UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0859

September Term, 2014

MICHAEL JONES

v.

UNIVERSITY OF MARYLAND MEDICAL CENTER

Eyler, Deborah S.
Friedman,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: July 14, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case involves a wrongful death suit brought by Michael Jones, appellant and personal representative of the estate of Frank Jones, against appellee University of Maryland Medical Center ("UMMC"). It comes on appeal from the grant of a motion for judgment in the Circuit Court for Baltimore City in favor of UMMC. We are asked to resolve the following two issues:

1. Whether the circuit court erroneously excluded the testimony of Jones's two experts.

2. Whether the circuit court erroneously prohibited Jones from redirecting his expert witness on the issue of causation after the appellee allegedly "opened the door" during cross-examination.

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

FACTUAL AND PROCEDURAL HISTORY

On January 15, 2009, around 10:00 p.m. Frank Jones ("Jones") was admitted to UMMC after being transferred from Bon Secours Hospital where he had presented with painful, swollen boils on his face. Jones had a history of seizure disorder, and while he was at Bon Secours, the hospital administered a blood test to determine the level of anti-seizure medication, Dilantin,[1] in his blood stream. The results were not reported to UMMC, and UMMC did not test Jones's Dilantin levels upon admission to the hospital.

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[1] Dilantin is the brand name for an anticonvulsant medication that is most commonly used to manage seizures for patients with epilepsy. National Multiple Sclerosis Society, "Dilantin," available at http://perma.cc/HLK9-WCDP (last accessed May 29, 2015).

Upon arrival at UMMC, Jones was initially evaluated by emergency room staff, and then by the ear, nose, and throat ("ENT") service.[2] Cheetan Nayak, M.D., was the attending ENT physician who oversaw Frank Jones's care. UMMC staff diagnosed Jones with a probable methicillin-resistant Staphylococcus aureus ("MRSA") infection.[3] UMMC emergency room staff drained one of the boils and administered antibiotics around midnight on January 15, 2009. After this, he was transferred to the ENT floor of the hospital and given his regular medications, including Dilantin. Altogether, Jones was off of his Dilantin medication for 16 to 17 hours.

On January 16, 2009, Jones was evaluated by an internal medicine physician who recommended that his Dilantin levels be tested. At that time, UMMC staff ordered a Dilantin level test, which was conducted at 4:30 a.m. on January 17. The result of that test was available by noon that same day, and revealed that Jones had an extremely low level of Dilantin. UMMC staff decided to continue to give him his oral Dilantin prescription. In the medical records, Dr. Nayak noted "a [D]ilantin level was ordered per medicine recommendation, which was very low.... We were planning to talk with neurology in

[2] "Otolaryngologists are physicians trained in the medical and surgical management and treatment of patients with diseases and disorders of the ear, nose, throat (ENT), and related structures of the head and neck. They are commonly referred to as ENT physicians." American Academy of Otolaryngology, "What is an Otolaryngologist?" available at http://perma.cc/VR64-PVLL, last visited June 10, 2015.

[3] "Methicillin-resistant Staphylococcus aureus (MRSA) infection is caused by a strain of staph bacteria that's become resistant to the antibiotics commonly used to treat ordinary staph infections." Mayo Clinic, "Diseases and Conditions – MRSA Infection" available at http://perma.cc/2HF2-NX5K, last visited June 10, 2015.

regards to re-loading patient on Dilantin." Despite this, no consult to neurology was actually completed.

Jones's infection proved unresponsive to antibiotics and his condition worsened throughout the day of January 17. By 5:00 p.m., he was unable to respond to a query from a nurse about his pain level. Minutes later, he had what the nursing staff described as a seizure,[4] and went in to cardiac arrest. Resuscitation attempts by UMMC staff were unsuccessful and he was pronounced dead at 5:46 p.m., January 17, 2009.

On November 7, 2012, Michael Jones, son and personal representative of the estate of Jones, filed a complaint against UMMC in the Circuit Court for Baltimore City, claiming UMMC was liable for negligence and wrongful death. He alleged that UMMC failed to properly monitor and maintain Jones's Dilantin levels, and that his death was the result of a preventable seizure.

Trial began on April 28, 2014. Plaintiff offered Dr. Richard Beck as an expert in "otolaryngology, head and neck surgery, including the management and treatment of patients with facial staph infections, seizure disorders and hypertension." After *voir dire*, UMMC objected on the grounds that Dr. Beck was not qualified to offer opinions regarding the management of Dilantin levels. The trial court ruled that:

> THE COURT: [Dr. Beck] is being offered as an expert with respect to –not how a neurologist would handle Dilantin—but how an ENT physician who had an ENT patient with a seizure

[4] The parties contest whether Jones actually suffered a seizure, or went into cardiac arrest as a result of the infection.

> disorder would deal with the issues raised by the Dilantin levels[.]
>
> [A]s to what he is being asked to opine about, he is acting as an ENT opining about the standard of care of another ENT.

Accordingly, Dr. Beck was accepted as an expert witness in otolaryngology, including the management and treatment of patients with facial staph infections, seizure disorders, and hypertension.

At trial, plaintiff's counsel questioned Dr. Beck about the medical significance of Frank Jones's low Dilantin levels. UMMC objected to the admission of any testimony by Dr. Beck concerning causation or damages related to UMMC's alleged failure to appropriately dose Jones with Dilantin. At an ensuing bench conference, plaintiff's counsel proffered that Dr. Beck would testify that the infection triggered the seizure, which would not have occurred if Jones's Dilantin levels had been better managed, and that the seizure resulted in his death. The trial court again stated that Dr. Beck had been qualified as an ENT expert alone, and was therefore not qualified to give an opinion on the medical implications of Jones's low Dilantin level. Dr. Beck was, therefore, precluded by the trial court from answering any questions pertaining to (1) what a neurologist would have done regarding Jones's low Dilantin level; and (2) whether the improper dosing of Dilantin caused a seizure that was the alleged cause of death. Dr. Beck was nevertheless permitted to testify that Dr. Nayak, the attending ENT physician, breached the standard of care of an ENT.

Plaintiff's counsel then offered a rebuttal expert, Dr. Bruce Charash, a cardiologist and internist, to testify regarding the impact of UMMC's alleged failure to properly reload Jones with Dilantin. The trial court excluded Dr. Charash's proffered testimony to the extent that it pertained to what action a neurologist would have taken, or how that action would have affected Jones's medical outcome. Absent either expert, Plaintiff could not establish the element of causation, and so the trial court entered a judgment at the conclusion of plaintiff's evidence in favor of UMMC. This appeal followed.

DISCUSSION

I. Expert Qualifications of Dr. Beck and Dr. Charash

Appellant first argues that the trial court erred in excluding the testimony of Dr. Beck and Dr. Charash regarding UMMC's alleged failure to properly reload Jones on Dilantin and what impact that had on his death. UMMC counters that both Dr. Beck and Dr. Charash lacked the requisite knowledge, training, or experience in neurology—the specialty most closely connected to treating patients with seizure disorders and prescribing Dilantin—and, therefore, were not qualified to testify as to what a neurologist would have done if consulted, and how it would have effected Jones's medical outcome. As we explain below, we agree that both Dr. Beck and Dr. Charash lacked the necessary qualifications to offer such opinions and we affirm.

Admissibility of expert testimony is governed by a three-part test set forth in Maryland Rule 5-702:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will

> assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

The admissibility of expert testimony under Rule 5-702 "is a matter largely within the discretion of the trial court and its action will seldom constitute ground for reversal." *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 417 (2013) (quoting *Radman v. Harold*, 279 Md. 167, 173 (1977)) (quotation marks omitted). We review a trial court's determination of expert qualifications under the deferential abuse of discretion standard.[5] *Id.*

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[5] Appellant urges us to apply a *de novo* standard of review to the trial court's decision on the grounds that the trial court was interpreting the admissibility of expert testimony pursuant to Md. Cts. & Jud. Proc. ("CJP") § 3-2A-02(c)(2)(ii), which requires that expert testimony pertaining to the standard of care for a medical professional be limited to experts within the same area of expertise as the defendant medical professional. If a trial court is making a determination under CJP § 3-2A-02(c)(2)(ii), then, as Appellant suggests, we would review the application of the statute *de novo*. In this case, however, the trial court clearly explained that it was receiving testimony concerning the establishment of causation, not with the standard of care:

> [PLAINTIFF'S COUNSEL]: ...[T]his is not a standard-of-care issue under the statute, as [UMMC] has indicated before—
>
> [THE COURT]: No, it's not. It's a causation—
>
> [PLAINTIFF'S COUNSEL]: —this is a causation issue—
>
> [THE COURT]: —correct—

We agree with the trial court's understanding of the purpose of the testimony and, therefore, find that the appropriate standard of review is abuse of discretion and not *de novo*.

In the case at hand, we are asked to review the trial court's determination as to the first element of Rule 5-702, namely whether the expert witnesses were sufficiently qualified to testify as to what a neurologist would have done in the same situation, and whether and how Jones's low Dilantin levels resulted in his alleged seizure and death.

When analyzing an expert witness's qualifications, our appellate courts have explained that "a witness may be competent to express an expert opinion if he is reasonably familiar with the subject under investigation regardless of whether this special knowledge is based upon professional training, observation, actual experience, or any combination of these factors." *Roy v. Dackman*, 219 Md. App. 452, 470 (2014) *cert. granted*, 441 Md. 217 (2015) (quoting *Radman*, 279 Md. at 167–68). "A witness need not be personally involved in the activity about which he is to testify[,] ... [n]or is it required that an expert be a specialist to be competent to testify regarding medical matters under Rule 5–702." *Roy,* 219 Md. App. at 470-71 (internal citations and quotation marks omitted). While "[i]t is sufficient if the court is satisfied that the expert has in some way gained such experience in the matter as would entitle his evidence to credit," the proffered expert must be able to demonstrate "more than a casual familiarity with the specialty[.]" *Radman,* 279 Md. at 169, 172.

Neither Dr. Beck nor Dr. Charash had the necessary qualifications or experience to offer an opinion on how to reload a patient in Jones's circumstance with Dilantin. It necessarily follows that neither expert was qualified to opine on what effect the reloading

would have had on the ultimate outcome in Jones's situation, and, therefore, that the trial court did not err by excluding their opinions. We explain.

During *voir dire*, Dr. Beck testified that during the period from 1984 to 1985 he completed a surgical internship in Germany where he was responsible for "verifying therapeutic drug levels," including checking patients' Dilantin levels. Dr. Beck further testified that although he did not ever prescribe Dilantin himself, as an ENT, he had treated patients who had been prescribed Dilantin by other specialists. Appellant took the position that Dr. Beck was therefore qualified to offer an opinion as to how UMMC should have reloaded Jones, and how that would have prevented his death. The trial court, however, was unpersuaded by Dr. Beck's limited experience monitoring Dilantin levels:

> [THE COURT]: ...The army experience did take place 27 years ago. And I recognize you said that he's an older physician; the drug has been around for a long time; he would have had experience with Dilantin 27 years ago.
>
> Be that as it may, that is 27 years ago. And all kinds of things have happened [since] 27 years ago.... [Y]ou would have to establish... that he had kept up with the literature; that he understood whether there's any changing indications or contraindications for the drug; whether people were using that drug in combination with others that hadn't been discovered 27 years ago.
>
> I mean, there's a million things [that] could have happened between now and 27 years ago. So ... the fact that he did something 27 years ago ... is not proof to me that he's an expert under conditions prevailing in 2009[.]

The trial court further highlighted the following deficiencies in Dr. Beck's qualification to offer an opinion as to what a neurologist—the specialty most closely associated with managing patients with seizure disorders—would have done:

> [PLAINTIFF'S COUNSEL]: ...[T]he theory of this case is, that [Jones] would not have had a breakthrough seizure ... if he had a therapeutic level of Dilantin, there wouldn't have been a breakthrough seizure; and therefore, death.
>
> * * *
>
> [THE COURT]: —I understand that's your position.... [T]he difficulty I'm seeing with this is – because I let him in certainly to testify as .. to what an ENT should have done.
>
> * * *
>
> [Dr. Nayak] calls in the medical people. And they say, yes, he has hypertension; we're going to maintain him on the hypertension drugs; check the Dilantin levels.
>
> Now, I would note that, by the time they say that, he was already ... maintaining his old prescription.
>
> Now, if your guy will say that was a mistake, that's fine; maybe. Then they get the Dilantin the next day, and they say, oh my God, this is low. So, at that point, your guy can say, would have called Neurology. Fine.
>
> * * *
>
> ... Now, had they called Neurology, what would Neurology have said? Can your guy say what neurology would have said? You're saying that ... Neurology would have said, reload.
>
> Now, I have no idea what reloading means. Now, does reloading mean that they would have given him a big jolt of Dilantin right up front, immediately to get the dose up?
>
> [PLAINTIFF'S COUNSEL]: Yes.

> [THE COURT]: Well, I don't know that. And you have to have a witness who's an expert who will say that. But you don't have—it seems to me—a witness who will do that.
>
> Secondly, might Neurology have said: no, too sudden; too aggressive; with his other circumstances, we have to hold off, and do the regular 100 milligrams, three times a day therapy because that will work better—they might have said that, too. Your guy can't say that, one way or the other.
>
> The third thing is, Neurology might say—or if you had a neurologist here as a witness—might say ... wouldn't have made a difference; or there was no way of knowing that this would happen; or there's no such thing as a breakthrough infection causing seizure.
>
> I don't know; [the jury doesn't] know; you're not an expert. You need somebody who can fill in the blanks on this; don't you think?

In light of the trial court's refusal to allow Dr. Beck to testify on how UMMC should have reloaded Jones on Dilantin and the resulting effect on Jones's health outcome, plaintiff's counsel then requested that, Dr. Charash, a cardiologist, be allowed to testify regarding UMMC's management of Jones's Dilantin levels. As Dr. Charash was out of state, his deposition transcript was proffered. In his deposition, Dr. Charash outlined his familiarity managing patients on Dilantin:

> [PLAINTIFF'S COUNSEL]: [Reading from Dr. Charash's deposition transcript]: I never initiated Dilantin for seizure activity. *I have always had a neurologist prescribe drugs for a new patient who has a seizure disorder*. I would not attempt to do that.
>
> I have had many patients over the years on Dilantin for different reasons. And therefore, I have—even in a non-

> neurology position—renewed Dilantin prescriptions for patients over the year.
>
> * * *
>
> I have had occasions to reload patients with Dilantin. If I want to do it intravenously, *I think I have consulted a neurologist before, just to make sure*. But I don't even remember that with certainty, if I have always done it that way.
>
> Sometimes, we would orally reload. Some of these patients could not be orally reloaded. It just depended on the circumstances.

(Emphasis supplied). Dr. Charash explained that the only time he would reload a patient with Dilantin without consulting a neurologist was when a patient had a history of seizure disorder while on Dilantin. However, Dr. Charash explained that Jones's situation was different because he did not have a history of frequent seizures, and he had not experienced a seizure after starting Dilantin. Plaintiff's counsel then proffered that Dr. Charash would testify that Jones should have been reloaded on Dilantin, and that had that happened, he would not have had a seizure and died. The trial court ruled:

> [THE COURT]: ... As a cardiologist, he could certainly testify as to—I would think—as to whether a seizure could trigger a heart condition or heart attack....
>
> * * *
>
> ... I am not going to permit him to testify, as to what a neurologist would have done, had he been consulted.

We agree with the trial judge that both Dr. Beck and Dr. Charash lacked the necessary qualifications and experience to give the opinions proffered. Both Dr. Beck and Dr. Charash testified that they did not have experience prescribing Dilantin, but deferred

to other specialists, such as neurologists, to do so. Dr. Beck had no experience reloading patients on Dilantin, and Dr. Charash testified that he only reloaded patients in Jones's situation in consultation with a neurologist. We perceive no abuse of discretion by the trial court in prohibiting Dr. Beck and Dr. Charash from providing testimony on an activity that both doctors specifically testified that they defer to other specialists to do.

For similar reasons, Dr. Beck and Dr. Charash were likewise not qualified to offer an expert opinion as to what the outcome would have been had Jones been properly reloaded with Dilantin. Without having the necessary background to testify as to how to reload Jones, in a limited amount of time, in light of his other medical complications, both Dr. Beck and Dr. Charash were unable to testify as to what result the reloading would have had. As the trial court noted:

> [THE COURT]: [T]he question becomes, had they gotten the neurology consult, what difference would that have made in the course of treatment, and what impact would that course of treatment have had on the final result in the case?
>
> * * *
>
> But once again, I don't know[,] the jury doesn't know[,] the Plaintiffs don't know[,] and you don't know[.]

Essentially, the trial court found that without the specialized knowledge and experience required by Md. Rule 5-702 to opine on what the proper course of action was in the first place, Plaintiff's experts could not testify as to the eventual result of the proper course of action, either. We agree, and conclude that the trial court did not abuse its discretion when

prohibiting Dr. Beck and Dr. Charash from testifying on a specialty with which they had no more than a casual familiarity.

II. Scope of Redirect-Examination

Next, Appellant argues that the trial court erred in prohibiting Dr. Beck from testifying as to the cause of death after UMMC allegedly "opened the door" during the cross-examination of Dr. Beck. Appellant refers to the following dialogue:

> [COUNSEL FOR UMMC]: And then what the doctor says: "We were planning to talk with Neurology in regard to reloading the patient on Dilantin." Correct?
>
> [DR. BECK]: It says that.
>
> [COUNSEL FOR UMMC]: All right. Now what happens is, Before Neurology sees the patient—all right—he has a Code later in the day; correct?
>
> [DR. BECK]: Apparently before a consultation was made to Neurology, he does have a seizure; and subsequently has cardiopulmonary resuscitation.
>
> [COUNSEL FOR UMMC]: And that would be, the Code; correct?
>
> [DR. BECK]: That is—yes, CPR is a Code.
>
> [COUNSEL FOR UMMC]: The C being, cardio—meaning, heart; correct?
>
> [DR. BECK]: Cardio; yes.

On redirect, plaintiff's counsel asked Dr. Beck "I think you testified before that the seizure caused death?" At this point, UMMC objected and a bench conference ensued at which plaintiff's counsel argued that UMMC had "opened the door" to allow Dr. Beck to answer

questions regarding Jones's cause of death. In particular, Jones alleges that by asking the witness about whether "C" stood for "cardio" had the effect of "opening the door" for Dr. Beck to testify that Jones first suffered a seizure that then required cardio-pulmonary resuscitation. The trial court sustained UMMC's objection on the ground that UMMC had not asked Dr. Beck any question relating to cause of death. As we explain below, we agree with the trial court and affirm.

The trial court is afforded wide discretion in determining the scope and admissibility of redirect examination, and accordingly we review a trial court's management of redirect-examination under the abuse of discretion standard. *Oken v. State*, 327 Md. 628, 669 (1992). "With respect to the scope of redirect examination, it is well settled that ... redirect examination must be confined to matters brought out on cross-examination." *Id*. (Internal quotation marks omitted).

Simply put, the record is clear that UMMC did not question Dr. Beck about anything related to cause of death that would have opened the door for Dr. Beck to offer the opinion that Jones had a seizure and died as a result. Asking what the "C" in "CPR" stands for is in no way eliciting testimony that Jones died from a seizure. Rather, UMMC just established that Jones "coded," as indicated in the medical record by the "CPR" notation. We conclude that the trial court was well within its discretion in limiting the scope of redirect examination and we affirm.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the circuit court.

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