really the failure of appellant’s counsel to communicate with appellee’s counsel regarding the scheduling of the deposition, which communication is not required by the rules. Therefore, appellant argues, the court erred by imposing sanctions for a failure to respond to communications, none of which was a notice of deposition or a court order.³

Appellee responds that another deposition notice could not have been issued after the February 11, 2014 deposition failure, because the discovery deadline passed a short time after February 11, and appellant’s counsel “specifically stated that rescheduling was impossible.” Appellee argues that the trial court was within its discretion to dismiss appellant’s claim, because appellant failed to appear for a deposition before the discovery deadline expired.

We agree with appellant that her counsel’s failure to respond to appellee’s counsel’s numerous attempts to reschedule the deposition is not a discovery violation. We shall explain.

Parties to a litigation are required to attend a deposition upon proper service of a notice of deposition. *See* Md. Rule 2-412. The failure of a party to appear for a deposition may be the basis for sanctions. Md. Rule 2-432(a). A discovering party may file either a

³ Appellant also argues that (1) the trial court erred in failing to exercise its discretion to determine what sanctions to issue, because “it did not analyze the circumstances of the case or weigh other alternatives short of issuing sanctions”; and (2) the trial court prejudiced appellant by granting all of appellee’s motions and denying all of appellant’s motions. Because we conclude that the trial court erred in finding that there was a discovery violation, we need not address these arguments.

motion for immediate sanctions under Rule 2-432(a), or a motion to compel discovery under Rule 2-432(b).

Rule 2-432(a), governing motions for immediate sanctions, provides:

(a) Immediate Sanctions for Certain Failures of Discovery. A discovering party may move for sanctions under Rule 2-433 (a), without first obtaining an order compelling discovery under section (b) of this Rule, if a party or any officer, director, or managing agent of a party or a person designated under Rule 2-412(d) to testify on behalf of a party, fails to appear before the officer who is to take that person’s deposition, after proper notice, or if a party fails to serve a response to interrogatories under Rule 2-421 or to a request for production or inspection under Rule 2-422, after proper service. Any such failure may not be excused on the ground that the discovery sought is objectionable unless a protective order has been obtained under Rule 2-403.

(Emphasis added). When a party files a motion under Rule 2-432(a), the trial court, “if it finds a failure of discovery, may enter such orders in regard to the failure as are just, including . . . [a]n 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.” Md. Rule 2-433(a)(2).

Alternatively, a party may seek an order compelling discovery under Rule 2-432(b), which provides:

(b) For Order Compelling Discovery.

(1) *When Available.* **A discovering party, upon reasonable notice to other parties and all persons affected, may move for an order compelling discovery if**

(A) there is a failure of discovery as described in section (a) of this Rule,

(B) a deponent fails to answer a question asked in an oral or written deposition,

(C) a corporation or other entity fails to make a designation under Rule 2-412(d),

(D) a party fails to answer an interrogatory submitted under Rule 2-421,

(E) a party fails to comply with a request for production or inspection under Rule 2-422,

(F) a party fails to supplement a response under Rule 2-401(d), or

(G) a nonparty deponent fails to produce tangible evidence without having filed written objection under Rule 2-510(f).

(Emphasis added). If a trial court grants a motion to compel pursuant to Rule 2-432(b), and the order is violated, the court may award sanctions “upon motion of a party.” *See* Md. Rule 2-433(c).

In the instant case, appellee filed a motion for immediate sanctions pursuant to Rule 2-432(a), rather than a motion to compel under Rule 2-432(b). Sanctions may be awarded immediately under this Rule, “without first obtaining an order compelling discovery,” where a party “fails to appear before the officer who is to take that person’s deposition, *after proper notice.*” Md. Rule 2-432(a) (emphasis added). It is undisputed that appellee’s notice of deposition for February 11, 2014, was proper, and that appellant notified appellee the day

before that, because of a family emergency, she would not be able to attend the deposition. However, appellant's failure to attend the February 11, 2014 deposition was *not* the basis of appellee's motion for sanctions. Rather, appellee argued that appellant's counsel was unresponsive to the efforts made by appellee's counsel to reschedule the deposition.⁴

The rules do not require appellee to consider appellant's schedule before scheduling her deposition. The Maryland Rules Commentary contains the following observation regarding deposition practice under Rule 2-412:

To the extent that strategic considerations are not compromised, **professional etiquette suggests that dates be arranged before the notice is sent.** *See* Discovery Guideline 7. Advance arrangements also minimize paperwork and unnecessary controversy. **However, the rule does not require prior agreement, and dates may be selected by the counsel serving the notice so long as the dates are consistent with the rule.**

Paul V. Niemeyer, et al., Maryland Rules Commentary 378 (4th ed. 2014) (emphasis added).

Appellee's counsel's attempt to contact appellant's counsel was an appropriate professional courtesy, but appellant's counsel's lack of response cannot serve as a basis for a motion for sanctions under Rule 2-432(a). With the trial date scheduled over thirty days after February 11, 2014, appellee had ample time to serve another notice of deposition on

⁴ In appellee's motion for sanctions, appellee did not dispute either the existence or nature of the "family emergency" that prevented appellant's appearance at her deposition. Thus any issue regarding appellant's failure to attend the February 11, 2014 deposition is not preserved. *See* Md. Rule 8-131(a).

appellant, and, had appellant failed to appear, appellee’s motion for sanctions would have been proper under the Rules. That did not occur here.

Appellee argues, however, that another notice of deposition could not have been issued after February 11, 2014, because the discovery deadline expired a short time after February 11. We are not persuaded.⁵

According to the Pre-Trial Conference Report signed by the trial judge and the parties’ counsel, discovery was to close thirty days before trial, on February 15, 2014, “[u]nless otherwise ordered.” Appellee did not ask the trial court for a short extension of the discovery deadline to allow for the ten-day period to properly notice appellant’s deposition. *See* Md. Rule 2-412(a). Given appellant’s counsel’s lack of response to the communications from appellee’s counsel, it is hard to imagine any valid ground for appellant to oppose such extension. Moreover, when the trial was postponed to mid-July following the courthouse closure on March 17, appellee again could have sought an extension of the discovery deadline. From the record, it appears that appellee never took such action. Therefore, we conclude that there was no discovery violation upon which (1) appellee could have based a motion for sanctions under Rule 2-432(a); or (2) the trial court could have ordered sanctions under Rule 2-433(a)(2).

⁵ We view appellee’s argument as somewhat disingenuous. As indicated *infra*, the discovery deadline was February 15, 2014. In her motion for sanctions, appellee stated that her counsel called appellant’s counsel on February 11, 19, and 24 in an effort to reschedule her deposition. February 19 and 24 were after discovery had closed.

Finally, even if there was a discovery violation, the trial court abused its discretion by sanctioning appellant when there was ample time to reschedule her deposition. *See Maddox v. Stone*, 174 Md. App. 489, 507 (2007) (“[T]he imposition of a sanction that precludes a material witness from testifying, and, consequently, effectively dismisses a potentially meritorious claim without a trial, should be reserved for egregious violations . . .”). When the court granted appellee’s motion for sanctions on May 6, 2014, the trial had been rescheduled to July 15, 2014. That period, over two months, provided more than sufficient time for the taking of a single deposition needed for a one-day damages-only personal injury case.⁶

**JUDGMENT OF THE CIRCUIT COURT
FOR PRINCE GEORGE’S COUNTY
REVERSED; CASE REMANDED TO THAT
COURT FOR FURTHER PROCEEDINGS.
APPELLEE TO PAY COSTS.**

⁶ We also hold that, if there was a discovery violation, the record is not clear that the trial court considered the factors established by *Taliaferro v. State*, 295 Md. 376, 390-91, *cert. denied*, 461 U.S. 948 (1983), when determining whether dismissal or the exclusion of evidence is the appropriate sanction for a party’s failure to comply with the discovery rules. *See Schneider v. Little*, 206 Md. App. 414, 437 (2012) (“We have reversed circuit court rulings that fail to consider the *Taliaferro* factors and make no findings with respect to any of the factors.”), *rev’d on other grounds*, 434 Md. 150 (2013); *see also Joyner v. State*, 208 Md. App. 500, 525-26 (2012) (holding that the trial court’s failure to explicitly consider the *Taliaferro* factors was harmless error, because the testimony of a witness who was not disclosed before trial did not affect the guilty verdicts).