Circuit Court for Montgomery County
Case No. 443250-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 921

September Term, 2019

NAVINDER SINGH SETHI, M.D., ET AL.

v.

PATRICIA BENT, ET AL.

Arthur,
Friedman,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: March 15, 2021

In this medical malpractice case, following a multi-day trial in the Circuit Court for Montgomery County, a jury returned a verdict in favor of appellees, Patricia Bent, *et al*, and against appellants, Navinder Singh Sethi, M.D., *et al*.[1]

Appellees claimed that appellant, Dr. Singh, negligently performed unnecessary surgery on Mrs. Bent without her informed consent, resulting in post-surgery injury, including permanent neurological injury.

While the case and trial concerned various complicated medical and legal issues, we are concerned in this appeal with only one ruling of the circuit court. Appellants present their issues to this Court as:

> 1. Did the [trial] Court's preclusion of cross-examination about Dr. [Gary J.] Lustgarten's prior discipline for testimonial misconduct, and his biases resulting therefrom, erroneously deny the jury the chance to assess, fairly and fully, Dr. Lustgarten's credibility and bias?
>
> 2. Was this restriction on cross-examination reversible error when (a) Dr. Lustgarten was the only expert opining that Dr. Sethi had breached the standard of care, (b) there was substantial expert testimony supporting Dr. Sethi's care, and (c) had the cross-examination been permitted, the jury could well have weighed Dr. Lustgarten's demeanor differently and discredited his testimony?

Absent argument, hyperbole, and speculative assertions, the question before us is this:

> Did the trial court, in granting appellees' motion *in limine* limiting appellants' cross-examination of Dr. Lustgarten, abuse its discretion?

We answer that question "No" and affirm the judgment of the circuit court.

[1] Mrs. Bent and her husband, Lance Bent, appellees, were the plaintiffs below; appellants, defendants below, are Dr. Sethi and the Centers for Advanced Orthopaedics, LLC d/b/a Potomac Valley Orthopaedic Associates.

BACKGROUND

Although we have reviewed the record as a whole, "[i]t is unnecessary to recite the underlying facts in any but a summary fashion because for the most part 'they … do not bear on the issues we are asked to consider.'" *Teixeira v. State*, 213 Md. App. 664, 666 (2013) (citation omitted). It is sufficient for us to report the following:

Mrs. Bent presented to Dr. Sethi with complaints of low back pain, radiating into her left buttock and down the left leg and foot. In July 2014, after several examinations, including MRI scans, Dr. Sethi recommended both a laminectomy and a bilateral laminectomy — in effect, a recommendation of surgery on both the left and right side of the spine, even though Mrs. Bent had no symptoms on the right side. Surgery was performed in August 2014. Post-surgery, Mrs. Bent experienced both physical and neurological pain and disability. As a result, suit was filed based on allegations that surgery to the right side of her spine was not consented to and was performed unnecessarily in violation of the applicable standards of care.

Motion *In Limine*

Pre-trial, appellees moved to "preclude any evidence, argument and/or testimony concerning (a) disciplinary action taken, and later judicially overturned,[2] against the Plaintiffs' expert witness, Gary Lustgarten, M.D.; and (b) prior sanctions against Dr. Lustgarten by the American Association of Neurological Surgeons (AANS)." Appellants

[2] *See In re Lustgarten*, 629 S.E.2d 886 (N.C. Ct. App. 2006).

filed a timely response in opposition. As we shall discuss, *infra*, the trial court entertained lengthy argument from counsel supporting and opposing the motion.

About Dr. Lustgarten

Dr. Lustgarten, at the time of trial, was a board-certified neurological surgeon with more than 40 years' experience. He was offered and qualified at trial as appellees' only expert witness on the applicable standard of care. During his professional life, Dr. Lustgarten maintained membership in the American Association of Neurological Surgeons (AANS), a voluntary professional association, for 20 years from 1981 until the early 2000's.

During the years of his AANS membership, Dr. Lustgarten had been twice subjected to six-month suspensions from the organization. Appellees asserted that, in each instance, the suspension resulted from expert testimony he had offered on behalf of plaintiffs in two medical malpractice litigations. After completion of his second AANS suspension, Dr. Lustgarten resigned from his membership.

In their motion *in limine*, appellees asserted, in part, that

> [AANS] is a voluntary, professional trade group engaged in advocacy on physicians' issues and comprised of members who pay annual dues. AANS is not a governmental entity, and it has no legal or regulatory authority over Dr. Lustgarten or his ability or license to practice medicine. The proceedings of the AANS are not open to the public, nor are they subject to "due process," nor are the findings and conclusions of AANS required to be made "beyond a reasonable doubt" (or even "by a preponderance of the evidence"). There is no right of judicial review, and no safeguards of any kind against the imposition of an arbitrary and capricious penalty….

Thus, appellees argued before the trial court,

> … the Defendants should not be allowed to bring up or argue that the biased actions of a private, unaccountable physicians' club has [sic] any relevance or probative value with respect to Dr. Lustgarten's credibility or opinions.
>
> The unaccountable acts of the AANS are wholly irrelevant to the claims and defenses of the parties in this case, and the danger of unfair prejudice wholly overwhelms whatever infinitesimal probative value such evidence might be claimed to have.

In their response to the motion, accompanied by several voluminous exhibits, appellants argued to the trial court:

> Dr. Lustgarten will be testifying regarding his opinions and his interpretations of the facts in this case. He has placed himself voluntarily before this Court and the jury to assist the jury in determining whether the Defendants committed malpractice. Dr. Lustgarten's education, experience, training, and knowledge will all be provided to the jury by the Plaintiffs to show that the correctness of his opinions and interpretations of the facts is more probable than not. Defendants have a right to likewise provide the jury with the facts of Dr. Lustgarten's disciplinary history[3] because that, too, will have a tendency to show that the correctness of his opinions and interpretations of facts is less probable than not. Accordingly, the discipline [sic] history of Dr. Lustgarten is both relevant under Maryland Rule 5-401, and admissible under Maryland Rule 5-402.
>
> Defendants do not intend to use this disciplinary history to prove Dr. Lustgarten's character. The jury will have ample opportunity to judge Dr. Lustgarten's character by the way he comports himself during direct testimony and during cross-examination. Defendants will use Dr. Lustgarten's disciplinary history to provide the jury with a fuller, more complete and accurate understanding of Dr. Lustgarten's professional background, his knowledge or lack thereof of the standard of care, and to show his standing in the community of his peers by his own testimony regarding the voluntary community to which he still belongs, the AANS, the very body that disciplined him. Defendants also plan to show Dr. Lustgarten's veracity and credibility through this evidence.…

[3] The "disciplinary history" referred to by appellants relates only to the two actions taken by AANS and the one action taken by the North Carolina Medical Board which, on appeal, was ordered to be dismissed. The record is silent as to any other disciplinary actions taken by a governmental licensing agency or commission in any jurisdiction in which Dr. Lustgarten was licensed.

On the first day of trial, before opening statements, the court took up several outstanding motions, including the motion *in limine* at issue in this appeal. The court was generous with the time allotted to appellees' motion *in limine* and appellants' response — counsels' arguments and the court's comments consumed some 20 pages of trial transcript. In their argument, respective counsel enlarged on the points made in their written motions and extensive supporting exhibits. Concluding the arguments, the court announced that the matter would be taken under advisement.

On the following day, the court first considered the motion *in limine*. The following ensued:

> THE COURT: Okay. I reviewed the pleadings and the attachment, with particular focus on the transcript of the hearing and the decision in the case where Doctor Jocklin … complained about Doctor Lustgarten's trial testimony in a case in which Jocklin was a defendant,[4] and the court views the proceedings as disagreements with the opinions of Doctor Lustgarten, which should have been raised at the time that the opinions were expressed during the trial, and not later. The court finds that the fact that Doctor Lustgarten was disciplined by a voluntary organization that had no impact on his licensure is not relevant to this case, it does not go to his credibility, and any questions about it would be prejudicial. So, therefore, plaintiff's motion in limine is granted. The defendant is not to question Doctor Lustgarten about the discipline. However, if he somehow opens the door, the court will revisit its ruling.

[4] Apparently referring to the AANS disciplinary action taken against Dr. Lustgarten in 2000 as a result of a complaint by Dr. Bruce Jaufmann, a defendant in a North Carolina medical malpractice case wherein Dr. Lustgarten had offered expert testimony in favor of the plaintiffs that was critical of Dr. Jaufmann. The Jaufmann AANS complaint against Dr. Lustgarten and related AANS disciplinary action was the basis of the North Carolina Medical Board's disciplinary action taken against Dr. Lustgarten two years later, which was ultimately ordered to be dismissed on appeal. *In re Lustgarten,* 629 S.E.2d at 892.

[DEFENDANTS' COUNSEL]: Yes. Just for point of clarification. Two questions I do, I would intend to still ask is number one, he used to be a member of AANS, and number two that ended in 2000. Or about.

THE COURT: What's the purpose for that?

[DEFENDANTS' COUNSEL]: Because he's no longer in a society that my experts will still say is a valid society, a society that promotes medical literature that helps promote the standard of care, and it's the, it is the largest society, despite what plaintiff's [sic] counsel's assertions are, for neurosurgeons in North America. And it's a valid one. It's not a club. It's an educational society that these neurosurgeons are part of. And, frankly, he's testified under oath the reason he joined AANS was for the medical education benefits of it, and I don't think that's violative of the court's ruling on this.

[PLAINTIFFS' COUNSEL]: It's backdooring the exact same kind of testimony. The AANS is one of, as far as I could find, five voluntary organizations to which neurosurgeons can belong to, have various members, various benefits of membership. Again, that is separate and apart from the American Board of Neurologic Surgery. Asking him questions about the AANS and why he's not a member of AANS would be like asking him questions about any other voluntary society, whether it's for neurologic surgeons or physicians or general healthcare providers in general. Those would be hundreds. They're simply picking one to try to backdoor testimony that this court has already precluded. It would be extremely prejudicial.

[DEFENDANTS' COUNSEL]: That's not what I proffered to this court. I never said I was going to ask him why. I would say, you were a member of AANS from 1981 until about 2000, correct? He says correct. Next question. And from 2000 to today, you're no longer a member of AANS, correct? Correct. He says correct to both of those, that's it. I'm not asking him why.

THE COURT: No, no questions about AANS, period.

Standard of Review

The parties urge upon us their differing standards under which we should determine the question raised in this appeal.

Appellants argue that "[b]ecause the Court below based its ruling 'on a pure conclusion of law,' and not 'on a discretionary weighing of relevance in relation to other factors,' review of the Court's ruling is de novo[,]" (quoting *Hall v. Univ. of Maryland Med. Sys. Corp*., 398 Md. 67, 82 (2007)), and "[i]n cases in which 'credibility is an issue and, thus, the jury's assessment of who is telling the truth is critical, an error affecting the jury's ability to assess a witness'[s] credibility is not harmless error." (Quoting *Sewell v. State*, 239 Md. App. 571, 630 (2018)). Appellants suggest that the trial court "engaged in no discretionary weighing of factors" and "summarily branded the disciplinary history as irrelevant to Dr. Lustgarten's credibility." Appellants do not further explain their position or provide us with authority that our review of a trial court's ruling on a motion *in limine* should be reviewed under a *de novo* standard.

Appellees, conversely, take the position that the trial court's ruling was singularly a ruling on the admission of evidence, which we must consider under an abuse of discretion standard. For support, they refer to this Court's decision in *Ayala v. Lee*, 215 Md. App. 457, 474–75 (2013), wherein we explained that "[a]n evidentiary ruling on a motion *in limine* 'is left to the sound discretion of the trial judge and will only be reversed upon a clear showing of abuse of discretion.'" (Quoting *Malik v. State*, 152 Md. App. 305, 324 (2003)). Appellees also rely on *Kruszewski v. Holz*, 265 Md. 434, 440 (1972) for the propositions that "exploratory questions on cross-examination are proper when they are designed to affect a witness' credibility[ ] …" and that "the scope, range and extent of such interrogation rests in the sound discretion of the trial court." We agree.

Because we view the trial court's ruling on appellees' motion *in limine* to be purely one of the admissibility of evidence, we shall undertake an abuse of discretion review. This Court, and the Court of Appeals, has steadfastly applied the abuse of discretion standard as enunciated by Judge Wilner's opinion in *North v. North*, 102 Md. App. 1, 13–14 (1994):

> "Abuse of discretion" is one of those very general, amorphous terms that appellate courts use and apply with great frequency but which they have defined in many different ways. It has been said to occur "where no reasonable person would take the view adopted by the [trial] court," or when the court acts "without reference to any guiding rules or principles." It has also been said to exist when the ruling under consideration "appears to have been made on untenable grounds," when the ruling is "clearly against the logic and effect of facts and inferences before the court," when the ruling is "clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result," when the ruling is "violative of fact and logic," or when it constitutes an "untenable judicial act that defies reason and works an injustice."

(Internal citations omitted).

That, as in this case, there involves a claim for serious permanent injuries resulting from alleged medical negligence, and that there is at stake a significant damages award, or that the case involves complicated medical issues, does not alter the test that we apply to the trial court's ruling on the motion *in limine*.

In our jurisprudence we vest in the trial courts of this State considerable discretion to rule on matters of evidence and other questions as they arise at trial. *See In re Elrich S.*, 416 Md. 15, 35–36 (2010) (internal citations omitted) (recognizing that trial judges are afforded broad discretion to control the conduct of trials and the courtroom). Included within the parameters of that authority is the discretion to rule on the admissibility of evidence. *See Mines v. State*, 208 Md. App. 280, 291 (2012) (explaining that the

"admissibility of evidence is left to the sound discretion of the trial court"). A prerequisite to such evidentiary rulings is the requirement that the trial court weigh the merits of admissibility in terms of whether the evidence is relevant to issues in the trial and may be helpful to the jury, or whether the evidence would produce prejudice in the minds of the jurors that would outweigh its probative value. *See* Rule 5-104(a) ("Preliminary questions concerning … the admissibility of evidence shall be determined by the court[.]"). Thus, we ask the trial court to be diligent and attentive to the significance the proffered evidence would have in the overall scope of the trial. We have often said that the trial judge is in a far better position to make such determinations than are appellate judges reviewing only the printed pages of a record. *See Stanley v. State*, 248 Md. App. 539, 553 (2020) (explaining that a trial court's decision concerning control over cross-examination is afforded broad discretion "'[g]iven that the trial court has its finger on the pulse of the trial while an appellate court does not[.]'" (quoting *Manchame-Guerra v. State*, 457 Md. 300, 311 (2018))).

Of course, we have also said that a trial court's discretion is not without limit. It is indeed possible for a trial court to abuse its broad discretion in making evidentiary rulings. *See, e.g., Kusi v. State*, 438 Md. 362, 385–86 (2014) (providing examples of such abuse, including where a trial court misapplies the proper legal standard, or where its ruling is wholly unsupported by the record). We have established that we will not find an abuse of discretion unless the trial court's ruling is beyond the center mark of reason. *See Mines*, 208 Md. App. at 292 (citation omitted); *North*, 102 Md. App. at 14.

Therefore, we find appellants' suggestion that the trial court "engaged in no discretionary weighing of factors" in its ruling to be unsupported by the record. We recall that the trial court considered appellees' motion *in limine* in a hearing separate from the many other pretrial motions then pending; that it allowed counsel extensive time to argue the pros and cons of the motion; and that the court reserved its ruling until the next day of trial when it convened counsel and said, "I reviewed the pleadings and the attachment[ ] …", and that it reviewed the transcript of the hearing. We take the court at its word as to its review and consideration of the motion and response thereto. The court said, in granting the motion, that "[t]he court finds that the fact that Doctor Lustgarten was disciplined by a voluntary organization that had no impact on his licensure is not relevant to this case, it does not go to his credibility, and any questions about it would be prejudicial." In that ruling, we find no departure from reason, nor do we find that it was against the logic and effects of the facts before the court.

We hold, therefore, that the trial court fulfilled its obligation to consider whether prejudice created by admission of the evidence would outweigh the probative value of the evidence before ruling. On this record, we find no abuse of discretion.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS ASSESSED TO APPELLANTS.