Circuit Court for Baltimore City
Case No. 004359

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1107

September Term, 2016

SAQUANNA WALKER

v.

VIOLETA MARANTAN, *et al.*

Woodward, C.J.,
Nazarian,
Friedman,

JJ.

Opinion by Nazarian, J.
Dissenting Opinion by Friedman, J.

Filed: November 9, 2017

Saquanna Walker sued her former landlords, Violeta and Amante Marantan[1] (the "Landlords"), in the Circuit Court for Baltimore City alleging that she had been poisoned by lead-based paint in the home. Ms. Walker identified an expert witness to opine that the home contained lead-based paint and her exposure to that paint caused her injuries. Ms. Walker obtained and produced a report (the "Report") from Arc Environmental ("Arc") that found lead in the home, but the report wasn't completed and produced until fourteen days after the discovery period closed. The Landlords moved to strike the Report as untimely and to strike the expert on the grounds that he lacked sufficient factual basis and qualifications for his opinion; after winning that motion, the Landlords moved for summary judgment and the circuit court granted it. We agree with Ms. Walker that, under these circumstances, the court abused its discretion when it excluded the Report, and we reverse in part, vacate in part, and remand for further proceedings.

I. BACKGROUND

Ms. Walker was born on June 10, 1994 at Mercy Hospital. From then until December 1995, she lived with her mother and grandmother at 500 N. Kenwood Avenue ("Kenwood" or the "Property"), and visited her grandmother there on the weekends after they moved, until Ms. Walker was almost two years old. Her blood was tested for lead six times between June 1995 and April 2000, and the tests revealed elevated blood lead levels four times between her birth and the time she moved from Kenwood:

[1] The Marantans were two of several Defendants, all of whom were dismissed. The Marantans owned Kenwood during Ms. Walker's residency and visitation there.

Date Taken	Blood Lead Level[2]
June 29, 1995	14 µg/dL
July 13,1995	15 µg/dL
September 12, 1995	17 µg/dL
October 25, 1995	17 µg/dL

In 2013, Ms. Walker sued the Landlords in the Circuit Court for Baltimore City, alleging negligence and violations of the Maryland Consumer Protection Act ("CPA"). On September 25, 2014, the trial court issued a scheduling order, setting December 26, 2015 as the discovery deadline. The court modified the scheduling order in response to a consent motion and revised the discovery deadline to March 25, 2016.

During discovery, Ms. Walker engaged Elite Professional Services Inc. ("Elite") to schedule a lead inspection of Kenwood with the new owners, Stephen and Patricia Richter. When first asked on October 29, 2014, Mr. Richter refused to allow Elite to inspect the Property, stating that he needed to speak with an attorney and "was not open to allowing anyone in." The record doesn't reveal what, if anything, Ms. Walker did in the months that followed to try to gain access to the Property.

Fifteen months later, in November 2015, Ms. Walker filed a Complaint for Equitable Bill in the circuit court, and asked the court to compel the Richters to allow her access to the Property for testing. The Richters answered in February 2016, sought dismissal of the complaint and continued to refuse access to the Property for testing. Ms.

[2] Blood lead levels are measured in micrograms per deciliter (µg/dL) of blood. *See Standard Surveillance Definitions and Classifications*, Center for Disease Control and Prevention, https://www.cdc.gov/nceh/lead/data/definitions.htm (last updated Nov. 18, 2016). As of 2012, the Centers for Disease Control and Prevention considers blood levels greater than 5 µg/dL to be elevated. *Id.*

Walker moved for summary judgment, which the Richters opposed. While that motion was pending, Ms. Walker gained access and Arc was able to inspect the Property; this happened, finally in March 2016, four days past the discovery deadline. On April 4, 2016, ten days after the discovery deadline, Arc issued the Report, which identified multiple areas of the Property containing lead in excess of the Maryland standard. She produced the Report to the Landlords on April 8, 2016, fourteen days after the discovery cutoff.

The Landlords moved on April 28, 2016, to strike the Arc Report, arguing that the late production prejudiced them. That same day, they filed a motion to exclude Dr. Klein, Ms. Walker's expert. They contended that Dr. Klein lacked both an adequate factual basis and necessary qualifications to support his opinions about the source of Ms. Walker's lead exposure and the medical causation of her injuries. The Landlords also moved for summary judgment. After a hearing on the motions, the circuit court struck the Report as untimely and excluded Dr. Klein's testimony, but denied the Landlords' motion for summary judgment.

The Landlords then renewed their motion for summary judgment, arguing that without Dr. Klein's testimony, Ms. Walker could not establish medical causation, and therefore couldn't establish a prima facie negligence case. The court granted that motion, and Ms. Walker appeals. We will provide additional facts as necessary below.

II. DISCUSSION

Ms. Walker challenges two of the trial court's decisions:[3] *first*, its decision to strike

[3] Ms. Walker phrased the Questions Presented in her brief as follows:

the Arc Report as untimely production, and without considering the factors governing discovery sanctions listed in *Taliaferro v. State*, 295 Md. 376, 390 (1983), and *second*, its decision to exclude Dr. Klein's expert testimony about the source of lead and medical causation.

A. The Trial Court Abused Its Discretion In Striking The Arc Report Without Considering The *Taliaferro* Factors Or Ms. Walker's Good Faith Efforts To Comply With The Scheduling Order.

We review a circuit court's decision to admit or exclude evidence for abuse of discretion. Although the abuse of discretion standard is highly deferential, a trial judge's discretion is not boundless, *see Nelson v. State*, 315 Md. 62, 70 (1989), and we will reverse a decision "if we are unable to discern from the record that there was an analysis of the relevant facts and circumstances that resulted in the *exercise* of discretion" *Maddox v. Stone*, 174 Md. App. 489, 502 (2007) (emphasis in original). When imposing discovery sanctions, particularly sanctions that effectively end the case, the record must reflect the court's analysis of the circumstances surrounding the violation, not a reflexive or hard-and-

I. WAS IT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO STRIKE THE ARC REPORT SOLELY BECAUSE THE REPORT WAS PRODUCED PAST THE DISCOVERY DEADLINE AND WITHOUT ANY SUBSTANTIVE ANALYSIS CONCERNING WHETHER STRIKING THE REPORT WAS AN APPROPRIATE REMEDY?

II. WAS THE TRIAL COURT'S DECISION TO EXCLUDE THE EXPERT TESTIMONY OF DR. KLEIN AN ABUSE OF DISCRETION, BASED ON THE FACT THAT DR. KLEIN UNEQUIVOCALLY HAD AN ADEQUATE FACTUAL BASIS FOR ALL OF HIS OPINIONS AND WAS QUALIFIED TO OFFER SUCH OPINIONS?

fast penalty. *See Taliaferro*, 295 Md. at 390 ("The exercise of discretion contemplates that the trial court will ordinarily analyze the facts and not act, particularly to exclude, simply on the basis of a violation disclosed by the file."). In *Taliaferro*, the Court of Appeals identified six factors that the court must consider before imposing sanctions for discovery violations: (1) whether the disclosure violation was technical or substantial; (2) the timing of the ultimate disclosure; (3) the reason, if any, for the violation; (4) the degree of prejudice to the parties respectively offering and opposing the evidence; (5) whether any resulting prejudice might be cured by a postponement; and, (6) if so, the overall desirability of a continuance. 295 Md. at 390–91. The court also must consider the violating party's good faith compliance, or not, with the scheduling order. *See Naughton v. Bankier*, 114 Md. App. 641, 653 (1997) ("Indeed, while absolute compliance with scheduling orders is not always feasible from a practical standpoint, we think it quite reasonable for Maryland courts to demand at least substantial compliance, or, *at the barest minimum*, a good faith and earnest effort toward compliance.") (emphasis in the original).

Ms. Walker argues *first* that the court abused its discretion when it excluded the Arc report without first analyzing the *Taliaferro* factors. Had it done so, she posits, the short-term delay in producing the Report would have been outweighed by the other factors, and the court should have concluded that the "technical" violation did not prejudice the Landlords. The Landlords respond that the exclusion of the Report was a reasonable exercise of the trial court's discretion and that they *were* prejudiced by its late disclosure. Moreover, they contend, the court *did* consider each of the *Taliaferro*.

Although we don't mean remotely to condone or recommend missing the discovery cutoff, even by a few days, we cannot discern from the record that the trial court considered the *Taliaferro* factors in full, or that it considered Ms. Walker's good faith compliance with the scheduling order, when it excluded the Arc Report. To the contrary, it appears that the court excluded the Arc Report based entirely on Ms. Walker's failure to produce the Report on time. The court inquired about Ms. Walker's efforts to gain access to the Property prior to filing the equitable bill, but that's where the analysis ends. There is no indication that the trial court considered that Ms. Walker provided the Arc Report as soon as she received it, the reasons for the delay, the fact that the Landlords had the Report more than three months before the scheduled trial date, or whether any option other than exclusion of the Report would respond appropriately to the violation, as *Taliaferro* requires. And "the court gave scant consideration to the degree of prejudice to the parties, or 'whether any resulting prejudice might be cured by a postponement and, if so, the overall desirability of a continuance.'" *Colter v. State*, 297 Md. 423, 429 (1983) (quoting *Taliaferro*, 295 Md. at 391).

Ms. Walker contends that she acted in good faith and complied substantially with the scheduling order. She relies on *Maddox v. Stone*, in which we held that a trial court abused its discretion in excluding key expert testimony, where the expert's report was disclosed thirty-four days after the close of discovery, in violation of the scheduling order. 174 Md. App. 489 (2007). We explained that such a sanction "should be reserved for egregious violations of the court's scheduling order, and should be supported by evidence of willful or contemptuous or otherwise opprobrious behavior on the part of the party or

counsel." *Id*. at 507; *see also Butler v. S & S P'ship*, 435 Md. 635, 653 (2013) ("[A]bsent a showing of an egregious violation or 'willful or contemptuous or otherwise opprobrious behavior,' a court should not exclude fundamental and essential evidence that effectively dismisses a case for a violation of a scheduling order."). The Landlords distinguish this case from *Maddox* because there was "ample time left in the discovery period" in that case, and thus the opposing party suffered no prejudice.

The Landlords are correct that the expert report in *Maddox* was submitted prior to the close of discovery, and that Ms. Walker's late production violated the scheduling order in this case. But without getting knotted up on whether this was a "technical" violation—the Report was indisputably late, and although she gained access to the Property late in the discovery period, she let a lot of time expire before taking more affirmative steps to get in—the relative detriment to the Landlords here is similar to that in *Maddox*. In context, the prejudice is pretty minor: the Landlords had the Report fourteen days after the discovery deadline, three months before trial, and before the motions deadline. *Compare Taliaferro*, 295 Md. at 398 (alibi witness disclosed on last day of trial); *Lowery v. Smithsburg Emergency Medical Service*, 173 Md. App. 662 (2007) (expert report filed two and one-half months after close of discovery, just 12 days before trial); *Helman v. Mendelson*, 138 Md. App. 29, 43–47 (2001) (report filed two months after close of all discovery with no good cause for delay); *Heineman v. Bright*, 124 Md. App. 1, 7 (1998) (party did not respond to interrogatories at all; "she just ignored them"); *Shelton v. Kirson*, 119 Md. App. 325, 332 (1998) (expert named almost twelve months after deadline). Indeed, the only prejudice the Landlords could identify was the inconvenience of editing

their at-that-point-unfiled motion for summary judgment, which had assumed there would be no Report. They filed, well in advance of the deadline, and rolled the dice that the court would grant their motion to exclude the Arc Report and Dr. Klein's testimony, rather than amending their motion to account for the materials they had in hand. That may not have been an unreasonable tactical decision, but the passage of time while that motion was pending isn't prejudicial to them.

To be sure, the fifteen-month gap between the time the case was filed and the filing of the equitable bill is curious, and we share the Landlords' frustration that they didn't get the Report in time. And we agree that Ms. Walker could, and should have been sanctioned, especially since she could have, and didn't, seek an extension of the discovery schedule, seek leave of court before the cutoff to produce it late, or otherwise anticipate and mitigate the delay. We recognize as well that the Landlords may have needed to re-depose Dr. Klein or take other steps to respond to the late-breaking report, and it would have been entirely appropriate for the court to impose those costs on Ms. Walker. But here, as in most lead paint claims, the exclusion of the Arc Report effectively ends the case—without it, as the circuit court held after excluding it, there is no direct evidence of lead in the Property.[4] The Arc Report was a "crucial piece of evidence," and its exclusion cascaded quickly into the exclusion of Dr. Klein's testimony and, ultimately, summary judgment for the defense grounded in a lack of evidence. *See Butler*, 435 Md. at 652 (2013) (explaining that "a lead

[4] We do not mean to suggest that this Report or any such report proves the presence of lead in any property—whether or to what extent the Report gets Ms. Walker past summary judgment or satisfies her burdens of proof on the merits remains to be seen, and must be determined by the trial court in the first instance.

test constitutes a crucial piece of evidence in a lead paint case, capable of making or breaking the plaintiff's case"). The record reveals no deliberation of Ms. Walker's lack of good faith compliance, nor any evidence of "persistent and deliberate violations that actually cause some prejudice" to the Landlords or the court, *Admiral Mortgage Inc. v. Cooper*, 357 Md. 533, 545 (2000), nor any willful or opprobrious behavior. Given its essentially all-or-nothing impact in this case, the decision to exclude the Report altogether—without any evidence of "egregious misconduct such as 'willful or contemptuous' behavior, 'a deliberate attempt to hinder or prevent effective presentation of defenses or counterclaims, or "stalling in revealing one's weak claim or defense,'" *Manzano v. Southern Maryland Hospital*, 347 Md. 17, 29 (1997), or any consideration of alternatives—was an abuse of discretion. We reverse, therefore, the decision to exclude the Arc Report.

B. The Court Didn't Err In Excluding Dr. Klein's Testimony Without The Arc Report, But Must Consider Whether To Admit It As Supplemented.

The rest of the court's decisions flowed from the first one. Once the court decided to exclude the Arc Report, it found that the opinions of Ms. Walker's expert, Dr. Klein, weren't supported by a sufficient factual basis. The Landlords agree. And so do we, at least insofar as Dr. Klein purported to testify without the Arc Report about the source of Ms. Walker's alleged lead exposure. Because, however, we have held that the court erred in excluding the Arc Report, and because Dr. Klein did supplement his opinion with that Report, we vacate the court's decision to exclude Dr. Klein and remand for the court to consider his testimony as supplemented. We review a circuit court's decision to admit or

exclude expert opinion testimony for abuse of discretion. *Ross v. Housing Authority of Baltimore City*, 430 Md. 648, 662 (2013).

Ms. Walker designated Dr. Klein, a pediatrician with experience treating lead poisoned children, as an expert witness to testify on the source of her lead exposure—source causation—and what caused her injuries—medical causation. Dr. Klein's November 2015 preliminary report concluded that "lead is a substantial organic etiology for [Ms. Walker's] Attention and Learning Disabilities." He based his opinion on (1) Ms. Walker's medical and school records and neuropsychological evaluation; (2) the age of the Property, which was built in 1902; (3) Maryland Department of the Environment ("MDE") records indicating Kenwood is registered,[5] as were several other properties Ms. Walker lived or frequented during the years in question and after she moved from Kenwood;[6] and (4) Ms. Walker's answers to interrogatories, where she described chipping paint in the house. Dr. Klein acknowledged at his deposition in March 2016 that he had never met or treated Ms. Walker, and that his testimony was based solely on his review of records, statements from Ms. Rayfield's deposition and his "own experience with lead." When asked whether he had "formed any opinions about any other properties being lead exposure sources to [Ms. Walker]," he replied affirmatively and explained that the reports on which

[5] Maryland law requires all leased properties built before 1950 to be registered with the MDE's lead poisoning prevention program. *See* MD. CODE ANN., ENVIR. §§ 6-801; 6-811; s*ee also Dow v. L & R Properties, Inc.*, 144 Md. App. 67, 74 (2002) (observing that no statutory provision expressly creates an evidentiary presumption that any residential rental property in Maryland constructed before 1950 has lead-based paint).

[6] One of the properties Ms. Walker frequented while living at Kenwood, and to which she eventually moved, 2729 Monument St., also tested positive for lead.

he relied confirmed a presence of lead at Kenwood and another property that Ms. Walker frequented. Dr. Klein later conceded that a report he relied on pertaining to Kenwood did not include a lead test or a notice of violation for lead.

The scheduling order required the parties to "respond to all interrogatory requests concerning the finding and opinions of experts" by January 25, 2016. On April 28, 2016, the Landlords moved to exclude Dr. Klein's testimony, and for summary judgment, on the grounds that he lacked the necessary qualifications and a sufficient factual basis for his opinions. On May 13, 2016, Ms. Walker opposed the motion and attached Dr. Klein's affidavit to the response. In the affidavit, Dr. Klein supplemented his initial opinion with the then-newly-produced Arc Report. Based on that Report, he opined that Ms. Walker was exposed to lead-based paint at Kenwood and that the Kenwood exposure was a substantial contributing causal factor in her lead poisoning that resulted in "damage on a cellular level to [Ms. Walker's] brain, disrupting normal cellular development[,] . . . immediate permanent bodily harm . . . resulting in neurocognitive deficits and other injuries."

On June 1, 2016, the circuit court held a hearing on the Landlord's motion to exclude Dr. Klein. In an order striking the Arc Report for its untimely disclosure, the judge then excluded Dr. Klein's testimony, explaining that "Dr. Klein was not shown to be competent . . . to testify because he had no personal knowledge nor did he have sufficient factual basis for determining the source of [Ms. Walker's] lead paint exposure." And without Dr. Klein's testimony on medical causation, the court agreed with the Landlords that Ms. Walker could not fashion a *prima facie* case of negligence, and it granted the Landlord's renewed motion for summary judgment.

It is undisputed that Dr. Klein's initial opinion was purely based on circumstantial evidence—Ms. Walker's counsel conceded as much at the hearing:

> We now have an ARC report demonstrating that there was lead paint at that property. So, Dr. Klein, using all of that information, has now supplemented his original opinion.
>
> His original opinion that he provided at his deposition provide using a circumstantial factual basis. He opined at that time that [Kenwood] was the source of exposure for [Ms. Walker]. However, he has now supplemented that opinion, as provided in his Affidavit . . ..
>
> And the primary distinction now is that, in addition to all of the circumstantial evidence he had, he now additionally has an ARC report demonstrating that in fact, there was lead at the property. And so, he has the adequate factual basis to determine the source of the property.

When relying on circumstantial evidence to prove source causation, a plaintiff must put lead in the property at issue, then connect *that* lead to the plaintiff herself:

> To connect the dots between a defendant's property and a plaintiff's exposure to lead[-based paint], the plaintiff must tender facts admissible in evidence that, if believed, establish two separate inferences: (1) that the [subject] property contained lead-based paint, and (2) that the lead-based paint at the subject property was a substantial contributor to the [plaintiff]'s exposure to lead[-based paint].

Rowhouses Inc. v. Smith, 446 Md. 611, 649 (2016) (quoting *Hamilton v. Kirson*, 439 Md. 501, 529–30 (2014) (alterations in *Rowhouses*)). In addition, a plaintiff relying solely on circumstantial evidence to prove the presence of lead-based paint at the subject property must rule out other reasonably probable sources of lead exposure. *Id.* at 650; *see also Roy v. Dackman*, 445 Md. 23, 47 (2015) (excluding expert opinion the based solely on "scant circumstantial evidence" that did not eliminate other probable sources).

Dr. Klein's initial opinions fall into this category. He grounded his opinion about the source of Ms. Walker's lead exposure solely in circumstantial evidence. At the time he rendered that opinion, he didn't have the Arc Report. He relied entirely on circumstantial evidence such as the age of the Property, Ms. Walker's testimony about chipping and flaking paint, and Ms. Walker's health records. Moreover, unlike *Roy*, there was no evidence at the time he submitted his preliminary report that any part of the Property had ever tested positive for lead. There was, however, direct evidence of the presence of lead-based paint throughout the interior of *another* property Ms. Walker frequented and in which she eventually lived. On that record, Ms. Walker needed to "connect the dots" by negating other reasonably probable sources of lead exposure, and Dr. Klein's preliminary report didn't attempt to do this. Accordingly, the circuit court did not abuse its discretion by excluding his preliminary opinion.

The parties also dispute Dr. Klein's competence to testify on medical causation of Ms. Walker's injuries, but as we read the record, the court didn't make any findings on this point one way or the other. Instead, the court found that "Dr. Klein was not shown to be competent on this record to testify because he had no personal knowledge nor did he have sufficient factual basis for determining the *source* of [Ms. Walker's] lead paint exposure." (emphasis added). The court's assessment of Dr. Klein's competence to testify about the source turned entirely on the nature and quality of the source evidence on which he relied, not on Dr. Klein's qualifications or competence to testify as to the proximate cause of Ms. Walker's injuries.

This all said, the trial court's exclusion of the Arc Report ended its analysis of Dr. Klein's ability and competence to testify *from a record that includes that Report* about the source of Ms. Walker's lead exposure and the cause(s) of her alleged injuries, and the summary judgment in favor of the Landlord followed inextricably from the exclusion of Dr. Klein's reports. In light of our decision reversing the court's exclusion of the Arc Report as a discovery sanction, we vacate the court's decision to exclude Dr. Klein's testimony and the summary judgment in favor of the Landlords, and remand for further proceedings consistent with this opinion. We leave to the trial court to assess in the first instance whether, as supplemented with the Arc Report, Dr. Klein is competent to testify on the source of lead and medical causation of Ms. Walker's injuries and, if so, what impact such a ruling would have on the Landlords' entitlement to summary judgment, and we express no views on the merits as to any of these points.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED IN PART, VACATED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY.

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There can hardly be a less worthwhile use of a judge's time than writing a dissent, based on factual grounds (and thus not possibly "cert-worthy"), to an unreported opinion. With that in mind, I write *briefly* to explain why I cannot agree with my esteemed colleagues as to the outcome of this case.

The Court of Appeals has instructed trial courts to consider six factors when considering the imposition of a discovery sanction: (1) whether the lateness was technical or substantial; (2) how late the disclosure was; (3) the reason for the lateness; (4) the degree of prejudice to the parties; (5) whether the lateness was curable by postponement; and (6) the overall desirability of a postponement. *Taliaferro v. State*, 295 Md. 376, 391 (1983). Our review of the trial court's imposition of discovery sanctions is deferential; we review only for an abuse of discretion. *Abrishamian v. Barbely*, 188 Md. App. 334, 342 (2009).

The majority of this panel faults the trial court for failing to articulate clearly these *Taliaferro* factors or to discuss them explicitly. Slip op. at 6. I disagree with that criticism for two reasons. *First*, trial judges are "presumed to know the law and apply it properly." *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 426 (2007) (internal citations omitted). Thus, even if the trial judge did not discuss the *Taliaferro* factors at all, we can still affirm the sanction. *Second*, and perhaps more importantly, on this record we can see that this trial judge was aware of the *Taliaferro* factors. The *Taliaferro* case was briefed by both parties and the factors were discussed by counsel and the trial judge at the hearing. *See* E. 618-19; 638-642; 671-76. And, beyond knowing of the existence of the factors, I think that she had a sufficient basis for finding that each of the factors supported the sanction she imposed.

- As to the first *Taliaferro* factor, "whether the lateness was technical or substantial," I don't think the issue is as easily avoided as the majority seems to. Slip op. at 7 ("But without getting knotted up on whether this was a 'technical' violation …"). The trial court presumably found the violation to be substantial. I don't have to demonstrate that the violation was substantial; merely that the trial judge didn't abuse her discretion in finding the violation to have been substantive. Moreover, I think I read this factor differently than do my brothers. They seem to find a low number of days late—4 or 14—could suggest that a violation was technical and, conversely, that a high number of days late would be more likely to be substantive. By contrast, I read "technical" to apply to situations in which the violation was unintentional: a party misapplies the mailbox rule, Md. Rule 1-203(c), miscounts the number of days in a month, Md. Rule 1-203(a), or has a computer crash while trying to e-file a document at 11:59 pm.[7] To me, those are "technical" violations. Missing a known deadline, no matter by how long, is, I think substantive. More importantly, if the trial judge read the technical/substantive dichotomy as I have, she didn't abuse her discretion in finding this violation to have been substantive.

- The second *Taliaferro* factor, "how late the disclosure was," was discussed extensively at the hearing and is a question of degree. The trial court clearly felt the answer was "very." The majority of this panel thinks it was "not too late." Here again, I don't have to prove the majority is wrong. Rather, I need only demonstrate that the trial court didn't abuse her discretion by finding that the disclosure came very late. In support of that view, I note that this was not, as the majority finds, just a violation of the deadline for the close of discovery, Slip op. at 3, but also of the deadline governing the disclosure of expert's testimony. Moreover, a late disclosure compounds the violation of the scheduling order when it affects the defense's ability to defend itself, *Helman v. Mendelson*, 138 Md. App. 29, 44 (2001) (holding that the late disclosure was more egregious when it impacted the defendant's ability to mount a defense), and it was not wholly unreasonable for the trial court to have found that the late disclosure, by requiring a change of the expert's opinion, did effect the defense's case.

- As to the third *Taliaferro* factor, "the reason for the lateness," I note that this was the focus of the trial judge's questioning at the hearing below. E. 639-41. Walker's lawyer blamed difficulties in gaining entry into the property to conduct testing. The trial court wasn't impressed with that reason, noting that

[7] Also relevant to the technical/substantive inquiry, in my view, is whether a party moved in good faith for an extension of the deadlines. Here there was no such motion.

counsel delayed 15 months before filing for an equitable bill of discovery and took no steps to accelerate the proceedings in that case. {E. 640-41} Given that, I don't think her decision that the reasons for lateness were not meritorious is wrong, let alone an abuse of her discretion.

- As to the fourth *Taliaferro* factor, "the degree of prejudice to the parties," the majority makes much of the fact that excluding the Arc Report effectively ended Walker's case. Slip op. at 9. I read the record differently. At the time the sanction was granted it was not known, and could not have been known, that excluding the Arc Report would terminate Walker's case. I have found no case that suggests that this *Taliaferro* factor requires a trial judge to predict the future or that allows this appellate court to apply 20/20 hindsight to see what the effect of the ruling was. Rather, the trial court must judge the prejudice based on the information available to it at the time. The prejudice and potential effects of excluding or not excluding the Arc Report were discussed substantially in briefs and at the hearing. Here, based on that information, I don't think there was an abuse of discretion.

- I consider the fifth and sixth *Taliaferro* factors together, as both concern postponement. At the hearing before the trial judge, Walker's attorney suggested the exact same alternative sanction offered by the majority: postponing the trial and reopening discovery to re-depose Dr. Klein. E. 643. I think that this possibility, which included the potential of postponing trial to nearly 3 years after the initial complaint because Walker could not meet a 16 month discovery deadline, was considered undesirable by the trial judge. It was, certainly, within the court's discretion to decide this.

In sum, I believe the trial court exercised the discretion afforded her in this case, and presumptively applied the *Taliaferro* standards as required. I respectfully dissent.[8]

[8] On the issue of the exclusion of Dr. Klein as an expert witness, I agree with the majority that, absent the Arc Report, Dr. Klein's testimony should be excluded for lacking an adequate foundation. Because I believe that the circuit court's discovery sanction should be affirmed, and that sanction did not permit Dr. Klein to use the Arc Report as a basis for his testimony, I think the order excluding the testimony of Dr. Klein should be affirmed.