

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1047

September Term, 2014

CIMENGA M. TSHIBAKA, ET AL.

v.

BARBARA S. WATT, ET VIR

Eyler, Deborah S.,
Meredith,
Berger,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: May 19, 2015

*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.

A jury in the Circuit Court for Baltimore County returned a verdict in favor of Barbara and Jerry Watt, the appellees, on their medical negligence claim against Cimenga Tshibaka, M.D., and his employer, Vascular and Cardiothoracic Associates of Maryland, P.A. (“VCA”), the appellants, and in favor of Dr. Tshibaka on their informed consent claim.¹ The jury awarded the Watts \$634,339.16 in economic and \$1,500,000 in non-economic damages. The latter award was reduced pursuant to the statutory cap on non-economic damages. Dr. Tshibaka filed a timely motion for new trial and/or remittitur, which was denied.

On appeal, Dr. Tshibaka presents four questions for review, which we have rephrased:

- I. Did the trial court err or abuse its discretion by admitting into evidence an exhibit listing Mrs. Watt’s past medical expenses and by permitting her expert witness to testify that those expenses were causally related to Dr. Tshibaka’s breaches of the standard of care?
- II. Did the trial court err by denying Dr. Tshibaka’s motions for judgment and for new trial with respect to damages for future lost income and future lost household services?
- III. Did the trial court err by refusing to permit Dr. Tshibaka’s standard of care expert to testify about a medical article that the Watts’ standard of care experts were cross-examined about?
- IV. Did the trial court err by permitting the Watts’ expert to testify about the timing of Mrs. Watt’s injury?

For the following reasons, we shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

In the summer of 2009, Mrs. Watt was diagnosed with a Type IV paraesophageal hernia, a condition in which her entire stomach, part of her pancreas, and part of her small

¹For ease of discussion, we shall refer to the appellants collectively as “Dr. Tshibaka.”

intestine had herniated into her chest cavity through the hiatus, which is the hole in the diaphragm through which the esophagus passes. Mrs. Watt was referred to Dr. Tshibaka for surgical repair of the hernia.

On September 11, 2009, Dr. Tshibaka performed a hernia repair operation on Mrs. Watt at the Carroll Hospital Center (“CHC”), in Westminster. While Mrs. Watt was recovering at CHC, her hernia recurred. Although this is not uncommon and does not necessarily require treatment, Mrs. Watt’s recurrence was severe enough that a second surgery was needed.

Consequently, on September 23, 2009, Dr. Tshibaka operated on Mrs. Watt a second time. During this surgery, Dr. Tshibaka discovered that the sutures of the tissue surrounding the hiatus (known as the crural tissues) had come undone and most of Mrs. Watt’s stomach had reherniated into her chest cavity. Dr. Tshibaka was unable to re-suture the crural tissues because they remained swollen and stiff from the first surgery. Instead, he repaired Mrs. Watt’s enlarged hiatus using synthetic prolene mesh. Employing a technique known as “bridging,” he patched the hiatus with a piece of mesh that he sutured to the surrounding tissue. A slit in the center of the mesh patch allowed the esophagus to pass through. Mrs. Watt was discharged from CHC on October 2, 2009.

Less than two weeks later, on October 14, 2009, Mrs. Watt was re-admitted to CHC with an infection that was thought to have been caused by an esophageal leak. A feeding tube was placed during her hospital stay. She was discharged after a week.

Three days later, on October 24, 2009, Mrs. Watt was re-admitted to CHC because she was weak and dehydrated. A feeding tube again was placed. During this admission, Dr. Tshibaka operated on Mrs. Watt a third time. He confirmed that there in fact was an esophageal leak and placed a chest tube to drain fluid from the area of the leak. Mrs. Watt was discharged on November 6, 2009, with a feeding tube in place.

For two months following her discharge, Mrs. Watt was unable to eat. At that point, Dr. Tshibaka performed tests from which he concluded that the esophageal leak had healed. Mrs. Watt was cleared to eat by mouth. She could not do so, however, because she experienced persistent vomiting and nausea. Between follow-up appointments with Dr. Tshibaka on January 11, 2010, and February 15, 2010, she lost 21 pounds. Around this time, Dr. Tshibaka referred Mrs. Watt to another physician who, in turn, referred her to Richard Heitmiller, M.D., a surgeon at Union Memorial Hospital, in Baltimore.

In April of 2010, Mrs. Watt met with Dr. Heitmiller. By then, she had lost another 14 pounds. Dr. Heitmiller diagnosed her with a “high-grade benign obstruction at the esophagogastric junction,” which is the point at which the stomach and the esophagus meet. He placed a gastrostomy feeding tube to stabilize her weight. An upper GI endoscopy revealed that the obstruction was “extrinsic” to the esophagus, meaning that it was caused by pressure on the esophagus from the outside.

On May 4, 2010, Dr. Heitmiller operated on Mrs. Watt. He discovered that the prolene mesh Dr. Tshibaka had used to bridge the hiatus had eroded into the outer wall of Mrs. Watt’s esophagus. The mesh could not be removed because it was overgrown and

“entangled” in scar tissue at the esophagogastric junction. Dr. Heitmiller attempted as best he could to debride the tissue and trim the mesh. As he was doing so, he noticed leaking fluid. He assumed that the debriding and trimming had caused a hole, which was the source of the fluid leak, although the hole was too small to be visible. He decided to perform a left cervical esophagostomy -- essentially a bisection of the esophagus -- and to insert a jejunostomy tube, which is a feeding tube that connects directly to the small bowel.

As a result, after the surgery Mrs. Watt again was not able to consume food by mouth. Two months later, in July of 2010, Dr. Heitmiller operated on Mrs. Watt to reverse the esophagostomy and reconnect her esophagus.

After this procedure, an upper GI endoscopy revealed that the mesh had completely eroded through the wall of Mrs. Watt’s esophagus. Dr. Heitmiller referred Mrs. Watt to Bruce Greenwald, M.D., a gastro-intestinal specialist at the University of Maryland Medical Center.

Over the next three-and-one-half years, Dr. Greenwald placed a stent in Mrs. Watt’s esophagus and performed five endoscopic procedures in which he used a laser to remove large pieces of mesh. There still is mesh in Mrs. Watt’s esophagus and she faces additional future procedures to remove it and possibly a future procedure to remove part of her esophagus.

On November 28, 2012, Mr. and Mrs. Watt filed suit against Dr. Tshibaka for medical negligence and lack of informed consent. The case was tried to a jury over eight days in March and April of 2014.

Mrs. Watt testified that she is an accountant and her husband is a dairy farmer. She recounted all of the medical treatment she had received since her initial diagnosis. She explained that her stomach still does not “empty properly” and she must take a daily medication to alleviate this problem. She has developed an “incisional hernia” on her stomach that makes it difficult for her to bend over, stoop down, or lift objects over five pounds. Consequently, she no longer can perform basic household tasks, such as doing laundry or vacuuming, and cannot garden or assist with milking cows on the family farm, which she used to do.

The Watts called two standard of care experts: Samuel J. Feinberg, M.D., a board certified general surgeon, and John C. Lipham, M.D., a board certified general surgeon who specializes in esophageal and upper GI surgery. As relevant here, both testified that Dr. Tshibaka breached the standard of care during the September 23, 2009 surgery by using prolene mesh to bridge Mrs. Watt’s hiatus, because that type of mesh has a tendency to erode tissue, and by placing the prolene mesh so as to encircle the esophagus. That placement, they opined, makes it likely that the esophagus will become infected, and that the tissue will erode, because the constant movement of the diaphragm generates friction between the mesh and the esophagus. They testified that other types of mesh that do not carry this risk were available and could have been used. Dr. Lipham opined that as a result of Dr. Tshibaka’s breaches of the standard of care, Mrs. Watt’s esophagus became obstructed by the mesh, causing the infections, vomiting, and weight loss, and necessitating the subsequent surgeries by Dr. Heitmiller and all the subsequent treatment by Dr. Greenwald.

In addition, the Watts called Dr. Greenwald as an expert in gastroenterology. He opined that Mrs. Watt will need about six additional endoscopic procedures to remove mesh from her esophagus over a period of about three years.

Dr. Tshibaka testified that he used the prolene mesh during the September 23, 2009 surgery because doing so was consistent with his training; he did not “wrap the mesh entirely around the esophagus,” as the Watts’ experts had suggested; and there was no evidence that the mesh began eroding into Mrs. Watt’s esophagus until after he ceased treating her and she was under Dr. Heitmiller’s care.

Dr. Tshibaka called three expert witnesses. Joel Bowers, M.D., a radiologist, testified that an imaging study performed on Mrs. Watt a week after the September 23, 2009 surgery showed that her esophagus was clear of any obstruction. Eric Oristian, M.D., a general surgeon, testified that Dr. Tshibaka’s use and placement of a prolene mesh patch during the September 23, 2009 surgery was in accordance with the standard of care. He further testified that the erosion of the mesh was not caused by that surgical procedure but by the May 4, 2010 surgery by Dr. Heitmiller. Finally, Paul Lin, M.D., also a general surgeon, echoed Dr. Oristian’s opinions and further opined that the erosion of the mesh was caused by Dr. Heitmiller’s accidentally tearing a hole in the wall of Mrs. Watt’s esophagus during the May 4, 2010 surgery, which over time led to the mesh entering the tube of the esophagus.

On April 2, 2014, the jury returned a verdict for the Watts on medical negligence and for Dr. Tshibaka on informed consent. It awarded damages as follows:

Past medical expenses:	\$363,289.10
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Past lost wages:	\$32,240.06
Past lost household expenses:	\$20,800
Future medical expenses:	\$147,850
Future lose wages:	\$22,000
Future lost household services:	\$48,160
Mrs. Watt’s non-economic damages:	\$750,000
Mrs. and Mr. Watt’s loss of consortium:	\$750,000
Total:	\$2,134,339.16

The verdict was reduced to \$1,299,339.16, pursuant to the statutory cap on non-economic damages.

Dr. Tshibaka filed a motion for new trial and/or a remittitur, which he subsequently amended. On July 13, 2014, the motion, as amended, was denied. This timely appeal followed.

We shall include additional facts in our discussion of the issues.

DISCUSSION

I.

Counsel for the Watts prepared a list of Mrs. Watt’s past medical bills (“Exhibit 11”).² Dr. Tshibaka contends the trial court erred by admitting Exhibit 11 into evidence and permitting Dr. Lipham to opine that all of the medical bills as listed in Exhibit 11 were made necessary by Dr. Tshibaka’s breaches of the standard of care during the September 23, 2009

²The earliest medical bill listed in Exhibit 11 is from September 23, 2009.

surgery. Dr. Tshibaka maintains that this was not permitted by a stipulation the parties had entered into and allowed the Watts to benefit from a discovery violation.³

The Watts respond that the defense had been given, in discovery, all the medical bills listed in Exhibit 11; defense counsel had stipulated that the medical bills listed in Exhibit 11 were fair and reasonable; and Dr. Lipham had opined that all the treatments to which the medical bills applied had been necessitated by Dr. Tshibaka's negligence. Therefore, the court properly admitted Exhibit 11. Likewise, the Watts maintain that the court did not abuse its discretion by permitting Dr. Lipham to opine that the medical bills listed in Exhibit 11 all were occasioned by Dr. Tshibaka's breaches of the standard of care; and there was no discovery violation.

As required by the scheduling order, the Watts identified their experts in August of 2013, seven months before trial. They designated Dr. Lipham to testify about the standard of care and "regarding the nature and extent of Mrs. Watt's injuries, the causal connection between the alleged negligence and those injuries, the necessity and reasonableness of the past treatment, the likely future treatment she will require, and medical bills," and her life expectancy.

By letter of September 18, 2013, the Watts' lawyer sent defense counsel a CD containing all the medical records and bills pertaining to Mrs. Watt's treatment from September of 2009 forward. The next month, by letter of October 30, 2013, the Watts'

³He argues as well that the trial court abused its discretion by denying his motion for new trial made on these bases.

lawyer sent defense counsel a summary of their economic losses. The letter advised that the “past medical[expenses]” were set forth on an attached list and totaled \$364,294.55. The attached list, entitled “Medical Bills, Barbara Watt,” listed all the past medical expenses by health care provider and date.

Defense counsel deposed Dr. Lipham on December 6, 2013. Dr. Lipham testified about Dr. Tshibaka’s breaches of the standard of care. Defense counsel asked Dr. Lipham whether he had “been asked to review any bills in connection with [the Watts’] case?” Dr. Lipham answered “No.” When asked to give his opinion as to how the breaches in the standard of care had “caused injury to Mrs. Watt,” Dr. Lipham replied:

It’s clearly [sic] that the mesh eroding into her esophagus is causing all her – all her problems since whenever, October of 2009. And everything following that is directly related to that mesh eroding into her esophagus.

That’s about it. Yes, I mean, it’s all related to the use of the mesh and the fact that it eroded into the esophagus.

In response to a follow-up question, Dr. Lipham amplified this opinion: “Well, again, everything subsequent to the September 23rd, 2009 surgery is, to me, directly related to the mesh, the use of the mesh in bridging of the hiatus.”

In February of 2014, a little over a month before trial, counsel for the parties exchanged two emails with regard to “[s]ome questions about stipulations or agreements for the upcoming trial” (“the Stipulation”). In the first email, dated February 20, 2014, the Watts’ lawyer asked, as relevant here:

Medical Bills: will you agree to the fairness and reasonableness of the bills produced in discovery and being claimed in this case. Can we also agree that once we present testimony linking the alleged negligence to the treatment that

we can introduce the bills. All post verdict challenges to the amount of the bills will be preserved.

The second email, dated February 28, 2014, was defense counsel’s response. As to the “Medical Bills,” he stated,

we will agree to authenticity and fairness and reasonableness, *but obviously not to relevancy* especially for treatment of conditions predating the alleged injuries. I will need to know precisely what bills you intend to introduce because some [of] the bills we have now do not pertain to relevant treatment for the injuries alleged.

(Emphasis added.)

On March 21, 2014, the Watts’ counsel sent defense counsel Exhibit 11, explaining that it was the “medical bills” exhibit he intended to introduce at trial. The record does not reveal any response. Exhibit 11 is an updated version of the list of medical expenses the Watts’ lawyer provided to defense counsel on October 13, 2013. It lists the amounts Mrs. Watt was billed for treatment by 18 health care providers. For each provider, the amounts billed are broken down by date.

Dr. Lipham testified on the second day of trial. He stated that he had reviewed all of Mrs. Watt’s medical records relative to her paraesophageal hernia, beginning with the records prior to her initial surgery and up to her most recent procedures to remove pieces of the mesh. He opined that Dr. Tshibaka had breached the standard of care by using prolene mesh to bridge Mrs. Watt’s hiatus during the September 23, 2009 surgery and by his placement of that mesh. He further opined that the prolene mesh began to erode into Mrs. Watt’s esophagus no later than October 14, 2009, when she was re-admitted to CHC with a

suspected esophageal tear. Without objection, he opined that the “care Ms. Watt [] received since her October 14th, 2009 admission to [CHC], where she was treated for an esophageal leak, was reasonable and necessary” and that all of that care and treatment complied with the standard of care.

The Watts’ lawyer then asked Dr. Lipham if he had “an opinion, to a reasonable degree of medical probability, as to whether the care that [Mrs. Watt] received [since October 14, 2009] was causally related to the breaches in the standard of care that [he had] testified to [at trial]?” Defense counsel objected, citing a “discovery problem,” and asked to approach.

At the ensuing bench conference, defense counsel explained that he had objected because he thought the Watts’ lawyer was “getting to the medical bills and whether they’re causally connected but on page sixty-three of [Dr. Lipham’s] deposition he specifically said he had not reviewed the bills.” Counsel for the Watts responded that he had not yet asked Dr. Lipham about the medical bills, but he intended to get into the bills. The court inquired how Dr. Lipham could testify about the bills if he had never seen them. The Watts’ lawyer replied, “well, he’s seen them since [his deposition].” (In fact, as would later become apparent, Dr. Lipham had not reviewed the actual bills, but had reviewed a list of the medical expenses similar to that set forth in Exhibit 11.) The court suggested that that amounted to unfair surprise.

In further discussion, the Watts’ lawyer pointed out that Dr. Lipham had testified in deposition that all of the medical care Mrs. Watt had received from October of 2009 forward

was “causally related” to the negligent use and placement of the prolene mesh on September 23, 2009. He argued that Dr. Lipham’s opinion that the medical bills listed in Exhibit 11 summarized the causally related treatment was no “different then [sic] what he said [at his deposition].” He also alerted the court to the Stipulation, in which defense counsel had agreed to the authenticity, fairness, and reasonableness of the medical bills, but not to their “relevancy.” He explained that it was his understanding that the Stipulation meant that once the Watts presented expert testimony at trial that “related the treatment to the negligence, the bills would be admissible.”

Defense counsel responded that that was not his understanding of the Stipulation. He explained that by saying that he would not stipulate to the “relevancy” of the medical bills, he had made clear that the Watts would have to introduce expert opinion testimony that the bills themselves, not a list of the bills, were causally related to the injuries. He took the position that, because the Watts had not disclosed any expert witness who was prepared to opine about the nexus between the actual medical bills and the alleged negligence, Exhibit 11 was not admissible, nor was any opinion by Dr. Lipham that the medical bills listed in Exhibit 11 covered treatment necessitated by Dr. Tshibaka’s negligence.

Stating that it did not “read that” in the Stipulation, the court overruled the objection. The Watts’ lawyer repeated his question and Dr. Lipham answered, over objection, that it was his opinion that all of Mrs. Watt’s treatment from October 14, 2009 forward “relate[d] back to the . . . second surgery, on September 23[, 2009].” The Watts’ lawyer then showed Dr. Lipham Exhibit 11 and asked him if that document “contain[ed] . . . a[n] itemized list of

the care and a summary of the bills that Ms. Watt has incurred as a result of the breaches in the standard of care that you've testified to?" Over objection, Dr. Lipham replied, "Yes."

When the Watts' lawyer offered Exhibit 11 into evidence, however, the court sustained defense counsel's objection. The court asked Dr. Lipham if he had "review[ed] the medical bills?" Dr. Lipham replied that he only had reviewed the list of medical bills (*i.e.*, Exhibit 11). At that point, the court called counsel to the bench for a second time. After the Watts' lawyer assured the court that, during discovery, he had provided defense counsel with copies of all the medical bills listed in Exhibit 11, and that, before trial, he had provided defense counsel with Exhibit 11, the court overruled the previously sustained objection and Exhibit 11 was admitted into evidence.

On cross-examination, defense counsel asked Dr. Lipham how he could opine that the medical bills listed in Exhibit 11 were causally related to Dr. Tshibaka's negligence when he had not "even seen the bills" and when Exhibit 11 did not "even say what the procedures are." Dr. Lipham replied that, having reviewed Mrs. Watt's medical records from all of the health care providers identified in Exhibit 11, he was able to link up the treatment with the dates and providers. He offered to go through Exhibit 11 item by item with defense counsel, but defense counsel declined his invitation and moved on to another topic.

Dr. Tshibaka argues that the trial court correctly found that the Stipulation was ambiguous, but then erred by rejecting the extrinsic evidence about its meaning, namely, defense counsel's proffer that his statement that he "obviously [would] not [agree] to relevancy" meant that the Watts would have to present expert testimony linking the actual

medical bills, not the list of medical bills in Exhibit 11, to the alleged negligence. He argues in the alternative that if the Stipulation is unambiguous, it clearly required that there be expert testimony linking the medical bills to the treatment and that the Watts did not disclose in discovery that any of their experts were prepared to offer such an opinion. Finally, he argues that the court erred by permitting Dr. Lipham to testify that Exhibit 11 “contained “a [sic] itemized list of the care and a summary of the bills that Ms. Watt incurred as a result of the breaches in the standard of care” because Dr. Lipham, having by his own admission never seen the bills, lacked a foundation to so testify.

The Watts counter that the trial court properly ruled that the Stipulation was an agreement between counsel that the medical bills, or a list of them, would be admissible so long as the Watts presented expert testimony linking *the treatment* for which Mrs. Watt was billed to the alleged negligence, which they did.

We disagree with Dr. Tshibaka that the court found the Stipulation to be ambiguous. The court responded to defense counsel’s explanation of the meaning of the Stipulation by stating, “I don’t read that. The objection is overruled.” It is plain from this ruling that the court found that defense counsel’s agreement that all the medical bills were authentic, fair, and reasonable, but reserving on “relevancy,” was an unambiguous stipulation that evidence of relevant medical bills incurred by Mrs. Watts would be admissible at trial. The plain language of the Stipulation bears this out; the trial court’s interpretation of that language was legally correct. *See generally Ragin v. Porter Hayden Co.*, 133 Md. App. 116, 134-36 (2000)

(stipulations between counsel are contracts and are interpreted under the objective law of contracts).

The actual medical bills were moved into evidence at trial. As explained, Exhibit 11 simply is a list of those bills by health care provider, date, and amount.

Dr. Tshibaka does not argue that the list of medical bills in Exhibit 11 is inaccurate, or that any of the listed medical bills were incurred for treatment of conditions that predated the alleged negligence or were for treatment not related to Mrs. Watt's paraesophageal hernia. Dr. Lipham opined that all of the medical care Mrs. Watt received after October 14, 2009, for her esophageal hernia was causally connected to Dr. Tshibaka's breaches of the standard of care. Dr. Tshibaka was on notice that Dr. Lipham would so opine because he had given the same testimony in his deposition. Once the Watts adduced expert testimony linking the medical treatment that Mrs. Watt received post October 14, 2009, to the negligence, the court properly exercised its discretion to admit Exhibit 11 into evidence.

The court also did not err by permitting Dr. Lipham to testify that Exhibit 11 was an "itemized list" of the medical bills for the causally related treatment. Dr. Lipham testified that he had reviewed all of Mrs. Watt's medical records. He was familiar with the treatment she had received, the names of the treating health care providers, and the dates on which treatment was rendered. Given that defense counsel had stipulated to the fairness, reasonableness, and authenticity of all the bills, this testimony laid the factual foundation for Dr. Lipham to opine that Exhibit 11 itemized the expenses incurred for that treatment.

II.

Dr. Tshibaka next contends the trial court erred by denying his motions for judgment and for new trial as they pertained to the Watts' recovery of damages for future lost income and future lost household services. He asserts that because the Watts did not present expert testimony from "an economist to calculate the losses according to established economic principles and reduce such losses to present value," the jurors should not have been permitted to award such damages. He acknowledges that there is Maryland case law holding that "proof of present value is not a material element of the plaintiff's claim for loss of future earnings," but urges us to hold otherwise, as those cases are "dated and inconsistent with various policy considerations."

The Watts respond that Dr. Tshibaka waived any argument that the evidence of future lost earnings was legally insufficient to support an award of damages because he did not raise it in his motion for judgment.⁴ With respect to the damages award for future lost household services, the Watts argue, in reliance on *Lewin Realty III, Inc. v. Brooks*, 138 Md. App. 244 (2001), *aff'd on other grounds*, 378 Md. 70 (2003), and *abrogated on other grounds by Ruffin Hotel Corp. of Md., Inc. v. Gasper*, 418 Md. 594 (2011), that they were not required to produce expert testimony to reduce the future damages to present value and that Dr. Tshibaka was free to present such evidence, but chose not to do so.

⁴The Watts argue that Dr. Tshibaka is trying to "nullify" the future economic damages awards, including the award for future medical expenses (\$147,850). Dr. Tshibaka's brief addresses only the future lost household services and the future lost income awards, however.

The pertinent facts are as follows. The Watts adduced expert testimony that it was probable that Mrs. Watt would need an esophagectomy at some point in the future and that she probably would miss six months of work as a result. Mrs. Watt testified that her ordinary work schedule had been 40 hours per week, and that she had been paid \$21.68 per hour.

Mrs. Watts testified that as a result of her injuries she no longer is able to garden or help her husband with farming chores. She and her husband hired a neighbor to help with the gardening and milking she used to do. They were paying him about \$8 per hour for approximately 15 hours of gardening work each spring and about 5 hours of milking work per week year round.

At the close of the Watts' case, defense counsel moved for judgment on the informed consent claim and on "future damages, household services, and so forth." By agreement, the court reserved on the motion without hearing argument at that time.

Later that day, the court heard argument on the motion for judgment. As relevant here, defense counsel argued that Mrs. Watt had failed to meet her burden of proof on the issue of lost future household services. Although she had testified that she no longer could engage in certain activities around the house, she had failed to make a showing about the "value of that loss," *i.e.*, "what the going rate for those services would be in a given community" and how that going rate would change over time. In response to the trial court's request for clarification, defense counsel gave the following example:

Yeah, so, . . . if I took the . . . per hour rate of income for milking a cow, it may be x in 2009, it might be y in . . . 2020, so the, the point is, you have to, somebody who's an expert . . . would have to say what that rate of change

would be . . . overtime [sic] and then an economist must reduce it to present value.

The court observed that in *Lewin Realty* this Court had held that “unless things are terribly, terribly complex, that you really don’t need an expert, you can leave it to the jury to do the present value calculation,” and, if expert opinion testimony was needed, the burden was on the defense to produce it.

Defense counsel argued that the Watts had not presented evidence to show how many hours a week Mrs. Watt had spent on the household tasks she no longer could perform. The Watts’ counsel conceded that they had not put on such evidence with regard to the household chores but said that they only would be claiming lost household services damages with respect to the “milking and the flower boxes.”

The trial court denied the motion for judgment, explaining that it did not “find that th[e] case [was] so complex . . . that they would require expert testimony.”

The court instructed the jurors as follows with respect to damages for future economic loss:

In deciding upon the damages to be awarded for any future economic loss, you shall consider how long the Plaintiff is likely to live, notwithstanding the injury, and the present cash value, if any, of the loss. Present cash value means that amount of money needed now, which when added to what that amount may reasonably be expected to earn in the future by prudent investment will equal the amount of the Plaintiffs’ loss. In other words, the total anticipated future loss must be reduced to an amount which if prudently invested at a particular rate of interest over the applicable number of years will return an amount equal to the total anticipated future loss.

In closing, the Watts' lawyer argued that Mrs. Watt would incur \$22,000 in future lost income because she would need to take 6 months off work when she had her esophagectomy. With regard to future lost household services, he argued that the Watts would spend approximately \$48 per week for milking and \$150 per year for gardening. Using life expectancy tables, he argued that the jurors could calculate those damages over a period of up to 25.3 years, but acknowledged that they reasonably could find that the Watts would have hired people to help with these tasks once they reached a certain age, even if Mrs. Watt had not been injured.

The jury awarded Mrs. Watt \$22,000 in damages for future lost income and \$48,160 in damages for future lost household services.

We agree with the Watts that Dr. Tshibaka waived his challenge to the damages awarded for future lost income by not arguing in his motion for judgment that the Watts had failed to meet their evidentiary burden. *See* Md. Rule 2-519(a) (moving party must “state with particularity all reasons why the motion should be granted”); *see, e.g., Barnes v. Greater Baltimore Medical Center, Inc.*, 210 Md. App. 457, 487 (2013) (hospital waived argument that patient assumed the risk when it failed to raise it in its motion for judgment).

With respect to the damages awarded for future lost household services, as Dr. Tshibaka concedes, *Lewin Realty* controls on this issue. In that case, this Court reviewed case law from Maryland and beyond bearing on whether a plaintiff must produce expert testimony to reduce the amount of any future lost earning capacity to present value. Our

holding, which is equally applicable to a claim for future lost household services, was as follows:

[I]n a simple and straightforward case, in which the trial court ascertains that it is within the ordinary knowledge of laypeople to reduce an award of future lost earning capacity to present value, the trial court must instruct the jury to reduce the award to present value when requested to do so. By contrast, when the plaintiff is seeking damages for lost future earning capacity and, in the trial court's assessment, the facts of the case are not so simple and straightforward as to allow ordinary laypeople to reduce such an award to present value by use of their general knowledge of economic variables, *the defendant bears the burden of producing present valuation evidence*. When the proper evidentiary foundation has been laid, the defendant will be entitled to an instruction telling the jury to reduce any such award to present value. Likewise, in such a case, the plaintiff has the burden of producing economic evidence about which he seeks to have the trial court instruct the jury. In deciding whether the claim for future lost earning capacity is of a simple and straightforward nature, the trial court should consider factors such as the length of time over which the future lost benefits are being claimed, the nature of the benefits, and the variables affecting the benefits over time.

138 Md. App. at 297-98 (emphasis added) (footnote omitted). Thus, even in a complicated case, the defendant, not the plaintiff, bears the burden of presenting expert testimony on the present value of the future economic damages.

In the instant case, the trial court opined that it could not imagine a case involving future damages that was “less complex” than the claim in this case. The damages sought were for preparing a flower bed each spring and milking cows on a daily basis. The evidence showed that the Watts hired out these services on an hourly basis. The jury was instructed that it should calculate the amount of any future loss and then reduce it to its present value based upon its knowledge of the ordinary rate of return on investments. Dr. Tshibaka does not challenge this instruction, which was a correct statement of the law. The arguments for

requiring a plaintiff to present expert valuation evidence that are raised by Dr. Tshibaka all were considered and rejected by this Court in *Lewin*. We decline Dr. Tshibaka's invitation to revisit that holding.

III.

On cross-examination of Drs. Feinberg and Lipham, defense counsel asked each witness if he was aware of a 2010 article in the *Journal of Surgical Endoscopy* entitled, "Hiatal Hernia Repair with Mesh, a Survey of S[AGES] Members."⁵ Only Dr. Lipham was familiar with it. Defense counsel proffered that the article reported that 75% of the surgeons surveyed used a synthetic mesh to repair hiatal hernias. Both doctors offered various reasons refuting defense counsel's characterization of the meaning of the survey results.⁶

Subsequently, on direct examination of Dr. Oristian, defense counsel asked whether the doctor was familiar with that same article. Dr. Oristian replied in the affirmative and the Watts' counsel objected. At the ensuing bench conference, the Watts' lawyer argued that Dr. Tshibaka could not affirmatively introduce evidence about the article because the defense had not disclosed in discovery that Dr. Oristian had relied on it in forming his opinion. The court asked defense counsel whether Dr. Oristian had "indicate[d] in any way that he had

⁵SAGES is an acronym for the Society of Gastrointestinal and Endoscopic Surgeons.

⁶Dr. Feinberg testified that defense counsel was combining responses about two types of synthetic mesh, one of which would be proper to use because it had been shown not to erode into the esophagus. Dr. Lipham disputed the relevance of the survey results given that they were based on answers to a 2006 survey that predated the publication of other studies showing that prolene mesh is contraindicated.

relied on this article”; he replied, “No he didn’t.” Defense counsel argued, however, that because the relevant finding in the article had been discussed on cross-examination of Drs. Feinberg and Lipham, the article was in evidence and “once it’s in, it’s in.” The court rejected this argument and sustained the objection.

Dr. Tshibaka contends the court’s ruling was in error because Rule 5-803(18) permits the admission of statements in a journal article after the article has been “called to the attention of an expert witness upon cross-examination.” Thus, according to Dr. Tshibaka, once Drs. Feinberg and Lipham were cross-examined about the article, it was “in evidence” and Dr. Oristian could be questioned about it on direct examination.

The Watts respond that the trial court prohibited Dr. Oristian from testifying about the article not because it was hearsay that did not fall within the exception in Rule 5-803(18), but as a sanction for a discovery violation. This was appropriate, they maintain, because it was undisputed that Dr. Oristian was asked in deposition if he had relied on any medical literature in forming his opinions and he had replied in the negative.

“Our review of the trial court’s resolution of a discovery dispute is quite narrow; appellate courts are reluctant to second-guess the decision of a trial judge to impose sanctions for a failure of discovery. Accordingly, we may not reverse unless we find an abuse of discretion.” *Warehime v. Dell*, 124 Md. App. 31, 44 (1998).

The medical article at issue was published in 2010, three years before Dr. Oristian’s deposition. During that deposition, the Watts’ lawyer asked Dr. Oristian if he had relied on *any* medical literature in reaching his opinion that Dr. Tshibaka had complied with the

standard of care; and Dr. Oristian had answered that he had not relied on *any* medical literature. The trial court made a non-clearly erroneous finding that the medical article had not been disclosed to the Watts in discovery, in particular in Dr. Oristian's deposition, and did not abuse its discretion in ruling that, under those circumstances, it would have been unfair to permit defense counsel to elicit testimony from Dr. Oristian that the article supported his view that the use of prolene mesh was not contraindicated in this case.

IV.

Finally, Dr. Tshibaka contends the trial court erred by permitting Dr. Lipham to opine that the prolene mesh used to bridge Mrs. Watt's hiatus in September of 2009 began to erode into her esophagus "much earlier" than May 4, 2010, when Dr. Heitmiller first operated on her. He asserts that this opinion was "utterly lacking in foundation" because there was "absolutely no evidence in the medical record of mesh eroding into the esophagus prior to the May 2010 surgery." The Watts respond that Dr. Lipham's testimony was properly admitted because it was based upon his review of Mrs. Watt's medical records and reflected his opinion that the erosion of the mesh into the wall of the esophagus began in October of 2009, when Mrs. Watt was re-admitted to CHC with signs of infection that later were revealed to be related to an esophageal tear.

Both of the Watts' standard of care experts -- not just Dr. Lipham -- opined that the prolene mesh started to erode into Mrs. Watt's esophagus in October of 2009. (Dr. Feinberg so testified without objection.) They each testified that the leak in the esophagus that was suspected and later confirmed in October of 2009 was caused by erosion of the mesh into the

esophagus. Dr. Lipham further opined that Mrs. Watt had air and puss in her chest at that time, which was consistent with there being a hole in the esophagus , and that too supported his opinion that the mesh had eroded into the esophagus well before Dr. Heitmiller operated on her.

There was an adequate factual foundation for Dr. Lipham’s opinion about the timing of the erosion of the mesh into the esophagus, and the trial court did not err in admitting that testimony into evidence.

**JUDGMENT AFFIRMED. COSTS TO
BE PAID BY THE APPELLANTS.**