Circuit Court for Baltimore County
Case No. 03-C-17-000468

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1168

September Term, 2018

AVA WYLER

v.

KATHLEEN TULLY

Leahy,
Gould,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: January 10, 2020

This is an appeal from the dismissal of a medical malpractice action in the Circuit Court for Baltimore County. Ava Wyler, as personal representative of the estate of Annette Samuels, filed a medical malpractice action against appellee, Kathleen Tully, M.D., claiming appellee failed to timely diagnose oral candidiasis, causing personal injuries.[1] Appellee treated Ms. Samuels when she was admitted to PowerBack Rehabilitation for care and rehabilitation following a pelvic and arm fracture.

Immediately prior to the start of trial on June 25, 2018, appellee moved to exclude the testimony of appellant's sole expert witness, Dr. James De Simone, which had been obtained through a *de bene esse* deposition on June 15, 2018.[2] Appellee argued that Dr. De Simone failed to define the standard of care during the deposition, and thus, could not testify as an expert witness. The trial court agreed and excluded Dr. De Simone's testimony. Because he was appellant's sole expert witness, the case was dismissed.

This timely appeal followed. Appellant presents the following questions for our review, which we have rephrased:

1. Whether the court erred in excluding Dr. De Simone's testimony?

2. Whether the court abused its discretion in failing to allow appellant to call Dr. De Simone as a witness at trial?

For reasons to follow, we hold the court erred in excluding the expert's testimony. Accordingly, we need not reach the question of whether the trial court abused its discretion

[1] Oral Candidiasis—also called oral thrush—is a condition in which the fungus Candida albicans accumulates on the lining of the mouth.

[2] A *de bene esse* deposition is a deposition taken for use at trial.

in failing to allow appellant to call Dr. De Simone as a witness at trial. We remand this case for further proceedings consistent with this opinion.

BACKGROUND

Annette Samuels was admitted to PowerBack Rehabilitation for care in the fall of 2011 after suffering fractures to her pelvis and arm. Her attending physician was Dr. Kathleen Tully. Appellant claimed appellee failed to timely diagnose and treat oral candidiasis which led to pain, an inability to eat, and weight loss. In 2016, a medical malpractice action was filed on her behalf. An initial deposition was taken of appellant's expert witness, James De Simone, M.D., on April 18, 2018 where, among other things, he briefly defined his understanding of the standard of care. Dr. De Simone later opined in a *de bene esse* deposition taken on June 15, 2019 about the care required of Dr. Tully and her failure to provide it. During the deposition, Dr. De Simone was asked to detail his qualifications. He outlined his employment, board certifications, specialty, and education. Dr. De Simone also described the types of patients he treated.

Appellant then offered Dr. De Simone as an expert in the field of internal medicine stating ". . . I would like to make a motion to offer Dr. De Simone as an expert in the field of internal medicine." Appellee objected stating that "I do not believe he's been properly qualified under Maryland law." Attempting to cure, appellant followed up with additional questions about Dr. De Simone's education and experience, board certifications and recertifications, and experience with candidiasis. The motion was then renewed. Appellee again objected stating "I do not believe he has been properly qualified under Maryland

law." Appellant's counsel then asked Dr. De Simone whether he had an opinion about the care that Dr. Tully gave Ms. Samuels, and he stated:

> Okay. Again, the – I was asked to look at whether the standard of care was followed, and, in my opinion it was two things – two violations of the standard of care.
>
> And in this particular case, the possible ulceration in the mouth was pointed out, Dr. Tully was informed of this, and she, in my opinion, should have done one of three things: Examine the mouth and determine that that was not the problem; order some kind of diagnostic test; or, what I would have done, I would have simply treated the patient with Nystatin because – I've seen the condition, people with the mouth ulcers, multiple times and there is no downside to doing that, and she did not do any of those three things. So – and that is the fundamental – those are two fundamental areas where I think she did not stick to standard of care.

The doctor was then asked:

> If she, if Dr. Tully had performed an examination, an oral examination on November 7, 2011, to a reasonable degree of probability, would she have detected candidiasis?

TAYLOR: Objection.

ANSWER: I think, so yes. It was apparently, was quite obvious, only several days later, to the physician who looked.

QUESTION: Okay. To a reasonable degree of medical probability, if Dr. Tully had performed an oral examination on November 3, 2012, the day after that note from Frank Kwokori, would she have been able to detect candidiasis in Annette Samuels?

TAYLOR: Objection. You can answer.

ANSWER: I believe so, yes.

At a motions hearing held on the morning of trial, June 25, 2018, appellee argued that her objections were focused on Dr. De Simone's failure to define the standard of care

stating "[Dr. De Simone] did not define standard of care. Never established what the applicable standard of care was as it applies to Dr. Tully or his basis for understanding the standard of care." Appellee citing Maryland Courts and Judicial Proceedings Section 3-2A-02(c),[3] explained that her expert would state that the standard of care "is what a physician similarly situated would do in a same or similar situation with regard to treating a patient." Appellant argued that the witness did opine about what he would have done and that he was giving the standard of care as required. He also brought to the court's attention that he had just received the motion the morning of trial and "it [was] something that could have been at least addressed earlier."

Appellant then sought leave of court to recall Dr. De Simone stating, "[t]o the extent that the court feels that there is any need in additional testimony from Dr. De Simone, we would request the court's right to recall the witness, understanding his testimony has been officially put on the record yet, but we can attempt to recall him and shore up that those questions that defense counsel had on his standard of care testimony." The trial court did not specifically address appellant's request but ruled that Dr. De Simone's testimony would

[3] Md. Code, Cts. & Jud. Proc. § 3-2A-02(C) states:

> In any action for damages filed under this subtitle, the health care provider is not liable for the payment of damages 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.

be excluded because he never stated that "the standard of care is x . . ." The case was thereafter dismissed as Dr. De Simone was appellant's sole expert witness.

This timely appeal followed.

DISCUSSION

I. The court erred in granting the motion to strike Dr. De Simone's testimony.

Maryland Rule 2-415(h) provides:

> All objections made during a deposition shall be recorded with the testimony. An objection to the manner of taking a deposition, to the form of questions or answers, to the oath or affirmation, to the conduct of the parties, or to any other kind of error or irregularity that might be obviated or removed if objected to at the time of its occurrence is waived unless a timely objection is made during the deposition. An objection to the competency of a witness or to the competency, relevancy, or materiality of testimony is not waived by failure to make it before or during a deposition unless the ground of the objection is one that might have been obviated or removed if presented at that time. The grounds of an objection need not be stated unless requested by a party. If the ground of an objection is stated, it shall be stated specifically, concisely, and in a non-argumentative and non-suggestive manner.

Appellant contends "[a]ppellee did not adequately preserve an objection to the qualification of [a]ppellant's expert during the *de bene esse* deposition" and therefore, appellee's objections were waived. Conversely, appellee asserts objections were made to the questions posed, and the reasons for the objections were articulated.

Appellant relies on *Davis v. Goodman*, 117 Md. App. 378 (1996) and *Mayor & City Council of Baltimore v. Theiss*, 354 Md. 234 (1999), as controlling authority on this point. In *Davis*, counsel sought to exclude expert testimony where objections were made to several questions asked during the expert's deposition that were "not in proper form."

Davis, 117 Md. App. at 387. The questions called for the witness to express an opinion even though he was not asked "whether the opinion was held to a reasonable degree of medical probability." *Id.* The trial judge overruled the objections and we affirmed that decision. *Id.* We held, in interpreting Rule 2-415(h) and its legislative intent that ". . . to preserve a deposition objection to any error or irregularity that might be cured . . . the objecting party must state the ground for the objection . . . so that the opposing party will have a chance to cure or obviate the error or irregularity." *Id.* at 404–05. We noted that "the Maryland Rules are be to be construed to secure simplicity in procedures, fairness in administration and elimination of unfair expense and delay." Rule 1-201(a).

Similarly, in *Theiss*, another case involving the deposition of a medical expert, the Court of Appeals affirmed that an objecting party must object timely and state the grounds for the objection during a deposition, or the objection is waived. 354 Md. 234, 257–58 (1999). "'[S]andbagging' an opposing counsel by attempting to defer the issue of the proper form of the question to a point in the process, immediately prior to the trial, when correction is necessary but the witness is not available to answer a new, properly framed question, are tactics contrary to the purposes for which the videotape deposition rule and Rule 2-415(g)[4] were designed to address." *Id.* at 257.

In the case at bar, appellee's initial objections to the admission of Dr. De Simone as an expert witness were stated specifically, concisely, and in a non-argumentative manner:

[4] This Rule is now codified as Maryland Rule 2-415(h).

[Appellant Counsel]: . . . I would like to make a motion to offer Dr. DeSimone as an expert in the field of internal medicine.

[Defense Counsel]: I would object at this point. I do not believe he's been properly qualified under Maryland law.

[Appellant Counsel]: Fair enough.

Appellant then asked several additional questions and again offered the witness as an expert. Appellee objected a second time restating that the witness was "not properly qualified under Maryland law." As we see it, these objections were specific and did not constitute a waiver.

However, these objections were noted after appellant offered to have Dr. De Simone recognized as an expert in internal medicine, not as a standard of care expert. The record then reflects appellant asked several questions related to the patient's care and any opinions the doctor held to a reasonable degree of probability. Appellee noted general objections to the questions, providing no specificity.

Writing for this court, Judge Salmon stated in *Davis*:

> "A plain reading of Rule 2-415(g) shows that the reason an objection to a defect [in any question or answer that can be immediately cured] must be made, in a timely fashion, during the deposition is so that the questioner will have an opportunity, during the deposition, to clear up the problem. The drafters of the rules did not wish a litigant to be prejudiced by a slip of the tongue or any other error that could be easily cured. If it were sufficient merely to utter the word "objection" when some flaw exists in a question or answer, that purpose oft-times would not be fulfilled. For instance, a questioner, even if he or she is a well-trained lawyer, may not know what "error or irregularity" needs correcting if a specific objection is not made. At deposition, attorneys can, and often do, object to questions for invalid reasons or for no reason at all . . . (Any other interpretation would not fulfill

> the purpose of the rule and would run afoul of the requirement that the Maryland Rules be interpreted to secure fairness in administration."

Davis v. Goodman, 117 Md. App. 378, 400–01 (1996).

Here, we note, if the grounds for the objections had been provided, counsel could easily have corrected the form of the questions to cure or obviate any error. We hold appellee's objections to the standard of care questions were, therefore, waived. As such, the circuit court committed error by striking the testimony of the expert witness and further dismissing the case.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEE.