Circuit Court for Anne Arundel County
Case No. 02-C-12-174853

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0013

September Term, 2018

STEPHANIE SUESSE

v.

NICOLE LUECKE, ET AL.

Fader, C.J.,
Reed,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: July 25, 2019

In 2015, appellant/cross-appellee Stephanie Suesse received a jury verdict in her favor against appellees/cross-appellants Nicole M. Luecke, M.D. and Chesapeake Women's Care, P.A. ("Chesapeake") on her medical negligence claim. Dr. Luecke and Chesapeake appealed and this Court issued an opinion reversing the judgment and remanding the case for further proceedings. Ms. Suesse asserts that the trial court erred on remand by (1) precluding her from introducing evidence regarding an aspect of her damages claim, (2) precluding all causation testimony from her expert witness, and (3) awarding summary judgment against her based on the absence of expert testimony as to causation. In their cross-appeal, Dr. Luecke and Chesapeake argue that the trial court erred in confining the proceedings on remand to the issue of non-economic damages only.

We conclude that the trial court misinterpreted this Court's prior mandate and erred when it did not hold a new trial on all issues. We will therefore remand for a new trial. As guidance for the trial court on remand, we also reach the first two issues raised by Ms. Suesse, and conclude that the trial court (1) abused its discretion in precluding Ms. Suesse from offering testimony about her left breast mastectomy as an element of damages and (2) abused its discretion in part when it precluded all causation testimony from Ms. Suesse's expert.

BACKGROUND

In December 2007, Ms. Suesse discovered a mass in her right breast. Dr. Luecke, Ms. Suesse's gynecologist, examined her and ordered a mammogram and sonogram. The radiology report found "[n]o mammographic or sonographic evidence of malignancy." From 2008 to 2011, Ms. Suesse continued to see Dr. Luecke for annual gynecological

appointments. According to Ms. Suesse, Dr. Luecke reassured her during these annual visits that the mass was a benign fibrous cyst, "nothing to worry about." Although Ms. Suesse described the mass as "a little pebble" the size of her "fingertip" when she first discovered it, she observed that the mass "seemed [] to slowly get bigger" and "was growing slowly outward and slowly towards the skin" over time.

In March 2012, a nurse practitioner at Chesapeake examined Ms. Suesse and ordered a mammogram and sonogram, the results of which then led to a biopsy. The biopsy in turn resulted in a diagnosis of cancer in her right breast, specifically ductal carcinoma in situ ("DCIS"),[1] with "an estimated maximum dimension of" nine centimeters. No abnormalities were detected in her left breast. In June 2012, after consulting with a breast surgeon, Ms. Suesse underwent a bilateral mastectomy,[2] meaning that both of her breasts were surgically removed. The parties agree that the right breast mastectomy was medically necessary and that the left breast mastectomy was not medically necessary.

The First Trial

In December 2012, Ms. Suesse filed a medical negligence action against Dr. Luecke and Chesapeake in which she alleged that they breached the standard of care by, among other things, failing to timely biopsy the mass, "order an appropriate diagnostic workup," and timely diagnose the mass. Ms. Suesse alleged that, as a result of their negligence, she

[1] DCIS is "[a] cluster of malignant cells in the mammary ducts." *Dorland's Illustrated Medical Dictionary*, "ductal carcinoma in situ," at 309 (32nd ed. 2012).

[2] A mastectomy is defined as "[s]urgical removal of the breast" and "usually is performed as treatment for or prophylaxis against breast cancer." *Taber's Cyclopedic Medical Dictionary*, "mastectomy," at 1408 (21st ed. 2009).

underwent the bilateral mastectomy and suffered "severe, painful and permanent injuries." In addition to economic damages, Ms. Suesse sought non-economic damages for "severe mental anguish" and "a diminished life expectancy."

Dr. Luecke and Chesapeake filed two relevant motions in limine in advance of trial. First, they requested that the court preclude testimony regarding Ms. Suesse's alleged loss of chance of survival as a result of the malpractice in light of the fact that her likelihood of survival remained well above 50 percent. Second, Dr. Luecke and Chesapeake moved to preclude evidence and argument regarding Ms. Suesse's left breast mastectomy because, they argued, the procedure was elective and "not medically necessary." The court denied both motions.

The parties tried the case to a jury over six days in May 2015. Dr. Barry Singer, an expert witness whose testimony we discuss more fully below, testified that Dr. Luecke and Chesapeake breached the standard of care and that the breach delayed the diagnosis of Ms. Suesse's cancer from 2007 until 2012. He also testified that, given the size of Ms. Suesse's breasts, the tumor would have been palpable throughout that period of time. Ms. Suesse testified that when she met with the breast surgeon after her 2012 diagnosis, she was told that a lumpectomy,[3] a procedure in which only a portion of the breast is removed, was not an option for her because of the size of the mass. Instead, the surgeon informed Ms. Suesse that she would need to undergo a right breast mastectomy to get rid of the cancer. Ms.

[3] A lumpectomy is the "[s]urgical removal of a tumor from the breast, esp[ecially] to remove only the tumor and no other tissue or lymph nodes." *Taber's Cyclopedic Medical Dictionary*, "lumpectomy," at 1366.

Suesse and her husband both testified as to her mental anguish and fear of diminished life expectancy if the cancer were to return.

Ms. Suesse also testified about her decision to undergo the left breast mastectomy, which she made in consultation with her plastic surgeon. She testified that if she only had the right breast mastectomy, that reconstructed breast would look different from her left breast: "it was not going to have a nipple, it was going to have a scar across it, and it was going to be down lower . . . . So it was going to look totally different from the other side." By contrast, if she had a bilateral mastectomy, she testified, "even though they would be scarred and disfigured, they would both look the same." Ms. Suesse claimed that this cosmetic benefit was "a plus," but not the exclusive reason she chose to undergo the left breast mastectomy.

Dr. Barry Singer's Testimony

Ms. Suesse designated Dr. Barry Singer, a medical oncologist, as an expert witness. Dr. Singer had been practicing medicine since 1967 and was board certified in internal medicine, medical oncology, and hematology. Ms. Suesse designated Dr. Singer to testify, among other things, that: (1) Ms. Suesse would not have suffered the injuries and damages she alleged in the lawsuit "but for the negligent acts of Defendants"; (2) those injuries and damages could have been prevented had Dr. Luecke and Chesapeake "provided medical treatment within the standard of care and diagnosed evidence of breast cancer in a timely manner"; and (3) "all the medical treatment received by [Ms. Suesse] to treat the breast cancer after its discovery was reasonable and medically necessary."

During the first trial, Dr. Singer described the role of a medical oncologist, such as himself, in the treatment process: "Basically he or she coordinates the[patient's] treatment. Generally cancer is treated by many specialists, and a medical oncologist is one of them who usually coordinates it." Dr. Singer testified that approximately 75 percent of his 42-year medical career had been devoted to medical oncology, and about 30 percent of his oncology patients had had breast cancer. He had been involved in "[s]everal thousand" breast cancer cases, with approximately ten to 15 percent, or "several hundred," of those involving DCIS. He acknowledged that he lacked any training or specialization in surgery and that he would defer to surgeons regarding "technique and necessity" for a particular procedure. The circuit court received Dr. Singer as an expert in oncology.

Dr. Singer testified that the pathology report for the tumor removed from Ms. Suesse's right breast showed that it was a "high grade" DCIS tumor that was 90 sonometers—equivalent to nine centimeters—in diameter, which Dr. Singer characterized as "a fairly large lesion."[4] Dr. Singer testified to a reasonable degree of medical probability, based on the medical reports and testimony he reviewed, that the tumor was probably between one and one-and-a-half sonometers in 2007 and that it stayed relatively stable at between "one to two sonometers through 2010." He believed that the tumor started growing rapidly in 2011 and 2012. As a result, Dr. Singer believed that it is "[m]ore

[4] A significant portion of Dr. Singer's testimony was dedicated to the risk that the cancer might have spread outside of the tumor and to Ms. Suesse's likelihood of survival and fear of a recurrence of her cancer. As that testimony is not relevant to any issues before us, we do not discuss it here.

likely than not" that if the tumor had been discovered before 2011, Ms. Suesse "would have had a lumpectomy and radiation treatment" rather than a mastectomy.

Defense counsel did not object to Dr. Singer's testimony that Ms. Suesse would more likely than not have had a lumpectomy had the cancer been discovered earlier. He did, however, object when Dr. Singer was asked how much of Ms. Suesse's right breast would have been removed in that procedure. Finding that to be a surgical opinion beyond Dr. Singer's expertise, the court sustained the objection. Dr. Singer did, however, testify later that a lumpectomy would not cause "significant asymmetry" in the breasts "in most cases."

On cross-examination, Dr. Singer acknowledged that if Ms. Suesse had undergone a lumpectomy, she would have required radiation therapy on "[t]he remainder of the breast," and that radiation therapy on a patient with breast implants, as Ms. Suesse had, is "not desirable." Ms. Suesse's implants would have needed to be removed for the radiation treatment and the breasts would have had to be reconstructed at a later date. Dr. Singer agreed that he would defer to a breast surgeon with respect to the level of reconstructive surgery that would have been required after such a procedure. He also agreed that there was no medical necessity requiring the removal of Ms. Suesse's left breast.

At the close of Ms. Suesse's case, the parties stipulated that if the jury found "that lumpectomy and radiation with reconstruction to one breast was a reasonable option" during the period between 2007 and 2011, her claim for past medical expenses would be

$35,000.00. The jury awarded Ms. Suesse that amount, plus $150,000.00 in non-economic damages, for a total of $185,000.00. Dr. Luecke and Chesapeake appealed.

The 2016 Appeal

On appeal to this Court, Dr. Luecke and Chesapeake contended that the circuit court had erred or abused its discretion in denying (1) their motion in limine to preclude testimony regarding Ms. Suesse's reduced chance of survival as a result of the delay in her diagnosis, (2) their two motions for judgment, (3) their motion for a new trial based on juror misconduct, and (4) their motion for judgment notwithstanding the verdict. *Luecke v. Suesse*, No. 1429, Sept. Term 2015, 2016 WL 6354579, at *2 (Oct. 28, 2016).

In an unreported opinion, a panel of this Court addressed only the first issue and concluded that the trial court had erred by allowing the loss of chance of survival testimony because her chance of survival, according to the testimony, remained at least 88 percent. *Id.* at *6 n.2, *8. The panel noted that the improperly-admitted testimony at trial about Ms. Suesse's distress regarding her fear of death "would have an obvious effect on any jury." *Id.* at *14. As a result, the panel "reverse[d] the court's judgment and remand[ed] for further proceedings wherein such evidence shall not be admitted." *Id.* Notably for our purposes, the panel determined that its reversal on that ground meant that it "need not address Suesse's other issues on appeal." *Id.* The mandate reversed the circuit court's judgment and "remanded for proceedings not inconsistent with this opinion." *Id.* (emphasis removed).

Proceedings on Remand

On remand, the parties disagreed about whether the court should hold a new trial on all issues or only on non-economic damages. Dr. Luecke and Chesapeake, focusing on the mandate's reversal of the prior judgment, moved for a de novo trial. The circuit court denied the motion and ordered that the retrial would be limited to non-economic damages.

Dr. Luecke and Chesapeake filed two additional motions in limine that are at issue here. First, they moved to preclude Dr. Singer from offering what they characterized as surgical opinions, including opinions as to (1) whether Ms. Suesse needed a "mastectomy over a lumpectomy [on her right breast] due to the alleged delay in diagnosis" and (2) the effect of a lumpectomy on Ms. Suesse's right breast. Ms. Suesse opposed the motion, arguing that Dr. Singer was qualified to opine on these issues. The court granted the motion without a hearing.

Second, Dr. Luecke and Chesapeake moved to preclude all testimony and argument regarding Ms. Suesse's left breast mastectomy. They argued that Ms. Suesse's treating physicians, Dr. Singer, and Ms. Suesse herself all agreed that the removal of the left breast was "elective" and not medically necessary. Thus, they asserted, the left breast surgery was not caused by "a delay in diagnosing cancer" and was not a compensable injury. Ms. Suesse filed an opposition in which she argued that the left breast mastectomy was performed to "mitigate any future disfigurement and asymmetry" as a result of the negligent acts and, therefore, was properly considered as an element of her damages. The court granted the motion without a hearing.

Based on the decision to preclude testimony from Ms. Suesse's only causation expert, Dr. Luecke and Chesapeake moved for summary judgment, which the court granted. Ms. Suesse appealed the adverse rulings on the two motions in limine and summary judgment. Dr. Luecke and Chesapeake cross-appealed the ruling limiting the scope of the trial on remand.

DISCUSSION

I. THE COURT ERRED IN LIMITING THE SCOPE OF THE TRIAL ON REMAND.

We address first the most fundamental of the four issues presented on appeal, which is the proper scope of the proceedings that should have taken place on remand from this Court's 2016 decision. In their first appeal, Dr. Luecke and Chesapeake raised four separate issues, only one of which the panel decided. The other three issues were the circuit court's denial of their motions for judgment, denial of a motion for a new trial based on juror misconduct, and denial of a motion for judgment notwithstanding the verdict. *Luecke v. Suesse*, 2016 WL 6354579, at *2. Once this Court reversed on the first issue raised, and remanded the case for further proceedings, the panel determined that it need not reach the other three issues at all. *Id.* Notably, that could only have been the case if the panel were remanding for a full trial, not a trial limited to the issue of non-economic damages. That is because the other issues raised, had the panel agreed with Dr. Luecke and Chesapeake, would have required a new trial on all issues.

Ms. Suesse disagrees, arguing that the other three issues also would only have affected her claim for non-economic damages and so resulted in a similarly-limited

remand. The record belies that assertion. In their motions for judgment and motion for judgment notwithstanding the verdict, Dr. Luecke and Chesapeake argued that Ms. Suesse "failed to establish a breach of the standard of care" and "failed to prove that any action or inaction by Dr. Luecke proximately caused any injury she suffered," not just her non-economic damages. And their motion for a new trial was based on a claim that the presence of a particular juror "visited undue prejudice upon Defendants," thus requiring an entirely new trial. The panel's determination that its reversal on the issue of Ms. Suesse's loss of chance of survival obviated the need to address these other issues necessarily meant that the new trial would be an entirely new start, unaffected by any of these alleged errors. We must, therefore, reverse once again and remand for a new trial on all issues.

Notwithstanding that ruling, we will proceed to address Ms. Suesse's first and second claims of error to provide guidance to the circuit court on remand. In doing so, we recognize that these issues will not necessarily be presented in the same way on remand and so it is possible that the outcome of similar motions filed on remand will be different.

II. THE COURT ABUSED ITS DISCRETION IN PRECLUDING ALL OF DR. SINGER'S CAUSATION TESTIMONY.

"An evidentiary ruling on a motion *in limine* 'is left to the sound discretion of the trial judge and will only be reversed upon a clear showing of abuse of discretion.'" *Ayala v. Lee*, 215 Md. App. 457, 474-75 (2013) (quoting *Malik v. State*, 152 Md. App. 305, 324 (2003)). However, if a ruling on the admissibility of evidence "involves a legal question, we review the trial court's ruling *de novo*." *J.L. Matthews, Inc. v. Maryland-Nat'l Capital Park & Planning Comm'n*, 368 Md. 71, 91 (2002).

"[T]he admissibility of expert testimony is a matter largely within the discretion of the trial court and its action will seldom constitute ground for reversal." *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 417 (2013) (quoting *Radman v. Harold*, 279 Md. 167, 173 (1977)); *Samsun Corp. v. Bennett*, 154 Md. App. 59, 67 (2003) ("The court's ruling on whether to admit or exclude expert testimony will seldom require a reversal."). The court's decision "is reversible if it is founded on an error of law or some serious mistake, or if the trial court clearly abused its discretion." *Wantz v. Afzal*, 197 Md. App. 675, 682 (2011) (quoting *Pepper v. Johns Hopkins Hosp.*, 111 Md. App. 49, 76 (1996)).

The parties disagree as to whether Dr. Singer's expertise as a medical oncologist qualifies him to offer opinions regarding two aspects of Ms. Suesse's treatment: (1) the treatment options available to Ms. Suesse had her cancer been diagnosed timely—lumpectomy followed by radiation, according to Dr. Singer—as opposed to when it was diagnosed—right breast mastectomy;[5] and (2) the cosmetic effect on Ms. Suesse's right breast from a lumpectomy as opposed to a mastectomy. Dr. Luecke and Chesapeake's argument for excluding Dr. Singer, both before the circuit court and here, conflates these two different aspects of his testimony, characterizing both as "surgical opinions" that they contend were beyond his "actual and proffered expertise" as a medical oncologist.[6]

[5] The parties agree that the only treatment option available to Ms. Suesse in 2012 for the cancer in her right breast was a mastectomy. The real issue with respect to Dr. Singer's testimony, therefore, is his opinion that a lumpectomy followed by radiation would have been a treatment option but for the delayed diagnosis.

[6] In the first trial, Dr. Luecke and Chesapeake did not object to Dr. Singer's testimony that a lumpectomy would have been an option for Ms. Suesse if the cancer had

Ms. Suesse acknowledges that Dr. Singer "cannot testify specifically to the techniques used while performing a surgery," but argues that his experience nonetheless qualifies him to offer opinions regarding her treatment plans, including her different surgical treatment options based on the timing of her diagnosis and the size of the tumor. Dr. Luecke and Chesapeake respond that Dr. Singer's deposition and trial testimony indicate that opinions "on the cosmetic and functional aspects of potential surgeries" are beyond the scope of his "actual and proffered expertise." They also contend that Ms. Suesse failed to provide sufficient notice that Dr. Singer would be offering these opinions.

We agree in part with both parties. If we had not remanded this case for a new trial, we nonetheless would have remanded it based on the circuit court's unexplained decision to preclude Dr. Singer's testimony regarding the treatment options Ms. Suesse would have

been diagnosed before 2011 because of the small size of the tumor. The trial court did, however, sustain their objection to testimony from Dr. Singer regarding the cosmetic effect of a lumpectomy on her right breast and the result of that procedure on symmetry between the breasts. When they filed their motion in limine as to Dr. Singer's testimony on remand, Dr. Luecke and Chesapeake asked the circuit court "to confirm[its] prior rulings in the earlier trial," claiming that "[t]his precise issue was addressed by this [c]ourt in the first trial" and that the "[c]ourt ruled several times that Dr. Singer would not be allowed to provide surgical opinions." On that basis, they asked that the court preclude Dr. Singer "from offering testimony regarding surgical treatments recommended to [Ms. Suesse] due to alleged delay in diagnosis."

The description in Dr. Luecke and Chesapeake's motion of what the circuit court had done in the first trial was misleading. Indeed, precluding *all* such testimony by Dr. Singer was actually a substantial departure from what the court did at the first trial, in which Dr. Singer had testified, without objection, that a lumpectomy would have been an option for Ms. Suesse if not for the delay in diagnosis. The court nonetheless granted the motion without a hearing or any explanation, and the effect of its order was to preclude Dr. Singer's causation testimony in its entirety.

had to treat the cancer in her right breast. Based on Dr. Singer's testimony about his qualifications and experience, we are unable to determine a proper basis for excluding that testimony and, therefore, conclude that the circuit court abused its discretion in doing so. On the other hand, we find no abuse of discretion in the court's decision to preclude Dr. Singer from offering opinions regarding the likely cosmetic outcome of different surgical options, including the probable effect of those options on Ms. Suesse's decision-making with respect to the removal of her left breast.

A. The Circuit Court Abused Its Discretion in Precluding Dr. Singer's Testimony Regarding Treatment Options for the Cancer in Ms. Suesse's Right Breast.

Expert testimony "in the form of an opinion or otherwise," is permitted "if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." Md. Rule 5-702. To make that determination, the court considers three factors: "(1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education[;] (2) the appropriateness of the expert testimony on that particular subject[;] and (3) whether a sufficient factual basis exists to support the expert testimony." *Sugarman v. Liles*, 460 Md. 396, 414 (2018) (quoting Md. Rule 5-702). "The proponent of the expert testimony carries the burden of demonstrating that these requirements are satisfied." *Sugarman*, 460 Md. at 414.

Here, Ms. Suesse proffered Dr. Singer as an expert to testify regarding, among other things, whether the damages Ms. Suesse claimed were caused by the negligence of Dr. Luecke and Chesapeake. To that effect, Dr. Singer testified that but for the delay in

diagnosis, a lumpectomy followed by radiation would have been an available treatment option for the cancer in her right breast. Although Dr. Singer does not specialize in breast cancer, "a proposed medical expert 'need not be a specialist in order to be competent to testify on medical matters[.]'" *Wantz*, 197 Md. App. at 686 (quoting *Ungar v. Handelsman*, 325 Md. 135, 146 (1992)). An expert witness is qualified to testify if his opinion is "consistent with his professional experiences and training," *Samsun Corp.*, 154 Md. App. at 73, that is to say, "when he exhibits such a degree of knowledge as to make it appear that his opinion is of some value, whether . . . gained from observation or experience . . . or any other reliable sources . . . ." *Raitt v. Johns Hopkins Hosp.*, 274 Md. 489, 501 (1975) (quoting *Casualty Ins. Co. v. Messenger*, 181 Md. 295, 298-99 (1943)).

As the Court of Appeals recently explained, "[e]xpert testimony is meant to assist the jury in resolving an issue outside the average person's realm of knowledge." *Levitas v. Christian*, 454 Md. 233, 245 (2017). An expert is "qualified to testify if he 'is reasonably familiar with the subject under investigation,'" *id.* (quoting *Roy v. Dackman*, 445 Md. 23, 41 (2015)), as a result of "professional training, observation, actual experience, or any combination of these factors," *id.* (quoting *Radman*, 279 Md. at 169). The expert need not "have hands-on experience with the subject about which he proposes to testify." *Id.* (quoting *Radman*, 279 Md. at 170-71). Instead, qualifications may be "derived not only from his own experience, but also from the experiments and reasoning of others, communicated by personal association or through books or other sources." *Id.* at 245-46 (quoting *Radman*, 279 Md. at 170). The question, therefore, is whether "the expert has in

some way gained such experience in the matter as would entitle his evidence to credit." *Id.* at 246 (quoting *Radman*, 279 Md. at 169).

Here, Dr. Singer testified, among other things, that he (1) has over 40 years' experience in treating patients with breast cancer, (2) has been involved in "[s]everal thousand" breast cancer cases, and (3) has treated "[s]everal hundred" patients with DCIS. We find particularly relevant Dr. Singer's testimony that, in his role as a medical oncologist, he "coordinates" the treatment of cancer patients with other specialists, including surgeons. One element of the treatment of breast cancer is, of course, the determination of available surgical options, and Dr. Singer testified that his opinion was based in part on his communications with those surgeons made in the course of coordinating that treatment. All of that can form a proper basis for expertise that might assist a jury in resolving Ms. Suesse's potential treatment options had the tumor been discovered timely, and what her options were in 2012.

Dr. Luecke and Chesapeake posit that the circuit court properly excluded Dr. Singer from testifying about these treatment options because he (1) "lacks any training, education, or experience in surgery," (2) "indicated [] that he would ultimately defer to a breast surgeon" as to "surgical recommendations or treatment," and (3) offered "conclusory opinions" regarding surgical treatments that lacked a sufficient factual basis. Although all of these points are true, and all might diminish the weight of Dr. Singer's testimony, none of them merit precluding his testimony altogether. An absence of experience as a surgeon is not automatically disqualifying. On that point, the Court of Appeals's decision in

Radman is dispositive. There, a surgeon performing a hysterectomy accidentally damaged the plaintiff's bladder. 279 Md. at 168. At trial, the plaintiff offered as an expert witness on the surgeon's standard of care an internal medicine specialist who had not "performed any surgery of any kind, let alone in . . . gynecology." *Id.* at 174. The trial court excluded the internist's testimony, finding that he was not qualified as an expert in that "particular specialty." *Id.* at 174-75. The Court disagreed, reasoning that a medical expert "who has acquired sufficient knowledge in an area" should not be disqualified "merely because he is not a specialist or merely because he has never personally performed a particular procedure." *Id*. at 167. The proper standard to apply, the Court found, is whether the expert witness "demonstrate[s] a knowledge acquired from experience or study of the standards of the specialty of the defendant physician sufficient to enable him to give an expert opinion as to the conformity of the defendant's conduct to those particular standards . . . ." *Id.* at 172. The Court remanded the case for the trial court to determine whether the internist's testimony met that standard. *Id.* at 176.

Here, Dr. Singer's testimony as to standard of care was limited to the diagnosis of Ms. Suesse's cancer, not the surgery that was ultimately performed to remove it. That standard of care testimony is not at issue in this appeal. His testimony that is at issue addressed not the standard of care for a surgeon, but surgical treatment options for a patient with DCIS. On that issue, Dr. Singer's unrebutted testimony was that he had experience treating hundreds of DCIS patients with tumors of varying sizes, and that it was his role to coordinate the treatment with other specialists, including surgeons. We fail to see on this

record how that did not give him "sufficient familiarity" with the subject to opine as to what surgical treatment options would have been available to Ms. Suesse. *See id.* at 172; s*ee also Samsun Corp.*, 154 Md. App. at 62, 76 (finding that a specialist in orthopedics was "sufficiently conversant" with urology to offer expert testimony as to causation of plaintiff's urological symptoms). Similarly, neither Dr. Singer's lack of study regarding specific surgical techniques nor the fact that he would defer to surgeons regarding those issues undermines his ability to testify as to the treatment options that would have been available to Ms. Suesse at a time when the tumor was much smaller than it presented in 2012.[7] And, in these circumstances, we see no issue with the adequacy of the factual basis for Dr. Singer's testimony, as he had reviewed Ms. Suesse's relevant medical records and testimony in the case, and based his opinion off of his own experience coordinating treatment of women with similar cancers.

On remand, Dr. Singer should be permitted to testify regarding the difference in available treatment options for the cancer in Ms. Suesse's right breast, as between lumpectomy and mastectomy, as a result of the delay in diagnosis.[8]

[7] To be sure, Dr. Luecke and Chesapeake raise points that call into question Dr. Singer's opinions, perhaps most prominently the potential difficulty in performing radiation on a patient with surgical implants and the complications that would present for post-treatment reconstruction. Although potential fodder for cross-examination, those concerns go to the weight and credibility of Dr. Singer's opinions, not their admissibility.

[8] We find no merit in Dr. Luecke and Chesapeake's contention that they did not receive sufficient notice that Dr. Singer would be asked to offer an opinion regarding Ms. Suesse's treatment options for the cancer in her right breast as a result of the delayed diagnosis of her cancer. Those opinions were fairly encompassed by Ms. Suesse's pretrial designation of his testimony as expounded upon in his deposition testimony.

B. The Circuit Court Did Not Abuse Its Discretion in Precluding Dr. Singer from Offering Opinions Regarding Disfigurement Resulting from Different Surgical Options.

In contrast to Dr. Singer's testimony regarding the difference in treatment options for the cancer in Ms. Suesse's right breast, we find no abuse of discretion in the circuit court's decision to preclude him from testifying regarding the cosmetic outcomes of different surgical procedures. Dr. Singer did not identify any aspect of his background, experience, education, reading, or communications with others that would have qualified him to opine as to the amount of disfigurement that would result from a particular surgical procedure on Ms. Suesse or what level of reconstruction would be necessary following such a procedure. To the contrary, he expressly disclaimed such expertise. As a result, the circuit court did not abuse its discretion in precluding him from testifying on such matters. *See Univ. of Md. Med. Sys. v. Waldt*, 411 Md. 207, 234 (2009) (finding expert testimony inappropriate when the expert has "limited experience" in a field, and "fail[ed] to disclose any specific scientific or factual underpinnings for any knowledge about" a medical procedure); *see also Porter Haydon Co. v. Wyche*, 128 Md. App. 382, 391 (1999) (stating that an expert may not "simply hazard guesses, however educated, based on [his or her] credentials").

III. THE TRIAL COURT ABUSED ITS DISCRETION IN PRECLUDING EVIDENCE REGARDING MS. SUESSE'S LEFT BREAST MASTECTOMY.

The parties agree that, by 2012, Ms. Suesse's right breast mastectomy was medically necessary. The parties also agree that Ms. Suesse's left breast mastectomy was not medically necessary. Ms. Suesse nonetheless intends to seek an award of non-economic

damages based on the loss of both of her breasts. She contends that she should be able to do so because the loss of her left breast "was proximately caused [by Dr. Luecke and Chesapeake Women's Care's] negligence." The logical progression of her argument is that: (1) but for the delayed diagnosis of the cancer in her right breast, it could have been treated with a lumpectomy; (2) her right breast mastectomy, unlike a lumpectomy, would have left her with asymmetrical breasts if she had not also undergone a left breast mastectomy; and (3) she underwent the left breast mastectomy to obtain symmetry between her reconstructed breasts. According to Ms. Suesse, this procedure mitigated her damages, which would have been greater if she were able to argue that the delay in diagnosis had left her with asymmetrical breasts.

Dr. Luecke and Chesapeake filed a motion in limine to preclude Ms. Suesse from introducing any evidence regarding her left breast mastectomy because it was not medically necessary and was, instead, a voluntary, "prophylactic" choice that "is unrelated to the allegations of negligence . . . of a delay in diagnosis of cancer in [Ms. Suesse's] right breast." The circuit court granted the motion without explanation.

We agree with Ms. Suesse that the circuit court abused its discretion in granting the motion in limine. On remand, Ms. Suesse should be permitted to argue that the delay in diagnosis of her cancer was a proximate cause of her left breast mastectomy and, therefore, that the jury should consider that in its award of damages. Whether to award damages based on the left breast mastectomy is a proper question for the jury.

"In a negligence action, a plaintiff bears the burden of proving: '1) that the defendant was under a duty to protect the plaintiff from injury, 2) that the defendant breached that duty, 3) that the plaintiff suffered actual injury or loss, and 4) that the loss or injury proximately resulted from the defendant's breach of the duty.'" *Marrick Homes LLC v. Rutkowski*, 232 Md. App. 689, 698 (2017) (quoting *Rowhouses, Inc. v. Smith*, 446 Md. 611, 631 (2016)). The plaintiff must prove these requirements by a preponderance of evidence. *See Univ. of Md. Med. Sys. Corp. v. Gholston*, 203 Md. App. 321, 340 (2012) ("[A] health care provider will be liable in damages for negligence, based upon the elements of a cause of action for negligence and subject to the same standard of proof (preponderance of the evidence) that applies generally to negligence actions . . . .").

The parties dispute whether Ms. Suesse's left breast mastectomy constitutes loss or injury that was proximately caused by the delay in diagnosis. Proximate cause, which "must be analyzed on a case-by-case basis," *Yonce v. SmithKline Beecham Clinical Labs., Inc.*, 111 Md. App. 124, 136-37 (1996), is comprised of two subparts: (1) "a cause in fact of the injury," and (2) "a legally cognizable cause," *id.* (quoting *Balt. Gas & Elec. Co. v. Lane*, 338 Md. 34, 51 (1995)). We conclude that that there is sufficient evidence in the record to establish a "reasonable probability" that Dr. Luecke and Chesapeake's conduct was a cause in fact and a legal cause of Ms. Suesse's injuries, thus creating a question of fact for the jury.

Causation in fact "concerns the threshold inquiry of 'whether defendant's conduct actually produced an injury.'" *Pittway Corp. v. Collins*, 409 Md. 218, 244 (2009) (quoting

Peterson v. Underwood, 258 Md. 9, 16 (1970)). We use two tests to determine if causation in fact has been met: (1) the "but for" test, which applies when "only one negligent act is at issue" and "the injury would not have occurred absent or 'but for' the defendant's negligent act," and (2) the "substantial factor" test, which applies when "it is more likely than not" that the defendant's negligent conduct was a substantial factor in bringing about the injury. *Pittway Corp.*, 409 Md. at 244.

Here, Ms. Suesse produced sufficient evidence from which a jury could conclude that her left breast mastectomy would not have occurred "but for" Dr. Luecke and Chesapeake's conduct and that the conduct was a substantial factor in bringing about the left breast mastectomy. Ms. Suesse testified that she decided to have her left breast removed only because of the medical need to remove her right breast. There is no suggestion in the record or basis in common sense for concluding that Ms. Suesse would have decided to have her left breast removed if not for the medical need to remove her right. This evidence thus meets "the threshold inquiry" for a jury to determine that the conduct of Dr. Luecke and Chesapeake was the cause in fact of Ms. Suesse's injury. *Id.*

A determination of legal causation is "grounded in foreseeability." *Troxel v. Iguana Cantina, LLC*, 201 Md. App. 476, 505 (2011). In analyzing whether legal causation exists, we consider "whether the injuries were a foreseeable result of the negligent conduct" and examine "whether the actual harm . . . falls within a general field of danger that the [defendants] should have anticipated or expected." *Pittway Corp.*, 409 Md. at 245-46. In performing this analysis, we further recognize that "[f]oreseeability, as an element of

proximate cause, permits a retrospective consideration of the facts," *Yonce*, 111 Md. App. at 145, and that a proximate cause of an injury need not be the sole cause of the injury, *Atlantic Mut. Ins. Co. v. Kenney*, 323 Md. 116, 127 (1991).

The deposition testimony and evidence adduced at the first trial included that (1) Ms. Suesse's cancer went undiagnosed while she was under the care of Dr. Luecke and Chesapeake; (2) a right breast mastectomy was "medically necessary" to treat the cancer; and (3) she chose a bilateral mastectomy only because of the need to undergo the right breast mastectomy to mitigate the damages she would have suffered from having asymmetrical breasts. If the jury were to credit this evidence, and also conclude, as the first jury did, that the delay in diagnosis caused the need to undergo the right breast mastectomy, then it could also find that Ms. Suesse undergoing the left breast mastectomy was a foreseeable result of Dr. Luecke and Chesapeake's conduct. *See Yonce*, 111 Md. App. at 144 (in a case involving complications during a surgery, finding that "the question is whether [defendants] should have foreseen the general harm . . . and not the specific manifestation of that harm . . . .").

Dr. Luecke and Chesapeake dispute that the evidence was sufficient to establish legal causation. They make several arguments that reflect a misunderstanding of the purpose of the testimony, including (1) that the left breast mastectomy was not a "medical injury" as defined in § 3-2A-01(g) of the Courts Article, (2) that Ms. Suesse did not present expert testimony that the delay in diagnosis caused the left breast mastectomy, and (3) that Ms. Suesse admitted that the surgery was cosmetic and not medically necessary. But Ms.

Suesse does not contend that the delay in diagnosis of her cancer caused any direct injury to her left breast. The "medical injury" she identifies and offered expert testimony to prove, and that the first jury found she did prove, is the growth in the size of the cancer in her right breast—from a fraction of a centimeter to nine centimeters—that necessitated a mastectomy rather than a lumpectomy. The testimony she seeks to offer regarding her left breast mastectomy relates to the damages flowing from that medical injury to her right breast. The relevant question, therefore, is whether the removal of her left breast to mitigate the adverse consequences of the removal of her right breast was a reasonably foreseeable consequence of the injury to her right breast. On this record, we believe that this is a proper jury question. *See Gholston*, 203 Md. App. at 329 (observing that "[i]n a jury trial, the quantum of legally sufficient evidence needed to create a jury question is slight"); *Troxel*, 201 Md. App. at 505 ("[I]t is well established that, unless the facts admit of but one inference . . . the determination of proximate cause . . . is for the jury.") (citations and quotations omitted). "Only in cases where reasoning minds cannot differ does proximate cause become a question of law." *Troxel*, 201 Md. App. at 505.

On remand, Ms. Suesse should be permitted to present otherwise admissible evidence that she underwent the left breast mastectomy to mitigate damages flowing from the need to undergo the right breast mastectomy as a result of the delay in diagnosis of the cancer in her right breast. Dr. Luecke and Chesapeake can, of course, impeach that

evidence and present contrary evidence and argument, including as to their contention that the left breast mastectomy was wholly elective and voluntary.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED. CASE REMANDED TO THE CIRCUIT COURT FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLANT/CROSS-APPELLEE.