UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2442

September Term, 2014

CAROLYN GIBAU, ET AL.

v.

JOEL FALIK

Wright,
Kehoe,
Berger,

JJ.

Opinion by Berger, J.

Filed: December 22, 2015

This appeal arises from an order of the Circuit Court of Prince George's County granting defendant-appellee's motion for judgment notwithstanding the verdict in a medical malpractice case. The suit was filed by plaintiffs-appellants Carolyn Gibau, mother of the decedent, Christopher Moody ("Moody"), and Henry Gibau, paternal grandfather of Moody. Ms. Gibau brought the suit individually and as personal representative of the estate of Moody. Mr. Gibau brought suit as co-personal representative of the estate of Moody. We shall refer to the plaintiffs-appellants collectively as "the Gibaus." The Gibaus sued Joel L. Falik, M.D. ("Falik") for medical negligence regarding Falik's care and treatment of Moody.

Following a jury trial, the jury found in favor of the Gibaus and awarded them over $900,000 in economic and non-economic damages. The circuit court subsequently issued an order which set aside the jury's verdict in its entirety and entered judgment in favor of Falik.

On appeal, the Gibaus raise two issues[1] for our review, which we have rephrased as follows:

> I. Whether the circuit court erred by granting Falik's motion for judgment notwithstanding the verdict on a basis that was not raised by Falik.
>
> II. Whether the circuit court erred in its substantive determination that no reasonable jury could find that the Gibaus had proved malpractice.

[1] The Gibaus raise a third issue relating to whether there was evidence presented at trial which supported the jury's award of damages for Moody's conscious pain and suffering. As we explain *infra* in Part III, we shall not reach this issue.

For the reasons set forth below, we conclude that the circuit court erred by granting the motion for judgment notwithstanding the verdict, setting aside the jury's verdict in its entirety, and entering judgment in favor of Falik. Accordingly, we shall reverse the judgment of the Circuit Court for Prince George's County and remand for further proceedings.

FACTS AND PROCEEDINGS

The alleged malpractice which gave rise to the instant litigation occurred from June 26, 2010 to June 28, 2010, when Moody was a patient at Prince George's Hospital Center. Moody was hospitalized after suffering an assault and subsequently died on June 28, 2010. In their complaint, the Gibaus alleged two separate breaches of the standard of care by Falik, a neurosurgeon and one of Moody's treating physicians during his hospitalization. The Gibaus alleged that Falik breached the standard of care when he made the decision not to prophylactically administer anticonvulsant medication[2] to Moody. The Gibaus further alleged that Falik breached the standard of care by failing to transfer Moody back to the intensive care unit ("ICU") on the morning of June 28, 2010.[3] The Gibaus claimed that the alleged breach of the standard of care caused Moody to suffer a seizure

[2] Anticonvulsant medication is also commonly known as anti-seizure medication. We shall refer to the category of medication by both names.

[3] On appeal, the Gibaus comment that the ICU "issue is moot because the jury ultimately found that there was a deviation from the standard of care for the failure to prescribe anti-seizure medication."

which, they claimed, ultimately caused Moody's death. The Gibaus sought economic damages for medical and funeral expenses and noneconomic damages for the pain and suffering of Carolyn Gibau and Moody.

Trial began on November 3, 2014. During the Gibaus' case-in-chief, the jury heard testimony from, *inter alia*, Dr. Stephen Bloomfield, a neurosurgeon who testified as an expert witness.[4] At the close of the Gibaus' case, Falik moved for judgment as a matter of law. Although defense counsel commented that he was moving "generally for a Judgment as a Matter of Law," he raised specific arguments. Defense counsel explained that he "specifically want[ed] to address the intensive care unit" issue, namely, whether the Gibaus had proved the causation element with respect to the intensive care unit issue.

After defense counsel concluded his argument with respect to the ICU, the circuit court inquired about counsel's next argument, asking, "Okay. Next one?" and "That was all?" Defense counsel replied:

> I think that, you know, to be fair to the [c]ourt, arguably, [the Gibaus' expert] did render an opinion about anti-seizure medication. And that's why I'm not going to jump up and down on that one.

The court denied the motion for judgment as a matter of law.

[4] We shall elaborate upon Dr. Bloomfield's testimony as necessitated by our discussion of the issues.

During the defense case, the jury heard testimony from three medical expert witnesses, as well as from Falik himself.[5] At the close of all evidence, Falik again moved for judgment as a matter of law. Defense counsel "renew[ed] the motion made at the end of the plaintiffs' case." At this juncture, defense counsel raised three specific arguments. First, defense counsel argued that "there [was] no causal connection between the asserted violation of the standard of care and returning the patient back to the intensive care unit." Second, defense counsel argued that there was no causal connection between the alleged breach of the standard of care and any pain or suffering. Third, defense counsel argued that Dr. Bloomfield's failure to produce complete subpoenaed tax records documenting the income he earned as an expert witness prejudiced the defense. Defense counsel moved for a mistrial or for Dr. Bloomfield's testimony to be stricken. Defense counsel noted that if there was a defense verdict, the issue relating to Dr. Bloomfield would become moot, but argued that if there was not a defense verdict, a mistrial should be granted.

The circuit court found that Dr. Bloomfield's tax documents were deficient and found Dr. Bloomfield in contempt for violation of the subpoena. The court reserved ruling on any sanction against Dr. Bloomfield and reserved on the motion for judgment. The circuit court did not rule on the request for mistrial.

On November 18, 2014, the jury returned a verdict in favor of the Gibaus in the amount of $926,640.46. The jury awarded $10,690.23 for past medical expenses, $2,630.00

[5] Again, we shall discuss the witnesses' testimony in our discussion of the issues.

for funeral expenses, $450,000.00 for Moody's pain and suffering, and $463,320.23 to Carolyn Gibau for her pain and suffering.

Following the jury's verdict, on November 19, 2014, Falik filed a renewed motion for mistrial based on the failure of Dr. Bloomfield to comply with the order of the court which required him to produce certain tax documents. Falik additionally filed a motion for judgment notwithstanding the verdict and accompanying memorandum. In his motion, Falik argued that the evidence adduced at trial did not support the jury's finding that Moody experienced conscious pain and suffering. Falik asserted that the Gibaus had failed to meet their burden of proving that Moody had suffered conscious pain. As such, Falik requested that the $450,000.00 awarded for Moody's pain and suffering be stricken. In his motion for judgment notwithstanding the verdict, Falik did not raise any issues relating to the standard of care or causation.

On December 15, 2014, the circuit court issued an opinion and order granting Falik's motion for judgment notwithstanding the verdict, but on entirely different grounds than those raised by Falik. The circuit court's order granted relief much broader than that requested by Falik. The circuit court set aside the jury's verdict in its entirety and entered judgment in favor of Falik. The circuit court concluded that "no reasonable trier of fact could have found that Dr. Falik breached the standard of care in this case, let alone that any suggested breach was a causative factor in Mr. Moody's death."

This timely appeal followed.

STANDARD OF REVIEW

We review a circuit court's order granting a motion for judgment notwithstanding the verdict applying a *de novo* standard of review. *Lowery v. Smithsburg Emergency Med. Serv.*, 173 Md. App. 662, 682 (2007). We have explained:

> Whether the trial court applied the correct standard of proof in adjudging its grant of appellees' motion for judgment is a question of law that we review *de novo*. *Coleman v. Anne Arundel County Police Dept.*, 369 Md. 108, 121, 797 A.2d 770 (2002). "We review the grant of a motion for judgment under the same standard as we review grants of motions for judgment notwithstanding the verdict." *Tate v. Bd. of Educ. of Prince George's County*, 155 Md. App. 536, 544, 843 A.2d 890 (2004) (citing *Johnson & Higgins of Pa., Inc. v. Hale Shipping Corp.*, 121 Md. App. 426, 450, 710 A.2d 318 (1998)). The Court assumes the truth of all credible evidence on the issue and any inferences therefrom in the light most favorable to appellants, the nonmoving parties. *Id.* (citation omitted). "Consequently, if there is any evidence, no matter how slight, that is legally sufficient to generate a jury question, the case must be submitted to the jury for its consideration." *Id.* at 545, 843 A.2d 890 (citing *Washington Metro. Area Transit Auth. v. Reading*, 109 Md. App. 89, 99, 674 A.2d 44 (1996)).

Lowery, *supra*, 173 Md. App. at 682-83.

DISCUSSION

I.

The Gibaus' first contention is that the circuit court erred by granting Falik's motion for judgment notwithstanding the verdict on a ground that had not been raised by defense counsel. As we shall explain, we agree with the Gibaus that the circuit court considered issues that had not properly been raised before it.

Maryland Rule 2-519(a) provides that, when moving for judgment as a matter of law, "[t]he moving party shall state with particularity all reasons why the motion should be granted." When a party moves for judgment notwithstanding the verdict, the motion "may only be made on grounds that have previously been advanced by the movant in seeking judgment pursuant to Rule 2–519 at the close of the evidence." *Smith v. Miller*, 71 Md. App. 273, 278 (1987).

The only issue raised in Falik's motion for judgment notwithstanding the verdict related to the issue of whether the Gibaus had proved that Moody experienced conscious pain and suffering which was caused by Falik's alleged breach of the standard of care. This is the issue to which the Gibaus responded in their response to Falik's motion for judgment notwithstanding the verdict.

The circuit court's opinion and order, however, did not address the issue raised by Falik in his motion and accompanying memorandum. Instead, the circuit court addressed the testimony from various witnesses with respect to whether anti-seizure medication should have been prescribed. The court discussed the testimony of Dr. Bloomfield as well as the testimony of the three expert witnesses called for the defense. The court found that Moody's injury was "a mild traumatic brain injury" and that anti-seizure medications were "not indicated" because "[l]ess than 1% of patients with a mild traumatic brain injury suffer a seizure and when seizures do occur they are not necessarily fatal."

We have explained that the particularity requirement of Maryland Rule 2-519 serves multiple purposes:

> This requirement has important and salutary purposes. It implements, on the one hand, a principle of basic fairness. A trial judge must be given a reasonable opportunity to consider all legal and evidentiary arguments in deciding what issues to submit to the jury and in framing proper instructions to the jury. The other parties must have a fair opportunity at the trial level to respond to legal and evidentiary challenges in order (1) to make their own record on those issues and (2) to devise alternative trial strategies and arguments should the court grant the motion, in whole or in part. Allowing these issues to be presented for the first time on appeal is also jurisprudentially unsound, for it may well result in requiring a full new trial that otherwise might have been avoided.

Kent Vill. Associates Joint Venture v. Smith, 104 Md. App. 507, 517 (1995).

In the present case, the Gibaus had no opportunity to respond to any argument about the legal insufficiency of the evidence with respect to whether anti-seizure medication was warranted. Indeed, the Gibaus had every reason to believe that the defense had conceded that it was a question of fact whether Falik breached the standard of care by failing to prescribe anti-seizure medication. As discussed *supra*, in the context of Falik's motion for judgment at the close of the plaintiff's case, defense counsel declined to present any argument with respect to the anti-seizure medication issue, commenting: "I think that, you know, to be fair to the [c]ourt, arguably, [the Gibaus' expert] did render an opinion about anti-seizure medication. And that's why I'm not going to jump up and down on that one." The circuit court's consideration of this issue, which had not been raised or argued before

the circuit court, deprived the Gibaus of "a fair opportunity at the trial level to respond to legal and evidentiary challenges" relating to the anti-seizure medication issue. *Id.* Accordingly, because the anti-seizure medication issue was not raised with particularity before the circuit court, the circuit court erred by considering the issue, and the circuit court's December 15, 2014 order must be vacated.

II.

Assuming *arguendo* the circuit court's consideration of the anti-seizure medication issue was proper, we hold, in the alternative, that the circuit court's substantive determination that no reasonable jury could have found that the Gibaus had proved malpractice was erroneous.

In order to prove the tort of medical malpractice, which is a form of negligence, a plaintiff must prove the following elements: "duty (standard of care); breach of the standard of care; causation of injury; and damages." *Univ. of Maryland Med. Sys. Corp. v. Gholston*, 203 Md. App. 321, 330 (2012). In its order granting judgment to Falik, the circuit court determined that anti-seizure medication was "not indicated" and that "no reasonable trier of fact could have found that Dr. Falik breached the standard of care, let alone that any suggested breach was a causative factor in Mr. Moody's death."

The circuit court's determination was not supported by the evidence presented at trial. We have commented that "[t]he bedrock principle justifying the grant of a judgment n.o.v. is when the evidence . . . taken in the light most favorable to the nonmoving party, does not

legally support the nonmoving party's claim or defense." *Kleban v. Eghrari-Sabet,* 174 Md. App. 60, 85 (2007). We explained:

> [I]t is principally when there is no competent evidence or inferences deducible therefrom to support the nonmoving party that the court will be justified in granting a judgment n.o.v. In other words, the court must then decide a question of law. A grant of a motion for judgment n.o.v., while encroaching on the province of the jury, is permitted only when the evidence and permissible inferences permit only one conclusion with regard to the ultimate legal issue.

Id. at 85-86. Judgment notwithstanding the verdict is improper " [i]f there exists any legally competent evidence, however slight, from which the jury could have found as they did." *Huppman v. Tighe*, 100 Md. App. 655, 663 (1994).

In the present case, the Gibaus' medical expert, Dr. Bloomfield, reached a very different conclusion from that reached by Falik's three medical experts. Dr. Bloomfield testified that Falik's failure to prescribe anti-seizure medication for Moody was a breach of the standard of care. In contrast, all three of the defense experts testified that prescribing anti-seizure medication for a patient in Moody's situation was inconsistent with the standard of care due to the mild nature of Moody's traumatic brain injury.

On appeal, Falik argues that the Gibaus failed to present evidence of the severity of Moody's brain injury and that Dr. Bloomfield failed to differentiate between mild, moderate, and severe brain injuries. Falik argues that Dr. Bloomfield's overly-broad, non-specific testimony left the jury to speculate as to Moody's actual risk of a seizure.

We have explained that medical expert testimony is required in medical malpractice cases:

> Because of the complexity of medical malpractice cases, the Court of Appeals has made clear that, in such cases, there ordinarily must be expert testimony to establish breach of the standard of care and causation. This requirement exists because the issues considered in the typical medical malpractice case are generally outside the understanding of ordinary lay people.

Tucker v. Univ. Specialty Hosp., 166 Md. App. 50, 58 (2005) (internal citations omitted).

In the present case, Dr. Bloomfield testified that Falik breached the standard of care by failing to prescribe anti-seizure medication. Dr. Bloomfield further testified that Moody's death was caused by Falik's failure to prescribe anti-seizure medication. Dr. Bloomfield testified as follows:

> [W]e do know that patients who have trauma to their brain that's significant trauma like Chris Moody had, that their risk of having seizures in the first week could be around 10 to 15 percent.
>
> ***
>
> [I]n my opinion, the standard of care is that a patient like Mr. Moody, who has a high risk of having a seizure when he has a mass lesion, and even if he didn't have a mass lesion, the standard of care after having a bruising of the brain is to have one week of an anticonvulsive medication. Either Dilantin or Keppra would be reasonable to reduce that risk.
>
> ***
>
> It's my opinion that it became the standard of care for patients like Mr. Moody to have an anti-seizure medication for one week

> after the diagnosis or at the time of the diagnosis of a head injury like Mr. Moody had.

When asked whether, to a reasonable degree of medical certainty, Moody would have survived his injury had he been prescribed anti-seizure medication, Dr. Bloomfield testified:

> He would have survived. Chris had an injury to the left side of his brain that was survivable. That would have left him with some injury to his brain above and beyond what his baseline brain function was, but that would have been measured by increased impulsivity and decreased ability to have proper behavior in the appropriate situations; but he would have become able to recover more likely than not had he not had the seizure at that time.

During the defense case, the jury heard from three medical experts in addition to Falik himself. The defense experts testified much more specifically than Dr. Bloomfield. Dr. Gary Dennis, a neurosurgeon, testified that Moody suffered a mild traumatic brain injury and that anti-seizure medication is not required by the standard of care for mild traumatic brain injuries. Dr. Michael Batipps, a neurologist, also differentiated between mild and severe traumatic brain injuries. Dr. Batipps explained that less than one percent of patients with mild traumatic brain injuries suffer a seizure and that anti-seizure medication is not required by the standard of care for patients with mild traumatic brain injuries.

Similarly, Dr. Brett Scott, a neurosurgeon, testified that Moody suffered a mild traumatic brain injury and that less than one percent of patients with mild traumatic brain injuries have a seizure. Dr. Scott further testified that the mortality rate for patients with mild traumatic brain injuries "is extremely low" and "almost nonexistent." Dr. Scott

testified that anti-seizure medication was not indicated for Moody because his traumatic brain injury was mild. Dr. Scott explained that "at the present time, the World Health Organization, the C[enter for] D[isease] C[ontrol], the Brain Trauma Foundation, all of their guidelines state that there are not enough data to justify use or to recommend use of anticonvulsants in mild traumatic brain injury." Like Dr. Dennis and Dr. Batipps, Dr. Scott testified that the standard of care did not require prophylactic administration of anti-seizure medication to Moody, given Moody's relatively mild injury.

To be sure, the testimony presented by the defense experts was much more detailed and specific than the testimony of Dr. Bloomfield. Dr. Bloomfield did not differentiate between mild, moderate, and severe traumatic brain injuries, and did not classify which degree of traumatic brain injury Moody had suffered.[6] Furthermore, Dr. Bloomfield did not explain precisely why, in his view, anti-seizure medication was required by the standard of care despite the risks of side effects. Dr. Bloomfield did, however, testify that for "a patient like Mr. Moody . . . the standard of care after having a bruising of the brain is to have one week of an anticonvulsive medication." A jury could have inferred that the phrase "a patient like Mr. Moody" referred to "a patient with the same degree of injury as Moody."

The level of specificity and detail with which Dr. Bloomfield testified could have affected the probative value of his testimony. A fact-finder could have found the testimony

[6] Defense counsel certainly could have elected to cross-examine Dr. Bloomfield about Moody's specific degree of injury, as well as about what degrees of injury would require the prophylactic administration of anti-seizure medication.

of the defense experts -- who testified much more specifically as to the precise degree of injury -- far more persuasive than that of Dr. Bloomfield.[7] Our task, however, and the task of the trial court when faced with a motion for judgment notwithstanding the verdict, is not to determine whether the jury reached what is, in our view, the correct result. Our task is to evaluate whether there is "*any* legally competent evidence, *however slight*," to support the jury's verdict. *Huppman*, *supra*, 100 Md. App. at 663. Dr. Bloomfield's testimony -- though general and at times superficial, particularly when compared to the detailed testimony provided by the defense experts -- was legally competent evidence based upon which the jury could have determined that Falik breached the standard of care by failing to administer anti-seizure medication and that the failure to administer anti-seizure medication caused Moody's death. Accordingly, we hold that the circuit court erred by concluding that no reasonable fact-finder could have found that Falik breached the standard of care in this case. Consequently, the circuit court's December 15, 2014 order must be vacated.

III.

Having determined that the circuit court erred by setting aside the jury's verdict based upon its determination that no reasonable fact-finder could have found that Falik breached the standard of care, we turn to the issue of how this case shall proceed on remand.

[7] Indeed, Falik's appellee brief presents several compelling factual arguments which would support a fact-finder's conclusion that the standard of care did not require the prophylactic administration of anti-seizure medication to Moody.

In Falik's written motion for judgment notwithstanding the verdict, which was filed on November 24, 2014, Falik argued that the evidence presented at trial did not support the jury's award of damages for Moody's conscious pain and suffering. Falik asserted that the Gibaus failed to prove that Moody actually experienced conscious pain and suffering. The Gibaus filed an opposition to Falik's motion on December 10, 2014. In the circuit court's order granting judgment in favor of Falik, however, the circuit court did not address the issue of whether the Gibaus had proved that Moody experienced conscious pain and suffering.[8] Accordingly, on remand, the circuit court shall address the merits of Falik's November 24, 2014 motion for judgment notwithstanding the verdict.

Furthermore, on November 19, 2014, Falik filed a renewed motion for mistrial based upon Dr. Bloomfield's failure to produce certain subpoenaed tax documents. The motion for mistrial was rendered moot by the circuit court's order entering judgment in favor of Falik. In light of our decision in this appeal, however, the motion for mistrial is no longer moot. Accordingly, the circuit court shall address the merits of Falik's motion for mistrial on remand.

[8] In the circuit court's order setting aside the verdict in its entirety, the court commented that it was "telling" that the bulk of the judgment was for conscious pain and suffering and that "no reasonable trier of fact could have found any evidence of consciousness at the advent of the seizure or thereafter." Nevertheless, the court did not address specifically whether the evidence established that Moody experienced any conscious pain and suffering as a result of Falik's breach of the standard of care.

Finally, we observe that Falik filed a motion for non-economic damages award reduction on November 24, 2014. Indeed, this issue may be rendered moot by the circuit court's actions in response to Falik's motion for judgment notwithstanding the verdict and Falik's motion for mistrial. Nevertheless, if the issue is not rendered moot by either of these two actions, the circuit court will need to address this motion as well on remand.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED. ORDER GRANTING JUDGMENT IN FAVOR OF DEFENDANT-APPELLEE FALIK VACATED. JURY VERDICT REINSTATED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.