UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 260

September Term, 2016

ESTATE OF CLARENCE MATTISON

v.

VEOLIA TRANSPORTATION SERVICES, INC., ET AL.

Meredith,
Beachley,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: July 19, 2017

Clarence Mattison was a double amputee who required the use of a wheelchair for mobility. In September of 2013, Mattison used Veolia Transportation Services ("Veolia"), appellee, to transport him home from a party at his sister's house. Kareem Hassan, appellee, is a driver for Veolia and was assigned to pick up Mattison. However, when Hassan arrived and attempted to load Mattison into his transport bus, Mattison's wheelchair rolled backwards and fell off the bus's lift. The fall sent Mattison crashing to the ground and broke his neck. Mattison spent the next few months in the hospital before passing away from his injuries on November 13, 2013.

In November 2014, the Estate for Clarence Mattison, appellant, filed suit against Hassan and Veolia in the Circuit Court for Baltimore City. The case proceeded to a jury trial on March 14, 2016. At the conclusion of the trial, the jury found that Mattison's injuries were not the result of Hassan's negligence.

Appellant appealed, and now presents two questions for our review:

1. Did the trial court abuse its discretion by striking the testimony of appellant's expert?

2. Did the trial court err by barring appellant from introducing evidence that Veolia was independently negligent for not having guidelines in place for dealing with intoxicated passengers?

For the following reasons, we answer no to appellant's questions and affirm the judgment of the circuit court.

BACKGROUND

Clarence Mattison was a double amputee who had lost both of his legs to diabetes. In order to get around Mattison used a manually operated wheelchair.

On September 1, 2013, Mattison attended a cookout at his sister's house in Glen Burnie. Mattison pre-arranged to be picked up from the party by Veolia, a company that provides transportation services to disabled individuals. The driver for Veolia, Hassan, arrived with the transport bus at 8:45 p.m. By the time Hassan had arrived, Mattison was intoxicated. Hassan rolled Mattison onto the bus's lift with the small, front wheels of the wheelchair facing the entry to the bus, and the larger back wheels facing towards the street. According to Hassan, he locked Mattison's wheelchair brakes and told him to keep his hands on the safety bars. Hassan then started raising the lift to floor level, but had to stop the loading process because the wheelchair was rocking back and forth. When Hassan left the loading area to help Mattison board the bus, he claimed that Mattison's hands were not holding on to the safety bars, but rather down by the wheelchair locks. Mattison's wheelchair started to roll backwards and fell off the lift onto the concrete six feet below. The fall caused Mattison to break his neck.

Mattison was transferred to University of Maryland Medical Center and was placed in the ICU for approximately two months. On October 28, 2013, he was transferred to Kernan Hospital for rehabilitation. Mattison passed away from his injuries on November 13, 2013.

On November 12, 2014, appellant filed suit against appellees in the Circuit Court for Baltimore City. Prior to trial, appellees filed two motions in limine. In the first motion, appellees requested, among other things, an order from the court precluding appellant from introducing any evidence regarding "whether Veolia had in place

guidelines and/or protocol for dealing with intoxicated passengers or that Veolia failed to properly train [ ] Hassan with regard to identifying or dealing with intoxicated passengers." In the second motion in limine, appellees asked the court to "Preclude [Appellant's] Expert and [Appellant] from Offering Evidence and/or Testifying as to the Standard of Care for Transporting Intoxicated Passengers."

The trial was set to begin on March 14, 2016. Prior to the start of the trial, the court held a hearing on the motions in limine. As to the first motion, the court found that the only claim against Veolia in appellant's complaint sounded in *respondeat superior*, and was not a direct claim against Veolia. Accordingly, the court excluded "any evidence with respect to the guidelines for dealing with intoxicated persons and how that may have resulted or proved that Veolia was negligent in this matter." The court denied appellees' second motion in limine, ruling that appellant's expert would be allowed to testify about transporting intoxicated passengers. However, the court noted that it was not sure if this was an appropriate area for an expert, because the average juror might "not need expert testimony to provide an opinion as to assisting somebody to get on a vehicle when they're intoxicated." The court added that it "may revisit that issue depending on how the testimony plays out."

Following those rulings, the case proceeded to a jury trial. During the trial, appellant's expert, Carmen Daecher, testified about the standard of care for transporting intoxicated passengers. After his testimony, appellees asked for Daecher's testimony to be stricken on the grounds that he was not qualified to testify as a paratransit expert and

that his testimony lacked a sufficient basis for an opinion. The court found that Daecher was qualified to be an expert, but agreed with appellees that he had no basis for his opinions and struck his entire testimony.

At the conclusion of the trial, the jury found in favor of appellees on the issue of liability. On April 7, 2016, appellant filed its notice of appeal.

DISCUSSION

I. Striking of Expert Testimony

> The admissibility of expert testimony is a matter largely within the discretion of the trial court and its action will seldom constitute a ground for reversal. It is well settled in this State, however, that the trial court's determination is reviewable on appeal and may be reversed if it is founded on an error of law or some serious mistake, or if the trial court clearly abused its discretion.

Rite Aid Corp. v. Levy-Gray, 162 Md. App. 673, 708 (2006) (Citation omitted).

Before allowing expert testimony, a trial court must make the following determinations: "(1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) *whether a sufficient factual basis exists to support the expert testimony*." Md. Rule 5-702 (Emphasis added). At issue in this appeal is the third factor, sufficient factual basis. "An expert's opinion testimony must be based on a[n] adequate factual basis so that it does not amount to conjecture, speculation, or incompetent evidence." *Giant Food, Inc. v. Booker*, 152 Md. App. 166, 182-83 (2003) (Internal quotation marks omitted). "[S]imply because a witness has been tendered and qualified

as an expert in a particular occupation or profession, it does not follow that the expert may render an unbridled opinion, which does not otherwise comport with Md. Rule 5-702." *Id.* at 182. "[E]xperts cannot simply hazard guesses, however educated, based on their credentials." *Porter Hayden Co. v. Wyche*, 128 Md. App. 382, 391 (1999).

In the instant case, the court found that appellant's expert, Daecher, was qualified as an expert, but lacked a sufficient factual basis for his opinions. Appellant contends that Daecher did have a sufficient basis for his opinion. Appellant also argues that appellees did not preserve their objection to Daecher's testimony, nor did they timely move to strike.

A. Insufficient Basis for Expert Opinion

The court accepted Daecher as an expert in the field of transportation safety and as a transportation specialist. He then testified that there were several breaches of care by Hassan. The first breach was that "Hassan failed to make proper decisions at the time that he determined that Mattison . . . reeked of alcohol. He should have made decisions in terms of how to handle a unique or an unusual situation." The second breach was that

> when [Hassan] loaded [ ] Mattison onto the lift he loaded him by pushing him onto the lift so that [ ] Mattison was facing the side of the bus. It would have been in accordance with the manufacturer's recommendation and in accordance with training . . . to back a person onto the lift so that their back is against or pointing to the face of the bus.

The third breach was that "Hassan failed to communicate appropriately throughout the process of that lift and before he departed to go into the bus to assist Mr. Mattison."

At the conclusion of Daecher's testimony, appellees' counsel moved to strike his testimony. Counsel argued that Daecher lacked both the qualification and basis for his opinions. Appellees' counsel pointed out that for each of his three opinions, Daecher was asked for the basis of his opinion. Each time, Daecher answered, "The procedures as I know them to be." Appellees' counsel argued that Daecher was "unable to point to any literature to support his position that a driver should stop an intoxicated passenger from having traveled or take additional measures." Counsel argued that

> [T]here's nothing from an expert's respective [sic] that he's done. . . . He's just arguing their positions in this case freely saying I think he should have done this. He should have done that. . . . But there's absolutely nothing anywhere in the record to support that. There's nothing he can point to other than well, their procedures as I know them to be.

The court initially denied appellees' motion to strike Daecher's testimony. However, after a recess for lunch, the court informed the parties that it had researched the issue and decided to revisit it. The court then proceeded to summarize eleven cases that dealt with the issue of sufficient basis for an expert opinion. After going through those cases, the court stated the following:

> And in this case before the Court I do find that it's very similar in that the statements made, the opinions provided by Mr. Daecher were simply [conclusory]. The Court finds that his testimony was wholly lacking in support for his opinions. It was a pure "because I said so" opinion. He cites no—and I'm not saying he needs to cite a statute or a rule but he cites nothing, no statute, no rule, study or even any sort of example or anything from his own experience in the field over the years that he's been in the field, or any observation at all to support his opinions.

The court then concluded that Daecher "wholly lacks a sufficient basis for his [conclusory] opinions," and granted the motion to strike his entire testimony.

We hold that the court's decision here was well-reasoned and in accordance with the law on expert testimony. The court cited and summarized eleven cases on the subject before making its ruling. Of particular relevance among those cases was *Beatty v. Trailmaster*, 330 Md. 726 (1993).

> In *Beatty* [ ], the Court of Appeals affirmed a summary judgment entered against a plaintiff who proffered the testimony of a qualified expert who could offer no "scientific evidence . . . [or] sound data to buttress his opinion." In that case, the expert had in essence furnished a "because I say so" explanation for his conclusion that a device installed on a motor vehicle was "unsafe." The *Beatty* Court rejected that explanation on the ground that "[o]ur cases hold that 'an expert's opinion is of no greater probative value than the soundness of his reasons given therefor will warrant.'"

Wood v. Toyota Motor Corp., 134 Md. App. 512, 525 (2000) (Citations omitted).

The trial court compared *Beatty* to the instant case:

> So much like the wheelchair facing inward or outward issue in compliance with federal reg, other than Mr. Daecher just saying that's his opinion that that's what it is that it's and perhaps a better practice which isn't standard of care, the Court finds it's [conclusory] and not sufficient.

Beatty requires that we affirm the trial court's decision to exclude the opinion at issue in this case.

The issues with respect to Daecher's testimony became apparent during cross-examination. Daecher admitted that there were no literature, policies, or procedures that specifically addressed what a driver should do with an intoxicated passenger. Daecher

also admitted that there was nothing concerning intoxicated passengers in Veolia's policies and procedures or in the Americans with Disabilities Act ("ADA"). In particular, there was nothing in the regulations providing that a driver should deny transportation to an intoxicated passenger. Moreover, under the ADA, the only situation where a driver could refuse transportation is if the passenger presented an imminent threat to safety. Daecher testified that Mattison presented an imminent threat to safety based on Hassan's testimony that he was angry and irritated. However, when presented with Hassan's deposition transcript, Daecher admitted that he could find no evidence of this in Hassan's statements. Daecher also testified that he was not aware of any policy or procedure from any paratransit company in the country that had provisions about how to deal with intoxicated passengers.

Daecher also opined that Hassan breached the standard of care when he loaded Mattison in an in-board position (facing the bus), because it was the "less appropriate" direction. On cross-examination, Daecher admitted that both federal regulations and the operating manual for the lift itself allow for loading wheelchairs both in-board and outboard facing. Daecher went on to concede that

> In every training that you'll find and the operators manual, you know, the standard training and the industry training specifically says because of what the ADA allows that look, you know**, passengers may board facing inward or outward**. But again, the training and the manuals recommend the preferred way because of what we know to be issues associated with the operation of the lift.

(Emphasis added).

Daecher had also testified that Hassan failed to adequately communicate with Mattison. On cross-examination, Daecher agreed that Hassan had told Mattison to keep his hands on the safety bars and that Hassan was going to go into the bus and roll him inside. When asked if this was the type of communication required, Daecher answered, "Well, sort of except this doesn't say, 'Mr. Mattison, continue to hold onto those safety bars, please, while I go in there.'" Again, Daecher did not cite to any statute, rule, or policy that required extra communication from Hassan when dealing with intoxicated passengers.

Like the *Beatty* case, the expert's opinions amounted to nothing more than "because I say so" explanations. Daecher could not cite to any statute, rule, study or example to support his conclusions. Accordingly, the court did not abuse its discretion in striking Daecher's entire testimony.

B. Objection to Expert Testimony

Alternatively, appellant argues that appellees did not properly object to the testimony. Appellant argues that appellees only asked for a continuing objection on Mr. Daecher's qualifications; and therefore, did not preserve any objection aimed at the basis of his opinion.

Md. Rule 2-517(b) provides that:

> At the request of a party or on its own initiative, the court may grant a continuing objection to a line of questions by an opposing party. For purposes of review by the trial court or on appeal, the continuing objection is effective only as to questions clearly within its scope.

As discussed above, prior to trial, appellees filed a motion in limine to preclude Daecher's testimony on the grounds that he was not qualified as an expert and did not have a sufficient basis for his opinions. Although the court denied the motion, it stated that it might revisit the issue during the trial. When appellant offered Daecher as an expert at trial, appellees' counsel objected. When Daecher began testifying about breaches in the standard of care, appellees' counsel objected again. The following colloquy then occurred:

> The Court: Basis for your objection?
>
> [Appellees' Counsel]: This guy is opining on the ultimate issues in this case, **based on what?** He is just using I believe it is more likely so than not that he breached the standard of care and that was the cause of this accident. He can't do that. Maybe within his field of expertise which I don't agree that applies here, but he can't just be asked, do you find it is more likely so than not that these breaches caused the injuries in this case.
>
> The Court: He didn't ask him more or likely. He said to a reasonable degree of probability in his field of expertise.
>
> [Appellees' Counsel]: He didn't say in his field of expertise. He did not say that.
>
> The Court: So if he rephrases it in your field of expertise?
>
> [Appellees' Counsel]: I'm still going to note an objection. **I don't want to interrupt, but if I can get a continuing objection to any opinion from him.** I don't want to interrupt the examination.

The Court:	Well, what opinions would he be—I'll say hypothetically that you agree he's qualified, what opinion would he offer?
[Appellees' Counsel]:	Opinion? I guess, standard of care, what the—
The Court:	And whether it was breached.
[Appellees' Counsel]:	**What the industry standard is. Well, whether it's breached, if there's a foundation, you know.**
The Court:	I mean, any medical malpractice case that you would see they say the doctor breached the standard of care and this is how.
[Appellees' Counsel]:	Okay.
The Court:	This is by analogy here's the standard of care and it was breached.
[Appellant's counsel]:	That's what I'm doing.
[Appellees' counsel]:	**Well, if I can get a continuing objection to his testimony. I don't think he's qualified to render those opinions at all.**
The Court:	Well, that objection is on the record.
[Appellees' Counsel]:	It's reserved. Okay.

(Emphasis added).

Appellees objected to Daecher as an expert both in pre-trial motions in limine and during his testimony at trial. In both instances, appellees' counsel mentioned lack of basis as one of the reasons why the expert testimony should have been precluded. Moreover, when appellees' counsel raised the issue at trial, the court granted a continuing

objection. The issue of the expert's basis for his opinion was clearly within the scope of this continuing objection; therefore, it was properly preserved.

C. Timely Motion to Strike Expert Testimony

Appellant contends that appellees' motion to strike Daecher's testimony was untimely, because it needed to be made immediately after Daecher answered any questions. Appellant attempts to analogize this case to *Baltimore & O.R. Co. v. Plews*, 262 Md. 442, 470 (1971), where the Court held that appellant was "deemed to have consented to the introduction of the testimony and the subsequent motion to strike may be denied by the trial court because it neither objected at the time the question was asked nor did it move to strike immediately after the answer." However, as discussed *supra*, appellees in the instant case objected to this evidence repeatedly, and the court granted a continuing objection to the expert's testimony. Furthermore, as appellees have argued, the lack of a proper basis for Daecher's testimony was not highlighted until the cross-examination. Maryland courts have permitted the striking of expert testimony in similar situations. *See Franch v. Ankney*, 341 Md. 350, 364-65 (1996) (holding that the trial court properly struck expert testimony after it had been presented to the jury when it became clear that the testimony was based on an incorrect interpretation of the law).

II. Exclusion of Evidence on Guidelines for Intoxicated Passengers

> Appellate review of a trial court ruling on the admissibility of evidence often is said to be based on the standard that such a ruling is left to the sound discretion of the trial court, so that absent a showing of abuse of that discretion, its ruling will not be disturbed on appeal. Application of that standard, however, depends on whether the trial judge's ruling under review was based

> on a discretionary weighing of relevance in relation to other factors or on a pure conclusion of law. When the trial judge's ruling involves a weighing, we generally apply the more deferential abuse of discretion standard. On the other hand, when the trial judge's ruling involves a pure legal question, we generally review the trial court's ruling *de novo.*

Bern-Shaw Ltd. P'ship v. Mayor of Baltimore, 377 Md. 277, 291 (2003) (Citations and internal quotation marks omitted).

Prior to trial, the court granted appellees' motion in limine excluding "any evidence with respect to the guidelines for dealing with intoxicated persons and how that may have resulted or proved that Veolia was negligent in this matter." The court based its ruling on the fact that appellant did not make any direct claims of negligence against Veolia in its complaint; therefore, appellant could not make an independent claim of negligence against Veolia at trial.

Appellant argues that its complaint did provide sufficient notice on this issue, and that the lack of an alcohol policy was addressed throughout the discovery process. The importance of pleading is well-established in Maryland.

> Of the necessities for the prosecution of a successful lawsuit, **none is more important than the pleading**. It is the first, and sometime the last, opportunity a plaintiff has to make his or her case. Although Maryland abandoned the formalities of common law pleading long ago, it is still a fair comment to say that pleading plays four distinct roles in our system of jurisprudence. It (1) provides notice to the parties as to the nature of the claim or defense; (2) states the facts upon which the claim or defense allegedly exists; (3) defines the boundaries of litigation; and (4) provides for the speedy resolution of frivolous claims and defenses.

Scott v. Jenkins, 345 Md. 21, 27-28 (1997) (Emphasis added). "[A]ny ambiguity or

uncertainty in the allegations bearing on whether the complaint states a cause of action must be construed against the pleader." *Alleco Inc. v. Harry & Jeanette Weinberg Found., Inc.*, 340 Md. 176, 193 (1995) (Citation and internal quotation marks omitted).

The sole claim against Veolia in appellee's complaint was stated in Paragraph 16 of the Complaint. It asserted the following:

> At all times relevant hereto, Defendant Hassan was operating the bus and conducting the passenger loading process on that date and time of the incident as the agent, servant and/or employee of Defendant Veolia and was further acting in the course of his employment with Defendant Veolia. Accordingly, under the doctrine of *respondeat superior*, Defendant Veolia is liable for all damages arising out of Defendant Hassan's . . . negligent conduct.

It is clear from the complaint that the sole basis for appellant's complaint against Veolia was vicarious liability. As appellees have argued, the complaint "did not set forth any facts or arguments that appellee Veolia was independently negligent for not having policies or procedures in place regarding the handling of intoxicated passengers." Furthermore, the complaint makes no mention of policies or procedures, nor does it even mention the intoxication of Mattison.

Appellant tries to make the argument that this was covered under Paragraph 13 of the complaint. Paragraph 13 reads as follows:

> That Defendants owed a duty of care to the Plaintiff to operate Defendant Veolia's bus and to perform the loading process in a careful and prudent fashion, and breached this duty by failing to operate this vehicle and perform the loading process in a careful and prudent fashion.

Appellant is correct that this part of the complaint referenced both defendants,

Hassan and Veolia, but it still makes no reference to guidelines. More specifically, it mentions nothing about guidelines for intoxicated passengers. Appellant's complaint only alleged liability for Veolia under the doctrine of *respondeat superior*. Therefore, the court did not abuse its discretion when it refused to allow any evidence that would make a direct claim of negligence against Veolia.

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