Circuit Court for Montgomery County
Case No. 423110V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1924

September Term, 2017

LATANYA HILL-HIGGINS

v.

STANLEY A. BOUCREE, SR., D.D.S., ET AL.

Fader, C.J.,
Nazarian,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: February 8, 2019

In the Circuit Court for Montgomery County, Latanya Hill-Higgins, the appellant, sued Stanley A. Boucree, Sr., D.D.S., an oral surgeon, and his practice, Stanley A. Boucree, D.D.S., M.S., P.A. (collectively "Dr. Boucree"), the appellees, on claims for dental malpractice and lack of informed consent. In a jury trial, at the close of Ms. Hill-Higgins's case-in-chief, the court granted Dr. Boucree's motion for judgment on both claims. It ruled that Ms. Hill-Higgins's expert witness had not identified a breach of the standard of care that was causally connected to her claimed injury, and that necessary expert witness testimony was not offered to support the informed consent claim.

On appeal, Ms. Hill-Higgins asks whether the trial court erred in granting judgment in favor of Dr. Boucree on her claims. For the reasons to follow, we shall reverse the judgment on the malpractice claim, affirm the judgment on the informed consent claim, and remand the case to the circuit court for further proceedings not inconsistent with this opinion.

FACTS AND PROCEEDINGS[1]

On December 5, 2012, Dr. Boucree surgically extracted Ms. Hill-Higgins's left upper and lower third molars, commonly known as wisdom teeth. Ms. Hill-Higgins had been referred to Dr. Boucree by her dentist, Dianne Whitfield-Lock, D.D.S. She had never been treated by Dr. Boucree prior to her surgery. At the time of the referral, Dr.

[1] Because the court granted Dr. Boucree's motion for judgment, we shall present the facts adduced at trial in the light most favorable to Ms. Hill-Higgins, the non-moving party.

Whitfield-Lock provided Dr. Boucree's office with a recent panoramic x-ray of Ms. Hill-Higgins's teeth.

Ms. Hill-Higgins arrived at Dr. Boucree's office for the extractions on the afternoon of December 5, 2012. According to Ms. Hill-Higgins, a receptionist "gave [her] some papers and stuff, and . . . told [her] to sign the papers[.]" After that, she was called back into the treatment room. Dr. Boucree did not talk to her about the extraction procedure.

A "Consent for Extraction" form, signed by Ms. Hill-Higgins at 1:33 p.m. on the day of the procedure, was moved into evidence at trial.[2] The first paragraph of the "Consent for Extraction" form stated:

> I understand that during surgery it may be possible [sic] to avoid touching, moving, stretching, or injuring the nerves in my jaws that control sensations and function in my lips, tongue, chin, teeth, and mouth. This may result in nerve disturbances such as temporary or permanent numbness, itching, burning, or tingling of the lip, tongue, chin, teeth, and/or mouth tissues.

Ms. Hill-Higgins initialed on a line farther down on the form next to the following statement: "I have had an opportunity to ask questions about these risks and any other risks I have heard or thought about, including [blank space]." She also acknowledged that she had "received information about the proposed treatment [and] . . . [had] discussed [her] treatment with Dr. Stanley A. Boucree and ha[d] been given an opportunity to ask

[2] Ms. Hill-Higgins also signed a medical history form, a notice of privacy rights form, and a financial policy form.

questions and ha[d] them fully answered." She initialed by a line stating that she "underst[ood] the risk of the recommended treatment[,]" she "wish[ed] to proceed with the recommended treatment[,]" and she "elect[ed] to have this procedure performed by Dr. Boucree." Ms. Hill-Higgins, Dr. Boucree, and a staff member at the office all signed and dated the bottom of the form.

During the procedure, Ms. Hill-Higgins's mouth was anesthetized but she remained conscious. Dr. Boucree extracted her upper left wisdom tooth first. He then moved to the lower left wisdom tooth. Ms. Hill-Higgins testified that when "he was working on the lower tooth," she perceived that there was "a problem." "[H]e kept pulling it and kept yanking and kept pulling and yanking at the tooth[.]" Ms. Hill-Higgins became concerned that something was wrong, and began to feel "as if [she was] dying[.]" Four people in white coats entered the treatment room, a blood pressure cuff was placed on her arm, and she saw what she believed to be a "crash cart." Eventually, Dr. Boucree successfully extracted the left lower wisdom tooth and, when he did, the people in the room began "cheering."

At the direction of Dr. Boucree's staff, Ms. Hill-Higgins remained at Dr. Boucree's office for about an hour post-surgery. Dr. Boucree did not schedule a follow-up appointment with Ms. Hill-Higgins. At 2:15 p.m., Ms. Hill-Higgins signed and dated a form with recovery instructions. That form advised that she could expect her mouth to be sore for a day or two following the procedure, and to expect some bleeding. It directed

her to call Dr. Boucree if "any problem develop[ed] which [was] not clearly explained above . . ." Dr. Boucree did not call Ms. Hill-Higgins to check on her recovery.

Ms. Hill-Higgins further testified that in the days following the surgery, she noticed that she could not taste food on the left side of her tongue and she had lost sensation in that area. It "felt like a Novocain shot that . . . had never worn off." She expected that this would improve as she healed, however. She explained that later in December 2012, at a visit to Dr. Whitfield-Lock's office, she told staff members there about her lack of sensation on the left side of her mouth, and she repeated this complaint to Dr. Whitfield-Lock during appointments in January 2013, and January 2014. The first reference to that complaint in Dr. Whitfield-Lock's chart was in January 2014, however.

According to Ms. Hill-Higgins, she returned to Dr. Boucree's office sometime between February 2013 and May 2013. At that time, she "told [Dr. Boucree] about what was going on" with the left side of her mouth. Dr. Boucree did not examine her. He told her that sensation would "probably come back within a period of time" and suggested that she see a neurologist. Dr. Boucree's chart for Ms. Hill-Higgins does not reflect any visit with Ms. Hill-Higgins after the date of surgery, however.

In January 2015, Ms. Hill-Higgins went to see a neurologist. Ultimately, she was evaluated by Sonia Francioni, D.M.D., an oral and maxillofacial surgeon, who diagnosed her with a serious injury to her left lingual nerve.

On November 13, 2015, Ms. Hill-Higgins filed a complaint against Dr. Boucree in the Health Care Alternative Dispute Resolution Office ("HCADRO"), attaching a

certificate of meritorious claim by Lloyd K. Klausner, D.M.D., a board certified oral and maxillofacial surgeon. On June 13, 2016, Ms. Hill-Higgins unilaterally waived arbitration in the HCADRO pursuant to Md. Code (1974, 2013 Repl. Vol.), section 3-2A-06B of the Courts and Judicial Proceedings Article, and on July 13, 2016, she filed her complaint in the Circuit Court for Montgomery County, stating claims for dental malpractice and lack of informed consent.

On October 13, 2016, Ms. Hill-Higgins designated Dr. Klausner as her standard of care and liability expert. Trial commenced on October 30, 2017.

Dr. Klausner testified as the first witness. He was accepted by the court as an expert in oral and maxillofacial surgery. At the outset, he opined generally that he had determined that there was "a departure from the standard of care and that [it] was the proximate or direct cause of Ms. Hill-Higgins'[s] injury to her left lingual nerve." He explained that the left lingual nerve "supplies feeling to the front two-thirds of the tongue, along with the gum tissue on the inner aspect of the jawbone[,]" and "supplies taste to the two-thirds of the front part of the tongue."

Dr. Klausner testified that he had reviewed Dr. Francioni's report. She had determined that Ms. Hill-Higgins had sustained a "Level V Sunderland injury[,]" which is "equivalent to . . . neurotmesis" or complete severance of a nerve. Dr. Klausner subsequently performed his own evaluation of Ms. Hill-Higgins. He tested her ability to discern soft touch, directional response, pressure, sharp response, and temperature response on both sides of the tongue, as well as her ability to taste on each side of her

tongue. The results of those tests confirmed Dr. Francioni's diagnosis of "anesthesia of the distribution of the left lingual nerve, which is consistent with a Sunderland Class V injury." Dr. Klausner opined that the injury to Ms. Hill-Higgins's left lingual nerve was permanent.

Dr. Klausner explained that in a routine (*i.e*. non-surgical) extraction of a tooth, forceps are used to pull the tooth out. In a "surgical extraction" of a tooth, a scalpel, known as a dental bur, is used to "make an incision in gum tissue or other type of tissue for the express purpose of moving the tissue away from the tooth" prior to extraction. According to Dr. Klausner, wisdom teeth "are more easily taken out when one of two things are done: either a trough or little channel is made between the tooth and the bone and/or the tooth is sectioned." "[S]ectioning" a tooth means using a drill or a bur to cut it into multiple pieces and then removing them. Dr. Klausner opined that sectioning is especially useful for lower wisdom teeth because they often have two or three roots.

Using as a reference a drawing he had made as a visual aide,[3] Dr. Klausner explained the location of the left lingual nerve in relation to the wisdom teeth and two ways in which that nerve can be injured during a surgical extraction. First, if the surgeon is making an incision to expose the neck of the tooth, to then use an instrument to elevate it out ("pop it out"), the lingual nerve can be "hit" by an improperly located incision.

[3] The drawing is not in the record.

Second, if the surgeon sections the tooth, the lingual nerve can be injured by drilling too far, beyond the confines of the tooth.

Counsel for Ms. Hill-Higgins then asked Dr. Klausner whether he had "an opinion to a reasonable degree of medical certainty as to how this injury happened in this case?" Dr. Klausner replied that he "believe[d] that [Ms. Hill-Higgins's left lower wisdom tooth] was sectioned due to the fact that there were at least two roots from what [he] could see on the x-rays." He explained that when a molar has more than one root, there is a small amount of bone between the roots. During the sectioning procedure, an oral surgeon should never "cut the bone on the inner aspect where the tongue lies," known as the "lingual cortex." Ordinarily, "an instrument called an elevator" should be used to protect "the tissues on the inner aspect." Dr. Klausner elaborated that if an oral surgeon

> quickly drill[s] through the tooth, because [he] ha[s] to do another patient in the next room or you have to get done because the patient is under sleep, under anesthesia, [he] can do it too quickly and sometimes [he] can go past [the] boundaries of the tooth and that's generally how the lingual nerve injury occurs.

Dr. Klausner commented that Dr. Boucree's chart for Ms. Hill-Higgins does not show whether he sectioned the tooth or, if he sectioned the tooth, whether he used a dental bur or another instrument; that in his deposition, Dr. Boucree testified that he "may or may not" have sectioned the tooth; and that Dr. Boucree's chart does not show his "incision design," which, Dr. Klausner opined (again by reference to a drawing) should have been shaped like a "hockey stick" to avoid hitting the lingual nerve.

Dr. Klausner was asked about the defense theory that Ms. Hill-Higgins's left lingual nerve was injured when she was given Novocain injections in preparation for having cavities filled by Dr. Whitfield-Lock at an appointment later in December 2012. He opined that that was "anatomically impossible."

Dr. Klausner testified that the incidence of any injury to the lingual nerve from surgical extraction of a wisdom tooth is between "two to six percent" and that the incidence of permanent injury to the lingual nerve, as Ms. Hill-Higgins experienced, is "between point three and point five percent."

On cross-examination, defense counsel asked Dr. Klausner whether he ever had caused a nerve injury in one of his patients. He replied that he had had one patient who experienced "transient lingual nerve neurapraxia" that spontaneously remitted. He was asked if it were possible for an oral surgeon to "do the work of an extraction of [the left lower wisdom tooth] . . . appropriately and yet there still . . . can be an injury to this lingual nerve[?]" Dr. Klausner acknowledged that it is "remotely possible but unlikely to have a Class V injury from a normal procedure." As noted above, Dr. Klausner testified that Ms. Hill-Higgins sustained a Class V injury.

Ms. Hill-Higgins testified as we have set forth above. Thereafter, her counsel read parts of Dr. Francioni's deposition testimony into the record. That testimony did not address the standard of care.

After Ms. Hill-Higgins rested her case-in-chief, defense counsel moved for judgment. He argued that Dr. Klausner had testified in generalities and had not identified

"anything that Dr. Boucree did wrong specifically" or "any particular action by Dr. Boucree [that] caused any injury to the lingual nerve." Emphasizing Dr. Klausner's acknowledgement, on cross-examination, that Ms. Hill-Higgins's injury could have happened in the absence of negligence, defense counsel argued that without evidence that Dr. Boucree did anything wrong, the evidence was legally insufficient to support a reasonable inference of negligence.

Counsel for Ms. Hill-Higgins responded that Dr. Klausner had opined that there was a "severance of the lingual nerve and it was proximately and directly caused by either a sectioning of the tooth too far or a bad incision design, cutting into it from the outside." Defense counsel replied that he disagreed that Dr. Klausner had offered that opinion but, in any event, Dr. Klausner had not specified how Dr. Boucree had breached the standard of care.

The court took a recess to review Dr. Klausner's testimony. When the court reconvened, the trial judge asked counsel for Ms. Hill-Higgins to address the informed consent count. Counsel responded that Dr. Klausner had opined that an oral surgeon is "required to talk to the patient" and that Ms. Hill-Higgins had testified that that had not occurred. Defense counsel disagreed that Dr. Klausner had so opined, and said he could not recall any testimony by Dr. Klausner that had touched on informed consent. Counsel for Ms. Hill-Higgins replied that, in Maryland, expert testimony is not required to support a claim for informed consent.

The court granted the defense motion for judgment on Count I (dental malpractice). It explained that notwithstanding that Dr. Klausner had opined in general terms that there had been a departure from the standard of care and that that departure was the proximate cause of the injury to Ms. Hill-Higgins's left lingual nerve, he had not testified about "what it is in his opinion that caused [her] lingual nerve to be severed" nor had he given "any specifics as to what he believes Dr. Boucree did to cause that injury." Thus, Ms. Hill-Higgins had not met her burden to show a "connection" between any alleged negligence by Dr. Boucree and her injury.

On Count II (informed consent), the court reserved and took another recess. Upon reconvening, the court heard additional argument of counsel and then granted the defense motion for judgment. The court reasoned that although expert testimony is not required to establish a breach in the standard of care in an informed consent claim, it is required to assist the jurors to "understand 'the severity and the likelihood of a risk so that the trier of fact may assess the material risks of the proposed treatment.'"(quoting *Shannon v. Fusco*, 438 Md. 24, 50 (2014)). Given the complexity of the case and Dr. Klausner's testimony that the risk of a permanent injury to the lingual nerve occurring was "very slim," the court determined that Ms. Hill-Higgins had failed to meet her burden to present evidence showing the materiality of the risk of the procedure.

The court entered an order to that effect on November 27, 2017. This timely appeal followed.

STANDARD OF REVIEW

In reviewing the grant (or denial) of a motion for judgment, we "consider all of the evidence, including the inferences reasonably and logically drawn therefrom, in a light most favorable to the non-moving party." *Univ. of Baltimore v. Iz*, 123 Md. App. 135, 149 (1998) (citing *Nationwide Mut. Fire Ins. Co. v. Tufts*, 118 Md. App. 180, 189, (1997)). "'If there is any legally relevant and competent evidence, however slight, from which a rational mind could infer a fact in issue, then a trial court would be invading the province of the jury by declaring a directed verdict.'" *Houston v. Safeway Stores, Inc*., 346 Md. 503, 521 (1997) (quoting *Impala Platinum v. Impala Sales*, 283 Md. 296, 328 (1978)). Conversely, if the evidence "permits but one conclusion, the question is one of law and the motion must be granted." *James v. Gen. Motors Corp.*, 74 Md. App. 479, 484 (1988).

Sufficiency of the evidence in a jury trial is a question of law. *See White v. Kennedy Krieger Inst., Inc.*, 221 Md. App. 601, 645 (2015). Therefore, appellate review of a trial court's decision to withhold a claim from consideration by the jury, for insufficient evidence, is *de novo*. *Id*.

DISCUSSION

I.

Ms. Hill-Higgins contends her evidence was legally sufficient to support a rational finding in her favor on her dental malpractice claim and therefore the trial court erred by granting judgment to Dr. Boucree on that claim. In her brief, she asserts that Dr. Klausner

opined that there were two possible mechanisms for her injury, each of which would be a violation of the standard of care, and argues that that expert testimony, coupled with her own testimony about the "extreme tugging, pulling, and yanking" during the extraction of her left lower wisdom tooth, was sufficient to permit reasonable jurors to infer that Dr. Boucree breached the standard of care and that his breach caused her injury. In oral argument before this Court, counsel for Ms. Hill-Higgins maintained that Dr. Klausner's standard of care opinion focused on improper sectioning of the tooth as the cause of Ms. Hill-Higgins's injury.

Dr. Boucree responds that Dr. Klausner's testimony that there were two possible mechanisms for the injury, standing alone, was insufficient as a matter of law to prove a breach in the standard of care or causation. This is so, he maintains, because Dr. Klausner failed to specify how Dr. Boucree breached the standard of care and failed to connect any breach to the injury Ms. Hill-Higgins sustained. In oral argument, counsel for Dr. Boucree emphasized that because Dr. Klausner agreed that Ms. Hill-Higgins's injury could have happened during the extraction without any negligence, the trial court properly withheld the dental malpractice claim from the jury.

To establish a *prima facie* case of medical or dental negligence, a plaintiff must prove "(1) the applicable standard of care; (2) that this standard has been violated; and (3) that this violation caused the complained of harm." *Sterling v. Johns Hopkins Hosp.*, 145 Md. App. 161, 169 (2002) (quotation omitted). Owing to the complexity of medical and dental malpractice cases, "expert testimony is normally required to establish breach of the

standard of care and causation." *Barnes v. Greater Baltimore Med. Ctr., Inc.*, 210 Md. App. 457, 481 (2013).

Three cases Ms. Hill-Higgins cites in her brief are helpful in determining whether the evidence against Dr. Boucree was legally sufficient to support a reasonable finding of dental malpractice.[4] In *Meda v. Brown*, 318 Md. 418 (1990), the plaintiff underwent bilateral breast biopsy surgery under general anesthesia. In the recovery room, she was found to have suffered an injury to a nerve in her arm. Dr. Meda was her anesthesiologist. At trial, the plaintiff's expert in neurology testified that her injury resulted from "sustained compression of the ulnar nerve for thirty minutes or more during surgery[,]" and that before, during, and after surgery, the anesthesiologist was primarily responsible for properly positioning the patient's arm, and keeping it properly positioned, so as to prevent a compression injury to the ulnar nerve. *Id*. at 425-27. The expert opined that Dr. Meda had deviated from the standard of care by not making sure that the plaintiff's arm was properly positioned at the outset of the surgery and remained properly positioned throughout the procedure and recovery from anesthesia. He testified that, even though the precise mechanism of the injury could not be determined - - that is, whether the arm was improperly positioned at the outset of surgery or whether it rotated out of the proper position during the surgery and was not returned to its proper position - - one reasonably

[4]Counsel for Ms. Hill-Higgins and counsel for Dr. Boucree cite several unreported opinions of this Court in their briefs. The opinions are cited as persuasive authority, in violation of Rule 1-104(a), which is referenced on the cover page of every unreported opinion of this Court. We shall not consider those improperly cited unreported opinions.

could infer from the immediacy of the symptoms that the injury was sustained during the period of time that Dr. Meda was charged with maintaining proper arm position. A second expert medical witness concurred with this assessment.

After the jury returned a plaintiff's verdict, the trial court granted judgment notwithstanding the verdict ("JNOV"), concluding that the evidence was legally insufficient to support the verdict. Specifically, the trial court found that the plaintiff's experts' opinions "rested upon inferences and thus constituted [impermissible] *res ipsa loquitur* evidence" to prove medical negligence. *Id*. at 420.

This Court reversed, and the case was taken by the Court of Appeals, which affirmed our reversal. The Court of Appeals held that negligence may be "established by the proof of circumstances from which its existence may be inferred[,]" *id*. at 427-28 (quotation omitted), and determined that the plaintiff's experts had "recited in detail the physical facts they considered, and the medical facts they added to the equation to reach the conclusion they did." *Id*. at 428. The Court concluded that the experts' opinions were supported by facts in the record and did not amount to speculation or conjecture.

Barnes, 210 Md. App. 457, also concerns the use of inferences by expert witnesses in forming opinions. The plaintiff was sent to the hospital with a note from his doctor requesting a full stroke workup. A triage nurse overlooked the note, misstated the plaintiff's symptoms, downgraded his level of severity, and sent him to the urgent care unit instead of to the emergency department. A doctor in the urgent care unit misdiagnosed him with carpal tunnel syndrome and sent him home. He returned to the

hospital after a nurse who had seen him before the triage nurse, and knew he was supposed to get a full stroke workup, which would take time, happened to see him leave. Upon his return, another doctor failed to perform a full stroke workup and he once again left the hospital. The next day, he suffered a stroke. He sued the hospital alleging negligence by its agents.

At trial, the plaintiff called expert witnesses who testified that each agent had breached the standard of care and been a cause of the injury. After a plaintiff's verdict, the trial court granted a JNOV in favor of the triage nurse and the urgent care doctor for legally insufficient evidence of causation. This Court reversed, holding that even though the expert testimony on causation rested on inferences as to what would have ensued had those agents not breached the standard of care, the inferences were based on fact, not speculation, and therefore were reasonable.

Finally, in *Jacobs v. Flynn*, 131 Md. App. 342 (2000), the plaintiff sued several doctors and a hospital for medical malpractice, alleging that they had failed, in various ways, to timely diagnose and treat an abscess on his spinal cord, and that the abscess had caused compression on the cord, resulting in paralysis from the waist down. In an appeal after a plaintiff's verdict, one of the doctors, a urologist, argued that the evidence was legally insufficient to prove causation against him. He maintained that the plaintiff's causation expert's opinion did not establish to a reasonable degree of medical probability that the plaintiff would not have suffered paralysis had he (the doctor) timely referred him for neurosurgery to have the abscess removed. When asked whether he thought the

plaintiff's paralysis could have been prevented had he been timely referred to a neurosurgical unit, the plaintiff's neurosurgical expert responded that the plaintiff "could have been paralyzed under any circumstance" but the best chance of recovery or maintaining normal neurological function probably would have been with neurosurgery, and that the plaintiff was a candidate for such surgery.

We held that the evidence of causation was legally sufficient to generate a jury question. Although causation evidence must rise "above speculation, hypothesis, and conjecture" so the jury will reach its conclusion with "reasonable certainty," *id*. at 353, and "'[t]he law requires proof of probable, not merely possible, facts, including causal relations,'" *id*. at 355 (quoting *Charlton Bros. Transit Co., Inc. v. Garrettson*, 188 Md. 85, 94 (1947)),

> "…[the] sequence of events, plus proof of *possible* causal relation, may amount to proof of *probable* causal relation, in the absence of any other equally probable cause."

Id. at 355 (quoting *Charlton*, *supra*) (emphasis in *Charlton*). We noted that the doctor's own expert, who was of the view that there never was spinal cord compression, agreed that if there was spinal cord compression, the plaintiff was a viable candidate for surgery. We concluded that the evidence as a whole permitted a rational inference, without resort to speculation, that the doctor's failure to diagnose the plaintiff's condition was causally connected to his paralysis.

We return to the case at bar, and begin with the question whether Dr. Klausner did no more than speculate in opining that Dr. Boucree breached the standard of care. It is

significant that Dr. Boucree's dental chart for Ms. Hill-Higgins does not document how Dr. Boucree extracted Ms. Hill-Higgins's wisdom teeth. There is one handwritten note that the extractions were "surgical," but nothing more.[5] It is impossible to determine from these records whether the left lower wisdom tooth was removed by sectioning or by elevating. (Nor can that be determined for the left upper wisdom tooth). Not only are Dr. Boucree's records sparse and uninformative, he testified in deposition that he does not remember Ms. Hill-Higgins or what procedure he performed to remove her wisdom teeth. What should be easily ascertainable from Dr. Boucree's chart for Ms. Hill-Higgins, had worthwhile notations been made, necessarily must be inferred instead.

To be sure, Dr. Klausner's testimony could have been more organized and succinct. Nevertheless, when asked to identify the breach of the standard of care by Dr. Boucree that caused the Class V injury to Ms. Hill-Higgins's left lingual nerve, he homed in on improperly performed sectioning. He explained that because the dental x-rays furnished to Dr. Boucree in advance of the extractions showed two, and perhaps three, roots on the left lower wisdom tooth, Dr. Boucree probably sectioned that tooth; multiple roots usually are not parallel, and if a wisdom tooth with multiple roots is sectioned, "it's easy to get out." He further explained, based on the anatomical location of the left lingual nerve, that sectioning cannot cause damage to the lingual nerve unless the

[5] The billing records code the procedures on each tooth as "D7210-Extaction-Surgical/Erupted Tooth." An "erupted" wisdom tooth is one that has emerged above the gum as it is supposed to, *i.e.*, is not impacted.

instrument used to section the tooth passes beyond the confines of the tooth; and that a barrier known as an elevator can be used to keep the instrument used in sectioning from reaching the area of the lingual nerve.

In our view, given the paucity of the chart Dr. Boucree created for Ms. Hill-Higgins and his inability to recall the precise method he used to extract her wisdom teeth, Dr. Klausner was not speculating when he drew inferences, from what facts are known, that Dr. Boucree probably sectioned the left lower wisdom tooth and likely damaged the left lingual nerve by sectioning the tooth without cabining his instrument to the confines of the tooth itself. In this regard, the case at bar resembles *Barnes*, in that Dr. Klausner's testimony rested on reasonable inferences based on fact, not on conjecture. As Professor James observed long ago, "Probability is a matter of appearance" that "always is relative to the data available at the time judgment is exercised." George F. James, *Relevancy, Probability and the Law*, 29 Calif. L. Rev. 689, 698 n. 20 (1941). "If all possible data were available we should be dealing not with probability in an ordinary sense but with the approximation of certainty." *Id.* Here, there is limited data available, through no fault of Ms. Hill-Higgins, so Dr. Klausner's opinions on what probably happened were necessarily inferential.

In her brief, Ms. Hill-Higgins emphasizes that Dr. Klausner also opined that if sectioning is not performed and instead a wisdom tooth is removed by elevation, the lingual nerve can be damaged by the incision that is made in that process; and that for the nerve to be injured, the incision must be improperly located. She argues that his

testimony put this case in the same posture as *Meda*, in which the plaintiff's nerve injury only could have been caused by improper placement of the arm at the beginning of the surgery or by the failure to return the arm back to its proper position during the surgery, and it is not necessary to show which of those two breaches in the standard of care actually took place.

For the reasons we have explained, we read Dr. Klausner's testimony to mean that, although there are two ways that this injury can happen, he thinks it happened by sectioning. Even if he had opined that the injury could have happened equally by improper sectioning or incision, this case would not be precisely on all fours with *Meda*, as in *Meda* there was no evidence that the injury could have happened in the absence of negligence. Counsel for Dr. Boucree hammers on this point, insisting that so long as the injury could have occurred without negligence, a *prima facie* case could not be made out.

We disagree. *Jacobs v. Flynn* teaches otherwise. It is not necessarily the case that a plaintiff's expert witness's concession that it is possible the same injury could have happened without negligence dooms all proof of causation. And in the case at bar, Dr. Klausner's agreement on cross-examination that it is "remotely possible," *i.e.*, conceivable, that a Class V injury could result from a "normal procedure" sounds more like a concession to the notion that anything is possible than a concession to causation.

Viewed in its totality, the evidence adduced by Ms. Hill-Higgins in her case-in-chief was legally sufficient to prove the elements of a claim for dental malpractice, by the liberal legal standard that Maryland follows.

II.

Ms. Hill-Higgins likewise contends the evidence at trial was legally sufficient to generate a jury question on her informed consent claim. She asserts that Dr. Klausner testified that "the risk of total severance of the lingual nerve in a wisdom tooth extraction is severe" because it is a permanent injury and that it is thus material and must be disclosed. She maintains that that testimony, coupled with her own testimony that Dr. Klausner did not speak to her about the risks of the procedure and that, had she known of the risk of a permanent injury to her lingual nerve, she would not have undergone the procedure, was sufficient to create a jury question.

Dr. Boucree responds that Dr. Klausner's testimony did not specifically address informed consent and was insufficient to assist the jurors in "understand[ing] the severity and the likelihood of a risk" so that they could assess the materiality of the risk.

"[T]he doctrine of informed consent imposes on [a medical or dental practitioner] a duty to disclose material information that '[he or she] knows or ought to know would be significant to a reasonable person in the patient's position in deciding whether or not to submit to a particular medical treatment or procedure[.]'" *Shannon*, 438 Md. at 46 (quoting *Sard v. Hardy*, 281 Md. 432, 444 (1977)). That information includes: "the nature of the ailment, the nature of the proposed treatment, the probability of success of the contemplated therapy and its alternatives, and the risk of unfortunate consequences associated with such treatment." *Sard*, 281 Md. at 440. "[E]xpert testimony is necessary to assist the trier of fact in understanding the severity and the likelihood of a risk so that

the trier of fact may assess the material risks of the proposed treatment." *Shannon*, 438 Md. at 50. In common parlance, a risk is "material" if it is a risk that would matter to a reasonable person in deciding whether to undergo a procedure.

Dr. Klausner gave little testimony relevant to the informed consent claim. He opined that the risk of a permanent Class V injury to the lingual nerve from a surgical extraction of a wisdom tooth is only "between point three and point five percent." He was not asked to and did not offer any opinion about the necessity for the extraction in Ms. Hill-Higgins's case and whether there were any alternative treatments. Although expert testimony is not necessary in an informed consent claim to establish a standard of care, it is necessary to prove materiality, and the materiality of a risk only can be determined by comparing it to any alternative procedure available and the reason for the procedure to begin with. The evidence from Ms. Hill-Higgins herself and from Dr. Whitfield-Lock's records showed that Ms. Hill-Higgins needed to have her wisdom teeth removed because she was in pain. With evidence that the risk of a Class V injury was tiny and in the absence of expert testimony about any alternative treatment to address the

tooth pain, there was legally insufficient evidence of materiality to take the informed consent claim to the jury.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART; CASE REMANDED TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID ONE-HALF BY THE APPELLANT AND ONE-HALF BY THE APPELLEE.