

Circuit Court for Baltimore City
Case No. 24-C-15-002573MM

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1700

September Term, 2016

BORIS BOBROV, *et al.*

v.

UNIVERSITY OF MARYLAND
PHYSICIANS, P.A., *et al.*

Eyler, Deborah S.,
Wright,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: January 17, 2018

*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.

The Maryland discovery rules are designed to promote a cooperative sharing of information between adversarial parties. This transparency allows all parties to make better informed, fact-based decisions about case valuation and the possibility of settlement and allows trials to be decided based on their merits without manipulation and surprise. Of course, no party enjoys sharing information with their opponents. From time to time disputes arise. The rules empower parties to monitor each other's compliance and to address issues that arise. Parties are expected to make good faith efforts to resolve their disputes, and turn to court intervention only as a last resort.

In this medical malpractice and wrongful death lawsuit, appellants ("Bobrov") allege that University of Maryland Medical Systems ("UMMS") made an expert witness designation that was less than complete and failed to identify physical exhibits in a timely manner. These issues could have—and should have—been resolved in accordance with the Maryland rules that govern discovery disputes. Rather than trying to work out the problems pretrial, however, Bobrov did nothing, and now asks the court system to take care of him after the fact. That is not how the process is designed to work.

For the reasons that follow, we affirm the circuit court.

BACKGROUND

I. The Alleged Malpractice

The medical malpractice and wrongful death claims in this case stem from the allegedly negligent perforation of Zhanneta Bobrova's esophagus during an upper endoscopy procedure. The purpose of the procedure was to remove a moderate-to-poorly differentiated invasive adenocarcinoma of the gastroesophageal junction—a form of

esophageal cancer—and to gather staging information on the cancer, so as to develop a treatment plan. The procedure, performed by Dr. Bruce Greenwald of the University of Maryland, required dilation of the esophagus and insertion of an endoscope. During that process, Bobrova’s esophagus was perforated, which Dr. Greenwald treated with an esophageal stent. Roughly two weeks later, Bobrova returned to the University of Maryland Medical Center complaining of shortness of breath and left chest pain. Dr. Greenwald performed a second surgery to repair the esophageal perforation.

In the six months following her surgery, Bobrova suffered from a variety of other health problems. She had a preexisting history of chronicpancreatitis that progressed to acute pancreatitis and required her to be admitted to Howard County General Hospital. There, she underwent an eight-hour pancreatic surgery, apparently without incident. During her recovery from the pancreatic surgery, however, Bobrova developed a systemic inflammatory response and sepsis, and died six days later.

After Bobrova’s death, Bobrov filed suit on Bobrova’s behalf against UMMS in the Circuit Court for Baltimore City. Bobrov alleged that Dr. Greenwald was negligent and breached the standard of care when he perforated Bobrova’s esophagus during the endoscopy to remove her cancer and that this breach started the decline that ultimately caused Bobrova’s death seven months later.

II. Procedural Background

At the outset of the case, the circuit court issued a scheduling order, which included deadlines by which each party was to designate expert witnesses and complete discovery. UMMS identified four expert witnesses in its Preliminary Designation of Expert

Witnesses, which it served three days *after* the deadline for expert disclosures set by the Scheduling Order. Among others, UMMS Dr. Elizabeth Montgomery, a gastrointestinal pathologist, was identified. UMMS noted in this preliminary disclosure that, if called, Dr. Montgomery would base her testimony on her review of pathology slides¹ prepared from tissue taken during Bobrova's endoscopy and biopsy procedures. Bobrov propounded interrogatories on UMMS, which included a request that it "[i]dentify the nature and subject matter of each picture, diagram, document, x-ray, or other objects (real evidence), which is known to you and which is relevant to this occurrence or its consequences." UMMS answered that "[Bobrov is] referred to X-rays, imaging studies and pathology slides identified in the medical records for Zhanneta Bobrova." UMMS supplemented its answer to this interrogatory on the final day of discovery, noting that it was in possession of pathology slides, and that the slides would be made "available for inspection upon request." Bobrov made no request to view or inspect the slides. Despite receiving no request, two weeks before trial, UMMS sent Bobrov copies of photomicrographs—pictures taken through a microscope—of the pathology slides.

Prior to trial, Bobrov moved *in limine* to preclude the expert testimony of Dr. Montgomery and the evidence of the pathology slides. In support of the motion, Bobrov argued, first, that UMMS's disclosure of the pathology slides was untimely and, second, that because Dr. Montgomery's testimony concerned the pathology slides, if the pathology

¹ Pathology slides are samples of preserved, biological tissue taken from a biopsy and mounted on glass slides. The slides are used by pathologists in the diagnosis and staging of cancer.

slides were excluded, Dr. Montgomery's testimony must also be barred. The motion did not mention that UMMS's designation of her as an expert was late or insufficient. The circuit court held a hearing and denied Bobrov's motion, concluding that Dr. Montgomery's testimony and the pathology slides would both be admissible at trial.

At trial, UMMS called Dr. Montgomery to the stand and moved to have her qualified as an expert in the field of gastrointestinal pathology. Bobrov did not object to her qualifications or her testimony. Dr. Montgomery's testimony generally concerned the nature and severity of different types of esophageal cancers. She also testified that Bobrova's specific cancer carried a high risk of spreading, and opined that, given the cancer's potential severity, Dr. Greenwald's decision to remove the entire tumor during the endoscopy procedure was correct. Throughout Dr. Montgomery's testimony, Bobrov renewed his objection to the pathology slide evidence, but did not object to Dr. Montgomery's opinions that Bobrova's cancer was aggressive, would typically require removal, or that Dr. Greenwald's removal was successful.

Following the six-day trial, the jury returned a verdict in favor of UMMS. Bobrov noted this timely appeal.

ANALYSIS

Bobrov challenges both the circuit court's decision to admit Dr. Montgomery's expert testimony and its decision to admit the pathology slides into evidence at trial. At the root of his challenges, Bobrov argues that (1) UMMS's expert designation was insufficient under the Maryland Rules and was late in violation of the scheduling order; and (2) UMMS's disclosure of the pathology slides was untimely, and that, as a result of these

deficient discovery responses, the circuit court erred in failing to exercise its discretion to exclude the challenged evidence. For the reasons that follow, we determine that the circuit court did not abuse its discretion in its evidentiary rulings. We, therefore, affirm.

I. Standard of Review

We review a trial court's decision to admit or exclude evidence for abuse of discretion. *Lowery v. Smithsburg Emergency Med. Serv.*, 173 Md. App. 662, 674 (2007). The abuse of discretion standard is highly deferential, and a trial court's action admitting or excluding challenged evidence "will seldom constitute a ground for reversal." *White v. State*, 142 Md. App. 535, 543-44 (2002) (quoting *Oken v. State*, 327 Md. 628, 659 (1992)). When that action is based on a party's failure to comply with discovery, we review the admission or exclusion of evidence in accordance with the principle that "[t]rial judges are vested with great discretion in applying sanctions for discovery failures." *Rodriguez v. Clarke*, 400 Md. 39, 56 (2007); *see also Butler v. S & S P'ship*, 435 Md. 635, 650 (2013). We will, therefore, review the circuit court's decision to allow Dr. Montgomery to testify as an expert and to admit the pathology slides at trial for abuse of discretion.

II. The Expert Designation

The circuit court's scheduling order identified a deadline for all parties to designate experts and required that all expert designations "include all information specified in Rule 2-402(g)(1)(A)." The identified portion of the Rule requires a party responding to an interrogatory that requests the identification of expert witnesses to "state the subject matter on which the expert is expected to testify; to state the substance of the findings and the opinions to which the expert is expected to testify and a summary of the grounds for each

opinion” and to produce any reports made by the expert regarding those findings. Md. Rule 2-402(g)(1)(A). Though we conclude that UMMS’s designation of Dr. Montgomery did not comply with these requirements, we hold that Bobrov’s failure to take the necessary steps to address this issue during discovery waived this grounds for challenge. Moreover, even if we were to reach the merits, we would find that Bobrov suffered no prejudice as a result of Dr. Montgomery’s expert testimony. We affirm the circuit court.

UMMS’s full expert designation of Dr. Montgomery, which was submitted to Bobrov three days after the deadline provided by the court’s scheduling order, reads:

Dr. Montgomery is a physician specializing in GI pathology. A copy of Dr. Montgomery’s Curriculum Vitae, which details her educational and professional background, training and experience, is attached hereto.

If called to testify, Dr. Montgomery is expected to testify about her review of the pathology slides from Zhanneta Bobrova’s procedures and is expected to base any opinions on her education, training, experience and review of the pertinent medical records, pathology slides, and other materials provided to her, including, but not limited to any depositions completed.

Her CV was attached. This expert designation fails to comply with the requirements of Rule 2-402(g)(1)(A) in several ways. Although it identifies the subject matter of Dr. Montgomery’s testimony—the pathology slides—it does not provide any information regarding the substance of Dr. Montgomery’s findings or opinions derived from her review of those slides. The designation also fails to provide a summary of any grounds on which Dr. Montgomery would rely for her unidentified opinions, if called to testify. Because UMMS’s designation of Dr. Montgomery did not include all of the material required under Rule 2-402(g)(1)(A) and was submitted three days after the scheduling order’s expert

deadline expired, we conclude that it was both an insufficient discovery response and a violation of the court's scheduling order. That alone, however, is not enough.

After receiving UMMS's insufficient expert designation, Bobrov should have engaged in good faith efforts to resolve the issue directly with UMMS before seeking court intervention. *See* Md. Rule 2-431 (discussing the requirement of good faith efforts to resolve discovery disputes). Initially, Bobrov should have contacted UMMS to inform it that its expert designation was unsatisfactory and to request a supplemented response. *See Rodriguez*, 400 Md. at 61-62 (discussing the importance of good faith efforts to resolve disputes). Bobrov could have done so by letter, email, or even a phone call. If these efforts to communicate failed, Bobrov could then turn to the court by filing a Motion to Compel Discovery. *See* Md. Rule 2-432(b). Along with a Motion to Compel, Bobrov would have been required to submit a certificate detailing the good faith efforts he took to resolve the dispute with UMMS, and certifying that the parties could not reach an agreement. Md. Rule 2-431; *Rodriguez*, 400 Md. at 61 ("This element of good faith, mandated by the Maryland discovery rules, is central to the entire discovery process."). To obtain additional information regarding the substance of Dr. Montgomery's testimony absent a more detailed expert designation from UMMS, Bobrov also could have deposed Dr. Montgomery. Md. Rule 2-411 ("Any party to an action may cause the testimony of a person ... to be taken by deposition for the purpose of discovery or for use as evidence in the action or for both purposes.").

Bobrov, however, did not make any attempt to contact or notify UMMS that its expert designation was insufficient. There is nothing in the record to suggest that Bobrov

requested a supplementary expert designation from UMMS or that he made any effort to contact UMMS to resolve the issue or to obtain additional information regarding Dr. Montgomery's expert opinions. Bobrov didn't note the deposition. In fact, UMMS, on its own initiative reached out to Bobrov to inquire whether he wished to depose their experts, including Dr. Montgomery. Bobrov scheduled depositions for each of UMMS's experts *except* for Dr. Montgomery. Instead, Bobrov remained silent until two weeks before trial when he filed a motion *in limine* to exclude Dr. Montgomery's expert testimony. Given Bobrov's complete lack of good faith efforts to resolve the dispute over Dr. Montgomery's expert designation with UMMS during discovery, the circuit court acted well within its discretion in denying Bobrov's motion. *Rodriguez*, 400 Md. at 56-57, 66 (trial judges have broad discretion to apply sanctions, such as the exclusion of an expert witness, for discovery violations); *Food Lion v. McNeill*, 393 Md. 715, 717 (2006) (holding that expert testimony may not be excluded "on the basis of a disclosure, made during discovery in response to interrogatories, that has neither been claimed nor determined to be a discovery violation, but that is challenged at trial ... for failing to provide information as required by Maryland Rule [2-402(g)(1)(A)]").

We also note that the trial court did not abuse its discretion by failing to exclude Dr. Montgomery's testimony on the grounds that UMMS's expert designation was filed late, in violation of the court's scheduling order. While "sanctions are available for the violation of directives in scheduling orders, although they are not specified in any rule," the trial court maintains broad discretion over whether, and to what degree, to sanction late disclosures. *Butler*, 435 Md. at 649 (quoting *Dorsey v. Nold*, 362 Md. 241, 256 (2001)). In

particular, “the more draconian sanctions, of ... precluding the evidence necessary to support a claim, are normally reserved for persistent and deliberate violations.” *Id.* at 650 (quoting *Admiral Mortgage, Inc. v. Cooper*, 357 Md. 533 (2000)). To determine whether to impose a sanction for the violation of a discovery disclosure requirement, courts consider several factors:

whether the disclosure violation was technical or substantial, the timing of the ultimate disclosure, the reason, if any, for the violation, the degree of prejudice to the parties respectively offering and opposing the evidence, whether any resulting prejudice might be cured by a postponement and, if so, the overall desirability of a continuance.

Taliaferro v. State, 295 Md. 376, 390-91 (1983).

Consideration of the *Taliaferro* factors here reveals that the circuit court did not abuse its discretion by opting not to sanction UMMS for its late expert witness designation. First, UMMS submitted its expert designation only three days late, making it more of a technical, rather than substantial, violation of the court’s scheduling order. *Id.* at 391 (noting that a disclosure that is made “a few days late, but well in advance of trial” is typically treated as a technical violation). Second, although UMMS gave no explanation for its late filing, Bobrov still received the designation more than six months before trial, and he therefore had sufficient time to gather necessary information regarding Dr. Montgomery and to prepare for his cross-examination of her at trial. *See id.* (discussing that situation where notice of an alibi witness was given 10 days late but still six months prior to trial reflected the party’s “substantial compliance with the letter and spirit of the rule”). Finally, as we will discuss in detail below, Dr. Montgomery’s testimony resulted in

no prejudice whatsoever to Bobrov, so the minor delay in UMMS’s expert designation did not warrant a continuance, and had no negative effect on Bobrov’s case. In light of these considerations, we agree with the circuit court that in this situation, UMMS’s filing of an expert designation three days late was not so egregious so as to warrant the exclusion of the expert, altogether, and thus would be “an unwarranted remedy for the situation.” Therefore, we conclude that the circuit court did not abuse its discretion by denying Bobrov’s motion *in limine* and allowing Dr. Montgomery to testify.

After the court denied Bobrov’s motion *in limine*, Bobrov did not properly preserve his challenge to Dr. Montgomery’s expert testimony for appellate review, so we need not decide the issue. At trial, UMMS moved to have Dr. Montgomery designated as an expert witness, but Bobrov failed to renew his objection:

[UMMS’S COUNSEL]: I’d move to have Dr. Montgomery designated as an expert in the field of pathology, and specifically gastrointestinal pathology.

[THE COURT]: Do you wish to voir dire the witness?

[BOBROV’S COUNSEL]: We’ll reserve for cross-examination, Your Honor.

[THE COURT]: All right. **Any objection to the expert status?**

[BOBROV’S COUNSEL]: **I won’t.**

(emphasis added). “When a motion *in limine* to exclude evidence is denied, the issue of the admissibility of the evidence that was the subject of the motion is not preserved for appellate review unless a contemporaneous objection is made at the time the evidence is later introduced at trial.” *Klauenberg v. State*, 355 Md. 528, 539 (1999). Thus, although

Bobrov objected to Dr. Montgomery testifying as an expert in his motion *in limine*, he did not preserve the issue for appeal because he failed to renew that objection at trial.

Even if Bobrov had preserved his challenge for appellate review, he would also have had to establish that Dr. Montgomery's testimony prejudiced him. Md. Rule 5-103(a) ("Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling."); *see also Crane v. Dunn*, 382 Md. 83, 91-92 (2004) ("It is the policy of this Court not to reverse for harmless error and the burden is on the appellant in all cases to show prejudice as well as error."). The circuit court's admission of Dr. Montgomery as an expert witness would only be considered prejudicial to Bobrov if it had "affected the verdict below." *Brown v. Daniel Realty Co.*, 409 Md. 565, 584 (2009) (quoting *Crane*, 382 Md. 83 at 91-92).

Dr. Montgomery's testimony was not prejudicial to Bobrov because it was duplicative of other experts who testified for UMMS. Dr. Montgomery's testimony focused on Bobrova's esophageal cancer diagnosis and the methods used by pathologists for evaluating and staging cancers. Each of the other three expert witnesses for UMMS also testified about Bobrova's cancer, including its aggressive potential and the typical process of treatment. Thus, there was nothing unique about Dr. Montgomery's testimony. Moreover, Bobrov concedes in his brief that excluding Dr. Montgomery's testimony "would not have prejudiced [UMMS] in any meaningful way." That is, Bobrov admits that Dr. Montgomery's testimony added nothing to UMMS's case. Given this admission, there is no way Bobrov can contend that the circuit court's admission of Dr. Montgomery as an expert "affected the verdict below." *Crane*, 382 Md. at 91-92. The circuit court, therefore,

did not commit reversible error by allowing Dr. Montgomery to testify at trial because it resulted in no prejudice to Bobrov.

III. The Pathology Slides

Bobrov also challenges the circuit court's admission of the pathology slides at trial because, he contends, UMMS did not disclose the slides in a timely manner. We disagree, and conclude that the slides were timely disclosed before the discovery deadline, and that UMMS properly supplemented its discovery responses before trial in accordance with Maryland Rule 2-401. Moreover, because Bobrov suffered no prejudice as a result of the pathology slides, the circuit court's decision to admit them at trial was not reversible error.

UMMS first disclosed the pathology slides to Bobrov in response to Bobrov's Interrogatory requesting the identity of evidence that was relevant to UMMS. In its response, UMMS directly referred Bobrov to the "pathology slides identified in the medical records for Zhanneta Bobrova," and stated that it would supplement the response in the event that it obtained additional responsive information. The circuit court's Scheduling Order mandated that "all discovery ... shall be completed no later than 7/22/2016." On July 22, UMMS served Supplementary Answers to Interrogatories by first class mail that stated "[UMMS] is in possession of the pathology slides ... relating to Ms. Bobrova's February 12, 2013 E[sophago]G[astro]D[uodenoscopy] procedure ... and recuts of the pathology slides from the specimen Dr. Greenwald obtained ... These are available for inspection upon request."²

² Because pathology slides are physical objects containing biological material, they cannot be duplicated and exchanged like a paper document could be, for purposes of

Bobrov contends that because he received UMMS's Supplementary Answers to Interrogatories after the July 22 discovery deadline, UMMS's disclosure that it was in possession of the pathology slides was untimely. Maryland Rule 1-321, which governs the service of pleadings, however, provides that "service by mail is complete upon mailing." Timeliness, therefore, is measured by the date of *service*, rather than the date of *receipt*. Md. Rule 1-321(a). Because UMMS mailed its Supplementary Answers within the discovery deadline, it is immaterial that Bobrov did not receive the responses until after it had passed. UMMS's disclosure of the pathology slides, therefore, was timely and sufficient.

In addition to informing Bobrov that the pathology slides were available for inspection, UMMS also sent photomicrographs of the slides to Bobrov two weeks before trial. Maryland's discovery rules impose a duty on a party to supplement its discovery responses when it obtains additional relevant, undisclosed information. Md. Rule 2-401; *but see Mattvidi Assocs. Ltd. P'Ship v. NationsBank of Virginia, N.A.*, 100 Md. App. 71, 95 (1994) (noting that the trial court did not abuse its discretion by admitting evidence even where the party offering the evidence did not supplement its discovery responses with the new information at all before trial). To comply with this duty, the party must supplement its discovery responses *before trial*. Md. Rule 2-401. Here, UMMS fulfilled that duty when it mailed Bobrov photomicrographs of the pathology slides referenced in its Supplemental

discovery. Maryland Rule 2-401 provides that "Parties may obtain discovery by one or more of the following methods: ... production or inspection of documents or other tangible things." Thus, by making the pathology slides available to Bobrov for inspection, UMMS satisfied its discovery obligation.

Answers to Interrogatories prior to trial. Thus, UMMS properly disclosed the photomicrographs to Bobrov.

If Bobrov believed that UMMS violated any rules of discovery with regards to its disclosure of the pathology slide evidence, however, he should have attempted to resolve the issue with UMMS, cooperatively. *See Rodriguez*, 400 Md. at 61. Prior to receiving UMMS's Supplementary Answers, Bobrov could have contacted UMMS to inquire about the location of the slides or to request access to the slides for his own inspection. If UMMS was unresponsive or refused to comply, Bobrov could have filed a motion with the court to compel UMMS to provide the slides. Md. Rule 2-432(b). Once UMMS informed Bobrov that it was in possession of the pathology slides, Bobrov also could have exercised his right to inspect them or propounded discovery on the custodian of records.

Bobrov, however, made none of these efforts, and instead filed a motion *in limine* seeking to exclude the pathology slide evidence at trial. "A dispute pertaining to discovery need not be considered by the court unless the attorney seeking action by the court has filed a certificate describing the good faith attempts to discuss with the opposing attorney the resolution of the dispute." Md. Rule 2-431. Thus, because Bobrov made no good faith attempts to resolve what he perceived to be a discovery violation by UMMS and did not file a certificate with the circuit court, the circuit court did not abuse its discretion by denying Bobrov's motion and ruling that the pathology slides were admissible at trial. *See Rodriguez*, 400 Md. at 62-66.

Even if Bobrov had convinced us that the pathology slides should have been excluded from evidence, there was no prejudice to him. *Crane*, 382 Md. at 92 ("To justify

the reversal, an error below must have been both manifestly wrong and substantially injurious.”) (internal quotation omitted). To determine whether the circuit court erred in its evidentiary ruling, we must focus on “not the possibility, but the probability, of prejudice” that results from the admission or exclusion of evidence at trial. *Perry v. Asphalt & Concrete Servs., Inc.*, 447 Md. 31, 49 (quoting *Crane*, 382 Md. at 91). Bobrov contends that, had UMMS promptly informed him that it was in possession of the pathology slides, Bobrov would have obtained his own expert to review the pathology slides and dispute the findings of UMMS’s experts. At the hearing on his *motion in limine*, however, Bobrov conceded that he did not dispute or disagree with the findings that Dr. Montgomery and UMMS’s other experts drew from the pathology slides. Thus, Bobrov is unable to establish—and we are unable to discern—any way in which the admission of the pathology slides resulted in a probability of prejudice to him, and we, therefore, see no reversible error in the circuit court’s ruling.

CONCLUSION

Benjamin Franklin famously said that “God helps those who help themselves.” The same is true of the Maryland discovery rules—they are designed to help parties who act to protect themselves. Here, Bobrov took no steps to help himself, and relied instead on the hope that this Court would do so later. We decline.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE CITY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**