

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2121

September Term, 2014

YVONNE SMITH, *et al.*

v.

THE CHIMES, INC., *et al.*

Eyler, Deborah S.,
Arthur,
Salmon James, P.
(Retired, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: January 5, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

An intellectually disabled woman gave a number of inconsistent explanations about how she had fallen and injured herself on a bus. Some of the explanations were consistent with the bus driver's negligence; some were not. The circuit court excluded her medical expert because he could not testify, to a reasonable degree of medical certainty, that the type of injuries that she suffered resulted from the defendants' allegedly culpable conduct, as opposed to some other cause. Because the exclusion of the expert prevented the plaintiff from proving the essential element of causation, the court then entered summary judgment against her. On the record in this case, we affirm.

FACTUAL AND PROCEDURAL HISTORY

A. Introduction

Appellant Antoinette Yvonne Smith is a 60-year-old woman with an intellectual disability. Since she was five years old, Ms. Smith has participated in programs, sponsored by appellee The Chimes, Inc. ("Chimes"), which provide employment for persons with developmental and intellectual disabilities. To transport employees like Ms. Smith to and from jobsites, Chimes contracts with companies such as appellee Veolia Transportation, Inc. ("Veolia").

While riding the Veolia bus to work on November 1, 2010, Ms. Smith broke her tibial plateau – the part of the tibia or shinbone that is located just below the knee. At some point well over a year after she suffered that injury, Ms. Smith fell down the stairs

at her mother's house. Ms. Smith claims that her knee, which was weakened from the first fall, gave way and caused her to fall a second time.¹

On September 10, 2013, after the second fall, Ms. Smith's sister, Sandra Stewart, filed suit on behalf of herself and Ms. Smith, naming Chimes and Veolia as defendants.² In January 2014, the plaintiffs amended the complaint to include Ms. Latundra Johnson, the Veolia bus driver, as an additional defendant.³

B. Ms. Smith's Allegations

Ms. Smith alleged that while she was traveling on the bus on the date of her first injury, November 10, 2010, a passenger named "Walter"⁴ began to touch her in an inappropriate and offensive manner. Ms. Smith claimed that, before that incident she had informed Chimes' employees and Ms. Johnson that Walter was frequently out of his seat, inappropriately touching her and other passengers.

¹ Oddly, none of the parties specified the date of the second fall. Ms. Smith alleged that it occurred "approximately eighteen months" after the first injury. In moving for summary judgment, Veolia said that the second fall occurred in "April 2013," which would be about 30 months after the first injury. The circuit court adopted the April 2013 date.

² While the parties originally dueled over whether Ms. Stewart was properly authorized to file suit on Ms. Smith's behalf, it no longer appears to be an issue on appeal.

³ In her deposition, Ms. Johnson stated that her name was actually "Latundra Johnson-Hemphill," but agreed that "Johnson" was acceptable. Because the parties have referred to Ms. Johnson-Hemphill as Ms. Johnson, we shall do the same.

⁴ Because "Walter" is not a party to this action, is accused of inappropriately touching Ms. Smith, and is one of Chimes' intellectually or developmentally disabled participants, we choose not to identify him by his full name.

Ms. Smith allegedly asked Walter to stop touching her and complained to the driver, Ms. Johnson. According to Ms. Smith's pleadings, Ms. Johnson ignored her. Walter allegedly continued to touch Ms. Smith inappropriately, and so Ms. Smith struck Walter. As a result, Walter allegedly shoved Ms. Smith to the ground, breaking her left knee. Ms. Smith claims to have requested medical assistance from Ms. Johnson, who allegedly ignored Ms. Smith and continued on to the destination. Ms. Smith's claims fit into three categories, based on the defendants and the injury implicated.

First, Ms. Smith brought claims against Veolia and Ms. Johnson regarding the first injury. Ms. Smith alleged that Ms. Johnson negligently failed to take measures to prevent Walter from injuring Ms. Smith despite knowledge of previous incidents, negligently failed to stop Walter once the altercation was in progress, and negligently ignored Ms. Smith's request for medical attention after the incident. Ms. Smith also alleged that Veolia had knowledge of Walter's dangerous nature and negligently did nothing, that Veolia negligently entrusted the bus to Ms. Johnson, and that Veolia was vicariously liable for the torts of its employee, Ms. Johnson.

Second, Ms. Smith brought claims against Chimes regarding the first injury. Ms. Smith alleged that she had repeatedly informed Chimes of Walter's behavior, but that Chimes had repeatedly and negligently ignored her, resulting in her foreseeable injury. Ms. Smith also appears to have alleged that Chimes owed Ms. Smith a non-delegable duty to protect her from foreseeable acts of other program participants, but that Chimes

failed to do so. Finally, Ms. Smith alleged that Veolia was Chimes' agent and thus that Chimes was vicariously liable for Veolia's torts.

Third, Ms. Smith brought claims against all of the defendants regarding the second injury, Ms. Smith's fall down the stairs. She alleged that her knee was so weakened by the first injury that many months later it gave way, causing her to fall down the stairs. The damages from that injury were included in the other claims, but required a causal link between the first and second fall.

C. Discovery

Discovery did not completely bear out Ms. Smith's allegations.

Ms. Smith's answers to interrogatories generally asserted that Chimes, Veolia, and Ms. Johnson were aware that Walter had harassed Ms. Smith in the past. According to the answers, it was "this plaintiff's understanding" that, during the bus ride, Walter was touching Ms. Smith, that Ms. Smith informed both Walter and Ms. Johnson that she did not appreciate the touching, that no one did anything to help Ms. Smith, that Walter pushed Ms. Smith to the floor, where she injured her leg, and that Ms. Johnson ignored Ms. Smith despite requests for help. Nonetheless, the answers to interrogatories were not signed by Ms. Smith, but by her sister; they were "not based solely on the knowledge of the executing party"; and the oath or affirmation did not assert that the signatory had personal knowledge of the truth of the answers, but only that they were true and correct to the best of her knowledge, information, and belief. *But see Zilichikhis v. Montgomery Cnty.*, 223 Md. App. 158, 180-81, *cert. denied*, 444 Md. 641 (2015) (answers to

interrogatories were insufficient to defeat summary judgment where they were not signed by the plaintiff, but by someone else on his behalf, and did not affirm that they were based on personal knowledge).

Ms. Smith's deposition testimony offered several inconsistent versions of events on the bus.

During her deposition, Ms. Smith testified that Walter approached her from the back of the bus and began touching her. She stated that, after telling Walter to stop, she struck him in the back. She also stated that she thought she "twisted her leg" "[b]y hitting" Walter. At another point, she denied that she had gotten out of her seat or fallen out of her seat, and she said that she did not know or remember whether she had (in the words of the questioner) "fall[en] onto the ground on the bus." At yet another point, she said that "[w]hen [she] got on the bus, [she] twisted [her] leg and . . . could not get up." She answered that, "yes," she had fallen while "stepping onto the bus that day" when the bus was at her mother's house. On the other hand, in response to a leading question from her former counsel (to which no one objected), she answered that, "yes," she had "also fall[en] on the bus that day and hurt [her]self." Although Ms. Smith never expressly testified that she fell because Walter pushed her, she did say that her Chimes case manager "didn't want to believe [her]," but instead took Walter's side by saying that "he did not push [her]."

In short, Ms. Smith's deposition testimony suggested several different ways in which she might have injured her knee, none of which clearly involved Walter pushing

her to the floor. She may have injured her knee when she twisted it while striking Walter. She may also have injured it when she fell while “stepping onto the bus” at her mother’s house. She may have injured it when she fell on the bus (even though she told defense counsel that she did not know or remember whether she had fallen). Finally, her statement about the case manager implies a complaint that Walter had pushed her and, perhaps, that she had fallen as a result.

At her deposition, Ms. Smith testified briefly about her second injury. She answered, “yes,” that she fell because her knee gave way and that she fell because her heel slipped while wearing heels after church.

D. The Initial Motions for Summary Judgment

After the completion of most of the discovery (except the depositions of the healthcare providers), the defendants moved for summary judgment. Among other things, the defendants contended that Ms. Smith needed, but did not have, expert testimony to link her second fall to the first. In addition, Chimes argued that it was not liable for the alleged torts of Veolia and Ms. Johnson, because, it said, they were independent contractors. The circuit court agreed with the defendants, entering summary judgment in favor of Chimes on all claims and in favor of Veolia and Ms. Johnson on the claims concerning the second fall.

After the entry of summary judgment, the only remaining issues related to the claims against Veolia and Ms. Johnson for the injuries that Ms. Smith suffered in the first fall.

E. Dr. Tepper

Ms. Smith's former counsel deposed her treating physician, Dr. Tepper, after the court entered summary judgment as to the claims against Chimes and the claims pertaining to the second fall. Dr. Tepper expressed the opinion, to a reasonable degree of medical certainty, that Ms. Smith suffered a tibial plateau fracture as a result of "the incident that's the subject of this litigation that occurred on November 1, 2010."

On cross-examination, Dr. Tepper acknowledged that he could not say exactly what that "incident" entailed, but only which injuries Ms. Smith suffered and whether a given scenario was consistent with Ms. Smith's injuries. Dr. Tepper testified that a fall was consistent with Ms. Smith's injuries, but that "twisting" her knee while striking Walter was not. Dr. Tepper also testified that he relied on notes made at the time of Ms. Smith's treatment to render an opinion that her injuries were caused by the incident on the bus, but that he could not testify as to what happened to Ms. Smith, because he was not present.

Dr. Tepper expressed no opinion about whether Ms. Smith's injuries were more likely than not to have been caused by being pushed to the floor, as opposed (for example) to falling while "stepping onto the bus" at her mother's house. In fact, Dr. Tepper expressed no opinion about whether being pushed would, more likely than not, have caused the injury at all. He opined that Ms. Smith suffered her injuries in a fall, but had no opinion about what type or manner of fall would most likely have caused the injuries.

F. Exclusion of Dr. Tepper and Second Motion for Summary Judgment

Veolia moved *in limine* to exclude Dr. Tepper, arguing that his deposition testimony did not establish that Ms. Smith's injuries resulted from any altercation with Walter – *i.e.*, that Dr. Tepper's testimony did not establish that Ms. Smith's injuries resulted from the defendants' negligence, as opposed to some other cause. The circuit court granted the motion.

Once Dr. Tepper's testimony was no longer part of the case, Veolia moved for summary judgment on the remaining claims. The court, even accounting for Dr. Tepper's now-excluded testimony, concluded that Ms. Smith had failed to present any evidence of a causal link between her broken knee and any push by Walter. Accordingly, the court granted summary judgment as to the remaining claims.

This timely appeal followed.

QUESTIONS PRESENTED

Ms. Smith's appeal presents the following questions, which we have rephrased and reordered:

1. Did the trial court err or abuse its discretion in granting the motion *in limine* to exclude Dr. Tepper's testimony?
2. Did the trial court commit reversible error in granting Chimes' motion for summary judgment?

3. Did the trial court commit reversible error when it ruled that expert testimony was required to prove a causal connection between Ms. Smith's fall on the bus and her subsequent fall?⁵

In response to the first question, we conclude that the court did not abuse its discretion in excluding Dr. Tepper. In light of that response, it is unnecessary to address the other questions.

DISCUSSION

Ms. Smith seems to concede that she needed expert testimony to establish a causal connection between the defendants' alleged negligence and her damages and to prove how her injuries in the first fall occurred. *See* Brief at 25 ("As a consequence of ruling out Appellants' expert's testimony, it was not possible to go forward with the trial

⁵ Ms. Smith phrased her questions as follows:

1. Did the trial court commit reversible error in granting Appellee Chimes' motion for summary judgment, where Chimes owed a duty to protect Appellant Smith from Mr. Scott when providing transportation to its facility by way of a contractor, and it had notice that Mr. Scott was a threat or danger to Ms. Smith on both the day of the occurrence, November 1, 2010, and prior to November 1, 2010?
2. Did the trial court commit reversible error in granting Appellees Veolia's and Johnson's motion *in limine* to preclude Appellants' medical expert from testifying as to the issue of causation, when the treating physician had testified during discovery that the injury was consistent with the fall described to him by Appellant Smith, which is the occasion given rise to this litigation?
3. Did the trial court commit reversible error when it ruled that expert testimony was required to prove a causal connection between Appellant Smith's fall on the bus and a subsequent fall suffered by Appellant when the same knee, as a result of the injury suffered on the bus, gave way and she fell down the stairs reinjuring the same leg she previously injured?

because Appellant would be unable to prove an essential element of [her] case”). Consequently, we focus on the propriety of the decision to exclude Dr. Tepper’s testimony.

“[T]he admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal.” *Bryant v. State*, 393 Md. 196, 203 (2006) (quotation marks omitted). We do not reverse the “circuit court’s decision to exclude a witness” unless “there is a clear abuse of discretion.” *Roy v. Dackman*, 445 Md. 23, 39 (2015). A “ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling.” *Nash v. State*, 439 Md. 53, 67, *cert. denied*, 135 S. Ct. 284 (2014) (quoting *North v. North*, 102 Md. App. 1, 14 (1994)) (quotation marks omitted). Rather, we reverse only when the circuit court’s decision is “well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.” *Nash*, 439 Md. at 67 (quoting *Gray v. State*, 388 Md. 366, 383 (2005)) (quotation marks omitted).

In this case, Ms. Smith’s confusing deposition testimony suggested a number of different ways in which she may have suffered the first injury. Some, such as twisting her knee when she struck Walter or falling after being pushed by Walter (if her deposition testimony can fairly be read to say that that actually occurred), are or may be consistent with the defendants’ negligence. Others, such as falling while stepping onto the bus at her mother’s house or falling on her own, are not.

Because of the several putative causes of Ms. Smith's injury, it was incumbent upon her to produce expert testimony that the injuries had, more likely than not, resulted from the defendants' negligence, and not from some other cause. *See S.B. Thomas, Inc. v. Thompson*, 114 Md. App. 357, 382 (1997). Medical causation is often a complicated medical question that requires expert proof (*see id.*), and the issue of causation was certainly not within the common knowledge of an ordinary layperson in this case, where Ms. Smith offered multiple explanations of how she had been injured, some of which involved no culpable conduct on any defendant's part.

Dr. Tepper, however, did not opine as to the specific cause of Ms. Smith's injury. In particular, Dr. Tepper did not opine that the injury probably resulted from a negligent act or omission by one of the defendants, such as failing to prevent or stop an altercation between Walter and Ms. Smith. To the contrary, from Dr. Tepper's testimony, it was at least as likely that the injury did not result from any such negligent act or omission.

In fact, Dr. Tepper testified that twisting while turning to strike Walter during an altercation was "not consistent" with the tibia plateau fracture that Ms. Smith suffered. Moreover, Dr. Tepper testified that a "more likely" cause of the fracture was that Ms. Smith fell while stepping on the bus. If anything, therefore, Dr. Tepper's testimony tends to suggest that Ms. Smith's injury may not have resulted from any negligent act or omission. The court did not abuse its discretion in excluding his testimony.⁶

⁶ Ms. Smith points to her answers to interrogatories, which state that Walter pushed her and that she fell to the floor of the bus and injured her leg. While Ms. Smith may not have needed expert proof of causation if she had *admissible* evidence (cont'd.)

The exclusion of Dr. Tepper prevented Ms. Smith from establishing any defendant’s liability for the first injury. Yet if Veolia and Ms. Johnson were not liable for the first incident, no defendant could be liable for the second incident on the only theory advanced: that Ms. Smith’s knee was so weakened by the first incident that it gave way and she fell. Likewise, if Veolia and Ms. Johnson were not liable for any of Ms. Smith’s injuries, it is irrelevant whether Veolia was Chimes’ agent, for which Chimes would be vicariously liable, or an independent contractor, for which Chimes would not. For those reasons, we need not consider whether the circuit court erred in the pretrial rulings in which it entered summary judgment in favor of all defendants on the claims relating to the second fall and entered summary judgment in favor of Chimes on all claims.

to the effect that, immediately after Walter pushed her, she experienced a manifestation of trauma in her leg (*see S.B. Thomas*, 114 Md. App. at 381-82), her answers to interrogatories were not admissible evidence. “[I]nterrogatory answers are insufficient to generate a genuine issue of fact if those answers are ‘made to the best of [the witness’s] information, knowledge and belief,’” as Ms. Smith’s were, and not “‘on the basis of personal knowledge.’” *Zilichikhis*, 223 Md. App. at 180 (quoting *104 W. Washington St. II Corp. v. City of Hagerstown*, 173 Md. App. 553, 573 (2007)) (internal quotation marks omitted). Furthermore, Ms. Smith did not personally affirm the accuracy of her answers – her sister did. Consequently, “‘the document is not sufficient to generate any genuine issues of material fact.’” *Zilichikhis*, 223 Md. App. at 181 (quoting *Cottman v. Cottman*, 56 Md. App. 413, 430 (1983)). In short, in the circumstances of this case, the answers to interrogatories could not take the place of the required medical testimony on causation.

CONCLUSION

Because Ms. Smith did not put sufficient admissible evidence into the record to establish a likely causal connection between her injuries and a negligent act or omission, we affirm.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE CITY AFFIRMED.
APPELLANT TO PAY COSTS.**