UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 608

SEPTEMBER TERM, 2015

MILANA ABBASOV ET AL.

v.

RAVINDER DAHIYA

Eyler, Deborah S.,
Woodward,
Salmon, James P.
Retired, Specially Assigned

JJ.

Opinion by Eyler, Deborah S., J.

Filed: April 29, 2016

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

In the Circuit Court for Montgomery County, Milana Abbasov, along with her husband, Mikael Abbasov, the appellants/cross-appellees,[1] sued Ravinder Dahiya, M.D., the appellee/cross-appellant, trading as "Potomac Facial Plastic Surgery" ("Potomac Facial"), asserting, *inter alia*, claims for medical negligence, lack of informed consent, fraud/deceit, and loss of consortium, all arising from his application of a chemical facial peel to Milana.[2] The case was tried to a jury.

During the trial, the court ruled that Harry Camper, III, M.D., the Abbasovs' medical expert, could not express an opinion about the standard of care for application of the chemical peel because he was not board certified in a specialty related to Dr. Dahiya's specialty, as required by the Maryland Health Care Malpractice Claims Act ("the Act"). At the close of the Abbasovs' case, the court granted judgment in favor of Dr. Dahiya on the medical negligence and fraud/deceit claims. The informed consent and loss of consortium claims were submitted to the jury on a special verdict. The jury returned a verdict in favor of Dr. Dahiya on informed consent and therefore did not reach the consortium claim. The Abbasovs filed a motion to alter or amend and for a new trial, which the court denied.

[1] For ease of discussion, we shall refer to the appellants by their first names.

[2] The Abbasovs also stated claims for breach of contract, detrimental reliance, negligent misrepresentation, and unjust enrichment. The court entered judgment in favor of Dr. Dahiya on all of these claims and the Abbasovs do not challenge those rulings on appeal.

On appeal, the Abbasovs present eleven questions,[3] which we have combined and rephrased as three:

[3] The questions as posed by the Abbsovs are:

> 1. The Circuit Court erred in refusing to qualify Dr. Camper as an expert witness with respect to the standards of care and departures therefrom by the defendant.
> 2. The Circuit Court erred in precluding and limiting Dr. Camper's testimony and opinions on the applicable standard of care, Dr. Dahiya's departures therefrom, and causation.
> 3. The Circuit Court erred in excluding and precluding all evidence and argument that Dr. Dahiya had used an expired and compromised 30% TCA solution on November 1, 2010.
> 4. The Circuit Court erred in entering judgment for the defendant on the negligence claim when the plaintiffs could prove negligence even in the absence of Dr. Camper's testimony on the applicable standard of care and Dr. Dahiya's departures therefrom.
> 5. The Circuit Court erred in improperly instructing the jury on informed consent, giving the jury an erroneous, defective, incorrectly framed and phrased, and confusing verdict sheet, and improperly formulating the issues for the jury.
> 6. The Circuit Court erred in suppressing the testimony of Dr. Smirnov.
> 7. The Circuit Court erred in entering judgment for the defendant on the negligence claim.
> 8. The Circuit Court erred in entering judgment for the defendant on the claim for lack of informed consent.
> 9. The Circuit Court erred in entering judgment for the defendant on the loss of consortium claim.
> 10. The Circuit Court erred in entering judgment for the defendant on the fraud and deceit claim.
> 11. The Circuit Court erred in denying the plaintiffs' motions for reconsideration and for a new trial.

The Abbasovs have not presented any argument in their brief on Question 10. Accordingly, we decline to consider it. *See* Md. Rule 8-504(a)(6) (an appellant's brief must contain "[a]rgument in support of the party's position on each issue.").

> I. Did the circuit court err by precluding Dr. Camper from offering standard of care opinions at trial?
>
> II. Did the circuit court err by precluding any testimony or evidence that the chemical peel solution was expired or compromised in some way and by granting judgment in favor of Dr. Dahiya on the medical negligence count?
>
> III. Did the circuit court improperly instruct the jury with respect to the informed consent claim and/or did the court improperly formulate the verdict sheet for that count?

In a conditional cross-appeal, Dr. Dahiya presents three questions, which we have rephrased:

> I. Did the circuit court err by denying Dr. Dahiya's motion for judgment on the informed consent claim?
>
> II. Did the circuit court err by refusing to strike the Abbasovs's designations of Dr. Singh and Dr. Smirnov as a sanction for discovery violations?
>
> III. Did the circuit court err by denying Dr. Dahiya's motion for summary judgment on the intentional tort claims?

For the following reasons, we answer the Abbasovs's questions in the negative and shall affirm the judgment of the circuit court. Accordingly, we do not address the cross-appeal issues.

FACTS AND PROCEEDINGS

When this case was tried, Milana was 35 year old. She and Mikael had been married since July 10, 2010. They live in Harrisonburg, Virginia. Milana had been working as a hairdresser.

Dr. Dahiya owns and operates Potomac Facial, a facial plastic surgery and medical spa facility in Montgomery County. He is the only physician on staff at Potomac Facial. In 2010, he employed two clinical assistants, Wendy Bojorquez and Amy Gladden, and a receptionist, Ilona Ruvenitz.

At the relevant times, Dr. Dahiya was board certified in otolaryngology–head and neck surgery, by the American Board of Otolaryngology, and in facial plastic and reconstructive surgery, by the American Board of Facial Plastic & Reconstructive Surgery. He performs surgical and non-surgical procedures on the face and neck, including chemical peels using varying concentrations of trichloroacetic acid ("TCA").

On November 1, 2013, Milana and Mikael filed an eight count complaint against Dr. Dahiya. They alleged that on November 1, 2010, Dr. Dahiya had applied a 30% concentration TCA peel to Milana's face without first obtaining her informed consent; that the TCA solution was expired, had a broken cap, and was partially evaporated "resulting in a higher concentration than safe and appropriate"; that Dr. Dahiya failed to "provide proper preoperative treatment"; and that he "improperly and incompetently applied" the TCA solution to Milana's face. Milana alleged that, as a result, she experienced "an acute adverse reaction" during the procedure, resulting in "excruciating pain that briefly caused her to lose consciousness." She further alleged that, after the procedure, she suffered "significant burns on 25 percent or more of her face" and the "injured areas on her face became irritated and infected"; Dr. Dahiya failed to "take prompt and adequate steps to address" these post-procedure complications; and, as a

consequence, she suffered permanent scarring on her face that required "lengthy and expensive treatment."

As relevant to the issues on appeal, Count I stated claims for negligence and gross negligence by Dr. Dahiya in the application of the TCA peel and the rendering or failure to render pre- and post-procedure treatment. In Count II, Milana stated a claim for informed consent, alleging that Dr. Dahiya failed to adequately explain the risks of TCA peels and alternative procedures and that, had he done so, she would not have undergone the procedure. In Count VII, the Abbasovs alleged that their marital relationship had been damaged as a result of Dr. Dahiya's breaches in the standard of care.

During discovery, the Abbasovs' designated three expert witnesses: Dr. Camper, an obstetrician and gynecologist ("OB/GYN") who operates a medical practice and medical spa facility in Harrisonburg, Virginia; Devinder Singh, M.D., a plastic surgeon employed by the University of Maryland Medical System; and Alexander Smirnov, Ph.D., a chemist. Dr. Dahiya also designated three expert witnesses: two plastic surgeons and a pharmacist.

The case was tried to a jury from March 23 to March 26, 2015. In their case, the Abbasovs' both testified and called Dr. Dahiya; Dr. Camper; Ruvinetz; Milana's mother, Nadya Lagoda; Milana's brother, Philip Lagoda; and Milana's sister-in-law, Alena

Khatman Lagoda.[4] The Abbasovs also read into the record excerpts from Bojorquez's deposition. We summarize the pertinent testimony and evidence adduced.

Milana suffers from acne and has acne scarring on her face. Between 2006 and 2010, she received various facial treatments, including chemical peels, laser resurfacing treatments, and Botox injections, at L'Idee Day Spa, which is owned and operated by Dr. Camper.

On March 1, 2009, Milana went to Potomac Facial, which is over 100 miles from her home, for the first time. According to Dr. Dahiya, he and Milana discussed her acne scarring and the options for treating it. He explained laser resurfacing, chemical peels, and mechanical abrasion as three options to decrease the visibility of the scarring. He advised Milana of the risks and benefits of each of these approaches, including risks of hyper or hypo-pigmentation and scarring. She decided to try a 30% concentration TCA peel, which was performed that day.

Milana denied that Dr. Dahiya told her about the risks of a TCA peel, or even the type of peel he was going to apply, during the March 1, 2009 appointment. She described him as being "really friendly, very flirty" that day. She said that if he had told her that a TCA peel carries a risk of scarring she "would [have been] out of there really fast."

[4] For clarity, we shall refer to Milana's family members by their first names.

The TCA solution used by Potomac Facial is prepared off-site at a compounding pharmacy in Vienna, Virginia, and is packaged in a 30 milliliter bottle. It ranges in concentration from 5% to 50% TCA. According to Dr. Dahiya, a 30% TCA concentration is a "medium depth" peel and is the strength he uses most frequently in his practice.

A TCA peel works by "denature[ing] the proteins in the outer layers of skin," which stimulates the production of collagen. A TCA peel typically is applied to the whole face, sometimes in multiple layers, depending on how the patient's skin reacts. Within minutes of applying the TCA solution, the outer layer of skin will begin turning an opaque white color, known as "frosting." A few minutes after that, the whiteness goes away and the skin turns a dark pink. During the first few minutes, the patient may experience a "pretty intense burning sensation." The recovery period after a TCA peel typically lasts about seven to ten days, although it varies. During recovery, the facial skin will develop erythema, which is redness; will look "beat up"; and may have pinpoint bleeding, mild swelling, and oozing.

Before Dr. Dahiya begins the TCA peel process, one of his clinical assistants cleanses the patient's face to remove any makeup and oils from the surface of the skin. Dr. Dahiya then applies a solution of TCA to one side of the patient's face, using a cotton swap or an "aesthetic wipe, which is a very soft sponge." He waits before applying the solution to the other side of the face to observe how much frosting occurs, and how quickly. If the frosting occurs and is quick to develop, he usually does not apply

additional layers of TCA solution. If the frosting is weak, he may apply a second or third layer. At the end of the application, he cleanses the patient's face again and applies an emollient.

After Milana's TCA peel on March 1, 2009, she recovered normally. At a follow-up appointment one week later, Dr. Dahiya noted that she had "[m]inimal erythema." According to Dr. Dahiya, Milana was not completely satisfied with the results, which were mild.

About a year later, in March of 2010, Dr. Dahiya treated Milana's face with a fractional CO_2 laser. In May of 2010, he implanted "filler" material into Milana's lips.[5] In June of 2010, he injected Botox around her eyes.

On November 1, 2010, Milana returned to Dr. Dahiya for another 30% TCA peel.[6] Philip drove her to the appointment and Nadya accompanied them. According to Milana, the waiting room at Potomac Facial was full. She paid in advance. Almost immediately, Bojorquez called her back to a treatment room. Nadya accompanied her. Bojorquez cleaned Milana's face using Cetaphil and an alcohol-based solution.

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[5] According to Milana, she returned to Dr. Dahiya to have the filler in her lips removed because it did not look right. Dr. Dahiya denied this, stating that he had never removed lip fillers from any patient.

[6] Milana testified that this was the third 30% TCA peel Dr. Dahiya performed on her. She could not recall the date on which she had the second peel, however.

A few minutes later, Dr. Dahiya came in. He asked Nadya to return to the waiting room. According to Milana, he seemed rushed. He did not speak to her about the risks of the 30% TCA peel or discuss alternative treatments.

Milana testified that she overheard Dr. Dahiya and Bojorquez having a discussion in which "[h]e was saying yes, and she was saying no." She could not hear the substance of their discussion, however. Dr. Dahiya began applying the TCA solution to her face. He was "moving a lot faster" than he had during her previous peels. He started with her forehead and the "the cotton was . . . really wet." The solution started running down her face. At that point, the "pain was so unbearable . . . [it] felt like [her] forehead was on fire." She grabbed Dr. Dahiya's hand and then passed out. When she came to, Nadya was standing there "grabbing [her] hand . . . in panic." Milana "felt like [her] whole face was on fire." She said Dr. Dahiya was acting as if everything was normal. He directed Bojorquez to prep the room for the next patient. Bojorquez walked Milana out of the treatment room. She gave Milana a cold pack to place on her face. Philip then drove her and Nadya home.

Ruvenitz, who by the time of trial was no longer employed by Dr. Dahiya, testified that she remembered the November 1, 2010, appointment because it was on her birthday. She recalled hearing Milana scream out in pain during the appointment. Nadya testified that when she was in the treatment room she heard Milana scream.

Dr. Dahiya testified that during the November 1, 2010 appointment Milana's facial skin reacted more intensely than it had to the peel in 2009. She developed frosting

"more brisk[ly]" than expected upon application of the TCA solution. Consequently, he did not apply a second layer of the solution. He denied that she ever lost consciousness during the treatment or that she screamed in pain.

According to Dr. Dahiya, on November 3, 2010, he and Milana spoke by telephone. Milana told him that she had pre-treated her skin before her November 1, 2010 appointment by using an aesthetician-grade peel that she had ordered online. She said she was worried that that had caused her intense reaction to the TCA peel. He responded that that "absolutely could make the reaction worse." Dr. Dahiya prescribed an antibiotic to reduce the risk of infection and asked Milana to schedule a follow-up appointment within the week.

Dr. Dahiya testified that he spoke to Milana by telephone a second time, on November 7, 2010. Milana told him that her skin reaction remained significant. He prescribed a second antibiotic to cover a broader spectrum of bacteria. He again urged her to come to the office for a follow-up appointment. She responded that it was difficult for her to get a ride to his office. On November 9 and 14, 2010, Dr. Dahiya spoke to Milana by telephone again. She said that her skin was improving, but slowly. In both calls, he asked her to come in for a follow-up appointment.

On November 14, 2010,[7] Milana returned to see Dr. Dahiya. He noted that she had "more erythema, and inflammation than [he] would normally see at two weeks out." They discussed options for trying to "suppress that inflammatory process." He recommended that she apply over-the-counter topical steroids and Vitamin E cream and wrote her a prescription for Silvadene 1%, another topical cream that acts as a skin protectant and improves healing. He advised her to return for a follow-up appointment in two weeks.

Milana did not return for a follow-up appointment until December 13, 2010. At that time, Dr. Dahiya observed improvement. Some areas of her face were "essentially completely healed." There was "induration," or swelling and redness, in a few small areas. He injected a steroid solution into Milana's skin in the areas that remained swollen. He recommended that she return in three to four weeks for additional steroid treatments.

Milana offered a different account of her post-procedure treatment by Dr. Dahiya. She testified that she called him several times on November 2, 2010, but could not reach him. She was in a panic because she was in significant pain, her face was completely red and swollen with raised red areas around her mouth and chin, and there was odorous pus oozing from wounds on her face.

[7] Dr. Dahiya testified that this appointment was on November 14, 2010. His treatment records, which were introduced into evidence, reflect that it occurred on November 15, 2010.

On November 3, 2010, Milana called again and spoke to Ruvenitz, who relayed a message from Dr. Dahiya. Ruvenitz told her that Dr. Dahiya had directed her to use a mixture of vinegar and water on her face and had prescribed an antibiotic. Milana wanted to return to see Dr. Dahiya, but he could not fit her in for a follow-up appointment during the first two weeks after her peel. Milana recalled only one follow-up appointment with Dr. Dahiya. On that date, she could tell he was "pretty surprised" by her appearance. Dr. Dahiya told her he didn't know why her face had reacted as it had and that her only option was to "cut out [the] scars." She was "bawl[ing]" throughout the appointment and declined any further treatment. She did not return to see Dr. Dahiya again.

On January 4, 2011, Milana went to see Dr. Camper at L'Idee. As we shall discuss, Dr. Camper was permitted to testify about his treatment of Milana both before and after the November 1, 2010 TCA peel, but was not permitted to offer an expert opinion as to whether Dr. Dahiya breached the applicable standard of care in his treatment of Milana before, during, or after the November 1, 2010 TCA peel. According to Dr. Camper, in January of 2011, Milana had scars on "25, maybe 30 percent of her face." Dr. Camper began seeing her approximately every two weeks as part of a "long and rigorous treatment of her scars." Keloid scars had formed near her eyes and on her upper lip. Dr. Camper explained that a keloid scar is a "hypertrophic scar" or an area of raised scar tissue that continues to grow for months or years. In an attempt to inhibit the continued growth of the keloid scars, he treated them with a vascular laser that limits the

blood supply to the scar tissue. He also injected steroids into the scar tissue and applied topical serums.

In addition, Dr. Camper continued to treat Milana's acne, which flared up in certain areas, and to treat areas with "inflammatory pigment changes." In May of 2010, he applied a "level one chemical peel" and, in July of 2011, he applied a "slightly higher level" peel.[8] Again in mid-August of 2011 and in September of 2011, Dr. Camper applied a level two peel "over the areas that had active acne in them."

Dr. Camper continued treating Milana in 2013 and 2014, seeing her a total of 23 times. Over time, Milana's face healed considerably. According to Dr. Camper, the keloid scar over her lip remained a "thorn in [their] sides" because it would get better and then get worse again. Milana decided against any "surgical intervention" to address that scar.

Photographs of Milana's face taken by Dr. Camper's office staff in 2007, shortly after he began treating her for acne, and in January of 2011 through June of 2011, were introduced into evidence at trial. Photographs from after the November 1, 2010 procedure of Milana taken by her family members in December of 2010 and two photographs taken before her November 1, 2010 peel were introduced into evidence as well. The photographs reflect significant facial scarring.

[8] These were not TCA peels. Dr. Camper testified that his office used to perform TCA peels, but no longer does so.

Nadya, Philip, and Alena testified about how devastated Milana was by her facial scarring in the months and years after her November 1, 2010 TCA peel. Philip testified that the scarring had damaged their marital relationship because Milana was so self-conscious about her face.

As we shall discuss, Milana sought to call Dr. Smirnov to testify about the chemical properties of TCA and the significance of the expiration date on a TCA solution. The court excluded Dr. Smirnov's testimony, however, because Milana had not established any factual basis for her allegation that the TCA solution applied to her face on November 1, 2010, had expired and because she had not presented any expert testimony to prove that her injuries were proximately caused by the November 1, 2010 TCA peel.

At the close of Milana's case, Dr. Dahiya moved for judgment on all counts. The court granted judgment in his favor on the medical negligence count, but denied the motion on the informed consent count and the loss of consortium count.

In his case, Dr. Dahiya read into the record excerpts from Milana's deposition in which she testified that she did not sign an informed consent form at the November 1, 2010 appointment, but she did "remember" "signing something the very first time" she came in for a TCA peel, on March 1, 2009. The paper she signed was similar to the forms she had signed when she saw Dr. Camper before 2010 and included information "[w]arning you about . . . what could happen when you had this peel."

At the close of all the evidence, Dr. Dahiya renewed his motion for judgment on the informed consent and loss of consortium claims. He argued that the Abbasovs' had failed to present a *prima facie* case because they did not introduce any expert testimony bearing on the material risks of a TCA peel or proving that the TCA peel had caused Milana's injuries. The court denied the motion.

The case was sent to the jury on a special verdict that set forth four questions. The first two questions concerned liability:

> 1. Do you find that [Dr. Dahiya] obtained informed consent from . . . Milana . . . on November 1, 2010, to perform a TCA peel?
>
> (If your answer to question 1 is "Yes," stop here, and sign the verdict sheet. Otherwise proceed to question 2.)
>
> 2. Do you find that the risk of the procedure of November 1, 2010, was known to . . . Milana . . . prior to that time or was so obvious as to justify presumption of that knowledge?
>
> (If your answer to question 2 is "Yes," stop here, and sign the verdict sheet. Otherwise proceed to question 3.)

Question 3 addressed causation and Question 4 addressed the amount, if any, of economic[9] and non-economic damages.

The jurors answered Question 1 in the negative and Question 2 in the affirmative. As a result, they did not reach Questions 3 and 4.

On April 1, 2015, the court entered judgment in favor of Dr. Dahiya on all counts.

[9] The only economic damages at issue at the time of trial were past medical expenses.

On April 6, 2015, the Abbasovs moved to reopen the record, to vacate the judgment, to alter or amend, and/or for a new trial. By order entered on May 18, 2015, the court denied the post-trial motion. This timely appeal and cross-appeal followed.

We shall include additional facts as necessary to our discussion of the issues.

DISCUSSION

I.

Pursuant to Md. Code (1973, 2013 Repl. Vol.), section 3-2A-02(c) of the Courts and Judicial Proceedings Article ("CJP"), the court precluded Dr. Camper from offering any standard of care opinions at trial. That statute states at subsection (c)(1) that a "health care provider" may not be held liable for medical negligence

> unless it is established that the care given by the health care provider is not in accordance with the standards of practice *among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action*.

(Emphasis added.) Subsection (c)(2)(ii)1 specifies that

> [i]n addition to any other qualifications, a health care provider who . . . testifies in relation to a proceeding before a . . . court concerning a defendant's compliance with or departure from standards of care:
>
> > A. Shall have had clinical experience, provided consultation relating to clinical practice, or taught medicine in the defendant's specialty or a related field of health care, or in the field of health care in which the defendant provided care or treatment to the plaintiff, within 5 years of the date of the alleged act or omission giving rise to the cause of action; **and**
> >
> > B. [Unless excepted in subsubparagraph 2], *if the defendant is board certified in a specialty*, ***shall be board certified in the same or a related specialty as the defendant.***

(Emphasis added.) One of the exceptions referenced in subsection (c)(2)(ii)1B is when the defendant doctor was "providing care or treatment to the plaintiff unrelated to the area in which the defendant is board certified." CJP § 3-2A-02(c)(2)(ii)2A.

On the first day of trial, Dr. Dahiya testified that he was board certified by the American Board of Otolaryngology - Head and Neck surgery, and by the American Board of Facial Plastic & Reconstructive Surgery.

On the second day of trial, Dr. Camper testified that he had been a board certified OB/GYN since 1987 and had practiced exclusively in that field for more than fifteen years. Around 2005, he began "getting into lasers and skin and different things" and "reinvented [himself]" as the operator of L'Idee. He continued to offer gynecological services to patients, but stopped practicing obstetrics. He obtained "the necessary credentials" to perform facial procedures by attending trainings with various medical consultants. He stated that it is not uncommon for gynecologists to perform chemical peels and other medical aesthetic treatments. He opined that "any licensed medical doctor can perform chemical peels as long as they have the appropriate training in the right field and understand the principles that are involved." He estimated that he performed between 300 to 400 chemical peels each year, which used to include around 10 or 20 TCA peels.

Counsel for Dr. Dahiya objected when the Abbasovs' lawyer moved to qualify Dr. Camper as a standard of care expert. She argued that Dr. Camper was not qualified under CJP section 3-2A-02(c)(2)(ii)1B because he was not board certified in "the same or a

related specialty as" Dr. Dahiya. Counsel for the Abbasovs responded that obstetrics and gynecology is a related specialty to otolaryngology and facial plastic and reconstructive surgery "[w]ith respect to the procedures in question," *i.e.*, chemical peels. He noted that OB/GYNs treat patients for "hormonal imbalances" that can cause acne, which was the underlying problem that had prompted Milana to seek out Dr. Dahiya's (and Dr. Camper's) services.

After hearing some argument, the court permitted the Abbasovs to question Dr. Camper briefly, outside the presence of the jury, about the scope of OB/GYN care. Dr. Camper testified that OB/GYNs provide "healthcare to women" including treatment for hormonal imbalances and, sometimes, acne.

The court ruled that Dr. Camper satisfied the requirements of CJP section 3-2A-02(c)(2)(ii)1A, because he had clinical experience in Dr. Dahiya's field, at least with respect to chemical peels, but did not satisfy the requirements of CJP section 3-2A-02(c)(2)(ii)1B, because obstetrics and gynecology is not a related specialty to facial plastic and reconstructive surgery. The court found that an OB/GYN provides prenatal and antenatal care, delivers babies, and performs gynecological services, whereas a facial plastic surgeon "deals strictly or almost strictly with the skin." Based on these findings, the court ruled that Dr. Camper was not qualified to offer an opinion that Dr. Dahiya departed from the standard of care in performing the November 1, 2010 TCA peel or in his post-procedure treatment of Milana.

On the third day of trial, the Abbasovs moved the court to reconsider its ruling. Their counsel asked to recall Dr. Camper for some additional *voir dire* outside the presence of the jury. The court denied the request, but permitted counsel to make a proffer. Counsel stated that Dr. Camper would testify that "there's no difference of administration of TCA peel by a gynecologist or a plastic surgeon" and that "the standard of care, whether it's applied by one physician or the other, is the same." The court denied the motion.

As mentioned, the Abbasovs also had designated Dr. Singh, a plastic surgeon, as a standard of care expert. They did not call him to testify at trial, however.

In their motion for new trial, the Abbasovs argued that at the time of trial, Dr. Dahiya was not board certified in any specialty and therefore Dr. Campter should not have been precluded from giving standard of care opinions, under CJP section 3-2A-02(c)(2)(ii)1B. Specifically, they asserted that, after the trial, they "conducted additional investigation" based upon Dr. Dahiya's *curriculum vitae*, which they received for the first time during trial, and the investigation revealed that Dr. Dahiya was not certified by the American Board of Plastic Surgery, but by the American Board of Facial Plastic & Reconstructive Surgery, a board that is not recognized by the American Board of Medical Specialties ("ABMS") and therefore is not a recognized specialty in Maryland under

COMAR 10.32.01.02(9).[10] They further asserted that Dr. Dahiya's board certification from the American Board of Otolaryngology had expired in December of 2014, and therefore he was not board certified in otolaryngology at the time of the trial. Maintaining that this information all was newly discovered evidence, the Abbasovs argued that it was not necessary for Dr. Camper to be board certified in a related specialty to offer a standard of care opinion at trial because Dr. Dahiya was not board certified in any specialty. The court denied the motion for new trial.

On appeal, the Abbasovs' contend, for the reasons argued at trial and in their motion for new trial, that the trial court erred in precluding Dr. Camper from offering standard of care opinion testimony. Dr. Dahiya responds that the argument that he was not board certified in a recognized specialty at the time of trial was not raised at trial and therefore was waived. He points out that the Abbasovs' counsel took his deposition and had "every opportunity to explore and investigate his qualifications prior to trial" and during trial. Alternatively, Dr. Dahiya maintains that even if this argument was not waived, it has no merit because he was board certified in the two specialties he testified to when he rendered the care at issue, and neither specialty was related to the specialty of obstetrics and gynecology. Moreover, contrary to the Abbasovs' representations, he

[10] That regulation appears in the chapter governing how a physician becomes licensed to practice medicine in Maryland. It provides that "'Board-certified' means the physician is certified by a public or private board, including a multidisciplinary board, and the certifying board is: (a) A member of ABMS; (b) An AOA certifying board; (c) The Royal College of Physicians and Surgeons of Canada; or (d) The College of Family Physicians of Canada." COMAR 10.32.01.02(9).

remains board certified in otolaryngology.[11] He further asserts that the COMAR regulations the Abbasovs rely on have absolutely "no bearing on the requirements for testifying experts in malpractice cases."

We agree with Dr. Dahiya that the Abbasovs waived any argument that he was not board certified in any recognized specialty at the time of trial. Dr. Dahiya testified that he was board certified by the American Board of Facial Plastic & Reconstructive Surgery. He did not testify that he was board certified by the American Board of Plastic Surgery. His deposition was taken before trial, and counsel for the Abbasovs had every opportunity to explore his board certification status by questioning him. There is no suggestion that Dr. Dahiya ever gave any information that was untruthful regarding his board certifications.

When, at trial, counsel for Dr. Dahiya objected to the Abbasovs calling Dr. Camper to give standard of care testimony, the Abbasovs did not argue that Dr. Dahiya was not board certified in any specialty. They argued only that obstetrics and gynecology is a "related specialty" to facial plastic and reconstructive surgery. The Abbasovs easily could have determined before and even during trial whether, as they now argue, board certification by the American Board of Facial Plastic & Reconstructive Surgery is not a board certification recognized by Maryland law. Likewise, they could have verified

[11] He maintained that a clerical error had resulted in the website for the American Board of Otolaryngology incorrectly stating that his board certification had expired in 2014. That error was corrected and the website now reflects that his board certification does not expire until 2024.

before and during trial the correct status of Dr. Dahiya's certification by the American Board of Otolaryngology.[12]

Instead, the Abbasovs waited until after the trial to gather information they could have found before or during trial and to present a legal argument they could have advanced during trial if they had acted in a timely manner. Accordingly, the issue was waived. With respect to their new trial motion, the Abbasovs merely state in their brief that the court "erred" in denying it. The correct standard is abuse of discretion, and more important, the Abbasovs do not make any legal argument as to why the court erred or abused its discretion in denying their new trial motion. In any event, the court clearly did not abuse its discretion, as the evidence the Abbasovs argued was newly discovered was not, for the reasons we have explained.

We now turn to whether obstetrics and gynecology is a specialty that is "related" to the specialties of otolaryngology and facial plastic and reconstructive surgery. The Abbasovs argue, as they did at trial, that "as far as TCA (and other cosmetic chemical peels) are concerned, the indicated specialties are patently related." They note Dr. Camper's testimony that an OB/GYN provides a range of treatment to women, including treatment for skin conditions that might arise due to hormonal imbalances. We disagree.

The phrase "related specialties," as used in CJP section 3-2A-02(c)(2)(ii)1B, has the ordinary dictionary meaning of "associated" or "connected." *DeMuth v. Strong*, 205

[12] And if they had done so, Dr. Dahiya could have investigated and clarified his board certification status with the American Board of Otolaryngology.

Md. App. 521, 535-36 (2012). The "purpose of the Act, which is to weed out non-meritorious medical malpractice claims but not to create roadblocks to the pursuit of meritorious medical malpractice claims," is effectuated by treating board certified specialties as "related" "when there is an overlap in treatment or procedures within the specialties and therefore an overlap of knowledge of treatment or procedures among those experienced in the fields or practicing in the specialties, and the treatment or procedure in which the overlap exists is at issue in the case." *Hinebaugh v. Garrett Cnty. Memorial Hosp.*, 207 Md. App. 1, 18 (2012) (citing *DeMuth*).

In *DeMuth*, we held that a board certified vascular surgeon was qualified to express a standard of care opinion against a board certified orthopedic surgeon because the treatment at issue concerned the "proper postoperative diagnosis and treatment of possible vascular complications of orthopedic surgery" and thus "implicated the 'overlap' between the specialties of vascular and orthopedic surgery." 205 Md. App. at 546. We concluded, moreover, that for specialties to be "related," under CJP section 3-2A-02(c)(2)(ii)1B, it is not necessary for physicians certified in each specialty to treat the same organ or organs.

In *Hinebaugh*, 207 Md. App. at 1, we applied *DeMuth* in determining whether the circuit court erred in ruling that a board certified oral and maxillofacial surgeon ("OMS") was not qualified to offer a standard of care opinion against two defendants, a board certified family medicine doctor and a board certified radiologist. The plaintiff was treated by the defendants in the emergency department for injuries to his facial bones

sustained during a fist fight. We held that although a dentist could be certified in a "related specialty" to a physician and be qualified to offer standard of care testimony, OMS was not a related specialty to the specialties of family medicine and radiology with respect to the treatment rendered to the plaintiff. We explained:

> Family medicine doctors, radiologists, and OMS dentists all may examine and test patients for possible facial fractures, but they do not do so on an equal footing. Ordinarily, and it is the case with the defendants here, family medicine doctors and radiologists do so as part of a general practice in which they see for initial examination and testing a wide spectrum of patients. For family medicine doctors and radiologists, the spectrum covers possible fractures of any of the bones of the body; and for family medicine doctors alone, the spectrum covers a myriad of symptoms that may signal a problem with any bodily system. OMS dentists examine and test patients as specialists whose area of practice only concerns facial fractures. *Thus, the specialties do not overlap in that OMS dentists and family medicine and/or radiology doctors are not by education, training, experience, or competency on an equal footing with respect to the diagnosis and treatment of facial fractures in front line patients.*

Id. at 28–29 (emphasis added.)

In the case at bar, the treatment at issue is a cosmetic chemical peel. We think it plain that an OB/GYN does not practice in a related specialty to an otolaryngologist or facial plastic and reconstructive surgeon with respect to the application of and follow-up care for a TCA peel. The certifying authority for an OB/GYN is the American Board of Obstetrics and Gynecology ("ABOG"). As its website explains, an OB/GYN specializes "in the general medical care of women, as well as care related to pregnancy and the reproductive tract." OB/GYNs receive specialized training in seven areas: "preconception health, pregnancy, labor and childbirth, postpartum care, genetics, genetic counseling and prenatal diagnosis." The ABOG recognizes four subspecialties:

Maternal-Fetal Medicine; Gynecologic Oncology; Reproductive Endocrinology and Infertility, and Female Pelvic Medicine and Reconstructive Surgery. None of these areas of specialized training or subspecialties concern treatment of the face and neck, treatment of skin conditions, or the application of chemical peels. As Dr. Camper testified, when he was practicing exclusively as an OB/GYN, he did not perform chemical peels. Only after he "reinvented" himself as a medical spa proprietor did he begin offering that service.

In contrast, the fields of otolaryngology and facial plastic and reconstructive surgery are entirely focused on treatment of the head and neck region. Board certification in otolaryngology requires training and experience in surgery of the head and neck and the specialty includes plastic and reconstructive surgery of the head and neck.[13] *See* American Academy of Otolaryngology-Head and Neck Surgery, "What is an Otolaryngologist,"http://www.entnet.org/content/what-otolaryngologist (last visited on Apr. 6, 2016). The American Board of Facial Plastic and Reconstructive Surgery certifies physicians who have completed an approved residency program in either otolaryngology or plastic surgery generally, as both residency programs include training in "all aspects of

[13] The Abbasovs argue in their reply brief that Dr. Dahiya's board certification status as an otolaryngologist, *vel non*, is not material because "TCA peels are not otolaryngological procedures by any measure," and thus fall within the CJP section 3-2A-02(c)(2)(ii)1A exception for a defendant "providing care or treatment to the plaintiff unrelated to the area in which the defendant is board certified." This argument was never raised before the trial court or in the Abbasovs' opening brief in this Court and is waived. In any event, as explained above, it lacks merit.

facial plastic surgery," and who are board certified in one of those specialties, sit for a two-day exam, and submit a clinical record for peer review reflecting performance of a minimum of 100 prior facial plastic surgeries. *See* American Board of Facial Plastic and Reconstructive Surgery, "Patient FAQ's" http://www.abfprs.org/certified/faq.cfm (last visited Apr. 6, 2016). Although a chemical peel is a non-surgical procedure, it draws upon the same training and expertise with respect to care of the skin and tissues of the face and neck as more complex surgical procedures.

An otolaryngologist who also is board certified as a facial plastic and reconstructive surgeon is uniquely qualified by training and experience to treat facial skin conditions, both surgically and non-surgically, and that training and experience does not overlap in any meaningful way with the training and experience of an OB/GYN with respect to the performance of cosmetic facial peels and the post-procedure follow-up care for an adverse reaction to a chemical peel. For this reason, the trial court did not err in precluding Dr. Camper from offering a standard of care opinion in this case.

II.

In their complaint, the Abbasovs alleged that the TCA solution used on November 1, 2010, had been opened before Milana's procedure and, as a result, had partially evaporated and/or had been contaminated, and that the TCA solution was past its expiration date. During pre-trial motions, the Abbasovs's lawyer proffered that he had interviewed Bojorquez and she had acknowledged that the TCA solution used on November 1, 2010, was expired and partially evaporated. In her deposition, however,

Bojorquez denied ever having said that. The Abbasovs lawyer proffered to the court that he intended to call Bojorquez as a witness at trial and, if she testified consistent with her deposition testimony, impeach her with her prior inconsistent statement. The court granted Dr. Dahiya's motion to exclude any mention of the expiration date of the TCA solution in opening statement, but reserved ruling on whether the Abbasovs could present lay or expert testimony on that issue.

Before trial, the Abbasovs designated Dr. Smirnov, a chemist, as an expert who would testify about the chemical properties of TCA. At trial, their counsel proffered that Dr. Smirnov also would opine about how expiration and/or evaporation would affect the solution. Specifically, Dr. Smirnov would opine that "if the bottle is past expiration date or is improperly stored, it will compromise. . . [and that o]ne thing [that could] happen is the chemical can disintegrate into other chemicals, one of which is hydrochloric acid." However, Dr. Smirnov was not going to offer an opinion that an expired TCA solution could have or did cause Milana's injuries in this case.

On direct examination, Dr. Dahiya testified that he could not recall whether he looked at the bottle of TCA solution before he applied it to Milana's face on November 1, 2010. He stated that Bojorquez would have checked the bottle. After the solution was applied, Bojorquez would have disposed of the bottle and any remaining solution. Dr. Dahiya stated that it was not appropriate to reuse any leftover solution in the bottle for a subsequent patient. When asked whether his office would still have the receipt for the TCA solution used on November 1, 2010, he replied, "[p]robably not." He had not

documented the expiration date of the TCA solution he used on November 1, 2010, or affixed the label from the bottle to Milana's chart, as that was not his practice. He always documented the strength of the solution, however.

Despite their earlier proffer, the Abbasovs did not call Bojorquez as a witness at trial. Rather, they elected to read into the record excerpts from her deposition, none of which pertained to the issue of the expiration date of the TCA solution. They also did not question Ruvenitz about this issue.

On the third day of trial, after the court had precluded Dr. Camper from offering any standard of care opinions, and after counsel for the Abbasovs had announced that he would not be calling Dr. Singh as a witness, the court heard argument on whether Dr. Smirnov should be permitted to testify about the chemical properties of TCA. The court ruled that he could not so testify because his testimony would not aid the factfinders in deciding any issue. This was so because the Abbasovs had not presented any evidence that the TCA solution used on November 1, 2010, was expired or compromised and, even if they had, they had no medical expert who could testify to a reasonable degree of medical certainty that ***if*** Dr. Dahiya had used an expired or opened bottle of TCA ***and*** the TCA solution had broken down into its component chemical as a result, ***then*** the application of that solution to Milana's face could have caused the injuries she ultimately sustained.

On appeal, the Abbasovs contend the trial court erred in granting judgment in favor of Dr. Dahiya on the medical negligence claim because they could have proved a

breach of the standard of care without Dr. Camper's expert testimony. They acknowledge that expert testimony was necessary to prove a breach of the standard of care in applying a TCA peel and in rendering post-procedure care. They argue that expert testimony was not required to prove that Dr. Dahiya used an expired or compromised bottle of TCA solution. They maintain that the court erred in barring them from presenting evidence on that issue and/or arguing it to the jury. We disagree.

First, the Abbasovs presented no evidence that the TCA solution used by Dr. Dahiya on November 1, 2010 was expired or compromised. They did not call Bojorquez, the only witness they said could establish that the solution was expired. Dr. Dahiya testified that he did not check the expiration date but that Bojorquez would have done so. Second, and more important, the meaning of the expiration date of a bottle of TCA solution and the potential adverse effects of the application of an expired TCA solution to facial skin was a matter beyond the ken of the average juror and required expert testimony to explain. While Dr. Smirnov may have been able to opine about the changes that might occur in the TCA solution after the expiration date, that did not obviate the need for the Abbasovs to present testimony from a medical expert, certified in a related specialty to Dr. Dahiya, that use of an expired TCA solution for the application of a TCA peel was a breach of the standard of care *and* that the injuries suffered by Milana were

proximately caused by an expired TCA solution.[14] For these reasons, the court did not err in granting judgment in favor of Dr. Dahiya on the medical negligence claim.

III.

The Abbasovs contend the court gave an erroneous jury instruction on informed consent and then compounded its error in the wording of the verdict sheet.

The court gave Maryland Pattern Jury Instruction – Civil ("MPJI-Civ") 27:4(a) on informed consent, reads as follows:

> Before a physician provides medical treatment to a patient, the physician is required to explain the treatment to the patient and to warn of any material risks or dangers of the treatment, so that the patient can make an intelligent and informed decision about whether or not to go forward with the proposed treatment. This is known as the doctrine of informed consent.
>
> In fulfilling the duty to disclose, the physician is required to reveal to the patient the nature of the ailment, the nature of the proposed treatment, the probability of success of the proposed treatment and any alternatives, and the material risks of unfortunate outcomes associated with such treatment.
>
> A "material risk" is defined as "a risk which a physician knows or ought to know would be significant to a reasonable person in the patient's position in deciding whether or not to have the particular medical treatment or procedure."
>
> The physician's duty to disclose material risks to the patient is based upon an objective standard rather than a subjective standard. This means

[14] The Abbasovs contend, as they did below, that Dr. Dahiya conceded in his deposition that the use of an expired TCA solution was a breach of the standard of care, and therefore they did not need expert testimony on that point. We disagree. Dr. Dahiya testified in his deposition that he never had used an expired TCA solution and was unsure what happened to TCA solution "if it was post the expiration date." He then was asked if it was "appropriate care to use an expired TCA solution" and he replied, "No." This testimony did not amount to a concession that use of an expired bottle of TCA solution is a breach of the standard of care.

> that the question of whether a risk is a "material risk" is based upon whether a reasonable person in the position of the patient would have considered the risk to be a material risk. Whether the patient would have consented to the procedure, if informed of the risk, is a relevant factor to be considered, but is not conclusive.
>
> The physician is not required to divulge all risks, but only those which are material to the intelligent decision of a reasonably prudent patient.

The court supplemented the pattern instruction with one additional sentence, taken directly from *Sard v. Hardy*, 281 Md. 432, 445 (1977): "Disclosure is not required where the risk is either known to the patient or is so obvious as to justify presumption of such knowledge."

As we have discussed, the first two questions on the verdict sheet paralleled this instruction, as supplemented:

> 1. Do you find that [Dr. Dahiya] obtained informed consent from . . . Milana . . . on November 1, 2010, to perform a TCA peel?
>
> (If your answer to question 1 is "Yes," stop here, and sign the verdict sheet. Otherwise proceed to question 2.)
>
> 2. Do you find that the risk of the procedure of November 1, 2010, was known to . . . Milana . . . prior to that time or was so obvious as to justify presumption of that knowledge?
>
> (If your answer to question 2 is "Yes," stop here, and sign the verdict sheet. Otherwise proceed to question 3.)

The Abbasovs argue that the trial court erred by adding the one-sentence supplement to the pattern jury instruction and by including Question 2 on the verdict sheet.

The "inquiry into whether a jury instruction was appropriately given requires that we determine whether the instruction correctly stated the law, and if so, whether the law was applicable in light of the evidence before the jury." *Goldberg v. Boone*, 396 Md. 94, 122 (2006). The supplement to the instruction in this case plainly was a correct statement of the law, as it was drawn directly from *Sard*, the seminal Maryland case recognizing a cause of action for lack of informed consent. *See Sard*, 281 Md. at 445 ("Finally, *disclosure is not required where the risk is either known to the patient or is so obvious as to justify presumption of such knowledge*, nor is the physician under a duty to discuss the relatively remote risks inherent in common procedures, when it is common knowledge that such risks inherent in the procedure are of very low incidence.")(emphasis added).

The supplement to the instruction also was generated by the evidence. Milana testified that during her treatments by Dr. Camper prior to November 1, 2010, she had received several forms that included warnings about the effects of chemical peels, including the risks of "hyperpigmentation" and "skin scarring." She denied having read the documents, but acknowledged having signed them. The documents were introduced into evidence at trial. Also, in her deposition, Milana testified that at her first appointment with Dr. Dahiya, on March 1, 2009, she was given and had signed a document informing her of the risks of a TCA peel. An excerpt from her deposition testimony to that effect was read into evidence. Dr. Dahiya testified that the risks associated with a chemical peel include hypo- or hyper-pigmentation and scarring and that he always advises patients of these risks.

Thus, there was evidence before the jurors that, if credited, could have persuaded them that on November 1, 2010, Milana already knew that a TCA peel carried a risk of scarring and pigmentation changes, the very risks she alleged that, if disclosed, would have caused her not to consent to the procedure. The jurors also reasonably could have found that a procedure involving the application of a chemical to the facial skin for the purpose of burning off outer layers of skin carries an obvious risk of burns and scarring to the facial skin. The court did not err in so instructing the jurors.

For the same reasons, the verdict sheet, which reformulated the supplemental instruction drawn from *Sard* as Question 2, was a correct statement of the law and was appropriate.[15] The jurors' affirmative answer to that question amounted to a finding that Milana knew, prior to the November 1, 2010 procedure, that the 30% TCA peel carried risks of changes in pigmentation and facial scarring. That finding was fatal to her claim for lack of informed consent. The court did not err in granting judgment in favor of Dr.

[15] Having determined that the jury instructions and the verdict sheet were not in error, we need not address Dr. Dahiya's question, on cross-appeal, as to whether the trial court erred by sending the informed consent claim to the jury. Were we to reach that issue, we would conclude that Dr. Dahiya was entitled to judgment as a matter of law on the informed consent claim because the Abbasovs failed to present expert testimony bearing on the materiality of the risks inherent in a TCA peel. *See Sard*, 281 Md. at 447-48 ("expert testimony would be required to establish the nature of the risks inherent in a particular treatment, the probabilities of therapeutic success, the frequency of the occurrence of particular risks, the nature of available alternatives to treatment and whether or not disclosure would be detrimental to a patient"); *Shannon v. Fusco*, 438 Md. 24, 50 (2014) ("expert testimony is necessary [in a cause of action for lack of informed consent] to assist the trier of fact in understanding the severity and the likelihood of a risk so that the trier of fact may assess the material risks of the proposed treatment").

Dahiya on that count, in keeping with the verdict, and on the derivative claim for lack of consortium.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANTS.