UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0277

September Term, 2014

MANUEL D. RIVERA

v.

UNO RESTAURANTS, INC. ET AL.

Krauser, C.J.,
*Hotten,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: April 5, 2016

*Michelle D. Hotten, J., participated in the hearing of this case while still an active member of this Court but did not participate in either the preparation or adoption of this opinion.

This appeal had its origin in a workers' compensation case brought by appellant, Manuel Rivera (hereinafter "Rivera"), against Rivera's employer, Uno Restaurants, Inc., and Uno's insurer, Massachusetts Bay Insurance Company, appellees. The issue that we must analyze and resolve in this case concerns an evidentiary ruling in the Circuit Court for Howard County made after Rivera filed a petition for judicial review of a decision by the Maryland Workers' Compensation Commission ("the Commission").

In this appeal, Rivera contends that the trial judge erred by allowing the jury to consider evidence that was (purportedly) barred by provisions set forth in Md. Code (2014 Repl. Vol.) Health Occupations Article ("HO") § 14-410, which provides:

> **Discoverability or admissibility in evidence of documents from investigations and hearings.**
>
> (a) *Records not discoverable or admissible – In general.* – Except by the express stipulation and consent of all parties to a proceeding before the [State] Board [of Physicians], a disciplinary panel, or any of its other investigatory bodies, in a civil or criminal action:
>
> (1) The proceedings, records, or files of the Board, a disciplinary panel, or any of its other investigatory bodies are not discoverable and are not admissible in evidence; and
>
> (2) Any order passed by the Board or disciplinary panel is not admissible in evidence.
>
> (b) *Records not discoverable or admissible – Exception.* – This section does not apply to a civil action brought by a party to a proceeding before the Board or a disciplinary panel who claims to be aggrieved by the decision of the Board or the disciplinary panel.

> (c) *Other evidence not affected*. – If any medical or hospital record or any other exhibit is subpoenaed and otherwise is admissible in evidence, the use of that record or exhibit in a proceeding before the Board, a disciplinary panel, or any of its other investigatory bodies does not prevent its production in any other proceeding.

The issue of the applicability, *vel non*, of HO § 14-410 first arose in a *de bene esse* videotaped deposition of an expert called by Rivera's attorney in the circuit court action. During that deposition, counsel for appellees asked the expert witness: 1) about the status of his license to practice medicine in Maryland; 2) whether the expert witness had been placed on probation by the Maryland Board of Physicians; and 3) whether it was true that the Maryland Board of Physicians had placed him on probation "for failing to meet the standards of patients and the standard of care in three patient cases." The witness declined to answer those questions.[1]

Rivera contended below that even though appellees never introduced at trial the "proceedings, records, or files of the Board [of Physicians]," the questions at issue should have been stricken by the circuit court because the public policy of Maryland, as enunciated by the Maryland General Assembly in HO § 14-410, was to exclude from evidence

[1]In this appeal, both sides recognize that even though Dr. McGovern never answered any of the questions at issue, questions in and of themselves can constitute impeachment evidence. *Elmer v. State*, 353 Md. 1, 15 (1999). As Judge Wilner said, speaking for this Court in *Craig v. State*, 76 Md. App. 250, 292 (1988), *rev'd on other grounds*, 316 Md. 551 (1989), *jdgmt. vacated on other grounds*, 497 U.S. 836 (1990): "[q]uestions alone can impeach" because questions can insinuate, they can suggest, and they can accuse.

"materials related to proceedings before the Maryland Board of Physicians in any civil or criminal action[.]" (Emphasis added.) In the alternative, appellant contended that any possible probative value of the questions asked was far outweighed by the potential for prejudice inherent in the questions. The trial judge disagreed with Rivera's position and declined to strike the questions.

The jury returned a verdict that was unfavorable to the appellant, who noted this timely appeal in which he raises one question, which he phrases as follows:

> Did the Trial Court err when it undermined the purposes of Maryland Code Ann. Health Occ. 14-410 by allowing improper questions about the Consent Order entered by the Maryland State Board of Physicians against Dr. Kevin McGovern, which in turn biased the jury against Mr. Rivera and caused them to find against him?

On January 13, 2016, this panel filed an unreported opinion in which we answered the above question in the negative and affirmed the judgment. But sixteen days later, on January 29, 2016, this Court issued a published opinion in *Pepsi Bottling Group, et al. v. Plummer*, No. 1055, September Term, 2014. Based on *Plummer,* appellants have asked us to reconsider our earlier opinion. We shall do so.

I.
BACKGROUND

A. Proceedings Before the Maryland Workers' Compensation Commission

On May 18, 2011, Rivera was working as a cook at an establishment owned by Uno Restaurants in the Long Gate Parkway Shopping Center in Howard County. On that date, he was reaching overhead to get a container when he slipped and fell, hitting his head, neck and back on the floor. As a result of the fall, Rivera required medical treatment along with an orthopedic and neurological evaluation.

Rivera brought a workers' compensation claim against his employer and its insurer seeking recompense for injuries suffered in the May 18, 2011 accident. On November 2, 2012, the Commission issued an Order finding that Rivera, under "other cases," suffered a 12% industrial loss of use of the body as a result of the aforementioned accident. The Commission divided the 12% industrial loss as follows: head (8%), neck (2%) and lumbar spine (2%). Rivera was dissatisfied with the Commission's finding in regard to the percentage of injury to his neck and lumbar spine. He was satisfied, however, with the finding of the Commission that he had suffered an 8% industrial loss of use to the head. Rivera filed a Petition for Judicial Review in the Circuit Court for Howard County, in which he claimed that the Commission's finding regarding the injury to his neck and lumbar spine were too low.

B. Proceedings in the Circuit Court for Howard County

Rivera's only medical expert was Dr. Kevin McGovern, an orthopedic surgeon. Dr. McGovern's *de bene esse* deposition testimony was videotaped on March 4, 2014. At the beginning of the deposition, counsel for Rivera asked Dr. McGovern a series of questions to establish his qualifications to give an opinion as an orthopedic surgeon. He testified, when questioned by counsel for Rivera, that he was licensed to practice medicine in the State of Maryland, that he was a board-certified orthopedic surgeon, and that in 1985 he had completed a four-year residency in orthopedic surgery at the Hahnemann University Hospital. Also, in establishing Dr. McGovern's qualifications, Rivera's attorney introduced into evidence a copy of Dr. McGovern's *curriculum vitae*, which showed that he had published several articles in the field of orthopedic surgery and had attended scores of medical meetings and other gatherings to improve his skills as an orthopedic surgeon.

Before Rivera's counsel submitted Dr. McGovern as an expert in the field of orthopedic surgery, the following exchange occurred:

> Q. [Counsel for appellees]: . . . Doctor, what is the current status of your medical license?
>
> [The Witness]: On the advice of my attorney, I'm not allowed to answer questions concerning the [B]oard.
>
> [Counsel for appellant]: Objection.

Q. [Counsel for appellees]: Doctor, have you been placed on probation by the Maryland Board of Physicians?

[Counsel for appellant]: Objection.

[The Witness]: Based on the legal advice of my attorney, I'm not allowed to answer that.

Q. [Counsel for appellees]: Okay. You are not willing to tell me or the members of the jury the current status of your license or whether you have been placed on any type of probation, or subject to any disciplinary measures by the Maryland Board of Physicians?

[Counsel for appellant]: Objection.

[The Witness]: On the advice of my attorney, I'm not allowed to answer those questions.

Later in the deposition, Dr. McGovern testified that Mr. Rivera, as a result of the subject accident, had a 15% permanent partial impairment of the body as a result of his neck injury and a 14% loss of use of the body due to his back injury.

At the videotaped deposition, during cross-examination, counsel for the appellees and Dr. McGovern engaged in the following colloquy:

Q. [Counsel for appellees]: And you believe that you met the applicable standard of care in treating Mr. Rivera?

[The Witness]: Yes.

Q. [Counsel for appellees]: I may know the answer to this, but, isn't it true that the Maryland Board of Physicians has placed you on probation for failing to meet the standards of patients - - and the standard of care in three patient cases?

> [Counsel for appellant]: Objection, move to strike.
>
> [The Witness]: As you know, I'm not allowed to answer that question on the advice of my attorneys.
>
> Q. [Counsel for appellees]: . . . If you will not answer that, Doctor, then I will see if [Rivera's counsel] has anything further.

On the date that the jury trial in this matter commenced, counsel for Rivera filed a motion *in limine* to strike the portions of Dr. McGovern's deposition quoted above. When the motion *in limine* was argued, the following facts were established: 1) on January 16, 2013, Dr. McGovern and the Maryland State Board of Physicians signed a consent order in which the parties agreed: a) that Dr. McGovern would be placed on probation for two years; b) that he would pay a $10,000 civil fine within three months of the date of the order; c) the reason that his license was placed on probation was because, in three instances, he had failed to meet the appropriate standards of delivering quality medical care in violation of HO § 14-404(a)(22); and d) in addition, in regard to six patients, he had failed to keep adequate medical records in violation of HO § 14-404(a)(40).[2]

[2]As a condition of probation, Dr. McGovern was required, *inter alia*, to complete certain medical-related courses.

The consent order stated that the Board "reprimanded" Dr. McGovern. The consent order also provided that "this Consent Order is considered a Public Document" pursuant to Maryland Code (2009 Repl. Vol. and 2012 Supp.), Gov't. Article § 10-611 *et. seq.*

After the trial judge denied the motion *in limine*, a jury was selected. Immediately before opening statements of counsel were given, the court and counsel once again had a lengthy discussion as to whether the jury could consider the questions put to Dr. McGovern that are here at issue. At the conclusion of that discussion, the trial judge said:

> The Court has considered the arguments, and the additional information presented by [Rivera's attorney]. The Court is going to stand by its original decision, and this Court is going to deny the Motion in Limine.

After opening statements were made, Rivera's attorney introduced the videotaped deposition of Dr. McGovern into evidence. Rivera then testified, and the defense played for the jury the videotaped deposition of their expert, Dr. John Parkerson, a specialist in the field of occupational medicine.

The trial judge sent to the jury a verdict sheet containing two questions, which were:

> 1) Expressed as a percentage, what is Mr. Manuel Rivera's permanent partial disability as a result of his neck injury sustained on May 18, 2011?
>
> 2) Expressed as a percentage, what is Mr. Manuel Rivera's permanent partial disability as a result of his lower back injury sustained on May 18, 2011?

To both questions, the jury answered "2%." The trial judge then signed an order affirming the decision of the Commission.

In this appeal Rivera makes two major contentions: 1) § 14-410 of the Maryland Health Occupations Article is designed to exclude from evidence all material related to proceedings before the Maryland State Board of Physicians and therefore his objections should have been sustained; and 2) in the alternative, even if the questions were not barred by HO § 14-410, the objection nevertheless should have been sustained because the questions "had limited-to-no relevance to the determination of Mr. Rivera's permanent partial disability, and any probative value . . . [in regard to] Dr. McGovern's credibility was greatly outweighed by the substantial prejudice[] suffered by Mr. Rivera."

II.
ANALYSIS

A. Preliminary Matters

Appellees contend that the issue of whether the trial court erred in allowing the jury to consider the questions at issue is not preserved for appellate review because, at the point where counsel asked to play for the jury the videotaped deposition of Dr. McGovern, appellant's trial counsel failed to repeat his objection to the questions at issue. Appellees argue: 1) that under the dictates of Md. Rule 2-517(a), an objection to the admission of evidence is waived unless an objection to that evidence is made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent; and 2) the denial of a motion *in limine* to exclude evidence will not preserve for review a decision to admit

evidence if no contemporaneous objection of the evidence is made to the introduction of evidence at trial (citing *Lewin Realty III, Inc. v. Brooks*, 138 Md. App. 244, 260-61 (2001)).

It is true that appellant's counsel did not object to the questions at issue contemporaneously with counsel's introduction of Dr. McGovern's deposition into evidence. But immediately before opening statements were made, counsel for appellants asked the court to reconsider its denial of the *in limine* motion. The court did reconsider its denial but, after hearing lengthy re-argument, the court decided not to change its ruling. Between that ruling and the introduction of Dr. McGovern's deposition, no evidence was introduced, the jury simply heard only the opening statement of counsel.

The preservation rule generally applicable in cases where a motion *in limine* to exclude evidence has been denied is set forth in *U.S. Gypsum v. Baltimore*, 336 Md. 145, 174 (1994) as follows:

> Generally, where a party makes a motion *in limine* to exclude irrelevant or otherwise inadmissible evidence, and that evidence is subsequently admitted, "the party who made the motion ordinarily must object at the time the evidence is actually offered to preserve [its] objection for appellate review." *Prout v. State*, 311 Md. 348, 356, 535 A.2d 445, 449 (1988).

(Emphasis added.)

There is an exception to this general rule that was discussed and applied in *Clemons v. State*, 392 Md. 339, 361-63 (2006), and in *Watson v. State*, 311 Md. 370, 372 n.1 (1988). The exception applies if two conditions are met, namely: 1) a judge, just prior to the

admission of the contested evidence, has announced a final decision to admit the evidence; and 2) requiring counsel to repeat the objection shortly after the court has overruled it would elevate form over substance. *Clemons*, *supra*, 392 Md. at 363. The exception to the general rule enunciated in *Watson* and *Clemons* is here applicable. It would have served no purpose to make a contemporaneous objection at the point Rivera's counsel introduced the deposition into evidence in light of the fact that shortly before the deposition was introduced, the trial judge had made clear that his decision to allow the jury to hear the questions at issue was final. Any further objection would have been futile. In other words, to require a further objection would be to place form over substance. *Id*. at 363. Therefore, the issue is preserved.

B. Appellant's First Contention

Appellant's main argument in this appeal is that, as a matter of law, no information "stemming from a Board of Physicians investigation," can be introduced into evidence in any trial. Whether the trial judge was right or wrong in his interpretation of HO § 14-410 is a question of law. When presented with an evidentiary question that is governed by a principle of law, we review the trial judge's decision *de novo*. *See Hall v. University of Maryland Medical System Corp.*, 398 Md. 67, 82-83 (2007). In the *Hall* case, the Court of Appeals said that although ordinarily the standard of review with respect to a trial court's

ruling on the admissibility of evidence is that such matters are left to the sound discretion of the trial court, the application of that standard:

> "depends on whether the trial judge's ruling under review was based on a discretionary weighing of relevance in relation to other factors or *on a pure conclusion of law*." *Bern-Shaw* [*Ltd. Partnership v. Mayor and City Council of Baltimore*], 377 Md. [277] at 291, 833 A.2d [502] at 510 [(2003)] (emphasis added). If "the trial judge's ruling involves a pure legal question, we generally review the trial court's ruling *de novo*." *Id*.; *Nesbit v. GEICO*, 382 Md. 65, 72, 854 A.2d 879, 883 (2004) (concluding that when a trial court's decision in a bench trial "involves an interpretation and application of Maryland statutory and case law, our Court must determine whether the lower court's conclusions are 'legally correct' under a *de novo* standard of review"), *quoting Walter v. Gunter*, 367 Md. 386, 392, 788 A.2d 609, 612 (2002). *See also Bernadyn v. State*, 390 Md. 1, 8, 887 A.2d 602, 606 (2005) (concluding, in a criminal case, that a trial court's decision to admit or exclude hearsay is not discretionary and that "whether evidence is hearsay is an issue of law reviewed *de novo*").

Id. *See also State v. Daughtry*, 419 Md. 35, 46 (2011).

Because Rivera contends that a statute barred defense counsel from asking the questions at issue, we shall review the trial judge's decision *de novo*.

Appellees, in response to appellant's argument, point out, *inter alia*, that:

HO § 14-411(c) provides:

> Nothing in this section shall be construed to prevent or limit the disclosure of . . . [g]eneral licensure, certification, or registration information maintained by the Board . . . .

HO § 14-411(c) is important, according to appellees, because the questions here at issue (see pages 5 & 6, *supra*) all dealt with "licensure . . . information" concerning Dr.

McGovern. Appellees also contend, citing *Unnamed Physician v. Comm'n.*, 285 Md. 1, 12 (1979), that the Court of Appeals, when construing Md. Code (1957, 1971 Rep. Vol., 1978 Supp.), Article 43 § 130(q) (the predecessor statute to HO § 14-410), stated that the General Assembly, when it enacted § 130(q), probably intended Article 43 § 130(q) to apply only to "a tort action for medical malpractice."[3] Therefore, according to appellee, HO § 14-410, which contains language nearly identical to the words used in Article 43 § 130(q) had no applicability in the subject workers' compensation case. Lastly, the plain language of HO § 14-410, according to appellees, does not support Rivera's position because § 14-410 does not prohibit a litigant from asking questions about orders issued by the Board. As already mentioned, appellant reads HO § 14-410 so as to prevent a litigant from introducing into evidence "materials related to" proceedings before the Board.

[3]The predecessor statute set forth in Article 43 § 130(q) concerned the Commission on Medical Discipline, which is the former name of the Board of Physicians. Article 43 § 130(q) reads:

> (q) *Admissibility in evidence of Commission's records*. - The records of any proceeding before the Commission or of any of its investigatory bodies or any order passed by the Commission may not be admitted into evidence in any proceeding, civil or criminal, except by the express stipulation and consent of all parties to the proceeding. This section may not be construed to prevent the production of medical records, hospital records, or any other exhibit in any other proceeding, provided that the medical records, hospital records, or other exhibit is legally subpoenaed and is otherwise admissible.

To justify his position, Rivera first points out, accurately, that language very similar to that found in HO § 14-410(a) can be found in HO § 1-401(d) that governs information produced at hearings before medical review boards. Appellant stresses that the Court of Appeals has characterized the statute involving medical review boards as providing a "medical review committee privilege." *See St. Joseph's v. Cardiac Surgery*, 392 Md. 75, 91-92 (2006), construing HO § 1-410(d). Based on the *St. Joseph's* case, appellant argues that HO § 14-410 should also be "construed as a privilege." We have no quarrel with that argument. HO § 14-410 does provide a Board of Physicians privilege. The question to be resolved concerns the extent of that privilege.

After this case was briefed and argued, this Court filed a reported opinion in *Pepsi Bottling Group v. Plummer*. The main issue presented in *Plummer* concerned the trial court's interpretation of the statutory privilege set forth in HO § 14-410. The facts in the *Plummer* case are very similar to the ones here presented. Derek L. Plummer, an employee at a bottling facility, slipped and fell at work on April 18, 2012. *Id*. at 1. Plummer filed a workers compensation case as a result of injuries suffered on that date. He named as his expert, Dr. Michael Franchetti, an orthopedic surgeon. *Id*. at 3. Prior to being designated as an expert, Dr. Franchetti had agreed to the entry of a consent order by the Board to resolve disciplinary proceedings brought against him. The consent order issued by the Board concluded: 1) that Franchetti's "actions and inactions [with respect to the patients

reviewed] constitute a failure to meet appropriate standards for the delivery of quality medical care, in violation of HO § 14-404(a)(22); 2) gross over utilization of healthcare services by Dr. Franchetti in violation of HO § 14-404(a)(19); and 3) a failure on Dr. Franchetti's part to keep adequate medical records, in violation of HO § 14-404(a)(40)." *Id*. Dr. Franchetti's *de bene esse* videotaped deposition was taken in May 2014. *Id*. at 4. During the deposition, counsel for the employer/insurer asked Dr. Franchetti a series of questions about the Board's disciplinary proceedings and the consent order. Dr. Franchetti refused to answer any of these questions, asserting a claim of privilege pursuant to HO § 14-410(a). The employer/insurer filed a motion to strike the *de bene esse* deposition of Dr. Franchetti. *Id*. at 5. Alternatively, movants asked that the court compel Dr. Franchetti to respond to the unanswered deposition questions. The claimant filed an opposition to the motion to strike as well as a motion *in limine* to preclude any mention of, and any evidence regarding, the Board's disciplinary proceedings and the consent order at the upcoming trial. *Id*. The trial judge denied the motion to strike Dr. Franchetti's *de bene esse* deposition and also denied the request for an order to compel Dr. Franchetti to answer questions about the Board's disciplinary proceedings and consent order. *Id.* The court, in addition, granted the claimant's motion *in limine* and thereby prevented counsel for the employer/insurer from making any mention of Dr. Franchetti's disciplinary proceedings. At trial, Dr. Franchetti's videotaped deposition was played for the jury, but all questions dealing with the disciplinary

proceedings were deleted. *Id.* at 5. The jury returned a verdict favorable to the claimant and the employer/insurer filed an appeal. In the *Plummer* opinion, this Court concluded that the trial judge correctly interpreted HO § 14-410 when it granted the appellee's motion *in limine* and denied appellants' motion to strike the *de bene esse* videotaped deposition. *Id*. at 21.

The arguments asserted by the appellant in the *Plummer* case are nearly identical to the ones made by appellees in the subject appeal, but in the *Plummer* case, those arguments were all rejected. First, this court held that HO § 14-410 applied to all civil cases, not just to tort cases for medical malpractice. *Id*. at 10. ("We conclude that the term 'civil action,' as used in HO § 14-410(a) includes any civil proceedings filed in a court, and is not limited to a civil proceeding alleging medical negligence."). The *Plummer* case also rejected an argument raised by the appellees in the subject case, that section 14-410 does not prohibit a litigant from asking questions about orders issued by the Board. In that regard, the *Plummer* Court said:

> Appellants argue that, even if HO § 14-410(a) applies in civil actions other than civil actions alleging medical negligence, its application is nevertheless "expressly limited to documentary evidence" because HO § 14-410 is titled "Discoverability or admissibility in evidence of ***documents*** from investigations and hearing," and HO § 14-410(a) is titled **"*Records*** not discoverable or admissible." (Emphasis in appellants' brief.) Appellants argue that "the plain meaning of the statute [therefore] prohibits the admission of documentary evidence only," and "Dr. Franchetti should have been compelled to answer questions regarding the Board's disciplinary proceedings even if the documents addressing those proceedings are inadmissible."

We disagree for several reasons. First, in determining the meaning of a statute, we look to the words of the statute itself, not a caption or heading. Captions and headings are mere catchwords and can never be taken to limit or expand plain meaning of the statutory language." *State v. Holton*, 193 Md. App. 322, 365 (2010); *accord* Maryland Code, General Provisions Article, § 1-208. Here, the language of the statute applies not only to "records or files of the Board," but also to "proceedings . . . of the Board." The term "proceedings" encompasses not only "documentary evidence" that may have been presented to the Board, but other information as well and expands the scope of the protection afforded by the privilege to all matters placed before or considered by the Board.

Second, to accept appellants' argument would mean that, even in medical malpractice suits against physicians and other health care providers, evidence about the Board's disciplinary proceedings would be admissible pursuant to testimony even if no documentary evidence about the proceedings could be introduced. To paraphrase a comment quoted by [the] Court of Appeals in reference to cross-examination of one spouse about privileged statements made by the other spouse, "'[p]rotections against the use of privileged and inadmissible evidence [provided by HO § 14-410(a)] would be of little benefit [because opposing counsel would be] allowed, under the guise of "artful cross-examination," to tell the jury the substance of inadmissible evidence.'" *Sweeney v. State*, 423 Md. 610, 625 (2011) (quoting *United States v. Hall*, 989 F.2d 711, 716-717 (4th Cir. 1993)). Indeed, acceptance of appellants' argument on this point would mean that a Board's decision to impose disciplinary action could serve as grounds for cross-examination of a physician testifying in any civil action. This would severely limit the utility of the statutory privilege, and would be contrary to one of the purposes to be served by the privilege, which is to encourage full and frank participation in a disciplinary proceeding without fear of later entanglement or repercussions in civil or criminal litigation. *See Certain Underwriters, supra*, 785 F.3d at 894 ("Barring the admission of Board disciplinary orders in later civil and criminal actions encourages physicians to cooperate during Board proceedings. Such cooperation strengthens the Board's ability to conduct proceedings that are thorough and fair, and thereby advances th Board's efforts to protect the health and safety of the public." (footnote omitted)). *See also Unnamed Physician, supra*, 285 Md. at 13 ("A more fundamental reason

> for preserving confidentiality in these proceedings is to ensure a high quality of peer review activity leading to the primary goal of this legislation to provide better health care."); *Brem v. DeCarlo, Lyon, Hearn & Pazourek, P.A.*, 162 F.R.D. 94, 97 (D. Md. 1995) (observing, with respect to the medical review committee privilege: "By ensuring the confidentiality of peer review proceedings, the Maryland legislature sought to foster effective review of medical care and thereby improve the quality of health care. As the Court of Appeals has noted, confidentiality is essential because "'physicians are frequently reluctant to participate in peer review evaluations for fear of exposure to liability, entanglement in malpractice litigation, loss of referrals from other doctors, and a variety of other reasons.'" Recognizing that effective review of medical care requires candid as well as objective communication, the legislature enacted the privilege to combat such reluctance." (citations omitted) (quoting *Baltimore Sun Co. v. University of Maryland Sys. Corp*., 321 Md. 659, 666 (1991))).
>
> There may be some appeal to the suggestion that, when a physician is voluntarily testifying about a healthcare issue as a paid expert witness, adverse rulings of the Board should, at a minimum, be a permissible topic of cross-examination if pertinent to the witness's expertise. But the statutory language of HO § 14-410 does not permit us to conclude that the legislature provided for different levels of privilege dependent upon the physician's role in the civil or criminal litigation. Consequently, we conclude that the General Assembly did not intend that doctors who have been the target of Board proceedings could be compelled to provide testimonial evidence about the disciplinary proceedings even though all documentary evidence regarding the action of the Board is protected by the privilege in HO § 14-410(a).

(Emphasis added.)

Lastly, the *Plummer* Court rejected the contention that because the consent order contained a provision stating that it was to be considered a public document pursuant to Md. Code, State Government Article, Section 10-611 *et seq.,* the document was therefore admissible despite the statutory protection afforded by HO § 14-410. *Id.* at 20. The Court

said: "We conclude that there is no exception to the privilege that permits evidence of an adverse ruling of the Board to be used for cross-examination or impeachment of a physician who is testifying as an expert witness." *Id.* at 21.

Appellees claim that *Plummer* does not govern this case and that we therefore should not reconsider the opinion this panel filed on January 23, 2016. In support of that claim appellees argue

> it is clear from a reading of the two cases that the questions and facts at issue in the *Plummer* case were different from the questions asked by counsel for Appellee in the subject case. Indeed, this Court's [January 13, 2016] opinion in the subject matter is narrow and specifically addresses the questions asked by counsel for Appellee, which solely related to the status of Dr. McGovern's medical license and do not reference the records, proceedings, or files of the Maryland Board of Physicians. The questions asked by the attorney involved in the *Plummer* case pertained more specifically to the Consent Order, which is distinguishable from the matter at hand. In *Plummer*, the questions pertained to one of Dr. McGovern's colleagues – Dr. Franchetti – and involved the charges filed by the Maryland Board of Physicians, the outcome of those charges, and the Consent Order. In the case *sub judice*, the questions solely related to the status of Dr. McGovern's medical license and are completely different than what was raised in *Plummer*.
>
> Appellant asserts that the cases are in material conflict, however, this is not the case because neither case stands for the broad, overarching principle that counsel for Appellant asserts. Indeed, in the subject matter, this Court's decision pertains to questions about the status of a doctor's medical license when no records, documents, or files of the Maryland Board of Physicians or any information concerning proceedings of the Maryland Board of Physicians were sought to be introduced. As the Court of Special Appeals noted in *Plummer*, that case pertained to questions concerning the records and proceedings of the Maryland Board of Physicians, which is wholly distinguishable from the case at hand. Appellant has argued that the *Plummer*

> decision means that he is entitled to a new trial but this is incorrect because the questions at issue in *Plummer* were noticeably different from the limited questions asked in the subject matter.

In the *Plummer* case, the precise questions asked of Dr. Franchetti were not set forth. But the *Plummer* Court did say:

> Dr. Franchetti's *de bene esse* video deposition in the workers' compensation case was recorded on May 19, 2014. During the deposition, counsel for appellants asked Dr. Franchetti a series of questions about the Board's disciplinary proceedings and the consent order. Dr. Franchetti refused to answer any of these questions, asserting a claim of privilege pursuant to HO § 14-410(a).

Slip op. at 4. (Footnote omitted.)

In the case *sub judice*, appellees' counsel never directly asked Dr. McGovern about the consent order or about the Board's disciplinary proceedings, but the doctor was asked a series of questions that, if answered, would have revealed the outcome of the Board's proceedings and the consequence of the consent order. To allow such questions would permit what the *Plummer* case warned against, *viz.*: allowing attorneys, through artful cross-examination, to disclose what disciplinary action the Board had taken. *Plummer, slip op.* at 16-17 (rejecting the argument that Dr. Franchetti should have been compelled to answer questions regarding the Board's proceedings even if no documents concerning those proceedings were admissible).

Based on the language and reasoning of the *Plummer* case, we hold that the trial judge erred when he ruled that the questions at issue were not barred by HO § 14-410(a). Appellant was clearly prejudiced by that ruling as demonstrated by the fact that appellees' counsel, in closing argument, placed great emphasis on the fact that Dr. McGovern had refused to answer the questions at issue.

Therefore, the judgment of the Circuit Court for Howard County shall be reversed, and the case remanded to the circuit court for a new trial.[4]

MOTION FOR RECONSIDERATION GRANTED; JUDGMENT REVERSED; CASE REMANDED TO THE CIRCUIT COURT FOR HOWARD COUNTY FOR A NEW TRIAL; COSTS TO BE PAID BY APPELLEE.

[4]Because we hold that the trial judge erred in allowing the jury to consider evidence that was barred by provisions set forth in HO § 14-410, we need not consider appellant's alternative contention that the trial judge erred when he failed to strike the four questions at issue because the prejudice to him outweighed the probative value of the questions.