UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2157

September Term, 2013

UPPER CHESAPEAKE HEALTH CENTER, INC.

v.

FRANK GARGIULO, et al.

Meredith,
Wright,
Hotten,

JJ.

Opinion by Meredith, J.

Filed: June 22, 2015

This appeal arises out of a wrongful death and survival action brought against Upper Chesapeake Medical Center ("appellant" and "cross-appellee") on behalf of the surviving husband and sons of the decedent, Ann Beverly Gargiulo ("Mrs. Gargiulo"), and also on behalf of the personal representative of her estate (collectively "appellees" and "cross-appellants"). After a multi-day jury trial in the Circuit Court for Harford County, the jury returned a verdict in favor of appellees. Judgment was entered in favor of appellees following post verdict motions. This appeal and cross-appeal followed.

QUESTIONS PRESENTED

Appellant presents the following questions for our review:

> I. Did the trial court abuse its discretion by admitting evidence of informed consent in a medical malpractice case with no separate cause of action for informed consent pled?
>
> II. Did the trial court commit reversible error by submitting the estate's claim for conscious pain and suffering to the jury despite no evidence that Ann Beverly Gargiulo suffered pain before her death?
>
> III. Did the trial court commit reversible error by instructing the jury on the issue of spoliation where the prerequisites for this instruction were not satisfied or supported by the evidence?
>
> IV. Did the trial court commit reversible error in permitting the jury to consider the life expectancy opinions of Dr. Robert Stoltz, despite that the expert opinion did not comport with Maryland Rule 5-702?

Appellees, as cross-appellants, present three additional questions for our review by way of cross-appeal:

> [V.] Did the Circuit Court for Baltimore City err when it ruled that venue was improper in Baltimore City and transferred the case to the Circuit Court for Harford County?

[VI.] Did the circuit court err when it granted summary judgment on July 17, 2013, in favor of Nnenna Uchendu, M.D., George Isckarus, M.D., and Lopa Basu, D.O.?

[VII.] Did the circuit court err when it excluded certain of Ms. Gargiulo's medical bills from evidence?

We answer appellant's questions one, three, and four in the negative. With respect to appellant's question two, because we conclude that the circuit court erroneously submitted the estate's claim for conscious pain and suffering to the jury, we will vacate the judgment in favor of the estate for noneconomic damages, but otherwise affirm the judgment in favor of the estate. We answer each of the questions posed by the appellees/cross-appellants in the negative.

BACKGROUND

On February 12, 2010, Mrs. Gargiulo arrived at the emergency room at Upper Chesapeake Health Center. She was suffering from painful and infected decubitus ulcers on her lower buttocks. The ulcers were a complication of multiple sclerosis, which had left Mrs. Gargiulo essentially bedridden for several years. In addition to multiple sclerosis, Mrs. Gargiulo also suffered from a number of other serious health problems, including osteomyelitis, loss of bladder control, and chronic obstructive pulmonary disorder.

Mrs. Gargiulo was admitted to Upper Chesapeake Health Center for treatment of the ulcers and remained hospitalized for approximately two and a half weeks. Mrs. Gargiulo was initially treated with antibiotics and narcotic painkillers. Mrs. Gargiulo's condition deteriorated during the hospitalization. On the afternoon of February 26, 2010, the hospital informed her family that the prognosis was poor and that she was a candidate for hospice

care. Later that day, Mrs. Gargiulo's doctors initiated hospice care by discontinuing her antibiotics and administering increased doses of painkillers. Mrs. Gargiulo's condition deteriorated further, and she died on March 1, 2010.

In September 2011, appellees filed a wrongful death and survival action against appellant in the Circuit Court for Baltimore City, alleging that the hospital breached the applicable standard of care in the administration of pain medications to Mrs. Gargiulo. Appellees alleged that the rapid upward increase of pain medications administered to Mrs. Gargiouo was not only in violation of the standard of care, but also caused her death on March 1, 2010.

In March 2012, appellant filed a motion to transfer the case to Harford County, arguing that venue was improper in Baltimore City. The Circuit Court for Baltimore City granted the motion, holding that venue was improper in Baltimore City, and, in the alternative, that the case should be transferred on grounds of *forum non conveniens.*

In April 2013, appellees filed a second complaint against the appellant and three physicians employed by the appellant: Drs. Nnenna Uchendu, George Isckarus, and Lopa Basu. The second complaint made the same allegations as had been made in the original complaint, except, unlike the first compliant, it specifically identified the three individual physicians as the persons responsible for the alleged malpractice. Appellees filed a motion to consolidate the second complaint for trial with the first complaint. The three individually named physicians in the second complaint filed a motion to dismiss, or in the alternative for summary judgment, asserting that the claims against them were barred by the applicable

statute of limitations and that the appellees had failed to satisfy the certificate and report requirement of the Health Care Malpractice Claims Act. The circuit court held that the claims against the three individual physicians were barred by the statute of limitations, dismissed them from the case as party defendants, and ruled that the case would proceed to trial against Upper Chesapeake Health Center only.

Prior to trial, appellant filed a motion in limine to preclude appellees from presenting evidence regarding their contention that they never agreed to a change of Mrs. Gargiulo's treatment plan to hospice care. Appellees responded, arguing that evidence as to their lack of consent to hospice care was necessary to establish the applicable standard of care which they alleged had been breached. The circuit court denied appellant's motion in limine.

The trial took place between July 29 and August 7, 2013. During opening statement, appellees' counsel remarked: "[The treatment given to Mrs. Gargiulo on February 26] is all consistent with this hospice care the hospital is proposing which the family has never okayed and which Beverly is incapable of commenting on." Appellees' counsel also stated: "There is no indication that Dr. Basu spoke, frankly, to anyone about what is going to happen going forward. . . . Rather, they simply moved forward with this whole hospice care phenomenon, doubled the [opiates], took her off the antibiotics." During direct examination Mrs. Gargiulo's husband, in response to the question "Did you ever, during the course of this meeting, indicate your approval or willingness to have your wife's situation converted to hospice?," he testified: "No way. Never." In response to the question "[D]id you tell anyone from the hospital [to] proceed with hospice or words to that effect?," Mr. Gargiulo

responded: "No, I didn't." Mr. Gargiulo also testified that he never signed any forms authorizing the goal of the hospitalization be changed to hospice care.

Appellees also called Dr. Robert Stoltz as an expert witness, and he opined that, absent appellant's negligence, Mrs. Gargiulo likely would have lived an additional 15 years. Dr. Stoltz testified that his opinion was based on his experience treating patients with similar medical conditions as Mrs. Gargiulo's, and based upon his knowledge of the typical decrease in life expectancy that occurs as a result of multiple sclerosis. After Dr. Stolz testified, appellant moved to strike Dr. Stoltz's opinion testimony regarding Mrs. Gargiulo's life expectancy, arguing that the opinion lacked an adequate factual or scientific basis. The trial court denied the motion.

At the close of evidence, appellant moved for judgment as to the estate's claim for Mrs. Gargiulo's conscious pain and suffering, arguing that no sufficient evidence had been presented to prove that Mrs. Gargiulo experienced conscious pain and suffering that was attributable to appellant's negligence. The trial court denied the motion. Appellees requested a jury instruction on the issue of spoliation, arguing that appellant failed to produce two documents — a "transfer summary" and a "sign out sheet" — that were generated during Mrs. Gargiulo's hospitalization. Appellant argued that these documents were not part of the patient's medical records and had been destroyed pursuant to hospital regulations to protect patient privacy. The trial court ultimately instructed the jury on the issue of spoliation as follows:

> The unexplained destruction of, or failure to preserve evidence by a party may give rise to an inference unfavorable to that party. If you find that the

> destruction or failure to preserve the evidence was negligent, you may, but are not required to, infer that the evidence, if preserved, would have been unfavorable to that party.

On August 7, 2013, the jury returned a verdict in favor of the three wrongful death beneficiaries and awarded each $300,000 in noneconomic damages. The jury also returned a verdict in favor of Mrs. Gargiulo's estate and awarded the estate $50,000 in noneconomic damages, and $8,238.05 in economic damages. The total verdict returned by the jury was in the amount of $958,238.05, with $950,000 attributable to noneconomic damages, and $8,238.05 attributable to economic damages.

Appellant filed a post trial motion for reduction of the verdict and for remittitur, pointing out that the jury awarded a total of $950,000 in noneconomic damages in connection with the wrongful death and survival claims, asserting that the aggregate statutory cap on noneconomic damages in connection with both claims was $850,000, and requesting that the verdict be reduced to "a total of $850,000 for all non economic damages awarded."[1] Appellees responded to this motion, "consenting to the court reducing the jury's award of non-economic damages to the Plaintiffs to $850,000 for pain and suffering and $8,238.05 in economic damages."

At a hearing on the motion for remittitur on December 12, 2013, the following exchange occurred:

[1]Maryland Code (1957, 2005 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP"), §3-2A-09(b)(2)(i) places limits on noneconomic damages awarded in medical malpractice actions, including those involving wrongful death and survival claims.

COURT: The question of remittitur is, as I said, one that seeks [sic] to be consented to by the Plaintiffs. I understand the cap calculations. The verdict should be reduced from nine hundred and fifty thousand to eight hundred and fifty thousand; is that correct as you understand it?

APPELLANT'S COUNSEL: That's correct.

APPELLEES' COUNSEL: On pain and suffering.

COURT: On pain and suffering only. Noneconomic damages only. There is a small award of economic damages, eight or $9,000, that stands. But I think that you are correct, and obviously the Plaintiff admits that you are correct, that the non economic damages must be capped at $850,000. I guess in order to do that fairly it ought to be a proportional reduction in the several awards for noneconomic damages, unless you have some contrary opinion.

APPELLEES' COUNSEL: I think that makes most sense.

COURT: So in each case – I think there was $300,000 to the husband and the two sons.

APPELLEES' COUNSEL: Correct.

COURT: Each. And the other fifty thousand was to the estate to constitute pain and suffering.

APPELLEES' COUNSEL: Correct.

COURT: So they all have to be reduced proportionately, by whatever proportion it is to accommodate the cap and the total of the noneconomic damages, eight hundred and fifty thousand dollars, instead of nine hundred and fifty thousand. Anything else?

APPELLEES' COUNSEL: Not from the Plaintiff, Your Honor.

APPELLANT'S COUNSEL: No, Your Honor.

COURT: Okay. I would ask you if you would prepare the reduction in judgment, remittitur based on the cap calculation. I would appreciate that. On that aspect you win.

> APPELLANT'S COUNSEL: Your Honor, I'm sorry to interrupt. By clarification, do you want that order to provide the specific number in the proportionate reduction or just to say to be proportionately reduced?
>
> APPELLEES' COUNSEL: I think the number would make it more clear and I guess you get an extra penny because of the –
>
> COURT: I think the actual number should be in the order. Plaintiff seems to agree. Okay.

Appellant's other post trial motions for new trial and for judgment notwithstanding the verdict were denied.

The trial judge later signed two orders in connection with the request for remittitur. For reasons not explained by the parties and not clear from the record, the orders did not reduce the noneconomic damage awards to the several appellees on a proportionate basis by $100,000 as directed by the court at the December 12, 2013, hearing. The first order directed that the noneconomic damages of $900,000 awarded to the three wrongful death beneficiaries be reduced to $850,000 with each beneficiary to receive $283,333.33, but that order was silent as to the award of damages to the estate. A "revised order," subsequently signed by the court, again directed that the noneconomic damages of $900,000 awarded to the three wrongful death beneficiaries be reduced to $850,000 with each beneficiary to receive $283.333.33, but the "revised order" also specified that "the non-economic damages awarded the Estate of Beverly Gargiulo remains as determined by the jury's verdict of August 7, 2013 at $50,000, and that the economic damages awarded the Estate of Beverly Gargiulo remain as determined by the jury's verdict at $8,238.05." Accordingly, the total

judgment entered against the appellant in connection with the wrongful death and survival actions was $908,238.05. This timely appeal followed.

DISCUSSION

I. Relevance of Evidence Regarding Informed Consent

Appellant argues that the circuit court abused its discretion by allowing appellees to present testimony regarding informed consent. Appellant specifically complains about remarks by appellees' counsel during opening statement that appellees did not consent to hospice care, as well as Mr. Gargiulo's testimony to the same effect. Appellant argues that, because the trial court allowed such comments and testimony, appellees were, in essence, permitted to pursue an informed consent claim that was never pled.

On appeal, this Court reviews the trial court's relevancy determinations for an abuse of discretion. *See Martinez ex rel. Fielding v. Johns Hopkins Hosp.*, 212 Md. App. 634, 657–58 (2013) ("When determinations of relevancy are 'the ultimate issue,' appellate courts are 'generally loath to reverse a trial court[.]' The trial court's consideration of prejudice or confusion of the issues 'will be accorded every reasonable presumption of correctness. . . .'" (internal citations omitted)). We will reverse only where the "decision under consideration [is] well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *North v. North*, 102 Md. App. 1, 14 (1994).

Claims for medical malpractice and breach of informed consent are separate theories of liability that must be pled separately, although both sound in negligence. *McQuitty v.*

Spangler, 410 Md. 1, 18 (2009). An action for medical malpractice alleges that a medical professional failed "to use that degree of care and skill which is expected of a reasonably competent practitioner . . . *acting in the same or similar circumstances*." *Dingle v. Belin*, 358 Md. 354, 368 (2000) (emphasis added). The claim "does not focus on what was told to the patient or what the patient's expectations may have been." *Id*. In contrast, an informed consent claim alleges that the healthcare provider failed "to explain the procedure to the patient and 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." *Sard v. Hardy*, 281 Md. 431, 439 (1977). We have cautioned that evidence of informed consent is usually not relevant in a medical malpractice action. *See Martinez*, 212 Md. App. at 681. *But cf. Reed v. Campagnolo*, 332 Md. 226, 234 (1993) (Analyzing a wrongful birth claim asserted based upon negligence, the Court concluded: "If the applicable standard of care required that the AFP and amniocentesis tests be offered or performed, that standard was violated, because it is undisputed that the tests were not offered or performed." The *Reed* Court further distinguished the negligence claim in that case from an informed consent claim, stating, 332 Md. at 241: "Whether the defendants had a duty to offer or recommend the tests is analyzed in relation to the professional standard of care.").

In this case, as in *Reed*, we are not persuaded that the testimony and argument regarding the lack of consent to hospice care was irrelevant to the claim of medical malpractice. In order to prevail on their medical malpractice claim, appellees were required to prove that appellant's conduct breached the appropriate standard of care. *Univ. of Md.*

Med. Sys. Corp. v. Gholston, 203 Md. App. 321, 330 (2012) ("The elements of the tort [of medical malpractice] are duty . . . breach of the standard of care; causation of injury; and damages."). In order to prove that a breach occurred, appellees needed to demonstrate at trial precisely what the appropriate standard of care was. *See Weimer v. Hetrick*, 309 Md. 536, 553 (1987) ("A *prima facie* case of medical malpractice must consist of evidence which . . . establishes the applicable standard of care."). But the standard of care does not exist in a vacuum. The standard of care is "that degree of care and skill which is expected of a reasonably competent practitioner . . . acting *in the same or similar circumstances*." *Dingle v. Belin*, 358 Md. 354, 368 (2000) (emphasis added.) The circumstances of the practitioner's conduct are, therefore, relevant to both establishing the standard of care and evaluating whether the standard has been met.

The key issue in the present case was whether the dose of narcotic painkillers administered to Mrs. Gargiulo between February 26 and March 1 was excessive *under the circumstances* and outside the standard of care. Whether the dose was excessive requires consideration of the circumstances of the case, including the goals of treatment. Appellees' expert testified at trial that the administration of a large dose of narcotic medication to a *recovering patient* may be negligent, while administering an identical dose to a *hospice patient* may be within the standard of care. Consequently, the treatment goal was critically important and relevant to the jury's determination of the applicable standard of care in this case. Consequently, the evidence presented by appellees to establish that the goal of Mrs. Gargiulo's hospitalization had, to their knowledge, never changed to hospice care was highly

relevant to their claim that the appellant breached the standard of care by administering doses of medication that were inappropriate for a patient who was not in hospice care. Here, the challenged evidence was not offered to support an unpled informed consent claim, as appellant asserts. Instead, it was offered to assist the jury in making its finding as to the applicable standard of care and to establish a *prima facie* case of medical negligence. We perceive nothing in our cases that would prohibit evidence of a patient's lack of consent to treatment in a medical malpractice case when that lack of consent is relevant to prove an element of the malpractice claim.

Appellant's heavy reliance on *Martinez* is misplaced. Contrary to appellant's assertion, *Martinez* does not impose a universal prohibition on evidence regarding a patient's lack of consent to treatment in the absence of an informed consent claim. *See Martinez*, 212 Md. App. at 681 (holding that evidence of a patient's lack of consent "*generally* is irrelevant . . . in an action wherein only medical malpractice is pleaded") (emphasis added). For the reasons discussed above, we are persuaded that this case is an example of a situation in which evidence of lack of consent to treatment is highly relevant to a malpractice claim. *See Reed, supra*, 332 Md. at 234. Further, the facts of *Martinez* are entirely different from those in this case. In *Martinez*, a child sued his mother's healthcare provider for injuries sustained during his birth, alleging that the hospital negligently failed to perform a timely emergency cesarean section. *Id*. at 639. On appeal, we held that evidence of the mother's lack of consent was irrelevant to the child's negligence claim because consent is inapplicable in such an *emergency*, and there was a substantial risk that the jury would erroneously apply the

informed consent doctrine in the context of an emergency. *Id*. at 682. In the instant case, there was no reason for the trial court to be concerned that the testimony about the goal of treatment would result in conflating the issues, and consequently, this case does not raise the same concerns of unfair prejudice as were present in *Martinez*. Because evidence of lack of consent to changing the goal of the hospitalization to hospice care was necessary to establish the circumstances of the appellant's conduct and the applicable standard of care, the testimony was relevant and the trial court did not abuse its discretion by allowing its admission.

II. Denial of Motion for Judgment Regarding Estate's Claim for Conscious Pain and Suffering

The jury returned a verdict in the amount of $50,000 in connection with the estate's claim for Mrs. Gargiulo's pain and suffering, and judgment was entered on this verdict. Appellant contends that the circuit court erroneously denied its motion for judgment as to the estate's claim for Mrs. Gargiulo's conscious pain and suffering.[2] We review the trial court's denial of appellant's motion for judgment *nov. See, e.g., Thomas v. Panco Mgmt., LLC*, 423

[2] We note that, if all of the various awards of noneconomic damages had been reduced on a proportional basis as directed by the court at the December 12, 2013, hearing, judgment in favor of each wrongful death beneficiary would have been entered in the amount of $268,333.33, rather than $283,333.33, and judgment in favor of the estate for noneconomic damages would have been entered in the amount of $45,000, rather than $50,000. But, for whatever reason, final judgment was entered in the full amount of the jury's award of $50,000 for noneconomic damages to the estate. The parties have raised no issue on appeal as to whether the verdict amounts were properly reduced in order to satisfy the statutory cap on noneconomic damages. Accordingly, we will not comment further on that aspect of the case, and will review the judgment actually entered by the court, which included $50,000 for noneconomic damages in the judgment entered in favor of the estate.

Md. 387, 393–94 (2011). If there is "any evidence, no matter how slight, that is legally sufficient to generate a jury question," we will not disturb the trial court's denial of a motion for judgment notwithstanding the verdict. *C&M Builders, LLC v. Strub*, 420 Md. 268, 290 (2011) (quoting *Tate v. Bd. of Educ.*, 155 Md. App. 536, 545 (2004)).

Appellant argues that the evidence presented at trial was insufficient to prove that Mrs. Gargiulo's pain was the result of appellant's conduct. Appellees respond that the evidence demonstrated that Mrs. Gargiulo was conscious after the negligent conduct occurred, and that evidence proves that she experienced pain as a result of appellant's negligence.

Appellees are correct that the evidence produced at trial demonstrated that Mrs. Gargiulo was conscious and in pain after the allegedly negligent administration of painkillers. But, in order to prevail on their claim for conscious pain and suffering, appellees were required to prove that Mrs. Gargiulo's conscious pain was proximately *caused* by appellant's negligent conduct, not simply that she experienced pain. *See Greenstein v. Meister*, 279 Md. 275, 291–92 (1977). Appellees failed to present any evidence at trial directly linking Mrs. Gargiulo's pain on February 26 and 27 with appellant's negligent conduct. Although appellant's dosage of pain medication proved fatal, there was no evidence that it caused or increased Mrs. Gargiulo's pain. Throughout trial and appeal, the parties have agreed that multiple sclerosis is a painful, debilitating condition, and that Mrs. Gargiulo experienced substantial pain as a result of her infected decubitus ulcers. In the absence of some evidence linking the *source* of Mrs. Gargiulo's pain to the appellant's negligent administration of lethal

painkillers, the jury had no basis for concluding that her pain was *caused by* appellant's negligence rather than her admittedly painful and infected decubitus ulcers.

Accordingly, the trial court erred by failing to grant appellant's motion for judgment as to the estate's claim for conscious pain and suffering, and we vacate this aspect of the circuit court's judgment that was entered in favor of the estate for noneconomic damages.

III. Spoliation Instruction

Appellant contends that the trial court erred by instructing the jury on spoliation, because appellant offered an explanation for why the documents were not produced and because the destruction of the documents occurred before litigation was anticipated. We review the trial court's decision to give a spoliation instruction for an abuse of discretion. *See CSX Transp., Inc v. Pitts*, 430 Md. 431, 458 (2013) ("We review a trial judge's decision whether to give a jury instruction under the abuse of discretion standard."); *Cost v. State*, 417 Md. 360, 382 (2010) (whether to give an instruction on missing evidence in criminal case is committed to trial judge's discretion).

Appellant's reliance on *Klupt v. Krongard*, 126 Md. App. 179 (1999), is misplaced. *Klupt* discusses the circumstances under which a trial court can dismiss a case as a result of a party's misconduct during discovery as a sanction, not the propriety of instructing the jury regarding spoliation of evidence. *Klupt*, 126 Md. App. at 198. Despite appellant's contention to the contrary, Maryland law does not require that destruction of evidence be intentional, or that it occur after litigation is anticipated to warrant a jury instruction on spoliation. *See* MPJI-Cv 1:10 ("If you find that the destruction or failure to preserve the

evidence was *negligent*, you may, but are not required, to infer that the evidence, if preserved, would have been unfavorable to that party." (emphasis added)). *See also Anderson v. Litzenberg*, 115 Md. App. 549, 561 (1997) (holding that "an adverse presumption may rise against the spoliator even if there is no evidence of fraudulent intent"). Appellant's claim that the instruction was improper because appellant offered an explanation for the failure to preserve the documents is also without merit. *See DiLeo v. Nugent*, 88 Md. App. 59, 70–71 (1991) (holding that, when a party gives an explanation for why evidence was not produced, the judge may "[give] the jury the opportunity to evaluate the credibility of her explanations"). Here, the trial judge told the jury that an inference was legally permissible, but not required. We perceive no legal error or abuse of discretion in the court's giving of that instruction.

Moreover, even if we had been persuaded that the trial court abused its discretion in giving the spoliation instruction, legal error alone is not sufficient for us to order a new trial in a civil case. In contrast to the harmless error rule that applies in criminal cases, the party asserting error in a civil case bears the burden of proving that an erroneously given instruction was prejudicial. *Barksdale v. Wilkowsky*, 419 Md. 649, 661 (2011) ("[I]t is . . . clear that a party complaining of an erroneous jury instruction in a civil case must show prejudice."). To prevail, appellant was required to persuade us that prejudice was probable, not merely possible. *Id.* at 662. Here, appellant makes a bald assertion that it was prejudiced by the spoliation instruction, but offers no explanation as to how or why the instruction was

prejudicial. Accordingly, even if we were persuaded that the spoliation instruction should not have been given, we would conclude that such error was harmless.

IV. Admissibility of Dr. Stoltz's Testimony Regarding Mrs. Gargiulo's Life Expectancy

Appellant contends that Dr. Stoltz's testimony regarding Mrs. Gargiulo's life expectancy was inadmissible because it was speculative and not grounded in reliable scientific methods. Although appellant did not raise any objection to Dr. Stolz's opinion until it moved to strike the testimony after the witness had testified, appellant argues that the trial judge abused his discretion by refusing to grant the motion to strike. Appellant contends that Dr. Stoltz's opinion was not based on any particular scientific or medical literature regarding the life expectancy of patients with the same set of conditions as Mrs. Gargiulo. Appellees argue that the issue was not preserved for appeal because appellant did not file a motion *in limine* to exclude Dr. Stoltz's testimony regarding Mrs. Gargiulo's life expectancy and did not object during his testimony.

Although *Frye-Reed* challenges are best dealt with prior to the time an expert witness takes the stand — *see Clemons v. State*, 392 Md. 339, 347 n.6 (2006); *Terumo Md. Corp. v. Greenway*, 171 Md. App. 617, 630 (2006) — Maryland Rule 2-517(a) provides that an objection to evidence "shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent." *See also* Maryland Rule 5-103(a). Appellees are correct that an objecting party must typically move to strike inadmissible testimony immediately after it is presented, but it appears that appellant moved to strike Dr. Stolz's testimony promptly after he testified. *Cf. Giant Food, Inc. v. Booker*, 152 Md. App. 166, 182

(2003) ("[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."). Accordingly, we will address the merits of the issue.

The decision to admit expert testimony is typically within the sound discretion of the trial court, and we will reverse only where the decision to admit the testimony is "founded on an error of law or some serious mistake, or if the trial court clearly abused its discretion." *Pepper v. Johns Hopkins Hosp.*, 111 Md. App. 49, 76–77 (1996). For expert opinion testimony to be admissible, the expert must have an adequate factual basis for his opinion and employ reliable methodology in drawing a conclusion from that data. Maryland Rule 5-702. *See also Booker*, 152 Md. App. at 183–84. As appellant notes, testimony that "amounts to a 'because I think so,' or 'because I say so,' situation" is generally inadmissible. *Id.* at 188.

At trial, Dr. Stoltz testified that he was familiar with Mrs. Gargiulo's medical records. Dr. Stoltz also testified that his opinion regarding Mrs. Gargiulo's life expectancy was based on years of experience treating patients who suffered from the same set of medical conditions as Mrs. Gargiulo. Although appellant places great weight on the fact that Dr. Stoltz did not rely on scientific literature in forming his opinion, appellant cites no case providing that an expert's medical opinion is inadmissible unless based on scholarly literature. Appellees concede that Dr. Stoltz's opinion was not based on scholarly literature, but argue that his 30 years of experience treating patients with the same conditions as Mrs. Gargiulo was a sufficient basis for forming an opinion regarding her life expectancy. Because Dr. Stoltz's

opinion testimony was based on his experience treating patients with the same set of conditions as Mrs. Gargiulo, his testimony had an adequate methodological basis, and therefore, the trial court's refusal to strike the testimony was not an abuse of discretion. *Pepper, supra*, 111 Md. App. at 76–77.

V. Transfer of Case to Harford County

Cross-appellants assert that the Circuit Court for Baltimore City erred when it determined that Baltimore was not a proper venue and transferred the case to Harford County. We review *de novo* the circuit court's decision to transfer a case due to improper venue. *See LeCronier v. United Parcel Serv.*, 196 Md. App. 131, 137 (2010).

Under CJP § 6-201(a), a corporate defendant such as cross-appellee can be sued in the county "where it maintains its principal offices in the State," as well as the county where it "carries on a regular business . . . or habitually engages in a vocation." In a negligence action, the plaintiff can also file suit in the county where the cause of action arose. Maryland Rule 6-202(8). Cross-appellants do not dispute that the cause of action arose in Harford County or that cross-appellee maintains its principal place of business there, but instead, cross-appellants argue that cross-appellee carried on regular business in Baltimore, thereby supporting venue in Baltimore under the "regular business" provision of CJP § 6-201(a). In support of this claim, cross-appellants assert that a substantial number of cross-appellee's patients live in Baltimore, that cross-appellee advertised its services in a Baltimore newspaper, and that cross-appellee maintained a close relationship with the University of Maryland Medical Center, located in downtown Baltimore.

This argument is without merit. For the purpose of CJP § 6-201(a), a party "regularly carries on a business" where he engages in "the continuous pursuit of some calling or profession, such as is ordinarily engaged in as a means of livelihood or for the purpose of gain or profit." *Nace v. Miller*, 201 Md. App. 54, 71 (2011). Cross-appellants presented no evidence at the motions hearing demonstrating that cross-appellee regularly renders medical services in Baltimore. The mere fact that cross-appellee solicits business in Baltimore and has a number of patients who reside there simply does not persuade us that cross-appellee regularly carries on business in Baltimore. *See Davidson Transfer & Storage Co. v. Christian*, 197 Md. 392, 396–97 (1951) ("[I]t is generally held that the mere solicitation of orders does not constitute doing business [for the purpose of the venue statute]"). Accordingly, we conclude that the circuit court did not err in ruling that venue was improper in Baltimore.

Moreover, even if Baltimore City had been a permissible venue, given the multiple contacts this case has to Harford County, it was not an abuse of discretion for the motions judge to transfer the case to Harford County on the basis of *forum non conveniens* pursuant to Maryland Rule 2-327(c). *See Leung v. Nunes*, 354 Md. 217, 223-24 (1999) (a court's decision to transfer case on *forum non conveniens* grounds is reviewed for an abuse of discretion). Maryland Rule 2-327(c) provides that "the court may transfer any action to any other circuit court where the action might have been brought if the transfer is for the convenience of the parties and witnesses and serves the interests of justice." Here, the motions court determined that cross-appellants and most of the fact witnesses resided in

Harford County, and that most of the relevant evidence was also located in Harford County. As a result, it was not an abuse of discretion to transfer the case on the basis of *forum non conveniens*.

VI. Summary Judgment for Individual Doctors

Cross-appellants argue that the circuit court erred when it granted summary judgment in favor of Drs. Uchendu, Isckarus, and Basu. Although cross-appellants do not dispute that the amended complaint naming the individual doctors as defendants was filed more than three years after Mrs. Gargiulo's death, they contend that the statute of limitations only began to run sometime in December 2010, when they became aware of the identities of the individual doctors responsible for Mrs. Gargiulo's care. Cross-appellee argues that the appeal of the ruling on this issue was not timely, and that, in any event, the statute of limitations began to run upon Mrs. Gargiulo's death on March 1, 2010. Cross-appellee also argues that the claims against the individual doctors were properly dismissed because cross-appellants did not satisfy the certificate requirements of the Health Care Claims Malpractice Act with regard to those claims.

We are not persuaded by cross-appellee's contention that this appeal is untimely. But for a limited number of exceptions, parties may appeal only "final judgments" that resolve the entire case. *See* CJP § 12-301. Maryland Rule 2-602(a) specifically provides that an order is not final where it "adjudicates the rights and liabilities of fewer than all the parties to the action." Because the ruling allowed cross-appellants to proceed with their case against cross-appellee, the order dismissing the claims against the individual physicians did not

adjudicate the rights of all parties and therefore was not a final and appealable judgment. Accordingly, the appeal of this issue is timely.

In a suit against a healthcare provider for medical negligence, a plaintiff generally has three years from the date the injury was discovered to file suit. CJP §5-109(a). Cross-appellants do not dispute that the injury was apparent to them at the time of Mrs. Gargiulo's death, but instead argue that the statute of limitations should be tolled because the identity of the individual tortfeasors was not apparent until discovery in the case against the hospital was underway. This argument simply has no basis in Maryland law. The statute of limitations begins to run "when the plaintiff has 'knowledge of circumstances which would cause a reasonable person in the position of the plaintiff[ ] to undertake an investigation which, if pursued with reasonable diligence, would have led to knowledge of the alleged [tort].'" *Pennwalt Corp. v. Nasios*, 314 Md. 433, 448–49 (1988) (quoting *O'Hara v. Kovens*, 305 Md. 280, 302 (1986)). The belated discovery of additional tortfeasors does not toll the limitations period once suit has been filed against a different defendant. *See Conaway v. State*, 90 Md. App. 234, 252 (1992) (rejecting argument that cause of action does not accrue until plaintiff has knowledge of the identity of a potential defendant). This is true even where the identity of the additional tortfeasor becomes apparent only from information obtained in discovery in the original case. *Id.* at 252–53 (holding that "knowledge of the identity of a particular defendant is not a necessary element to trigger the running of the statute of limitations."). Because we conclude that cross-appellants' claims against the individual doctors were barred by the statute of limitations, we need not reach cross-

appellee's argument that the amended complaint did not comply with the requirements of the Health Care Malpractice Claims Act.

VII. Exclusion of Evidence of Hospital Bills for Entire Hospitalization

Cross-appellants argue that the trial court erred by excluding evidence of Mrs. Gargiulo's hospital bills incurred prior to cross-appellee's alleged negligence on February 26. They argue that, because the care administered to Mrs. Gargiulo between February 26 and March 1 was negligent, her estate should not be responsible for any of the hospital bills incurred during her stay. Cross-appellee responds that, because the alleged negligence that led to Mrs. Gargiulo's death occurred on February 26 and 27, 2010, any expenses incurred prior to that time cannot be recovered by cross-appellants, and therefore evidence of these expenses is irrelevant. Cross-appellants did not advance any legal theory at trial or on appeal that would allow them to recover Mrs. Gargiulo's hospital bills for the entirety of her hospitalization, and therefore the trial court did not err in excluding this evidence.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED IN PART AND REVERSED AND VACATED IN PART.
COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY APPELLEES.