Circuit Court for Baltimore City
Case No. 24-C-20-002817

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1503

September Term, 2021

CATRINA LAWRENCE

v.

UNIVERSITY OF MARYLAND MEDICAL CENTER

Wells, C.J.,
Graeff,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, C.J.

Filed: September 14, 2022

Appellant Catrina Lawrence filed suit against appellees, University of Maryland Obstetrical and Gynecological Associates, P.A. ("University of Maryland"), on behalf of her daughter Courtni Lawrence, after Courtni suffered permanent brain injury shortly after birth. The circuit court excluded the testimony of Lawrence's causation expert, Dr. Bohman, for lacking a sufficient factual basis under Maryland Rule 5-702. Following the exclusion, the circuit court granted summary judgment in favor of University of Maryland. Lawrence filed this timely appeal. She asks whether she presented the circuit court with "sufficient evidence to create a jury question on the issue of whether [University of Maryland's] breach of the standard of care caused her injuries." For the reasons we explain, we conclude that she did not. Consequently, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 11, 2011, Ahmet A. Baschat, M.D., a maternal fetal medicine specialist, saw Appellant Catrina Lawrence ("Lawrence") who was 35 4/7 weeks pregnant with Courtni Lawrence ("Courtni")[1] at the Center for Advanced Fetal Care, the trade name of Appellee University of Maryland Obstetrical and Gynecological Associates, P.A. Although Dr. Baschat did not personally examine Lawrence, Dr. Baschat reviewed and prepared a report based on the ultrasound examinations of Lawrence and the fetus. The ultrasound examined a biophysical profile ("BPP") and a Doppler assessment of blood flow in the uterine and umbilical arteries.

[1] Courtni Lawrence brings this appeal as a minor, by and through her Mother and Next Friend, Catrina Lawrence.

A BPP is a non-invasive test which assesses, via ultrasound, four components of fetal well-being: fetal movement, fetal tone, amniotic fluid volume, and fetal breathing effort. Each of the four components is scored either 0 (abnormal) or 2 (normal). The accumulated scores yield a total BPP score ranging from 0/8 to 8/8. An 8/8 is a normal BPP, and a strong indicator that fetal oxygen levels and acid base are normal, and that the fetal brain is well-perfused. The Doppler assessment measures blood flow in both the umbilical and uterine arteries which transport blood to the fetus through the placenta. While Ms. Lawrence's BPP was scored 8/8, her fetal Dopplers were abnormal. The BPP did not include a fetal non-stress test ("NST") at the appointment on November 11, 2011.

Dr. Baschat interpreted the results and recommended once weekly BPPs with NSTs for the remainder of her pregnancy along with a follow-up Doppler assessment to be performed every two weeks. However, at 11:30 p.m. on November 17, 2011, the University of Maryland Medical Center admitted Lawrence for labor and delivery. A decision was made to deliver the baby by cesarean section based on fetal intolerance of labor, and Courtni was born at 12:35 p.m. on November 18, 2011. Courtni required resuscitation at birth, "including stimulation, suctioning, oxygen, continuous positive airway pressure and positive pressure ventilation." Courtni was eventually admitted to the neonatal intensive care unit and then Mt. Washington Pediatric Hospital for various types of treatment.

On December 7, 2011, a head ultrasound was ordered to assess her feeding difficulties. An ultrasound and MRI revealed encephalomalacia and gliosis in Courtni's right lateral frontal and parietal lobes as well as cortical laminar necrosis, leaving her with permanent brain injury.

On June 25, 2020, Lawrence filed a complaint against University of Maryland, alleging medical negligence by Dr. Baschat for failing to order that Lawrence and the fetus be evaluated twice weekly rather than weekly intervals. Lawrence's single expert witness, Van Reid Bohman, M.D., testified that had Lawrence been seen and evaluated on November 14 or 15, 2011 based on twice weekly evaluations, Dr. Baschat would have seen some sign to cause him to admit her for continuous monitoring, avoiding the brain injury that occurred during labor.

On August 16, 2021, University of Maryland moved for summary judgment and to preclude the causation testimony of Dr. Bohman. After a series of replies, the circuit court held a hearing and ultimately granted summary judgment for University of Maryland based on its findings that: 1) Lawrence had not introduced evidence from which a reasonable juror could conclude that if Dr. Baschat had examined her on November 14 or 15, 2011, he would have seen symptoms or results that would have caused a reasonable fetal maternal medical specialist to urge continuous monitoring; 2) Dr. Bohman's testimony did not provide a basis for this conclusion by a reasonable juror that rises above the level of conjecture by hindsight; 3) Dr. Bohman's testimony lacked a sufficient factual or medical foundation; and 4) Dr. Bohman failed to provide a basis to support the necessary conclusion that continuous fetal monitoring inevitably would have led to an earlier delivery. Lawrence filed this timely appeal.

STANDARD OF REVIEW

The parties disagree on the applicable standard of review. Lawrence asserts that because she is appealing a grant of summary judgment—a question of law—our review

should be non-deferential. University of Maryland counters that because the trial court's decision to exclude Dr. Bohman's testimony underlies its grant of summary judgment, the corresponding abuse of discretion standard controls. Although University of Maryland is correct that "[w]hen the basis of an expert's opinion is challenged pursuant to Maryland Rule 5-702[2], the [standard of] review is abuse of discretion," *Rochkind v. Stevenson*, 471 Md. 1, 10 (2020),[3] our Court of Appeals has addressed the more nuanced situation of the present case, where the exclusion of expert testimony forms the sole basis of a grant of summary judgment:

> [W]here a circuit court grants a summary judgment motion on the grounds that the plaintiff's expert lacks a sufficient factual basis of admissible facts and the admissible evidence (if any) is insufficient independently to prove causation, the circuit court is making a decision on the admissibility of the expert's testimony as part of its summary judgment decision and, thus, is making a legal decision. Such a decision is reviewed on appeal without deference, as the grant of all summary judgment motions are.

Hamilton v. Kirson, 439 Md. 501, 521 n.11 (2014); *see also Frankel v. Deane*, No. 43, slip op. (Aug. 25, 2022) (reviewing a trial court's granting of summary judgment de novo despite the trial court's decision being partially based on excluding an expert under Md.

[2] Maryland Rule 5-702, to be discussed more fully below, provides the basic criteria for admission of expert testimony.

[3] The Court in *Rochkind* simplified the maintenance of "two separate, and potentially outcome determinative, standards of review—*de novo* for *Frye-Reed* and abuse of discretion for Rule 5-702"—to a uniform rule that "all expert testimony is reviewed under the abuse of discretion standard" described in *Daubert v. Merrell Dow Pharma., Inc.*, 509 U.S. 579 (1993). *Id.* at 37 (referencing the general acceptance test from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and *Reed v. State*, 283 Md. 374 (1978) that the Supreme Court superseded with *Daubert*'s flexible factor test to determine expert reliability).

Rule 5-702); *Giant Food, Inc. v. Booker*, 152 Md. App. 166, 176–78 (2003) (reviewing the denial of a motion for judgment and a motion for judgment notwithstanding the verdict without deference, even though the reasoning for the trial judge's decision was based upon the admissibility of the expert testimony due to an allegedly sufficient factual basis for concluding that accidental exposure to Freon caused the plaintiff's asthma). We therefore conclude that the appropriate standard of review is de novo.

Summary judgment is appropriate when a plaintiff in a complex medical malpractice case lacks admissible expert causation testimony to support her prima facie case of negligence. *Adventist Healthcare, Inc. v. Mattingly*, 244 Md. App. 259, 283 (2020). Therefore, we will make our own determination as to whether the circuit court properly excluded Dr. Bohman's causation testimony, thus leaving Lawrence without any causation evidence necessary to prove medical negligence.

DISCUSSION

Dr. Bohman's Medical Causation Opinions Lacked A Sufficient Factual Basis Under Md. Rule 5-702(3), And Thus Exclusion Of His Testimony Was Proper And Grant Of Summary Judgment In Favor Of University Of Maryland Was Legally Correct.

A. Parties' Contentions

Lawrence frames the issue as whether the circuit court's judgment should be reversed because that court erroneously usurped the jury's task of determining whether Dr. Baschat's breach of care caused Courtni's permanent injuries. Lawrence submits that the jury should have decided whether 1) Dr. Baschat's failure to order twice-weekly BPP violated the standard of care; and 2) Dr. Baschat would have seen evidence from a BPP that would have caused a reasonable fetal-maternal specialist to admit Lawrence for

continuous fetal monitoring leading to an earlier delivery. Lawrence further argues that Dr. Bohman's expert testimony has a sufficient factual basis to create a jury question on whether Courtni could have avoided permanent brain injuries had Dr. Baschat not breached the standard of care.

University of Maryland contends that the trial court's decision to exclude Dr. Bohman's causation testimony should be affirmed because Dr. Bohman was unable to provide anything beyond conjecture as to which BPP abnormalities he would have expected to see on an earlier follow-up test, why he would have seen them, and why these abnormalities would have triggered a swifter delivery. In short, because Dr. Bohman lacked a factual basis for his conclusion that an interim BPP would have caused earlier delivery, his causation testimony failed to meet the admissibility criteria for expert testimony set forth in Md. Rule 5-702.

B. Analysis

At the outset, we note that the exclusion of Dr. Bohman's testimony is the issue on appeal—not standard of care, as Lawrence's brief to this Court suggests. The trial court granted summary judgment for University of Maryland after excluding Lawrence's sole causation evidence—testimony by Dr. Bohman. The circuit court excluded Dr. Bohman's causation testimony on the ground that it did "not provide a basis for [its] conclusion by a reasonable juror that rises above the level of conjecture by hindsight." Critically, in reaching this decision, the trial court "accept[ed] and assume[d]" "for purposes of [the] motion" that Lawrence *had established* that Dr. Baschat breached the standard of care. Therefore, the issue of standard of care is not before us.

As the trial court's decision to exclude Dr. Bohman's causation testimony was based on the court's finding that the testimony lacked an adequate factual basis, Maryland Rule 5-702(3) guides our analysis:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine . . . (3) whether a sufficient factual basis exists to support the expert testimony.

This requirement exists to prevent the introduction of expert testimony that is no more "than mere speculation or conjecture." *Rochkind v. Stevenson*, 454 Md. 277, 286 (2017) (quoting *Exxon Mobil Corp. v. Ford*, 433 Md. 426, 478 (2013)).

"The sufficiency of the factual basis 'include[s] two subfactors: an adequate supply of data and a reliable methodology.'" *Walter v. State*, 239 Md. App. 168, 196–97 (2018) (quoting *Rochkind*, 454 at 286). An adequate supply of data "may arise from a number of sources, such as facts obtained from the expert's first-hand knowledge, facts obtained from the testimony of others, and facts related to an expert through the use of hypothetical questions." *Rochkind*, 454 Md. at 286 (quoting *Sippio v. State*, 350 Md. 633, 653 (1998)). And, in order for a methodology to be reliable,

> an expert opinion must provide a sound reasoning process for inducing its conclusion from the factual data and must have an adequate theory or rational explanation of how the factual data led to the expert's conclusion. We have explained that for an opinion to assist a trier of fact, the trier of fact must be able to evaluate the reasoning underlying that opinion. Thus, conclusory statements of opinion are not sufficient—the expert must be able to articulate a reliable methodology for how she reached her conclusion.

Id. at 287 (internal quotations and citations omitted).

In *Walter v. State*, this Court found that an expert's testimony did not demonstrate a reliable methodology for reaching her conclusion that victims of child sexual abuse often delay reporting. 239 Md. App. at 197. We explained the shortcomings of her testimony:

> In particular, it is unclear how she determined that a delayed report originated with a bona fide victim as opposed to someone who had fabricated a report or had a false memory of abuse, which, she recognized, sometimes occurs. Ms. Lemon kept no statistics and could point to no peer-reviewed studies to support her conclusion, so she appears to have based her opinion on only an extrapolation from her own experiences. In evaluating those experiences, did she do anything to distinguish true or reliable claims from false or unreliable claims? For example, did she assume that a person was a victim of sexual abuse only if an abuser has been convicted of sexual abuse, or if the abuser has admitted to sexual abuse, or if there is some corroborating evidence of sexual abuse? Did she rely on her own, subjective evaluation of the validity of the claim of abuse? Or did she draw the conclusion from a conflation of all of the claims that she had heard, without distinguishing the true from the false or the reliable from the disproven? We simply do not know.

239 Md. App. 168, 197 (2018). In short, while a sufficient factual basis will permit "an expert to reasonably extrapolate from existing data . . . when the only connection between opinion testimony and the data is the expert's assertion, without more, such testimony cannot support general causation." *Sugarman v. Liles*, 460 Md. 396, 427 (2018) (citing *Rochkind*, 454 Md. at 293–94).

Likewise, our courts have held that expert causation testimony lacks an adequate factual basis when it relies "on scant circumstantial evidence alone" or mere assumptions. *Roy v. Dackman*, 445 Md. 23, 45 (2015). In *Taylor v. Fishkind*, for instance, we held that an expert lacked a sufficient factual basis for her opinion that a particular property was the source of the plaintiff's lead exposure, where the basis of her conclusion that the property "contained lead-based paint [was] only supported by the age of the house and the presence

of lead on one component of the exterior of the house," and where the expert admitted that she could not rule out the possibility of other sources. 207 Md. App. 121, 142 (2012). Similarly, in *Ross v. Housing Authority of Baltimore City*, our Court of Appeals affirmed the exclusion of an expert's testimony on a property as the source of lead exposure, where she admitted that "she was not capable of definitively determining the source of lead exposure [and that] she was merely assessing the risks." 430 Md. 648, 657 (2013). The court reasoned that she

> did not explain adequately how she reached [her] conclusion [and that m]erely reciting certain information that she took into account and then stating the ultimate conclusion without explaining how and by what expert method that information was weighed did not provide a basis by which the trier of fact could evaluate that opinion.

Id. at 663.

Dr. Bohman was questioned at length during his deposition about what he would have expected to find at follow-up testing on November 14 or 15. When asked what abnormalities would have been present in a follow-up BPP, he testified, "I could not know for sure, but I think very confidently there would have been some finding at that point that would have pointed us to do more for the child." Ultimately, for each of the four components of the BPP, Dr. Bohman testified that (1) fetal movement would have been normal, (2) amniotic fluid level would have been normal, (3) he "suppos[ed]" fetal tone might be decreased, but would not offer an opinion that "it's more likely than not" that this decrease would result in a score reduction, and (4) he offered no opinion on fetal breathing effort, adding that the presence or absence of this component does "not make or break" the BPP score.

When asked what a follow-up NST might have shown, Dr. Bohman testified that because "it wasn't done[, w]e don't know," stating further that he "would not know exactly [what] would be the sign that we would see, but more likely than not there would be some sign that this child was not doing well." When pressed by counsel whether he could offer an opinion to a reasonable degree of medical probability that had a biophysical profile been performed on November 14, it would have shown decreased "tone such that the normal score would be reduced," Dr. Bohman responded:

> What I'm trying to say is that there's going to be *something* that would be indicative at that point, whether it would be movement, whether it would be tone, whether it would be the heart rate, *something*. I cannot know exactly how this particular child is going to react to this particular environment. I am saying that there would be an issue. Would I say it's more likely than not it would be this one particular thing? I can't say that. But I can say more likely than not there would be a finding that would point us that this child needed further evaluation and admission.

(Emphasis added). When pressed again on whether he held an opinion to a reasonable degree of medical probability as to the score for fetal breathing if a biophysical profile was performed on November 14, Dr. Bohman again failed to state what specifically would have caused a doctor to act:

> I'm going to go back to what I said before, that there will be *some* abnormality. Exactly which abnormality that is, I do not know, but with a more likely than not probability this child is going to have *something* that says I am in a hostile in utero environment and I would do better on the outside than inside. What that's going to be, whether it is breathing, heart rate, tone, movement, *something*, will be there that would say to the astute, reasonable physician, we need to do more.

(Emphasis added). He later agreed that a follow-up NST would have been reactive/normal "because it meets this three acceleration type criteria." Dr. Bohman further testified that

even if BPP and NST tests were normal on November 14 or 15, there may have been "peripheral findings" that he "can't predict exactly" that would indicate "further monitoring, testing and possibly delivery."

Expert testimony must be "sufficiently definite and certain to be admissible, for 'neither the Courts nor the juries are justified in inferring from mere possibilities the existence of facts, and they cannot make mere conjecture or speculation the foundation of their verdicts." *Porter Hayden Co. v. Wyche*, 128 Md. App. 382, 391 (1999) (quoting *Davidson v. Miller*, 376 Md. 54, 61 (1975)) (internal quotation marks omitted).

Dr. Bohman's testimony was indefinite and did not provide the trier of fact with "an adequate theory or rational explanation of how the factual data" led to his conclusion that there would have been any indication on November 14 or 15 from a BPP, NST, or other source to motivate an earlier delivery of Courtni that would have avoided her injury. *Rochkind*, 454 Md. at 287. While it is possible that Dr. Bohman's testimony presented "an adequate supply of data and a reliable methodology" to show that the BPP and Doppler assessment on November 11, 2011 warranted a follow up on November 14 or 15, Dr. Bohman certainly failed to provide the requisite data and methodology to establish what specifically would have alerted doctors that something was wrong upon another evaluation on November 14 or 15. Because Dr. Bohman's testimony that there would have been "something" that would have caused the doctors to deliver Courtni earlier is speculative at best and does not provide enough information to allow the trier of fact to evaluate the reasoning underlying that opinion, the testimony fails to provide a sufficient factual basis.

The circuit court properly excluded Dr. Bohman's testimony and summary judgment was thus appropriate.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED. APPELLANT TO PAY THE COSTS.