UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1727

September Term, 2015

CHIMERE HARPER, AS MOTHER AND NEXT FRIEND OF JOSHUA HARPER, A MINOR

v.

CALVERT OB/GYN ASSOCIATES OF SOUTHERN MARYLAND, LLC, ET AL

Wright,
Graeff,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: December 6, 2016

This appeal arises from the Circuit Court for Calvert County's grant of judgment in favor of appellees, Calvert OB/GYN Associates of Southern Maryland, LLC ("Calvert") and Dr. Barbara K. Estes. On November 28, 2011, appellant, Chimere Harper, as the mother and next friend of Joshua Harper, a minor, filed a complaint against appellees, alleging "Negligence – Medical Malpractice." On May 10, 2013, appellant amended her complaint to add a claim for "Failure to Provide Informed Consent." After appellant's expert witness fell ill, trial was continued to 2015. Days before the scheduled trial, appellant subpoenaed one of appellees' designated experts. Appellees filed a motion to quash the subpoena, which the circuit court granted.

Trial began on September 14, 2015, at which time appellant abandoned her medical negligence claim and pursued only her informed consent claim. At the close of appellant's case on September 18, 2015, appellees moved for judgment, arguing that appellant failed to establish a *prima facie* case for informed consent. After hearing from the parties, the circuit court granted appellees' motion. On October 13, 2015, appellant timely appealed.

Questions Presented

Appellant presents the following questions, which we have reworded for clarity:[1]

[1] In her brief, appellant asked:

1. Did the trial court err in granting a motion for judgment against the Appellant for failure to provide expert testimony in an informed consent case when Appellant called the Appellee, a physician, adversely in her case and the Appellee testified, without objection, as to the material risks and other significant factors as delineated in *Sard v. Hardy*? (continued…)

1. Did the circuit court err in granting appellees' motion for judgment?

2. Did the circuit court abuse its discretion when it quashed appellant's subpoena and precluded appellees' designated expert from testifying?

For the reasons that follow, we answer both questions in the negative and affirm the judgment of the circuit court.

Facts

Dr. Estes, an obstetrician and gynecologist for Calvert, cared for appellant at Calvert Memorial Hospital ("CMH") during appellant's two pregnancies in 2002 and 2006. In 2002, appellant's labor and delivery were, in appellant's own words, "very difficult." During that delivery, the umbilical cord was wrapped twice around the baby's neck – an occurrence that can slow down the delivery process because the mother must stop pushing to allow the umbilical cord to be safely removed. Nonetheless, Dr. Estes successfully delivered the baby boy, Aaron, and appellant subsequently went home with a healthy baby.

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2. Did the trial court abuse its discretion by (a) quashing Appellant's trial subpoena of one of Appellees' retained expert witnesses when there was no affidavit in support of the Appellees' motion verifying any alleged burden on the expert, and (b) denying Appellant's renewed request to call the same expert witness when it was learned that he was already present in the courthouse and available to testify?

Although Aaron had no shoulder injury at the time of his birth, a small check mark appears next to "shoulder dystocia"[2] in his delivery record[3] under "Initial Newborn Exam." According to Dr. Estes, this check mark was likely made by a nurse who would not have been watching the delivery but "waiting for the baby" "over on the other side." On the same delivery record, under "Initial Newborn Exam," a second check mark indicated "no observed abnormality." This second check mark was more consistent with Dr. Estes's recollection of the delivery. Dr. Estes stated that if she "had a baby with a shoulder dystocia, then [she] would have written a note with the maneuvers required to reduce the shoulder." Likewise, appellant did not "remember any problems with this delivery" other than "cramping and pain."

In 2006, appellant returned to Dr. Estes to discuss the delivery of her second child. Although a known prior shoulder dystocia can pose an increased risk of a subsequent dystocia, its possibility was not considered because neither Harper nor Dr. Estes had knowledge of a shoulder dystocia occurring with the first delivery in 2002. Dr. Estes had access to the 2002 delivery summary, but was unaware of the checkmark indicating shoulder dystocia because she did not look at the entire document. In addition, Dr. Estes conceded that even though a delivery note should accompany the birth of every baby at CMH, she did not write a delivery note for Aaron's birth.

[2] A shoulder dystocia occurs when the baby's shoulder becomes stuck during delivery.

[3] Despite being used extensively at trial, this delivery summary was not moved into evidence and, as such, is not part of the record before us. The parties do not dispute the general appearance of that document.

During appellant's second pregnancy, Dr. Estes did not discuss the possibility of a cesarean section because appellant did not meet any of the established obstetrical criteria for the procedure. Appellant, however, requested that Dr. Estes induce labor, with the hope that her second delivery would not be as difficult as the first. Dr. Estes agreed to the request; nevertheless, appellant went into labor spontaneously prior to her induction date.

On September 18, 2006, appellant presented to CMH in labor. During delivery, a shoulder dystocia occurred. According to appellant, "everything in the room changed" after the head was delivered. She recalled that Dr. Estes looked serious and instructed her not to push. Dr. Estes then called for help and, after more nurses arrived, the nurses flexed appellant's legs back into an extended position and informed appellant that Dr. Estes would have to put her hand into the patient's vagina to try and get the baby out. Two and a half minutes later, the baby, Joshua, was delivered. Appellant acknowledged that Joshua's delivery was "a very different experience" compared to Aaron's. As a result of the shoulder dystocia, Joshua sustained a severe and permanent brachial plexus injury.[4]

[4] Coming from the spinal cord in the neck and traveling down the arm, the brachial plexus is a group of nerves that controls "the muscles of the shoulder, elbow, wrist and hand, as well as provide feeling in the arm." American Society for Surgery of the Hand, *Brachial Plexus*, https://www.assh.org/handcare/hand-arm-injuries/Brachial-Plexus-Injury (last visited Nov. 22, 2016). Although some brachial plexus injuries are minor and will completely recover in several weeks, others are severe enough to cause permanent disability in the arm. *Id.*

Appellant filed her complaint in 2011, alleging medical negligence. Neither her Designation of Expert Witnesses nor her Pretrial Conference Statement identified Dr. Estes or defense expert, Dr. Craig Dickman, as witnesses who may offer expert opinions for her case at trial. In 2013, appellant amended her complaint to add a claim for lack of informed consent. As a result, the trial was postponed.

In 2014, one of appellant's two expert witnesses fell ill, causing trial to again be postponed. On the eve of the third trial date, appellant withdrew her second expert witness due to an unforeseen conflict of interest and moved for leave to substitute a new expert witness, Dr. Gary Smith. The circuit court denied that motion.

On September 2, 2015, appellant purportedly served Dr. Dickman with a trial subpoena ordering him to appear in court on September 15, 2015. In response, appellees moved to quash the subpoena, arguing that appellant had not made arrangements to accommodate Dr. Dickman's schedule or to compensate him for his compelled testimony. After hearing from the parties, the circuit court granted appellees' motion to quash, in part because appellant never filed an affidavit stating what Dr. Dickman's opinions would be. The court went on to reason:

> There is no Maryland case that really addresses this issue . . . . Dr. Dickman is an expert who has been retained by the defense to offer a defense standard of care opinion . . . . [I]t just wouldn't be a fair thing to simply compel Dr. Dickman to offer testimony in a Plaintiff's case in chief when the Plaintiffs . . . should secure their own witness to offer those opinions.

In so ruling, the circuit court stated that it could not "turn a blind eye and ignore" the fact that "[t]his matter has been set for trial for several years now" and, therefore, "was

surprised that [appellant was] attempting to call a defense expert in [her] case in chief." The court noted, however, that Dr. Dickman would remain available for cross-examination.

At trial, appellant abandoned her claim for medical negligence. Considering her remaining claim for lack of informed consent, she called Dr. Estes as an adverse witness. While appellant never formally tendered Dr. Estes as an expert witness, Dr. Estes testified, without objection, to the following: the nature of the risks of a cesarean section and a vaginal delivery when the mother has a history of shoulder dystocia, the probabilities of therapeutic success for both a cesarean section and a vaginal delivery, the frequency of the occurrence of particular risks, and the nature of available alternatives to treatment.

Specifically, Dr. Estes testified that she delivered appellant's first child in 2002, at which time there was no shoulder dystocia. She gave multiple reasons why she knew that there was no dystocia in 2002. When asked about a check mark on the delivery record suggesting a shoulder dystocia, Dr. Estes pointed out that a second check mark on the same form was in conflict. Dr. Estes also testified that appellant did not meet the criteria to be offered a cesarean delivery. After offering her medical knowledge about potential risks, Dr. Estes clarified that those risks and any recommendation for cesarean delivery would not apply to a patient like appellant.

At the close of appellant's case on September 18, 2015, upon learning that Dr. Dickman was ready to testify at the beginning of appellees' case that afternoon, appellant

renewed her request to call Dr. Dickman. After some discussion, the circuit court denied appellant's request, stating that it would not be "appropriate [to call] Dr. Dickman when he is not under [appellant's] subpoena, and the Court was led to believe that Dr. Estes was going to be the last witness."

Appellant rested her case.[5] Appellees then moved for judgment on the grounds that appellant failed to present the expert testimony necessary to sustain an informed consent case. Appellees further argued that even if Dr. Estes has been admitted as an expert, appellant did not establish the foundation for her informed consent claim at trial. Over appellant's objection, the circuit court granted appellees' motion and entered judgment in their favor, stating:

> For a complainant to establish a *prima facie* case for failure to obtain informed consent the Plaintiff must illustrate four factors. One, an extreme material risk which the physician must explain to the patient; two, the failure of the physician to inform the patient of the material risk; three, the physician knew or ought to have known of the material risk; and four, a causal connection between the lack of informed consent and the harm.
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> * * *
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> It's well established that expert testimony needs to be provided to establish the nature of the risks and the lack of informed consent . . . .
>
> Plaintiffs may rely on adverse expert testimony from the Defendant. In this case Dr. Estes was called, but Dr. Estes was never qualified as an expert. She never offered expert opinion testimony . . . . She was called to offer admissions, and admissions by party opponent are admissions of fact. They are not expert testimony.
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> * * *
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> [T]he Court has found at the close of evidence for the Plaintiffs, and taking the evidence in the light most favorable to them, that there is a deficiency in

[5] To be clear, Dr. Dickman did not testify during appellant's case; neither did he testify on behalf of appellees, as the circuit court granted appellees' motion for judgment at the close of appellant's case.

> the requirements that they need to present expert testimony to bolster their informed consent.
>
> I will even go one step further, I will say that of the requirements, the four requirements, . . . even if we accept Dr. Estes's testimony as expert opinion, there was no testimony whatsoever about the alternatives, specifically the alternative of a C-section, a Cesarean section being the best alternative under the circumstances.
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> So . . . even if I could find that that was, I don't feel that she has offered any testimony of one of the four requirements to show that there was a breach of duty on the informed consent.

This appeal followed.

Discussion

I. Motion for Judgment

Appellant first argues that the circuit court erred in finding that she failed to present the necessary expert testimony to survive a motion for judgment on an informed consent claim. Specifically, she contends that although Dr. Estes was not formally tendered as an expert witness, Dr. Estes's testimony, "which was expert in nature, was admitted without objection." Moreover, appellant asserts that Dr. Estes's testimony fulfilled the requirements set forth in *Sard v. Hardy*, 281 Md. 432 (1977), to support her informed consent claim.

In response, appellees argue that there was no error, because appellant failed to identify Dr. Estes as an expert witness before trial. Alternatively, appellees contend that, "[e]ven accepting Dr. Estes's testimony was expert testimony, it was still insufficient to sustain [appellant's] informed consent claim." We agree with appellees.

Under Md. Rule 2-519(a), "[a] party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party." When a motion for judgment is made in a case tried by a jury, "the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made." Md. Rule 2-519(b); *see also Cavacos v. Sarwar*, 313 Md. 248, 250 (1988). When a trial court grants a motion for judgment, we review the decision "to determine whether it was legally correct[.]" *Scapa Dryer Fabrics, Inc. v. Saville*, 418 Md. 496, 503 (2011) (citation omitted).

In *Sard*, the Court of Appeals stated that in cases of informed consent, "*expert testimony would be required* to establish the nature of the risks inherent in a particular treatment, the probabilities of therapeutic success, the frequency of the occurrence of particular risks, the nature of available alternatives to treatment and whether or not disclosure would be detrimental to a patient." 281 Md. at 448 (citations omitted) (emphasis added). As appellant acknowledges in her brief, "[f]or expert testimony to be admissible, . . . the witness must first qualify as an expert." (Citing Md. Rule 5-702). Indeed, the Court of Appeals has previously ruled that "a witness whose testimony could be admitted as expert testimony . . . must be qualified and received as an expert before the testimony may be admitted." *Ragland v. State*, 385 Md. 706, 720-25 (2005) (choosing to interpret Md. Rule 5-702 narrowly).

In this case, appellant never offered Dr. Estes as an expert witness. She never identified Dr. Estes as a potential expert in her answers to interrogatories, designation of

expert witnesses, or pretrial conference statement. While appellant was examining Dr. Estes at trial, the circuit court asked if Dr. Estes was "testifying as an expert," and appellant responded by saying: "[S]he is a party, Your Honor. *And I can try to qualify her as an expert*, if that's what the Court would require, but in this context, the standard is what a reasonable patient would want to know." (Emphasis added). Based upon this exchange, we agree with appellees that appellant understood that Dr. Estes had not been qualified to give expert testimony. Therefore, appellant failed to meet the baseline requirement of establishing an informed consent claim. *See Mitchell v. Montgomery Cnty.*, 88 Md. App. 542, 552 (1991) ("Before a witness may be asked a question which calls for expert testimony, the witness' qualifications must be proved and the witness proffered to the court and accepted by it as an expert in the relevant field.") (Quoting McLain, Maryland Evidence § 702.2 (1987)); *Blackwell v. Wyeth*, 408 Md. 575, 621 (2009) (reiterating that "[i]n order to determine whether a proposed witness is qualified to testify as an expert, the trial court must examine whether the witness has sufficient knowledge, skill, experience, training, or education pertinent to the subject of the testimony") (quoting *Deere v. State of Maryland*, 367 Md. 293, 304 (1999)).

Appellant asserts that even though there was no formal tender and acceptance of Dr. Estes as an expert witness, the circuit court should have still considered her testimony as "expert testimony" because appellees failed to lodge an objection. However, even if we assume that Dr. Estes's opinions were admissible as expert testimony, appellant's

claim would nonetheless fail because she did not establish a *prima facie* case for lack of informed consent.

Pursuant to the informed consent doctrine, "a physician is under a duty to make an adequate disclosure of substantial facts which would be material to the patient's decision." *Sard*, 281 Md. at 438 (citations and quotations omitted). "Simply stated, the doctrine of informed consent imposes on a physician, before he subjects his patient to medical treatment, the duty to explain the procedure to the patient and to warn him of any material risks or dangers inherent in or collateral to the therapy, so as to enable the patient to make an intelligent and informed choice about whether or not to undergo such treatment." *Id.* at 439 (citations omitted). In *Sard*, the Court of Appeals held that "the scope of the physician's duty to inform is to be measured by the materiality of the information to the decision of the patient." *Id.* at 444. According to the *Sard* Court, "[a] material risk is one which *a physician 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." *Id.* (emphasis added); *accord McQuitty v. Spangler*, 410 Md. 1, 19 (2009).

In this case, appellant failed to establish that a shoulder dystocia occurred in her first delivery, thereby relieving Dr. Estes of the duty to warn appellant of any material risks or dangers regarding the delivery of her second child. Neither Dr. Estes nor appellant recalled a shoulder dystocia occurring during her first delivery, and appellant testified that her second delivery was "a very different experience" compared to her first.

Moreover, even if we were to ignore the fact that the delivery summary for appellant's first child was not admitted into evidence, the information within that document did not clearly establish the occurrence of a shoulder dystocia. Although there was a check mark next to "shoulder dystocia," it was in direct conflict with a second check mark indicating "no observed abnormality." Without any indication that a shoulder dystocia occurred, and because appellant did not meet the criteria for a cesarean section, Dr. Estes had no duty to warn appellant of any material risks associated with a natural delivery.

For these reasons, the circuit court did not err in granting appellees' motion for judgment.

II. Subpoena

Next, appellant argues that the circuit court abused its discretion when it granted appellees' motion to quash her trial subpoena of Dr. Dickman. Appellant avers that she was not prohibited from calling her opponents' expert witness in her case, and because the subpoena was proper the court should not have quashed it. Appellant also contends that, at the very least, the circuit court should have granted her renewed request to call Dr. Dickman during trial.

In reviewing the circuit court's decisions to quash the trial subpoena and to deny appellant's oral motion to compel Dr. Dickman's testimony, we apply the abuse of discretion standard. *Forensic Advisors, Inc. v. Matrixx Initiatives, Inc.*, 170 Md. App. 520, 531 n.6 (2006) ("This Court applies the abuse of discretion standard when reviewing the circuit court's ruling on a motion to quash a subpoena . . . .") (citing *Prince George's*

Cnty. v. Hartley, 150 Md. App. 581, 586-87 (2003)); *see also Brown v. Daniel Realty Co.*, 409 Md. 565, 601 (2009) ("[T]he admissibility of evidence . . . is left to the sound discretion of the trial court, and absent a showing of abuse of that discretion, its rulings will not be disturbed on appeal.") (citation omitted). The Court of Appeals has stated that "[d]iscretionary trial court matters are 'much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred.'" *Sumpter v. Sumpter*, 436 Md. 74, 82 (2013) (quoting *Northwestern Nat'l Ins. Co. v. Samuel R. Rosoff, Ltd.*, 195 Md. 421, 436 (1950)).

Even when an appellate court finds an abuse of discretion, it "will not reverse a lower court judgment for harmless error: the complaining party must show prejudice as well as error." *Id.* (citation and emphasis omitted). Except for rare circumstances, "the burden . . . in civil cases is on the appealing party to show that an error caused prejudice." *Barksdale v. Wilkowsky*, 419 Md. 649, 660 (2011) (citations omitted). Furthermore, "the general rule is that a complainant who has proved error must show more than that prejudice was possible; she must show instead that it was probable." *Id.* at 662 (footnote and emphasis omitted).

"When weighing the probative value of proffered evidence against its potentially prejudicial nature, an abuse of discretion in the ruling may be found 'where no reasonable person would share the view taken by the trial judge.'" *Consol. Waste Indus., Inc. v. Std. Equip. Co.*, 421 Md. 210, 219 (2011) (quoting *Brown*, 409 Md. at 601). In other words,

"an abuse of discretion occurs when a decision is 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Id.* (quoting *King v. State*, 407 Md. 682, 711 (2009)).

In this case, appellees raise several challenges to appellant's argument. First, appellees contend that the circuit court properly quashed the subpoena because appellant asked Dr. Dickman to appear and testify at trial during a religious holiday, namely Rosh Hashanah. Second, appellees aver that appellant failed to disclose Dr. Dickman as an expert and never arranged to compensate him. Third, appellees note that the circuit court reasonably relied on representations of counsel, which were affirmed by subsequent affidavit.

After considering these arguments, we conclude that appellant's failure to include Dr. Dickman in her pretrial conference statement, standing alone, provided enough justification for the circuit court to grant appellees' motion to quash the subpoena. *See Eagle-Picher Indus., Inc. v. Balbos*, 84 Md. App. 10, 34 (1990), *aff'd in relevant part, rev'd in part*, 326 Md. 179 (1992) ("In light of the overwhelming public interest in ensuring fair and efficient adjudication of these [] cases, we hold that the trial court properly – and not arbitrarily – exercised its discretion in not allowing testimony by a witness whose name was not included in the pre-trial order.") (citation omitted). But, in addition, appellant failed to disclose Dr. Dickman during discovery and, at trial, waited until the end of the presentation of her case before informing the court that she intended to call Dr. Dickman. Because "[t]he trial court has broad discretion in fashioning a

remedy for the violation of discovery rules," *Lowery v. Smithsburg Emergency Med. Serv.*, 173 Md. App. 662, 678 (2007), it was within the circuit court's discretion to deny appellant's requests.

Even if there had been an abuse of discretion on the circuit court's part, we would nevertheless uphold its ruling because appellant did not show how she was prejudiced by the court's decision. In particular, to preserve her objection to the court's exclusion of Dr. Dickman's testimony, appellant must have shown "both prejudice and that 'the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered.'" *Peterson v. State*, 444 Md. 105, 125 (2015) (quoting Md. Rule 5-103(a)(2)). "Without a proffer, it is impossible for appellate courts to determine whether there was prejudicial error or not." *Univ. of Maryland Med. Sys. Corp. v. Waldt*, 411 Md. 207, 235 (2009) (citing *Merzbacher v. State*, 346 Md. 391, 416 (1997)).

At no time during the proceedings below did appellant proffer the substance of Dr. Dickman's testimony. Specifically, appellant presented nothing to support her vague claim that his deposition testimony was somehow "critical of Dr. Estes" or "bolster[ed] [appellant's] case." Instead, appellant merely stated that Dr. Dickman "gave deposition testimony that supported [her] theories in this case," and appellant argued, without any meaningful elaboration, that Dr. Dickman was "critical of Dr. Estes." As appellees correctly state, vague proffers of expert testimony, like the ones here, not only fail to show prejudice but also fail to preserve the issue for our review. Without a specific

substantive proffer on the record, we have no basis to presume that such evidence existed or that its admission would have changed the outcome of the trial.

Accordingly, we affirm the circuit court's judgment.

JUDGMENT OF THE CIRCUIT COURT FOR CALVERT COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.