Circuit Court for Baltimore City
Case No. 24X12000713

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2103

September Term, 2016

CAROLE COLVIN, ET AL.

v.

EATON CORPORATION, ET AL.

Wright,
Kehoe,
Rodowsky, Lawrence F.,
(Senior Judge, Specially Assigned)
JJ.

Opinion by Kehoe, J.

Filed: October 4, 2019

Carole Colvin appeals from a judgment of the Circuit Court for Baltimore City that dismissed, with prejudice, her civil action against Eaton Corporation, PACCAR, Inc., and other defendants based upon what the court perceived to be a discovery violation. To this Court, Ms. Colvin presents two arguments, which we have consolidated and reworded:

> Did the circuit court erroneously grant appellees' motion to dismiss Ms. Colvin's wrongful death and survivorship action on the basis of an alleged discovery violation?[1]

Because our answer is yes, we will reverse the judgment and remand to the circuit court for further proceedings consistent with this opinion.

Background

In March 2012, Ronald Colvin died as a result of complications from mesothelioma, an asbestos-related disease for which he had been diagnosed one month earlier. He was survived by his spouse, Carole Colvin. On June 7, 2012, Ms. Colvin, on behalf of herself (as Mr. Colvin's surviving spouse) and as personal representative of Mr. Colvin's estate,

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[1] In her brief, Ms. Colvin presents the following issues:

> 1. Whether the trial court lacked the power to enter a judgment of dismissal with prejudice under rule 2-432 and 2-433 because (a) the inability of Mrs. Colvin's lawyers to produce nonparty witnesses for a deposition is not a discovery violation; and (b) there was no court order compelling Mrs. Colvin's lawyers to produce the nonparty witnesses.
>
> 2. Whether it was an abuse of discretion for the trial court to enter a judgment of dismissal with prejudice for a discovery violation when there was no discovery violation; there was no "egregious conduct;" the prejudice suffered by Appellees was minimal; and the trial court failed to consider less severe options to rectify the perceived prejudice.

filed a wrongful-death and survival action in the Circuit Court for Baltimore City against Eaton Corporation, PACCAR, Inc., (collectively "appellees") and about thirty other entities. While the complaint referenced five specific locations where Mr. Colvin was allegedly exposed to asbestos, it alleged that all the named defendants were responsible for asbestos-containing products utilized at only one worksite: a Safeway grocery plant in Landover, Maryland. At the outset of this litigation, Ms. Colvin was represented by Jason Weiner, Esq., of the New York-based law firm of Napoli, Bern, Ripka, Shkolnik, LLP.

The case was subject to numerous scheduling orders. The first was issued in April 2013. It consolidated Ms. Colvin's case with two others, and required that, by September 2013:

> Plaintiffs produce all claim forms and any exposure affidavits or statements submitted to any bankruptcy entity or trust, and supplement such information as necessary every sixty (60) days thereafter [and] provide executed answers to interrogatories which identify each worksite where plaintiff or plaintiff's decedent worked, dates at each site, co-workers at each site, asbestos-containing products (both type and manufacturer) at each site, and contractors installing asbestos products at each site . . . .

The order also designated March 5, 2014, as the deadline for deposing "plaintiffs' fact witnesses who plaintiffs are able to voluntarily produce for deposition without subpoena by defendants," and April 27, 2014, as the "[l]ast day for deposition of plaintiffs' fact witnesses who plaintiffs are unable to voluntarily produce for deposition without subpoena by defendants." Finally, the order set a trial date of July 8, 2014. Additional scheduling orders containing the same language about producing claim forms, affidavits, and fact witnesses followed. Then, in June 2014, the Raymond Corporation moved to sever Ms.

Colvin's case from the group to which it had been originally assigned. That motion was granted in December 2013, and Ms. Colvin's case was consolidated with five other asbestos-related cases, subject to a new scheduling order (similar to the one described above) that set a trial date of February 10, 2015.

Throughout that time, a series of depositions, interrogatories, and other discovery-related matters were conducted. Ms. Colvin filed the first of many answers to appellees' interrogatories on February 7, 2013. Of note, Master Interrogatory No. 9 sought employment history regarding any employment from which Mr. Colvin may have been exposed to any type of chemical or dust. Ms. Colvin's answer included the Safeway facility, from 1972 to 1998, in Landover, as well as a Shell gas station from 1964 to 1965. For the remainder of jobsites identified in this answer, including Mr. Colvin's military history, Ms. Colvin responded, "[I]nvestigation continues."

Interrogatory No. 36 sought detailed information regarding any claims submitted in any bankruptcy proceeding. Ms. Colvin objected to this interrogatory and provided no additional information. Interrogatory No. 83 sought information regarding any written statement made to anyone concerning the facts of the case. She again objected and, without waiving the objection, limited her response to statements made to a "law enforcement officer, insurance company representative, investigator or state or federal agent."

Three fact witnesses, who worked with Mr. Colvin at the Safeway plant, were also deposed during the initial discovery period. Paul Kelly was deposed on August 28, 2013, and again on January 15, 2014. Joe McGuire was deposed on October 30, 2013, and again

on February 6, 2014. Thomas Moore was deposed on January 9, 2014. All three witnesses appeared voluntarily for these depositions. (We will refer to Messrs. Kelly, McGuire, and Moore as the "Fact Witnesses".)

Between May 28, 2014 and September 16, 2014, Mr. Weiner produced, for the first time, nearly 300 pages of bankruptcy trust claim forms, as well as approximately twenty-five affidavits executed by Mr. Colvin shortly before his death, alleging exposure to various asbestos products. Then, on August 25, 2014, Mr. Weiner produced an affidavit signed by Ms. Colvin two years earlier. That affidavit stated that Mr. and Ms. Colvin performed home remodeling work from 1970 to 1972, in which both were exposed to dust in asbestos-related products, but that only Mr. Colvin wore a mask while performing the work.

As a consequence of the belated production of these materials, on September 4, 2014, appellees filed a joint motion for sanctions, to re-open discovery, and for a continuance. Appellees requested that the case be dismissed, or, in the alternative (1) an order compelling the production for all bankruptcy forms and related material; (2) reopening discovery, including continuation depositions for Ms. Colvin and the Fact Witnesses; (3) severing the case; (4) the issuance of subpoenas to all known bankruptcy trusts; (5) sanctions; and (6) reasonable fees. Appellees filed the motion "because of severe discovery failures involving multiple misrepresentations by Plaintiffs' counsel regarding the existence of . . . bankruptcy trust claim submissions." Appellees alleged that Mr. Weiner had engaged in a pattern of misconduct in failing to disclose bankruptcy forms in a timely fashion. Appellees specifically cited to three affidavits filed in June and August 2014,

arguing that they had been untimely filed because they were produced after depositions had been taken, expert reports had been prepared, and dispositive motions had been filed. Appellees claimed they did not have the benefit of the information, contained in the bankruptcy trust claim forms and affidavits, with which to test the recollection of the several deponents.

After appellees filed their motion to reopen discovery and for sanctions, Mr. Weiner produced, for the first time, thirty-seven affidavits executed by Mr. Colvin prior to his death, an additional 524 bankruptcy trust claim forms, and served numerous Supplemental Answers to Interrogatories. The supplemental answers: (1) corrected the dates upon which the various bankruptcy trust claims were filed, (2) disclosed that approximately 25 of the bankruptcy trust claims had been withdrawn, and (3) provided a privilege log of those affidavits provided by Mr. Colvin to his counsel but never submitted to a bankruptcy trust.

On September 26, 2014, and as a result of these disclosures, appellees filed a supplement to their motion to reopen discovery. Mr. Weiner filed an opposition to the appellee's motion one month later.

In December 2014, a hearing on the motion was held before the Honorable John M. Glynn. Counsel argued about, *inter alia*, which bankruptcy trust claims and affidavits needed to be produced in discovery. The parties also disputed the need for the Fact Witnesses to be re-deposed. Additionally, counsel for Eaton argued that, in addition to an order reopening discovery and rescheduling the trial, the defendants were seeking sanctions.

At the conclusion of argument, the court decided not to dismiss the case, but severed it from the other cases with which it was grouped and continued the case to an undetermined later date. The court determined that affidavits not submitted to a bankruptcy trust did not need to be produced, but also concluded that answers must be produced relating to other potential exposures to asbestos-related products. The court also directed the parties to develop and agree upon a discovery plan.

In the months that followed the hearing, the parties exchanged discovery plans. Appellees' proposed plan noted that the parties had already agreed that appellees could re-depose Ms. Colvin. Additionally, appellees sought to re-depose Ms. Colvin's expert witnesses in light of the additional information contained in the affidavits signed by Mr. Colvin before his death. They sought an order that would prevent their experts from being cross-examined regarding their initial reports because those reports did not take into account the information contained in the affidavits.

This brings us to the part of the appellees' proposed discovery plan that is most relevant to the issues in this appeal. The plan proposed to re-depose the Fact Witnesses. All three of these witnesses had been deposed before Mr. Weiner's disclosure of the affidavits filed by Mr. Colvin. As to these witnesses, the proposed plan stated:

Defendants have conferred and believe the following depositions are needed:

• • •

2. Co-workers, Thomas Moore, Joseph McGuire, and Paul Kelly

> a. Mr. Moore discussed being a maintenance mechanic, including repairing some insulation on pipes. He did not recall insulation brands and we need to depose him based upon the information in the affidavits to see if they refresh his recollection. Some of the affidavits are for companies who manufactured amphibole containing asbestos insulation products.
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> b. Paul Kelly was a truck mechanic and describe[d] Mr. Colvin repairing pipe in the ceiling in the truck repair garage. He did not recall insulation brands; like Mr. Moore, we need to depose Mr. Kelly to determine whether the information and products and the affidavits refreshes recollection of what was used at Safeway.
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> c. Joseph McGuire was the shop steward for part of Mr. Coleman's career at Safeway. In addition, he was also a maintenance mechanic and claimed that the maintenance mechanics were responsible for electrical, plumbing, and forklift and pallet jack repairs. As with the others we need to depose Mr. McGuire to see if the information in Mr. Colvin's affidavits refresh[es] his recollection about the work Mr. Coleman did at Safeway in the brands of insulation products used.
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> • • •
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> Based upon the information in the affidavits signed by Mr. Colvin [and belatedly produced by Mr. Wiener,] Defendants need time to locate and identify additional Safeway employees who may be able to shed light on the use of the products identified in the affidavits and take their depositions.

Beyond stating that these depositions "were needed," there was nothing in appellees' proposed discovery plan that indicated that Ms. Colvin or her counsel was required to produce the Fact Witnesses for the depositions. Nor was there anything in the proposed discovery plan that set out deadlines by which any of the additional discovery was to be accomplished. Mr. Weiner disagreed with that request.

Because counsel were unable to agree on a discovery plan, the court held another hearing on May 11, 2015, before Judge Glynn. After argument, the court announced its ruling (emphasis added):

> The Court: Okay. This is complicated as Mr. Weiner knows, and you gentlemen and ladies all know. But the fact [is] that this has been all too much of a problem all too long, *I'm going to grant the Defendants' plan. You're going to comply with it*. If there's any cost that you think were occurred, I'll hear them afterwards. . . .
>
> Mr. Weaver[2] : Okay.
>
> The Court: –You want costs, right?
>
> Mr. Weaver: Absolutely. We will keep track of the additional depositions. And —
>
> The Court: And I'll decide what I think of that when it happens —
>
> Mr. Weaver: Yeah, and, you know, we're not talking about taking all-day depositions. You know —
>
> The Court: I hope not.
>
> Mr. Weaver: — So, you know, but we do want the follow up. And at a minimum, we want to follow up on the contents of these affidavits.
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> The Court: Brevity is the soul of wit. Right? Get to the point. Okay. . . .

Then, between October 2015 and May 2016, a series of events occurred that were outside of Ms. Colvin's control but nonetheless affected the course of the litigation. Mr. Weiner's firm, Napoli, Bern, Ripka, Shkolnik, LLP, which had been representing Ms. Colvin since the action had been filed in June 2012, broke up, and Mr. Weiner withdrew

[2] Warren N. Weaver, Esq. is counsel for Eaton Corporation.

his appearance for Ms. Colvin. On October 22, 2015, George M. Tankard, III, Esq., of Napoli Shkolnik PLLC (an offshoot of the original firm) entered his appearance for Ms. Colvin. However, almost immediately, Mr. Tankard left the firm, and so on December 16, 2015, Aaron M. Graham, Esq., of Napoli Shkolnik entered his appearance on behalf of Ms. Colvin. When Mr. Graham himself left the firm several months later, he was replaced by Lonny Bramzon, Esq., on May 31, 2016.

During that time, a series of communications took place between Ms. Colvin's counsel at the time (Mr. Graham) and counsel for appellees regarding outstanding discovery issues, particularly the Fact Witnesses who had yet to be re-deposed.

On March 1, 2016, after reviewing the transcript of the May 11, 2015, hearing, Mr. Graham emailed the following: "Regarding the Colvin case; I've reviewed the materials, and we're working to contact our witnesses to come up with dates. I absolutely intend to comply with the Judge's order." Because the deadline for deposing fact witnesses established by the revised scheduling order had already passed, counsel for appellees proposed to Mr. Graham that the Colvin case be severed from its new trial group and continued to a later date. A severance did in fact occur on May 11, 2016, when the court issued an order severing the case and continuing it to an October 2016 trial group.

Then, on May 16, 2016, Graham wrote to opposing counsel: "Our office is reaching out to the witnesses to secure dates. As soon as we are able to coordinate with their schedules, we will notify all parties involved." Soon thereafter, Mr. Bramzon entered his appearance on behalf of Ms. Colvin.

On June 3, 2016, counsel for appellees asked Mr. Bramzon to make the three Fact Witnesses available for their depositions. Mr. Bramzon did not respond.

The third scheduling order's deadline for producing fact witnesses, June 8, 2016, and the deadline for appellees to depose those witnesses, July 11, 2016, passed without Ms. Colvin producing the Fact Witnesses, and without the appellees deposing the Fact Witnesses.

On August 16, 2016, appellees filed a renewed Joint Motion for sanctions in the form of Dismissal of the Case for Plaintiff's Repeated Discovery Violations and Failure to Comply with the Circuit Court's Order, pursuant to Md. Rules 2-432 and 2-433. Mr. Bramzon failed to respond to the Renewed Motion for Sanctions. On September 15, 2016, the court granted the motion and dismissed all claims with prejudice.

One day later, on September 16, 2016, Mr. Bramzon filed a motion for the *pro hac vice* admission of Kardon Stolzman, Esq., also of Napoli Shkolnik. That same day, Mr. Bramzon filed a motion to vacate the judgment, as well a motion for reconsideration. Accompanying that motion was an affidavit, executed by Mr. Stolzman, which stated, among other things, that: (1) he had made repeated attempts to contact Messrs. Kelly, McGuire, and Moore; (2) on September 7, 2016, Mr. McGuire informed Mr. Stolzman that he could not be re-deposed due to an injury, and, in any event, he refused to appear for another deposition because of his displeasure with his previous depositions; (3) Mr. Kelly has not responded to Mr. Stolzman's messages or calls; and (4) the phone number for Mr. Moore is no longer in service.

On September 28, 2016, the circuit court held a hearing on Ms. Colvin's motion to vacate and her motion to reconsider. Although the court had already dismissed the case with prejudice, it also heard argument on the appellees' renewed joint motion for sanctions. Mr. Stolzman relayed to the court the situation with the Fact Witnesses and told the court:

> Unfortunately, we've now learned that they don't want to present themselves for deposition voluntarily.
>
> They are still subject to subpoena power, and if Plaintiff so needs to subpoena them for trial, we will do that. And I—and Defendants are open to do that as well.
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> • • •
>
> I think to be clear, and I want to be able to—I want these witnesses to be able to be available. There's only so much I can do. They're not under my control. I would imagine that they would be under subpoena power.

The court issued its ruling from the bench. In deciding whether to dismiss the case, the court analyzed what it perceived as discovery violations under the five factors of *Taliaferro v. State*, 295 Md. 376 (1983). In doing so, the court found that:

> [T]here's no real evidence that any of [Ms. Colvin's] attorneys really, you know, did anything to try to comply with the order.
> So I'm going to look at the factors because I know that certainly there could be an appeal. The factors are whether the disclosure violation was technical or substantial. And I think the denial, the outright denial, of the deposition of those three witnesses is a substantive violation because now they're faced with new material that they never had before. They can't depose the witnesses. We don't even know if the witnesses are available. So I would say that it is definitely of a substantial nature.
>
> The timing of the ultimate disclosure, well, it sounds like nobody noticed anything until after Defendants filed their motion, and so that certainly doesn't show any good faith on the part of Plaintiffs' counsel.

> The fact that nothing was done, and the fact that they did not even respond to the motion is even more egregious in my view. Certainly, you would look at that and it would be an emergency, oh, my gosh. Look what we neglected to do because we had three counsel leave. That didn't even happen.
>
> The reason, if any, for the violation, I'm just saying mismanagement of the law firm or something. I don't know what to say. I don't want to pin it on any one person, but—and definitely don't want to pin it on present counsel, but what else could you say? There's no really good reason, or good cause that I can point to, to say why they didn't comply with the court's order.
>
> The degree of prejudice to the parties respectively offering and opposing the evidence. I think the prejudice is great. The prejudice not only is that they can't depose the witnesses, but I'm trying to figure out if I were the defense attorney, what on earth my strategy's going to be at trial. Not—I really don't even know at this point if I can locate them, and if they do show up, and I can't depose them, do I ask them certain questions? Do I not ask them questions? Is this going to hurt my case? Is this going to help my case? I don't know. No clue what they're going to say.
>
> And whether the resulting prejudice can be cured by a postponement. Maybe it could be cured by a postponement, but we've already been down that road three times before and nothing has happened. And I have no faith in the fact that there's a suggestion that it might remedy it this time. Certainly, the Court is not required to grant an unlimited number of postponements so that counsel can comply with a court order that they should have complied with before.
>
> So I think under all five of those factors, dismissal is the appropriate remedy, and I think it should be a dismissal with prejudice. So that's my ruling.

Ms. Colvin timely appealed.

The Standard of Review

The resolution of a discovery dispute is a matter of the trial court's discretion. *See, e.g.*, *Valentine-Bowers v. The Retina Group of Washington*, 217 Md. App. 366, 378 (2014). A court can abuse its discretion when its decision is based on an incorrect legal premise or

upon factual findings that are clearly erroneous. The parties do not dispute the facts for the purposes of this appeal. We review the contentions that the circuit court erred as to matters of law on a *de novo* basis. *In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90, 100 (2010). Absent factual or legal error, we defer to the trial court resolution of the discovery dispute unless the court's decision was "well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *Valentine-Bowers*, 217 Md. App. at 366 (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 313 (1997)). Additionally, "[t]he court's exercise of discretion is presumed correct until the attacking party has overcome such a presumption by clear and convincing proof of abuse." *Hossainkhail v. Gebrehiwot*, 143 Md. App. 716, 725 (2002).

Analysis

1.

Before reaching the substantive issues on appeal, we must address appellees' argument that Ms. Colvin failed to preserve the arguments she makes on appeal because (1) she did not file any written opposition to appellees' renewed motion for sanctions, and (2) she did not otherwise raise these arguments during the September 28, 2016, hearing. In her reply brief, Ms. Colvin tacitly concedes that her appellate contentions were not raised before the circuit court, but asks us to exercise our discretion to consider them nonetheless.

Rule 8-131 provides that (emphasis added):

> The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court.

> *Ordinarily*, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, *but the Court may decide such an issue if necessary or desirable to guide the trial court* or to avoid the expense and delay of another appeal.

An appellate court's discretion to address unpreserved contentions is not unlimited. In particular, an appellate court should not exercise its discretion to review an unpreserved issue if doing so will unfairly prejudice the parties. *Davis v. DiPino*, 337 Md. 642, 648, (1995) (citing *County Council v. Offen*, 334 Md. 499, 509–10 (1994)).

We will exercise our discretion to review Ms. Colvin's arguments on their merits. As we will explain, the circuit court's decision was not consistent with the rubric for the imposition of discovery sanctions set out in Md. Rules 2-432 and 2-433. An explanation of why this is so will assist the circuit court in resolving similar discovery disputes in the future. Appellees are not unfairly prejudiced by our doing so because our review in this matter is *de novo* and both parties fully briefed and argued the issues on the merits. Moreover, the court's error clearly affected Ms. Colvin's substantial rights, as the court dismissed her case with prejudice.

2.

Discovery in circuit court civil cases is controlled by Title 2, Chapter 4, of the Maryland Rules. *See* Paul V. Niemeyer et al., MARYLAND RULES COMMENTARY 338–39 (4th ed. 2014) (hereafter "Rules Commentary"). Md. Rule 2-401(c) encourages parties to "reach agreement for the scheduling and completion of discovery." If the parties are unable to agree upon a plan for the timing and sequence of discovery, the court may impose such

a plan, as part of its authority to establish and revise scheduling orders pursuant to Md. Rules 2-504 and 2-504.1. Rules Commentary at 321.

Sanctions may be sought when a party fails to properly respond to requests for discovery. *See* Md. Rules 2-432 and 2-433. These two rules are intertwined and must be read together. They distinguish between "discovery failures," which occur when a party simply does not respond at all to a discovery request, and situations in which the party responds but the response is incomplete or otherwise objectionable. Rules Commentary at 436–37.[3]

As a general matter, the first step in obtaining a judicial resolution of a discovery dispute is to seek a court order compelling discovery. Md. Rule 2-432(b); Rules

[3] Judge Niemeyer and his co-authors summarize the relationship between Rule 2-432 and Rule 4-333 (emphasis in original):

> When a party fails to provide discovery altogether, the party seeking discovery has two choices: to file a motion for immediate sanctions under section (a) of this rule or, in the alternative, to file a motion for a court order that compels the discovery under section (b). The immediate sanctions available are those contained in section (a) of Rule 2-433. The party who failed to appear for a deposition or who failed to file a response to interrogatories or to a request for documents may not assert as a defense to the motion that the discovery sought is objectionable, unless a protective order has actually been *obtained*. . . .
>
> With respect to any other failure of discovery, such as an incomplete or inadequate answer or a contested objection properly raised, the party may only file a motion to compel discovery under section (b). An order compelling the discovery must be obtained prior to the imposition of certain sanctions, such as contempt. . . .

Rules Commentary at 437.

Commentary at 436–37. However, in the absence of an order to compel discovery, a party may request for an immediate imposition of sanctions for certain types of discovery failures. Md. Rule 2-432(a)[4] provides that a party seeking discovery may move for sanctions without first obtaining an order to compel discovery when (1) a *party* or a party's designee fails to appear for a deposition after receiving proper notice, (2) a party fails to answer properly served interrogatories, or (3) a party fails to respond to a request for production or inspection pursuant to Rule 2-422.

Certainly, none of the Fact Witnesses were parties to Ms. Colvin's action, nor were they her designees under Md. Rule 2-412(d).[5] Appellees have never asserted that Ms.

[4] Rule 2-432(a) reads:

> 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.

[5] Rule 2-412 states in pertinent part:

> (d) A party may in a notice and subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, managing agents, or other persons who will testify on its behalf regarding the matters described and may set forth the matters on which each person designated will testify. A subpoena shall advise a nonparty

Colvin's lawyers failed to file answers to interrogatories but rather that Mr. Weiner's responses were untimely, incomplete, and misleading. Thus, this case does not involve one of the failures of discovery that can be the basis for an immediate imposition of sanctions pursuant to Rule 2-432(a).

Next, we turn to appellees' argument that Judge Glynn's May 11, 2015, order approving appellees' discovery plan was an order compelling discovery and the order required Ms. Colvin to produce the Fact Witnesses for depositions. They contend that the serial failures of Ms. Colvin's lawyers to provide the information that appellees assert they were required to provide constituted the violation of an order to compel discovery entered pursuant to Md. Rule 2-432(b). Appellees reason that, because Ms. Colvin's attorneys completely failed to comply with Judge Glynn's order, the circuit court did not abuse its discretion in dismissing her claims with prejudice. *See Hossainkhail v. Gebrehiwot*, 143 Md. App. 716, 733 (2002) (Affirming the circuit court's ruling dismissing an action for the plaintiff's failure to comply with a court-mandated discovery order). Additionally, appellees assert that Judge Glynn's order must be read in conjunction with the scheduling orders in this case, which, according to appellees, "required that the [Fact Witnesses] be produced without the necessity of a subpoena from the Appellees."

> organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization.

For her part, Ms. Colvin contends that Judge Glynn's order was not an order to compel discovery. According to her, we should consider an order to compel discovery as analogous to an injunction and "[l]ike an injunction, an order compelling discovery should be specific in terms and describe in reasonable detail the act sought to be mandated. *See* Rule 15-502(e)." Ms. Colvin cites to the lack of specificity in Judge Glynn's order to conclude that it is not an order compelling discovery at all. Then, assuming we do find Judge Glynn's order was an order compelling discovery, Ms. Colvin contends that her lawyers didn't violate it because it was neither her nor her attorneys' responsibility to produce and potentially subpoena the witnesses on appellees' behalf.

We agree with appellees that Ms. Colvin's focus on the (metaphorical) four corners of Judge Glynn's order and the (actual) four corners of appellees' discovery plan is somewhat misplaced. When his order and the discovery plan are considered in context, it is clear that the order was, at least in part, an order compelling discovery. However, the scope of the compulsory portions of that order is far more limited than appellees suggest.

Our analysis starts with the principle that "court orders are construed in the same manner as other written documents and contracts, and if the language of the order is clear and unambiguous, the court will give effect to its plain, ordinary, and usual meaning, taking into account the context in which it is used." *Taylor v. Mandel*, 402 Md. 109, 125 (2007) (citation omitted). The procedural context in which Judge Glynn's order was issued is extremely important.

As we have related, in their motion filed on September 4, 2014, appellees set out the history of Mr. Weiner's untimely and incomplete responses to their discovery requests. They sought dismissal of Ms. Colvin's action or, in the alternative, an order to compel discovery, to re-open discovery, sanctions, and related relief. Several months later, after a hearing, Judge Glynn declined to dismiss Ms. Colvin's case but severed it from its trial group and continued the case. In addition, the court ordered the parties to develop a jointly acceptable discovery plan. They were unable to do so and, ultimately, Judge Glynn approved appellees' proposed discovery plan, reserved on the question of awarding costs to appellees, and informed Ms. Colvin's counsel that "[y]ou're going to comply with [appellees' discovery plan.]" The discovery plan contained no deadlines for the completion of discovery but the court periodically entered scheduling orders that did set out deadlines for the completion of various forms of discovery.

Returning briefly to the substance of the appellees' discovery plan, appellees sought to re-depose Ms. Colvin and her experts and re-depose the Fact Witnesses. Obviously, Ms. Colvin controlled whether she and her experts would appear for additional depositions. But the Fact Witnesses were not parties nor was Ms. Colvin paying them for their professional opinions. They were not under Ms. Colvin's control. We conclude that Judge Glynn's order adopting the discovery plan, when viewed in the context of the substantive provisions of the plan itself, constituted, at most, an order compelling Ms. Colvin to produce herself and her experts for additional depositions within the time limits set out in the scheduling orders.

The availability of Ms. Colvin and her experts for additional depositions is not at issue in this appeal.

Moreover, appellees' discovery plan did not require Ms. Colvin to produce the Fact Witnesses, or to canvass the Fact Witnesses to find out if they were willing to be re-deposed, or, indeed, to do anything whatsoever regarding the Fact Witnesses. When issuing his order, Judge Glynn ruled, without elaboration: "I'm going to grant the [appellees'] plan. You're going to comply with it." Further, it is clear beyond cavil that appellees' discovery plan also did not require Ms. Colvin to subpoena the Fact Witnesses to compel their attendance at depositions to be conducted by appellees' counsel. If appellees desired that Ms. Colvin be required to produce the Fact Witnesses, they could have included such language in their discovery plan. Thus, when the circuit court later construed Judge Glynn's order as imposing such obligations, it erred.

That brings us to appellees' argument that the scheduling orders required Ms. Colvin to produce the Fact Witnesses and that appellees were not required to, let alone expected to, subpoena the Fact Witnesses *they* sought to re-depose. This issue arose during the September 26, 2016, hearing on Ms. Colin's motion for reconsideration. At that hearing, Mr. Stolzman stated (emphasis added):

> Unfortunately, we've now learned that [the Fact Witnesses] don't want to present themselves for deposition voluntarily.
>
> They are still subject to subpoena power, and if Plaintiff so needs to subpoena them for trial, we will do that. And I—and Defendants are open to do that as well.

• • •

> What's more, Your Honor, is with respect to the various affidavits and the claims, I understand Judge Glynn's order and the transcript. I think he is clear, and I want to be able to—I want these witnesses to be able to be available. There's only so much I can do. *They're not under my control. I would imagine that they would be under subpoena power*.

The court responded:

> But then Mr. Graham must have been aware of the time, right, the time passing, and the requirement to comply with discovery by a certain deadline? So he—you would think he would communicate to the Defendants I can't find these people. Time's running out. You better subpoena them.

That the court suggested it was the burden of Ms. Colvin's counsel to provide appellees with notice that the Fact Witnesses could not be produced voluntarily is not consistent with either the discovery plan or the provisions of the numerous scheduling orders issued in Ms. Colvin's case. The scheduling orders provided two separate dates regarding depositions of plaintiffs' witnesses. The first deadline for those witnesses Ms. Colvin was *able* to produce, and a second, later deadline for those witnesses Ms. Colvin was *unable* to produce. After listing a specific date, all of the orders provided (emphasis added):

> [Date]: Last day for deposition of plaintiffs' fact witnesses who plaintiffs *are able* to voluntarily produce for deposition *without subpoena by defendants*. (Product Identification Witnesses).

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> [Date]: Last day for deposition of plaintiffs' fact witnesses who plaintiffs *are unable* to voluntarily produce for deposition *without subpoena by defendants*.

This language was contained in *every* scheduling order issued for this case. Once the first deadline had passed, appellees were on notice that Ms. Colvin could not produce the Fact Witnesses, and they had until the later deadline to depose them, with or without a subpoena. Contrary to the language of the scheduling orders, appellees have attempted to shift the burden to Ms. Colvin and her counsel to produce the Fact Witnesses. To be sure, Mr. Weiner and Ms. Colvin's subsequent counsel offered to locate the Fact Witnesses on appellees' behalf. But when they failed to do so, nothing prevented appellees from locating the Fact Witnesses and issuing subpoenas requiring their appearance at depositions. Appellees have overlooked their own role in the discovery process.

Thus, both the language of the discovery plan itself and the procedural context within which it was approved undercut the circuit court's ultimate conclusion that Judge Glynn's approval of the discovery plan had the effect of requiring Ms. Colvin to produce the Fact Witnesses for re-deposition. Because Ms. Colvin was under no such obligation, the circuit court erred when it dismissed her case with prejudice.

Accordingly, we will reverse the judgment of the circuit court and remand this case for further proceedings. The first steps should be the adoption of a plan to complete discovery within a reasonable time frame and the entry of a new scheduling order.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS REVERSED AND THIS CASE IS REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLEES TO PAY COSTS.