UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 0888 & 0889

September Term, 2015

KARLY C. BAILEY

v.

BENJAMIN S. CARSON, *ET AL.*

Nazarian,
Friedman,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: April 20, 2016

Karly Bailey alleged that Dr. Benjamin Carson committed medical malpractice in connection with brain surgery he performed on her in 1997. She followed the appropriate procedural path and eventually filed a complaint in the Circuit Court for Baltimore City. After proceedings in that court, an appeal, and further proceedings in the circuit court on remand, the circuit court granted the summary judgment motion of Dr. Carson and his co-defendant, the Johns Hopkins Hospital ("Hopkins"). She appeals again and we affirm.

I. BACKGROUND

Ms. Bailey learned when she was young that she had a pilocytic astrocytoma—a brain tumor. She first had surgery to remove it in 1995, when she was seven years old, but, as tumors of this type often do, it grew back. She consulted Dr. Carson, and he performed surgery on her on August 4, 1997. That surgery forms the basis of this lawsuit.

On June 18, 2009, Ms. Bailey filed a Statement of Claim against Dr. Carson and Hopkins in the Maryland Health Care Alternative Dispute Resolution Office ("HCADRO"), alleging that she and her parents did not consent to the procedure Dr. Carson performed—they contend that he removed more of the tumor than they had agreed to allow, and therefore that he breached the standard of care. On December 15, 2009, she filed a Certificate of Merit naming Dr. William Hudgins, a board-certified neurosurgeon, who certified that Dr. Carson breached the standard of care and proximately caused "damage to her brain stem and several cranial nerves." She refiled the claim after it was dismissed for lack of an accompanying report from Dr. Hudgins, and on March 31, 2010,

she also filed a complaint in circuit court, which was accompanied by a second, updated certificate of merit from Dr. Hudgins dated March 24, 2010.[1]

Counsel for Dr. Carson and Hopkins deposed Dr. Hudgins on January 13, 2011. Later that year, Ms. Bailey filed an affidavit signed by Dr. Hudgins in which he added more detail to his opinion. After the close of discovery, the circuit court granted Hopkins's and Dr. Carson's motion for summary judgment, reasoning that Dr. Hudgins was not qualified as an expert. This Court reversed that decision in *Bailey v. Carson*, September Term, 2011, Nos. 1885, 1887, slip op. at 19 (Feb. 22, 2013).

The case resumed in circuit court, and on May 26, 2015, the circuit court held a hearing on pending discovery motions at which Ms. Bailey appeared *pro se.* (She filed the first claim in HCADRO *pro se*, then obtained counsel for a time, but counsel later withdrew.) Hopkins and Dr. Carson sought to strike Ms. Bailey's experts; then three in number, they did not include Dr. Hudgins. Ms. Bailey withdrew one of the three at the hearing, and took the position that the other two experts would not agree to take her case unless she was represented by counsel. The court then struck Ms. Bailey's expert designations, which left her with no named expert to testify as to any breach in the standard of care or causation.

Hopkins and Dr. Carson moved for summary judgment on May 11, 2015, arguing that because Ms. Bailey could not produce an expert, she was barred from presenting a case

[1] She actually filed two separate complaints for procedural reasons that have no bearing on this appeal. We have a notice of appeal in each case, but have consolidated the appeals because the cases both raise the same legal issue.

to a jury on informed consent, or any claim that Dr. Carson had breached the standard of care or caused Ms. Bailey's injury. At a hearing on June 15, 2015, Ms. Bailey—again appearing *pro se*—produced four pages of Dr. Hudgins's deposition transcript, his two certificates of merit, and his September 21, 2011 Affidavit in opposition to the Motion for Summary Judgment. She argued that Dr. Hudgins was "unavailable" to testify under the applicable hearsay exceptions, and so she could use the supporting evidence—the certificates of merit, the excerpt from his deposition testimony, and his affidavit—to overcome summary judgment. When the court asked Ms. Bailey at the hearing why Dr. Hudgins was "unavailable," she explained her most recent encounter with his office:

> Dr. Hudgins[2] is unavailable due to a present physical illness that we became aware of in—goodness. Well, Dr.—we contacted Dr. Hudgins's office manager, Kyle, January of 2015, and he said he maybe had—he was sick—that he may—*he may be deteriorating. He did not know for sure.* And we talked—we actually confirmed this on April of 2015 when we talked to him personally.

(Emphasis added.)

The court declined to deem Dr. Hudgins unavailable. The court also concluded that neither the Certificate of Merit submitted by Dr. Hudgins nor his affidavit would be admissible as former testimony under Maryland Rule 5-804(b)(1). Although acknowledging that the deposition testimony could conceivably be treated differently, the court explained that only four pages of the deposition were before it, and the testimony in

[2] The transcript misspells Dr. Hudgins's name consistently as "Dr. Hudjins"; we have corrected it in any quoted excerpts.

that excerpt did not establish the standard of care, a breach, or causation. Because Ms. Bailey failed to produce an expert in support of her claims, and because the evidence she produced in opposition to the Motion for Summary Judgment could not have established the elements of her claim even if the court had deemed Dr. Hudgins "unavailable," the court granted summary judgment in favor of Hopkins and Dr. Carson. Ms. Bailey filed a timely notice of appeal.

II. DISCUSSION

Although the underlying case is all about medical malpractice, this appeal is not.[3] Instead, it is about the operation of the hearsay rule,[4] and the principle that a court will not substitute an out-of-court declarant's testimony on the truth of the matter asserted for in-person testimony except under limited circumstances. We agree with the circuit court that no such circumstances exist here, and we see no abuse of discretion in the court's decision not to admit the various forms of testimonial evidence Ms. Bailey sought to introduce from Dr. Hudgins. From there, the court properly granted the Motion for Summary Judgment because without that expert testimony, Ms. Bailey's claim could not go forward.

[3] Ms. Bailey agrees, and presents but one question for our review:

> Whether the Circuit Court erred as a matter of law in not finding Dr. Hudgins' statements admissible under the former testimony exception under Maryland Rule 5-804(b)(1) or under the residual exception in Maryland Rule 5-803(b)(24) and in granting Appellees' Motion for Summary Judgment?

[4] We assume for present purposes that the exceptions to the hearsay rule that Ms. Bailey seeks to invoke apply equally and in the same manner to expert and fact witnesses.

We review the trial court's grant of summary judgment *de novo*. *Schmerling v. Injured Workers' Ins. Fund*, 368 Md. 434, 443 (2002). Because the trial court does not resolve any disputed issues of fact on that posture, *see* Md. Rule 2–501(a), "the standard for appellate review of a trial court's grant of a motion for summary judgment is simply whether the trial court was legally correct." *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 737 (1993). For the opposing party to defeat such a motion, it "must show that there is a genuine dispute as to a material fact by proffering facts which would be admissible in evidence." *Id.*

A. Dr. Hudgins Was Not "Unavailable," And The Evidence Presented Was Not Admissible Under Rule 5-804.

As a general rule, hearsay is inadmissible. Md. Rule 5-802. But there are exceptions to this rule. The first to come potentially into play is the unavailability exception under Rule 5-804(a)(4) or (5). The two subparts present alternate paths to establish unavailability[5]:

> "Unavailability as a witness" includes situations in which the declarant:
>
> * * *
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

[5] Ms. Bailey claims that even though she argued applicability of Rule 5-804(a)(4) in the trial court, that court "should have also analyzed Dr. Hudgins' unavailability under Rule 5-804(a)(5) since Ms. Bailey was unable to procure the declarant's attendance by reasonable means." We give Ms. Bailey the benefit of the doubt because of her then-*pro se* status, but the outcome is the same either way.

> (5) is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance . . . by process or other reasonable means.

"[W]e apply a *de novo* standard to the trial court's legal findings and a deferential standard to any factual findings that might be required." *Vielot v. State*, 225 Md. App. 492, 500 (2015).

1. Dr. Hudgins was not "unavailable."

The information before the circuit court fell short of establishing that Dr. Hudgins was "unavailable" for purposes of Rule 5-804(a)(4). The "existing physical illness" from which she claims Dr. Hudgins suffered was supported only by the testimony of Ms. Bailey, her father, and a friend, Michael Rockwood, which they offered during the June 15, 2015 hearing and in subsequent affidavits. At the summary judgment hearing, Ms. Bailey *first* offered her recollection of her call with Dr. Hudgins's office, in which his office manager said that he "may be deteriorating," and said that she confirmed this when she talked to Dr. Hudgins personally. The court pointed out in its ruling that these claims went wholly undocumented. *Second*, Ms. Bailey submitted three affidavits that established a number of conversations among the Baileys, Mr. Rockwood, and Dr. Hudgins's office assistant, Kyle Everett, in which Mr. Everett told the Baileys that Dr. Hudgins's health "had declined over the past year and he had developed a medical condition that *could* prevent him from representing Karly Bailey as an expert witness." (Emphasis added.) Mr. Bailey's affidavit also detailed the telephone conversation he finally had with Dr. Hudgins in April 2015:

> When John Bailey asked Dr. Hudgins if there were any medical conditions that would prohibit him from representing [Ms. Bailey] as an expert witness at trial, Dr. Hudgins started yelling

> in a loud voice. He said, "I will no longer be able to represent her as an expert witness,[] numerous times. Don't ever call me again," and hung-up the phone. *That was the only verbal conversation [Ms.] Bailey or [Mr.] Bailey were privileged to hear from Dr. Hudgins that confirmed he would not be able to represent her as an expert witness.*

(Emphasis added.)

But Dr. Hudgins's statement doesn't help Ms. Bailey. At best, and even if it were admissible via an exception to the hearsay rules, it establishes only that he doesn't intend to serve as an expert witness in the case. And because the statement doesn't reference illness or unavailability, Rule 5-804(a)(4) wasn't even implicated in the first place. In deciding whether a witness is unavailable for medical reasons, a trial judge "'must consider both the duration and the severity of the illness.'" *Vielot*, 225 Md. App. at 502 (quoting *Burns v. Clusen*, 798 F.2d 931, 937 (7th Cir. 1986)). Here, the trial court had no credible evidence on which to find that Dr. Hudgins was ill.

But even if we were to give Ms. Bailey the benefit of the doubt and analyze Rule 5-804(a)(5) instead, we still see no basis on which the circuit court could have grounded an unavailability finding. Nothing Ms. Bailey produced established that she could not "procure [Dr. Hudgins's] attendance . . . by process or other *reasonable means*." Rule 5-804(a)(5) (emphasis added). Again, we appreciate Ms. Bailey's efforts as a *pro se* litigant to reach Dr. Hudgins and discuss her case with him, but they do not exhaust the range of "reasonable means" required by the rule. She did not attempt to serve him with a subpoena, *see State v. Breeden*, 333 Md. 212, 222 (1993) (explaining that "[o]ther reasonable means require efforts in good faith and due diligence to procure attendance,"

and finding inadequate the State's efforts to serve with process an out-of-state witness who was still within the reach of the court's subpoena power (internal quotations and citations omitted)), nor did she establish that he was beyond the court's subpoena powers, *Attorney Grievance Comm'n v. Johnson*, 363 Md. 598 (2001), and her *pro se* status does not alter this basic requirement. *See Tretick v. Layman*, 95 Md. App. 62, 86 (1993) ("[T]he procedural, evidentiary, and appellate rules apply alike to parties and their attorneys. No different standards apply when parties appear *pro se*.") We elaborated in *Tretick* that "[i]f an uneven 'playing field' results when parties represent themselves, it is not because the rules are applied differently, but that one side has available the education, training, and experience of a lawyer who functions in the legal arena to assist and represent his client to the fullest extent of his ability." *Id.*

2. The documents Ms. Bailey offered weren't "former testimony" and didn't establish the elements of her claim in compliance with the summary judgment rule.

Even assuming that Ms. Bailey could establish that Dr. Hudgins was "unavailable," that's not the end of the story. In order for her to overcome the Motion for Summary Judgment, she was required to provide admissible evidence that supported her claims, and Dr. Hudgins's affidavit, certificates, and deposition testimony (at least the excerpt made available to the circuit court) fell short.

First, the affidavit and certificate didn't constitute "former testimony" that would have been admissible under Rule 5-804(b)(1), even if Ms. Bailey had effectively established the doctor's unavailability. The Rule defines "former testimony" in specific terms:

> Testimony given as a witness in any action or proceeding or in a deposition taken in compliance with law in the course of any action or proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, *had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.*

(Emphasis added.) The certificates unquestionably constituted hearsay, as they were statements made by Dr. Hudgins out of court, but the defense had no opportunity to cross-examine Dr. Hudgins at that time.

Second, because the certificates were not made under oath, they could not satisfy her burden as a summary judgment opponent:

> A response to a motion for summary judgment shall be in writing and shall (1) identify with particularity each material fact as to which it is contended that there is a genuine dispute and (2) as to each such fact, identify and attach the relevant portion of the specific document, discovery response, transcript of testimony (by page and line), *or other statement under oath that demonstrates the dispute*. A response asserting the existence of a material fact or controverting any fact contained in the record shall be supported by an affidavit or other written statement under oath.

Md. Rule 2-501(b) (emphasis added).

Third, the court couldn't ignore the fact that, as Ms. Bailey explained at the June 15 hearing, Dr. Hudgins was *unwilling* to appear, and so the common sense purpose of the summary judgment rule—deferring to allow the subsequent trial testimony—couldn't have been satisfied. *See Imbraguglio v. Great Atl. & Pac. Tea Co.*, 358 Md. 194, 207 (2000) (permitting the trial judge to consider an affidavit that might otherwise be inadmissible based on the assumption that the affiant ultimately would testify).

Finally, with regard to the portion of Dr. Hudgins's deposition testimony that Ms. Bailey presented at the hearing, we agree with the trial court that this excerpt "d[id] not in any way establish . . . what the standard of care was, what the breach of the standard of care was, whether there was a breach, and whether there was any causation between that breach and any damages." The portion of the deposition to which Ms. Bailey pointed neither addressed nor established any breach in the standard of care, and references only whether Dr. Hudgins had been paid for his time spent reviewing the case, and discussing the documents he reviewed. So even if the court did consider the transcript excerpt (and it had no reason to look beyond those four pages), nothing in that excerpt established a breach of duty on the part of Dr. Carson or that his actions caused Ms. Bailey's injuries. Without more, the court properly granted summary judgment. *See Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 442 (2007) (requiring that a plaintiff produce a medical expert "to prove specific causation within a reasonable degree of scientific certainty" where the case presented a "complex medical question").

B. The Evidence Did Not Fall Under Rule 5-803(b)(24)'s Catch-All Exception.

Ms. Bailey argues that even if the unavailability exception to the hearsay rule could not save her case, the trial court should have considered the documents regarding Dr. Hudgins's testimony under the residual hearsay exception:

> *Other Exceptions*. Under exceptional circumstances, the following are not excluded by the hearsay rule: A statement not specifically covered by any of the hearsay exceptions listed in this Rule or in Rule 5-804, but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a

> material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

Md. Rule 5-803(b)(24). The Committee notes to the Rule explain the purpose of the exception, which is to be applied narrowly:

> The residual exception provided by Rule 5-803(b)(24) does not contemplate an unfettered exercise of judicial discretion, but *it does provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions*. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 5-102.
>
> It is intended that the residual hearsay exception will be used very rarely, and only in exceptional circumstances.

(Emphasis added.)

Ms. Bailey argues that *Nixon v. State*, 140 Md. App. 170 (2001), compels us to consider the statements. In that case, we looked at the residual exception and determined that it did not apply to permit consideration of the hearsay statements of a sexual assault victim to a social worker. The victim, who was sixteen years old at the time of trial, had an IQ of forty-six and a mental age of about six years old. *Id.* at 185. The State took the position that even though the victim was available to testify, the trial court properly permitted the testimony of the social worker instead. We disagreed, explaining that there

was nothing "exceptional, rare, or unanticipated," *id.*, about the circumstances that justified invoking the exception: the declarant was available but the trial court declined the State's invitation to interview her, and as a general matter, the question of out-of-court statements by child victims had been addressed before by the legislature, and so it was not "unanticipated." *Id.* at 185-86.

We see similar problems for Ms. Bailey here. Again, we understand the frustration she must feel as her former counsel and her expert decline to press her cause. But that's part of the reason she can't invoke this exception. We attribute no motive to those now-absent participants, but it's not appropriate for us to speculate about *why* counsel withdrew or *why* Dr. Hudgins declined to testify. Unfortunately that situation is all too common, and these facts alone aren't unusual enough to justify invoking a rule that the legislature has made plain should be used in only the most exceptional circumstances.

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