Circuit Court for Prince George's County
Case No. CAL 1645892

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2534

September Term, 2018

---

JOHN P. BYRNE, ET AL.

v.

RONALD L. WHITE

---

Berger,
Arthur,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

---

Opinion by Woodward, J.

---

Filed: September 2, 2020

On December 21, 2016, Ronald L. White, appellee, and his wife, Yvette White, (collectively "the Whites") filed a complaint in the Circuit Court for Prince George's County for medical malpractice and loss of consortium against John Byrne, M.D. and Greater Metropolitan Orthopaedics, P.A. ("Greater Orthopaedics"), appellants. The Whites designated Phil Stiver, M.D. as a standard of care and medical causation expert witness to testify at trial. A jury trial commenced on May 7, 2018, and on May 11, 2018, the jury returned a verdict in favor of Mr. White.[1]

On appeal, appellants present four issues for our review, which we have rephrased as questions and expanded:[2]

[1] At some point before trial, the Whites dismissed the loss of consortium claim, leaving Mr. White as the only plaintiff.

[2] Appellants' four issues, as presented in their brief, are:

1. Whether the Trial Court abused its discretion in finding that Dr. Stiver's opinions were supported by a sufficient factual foundation, as required under Maryland Rule 5-702(3)[.]

2. Whether the Trial Court abused its discretion in permitting Dr. Stiver to offer a new standard-of-care opinion for the first time at trial[.]

3. Whether the Trial Court abused its discretion by failing to properly instruct the jury as to the applicable standard of care and failing to summarize the evidence for the jury pursuant to Maryland Rule 2-520[.]

4. Whether the Trial Court abused its discretion by permitting Mr. White to utilize "Golden Rule" or "Reptile Theory" statements during closing argument in violation of its pretrial ruling[.]

1. Did the circuit court abuse its discretion by failing to exclude Dr. Stiver's expert opinions for lack of an adequate factual basis under Maryland Rule 5-702(3)?

2. Did the circuit court err or abuse its discretion when it allowed Dr. Stiver to give an allegedly new standard of care opinion at trial?

3. Did the circuit court abuse its discretion when it declined to summarize the evidence under Maryland Rule 2-520?

4. Did the circuit court abuse its discretion when it declined to give appellants' proposed nonpattern jury instructions?

5. Did the circuit court abuse its discretion when it allowed Mr. White's counsel to use alleged "reptilian" arguments during trial?

For the following reasons, we answer all five questions in the negative. Accordingly, we shall affirm the judgment of the trial court.

## BACKGROUND

On April 1, 2013, Dr. Byrne performed a right total hip arthroplasty (a total hip replacement) using the direct anterior approach ("DAA") on Mr. White at Southern Maryland Hospital. The procedure involved Dr. Byrne making a small incision near the outside of Mr. White's right groin and encountering Mr. White's hip through the tensor fascia muscle.[3] Dr. Byrne then cut across the femoral neck, which is the upper part of the femur bone, and removed Mr. White's arthritic femoral head, which is the ball of the hip. Through an incision at the femoral neck, Dr. Byrne was able to find the soft bone inside of the femur, which is known as the canal. The canal is surrounded by the cortex, which is the hard outer surface of the femur. Dr. Byrne then placed an instrument called a broach

[3] Also known as the tensor fascia lata muscle, this muscle is one of three muscles that make up the superficial layer of the hip region. 98 Am. Jur. Trials 1, § 5 (2005, 2020 Supp.).

into the canal. The broach opened up the canal for Dr. Byrne to insert the prosthetic stem into the canal. While the broach was in the canal, Dr. Byrne moved Mr. White's leg (1) to make sure that the broach was the appropriate size, (2) to ensure that the broach was stable, and (3) to confirm that there was no chance of dislocation. Believing that the broach fit appropriately in the canal, Dr. Byrne inserted the stem of the prosthesis into the canal so that the prosthesis would attach to Mr. White's femur. Finally, Dr. Byrne placed the prosthetic femoral head at the top of the femur and arranged all of the components of the prosthesis. At the end of the surgery, Dr. Byrne believed that he had properly inserted the prosthetic stem into the canal. Dr. Byrne then allowed the muscles surrounding the femur to come back together, stitched together the fatty tissue, and stapled the skin around the incision. During the procedure, Dr. Byrne did not use intraoperative fluoroscopy, which is a portable x-ray machine that allows the surgeon to instantly see a patient's bones.

After Dr. Byrne completed the surgery, Mr. White went to the post-anesthesia care unit ("PACU") where he underwent a single anteroposterior ("front to back view") x-ray. Dr. Byrne did not request, and Mr. White did not undergo, any additional x-rays after the surgery.

Shortly after the surgery, Mr. White began to experience severe pain and discomfort. Several days later swelling at the incision site and bleeding were noted. Dr. Byrne then ordered another front to back view x-ray, as well as a lateral view x-ray. The lateral view x-ray differs from the front to back view, because the lateral view is taken from the side of the patient and allows the surgeon to determine whether the prosthetic stem is protruding out of the back of the patient's femur. The lateral view x-ray of Mr. White's right hip

showed a "perforation fracture," namely, the stem component of the prosthetic had perforated through the canal and the cortex of Mr. White's femur and into the muscles of his thigh. On or about April 9, 2013, Mr. White was transported to Georgetown University Hospital where he underwent another surgery on April 19, 2013, to correctly place the prosthetic stem into the canal.

On December 21, 2016, the Whites filed a complaint in the Circuit Court for Prince George's County for medical malpractice and loss of consortium against appellants. The Whites alleged, among other things, that Dr. Byrne failed to diagnose and correct the misplaced prosthetic stem during or after the surgery on April 1, 2013. The complaint also alleged that Dr. Byrne was an employee, agent, and/or servant of Greater Orthopaedics and that Dr. Byrne was acting within the scope of his employment at the time of Mr. White's surgery; thus, according to the complaint, Greater Orthopaedics was vicariously liable for Dr. Byrne's acts and omissions under the doctrine of *respondeat superior*.

Thereafter, on February 21, 2017, appellants filed an answer to the Whites' complaint in which, among other things, appellants generally denied all allegations of liability. The trial court issued a scheduling order that required the Whites to designate expert witnesses and disclose information related to each expert witness's testimony under Md. Rule 2-402. In response, on November 22, 2017, the Whites designated Dr. Stiver as their standard of care and causation expert witness. On March 9, 2018, appellants deposed Dr. Stiver. In his deposition, Dr. Stiver opined that Dr. Byrne did not meet the standard of care because he failed "to adequately identify the perforation by, one, not using intraoperative fluoroscopy; and number two, by [not] ordering standard, by every

orthopedic surgeon I know of, . . . post-operative[ ] AP and lateral [x-rays] in the [PACU]." Dr. Stiver acknowledged that, if a perforation occurs intraoperatively, it does not necessarily happen because there is a breach of the standard of care.

On March 16, 2018, appellants filed a motion for summary judgment. In their memorandum in support of the motion for summary judgment, appellants argued, among other things, that Dr. Stiver could not testify as an expert under Maryland Rule 5-702 because his testimony was *ipse dixit* ("because I say so") and therefore did not have a sufficient factual basis as required by Rule 5-702. Additionally, appellants filed several motions *in limine*. Of relevance to this appeal, appellants filed (1) a motion *in limine* to preclude Dr. Stiver from rendering standard of care and causation opinions because of the alleged *ipse dixit* nature of his opinions, and (2) a motion *in limine* to preclude Mr. White from making "Golden Rule" or "Safety" arguments. According to appellants, Safety arguments are "reptilian" arguments, and reptilian arguments are generally prohibited, because they "attack jurors' sense of personal safety and exploit their fear in an effort to create a new standard of care unrelated to the controlling law."

On May 1, 2018, the trial court held a motions hearing and granted appellants' motion *in limine* regarding the Golden Rule and Safety arguments. The trial court, however, denied appellants' motion *in limine* regarding Dr. Stiver's expert opinions, as well as appellants' motion for summary judgment.

Trial began on May 7, 2018. On May 11, 2018, the jury returned a verdict in favor of Mr. White for $294,906.54. Appellants filed a motion for remittitur on May 31, 2018. On August 20, 2018, the trial judge granted the motion for remittitur and entered a final

judgment in favor of Mr. White for $236,590.24 on August 28, 2018. Appellants filed a timely notice of appeal to this Court.

We will provide additional facts that are necessary to the disposition of each issue in the discussion below.

## DISCUSSION

### I. Factual Basis for Dr. Stiver's Opinions at Trial

#### A. Parties' Contentions

Appellants argue that the trial court should have excluded Dr. Stiver's standard-of-care opinion under Maryland Rule 5-702(3) because it lacked an adequate factual foundation. Specifically, appellants assert that Dr. Stiver's opinion is "simply *ipse dixit* or 'because I say so' conclusions," because Dr. Stiver could not identify any peer-reviewed medical literature, guidelines, or position statements of medical organizations that supported his opinion, nor had he authored any publications regarding the use of intraoperative or post-operative radiology. Moreover, according to appellants, Dr. Stiver provided no support for his opinion other than that "he and a small handful of other physicians" in Evansville, Indiana, used intraoperative fluoroscopy or post-operative lateral view x-rays when performing DAA hip replacements. Appellants conclude that Dr. Stiver's "personal preference for how he performs the surgery at issue in Indiana does not constitute a sufficient factual basis to opine that his method of performing the procedure is *the generally accepted* standard of care[.]" (Italics in original).

Mr. White counters that Dr. Stiver's opinion was supported by a sufficient factual basis because Dr. Stiver (1) had thirty-four years of experience in the field of orthopedic

medicine, having performed 1700 to 1800 DAA hip replacements, (2) was familiar with the standard of care for a board certified orthopedist performing a DAA hip replacement, and (3) reviewed Mr. White's medical records and the depositions of Mr. White, Dr. Byrne, and the three defense experts. Furthermore, Mr. White contends that Dr. Stiver's failure to identify any peer-reviewed literature or to author any publication regarding the use of intraoperative fluoroscopy or post-operative radiology goes to the weight, not the admissibility, of Dr. Stiver's opinion. Indeed, according to Mr. White, appellants' own expert witnesses could not identify any medical literature that supported their standard of care opinions. Mr. White concludes that Dr. Stiver's expertise and review of the relevant factual materials satisfied the requirements of Rule 5-702(3).

**B. Pertinent Facts**

At trial Dr. Stiver testified that he was familiar with the standard of care for a board certified orthopedist performing a hip replacement using the DAA technique. Dr. Stiver explained that he had been a board certified orthopedist from 1986 to the end of 2016, meaning that he had applied for certification with the American Board of Orthopedic Surgery, had passed both an oral and written exam, and had been recertified every ten years.[4] Dr. Stiver stated that he had worked at an orthopedic group called Tristate Orthopedic Surgeons since 1984, where at the time of his testimony, he specialized in joint replacement surgeries.

[4] Dr. Stiver explained that he let his board certification lapse in 2016 because he planned to retire in the near future, and the recertification process was timely and expensive.

Dr. Stiver testified that he began performing DAA hip replacements in 2008, and since that time he had performed between 1700 and 1800 of such hip replacements. Dr. Stiver explained that his education about the DAA technique started in 2006 and came from "going to lectures, going visiting other surgeons, spending time with them and getting the hospital to purchase the special equipment that [surgeons] use to do anterior total hips, that took two years." Dr. Stiver pointed out that with only two surgeons in the state of Indiana using the DAA technique, he taught the DAA hip replacement surgery to doctors from Indianapolis and Kentucky. Dr. Stiver further testified that he was a clinical associate professor at Indiana University Medical Center. In that role, Dr. Stiver was responsible for teaching medical students and residents, nurse practitioners, and physicians' assistants. According to Dr. Stiver, out of the 1700 to 1800 DAA hip replacements that he had performed in his career, he perforated only one patient's femur bone. Dr. Stiver explained that, when he perforated the femur, he identified the perforation by x-ray and then repositioned the prosthetic in the operating room.

Dr. Stiver testified that he became familiar with the standard of care for a DAA hip replacement through his thirty-four years of practice, along with spending time with other physicians, attending national meetings, and reading medical materials. Dr. Stiver explained that through his experience with other surgeons from across the country, he learned that there is a uniform standard of care for DAA hip replacements. He stated:

> I have friends that practice in all parts of the country. I also attend national meetings which bring in physicians from all over the world, you know, really, in that and so through that experience you talk, you learn, and you realize the standard of care is the same.

Finally, Dr. Stiver testified that he formed his opinion by reviewing (1) Mr. White's medical records from Southern Maryland Hospital, Georgetown University Hospital, and Greater Orthopaedics, (2) x-rays and different radiology studies, and (3) the sworn testimony from Mr. White, Dr. Byrne, and appellants' expert witnesses.

**C. Standard of Review**

> We have explained the 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. A circuit court's decision to exclude a witness will be reversed only if there is a clear abuse of discretion.

*Roy v. Dackman*, 445 Md. 23, 38–39 (2015) (quotations and citations omitted).

**D. Discussion**

Maryland Rule 5-702 provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. **In making that determination, the court shall determine** (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.**

(Emphasis added).

The third requirement of the rule mandates that "[t]he facts upon which an expert bases his opinion must permit reasonably accurate conclusions as distinguished from mere conjecture or guess." *Sippio v. State*, 350 Md. 633, 653 (1998) (quotation omitted). We have explained:

> With respect to the third requirement, whether there is a sufficient factual basis to support the expert testimony, the factual basis for expert

> testimony may arise from a number of sources, such as facts obtained from the expert's first-hand knowledge, facts obtained from the testimony of others, and facts related to an expert through the use of hypothetical questions.

*Rosebrock v. E. Shore Emergency Physicians, LLC,* 221 Md. App. 1, 25 (2015) (quotation omitted). In *Wantz v. Afzal*, 197 Md. App. 675 (2011), also a medical malpractice case, the trial court excluded testimony from three expert witnesses based in part on the defendants' argument that the experts lacked a sufficient factual basis for their opinions. *Id.* at 681, 687–90. On appeal, this Court held that the trial court abused its discretion when it excluded the testimonies of all of the expert witnesses. *Id.* at 678. For example, with regard to one expert witness, Dr. Gaber, we determined that he had a factual basis to support his opinion, because "his experience, as demonstrated through [ ] discovery deposition and curriculum vitae, as well as [ ] review of the pertinent medical records, create[d] the requisite basis necessary to offer" an expert opinion. *Id.* at 695. We concluded that there was a sufficient factual basis under Rule 5-702(3) for the opinions of all of the experts, because they "had substantial training and experience, over many years, and had reviewed materials pertinent to this case." *Id.* at 684.

Here, on May 7, 2018, prior to the beginning of trial, the trial court denied appellants' motion *in limine* and motion for summary judgment, both of which asserted that Dr. Stiver's opinion lacked a sufficient factual basis required by Rule 5-702(3). In its ruling, the court stated in relevant part:

> **Dr. Stiver's expert opinion** regarding Dr. Byrne's alleged failure to properly inspect the prosthetic during the surgery and to correctly diagnose and correct the misplaced prosthetic in a timely manner or to diagnose his error post-operatively **[is] not based on isp[e] [ ] dixit but rather based on**

> **his extensive training and experience. In fact, Dr. Stiver gave a** – in the Court's opinion – **a specific factual basis for his opinion.** He'd – he opines that Dr. Byrne should have conducted a[n] intraoperative fluoroscopy during the procedure or get a post-operative lateral x-ray. Had Dr. Stiver simply said Dr. Byrne[ ] . . . committed malpractice because he didn't do the surgery how I would do it there might be something to [appellants'] argument. But that – that's not what Dr. Stiver opined. **He said that the malpractice was based on something specific that Dr. Byrne did not do—an intraoperative fluoroscopy or a post-operative x-ray.**
>
> ***
>
> . . . [T]he issue is whether Dr. Stiver's opinions and conclusions are supported by a sound reasoning process and a rational explanation as to how he came to his conclusions**. On this question the Court finds that Dr. Stiver has sufficient factual basis so as to render his opinion on the standard of care for the procedure at issue**, precautions that the Defendant should have used according to the – that standard, **particularly the lateral x-ray and fluoroscopy and as a conclusion of that failure to do so constituted a breach of the standard of care [appellants] owed to [Mr. White].** It is up to the jury to then assess his credibility and evaluate his testimony.

(Emphasis added).

The trial court reaffirmed the above ruling during the trial when it overruled appellants' objection to the qualification of Dr. Stiver as an expert "in orthopedic medicine with opinions on the standard of care for a board certified orthopedist performing a direct anterior hip replacement." The court stated that Dr. Stiver "is qualified as an expert by knowledge, skill, experience, training, [and] education. His testimony is appropriate on the subject matters identified by [Mr. White's] counsel, and there is a significant factual basis to support his testimony."

We see no abuse of discretion by the trial court when it allowed Dr. Stiver's expert testimony on the standard of care in the instant case. We shall explain.

At the time of trial, Dr. Stiver had extensive experience in the field of orthopedic surgery. He was board certified from 1986 to 2016, and board eligible thereafter. Dr. Stiver began learning about the DAA technique for total hip replacements in 2006. He went to lectures, visited other surgeons, trained with probably ten to twelve different doctors, including Dr. Joel Matta who developed the DAA technique. Dr. Stiver performed his first hip replacement using the DAA technique in 2008, and over the next ten years performed between 1700 and 1800 of such procedures. Dr. Stiver testified at trial that he was familiar with the standard of care for a board certified orthopedic surgeon using the DAA technique through his practice of over thirty years and "[s]pending time with other physicians, national meetings, education, materials, reading materials through." Further, according to Dr. Stiver, the standard of care for the DAA procedure was the same for the Washington, D.C. area and for the Midwest, where he practiced, based on his experience with doctors "from all over the country," and his attendance at national meetings, "which bring in physicians from all over the world." Finally, Dr. Stiver reviewed Mr. White's medical records, (*i.e.*, the hospital records from Southern Maryland Hospital and Georgetown University Hospital and Dr. Byrne's office records), the x-rays and radiology studies, and the deposition testimony of Mr. White, Dr. Byrne, and appellants' expert witnesses.

From the above evidence, it is clear that Dr. Stiver had extensive training, experience, and knowledge of the performance of a hip replacement using the DAA technique by a board certified orthopedist, and the standard of care regarding the same. Dr. Stiver also became aware of the facts and circumstances of the instant case through his

review of the relevant materials. Consequently, Dr. Stiver had a sufficient factual basis under Rule 5-702(3) to render an expert opinion on the standard of care for the DAA hip replacement performed by Dr. Byrne on Mr. White and Dr. Byrne's breach of that standard of care.

Appellants, however, claim that Dr. Stiver's standard of care opinion lacks a factual basis because he did not identify any peer reviewed literature or guidelines that supported his opinion. In Maryland, simply because an expert cannot point to medical literature in support of his or her opinion does not mean that the expert cannot satisfy the requirements of Rule 5-702(3). *See Rite Aid Corp. v. Levy–Gray*, 162 Md. App. 673, 707 (2005) (rejecting defendant's argument that plaintiff's experts failed to satisfy Rule 5-702 because they did not provide "a single study or textbook to support" their opinion). Furthermore, as pointed out by Mr. White and by the trial court at the hearing on the motion for summary judgment and motion *in limine*, appellants' experts, Dr. Anthony Unger and Dr. John Keggi, likewise could not identify any medical literature that supported their opinions that the standard of care does not require intraoperative fluoroscopy or a post-operative lateral view x-ray. Dr. Unger testified:

> [Mr. White's Counsel]: . . . . Is it fair to say that your testimony, with regard to what the standard of care does and does not require, you're not relying on any particular text or journal or treatise or anything of that nature for the opinions that you've expressed here today?
>
> [Dr. Unger]: That's true. I'm relying on my experience and education and knowledge.

Dr. Keggi then testified:

| | |
|---|---|
| [Mr. White's Counsel]: | So the opinions that you've expressed here today are based on your knowledge, training, and experience, opinion literature, but nothing (inaudible)? |
| [Dr. Keggi]: | That's correct. |
| [Mr. White's Counsel]: | And in fact, to the best of your knowledge, there really isn't any book that I could go to that says doing an intraoperative fluoroscopy is the standard of care or is not the standard of care, it's just not written, correct? |
| [Dr. Keggi]: | Well, I don't know if someone has written that. That would not be the case. |
| [Mr. White's Counsel]: | To your knowledge? |
| [Dr. Keggi]: | To my knowledge, no. |

These exchanges at trial buttress Mr. White's argument that an expert witness is not required to rely on medical literature or guidelines as the basis of his or her expert opinion. For if the standard of care required expert witnesses to rely on medical literature, appellants' own witnesses would not have met the requirements of Rule 5-702(3).

Appellants also argue that Dr. Stiver's standard of care opinion is based on his own personal experience and thus does not constitute a sufficient factual basis "to opine as to the nature and scope of the *generally-accepted* standard of care applicable under the circumstances." In support of their position, appellants rely on *Travers v. District of Columbia*, 672 A.2d 566 (1996). We are not persuaded.

*Travers* involved the sufficiency of the factual basis for an expert witness to opine on the standard of care. *Id.* at 568. In that medical malpractice case, the plaintiff offered

a medical expert witness to opine that aspirin should have been administered to prevent a post-splenectomy patient from forming a blood clot. *Id.* After a mistrial was declared due to a hung jury, the defendant filed a motion for entry of judgment based in part on the ground that the plaintiff failed to prove the existence of a national standard of care for the administration of aspirin. *Id.* at 567. The trial court granted the motion, and the District of Columbia Court of Appeals affirmed. *Id.* at 570. The Court reasoned that an expert must testify to a national standard of care, not his or her personal opinion as to what should be done in a particular case. *Id.* at 568. The Court stated that "[r]eference to a published standard, *though not required*, can be important in determining whether a national standard's adherence was proven with sufficiency." *Id.* (emphasis added). Further, the Court observed that, "if there was evidence that the witness had discussed the described course of treatment with practitioners outside the District, such as seminars or conventions, and that those other practitioners agreed with the course urged, the testimony might have been sufficient[ ]." *Id.* at 569.

The expert witness in *Travers* "was unable to specify any published medical standards, manuals, or protocols to support his opinion." *Id.* Moreover, the expert admitted that he may or may not have discussed a national standard on this issue at various national conferences. *Id.* The Court concluded that "[e]ssentially" the expert witness's standard of care opinion "rested on discussions with about five or six local fellow surgeons." *Id.*

*Travers* is inapposite here for two reasons. First, as stated above, although Dr. Stiver could not point to any medical literature or guidelines to support his standard of care

opinion, neither could appellants' expert witnesses. Second, unlike the expert in *Travers*, Dr. Stiver based his standard of care opinion on more than just conversations with a handful of surgeons in Evansville, Indiana. Dr. Stiver testified that the standard of care in the Washington, D.C. area was the same standard of care in the locality of his practice, through his "experience with people from all over the country." He elaborated that he attended national meetings with surgeons from around the world with whom he talked, and learned that "the standard of care is the same."

For the above reasons, we hold that the trial court did not abuse its discretion in ruling that Dr. Stiver's standard of care opinion had the requisite factual basis to satisfy Rule 5-702(3).[5]

## II. Dr. Stiver's Allegedly New Standard of Care Opinion at Trial

### A. The Parties' Contentions

Appellants assert that the trial court abused its discretion by allowing Dr. Stiver to offer a new, undisclosed expert opinion for the first time at trial. Specifically, appellants

[5] Appellants also contend that Dr. Stiver's causation opinion—that Dr. Byrne's failure to use intraoperative fluoroscopy or a post-operative lateral view x-ray caused the revision surgery weeks later and related medical expenses—lacked the requisite factual basis under Rule 5-702(3). Appellants' contention is without merit. Based on his extensive training and experience, as outlined above, coupled with his review of Mr. White's medical records and other relevant materials, Dr. Stiver testified at trial that, if the femoral perforation had been discovered by Dr. Byrne by use of intraoperative fluoroscopy, the revision procedure would not have been necessary, because the perforation would have been treated before Mr. White ever left the operating room. Dr. Stiver testified further that, if the femoral perforation had been discovered by the use of post-operative lateral view x-ray, Mr. White could have been "taken back" to the operative room and the condition corrected "at that time while the wound was most sterile." In our view, these causation opinions of Dr. Stiver have a sufficient factual basis under Rule 5-702(3), and thus the trial court did not abuse its discretion in so holding.

claim that "Dr. Stiver opined consistently throughout discovery and trial that the applicable standard of care specifically required Dr. Byrne to utilize intraoperative fluoroscopy and a post-operative lateral view x-ray." Then, according to appellants, Dr. Stiver "pivoted" when he testified on cross examination that "Dr. Byrne breached the standard of care simply by failing to identify the femoral perforation by *any* available method before [Mr. White] left the operating room." (Italics added by appellants). Appellants argue that Dr. Stiver's testimony on cross examination was a "new opinion" that "decisively changed the legal landscape of this case," and under Rule 2-402(g) and the trial court's scheduling order, appellants were entitled to discovery of such opinion so that appellants could explore the issue at Dr. Stiver's deposition. Appellants conclude that they were severely prejudiced by the trial court's decision to allow Dr. Stiver to offer a "new opinion," and that the court abused its discretion, which requires a new trial.

Mr. White responds that Dr. Stiver's standard of care opinion did not change, and that, if he did offer a new opinion, it was harmless.[6] Mr. White points to Dr. Stiver's report attached to the Certificate of Qualified Expert, which sets forth Dr. Stiver's expert opinion that Dr. Byrne breached the standard of care by his "failure to recognize" the femoral perforation at the time of surgery. Additionally, Mr. White points out that in his deposition, Dr. Stiver opined that Dr. Byrne breached the standard of care when he failed to identify the femoral perforation by not using the "proper studies," namely intraoperative

[6] Mr. White also argues that the issue was not preserved and Dr. Stiver's trial testimony falls under the invited error doctrine. Because we conclude that the trial court was not clearly erroneous in finding that Dr. Stiver's testimony at trial did not constitute a "new opinion," we need not address these arguments.

fluoroscopy and post-operative AP and lateral view x-rays. Finally, Mr. White argues that, even if Dr. Stiver offered a new expert opinion at trial, appellants were not prejudiced because they adduced rebuttal testimony from Dr. Unger on "this exact point."

**B. Pertinent Facts**

Because appellants claim that Dr. Stiver provided a new standard of care opinion in his testimony at trial, we quote the relevant portions of Dr. Stiver's opinion as follows.

In his report attached to Mr. White's Certificate of Qualified Expert, Dr. Stiver opined:

> Therefore, it is my professional opinion that Dr. Byrne breached the standard of care expected for a total hip joint replacement surgeon by executing the technical errors listed above in performance of a right total hip replacement upon [Mr.] White. **The failure to recognize the perforation of the posterior wall by the femoral stem in the operative room could have been prevented by utilization of fluoroscopy during the surgery. Use of fluoroscopy during the performance of anterior total hip procedures is considered standard technique.** The perforation could have been recognized and corrected at that time with little to no sequela. **Ordering a single AP x-ray of the pelvis in the recovery room as a postoperative position assessment of the total hip components was inadequate and not consistent with the standard required 2 views (ap and lateral of the hip) typical[ly] utilized by total joint surgeons to evaluate proper total hip placement.**

(Emphasis added).

In his preliminary expert witness designation, Mr. White stated:

> **In [Dr. Stiver's] opinion, the standard of care requires checking the position of the prosthetic components for the anterior approach technique**, especially when the surgeon is relatively inexperienced with the procedure as was Dr. Byrne. **Dr. Stiver will opine that the failure to properly check the position of the components resulted in the failure to discover the misplacement of the femoral component** with the ability to revise the surgery without the need for readmission and another subsequent surgical procedure.

(Emphasis added).

At his March 9, 2018 deposition, Dr. Stiver summarized his standard of care opinion as follows:

> **[Dr. Byrne] failed to adequately identify the perforation by, one, not using intraoperative fluoroscopy; and number two, by ordering standard, by every orthopedic surgeon I know of, to use post-operatively AP and lateral in the post-anesthesia recovery unit. So he would have diagnosed that in a more timely fashion, and had he seen that probably would have taken him right back to the OR and corrected it at that time.** Now, maybe not because of indicating in the record they had some blood pressure issues with him and that sort of thing. **But it would have been discovered immediately and they could have dealt with that.** That's the opinion about the use of intraoperative fluoroscopy. So many people who do use it and consider it standard where I'm from, that that would have avoided that complication to remain, could have been corrected in the OR and probably would have had no problems or sequela as a result of that.
>
> **So failure to diagnose. Ordering the proper studies to adequately diagnose the intraoperative procedure. Then that resulted in the second surgery** . . . .

At trial on direct examination, Dr. Stiver testified:

> [Mr. White's Counsel]: Do you have an opinion, Doctor, to a reasonable degree of medical probability as to the standard of care for a board certified orthopedist performing [DAA] hip replacement regarding the use of intraoperative radiology or fluoroscopy, as it's also been called?
>
> [Dr. Stiver]: I realize there's different schools of thought on that. In the area where I practice, everybody uses fluoroscopy, that portable x-ray machine, during their surgery. And I use it on every case and everybody I know uses it on every case.
>
> [Mr. White's Counsel]: **And in – based on your training and education and experience and your visits with the different surgeons that you talked about earlier, is the use of intraoperative**

**fluoroscopy standard of care for a doctor performing DAA?**

[Dr. Stiver]: **Yes.**

***

[Mr. White's Counsel]: All right. Do you have an opinion, Doctor, to a reasonable degree of medical probability as to **the standard of care for a board certified orthopedist performing [DAA] hip replacement regarding the use of radiology in the recovery room?**

[Dr. Stiver]: **Yes.**

[Mr. White's Counsel]: **And what is the standard of care in that regard?**

[Dr. Stiver]: **Two views, AP and lateral x-ray if you're going to get an x-ray in recovery room.**

[Mr. White's Counsel]: **And why is that?**

[Dr. Stiver]: **So that you can properly assess the position of the components. Without two views, as evidenced by this case, you can't tell.**

***

[Mr. White's Counsel]: And when you've gotten – approximately how many patients have you gotten lateral view on with DAA?

[Dr. Stiver]: In PACU, none, because I use intraoperative fluoroscopy on every patient.

[Mr. White's Counsel]: **Okay. So as I understand what you're saying, you do one or the other. You don't have to do both.**

[Dr. Stiver]: **Right.**

[Mr. White's Counsel]: All right.

[Dr. Stiver]: And the preference would be to do it intraoperative so you can find a problem or see a problem and make an assessment and treat it before the patient ever leaves the operative room. . . .

(Emphasis added).

On cross examination, Dr. Stiver testified as follows:

[Appellants' Counsel]: Okay. So can we now agree that it doesn't seem as shocking to you that Dr. Byrne used – did not use intraoperative fluoroscopy in this case?

[Dr. Stiver]: I'm not as shocked. I agree to that.

[Appellants' Counsel]: Okay. And [n]ow you're starting to agree that there may be more than one school of thought in how to approach this procedure, fair?

[Dr. Stiver]: Uh-huh. Yes.

[Appellants' Counsel]: Okay. And **I think you testified in your deposition, and I'll use your words, there's more than one way to skin a cat.**

[Dr. Stiver]: **Correct.**

***

[Appellants' Counsel]: **Some people like to use intraoperative fluoroscopy during a procedure, some don't fair?**

[Dr. Stiver]: **Yes.**

***

[Appellants' Counsel]: . . . . **I think you've agreed that there are two schools now that are out there. One, don't use intraoperative fluoroscopy and one who**

| | |
|---|---|
| | **[does] and both meet the standard of care. Fair.** |
| [Mr. White's Counsel]: | Objection. Asked and answered, Your Honor. |
| The Court: | Overruled. |
| [Dr. Stiver]: | **No. I disagree with that. I think – the goal is not to leave the OR with it protruded.** However you decide to do that, to acquiesce to your view of there are two schools of thought and whether or not to use it, what means do you have of preventing that from occurring? That's the ultimate goal on breach of standard of care. **And to leave the OR with a stem protruded undiscovered and uncorrected, that's the breach of standard of care.** |
| [Appellants' Counsel]: | Doctor, but you just testified earlier that there are many times surgeons don't appreciate that a perforation or other type of complication occurred in the OR. |
| [Dr. Stiver]: | You just proved my point and why you need evaluatory (sic) aids to do that because you can't rely totally a hundred percent on your feedback and your ability to differentiate when that happens. |
| | *** |
| [Appellants' Counsel]: | So it's your opinion that despite the fact regarding a one, two, three, four, five people who work within this community who helped develop[ ] the anterior approach, that they're all breaching the standard of care. |
| [Mr. White's Counsel]: | Objection; asked and answered— |
| [Dr. Stiver]: | Yes, it— |
| [Mr. White's Counsel]: | —now multiple times. |

| | |
|---|---|
| The Court: | Overruled. |
| [Dr. Stiver]: | No. I'm saying that **if you choose to give up utilizing x-ray and – or fluoroscopy or plain x-rays in the OR then** you're giving up an evaluation tool and **it's up to you to come up with other means to ensure that the components are properly placed and you don't leave the OR with it protruding out the back side of the femur. That's – that – I mean, that's the point in this case. That's really what this is about. That's the breach of standard of care, leaving the [operating room] with a mal-positioned, mal-placed component and not discovering it before you leave the OR.** . . . |

(Emphasis added).

**C. Standard of Review**

In *Hill v. Wilson*, 134 Md. App. 472, 489 (2000), this Court set forth the standard of review governing the issue of an alleged material variance between a witness's deposition and trial testimony:

> When the question is whether there is a material variance between what the witness testified to at deposition and what the witness will testify to at trial, the trial judge's finding of fact will be affirmed on appeal unless the reviewing court is persuaded that the trial judge's finding is clearly erroneous. . . . When the question is whether the trial court selected an appropriate remedy for the type of discovery violation found in this case, the trial court's remedy of choice will be affirmed on appeal unless the reviewing court is persuaded that the trial court abused its discretion. Our review of the trial court's resolution of a discovery dispute is quite narrow; appellate courts are reluctant to second-guess the decision of a trial judge to impose sanctions for a failure of discovery. Accordingly, we may not reverse unless we find an abuse of discretion.

(Footnote, citations, and internal quotations omitted).

**D. Discussion**

Maryland Rule 2-402(g)(1)(A) provides:

> A party by interrogatories may require any other party to identify each person, other than a party, whom the other party expects to call as an expert witness at trial; to state the subject matter on which the expert is expected to testify; to state the substance of the findings and the opinions to which the expert is expected to testify and a summary of the grounds for each opinion; and to produce any written report made by the expert concerning those findings and opinions. A party also may take the deposition of the expert.

Appellants cite to *Hill* in support of their argument on this issue. In *Hill*, a medical malpractice case, the appellants' expert testified in his deposition that the appellee's lumbar ulcer, which required amputations, had developed from a bar that ran across the back of the appellee's wheelchair. *Id.* at 481. The expert, however, never testified in his deposition that the wheelchair was "broken" or in poor condition. *Id.* at 483. At trial, the expert was prepared to testify that the appellee's wheelchair was "broken." *Id.* at 481. The trial court ruled that the expert could testify that the lumbar ulcer was caused by the bar of the wheelchair rubbing the appellee's back, but could not opine that the wheelchair was broken. *Id.* The court reasoned that "to say that there was a problem with the rod on the back of the wheelchair rubbing against [the appellee's] back does not connote that the wheelchair was broken." *Id.* at 488.

On appeal, this Court first noted "the well established rule that a trial judge has the power to exclude trial testimony that constitutes a material departure from what the witness testified to at deposition." *Id.* at 481–82. We next observed that the trial court found as a fact that there was a material variance between the expert's deposition and trial testimony because the expert's "deposition testimony about the condition of appellee's wheelchair

does not connote that the wheelchair was broken." *Id.* at 489 (quotation omitted). We held that such finding of fact was not clearly erroneous. *Id.*

This Court next addressed the trial court's remedy for the appellants' discovery violation, namely, prohibiting the expert from using a term, "broken," that he had not used during his deposition. *Id.* at 490–91. We held that there was no abuse of discretion because the appellants' expert "was not prohibited from testifying at trial to everything that he had testified to in his deposition," and thus the appellants were not unfairly prejudiced by the trial court's ruling. *Id.* (footnote omitted).

In the instant case, unlike in *Hill*, the trial court found that Dr. Stiver did not offer a "new opinion," and thus his trial testimony did not materially depart from his pre-trial testimony or statements. When appellants objected at trial to Dr. Stiver's alleged new opinion, the trial court said: "I don't think it qualifies as a brand new opinion." Later in its colloquy with appellants' counsel, the court repeated: "So I say it's not— . . . a second opinion." Further, during a hearing on post-trial motions, the court rejected appellants' claim of surprise by Dr. Stiver's trial testimony:

> **I mean the surprise part is, I mean it's hard for me to accept that.** I mean you say he said that the reason there was liability because of A and B, I don't think he deviated from that.
>
> I guess he allowed for another – **At best he allowed for another possibility. I don't think he changed his opinion** that, and I forget the, I have already forgotten what his testimony was, but I mean in effect his opinion was you had to use this sort of intraoperative fluoroscopy and that was – mean I don't think he deviated from that.

(Emphasis added).

We hold that the trial court was not clearly erroneous when it found that Dr. Stiver's trial testimony was not a "new" or different standard of care opinion from the one that he provided during discovery. In his preliminary expert witness designation, Mr. White stated: "In [Dr. Stiver's] opinion, the standard of care requires checking the position of the prosthetic components," and "the failure to properly check the position of the components [ ] resulted in the failure to discover the misplacement of the femoral component[.]" Then, in his deposition, Dr. Stiver summarized his opinion by stating that Dr. Byrne failed to diagnose the femoral perforation by failing to order the proper studies that would have detected the perforation. The "proper studies" were the intraoperative fluoroscopy and the post-operative AP and lateral view x-rays. At trial, on direct examination, Dr. Stiver testified that to satisfy the standard of care, a surgeon performing a DAA hip replacement must do either intraoperative fluoroscopy or a lateral view x-ray in the PACU. On cross examination, Dr. Stiver repeated his deposition testimony that the standard of care required Dr. Byrne to adequately identify the perforation by ordering the proper studies to make such diagnosis. Dr. Stiver testified that "the goal is not to leave the OR with it protruded. . . . And to leave the OR with a stem protruded undiscovered and uncorrected, that's the breach of [the] standard of care." Dr. Stiver explained further that, if a surgeon fails to use fluoroscopy or plain x-rays, then it is up to the surgeon "to come up with other means to ensure that the components are properly placed[,] and you don't leave the OR with it protruding out the back side of the femur."

It is clear to us that Dr. Stiver's standard of care opinion consisted of two parts—an end or goal and the means or method for achieving that end. The end was the identification

of a femoral perforation caused by the improper placement of the prosthetic component during a hip replacement using the DAA technique. The means for achieving that end was the utilization of the proper studies—intraoperative fluoroscopy or post-operative AP and lateral view x-rays. This standard of care opinion was consistently advanced by Dr. Stiver during both pre-trial discovery and at trial.

The trial court noted, however, that "at best" Dr. Stiver's trial testimony acknowledged "another possibility" to achieve the same goal, but according to the court, such acknowledgement did not change Dr. Stiver's opinion. We agree. The existence of another method to properly diagnose a femoral perforation does not change the requirement of the standard of care advocated by Dr. Stiver that the surgeon adequately identify such perforation at the time of the surgery. Moreover, appellants never adduced evidence of another possible method to detect a femoral perforation, nor did Dr. Byrne testify that he used any such method during the hip replacement surgery for Mr. White.

Assuming *arguendo*, that the trial court was clearly erroneous when it found that Dr. Stiver's trial testimony was not a "new opinion," we hold that appellants were not prejudiced by the admission of Dr. Stiver's "new opinion" at trial, and thus the trial court did not abuse its discretion by so ruling. As stated above, appellants contend that Dr. Stiver originally opined that the standard of care required a surgeon to check for a perforation by using intraoperative fluoroscopy and a post-operative lateral view x-ray, but at trial Dr. Stiver testified that a surgeon simply must check for a perforation by *any* available method. Appellants argue that the alleged new opinion was severely prejudicial to Dr. Byrne

because appellants did not have the ability to depose Dr. Stiver about the new opinion "and to explore the foundational evidence supporting that conclusion."

At trial, Dr. Byrne and appellants' experts testified that the standard of care required surgeons performing DAA hip replacements to use intraoperative fluoroscopy or a post-operative lateral view x-ray only if there were abnormalities or causes for concern that occurred during the surgery. Dr. Byrne testified that during Mr. White's surgery, he did not encounter any abnormalities or otherwise have any indication that a perforation had occurred. Thus, according to Dr. Byrne, he did not use any method to check for a perforation. Dr. Keggi also stated that Dr. Byrne did not use any method to detect a potential perforation. He testified:

> [Appellants' Counsel]: . . . Dr. Keggi, we all understand that Dr. Byrne could have done things; he could have used fluoroscopy, he could have taken a post-operative lateral. **But does the standard of care require, not could have, but require Dr. Byrne to have done those things?**
>
> [Dr. Keggi]: **No. Because there was no indication during surgery that there was a problem.** In my particular cases that I reference, there was a loose broach or something like that. In this case, there was no loose broach. We know that, because Mr. White walked on it. . . . **So in this case there was no indication that there was a problem intraoperative[ly], so the standard of care did not require – nothing suggested that anything needed to be done further and therefore the standard of care was met.**

(Emphasis added).

Because Dr. Byrne did not encounter any complications during Mr. White's surgery, he did not utilize any diagnostic tool or other method to detect a perforation of the femur. Therefore, even if Dr. Stiver's testimony at trial was a "new opinion," namely that the standard of care required Dr. Byrne to use *any* available method to detect a perforation, the fact remains that Dr. Byrne never claimed to use any such method. In other words, under either the original or "new" opinion of Dr. Stiver, Dr. Byrne breached the standard of care. Furthermore, appellants used Dr. Stiver's alleged change in his opinion to their advantage by repeatedly mentioning it in their closing argument to discredit Dr. Stiver. Thus, even if an error had occurred in allowing Dr. Stiver's testimony, appellants were not unfairly prejudiced by it. Accordingly, there was no abuse of discretion by the trial court.

## III. Trial Court's Refusal to Summarize the Evidence

### A. Parties' Contentions

Appellants argue that the trial court abused its discretion by refusing to summarize the evidence under Maryland Rule 2-520(d). Specifically, appellants argue that Mr. White's counsel repeatedly implied that the perforation was a breach of the standard of care when (1) Mr. White's counsel referred to the perforation as a "dirty deed" in his cross examination of Dr. Byrne, and (2) Mr. White's counsel suggested during closing argument that the perforation constituted negligence. Appellants conclude that "there was a strong likelihood that the jury would confuse the issues and reach a liability determination based merely on the occurrence of the femoral perforation," and therefore a summary of the evidence was necessary.

Mr. White responds that appellants waived any objection to the failure of the trial court to summarize the evidence. According to Mr. White, after appellants' counsel requested a summary of the evidence, and Mr. White's counsel responded that he would state in his closing argument that the perforation by itself was not a breach of the standard of care, appellants' counsel said, "All right, then I've argued for nothing. I apologize." Additionally, Mr. White contends that appellants did not cite to any case in support of their argument that the court's failure to summarize the evidence constituted an abuse of discretion. Finally, Mr. White argues that, even if the issue was preserved, the error was harmless, because Mr. White's counsel "emphasized repeatedly in closing argument that Dr. Byrne's act of perforating [Mr.] White's femur was not the negligence upon which the jury should base its verdict."

**B. Pertinent Facts**

During his cross examination of Dr. Byrne, Mr. White's counsel referred to the perforation of the femur as a "dirty deed." Appellants' counsel objected, and the trial court overruled the objection. In a bench conference that followed Dr. Byrne's testimony, appellants requested that the court summarize the evidence to clarify that the perforation of the femur was not a breach of the standard of care. Appellants argued that the reference to the perforation as a "dirty deed" by Mr. White's counsel may have confused the jury that the perforation was a breach of the standard of care. The court denied appellants' request, stating that it would "give an instruction and merely say that whatever the lawyers say is not evidence." Then, after further discussion in that same bench conference, Mr. White's counsel agreed that in his closing argument he would state that the perforation was

not a breach of the standard of care. Appellants' counsel responded, "[a]ll right, then I've argued for nothing. I apologize."

During a later bench conference, in response to appellants' request for a nonpattern jury instruction that is not at issue in this appeal, appellants' counsel reiterated that appellants were not concerned about the jury being confused that the perforation was a breach of the standard of care. Specifically, appellants' counsel stated: "Now we know that both [Mr. White's counsel] and [appellants' counsel] are going to affirmatively state in their closings that the perforation is not a breach in the standard of care, we're not concerned about that instruction."

After the trial court instructed the jury, appellants' counsel objected, stating:

> The [appellants] take exception to the failure to include the court's decision, not to include non-pattern instruction number two, number three, number four, number five, number six, number seven, number eight, number nine, number 10, number 11. Thank you.

Appellants' counsel did not raise any objection to the trial court's failure to summarize the evidence about the perforation.

At the beginning of his closing argument, Mr. White's counsel stated: "So let's talk about what negligence is. *The perforation itself is not negligence.* Failing to discover it timely, either in the operating room or the recovery room, that's what the negligence is." (Emphasis added). Later on in his closing argument, Mr. White's counsel said:

> So if you don't have that experience, because it does count, you've got to use the tools at your disposal. You've got to use intraoperative fluoroscopy, you've got to use post-operative radiology. Because if you don't, you'll miss it. And that's exactly what happened here. Now, the defense is that a perforation is a known complication. Remember what I said in my opening, what's [a] complication? That's just a medical term for a

> mistake or accident. **Well again, I've said this already I think two or three times, perforation by itself, that's not negligence. But do you know what is? You know what's breaching the standard of care? Leaving the operating room with a stem sticking out of your thigh bone. That's negligence.**
>
> And you know what? That's not a known complication. Because we already know that the three experts who testified here, that didn't happen to a single one of the three. And the reason is because they all caught it. Every single one caught it. Except for one person in this courtroom. And that's Dr. Byrne.

(Emphasis added).

At the end of the above statements by Mr. White's counsel, appellants' counsel did not object, but the trial court called counsel to the bench for a conference. Although not entirely clear, the court appeared to suggest that Mr. White's counsel was arguing to the jury that the perforation "in and of itself was negligence."[7] Mr. White's counsel replied that "what this is is the failure to discover [ ] is in fact what I'm saying. If [Mr. White] is leaving the OR with it, it hasn't been discovered. That's what I'm talking about. Not the perforation." Appellants' counsel then complained that Mr. White's counsel "emphasized the perforation [more] than anything else," to which Mr. White's counsel said, "I'm emphasizing when the perforation was not discovered." Apparently persuaded by the argument put forth by Mr. White's counsel, the court stated that "[t]he negligence is that [Dr. Byrne] didn't catch it" and that "[t]here's two tools to check it."

The bench conference then moved on to a different, but related topic and concluded with the following colloquy among the court and counsel for the parties:

[7] In the transcript of the bench conference, statements by the trial court are listed as "inaudible" ten separate times.

[Appellants' Counsel]: **But you said he's the only one that let a patient leave the operating room. Dr. Unger did too.**

[Mr. White's Counsel]: **And recovery room.**

The Court: That's fine.

[Appellants' Counsel]: **But that's not what he said though.** His words, he left that part out when he just said it. **That's why I was troubled by it. What he said is different than what he wrote. What he said to the jury was that Dr. Byrne was the only one who let the patient leave the operating room with a perforation.**

The Court: **Yes, clean it up.**

[Mr. White's Counsel]: **Okay.**

[Appellants' Counsel]: Your Honor, (inaudible 04:37:22) that **on the basis of [Mr. White's counsel's] closing and his slides, we're going to have to make a motion for a mistrial.** You can deny that and take it under advisement, but we need to make it for the record.

The Court: I'll deny the motion for a mistrial.

[Mr. White's Counsel]: All right. I'll clean it up.

The Court: All right.

(Bench Conference concluded – 04:37:35 p.m.)

(All Counsel return to the trial tables where the following ensues: )

[Mr. White's Counsel]: Okay. **So I want to be very clear.** Again, you've heard about all of these perforations. **But the negligence – the negligence is not discovering the perforation either in the operating room or in the recovery room. So if you let the patient leave both the operating room or the recovery room with the stem**

> **sticking out of his bone, Dr. Byrne was the only one who did that, you're negligent.**

(Emphasis added).

At no time during the above bench conference did appellants' counsel request the trial court to summarize the evidence by advising the jury that a perforation of the femur did not constitute negligence.

**C. Discussion**

We agree with Mr. White that appellants' challenge to the failure of the trial court to summarize the evidence was not preserved for appellate review, and even if it had been preserved, there was no abuse of discretion by the trial court.

Maryland Rule 2-520 provides, in relevant part:

> (d) Reference to Evidence. **In instructing the jury, the court may refer to or summarize the evidence in order to present clearly the issues to be decided.** In that event, the court shall instruct the jury that it is the sole judge of the facts, the weight of the evidence, and the credibility of the witnesses.
>
> (e) Objections. No party may assign as error the giving or the failure to give an instruction **unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection.** Upon request of any party, the court shall receive objections out of the hearing of the jury.

(Emphasis added).

We have explained that the rationale of Rule 2-520(e) is "to enable the trial court to correct any inadvertent error or omission in the oral [or written] charge, as well as to limit the review on appeal to those errors which are brought to the trial court's attention." *Mayor & City Council v. Hart*, 167 Md. App. 106, 124, *aff'd*, 395 Md. 394 (2006) (alteration in original) (quotation omitted). Here, appellants requested that the trial court provide a

summary of the evidence after Mr. White's counsel referred to the perforation as the "dirty deed" during his cross examination of Dr. Byrne. The court declined to give a summary that the perforation was not a breach of the standard of care, but agreed to give a general instruction that the attorneys' comments were not evidence. Then, after Mr. White's counsel stated that he was going to tell the jury that a perforation was not a breach of the standard of care, appellants' counsel stated that she "argued for nothing." Later in the trial, after the court had instructed the jury, appellants' counsel made specific objections to the court's refusal to give other nonpattern jury instructions, but did not object to the court's failure to summarize the evidence about the perforation. When the issue of the perforation was raised later *sua sponte* by the court during the closing argument by Mr. White's counsel, appellants again did not ask for a summary of the evidence.[8] Thus appellants did not "afford the trial court an opportunity to amend the instruction," because appellants' counsel effectively withdrew the request for a summary of the evidence, did not object to the lack of such summary after the court instructed the jury, and did not again request the summary during closing argument. *See Hart*, 167 Md. App. at 126. Because appellants never raised the issue of whether the trial court should have summarized the evidence about the perforation after withdrawing their request for such summary, we hold that the issue is not preserved for our review under Rule 2-520(e).

[8] Appellants' counsel did make a motion for a mistrial, but did not specifically base the motion on any comment by Mr. White's counsel about the perforation or the court's failure to summarize the evidence. Appellants' counsel simply said that the motion was based on Mr. White's counsel's "closing and his slides."

Assuming, *arguendo*, that appellants' challenge to the trial court's failure to summarize the evidence about the perforation was preserved for appellate review, we conclude that there was no abuse of discretion. Our review of the record indicates that Mr. White's counsel repeatedly, and unequivocally, told the jury that "[t]he perforation itself is not negligence." There is simply no factual support in the record for appellants' assertion that Mr. White's counsel "repeatedly implied" or "improperly suggested to the jury during his closing argument that the perforation constituted negligence." Moreover, as pointed out by Mr. White, appellants have not cited to any case, nor have we found one, holding that the trial court abused its discretion by failing to summarize the evidence under Rule 2-520(d).

## IV. Nonpattern Jury Instructions

### A. Pertinent Facts

Appellants proposed several nonpattern jury instructions, two of which are relevant on appeal. The first, nonpattern jury instruction number two, would have instructed the jury that there are multiple methods of meeting the standard of care. Specifically, it states:

> STANDARD OF CARE
>
> While providing health care within the standard of reasonable care, there may be more than one approach that is reasonable. When there is more than one recognized manner of diagnosis or treatment, it is not negligence for an orthopedic surgeon to select one of the accepted methods that is not favored by other orthopedic surgeons, so long as he is acting within the standard of reasonable care under the circumstances confronting the orthopedic surgeon.

The second, nonpattern jury instruction number three, would have instructed the jury that a difference in opinion does not equate to negligence. Specifically, it states:

> DIFFERENCE OF OPINION
>
> A mere difference of professional opinion as to the diagnosis or treatment is not enough to establish negligence. There must be an act or omission by a health care provider that breaches the standard of care or practice that causes injury to a plaintiff.

The trial court ruled that it would not give nonpattern jury instruction number three immediately after appellants proposed that instruction, but stated that it would take nonpattern jury instruction number two under advisement. At a later bench conference, the court ruled that it was not going to allow nonpattern jury instruction number two, nor any of appellants' other nonpattern jury instructions. Appellants' counsel then objected to the court's refusal to give appellants' proposed nonpattern jury instructions.

Later that same day, the trial court instructed the jury. Among other instructions, the court gave Maryland Civil Pattern Jury Instruction 27:2 ("Pattern Instruction 27:2"). It states: "The standard of care for a health care provider is that degree of care and skill that would be used by a reasonably competent health care provider engaged in a similar practice and acting in similar circumstances." Appellants' counsel again objected to the court refusing to give the proposed nonpattern jury instructions.

**B. Parties' Contentions**

Appellants argue that the trial court erred by declining to give their proposed nonpattern jury instruction numbers two and three. According to appellants, these nonpattern instructions were necessary "to clarify for the jury that there may be more than

one recognized method of performing the procedure at issue." Appellants argue that the jury instruction used "refers to *the* standard of care," which is contradictory to Dr. Stiver's testimony that there was "more than one school of thought in how to approach this procedure." Appellants conclude that both of their nonpattern instructions were supported by Maryland case law and evidence in this case, and were not covered by any of the other instructions that the court gave to the jury.

Mr. White responds that proposed nonpattern jury instruction number two was inapplicable to the facts of the case because there was no evidence at trial that there was more than one reasonable method that met the requirements of the standard of care. Furthermore, Mr. White contends that proposed nonpattern jury instruction number three was inapplicable at trial because the dispute between the parties was factual in nature and not a dispute in professional opinion.

**C. Standard of Review**

"A trial court is given wide latitude in instructing a jury." *Jacobs v. Flynn*, 131 Md. App. 342, 383 (2000). "A Maryland appellate court reviews a trial court's refusal or giving of a jury instruction under the abuse of discretion standard." *Stabb v. State*, 423 Md. 454, 465 (2011). A reviewing court "consider[s] the following factors when deciding whether a trial court abused its discretion in deciding whether to grant or deny a request for a particular jury instruction: (1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given." *Id.* "The burden is on the complaining party to show both prejudice and error." *Tharp v. State*, 129 Md. App. 319, 329 (1999),

*aff'd*, 362 Md. 77 (2000). "Where the decision or order [of the trial court] is a matter of discretion it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Wallace & Gale Asbestos Settlement Trust v. Busch*, 238 Md. App. 695, 715, *aff'd*, 464 Md. 474 (2019) (quotations and citations omitted).

**D. Discussion**

Mr. White focuses his argument on the second factor of the above three-factor test, namely, whether nonpattern jury instruction numbers two and three are "applicable under the facts of the case." *See Stabb*, 423 Md. at 465. We agree with Mr. White that the evidence in the record does not support these instructions. We shall explain.

With regard to nonpattern jury instruction number two, appellants assert that such instruction is supported by the evidence because "all parties ultimately agreed that there are multiple acceptable ways to perform the surgery at issue." Appellants point to Dr. Stiver's testimony, wherein, they claim, he "testified that there was 'more than one school of thought in how to approach this procedure' and that 'there's more than one way to skin a cat.'" Appellants, however, ignore Dr. Stiver's consistent and repeated testimony that the standard of care for an orthopedic surgeon who performs a hip replacement using the DAA technique is to discover a perforation of the femur by the prosthetic stem at the time of the surgery, and thus a breach of the standard of care is "leaving the OR with a mal-positioned, mal-placed component, and *not discovering it before you leave the OR.*" (Emphasis added). When asked directly whether there were two acceptable methods to meet the standard of care, Dr. Stiver testified: "No. I disagree with that."

Dr. Stiver identified two diagnostic tools, the intraoperative fluoroscopy and the post-operative lateral view x-ray, one of which must be used to discover a femoral perforation. Dr. Stiver acknowledged that there may be another "evaluation tool" to discover the perforation, but "it's up to you to come up with other means to ensure that the components are properly placed and you don't leave the OR with it protruding out the back side of the femur." By contrast, Dr. Byrne testified that during Mr. White's surgery, he did not use any diagnostic tool or other method to discover the prosthetic stem's perforation of Mr. White's femur. Appellants' experts also testified that the standard of care did not require an orthopedic surgeon to check for a femoral perforation in every case by using a diagnostic tool or other method that would discover such perforation. Therefore, appellants' nonpattern jury instruction number two was not supported by the facts of this case.

Similarly, the underlying facts do not support nonpattern jury instruction number three. Appellants' experts and Dr. Stiver disagreed on whether the standard of care required Dr. Byrne to check for a perforation. Because Dr. Byrne did not check for a perforation, it was up to the jury to decide the factual issue of what was the applicable standard of care. For nonpattern jury instruction number three to characterize the evidence as "[a] mere difference of professional opinion as to diagnosis or treatment" would have been misleading and ultimately confusing to the jury. Accordingly, the trial court did not abuse its discretion by refusing to give the jury appellants' proposed nonpattern jury instruction numbers two and three.

## V. "Golden Rule" and "Safety" Arguments

### A. Pertinent Facts

Before trial began, appellants filed a motion *in limine* prohibiting Mr. White from making "Golden Rule" or "Safety" arguments that might "confuse the law and applicable standards." In this motion, appellants argued that Golden Rule and Safety arguments, the latter being known as a reptilian theory argument, "misstate the law and standards to be applied" by "suggesting that jurors should 'protect the community' or act as the 'conscience of the community[.]'" The trial court granted appellants' motion.

On appeal, appellants argue that Mr. White's counsel made reptilian arguments three times during the trial. The first instance cited by appellants occurred during the direct examination of Dr. Stiver. The exchange occurred as follows:

| | |
|---|---|
| [Mr. White's Counsel]: | Do the fundamentals of how to **safely** perform the total hip replacement surgery differ depending on the system that the surgeon uses? |
| [Appellants' Counsel]: | Objection. |
| The Court: | Well, there's an objection. What's the objection? |
| [Appellants' Counsel]: | Objection to our motion *in limine* regarding safety issues. |
| The Court: | Oh, approach. |

(Emphasis added). In the bench conference that followed this exchange, Mr. White's counsel stated: "if I said safety, I'll withdraw the term." Appellants did not request any further relief.

The next instance, according to appellants, occurred during closing argument when Mr. White's counsel used a PowerPoint slide that referred to intraoperative fluoroscopy and post-operative radiology as "safety tools." Appellants' counsel objected, and the court told Mr. White's counsel to remove the slide. The court then instructed the jury as follows:

> The Court: Ladies and gentlemen, disregard the last slide.
>
> [Appellants' Counsel]: Thank you, Your Honor.
>
> ***
>
> The Court: I said this when I instructed you. But remember, the arguments of lawyers are not evidence. It's just a guide to help, the lawyers believe is going to help, you view the evidence in such a way that it wants you to view it. So please disregard. . . .

No further request for relief was made by appellants' counsel. During the next bench conference, which dealt with a different issue, appellants' counsel said "that on the basis of [Mr. White's counsel's] closing and his slides, we're going to have to make a motion for a mistrial." Appellants' counsel did not elaborate on the basis for that motion. The court denied appellants' motion for a mistrial.

Lastly, appellants point to the closing argument of Mr. White's counsel wherein he analogized Dr. Byrne's conduct to running a red light. The transcript of this instance reads:

> [Mr. White's Counsel]: Well, let me ask you a question. If you're a driver and 364 days out of the year you're driving to work and you stop at a red light. Because that's what you're supposed to do as a driver. And on one day you're distracted, you don't check, you don't see that it's not — **you think it's green when it's red. Are you going to get a pass because for the other 364 days you stopped at the stop light?** Do you get a

pass for doing that? Does anyone get a pass? **Of course not. So why shouldn't orthopedic surgeons—**

[Appellants' Counsel]: Your Honor, I apologize. **The red light, green light thing is straight [from] a reptile book.** I'm sorry to have to object.

[Mr. White's Counsel]: I think the analogy is the same thing.

The Court: I'll overrule it. That's overruled.

(Emphasis added). Appellants' counsel did not request a curative instruction.

**B. Parties' Contentions**

As explained previously, the trial court granted appellants' motion *in limine* regarding the "Golden Rule" and "Safety" arguments. According to appellants, a reptile theory argument is an approach that "attack[s] jurors' sense of personal safety and exploit[s] their fear in an effort to create a new standard of care unrelated to the controlling law." Similarly, appellants explain that the Golden Rule argument plays on the jurors' emotions by asking them "to put themselves in the proverbial shoes of a plaintiff when deciding what a defendant should or should not have done."[9] Appellants argue that despite the court granting a motion *in limine* prohibiting such arguments, Mr. White's counsel improperly used reptilian arguments on three occasions during the trial, as set forth above. Appellants claim that these arguments confused the jury because the "arguments were designed to improperly distract the jury from the applicable standard of care." Finally,

[9] Appellants do not argue that Mr. White's counsel violated the court's ruling prohibiting a Golden Rule argument.

appellants contend that the trial court's responses to the improper arguments were inadequate to remedy the prejudice suffered by appellants.

Mr. White counters that the circuit court did not abuse its discretion when responding to the alleged reptilian arguments. Specifically, as to the first instance, Mr. White argues that his counsel withdrew the term "safety" in response to appellants' objection. Consequently, according to Mr. White, "there is nothing for this Court to review." For the second and third instances, Mr. White contends that attorneys have great leeway in closing arguments, and as a result, his counsel's comments do not warrant the granting of a motion for a mistrial.

**C. Standard of Review**

To the extent that appellants are challenging the trial court's denial of their motion for a mistrial, we review the court's decision for abuse of discretion. *State v. Baker*, 453 Md. 32, 46 (2017). An abuse of discretion has been defined as an exercise of discretion that "was 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Id.* (quoting *Simmons v. State*, 436 Md. 202, 212 (2013)). "The failure to declare a mistrial after counsel has made improper remarks to the jury does not usually constitute an abuse of discretion. Indeed, '[e]ven when a clearly improper remark is made, a mistrial is not necessarily required.'" *Hopkins v. Silber*, 141 Md. App. 319, 339–40 (2001) (quoting *Hill v. State*, 355 Md. 206, 223 (1999)). Instead the trial court must decide whether

> improper or prejudicial statements, remarks or arguments of counsel generally are cured by reproof by the trial judge; to his discretion customarily is left the choice of methods to protect the fair and unprejudicial workings of

> the judicial proceedings and his decision as to the effect of that choice upon the jury and only in the exceptional case, the blatant case, will his choice of cure and his decision as to its effect be reversed on appeal.

*Id.* at 340 (quotation omitted).

**D. Discussion**

At the outset, we agree with Mr. White that appellants did not preserve for appellate review the first alleged instance of a reptilian argument. The record indicates that, when Mr. White's counsel used the term "safety" in his direct examination of Dr. Stiver, appellants' counsel objected, and Mr. White's counsel said that he would "withdraw the term." Appellants' counsel did not request any further relief from the trial court. Because no further relief was requested by appellants' counsel, we will not review appellants' challenge to the first claim of a reptilian argument. *See Hyman v. State*, 158 Md. App. 618, 631 (2004) (holding the defendant "did not request further relief at trial; he did not ask the court to strike the statement, that a curative instruction be given, or that a mistrial be granted," and therefore "effectively waived all other potential review on appeal").

Both parties agree that "as a general rule, attorneys have great leeway in closing arguments." *Ware v. State*, 360 Md. 650, 681–82 (2000). In *Leach v. Metzger*, 241 Md. 533 (1966), the Court of Appeals analyzed the specific issue of whether a defendant should have been granted a mistrial after plaintiff's counsel allegedly used a Golden Rule argument in his closing argument. *Id.* at 535. Although the trial court immediately instructed the jury to disregard the Golden Rule argument and reinstructed the jury, the defendant asserted that the court committed reversible error by not granting a mistrial. *Id.* at 536–37. On appeal, the Court of Appeals explained:

> If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since, in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation.

*Id.* at 537 (quotation omitted). The Court concluded that, because the trial court is "empowered with wide discretion in deciding whether the prejudicial effect of counsel's remarks can be erased by corrective instructions," the court did not abuse its discretion by not granting a mistrial. *Id.*

Similar to *Leach*, the trial court here did not abuse its discretion. Regarding the second instance, the court instructed the jury to disregard the PowerPoint slide that contained the term "safety tools," and then reinstructed the jury that "the arguments of lawyers are not evidence." Nevertheless, appellants claim that the court's comments were insufficient because the court did not (1) provide an explanation as to why the jury should disregard the slide, (2) "address the prejudicial effect of the use of the term safety tools," or (3) "explain to the jury that its charge was not to determine generally applicable safety rules." Appellants overlook the fact that their counsel did not object to the court's actions in response to their objection, nor did appellants' counsel request any further curative instruction. Appellants just moved for a mistrial at a later time on the cryptic ground of Mr. White's "closing and his slides." Therefore, we conclude that the circuit court did not abuse its "wide discretion" by not granting appellants' motion for a mistrial. *See Leach*, 241 Md. at 537.

Regarding the third instance of an alleged reptilian argument, we disagree with appellants that Mr. White's counsel used a reptilian argument by analogizing Dr. Byrne's

actions to running a red light. As explained by appellants themselves, reptilian arguments improperly appeal to jurors' emotions in an attempt to make jurors disregard the applicable standard of care. Here, appellants fail to explain how Mr. White's analogy improperly played on jurors' emotions. Instead, appellants simply state that the "comparison of running a red light to a surgeon's performance for radiology" is the "most classic 'reptilian' comparison." We agree with Mr. White's assertion that his counsel's use of the analogy was "to legitimately illustrate that orthopedic surgeons, like everyone else, may face liability if they breach the standard of care." Mr. White's analogy thus was well within the "great leeway" permitted in closing argument. *See Ware*, 360 Md. at 681–82. Accordingly, we hold that the trial court did not abuse its discretion in overruling appellants' objection to the stoplight analogy.

Finally, appellants argue in their reply brief that, even if one of the alleged errors did not warrant a new trial, "the Trial Court's repeated acquiescence to Mr. White's violations of its pretrial ruling . . . had the cumulative effect of causing severe prejudice to Dr. Byrne." To support this assertion, appellants cite to *Muhammad v. State*, 177 Md. App. 188 (2007) and *Kozlowski v. Hampton School Board*, 77 Fed. Appx. 133 (4th Cir. 2003). Appellants, however, fail to recognize that the cumulative error analysis explained in each of these decisions is only relevant if the court finds multiple harmless errors. The *Muhammad* court explained that "[c]umulative error is a phenomenon that exists only in the context of harmless error analysis. More precisely, it exists only in the context of multiple findings of harmless error." *Id.* at 325 (quotation marks omitted). The Court emphasized that "[e]ach fraction of prejudice, however, is contingent on an undergirding

finding of error." *Id.*; *see Kozlowski*, 77 Fed. Appx. at 154 (listing all of the individually harmless errors, and then explaining "the collective force of multiple errors can, in some instances, warrant reversal even when one or two of the errors standing alone would not"). Here, we see only one possible harmless error stemming from Mr. White's alleged reptilian arguments.

**JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANTS.**