UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1293

September Term, 2014

HEATHER P. PEIRCE

v.

LINDA FAZENBAKER

Meredith,
Kehoe,
Moylan, Charles E. Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: November 28, 2016

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.

At the conclusion of a trial in the Circuit Court for Alleghany County, the jury returned a verdict in favor of Linda Fazenbaker, appellee, and against Heather P. Peirce, M.D., appellant. In that action, Ms. Fazenbaker alleged, *inter alia*, that Dr. Peirce committed malpractice when she failed to appreciate that Ms. Fazenbaker was having an allergic reaction to a drug called PTU, and that Dr. Peirce made matters worse by failing to discontinue the medication. Ms. Fazenbaker's expert witness testified that her allergic reaction was caused by PTU. Dr. Peirce's expert witnesses did not testify that Ms. Fazenbaker's cataclysmic allergic reaction was to a cephalosporin; rather, their testimony was that they did not have an opinion, to a reasonable degree of medical probability, whether it was the PTU or the cephalosporin. Dr. Peirce's defense relied on the suggestion, made in her testimony and that of her experts, that it was possible that Ms. Fazenbaker actually had an allergic reaction to a cephalosporin. After defense witnesses suggested the allergic reaction might have been caused by a cephalosporin, Ms. Fazenbaker asked the trial court to take judicial notice that a certain drug, Cephalexin, belongs to a class of drugs called cephalosporins. On appeal, Dr. Peirce contends that the trial court erred in taking judicial notice.

QUESTIONS PRESENTED

Dr. Peirce presents one question:

Did the trial court err:

A. in taking judicial notice,
B. doing so as rebuttal evidence, and
C. in permitting an improper inference to be drawn from the judicially noticed matter during closing argument?

For the reasons that follow, we answer "no" to subparts A and B, find the issue presented in subpart C to be unpreserved, and affirm the judgment of the circuit court.

FACTS AND PROCEDURAL HISTORY

On January 8, 2009, Linda Fazenbaker had an appointment with her primary-care physician, Dr. Robin Bissell, a general-practice physician in Grantsville, Maryland. The medical records document that among Ms. Fazenbaker's complaints was a "rash to neck, arms x 3 days[,] 'knots' to bilat. [lower] legs[,] started in October but last couple weeks has gotten worse – the 'knots'[,] Also had/has H2O blisters to arms, neck, legs[.]" One of Ms. Fazenbaker's known medical conditions was hyperthyroidism, for which she previously had been treated by a Dr. Nawab, who was evidently no longer practicing in the area as of January 2009. To address the hyperthyroidism, Dr. Nawab had prescribed for Ms. Fazenbaker a drug called propylthiouracil, or PTU. As of January 8, 2009, Ms. Fazenbaker had been taking PTU for six months. Dr. Bissell ran lab tests that showed that Ms. Fazenbaker's thyroid levels were "mildly elevated," and on physical examination, Dr. Bissell discovered that Ms. Fazenbaker had an enlarged thyroid gland, or goiter. Dr. Bissell was not familiar with PTU or its side effects, and referred Ms. Fazenbaker to the only endocrinologist in the area, Dr. Peirce. Dr. Bissell testified:

> Actually on January 8th before I knew the, the test results, I told her she needed to go to an endocrinologist, because regardless of the results I still would want her to go to a um, an endocrinologist. For one thing I knew she was on PTU, so that's a, that's a medication I don't prescribe, and I'm not familiar with it, and it made me uncomfortable that she was no longer seeing the doctor that had prescribed it, who was an internal medicine doctor in Grantsville.

* * *

> . . . I was very concerned that she was basically without care of her thyroid condition by someone who knew how to treat it.

The medical records from Dr. Bissell's office reflect that, on January 20, 2009, "Dr. Peirce's office called, [Ms. Fazenbaker] to stop taking PTU 50 mg BID. [Ms. Fazenbaker] was made aware and that Dr. Peirce's office is trying to reach her. [Ms. Fazenbaker] stated she would call them." Dr. Bissell testified that she agreed with the proposition that a medication allergy would be reasonable to consider in a patient presenting to the office with a rash.

Ms. Fazenbaker returned to Dr. Bissell's office on January 21, 2009, still complaining of "rash from 1/8/09 - still has H2O blisters[,] mostly to feet/legs[,] very itchy[.]" She apparently had been told by a family member, sometime after the January 8 appointment, that the family member had been exposed to scabies. Ms. Fazenbaker informed Dr. Bissell of this, and Dr. Bissell treated the rash as if it was caused by scabies, although Dr. Bissell did not run any tests confirming that diagnosis. She prescribed for Ms. Fazenbaker a topical cream, Elimite, and instructed her to "wash everything." Ms. Fazenbaker also had a urinary tract infection at that time, for which Dr. Bissell prescribed Bactrim.

On February 3, 2009, Ms. Fazenbaker had a follow-up appointment with Dr. Bissell. The medical records reflect that the rash was "now gone," and "scabies resolved." Dr. Bissell's office also gave Ms. Fazenbaker a note to give to Dr. Peirce, informing Dr. Peirce that Ms. Fazenbaker's "scabies" was now resolved and she was no longer contagious. Dr.

Peirce's office would not see Ms. Fazenbaker without the note. Dr. Bissell's records also reflect that, on "4/22/09 – Note faxed to Dr. Peirce's office – scabies resolved."

Dr. Bissell agreed in her testimony that, if left untreated, Ms. Fazenbaker's thyroid levels would rise, but disagreed that serious medical consequences naturally would result. Specifically, Dr. Bissell testified:

> [BY APPELLEE'S COUNSEL]: Not everybody with high thyroid hormone levels has a serious medical question, uh, medical problem, right?
>
> [BY DR. BISSELL]: They don't have serious medical consequences or symptoms.
>
> Q. Right, but some people do, right?
>
> A. Yes.
>
> Q. Okay. So my question was if you take her off the medication that's trying to keep her thyroid hormone level normal, when you do that you know that doing that could cause harm to her, agree or disagree?
>
> A. Yes.
>
> Q. Okay. And we could agree that one of those harms that could have been caused to her is that she could go into congestive heart failure. Isn't that also correct?
>
> A. Yes. If she didn't go to the specialist as she was instructed to.
>
> [BENCH CONFERENCE BETWEEN COURT AND COUNSEL]
>
> Q. Doctor if the patient has elevated thyroid hormone levels in their blood, that can lead to them going into congestive heart failure, can we agree?
>
> A. Yes that's true especially if there's a uh, something that happens on top of it like a, an infection of some kind, pneumonia or a virus.

Q. Can we agree that you never told Linda Fazenbaker that if she remained off of PTU for any length of time she was potentially injuring her health?

[OBJECTION BY APPELLANT'S COUNSEL. OVERRULED.]

A. I think I probably did say something to her about that because even when I talked to her in 2005 and I was concerned about her thyroid and I told her how important it was to get testing, and then when I saw her in 2009 I told her she had to get testing and she had to see a specialist. I'm sure – you know, I usually spend about a half hour with each patient, and um, I'm sure in the course of sitting and talking with her I probably told her just about everything I did know, and uh, you know, I can't – because of my documentation I can't prove that, but it would've been my customary practice to inform the patient of, of what I knew, and I, I pretty much — when I'm sitting with a patient with my chart here, I'm like reading through my notes, and uh, you know, talking about what I know about her and what my, what my thinking is about what the next step would be, and uh, I probably did tell her. I, but I can't prove that.

Ms. Fazenbaker testified that Dr. Bissell's office called her on January 20, 2009, and told her she needed to stop taking the PTU. She also testified that no one told her why, or that it was dangerous to be off PTU for any period of time.

As it turned out, the first time Ms. Fazenbaker traveled to Dr. Peirce's office, she was not seen by Dr. Peirce. Ms. Fazenbaker testified that she made an appointment with Dr. Peirce, and drove to her office in Cumberland with a friend, Nancy Kitzmiller, who also testified. Ms. Fazenbaker described Dr. Peirce's office in detail, and testified that she checked in and was given new patient forms to complete:

[BY APPELLEE]: It wasn't too long they came and got me. I went back in. I sit down at a desk across from Dr. Peirce. Uh, I looked down and I seen this file, and it was pretty thick, and I, and I knew I'm a new patient so I shouldn't have a file, and I, it did not have my name on it [sic]. It had another Linda Fazenbaker on it, and I had said that to her, and she says, "Well I can't

> see you right now. I got to get this cleared up." She says, "Make another appointment and we'll, when I'm, when I get this done then we'll, I'll see you again." And I went back out.

Ms. Fazenbaker testified that she made another appointment to see Dr. Peirce in June, but, by then, she was too sick to attend the appointment before being admitted to Western Maryland Health System late in June.

Dr. Peirce testified that she had no recollection of Ms. Fazenbaker ever coming to her office, or of ever seeing her prior to her hospitalization later in June 2009. It apparently was confirmed during discovery that Dr. Peirce did, in fact, have a different patient named Linda Fazenbaker, a circumstance about which Dr. Peirce testified, "I can't even explain to you, cause I, it's beyond my explanation." Dr. Peirce testified that she had no recollection of any conversation with Dr. Bissell's office on January 20, 2009, directing Ms. Fazenbaker to stop taking the PTU, although she acknowledged that, "if I was involved," one possible explanation for why she would have directed Ms. Fazenbaker to stop taking the PTU would have been if Ms. Fazenbaker had a rash.

As noted above, Ms. Fazenbaker stopped taking PTU on January 20, 2009, and consequently, her hyperthyroid condition was not being medicated after that date. Ms. Fazenbaker testified that, by June 2009, she "just kept on getting sicker and sicker[.]" She made an appointment with Dr. Bissell on June 23, 2009, and Dr. Bissell sent her immediately to the emergency room at Western Maryland Health System to be evaluated for possible pneumonia. Ms. Fazenbaker was hospitalized from June 23 until June 26. She was in congestive heart failure and had elevated thyroid hormone levels.

Dr. Peirce saw her for a consultation on June 24, 2009. Ms. Fazenbaker recognized Dr. Peirce from the earlier encounter at her office. Dr. Peirce's consult note does not mention any prior history with Ms. Fazenbaker. It relates:

> The patient is a 46-year-old white female who was a prior patient of Dr. Nawab and who was diagnosed in June of 2008 with severe hyperthyroidism. The patient has financial issues as she is a private pay, and Dr. Nawab and I discussed this case. Dr. Nawab placed her on propranolol and on PTU which she remained on from June until February 2009 when Dr. Nawab left her practice. After that, she was followed by Dr. Bissell. The patient had no finances and stopped taking her PTU but apparently continued taking her propranolol. She is admitted with extreme dyspnea, found to be in congestive heart failure. She has some COPD. She has a pleural effusion and her energy is very poor for about 1 ½ weeks and this started with a cough and sore throat about a week and a half ago and some nausea in her stomach after eating, diarrhea[,] and edema in her ankles, legs, and abdomen. Her TSH on admission is less than 0.01. Free T4 is 5.6 and her free T3 is 18.4. This is extremely elevated. Thyroid ultrasound was performed and found a bilateral goiter which has a heterogeneous pattern with no dominant nodules and a radioactive iodine scan is being ordered for soon as possible. The patient has had some tachycardia in the past but this has been controlled by the propranolol.

Dr. Peirce's impression was that Ms. Fazenbaker was in a state of severe hyperthyroidism. Dr. Peirce wrote: "The patient does not appear to be in thyroid storm at the moment, however, this could occur. The treatment should be as soon as possible." Destruction of the thyroid via radioactive ablation was the first option mentioned under "Plan." Dr. Peirce's note continued:

> Discuss the case with Dr. Gupta as the other options are to get the thyroid under control with [PTU] and then perform surgery and then take Synthroid daily. The other option is to take PTU several times a day, and the patient because she is so severely hyperthyroid will require very large doses of this medication which by itself has many potential side effects and will require frequent lab monitoring which will also be expensive.

At that point, Ms. Fazenbaker was placed back on PTU, at 200 milligrams three times a day.

Ms. Fazenbaker testified that she had stopped taking PTU in January because she was instructed to do so by Dr. Bissell, and not because of financial issues. She introduced evidence that her monthly supply of PTU cost $15.99, and she paid that amount until she was taken off the drug. She testified that she could have afforded to continue paying that amount had she remained on the medication, and denied ever telling Dr. Peirce that she stopped taking the PTU because she could not afford it.

Following her discharge from the hospital, Ms. Fazenbaker had a follow-up visit with Dr. Bissell on July 1, 2009. On that date, Dr. Bissell documented in her chart that Ms. Fazenbaker "had rash before on PTU." The record of the July 1 visit mentions nothing about scabies.

On July 4, 2009, Ms. Fazenbaker presented at the emergency room at Western Maryland Health System "in worsening congestive heart failure," according to Dr. Peirce's consultation note of July 5. Pertinent to this case, she also presented with

> a vesicular papular rash starting basically from her toes all the way up to her thighs and there are a few of these vesicles actually on her face and her arms as well. There is 1 very large, it appears blood-filled lesion on her right lateral calf. The patient, of significance, never had any type of rash of this nature when she was on the PTU from June until February and she just completed a dose of one of cephalosporins on June 30, 2009, so she had had no antibiotic on July 1, 2009, July 2, 2009, July 3, 2009, and developed this

> rash on July 4, 2009. [. . .] The patient has no known allergies except for now she may have an allergy to the cephalosporin and/or the PTU.[1]

Dr. Peirce's plan was to order a dermatology consult "to determine the etiology of the rash whether it was the prior cephalosporin and/or due to the PTU," although she noted, "I have never seen a rash like this from PTU. The PTU will be increased to 200 mg from TID [*i.e.*, three times per day] to QID [*i.e.*, four times per day]."

On July 6, 2009, Dr. David Litman, an ENT surgeon, consulted on Ms. Fazenbaker's case. His report notes that, following her June 26 discharge, "over the past several days [she] has developed a severe rash over her lower extremities. It is felt that this is likely secondary to her PTU treatment. She has been taken off the PTU." Dr. Litman noted, on physical examination, that Ms. Fazenbaker's "lower extremities are covered with a bullous erythema which appears hemorrhagic." His report also noted an "apparent intolerance to the PTU." Despite the mention in Dr. Litman's July 6 report that Ms. Fazenbaker had "been taken off the PTU," this was not actually the case. The PTU was not stopped until July 7.

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[1] The evidence reflected that Ms. Fazenbaker was on PTU from July 16, 2008, until she stopped taking it, at the direction of Dr. Bissell's office (at the direction of Dr. Peirce), on January 20, 2009. She did have a rash during this time. When she went to Dr. Bissell's office on January 8, 2009, she presented with a rash that she told the doctor she had had since October. Further, pharmacy records, admitted in evidence as Plaintiff's Exhibit 11, showed that Ms. Fazenbaker was prescribed a 10-day course of Cephalexin twice in the summer of 2008, both before and after she was prescribed PTU for the first time on July 16, 2008, by Dr. Nawab. There was no evidence in the record of Ms. Fazenbaker experiencing any rash until she presented to Dr. Bissell's office on January 8, 2009, complaining of a rash since October. As of October 2008, she had been on PTU for three months, well after she had concluded her 10-day course of Cephalexin.

Dr. Sean McCagh, a dermatologist, consulted on Ms. Fazenbaker's case at the request of Dr. Peirce on the morning of July 6. Dr. McCagh's report notes that "[Ms. Fazenbaker] states that she recently resumed PTU and immediately developed red spots that are tender & purpuric. The flat spots became raised and are growing larger." Dr. McCagh's assessment was "Bullous drug eruption (favor PTU) vs. hemorrhagic vasculitis."

A progress note by Dr. Mark Sagin, dated July 6, 2009, notes that Ms. Fazenbaker had "extensive bullous hemorrhagic skin rash. This is most likely due to [PTU], but she was on a short outpatient course of cefuroxime recently." Dr. Sagin noted: "Her PTU will need to be held."

The medical records contain two July 8, 2009, progress reports from Dr. Sunil Gupta, the hospitalist. The earlier of the reports notes: "The patient developed a temperature of 103.8 last evening. She was cultured and continued on IV Rocephin. She has diffuse rash all over including in her mouth and in the eyelid area. She is unable to open her eyes. She has not had any oral intake because of mouth ulcers." The earlier July 8 note also reflected that Dr. Gupta had been trying to discuss a transfer to the University of Maryland Hospital, but that facility did not have a bed available.

The later of the July 8 notes reflects that Ms. Fazenbaker's family had requested that she be transferred to Ruby Memorial Hospital at West Virginia University. Dr. Gupta's transfer summary noted that "[t]he etiology of the rash is thought to be due to

PTU." Ms. Fazenbaker was transferred to Ruby Memorial Hospital via ambulance later that day. She remained in that hospital until her discharge on July 21, 2009.

Dr. Jessica Jajosky, who cared for Ms. Fazenbaker at Ruby Memorial, testified via video deposition that it was her opinion, to a reasonable degree of medical probability, that Ms. Fazenbaker's rash was due to PTU.

Dr. Adrian Schnall, a Board-certified endocrinologist and internal medicine physician, testified as an expert witness on behalf of Ms. Fazenbaker. Dr. Schnall opined, based on his review of the records, that Dr. Peirce had told Dr. Bissell's office to take Ms. Fazenbaker off the PTU on January 20, 2009, because Ms. Fazenbaker had a rash. He opined that, having taken Ms. Fazenbaker off PTU, appellant should at least have asked Ms. Fazenbaker why she was there on the day Ms. Fazenbaker says she went to her appointment at appellant's office, only to be told that appellant could not see her due to a mix-up with a different patient whose name was the same as appellant's. Dr. Schnall opined that Ms. Fazenbaker ended up in congestive heart failure and with "a much more severe overactive thyroid" when she was hospitalized on June 23, 2009, because she had not been medicated for her hyperthyroid condition since January 20, 2009. He testified that rash is a known side effect of PTU. His specific testimony as to the etiology of the rash Ms. Fazenbaker had developed when she returned to the hospital on July 4, 2009, was that "[i]t was a severe allergic reaction to PTU." . As Dr. Schnall explained:

> [BY THE WITNESS]: . . . she had been on PTU previously between August of 2008 and January of 2009. She was uh, on this when she had the rash on January 8th, 2009. Uh, Dr. Bissell told her on January 20th to stop the PTU, and I understand that there's some uh, people involved in this case that think

the rash may partly have been due to scabies, but you're asking me the basis of my opinion.

* * *

Basis of my opinion: She was on PTU. She had a rash in January of '09. The PTU was stopped. The rash went away. She's put back on PTU uh, June 24th or June 23rd, 2009. She gets a rash again two weeks later, okay? Now. . .

[BY MS. FAZENBAKER'S COUNSEL]: Why, why does two weeks — is that of any significance in the administration of PTU to a person?

A. No, but she was still on it. She was still on the PTU uh, when she developed this rash, and the rash got worse and worse. The PTU was continued. The rash continued to get worse.

Q. Doctor um, I don't want to go through everything that happens uh, at Western Maryland Health Systems over the next few days, but over those next three to four days how does Mrs. Fazenbaker's condition change after the PTU is increased?

A. She got worse. She got worse every day, and she got so much worse she had to be transferred to the Intensive Care Unit, and ultimately was transferred to another hospital that specialized in treatment of complex conditions.

* * *

Q. Doctor, do you have an opinion to a reasonable degree of medical probability as to what was likely than not (sic) caused Mrs. Fazenbaker to get significantly worse and require transportation or treatment at West Virginia University Hospital Center?

A. My opinion is it was the continuation of the PTU which caused her condition to worsen.

Dr. Schnall went on to identify breaches in the standard of care by Dr. Peirce, beginning with Ms. Fazenbaker's June 23 admission to Western Maryland Health System, to which she had been sent from Dr. Bissell's office:

A. . . . on June 24th when Mrs. Fazenbaker was admitted to Western Maryland Health System Hospital.[2] Dr. Peirce recommended that she start back on PTU. There were other alternatives for treating her overactive thyroid, and in my opinion if there was any question as to whether she had had an adverse reaction to PTU in the past it was a deviation from standard to put her back on that same medication.

Q. And doctor uh, do you have an opinion as to whether or not there were further breaches in the standard of care by Dr. Peirce?

A. Yes. On July 5th, 2009, again the patient now presented with a very severe rash. She was on this drug, PTU. In my opinion it was a breach of the standard of care to say continue PTU and increase the dose.

Q. Uh, doctor, what is the basis for, for the opinion it was a breach in the standard of care to uh, double dose, increase the dose, whatever it was, on or about January 5 [sic], July 5, July 6 timeframe?

A. The basis for that is that there were other alternatives to treat her overactive thyroid condition other than PTU, and there was certainly a definite possibility that PTU was the cause . . . . There was definitely a possibility that the PTU was the cause of her rash.

Q. Doctor[,] do you have an opinion to a reasonable degree of medical probability after having looked at all of the medical records in this case, deposition, testimony more likely than not to whether or not PTU was the cause of the rash um, experienced by Mrs. Fazenbaker from July 4th, 2009, on?

A. Yes[,] I have an opinion.

Q. And what is that?

A. Yes, PTU was the cause of that rash.

Q. And what is the basis of that opinion more likely than not to a reasonable degree of medical probability?

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[2] The medical records are clear that Ms. Fazenbaker was admitted to Western Maryland Health System on June 23, 2009, and seen in consult by appellant on June 24.

> A. Yes, and my opinion is to a reasonable degree of medical probability. The, the basis is she had been on PTU in um, uh, the fall of 2008 until January of 2009. She had a rash in January 2009. The PTU was stopped, the rash went away. She was put back on PTU on June 23rd, 2009. She developed a rash again while taking that drug.
>
> Okay? So in my opinion that's part of the basis for her uh, for the PTU being the cause of her rash.
>
> In addition there are multiple entries in the medical records — both at Western Maryland Health System, on the admission of uh, July 4th, and at West Virginia University uh, the admission July 8th, 2009, the admission August 15th, 2009, the outpatient records — multiple entries uh, indicating that the physicians caring for Mrs. Fazenbaker felt that PTU was the cause of her rash.

Appellant called Dr. James Dicke as an expert witness in her defense. On cross-examination, Dr. Dicke admitted that, in the 1800 pages of medical records generated by Ms. Fazenbaker's stay at Ruby Memorial Hospital, there were no specific references to a drug rash caused by cephalosporins, but "frequent" references to a drug rash secondary to PTU. Dr. Dicke testified that he was "personally unable to a reasonable degree of medical certainty to say which drug [*i.e.*, PTU or a cephalosporin] did cause her, her hemorrhagic rash."

Appellant also called Dr. John Messmer as an expert witness. Dr. Messmer, a board-certified family practice physician and geriatrician (not an endocrinologist), testified that he was not able to say, to a reasonable degree of medical probability, that Ms. Fazenbaker had an allergic reaction to PTU in July 2009. It was pointed out to Dr. Messmer on cross-examination that, when he was deposed prior to trial, he had testified that it was more likely than not that PTU was the cause of the July rash that ultimately led to Ms. Fazenbaker's

serious illness and transfer to West Virginia University. Dr. Messmer agreed that, "I said that in my deposition, but I think I was confused as to what was being asked."

At trial, Dr. Messmer testified that Ms. Fazenbaker's drug reaction could have been caused by either PTU or cephalosporin. It was pointed out to Dr. Messmer that, at his deposition, he had been asked if he intended, at trial, to express an opinion that Ms. Fazenbaker had an allergic reaction to any other medicine than PTU, and he had said no. Dr. Messmer responded that, after the deposition, he had gone back and "was able to look through the . . . pathology reports again, the dermatologic opinions from her hospitalization, and, and after that I remembered about the cephalosporin." He added, "perhaps I misunderstood the question." In the end, Dr. Messmer was not able to give a definite causation opinion: "It's speculation as to whether it was an allergic reaction. It's speculation as to what it was an allergic reaction to."

After Dr. Messmer's testimony, appellant rested her case. In rebuttal, Ms. Fazenbaker asked the court to take judicial notice of the fact that Cephalexin is a cephalosporin, which the court did, over objection, as discussed more fully below.

The jury returned a verdict in favor of Ms. Fazenbaker, and against Dr. Peirce. This appeal followed.

STANDARDS OF REVIEW

A trial court's decision to take judicial notice is reviewed deferentially under the clearly erroneous standard. *Abrishamian v. Washington Medical Group, P.C.*, 216 Md. App. 386, 413 (2014) ("We review the trial court's decision [when asked to take judicial

notice pursuant to Rule 5-201] under the 'clearly erroneous' standard, keeping in mind '[t]he principle that there is a legitimate range within which notice may be taken or declined and that there is efficacy in taking it, when appropriate.' *Smith v. Hearst Corp.*, 48 Md. App. 135, 141, 426 A.2d 1 (1981)."). The court's decision to permit rebuttal evidence is reviewed for an abuse of discretion. *Sinclair v. State*, 214 Md. App. 309, 335 (2013). Ordinarily, an appellate court "will not decide any . . . issue [other than jurisdiction] unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Maryland Rule 8-131(a).

DISCUSSION

I. Judicial Notice

Maryland Rule 5-201 provides:

> (a) This Rule governs only judicial notice of adjudicative facts. Sections (d), (e), and (g) of this Rule do not apply in the Court of Special Appeals or the Court of Appeals.
>
> (b) A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> (c) A court may take judicial notice, whether requested or not.
>
> (d) A court shall take judicial notice if requested by a party and supplied with the necessary information.
>
> (e) Upon timely request, a party is entitled to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of

> prior notification, the request may be made after judicial notice has been taken.
>
> (f) Judicial notice may be taken at any stage of the proceeding.
>
> (g) The court shall instruct the jury to accept as conclusive any fact judicially noticed, except that in a criminal action, the court shall instruct the jury that it may, but is not required to, accept as conclusive any judicially noticed fact adverse to the accused.

In *Abrishamian v. Washington Medical Group, P.C.*, *supra*, 216 Md. App. at 413-14 (2014), this Court discussed some of the instances in which judicial notice is appropriate:

> Trial courts can take judicial notice of "matters of common knowledge or [those] capable of certain verification." *Faya v. Almaraz*, 329 Md. 435, 444, 620 A.2d 327 (1993); *see also Dashiell v. Meeks*, 396 Md. 149, 174–76, 913 A.2d 10 (2006) (holding that appellate court may take judicial notice of adjudicative facts at its discretion). We have distinguished "adjudicative facts" from "legislative facts" by defining the former as facts "'about the parties and their activities, businesses and properties. They usually answer the questions of who did what, where, when, how, why, with what motive or intent.'" *Dashiell,* 396 Md. at 175 n. 6, 913 A.2d 10 (quoting *Montgomery County v. Woodward & Lothrop, Inc*., 280 Md. 686, 376 A.2d 483 (1977)); *Irby v. State*, 66 Md. App. 580, 586, 505 A.2d 552 (1986) ("The doctrine of judicial notice substitutes for formal proof of a fact 'when formal proof is clearly unnecessary to enhance [the accuracy of] the fact finding process.'" (quoting [*Smith v.*] *Hearst Corp*., 48 Md. App. [135] at 136, 426 A.2d 1 [(1981)])). Many different types of information can fall under the umbrella of judicial notice, most commonly public records such as court documents, *see Marks v. Criminal Injuries Comp. Bd.*, 196 Md. App. 37, 78, 7 A.3d 665 (2010), or facts that are widely known (often within the particular geographic area where a case is pending). *See, e.g*., *Dean v. State*, 205 Md. 274, 280–81, 107 A.2d 88 (1954) (taking judicial notice that certain streets were within a particular city's borders, thus allowing a trial judge to determine that crimes were committed within the jurisdiction); *see also Hearst Corp*., 48 Md. App. at 140–41, 426 A.2d 1 (permitting trial court to take judicial notice of the fact that a local newspaper was owned by a

> particular corporation). And the categories of adjudicative facts susceptible to judicial notice run the gamut, from public records, *see Marks,* 196 Md. App. at 79 n. 7, 7 A.3d 665 (judicially noticing that the Administrative Office of the Courts makes Maryland Judiciary records available on the Judiciary's website), to medical, *see Schultz v. State*, 106 Md. App. 145, 173, 664 A.2d 60 (1995) (taking judicial notice of reliability of ophthalmological test, if properly administered), to forensic, *see Eley v. State*, 288 Md. 548, 553–54, 419 A.2d 384 (1980) ("This Court has taken judicial notice of the high degree of reliability accorded to [fingerprint] identification."), to geographic, *see Iozzi v. State*, 224 Md. 42, 44, 166 A.2d 257 (1960) ("[G]eographical facts of a local nature may be judicially noticed by a trial court to establish venue. This is particularly true as to the location of towns within a particular county where the court sits." (citations omitted)), to behavioral. *See Pettit v. Erie Ins. Exch*., 117 Md. App. 212, 228, 699 A.2d 550 (1997), *aff'd*, 349 Md. 777, 709 A.2d 1287 (1998) (taking "judicial notice of the definition of pedophile provided in Diagnostic Statistical Manual IV (DSM–IV), a publication of the American Psychiatric Association" (citations omitted)).
>
> **What unites these various classes of information is** not so much their nature as public or widely-known, but more **their nature as undisputed** — as one commentator has described it, falling into either the "everybody around here knows that" category, or the "look it up" category. *See* Lynn McLain, Maryland Evidence, State & Federal § 201:4(b)-(c), at 221, 237 (3rd ed. 2013). **Put another way, "[i]f there is no reason to waste time proving a fact, it can be 'judicially noted.**'" Joseph Murphy, Maryland Evidence Handbook § 1000, at 489 (4th ed. 2010).

(Emphasis added.)

Here, on the morning of the last day of trial, Ms. Fazenbaker asked the court to take judicial notice that the antibiotic drug Cephalexin belongs to a class of drugs called cephalosporins. Appellant objected on relevancy grounds; she did not object because of any contention that Cephalexin was <u>not</u> a member of a class of drugs called cephalosporins. Pertinent to the objections based on relevance, counsel for Ms. Fazenbaker proffered the reason she was seeking to have the court take judicial notice:

> [BY COUNSEL]: Alright, just so the record is clear. Suggestions have been made in the defendant's case — through allusion, through reference, that — and through Dr. Peirce saying that it's either cephalosporin allergy or a PTU allergy — lots of people in this case, nearly everybody, said it's a PTU allergy more likely than not. However, because that point has been made, my client was on a cephalosporin in June and July of 2008, and never had a drug reaction to that cephalosporin. That has some probative value, particularly because she did have a drug reaction when she was on PTU the first time, or at least had a rash of some sort, and she was not on a cephalosporin at that time.
>
> That's what I'm offering it for. I'm not suggesting that they prescribed Cephalexin for [her].

Counsel for appellant objected to the court taking judicial notice that Cephalexin was a cephalosporin, and contends on appeal that the court erred in allowing the jury to draw an improper inference. However, counsel for appellant did not object to any mention of Cephalexin during Ms. Fazenbaker's closing argument. Where Ms. Fazenbaker's counsel asked the court to take judicial notice, appellant's objections were explained to the court, outside the presence of the jury, as follows:

> [BY APPELLANT'S COUNSEL]: I just want to clarify my issue on the record with regard to judicial notice. Uh, I, I'm not exactly sure what the Court is going to note uh, but I do want to make an objection to giving judicial notice as to whether or not a medication is a cephalosporin or not. As I indicated back in chambers, I believe that this is something that would be testified to, and must be testified to by an expert witness.
>
> For the Court to step in and try to uh, to explain by judicial notice whether or not a particular medication in the set of medical records that the jury has in front of it is a cephalosporin or not a cephalosporin I don't believe is, is proper um, and — because the, the truth is it's going to create a, an, an improper inference that the Court has now corrected something that has been left hanging. This could've been asked of any one of the expert witnesses by the plaintiff's counsel if they wanted to bring that point that there is a medication that she was being given during the second hospitalization at Sacred Heart that, that was uh, a cephalosporin, does that more, make it more

or less likely, or was it, was cephalosporin ruled out as an allergy um, or as an, a medication that the patient had an allergic reaction to.

So um, I, I don't believe that this is judicial notice, and I would just object to any use, or any effort on plaintiff's part to ask for judicial notice as to whether a particular medication was a cephalosporin. I think that it, it opens up a can of worms that is impossible to, to get back into place.

[BY THE COURT]: Okay. Let, let me address the second point first. As counsel said uh, we, our discussions in chambers were not — my understanding of taking judicial notice of things would be like uh, today is Monday, and it's a certain day of the [ ] month. That this is the Year 2014. Last year was 2013. Next year will be 2015. Those are kind of simplistic things that I thought, that are so commonly known that the Court can take judicial notice of.

* * *

[BY APPELLANT'S COUNSEL]: Well, I can tell you that she was given a drug called Cefazolin in the second hospitalization, and to my knowledge I don't think that she was ever given that medication that has now been offered in, um, that has been marked as an exhibit, the . . .

[BY THE COURT]: Okay, that's fine . . .

[BY APPELLANT'S COUNSEL]: . . . Cephalexin.

[BY THE COURT]: You can argue that. All I'm taking judicial notice of is what he asked me to take judicial notice of, which I can, and what was never given to, given to the lady, wonderful. But I'm taking judicial notice of the information, which is, can be easily looked up and, and [is] common knowledge in the area. Okay?

[BY APPELLANT'S COUNSEL]: Your Honor, I would ask that mister . . .

[BY THE COURT]: What can, what possibl[e] objection could have to this . . .

[BY APPELLANT'S COUNSEL]: Because she was never given . . .

[BY THE COURT]: . . . if it has no application?

[BY APPELLANT'S COUNSEL]: . . . this medication.

[BY THE COURT]: Okay, so be it.

[BY MS. FAZENBAKER'S COUNSEL]: Your Honor, Your Honor . . .

[BY THE COURT]: You can argue that to the jury.

[BY MS. FAZENBAKER'S COUNSEL]: . . . Your, Your Honor, just very quickly for the record — he's thinking I'm talking about medication she was on at the hospital. I am not. This [*i.e.*, Cephalexin] is medication that has been put into evidence that she was on in June and July of 2008.

[BY THE COURT]: I, I don't care.

[BY MS. FAZENBAKER'S COUNSEL]: No, I understand. I just . . .

[BY THE COURT]: I, I just, you're asking me . . .

[BY MS. FAZENBAKER'S COUNSEL]: . . . just so the record's clear.

[BY THE COURT]: . . . the legal issue I have to decide is [c]an I take judicial notice of this particular fact, and our research indicates we can. If it has nothing to do with this case, then it has nothing to do with this case. You can argue that out. But I'm taking judicial notice of what you asked me to take judicial notice of. That's all.

[BY APPELLANT'S COUNSEL]: Can, can I also make one other objection, Your Honor . . .

[BY THE COURT]: Sure.

[BY APPELLANT'S COUNSEL]: . . . for the record. Um, there are different types of cephalosporins um, and the – there, there was a cephalosporin that was given in the hospital setting. Um, there are other types of cephalosporins. Patients can have allergic reactions to one type of cephalosporin and not another. That's the reason why an expert witness would be necessary to be able to determine, and if, give any benefit to the jury in their understanding of the cephalosporin. So to tell them that this medication was a cephalosporin uh, is, is misleading, because you could have an allergic reaction to another type of cephalosporin. And not have an allergic reaction to that cephalosporin.

> [BY MS. FAZENBAKER'S COUNSEL]: Your Honor, we're not asking the Court to recognize that there's any allergic reaction to anything. All I'm asking the Court to do is to recognize that Cephalexin's a cephalosporin. Counsel had an opportunity in his case, if he wanted to argue that, to develop testimony in that regard. That's all I'm asking.
>
> [BY THE COURT]: It's so, it, it's so written in the simplest thing. It is a cephalosporin antibiotic, period.
>
> [BY MS. FAZENBAKER'S COUNSEL]: That's it. That's all we're asking for, Your Honor. Thank you.
>
> [BY THE COURT]: Doesn't say anything about 35 different varieties or two or three. It says it's used to treat certain infections by bacteria such as pneumonia, bone, ear, skin, urinary tract infections. Antibiotics will not work for flu, colds, or autoviral infections. That's pretty so, simple. I can take judicial notice of this, only this. Not as it applies to this case at all. Same as – I, I guess there's a known circumference of the earth . . . I can take judicial notice of that.

As noted, although appellant preserved her objection to the court taking judicial notice of the fact that Cephalexin is a cephalosporin, appellant did not object during Ms. Fazenbaker's closing argument to the allegedly "impermissible inference" she now contends the taking of judicial notice enabled the jury to draw. In her Brief to this Court, appellant argues:

> Finally, the trial court erred in allowing Appellee to argue in her closing argument that the apparent lack of rash or other allergic reaction to Cephalexin in 2008 reduced the chances that Appellee had a reaction to the different cephalosporin medications she took in 2009. As discussed supra, this was a suggestion that required an expert opinion, one not given by any expert in the case. Absent an expert opinion, counsel for Appellee's statements in closing argument drew an impermissible inference based upon the evidence (including the judicially noticed fact) produced at trial.

But "Appellee's statements in closing argument" regarding Cephalexin did **not** draw an objection from appellant. As quoted above, at the point in time when the trial court ruled that it could and would take judicial notice of the fact that Cephalexin is a cephalosporin, the court made plain that it was not, at that point, addressing closing arguments because the arguments were yet to come.

During Ms. Fazenbaker's closing argument, her counsel argued to the jury the following:

> [BY COUNSEL FOR APPELLEE]: Dr. Peirce denies that it was caused by PTU. Well what does her chart say? Vesicular papular rash in the lower extremities, in the torso and arms and a few under her left eye. They also appear slightly hemorrhagic. Whether this was related to the cephalosporin and/or the PTU. There's a dermatology consult to resolve this issue. Well what does the dermatology consult say? It says favor PTU.
>
> What do the paid witnesses say? Not even Dr. Dicke can tell you it's not PTU. He says, I can't tell you one way or another what it is. I can't say. The paid witness. . . . Did you hear Dr. Jajosky and what she said? She's the only expert in this case that wasn't paid. She testified to the treatment she gave. Nobody gave her any money for that. What did she say? She said it's PTU. Take a look at the records you have. They all say it's PTU.
>
> Why didn't they transfer her to West Virginia? Do you remember they wanted to transfer her to University of Maryland. I wonder why that is? Could it be that that's where Dr. Peirce was trained? She knew she screwed up and she'd have people covering her tail? Why didn't they transfer her to, to West Virginia University? Is West, is Morgantown closer than Baltimore? Who arranged the transfer [to] West Virginia? Linda's family. Not the doctors. They made the calls. Of course, after they made the calls, the doctors worked it out and did the handshake, and then the West Virginia doctor comes here and tells you, not being paid, tells you it was PTU.
>
> Did they bring anybody from West Virginia to ask them that question? Did you hear anybody tell you it wasn't PTU? And while we're on the subject, the reason I had the judge read you that thing about Cephal[e]xin [ ] being a cephalosporin? You remember Dr. Peirce keeps talking about oh,

> it's either cephalosporin or PTU, right? July 18th, 2008. June 4th, 2008. Cephalexin. She'd taken cephalosporins in the past. No rash, no reaction.

In response to the argument regarding Cephalexin, appellant addressed the issue in her closing argument as follows:

> [BY APPELLANT'S COUNSEL]: Now with regard to causation, couple of points. Dr. Dicke and Dr. Messmer [appellant's experts] both explained that even in retrospect — even based on everything we have available to us today — even in retrospect, it is not clear whether Miss Fazenbaker had an allergic reaction to PTU or to a cephalosporin.
>
> There, there are multiple generations of cephalosporin. The fact that Miss Fazenbaker took a medication in 2008 that's a cephalosporin does not mean that she's not going to be allergic to another generation of cephalosporin. There are a, the, the cephalosporins are many, and there's at least three generations up to the time that she was taking medications, and then there are different derivatives of each one of those medications. So the fact that she didn't have an allergic reaction in 2008 proves absolutely nothing, and if [counsel for Ms. Fazenbaker] believed that, he would've ex – , he would've asked expert witnesses those questions including his own expert, Dr. Schnall.
>
> Now, both Dr. Dicke and Dr. Messmer explained, and Dr. Peirce explained this as well um, that they have personally seen patients develop um, the, these hemorrhagic rashes caused by cephalosporins, but none of them — Dr. Dicke, Dr. Messmer, Dr. Peirce — none of them have seen any such rash caused by PTU, and apparently nor had any of the doctors that were treating Miss Fazenbaker at WVU. Dr. Dicke and Dr. Messmer both explained that the necessary testing to determine whether or not this was cephalosporin related or whether this was PTU related, unfortunately, was never done, so to this very day we don't know what the responsible drug was for Miss Fazenbaker's allergic reaction.

II. No Error in Taking Judicial Notice

As noted above, appellant's single question on appeal raises three sub issues: the propriety, *vel non*, of judicially noticing that Cephalexin is a cephalosporin; the fact that the judicial notice occurred at the rebuttal stage; and the court's alleged "error" in

"permitting an improper inference to be drawn from the judicially noticed matter during closing argument."

With respect to the first contention, the categorization of Cephalexin as a cephalosporin is a factual matter, in the "look it up" category, and we perceive no error in the trial court's agreement to take judicial notice that Cephalexin is a cephalosporin. It is "not subject to reasonable dispute," Rule 5-201(b), and indeed, appellant does not dispute the fact on this appeal. Judicial notice of such a fact was not error.

Second, pursuant to Rule 5-201(f), "[j]udicial notice may be taken at any stage of the proceeding." Because the point at which Ms. Fazenbaker asked the trial judge to take judicial notice *was* during a "stage of the [trial] proceeding," we perceive no error in the timing of the judicial notice in this case. When appellant's experts, Drs. Dicke and Messmer, testified that neither of them could say, within a reasonable degree of medical probability, whether Ms. Fazenbaker's catastrophic rash was an allergic reaction to PTU or cephalosporin — and after Dr. Messmer admitted on the stand that he had testified in his deposition that he did not intend to express an opinion at trial that Ms. Fazenbaker's rash was attributable to any other medication than PTU — the issue of whether cephalosporin was the culprit became a new topic of dispute, introduced by appellant, to which Ms. Fazenbaker had a right to respond. *Cf. Hyman v. State*, 158 Md. App. 618, 631 (2004), in which we observed:

> Rebuttal evidence is within a trial court's sound discretion and will not be disturbed on appeal unless there is an abuse of discretion. *State v. Booze*, 334 Md. 64, 68 [637 A.2d 1214] (1994). Rebuttal evidence is admissible when it

> "'explains, or is a direct reply to, or a contradiction of, any new matter that has been brought into the case by the accused.'" *Id*. at 70 (citations omitted).

The final subpart of appellant's question presented posits that the trial court committed error "in permitting an improper inference to be drawn from the judicially noticed matter during closing argument." But appellant did not object during, or after, Ms. Fazenbaker's closing argument to the allegedly improper inference regarding Cephalexin. Appellant did not ask that the Cephalexin argument be stricken or that any cautionary instruction be given.

In appellant's reply brief on appeal, she urges this Court to nevertheless find the argument preserved by the arguments made prior to closing arguments. We do not view the colloquy regarding judicial notice as preserving an objection to any particular argument that might be subsequently made.

We regard appellant's contention on appeal that the court "erred in permitting an improper inference to be drawn" to be unpreserved. In *Green v. North Arundel Hosp. Ass'n, Inc.*, 126 Md. App. 394, 425 (1999), this Court dealt with an appeal in which appellants "took issue with a number of statements" made by opposing counsel in closing arguments. Appellants in *Green* argued on appeal that the statements gave the jury the wrong impression regarding the proximate-cause issues. We held:

> This issue has not been preserved for appellate review. None of the statements that appellants point to in the brief were objected to at trial. As such, this claim is waived. *See Grier v. State*, 116 Md. App. 534, 544-45, 698 A.2d 1133 (1997), *rev'd on other grounds*, 351 Md. 241, 718 A.2d 211 (1998) (objections to improper argument of counsel must be made either contemporaneously or before jurors are excused from courtroom to preserve issue for appellate review).

In this case, appellant cites *Jones v. State*, 217 Md. App. 676 (2014), which appellant describes as "analogous." In *Jones*, the prosecutor argued a fact not in evidence during closing argument. Jones objected, but the court overruled the objection. On appeal, the State conceded that the fact argued was not in evidence, but asserted that it was nevertheless a permissible topic of argument because it was a matter of common knowledge. We disagreed. We acknowledged in that case:

> During closing arguments, "[t]he prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom." *Lee v. State*, 405 Md. 148, 163, 950 A.2d 125 (2008) (quoting *Degren v. State*, 352 Md. 400, 429–30, 722 A.2d 887 (1999)).
>
>> [I]t is, as a general rule, within the range of legitimate argument for counsel to state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence; and such comment or argument is afforded a wide range. Counsel is free to use the testimony most favorable to his side of the argument to the jury, and the evidence may be examined, collated, sifted and treated in his own way. . . . Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom; the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, as is accused's counsel to comment on the nature of the evidence and the character of witnesses which the prosecution produces.
>
> *Sivells v. State*, 196 Md. App. 254, 270, 9 A.3d 123 (2010) (quoting *Mitchell v. State*, 408 Md. 368, 380, 969 A.2d 989 (2009)). The prosecutor **may also "argue to the jury** — even though evidence of such facts has not been formally introduced — matters of common knowledge or **matters of which the court can take judicial notice.**" *Wilhelm v. State*, 272 Md. 404, 438, 326 A.2d 707 (1974). A prosecutor's artistic license is not unlimited: "[n]otwithstanding the wide latitude afforded prosecutors in closing

> arguments, a defendant's right to a fair trial must be protected." *Lee*, 405 Md. at 164, 950 A.2d 125 (citing *Degren*, 352 Md. at 430, 722 A.2d 887; *Wilhelm*, 272 Md. at 415–16, 326 A.2d 707). But an improper argument does not necessarily require reversal and retrial . . . .

Id. at 691-92 (emphasis added).

But *Jones* is inapposite to the matter on appeal here because, unlike appellant, Jones preserved his objection to the remarks. Appellant preserved no objection to the closing argument relative to Cephalexin.

JUDGMENT OF THE CIRCUIT COURT FOR ALLEGANY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.