Circuit Court for Prince George's County
Case No. CAL16-24011

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1212

September Term, 2017

MORGAN PRINCE

v.

ANDRECA BAILEY

Graeff,
Shaw Geter,
Harrell, Glenn T., Jr.
(Senior Judge, Specifically Assigned)

JJ.

Opinion by Shaw Geter, J.

Filed: December 18, 2018

This is an appeal of a judgment and award of damages in the Circuit Court for Prince George's County arising from a motor vehicle collision involving Morgan Prince, appellant, and Andreca Bailey, appellee. Prior to trial, Bailey filed a Stipulation of Fault in which she conceded fault for the collision. Trial was then held on the issues of causation as to Prince's alleged injuries and damages. At the beginning of trial, Prince moved to strike a portion of his expert's *de bene esse* deposition citing Md. Code Ann., Health Occ., § 14-410. The court granted Prince's request in part, and denied it in part—admitting a contested portion of the deposition. Throughout trial, Prince attempted to introduce argument and evidence regarding Bailey's alleged failure to stop at a stop sign and yield to favored traffic just prior to the parties' vehicles colliding. Opposing counsel objected in many of these instances, arguing those facts were not relevant to the issue being tried. At the conclusion of trial, the jury found Bailey negligent and awarded Prince damages in the amount of $20,000. Prince brings this timely appeal and presents the following questions:

1. Whether the court erred in denying Prince's motion to strike?
2. Whether the court abused its discretion in failing to admit certain evidence related to Bailey's alleged failure to yield to favored traffic just prior to the parties' vehicles colliding?

For reasons discussed below, we shall affirm the judgment of the circuit court.

BACKGROUND

On August 25, 2013, Bailey was traveling on Danford Drive in Prince George's County and approached a stop sign at its intersection with Brandywine Road. While attempting to turn right onto Brandywine Road, Bailey's vehicle collided with Prince's vehicle, which was traveling on Brandywine Road. Prince brought a single count of negligence against Bailey in the Circuit Court for Prince George's County.

Prior to trial, Bailey filed a Stipulation of Fault with the court in which Bailey conceded fault for the collision. On July 17, 2017, trial commenced limited to the issues of causation as to Prince's alleged injuries and damages.

Prince designated Dr. Franchetti, an orthopedic surgeon, to testify as an expert witness. In December 2013, prior to his designation as an expert witness, the Board of Directors of the American Association for Orthopaedic Surgeons ("AAOS") suspended Dr. Franchetti's membership with the organization. The decision to suspend Dr. Franchetti was in response to the Maryland Board of Physicians' ("MBP") issuance of a consent order ("the Consent Order") wherein Dr. Franchetti was reprimanded and placed on probation for a minimum of three years. The suspension was to last until Dr. Franchetti regained a full and unrestricted medical license.

During pre-trial motions, Prince moved to strike a portion of Dr. Franchetti's *de bene esse* deposition, arguing the testimony violated the medical review committee privilege provided by Md. Code Ann., Health Occ., § 14-410 (hereinafter "HO § 14-410"). Prince alleged the questioning regarding Dr. Franchetti's suspension from the AAOS was

inadmissible because the suspension derived from the Consent Order with the MBP. The court redacted a portion of the deposition, but admitted the following:

> BAILEY'S COUNSEL: Okay. And is it correct to say that your fellowship in the American Association of Orthopedic Surgeons was suspended for a period of time?
>
> PRINCE'S COUNSEL: Objection. Move to Strike.
>
> DR. FRANCHETTI: I'm advised that—been advised that that's an improper question and I should never answer any improper question.

After pre-trial motions were concluded, opening statements were given. During Prince's opening statement, the following was stated:

> PRINCE'S COUNSEL: At the intersection, there's a stop sign on Danford Drive. There's no stop sign, or any traffic light, or any traffic control device on Brandywine Road. It's a clear and sunny day. [Bailey] drives [her vehicle] towards the stop sign. [Bailey] doesn't stop.
>
> BAILEY'S COUNSEL: Objection. May we be heard at the bench, Your Honor?

A bench conference ensued where the parties debated the relevance of Bailey's alleged failure to stop at the stop sign just prior to the collision. Prince argued the failure to stop was related to the causation of his injuries, while Bailey contended the statement was inaccurate and only relevant to the issue of liability for the collision, which was not an issue being tried. The court ruled that Prince could "describe the accident," but to "focus

on damages" because "the only issue before this jury . . . is damages." Prince's counsel continued his opening statement, explaining:

> [Bailey] drives into the intersection with Danford Drive and Brandywine Road and causes a multi-car collision. [Bailey's vehicle] collides with the car coming from the left, [Prince's vehicle], and a car coming from the right. The air bags go off, the cars end up all over the road. [Prince's vehicle] ends up on the far side of the road next to–running into a tree.

Later in trial, as part of his case-in-chief, Prince testified on direct examination as to the events leading up to the vehicle collision and his injuries. Prince testified:

PRINCE'S COUNSEL:	Did you see [Bailey's] vehicle coming before the collision?
PRINCE:	You know, I'm coming down Brandywine and it seemed like I could see it out the side, and you know how people drive and they drive fast, but they stop right at the last minute at the stop sign. So I'm driving and I'm saying to myself, "Is this car stopping," and it seemed like as soon as I said it the impact happened.

Bailey made no objection to this testimony.

Prince then attempted to call Bailey as a witness. Bailey objected and a bench conference followed. Prince stated that he "want[ed] to ask [Bailey] about the timing of the admission of liability, so when [Bailey] admitted she caused this crash." The court denied Prince's request and inquired whether Prince had any additional questions for Bailey, to which Prince responded, "No, the Plaintiff rests."

During Prince's closing argument to the jury, the following interaction occurred:

PRINCE'S COUNSEL:	But I want to remind you that what brings us all together here in the Circuit Court for Prince

	George's County is an, excuse me, an admitted violation of the basic traffic safety rules that protect all of us on and around the roadway.
BAILEY'S COUNSEL:	Objection, Your Honor.
THE COURT:	Sustained. We have no evidence of any traffic rules being violated. Let's move on.

At the conclusion of trial, the jury found Bailey negligent and awarded damages to Prince in the amount of $20,000.

STANDARD OF REVIEW

"The decision whether to allow or preclude the admission of evidence is generally committed to the sound discretion of the trial court." *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387, 406 (2012). We will only find an abuse of such discretion "where no reasonable person would share the view taken by the trial judge." *Consol. Waste Indus. v. Standard Equip. Co.*, 421 Md. 210, 219 (2011). However, where a trial judge's ruling as to the admissibility of evidence presents a question of statutory interpretation we review the court's ruling *de novo*. *Salamon v. Progressive Classic Ins. Co.*, 379 Md. 301, 307 (2004).

We "will only reverse upon finding that the trial judge's determination was both manifestly wrong and substantially injurious." *Angelakis v. Teimourian*, 150 Md. App. 507, 525 (2003). "Error may not be predicated upon a ruling that admits evidence unless the party is prejudiced by the ruling[.]" Md. Rule 5-103. In determining whether a party suffered prejudice, it is the probability, rather than the possibility, of prejudice which is the

focus of our review. *Brown v. Daniel Realty Co.*, 409 Md. 565, 584 (2009). "The party maintaining that error occurred has the burden of showing that the error complained of likely…affected the verdict below." *Id*. (internal quotations omitted).

DISCUSSION

I. Whether the court erred in denying Prince's motion to strike.

1. *The clear and unambiguous language of HO § 14-410 does not prohibit the admitted portion of Dr. Franchetti's deposition.*

Prince contends Dr. Franchetti's suspension from the AAOS was "a direct and inextricable consequence of the [MBP's] suspension" and, thus, Bailey's questions and the testimony elicited therefrom about the suspension is undiscoverable and inadmissible under HO § 14-410. Conversely, Bailey posits that HO § 14-410 is not applicable in this context because there was no mention on the record as to any disciplinary action taken by the MBP against Dr. Franchetti.

Whether the court erred in failing to grant Prince's motion to strike is a matter of statutory construction. We therefore analyze HO § 14-410 using the fundamental rules of statutory construction, which state:

> The cardinal rule of statutory interpretation is to ascertain and effectuate the real and actual intent of the Legislature. A court's primary goal in interpreting statutory language is to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by the statutory provision under scrutiny.
>
> To ascertain the intent of the General Assembly, we begin with the normal, plain meaning of the language of the statute. If the language of the statute is unambiguous and clearly consistent with the statute's apparent purpose, our inquiry as to legislative intent ends ordinarily and we apply the statute as

> written, without resort to other rules of construction. We neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute, and we do not construe a statute with "forced or subtle interpretations" that limit or extend its application.

Lockshin v. Semsker, 412 Md. 257, 274–75 (2010) (internal citations omitted).

HO § 14-410 states in pertinent part:

> (a) Except by the express stipulation and consent of all parties to a proceeding before the Board, a disciplinary panel, or any of its other investigatory bodies, in a civil or criminal action:
> (1) The proceedings, records, or files of the Board, a disciplinary panel, or any of its other investigatory bodies are not discoverable and are not admissible in evidence; and
> (2) Any order passed by the Board or disciplinary panel is not admissible in evidence.

"Board" is defined in the title as the State Board of Physicians, i.e. the MBP. Md. Code Ann., Health Occ., § 14-101(b). "[D]isciplinary panel" is defined as a disciplinary panel of the Board of Physicians, i.e. the MBP, established under § 14-401 of the same title. *Id.* at (e-1).

Prince cites *Pepsi Bottling Group v. Plummer*, 226 Md. App. 460 (2016), *cert. denied*, 450 Md. 213 (2016) to support his argument that Dr. Franchetti cannot be compelled to provide testimonial evidence regarding his suspension from the AAOS because it related to disciplinary proceedings before the MBP. In *Plummer*, appellant's counsel asked appellee's designated expert witness a series of questions about a consent order and disciplinary proceedings involving the expert and the MBP. *Id*. at 466. There, we held "the General Assembly did not intend that doctors who have been the target of [the MBP] proceedings could be compelled to provide testimonial evidence about the

disciplinary proceedings." *Id*. at 478. However, we expressly stated that "[t]he term 'proceedings' encompasses not only 'documentary evidence' that *may have been presented to the* [*MBP*], but other information as well, and expands the scope of the protection afforded by the privilege to all matters *placed before or considered by the [MBP]*." *Id*. at 476 (emphasis added).

In our view, the admitted portion of Dr. Franchetti's *de benne esse* deposition is not prohibited by the plain and unambiguous language of HO § 14-410 and applicable case law. It is clear HO § 14-410 is focused on information provided to and action taken by the MBP. The statute does not extend protection to actions of unrelated entities taken in response to disciplinary proceedings of the MBP. The questioning of Dr. Franchetti did not relate to any proceedings, records, or files of the MBP; a disciplinary panel established by the MBP; nor any of its other investigatory bodies. Instead, the admitted portion of the deposition related to a collateral disciplinary action taken by a private professional organization. *Plummer* makes clear such action does not fall within the ambit of HO § 14-410 as Prince contends.

Prince argues that the AAOS's suspension of Dr. Franchetti related to his proceedings before the MBP. However, the MBP and the AAOS are distinct entities. The MBP is an agency of the State with the authority to license and discipline physicians and other health care providers. Md. Code Ann., Health Occ., § 14-201, § 14-313(a), § 14-404. By contrast, the AAOS is a professional organization of individuals in the field of orthopedic surgery with the purpose of promoting the best interest of the profession and its

patients with no relation to the State. AM. ASS. OF ORTHOPEDIC SURGEONS, BYLAWS OF AM. ASS. OF ORTHOPEDIC SURGEONS, 8 (2018). The AAOS's decision to suspend Dr. Franchetti was in response to the Consent Order with the MBP, not vice versa. Thus, the AAOS's suspension of Dr. Franchetti was not presented to, placed before, or considered by the MBP during its proceedings.

This application is consistent with the purpose of HO § 14-410, which is to "encourage full and frank participation in a disciplinary proceeding without fear of later entanglement or repercussion in civil or criminal investigation." *Id*. at 477. "By ensuring the confidentiality of peer review proceedings, the Maryland legislature sought to foster effective review of medical care and thereby improve the quality of health care." *Brem v. DeCarlo, Lyon, Hearn & Pazourek, P.A.*, 162 F.R.D. 94, 97 (D. Md. 1995).

Prince maintains the statute's purpose necessitates a broad interpretation of HO § 14-410. However, to read HO § 14-410 as providing a widened prohibition of any disciplinary action taken by entities unrelated to the MBP would "add language as to reflect an intent not evidenced in the plain and unambiguous language of the statute[.]" *Woznicki v. GEICO Gen. Ins. Co.*, 443 Md. 93, 108 (2015). Thus, we conclude the court did not err in denying Prince's motion to strike. To hold otherwise would require departure from the clear and unambiguous language of the statute.

2. *Prince was not prejudiced by the court's denial of his motion to strike.*

Assuming, *arguendo*, the question regarding Dr. Franchetti's suspension from the AAOS was improper, the court's admission of the question and Dr. Franchetti's response thereto was harmless error and not grounds for reversal.

Prince argues the admission of the question regarding Dr. Franchetti's suspension from the AAOS and the response thereto was prejudicial. Specifically, he asserts the admission improperly impeached his primary medical expert, which "is particularly damaging in a case which is decided exclusively on the issues of 'causation and damages' such as this one."

The Court of Appeals considered the prejudicial effect of evidence admitted in violation of HO § 14-410 in *Smith v. Del. North Cos.*, 449 Md. 371 (2016). In *Smith*, the court admitted into evidence a redacted version of a consent order between the MBP and the plaintiff's expert. *Id*. at 380. The consent order listed the violations for which the MBP found the expert responsible and the conditions of his probation. *Id*. at 380–81. The defense emphasized the consent order in four different instances as a reason for disregarding the testimony of the plaintiff's expert. *Id*. at 403. The Court of Appeals concluded the plaintiff was prejudiced sufficient for reversal because it was "more than probable that the jury considered this inadmissible evidence as a result of defense counsel's repeated mention of the consent order and urging of the jury to render a verdict based on the disciplinary action." *Id*. at 404.

Here, the prejudice, if any, to Prince does not rise to a level sufficient for reversal. *Crane v. Dunn*, 382 Md. 83, 92 (2004) (explaining that "[s]ubstantial prejudice must be

shown" to justify reversal due to error in admitting evidence). First, Dr. Franchetti did not respond to the question relating to his suspension from the AAOS other than to state that it was "an improper question and I should never answer any improper question." As such, the jury heard no evidence confirming Dr. Franchetti's suspension from the AAOS. Second, unlike in *Smith*, Bailey's counsel never referenced any disciplinary action taken against Dr. Franchetti, by the AAOS or otherwise, other than the single question asked during *voir dire*. Given these facts, it is improbable the jury considered the question or Dr. Franchetti's response in reaching its verdict. Accordingly, we hold the court's denial of Prince's motion to strike does not require reversal.

II. Whether the court abused its discretion in failing to admit evidence and argument related to Bailey's alleged failure to yield to favored traffic just prior to the collision.

Prince contends the court abused its discretion in excluding evidence related to Bailey's admitted negligence, specifically that Bailey "chose to drive through a stop sign without stopping and to not yield to favored cross-traffic." As a result, Prince argues, he was precluded from presenting evidence necessary to establish a *prima facie* claim of negligence. Bailey counters that Prince was limited to presenting evidence on the issues of damages and the causation thereof only, and that evidence of Bailey's failure to stop at the stop sign is not relevant to those issues.

First, Prince argues he was precluded from testifying to the fact that Bailey failed to stop at the stop sign just prior to the collision. We disagree. Prince, during his case-in-chief, testified to the following, without objection:

> You know, I'm coming down Brandywine and it seemed like I could see it out the side, and you know how people drive and they drive fast, but they stop right at the last minute at the stop sign. So I'm driving and I'm saying to myself, "Is this car stopping," and it seemed like as soon as I said it the impact happened.

Second, Prince claims the court's ruling was responsible for Prince being unable to call Bailey to testify on the issue. With this contention too, we disagree. Prince did not request Bailey to testify regarding her alleged failure to stop at the stop sign just prior to the collision. Indeed, when the court asked the purpose for calling Bailey as a witness, Prince's counsel stated he intended to ask "about the timing of the admission of liability, so when she admitted she caused this crash." After denying this request, the court asked Prince's counsel whether he had any additional questions. Prince's counsel responded, "No" and rested his case. On review, we will not disturb a verdict due to a party's later realization of a missed opportunity.

Even had the court denied Prince's specific request to question Bailey regarding whether she stopped at the stop sign prior to the collision, Prince would not be entitled to reversal. A court's refusal to permit a witness to testify does not amount to reversible error where the evidence upon the same point was presented without objection. *See Zipus v. Utd. Rys. & Elec. Co. of Baltimore Cty.*, 135 Md. 297, 297 (1919) (holding the court's refusal to allow a father to testify as to the use of his daughter's hand was not reversible error where a witness previously testified upon same point without objection).

Prince's testimony, stated above, that Bailey failed to stop at the stop sign before colliding with Prince's vehicle was presented to the jury and was uncontradicted. Thus, the court did not abuse its discretion.

Prince also asserts he was prejudiced by the court's exclusion of the evidence because it limited his counsel's opening statement and closing argument. Prince argues that his counsel's opening statement regarding Bailey's alleged failure to stop was relevant to the issue of damages and was wrongly excluded. While it is well established that counsel has reasonable latitude in its opening statement, it should be confined to statements based on facts that can be proved. *Simpson v. State*, 442 Md. 446, 458 (2015). Thus, where there exists a question as to whether an opening statement will be supported by admissible evidence, the court may, at its discretion, exclude such a statement.

In our view, the court did not abuse its discretion in excluding Prince's counsel's statement made in his opening. Prince's counsel stated over objection, "[Bailey] drives the [vehicle] towards the stop sign. [Bailey] doesn't stop." A bench conference ensued between the parties and the judge, in which the parties disputed whether the statement was relevant to the issues being tried. While Prince claimed the statement was relevant to the causation of his injuries, Bailey argued the statement was only relevant to the issue of liability for the collision—not an issue at trial. We hold there was a valid question as to whether Prince's counsel's statement would be supported by admissible evidence. Thus, the court did not abuse its discretion in excluding it from Prince's opening statement.

Prince further relies on *Hendrix v. Burns*, 205 Md. App. 1 (2012) for the proposition that the statement, made during his opening, relating to Bailey's alleged failure to stop was relevant to the issue of damages and was wrongly excluded. In that case, the court held "the fact that [the defendant] went through a red light, and that he may have been driving at an inordinate speed at the time the accident occurred" would be admissible. *Id*. at 27. We affirmed, noting the plaintiff "was permitted to elicit evidence of the speed of the vehicles at the time of the collision and the severity of the impact." *Id*. at 30. However, *Hendrix* did not address opening statements.

We will assume, *arguendo*, the statement was relevant to the speed of the vehicles at the time of the collision and the severity of the impact, even if only remotely probative, and the court erred in excluding the statement. Notwithstanding, we conclude reversal is not appropriate because Prince was not prejudiced in any way by this alleged error. After the objection, Prince's counsel spoke to the jury at length regarding the speed of the vehicles at the time of the collision and the severity of the impact. Prince's counsel continued to tell the jury Bailey caused a "multi-car collision" by colliding with a "car from the left . . . and a car coming from the right." The jury heard that the air bags within the cars deployed, the "cars end[ed] up all over the road," and Prince's vehicle "end[ed] up on the far side of the road . . . running into a tree." We therefore cannot say the jury's failure to hear that Bailey did not stop at the stop sign just prior to the collision affected the jury's verdict where the jury was presented with other statements on the issue of speed and

impact. Accordingly, the court's exclusion of Prince's counsel's statement made in his opening statement did not prejudice Prince as to require reversal.

Additionally, "[w]e have long held that counsel has great latitude in the presentation of closing argument." *Dorsey Bros. v. Anderson*, 264 Md. 446, 454 (1972). However, counsel may not, during closing argument, "comment on facts not in evidence or . . . state what he or she would have proven." *Fuentes v. State*, 454 Md. 296, 319 (2017) (internal quotations omitted).

During Prince's closing argument, Bailey objected to his counsel's statement, "But I want to remind you that what brings us all together here in the Circuit Court for Prince George's County is an . . . admitted violation of the basic traffic safety rules that protect all of us on and around the roadway." Prince seems to contend that Bailey's Stipulation of Fault supports the fact Bailey violated a traffic law. However, an individual's liability for a vehicle collision does not necessarily establish the individual's violation of a traffic law. Indeed, at no point during trial did either party present evidence that could substantiate the assertion that Bailey violated a traffic law. Therefore, the court did not abuse its discretion in finding Prince's remark improper.

Finally, Prince's claim that the evidence and argument regarding Bailey's failure to stop at the stop sign before the collision was necessary to prove a *prima facie* case of negligence is simply incorrect. Prince is accurate in the assertion that proximate cause must be shown to establish a *prima facie* negligence claim. *Bell v. Heitkamp, Inc.*, 126 Md. App. 211, 222 (1999). Indeed, a claim will not be submitted to the jury without establishing

a *prima facie* case. *See Hamilton v. Kirson*, 439 Md. 501, 545 (2014) (holding the court did not err in granting summary judgment on a claim of negligence where the plaintiff did not advance a viable theory on the element of causation). Here, the Stipulation of Fault and the evidence presented at trial established a *prima facie* case. The issue of damages was then submitted to the jury. We hold Prince was not prejudiced in any way as to require reversal.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.