Circuit Court for Anne Arundel County
Case No. 02-C-12-173862

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2037

September Term, 2015

CHESAPEAKE WOMEN'S CARE, P.A.

v.

BARBARA MESSICK, ET AL.

Woodward, C.J.,
Graeff,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Woodward, C.J.

Filed: September 19, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal arises out of a medical malpractice and wrongful death action filed by appellees, Barbara Messick ("Barbara") and Michael Messick ("Michael") (collectively "the Messicks"), against appellant, Chesapeake Women's Care, P.A. The Messicks alleged that appellant's prenatal monitoring of Barbara Messick breached the standard of care, causing the premature birth of the Messicks' daughter, Molly, and her subsequent death two days later. The claims initially were filed in the Health Care Alternative Dispute Resolution Office ("HCADRO") with a Certificate of Qualified Expert and report ("CQE") signed by Lawrence S. Borow, M.D., pursuant to Maryland's Health Care Malpractice Claim Act, Maryland Code (1973, 2013 Repl. Vol.), § 3–2A–01 *et seq.* of the Courts & Judicial Proceedings Article ("CJ"). After the claims were transferred to the Circuit Court for Anne Arundel County, the Messicks voluntarily dismissed the case without prejudice ("*Messick I*"). Using Dr. Borow's CQE from *Messick I*, the Messicks refiled their complaint in the Circuit Court for Anne Arundel County ("the instant case"), where their first trial resulted in a mistrial on February 4, 2014.

Before the second trial began, the Messicks filed a motion to substitute expert witness and a motion for "good cause" extension of time for filing a certificate of qualified expert, requesting that they be allowed to substitute a CQE signed by Steven Pliskow, M.D., FACOG, FACFE, for Dr. Borow's CQE and designate Dr. Pliskow as their expert witness. Appellant filed a motion to strike Dr. Borow's CQE and to dismiss. The circuit court granted the appellees' motions for a "good cause" extension and to substitute experts, and denied appellant's motions to strike and to dismiss. The case proceeded to trial during which Dr. Pliskow testified that appellant violated the standard of care and such violation

was the proximate cause of Molly's death. On October 5, 2015, a jury returned a verdict in favor of appellees on two counts of wrongful death and awarded damages in the total amount of $250,000.

Appellant presents the following questions for our review:

> I. Where appellees' certifying expert [Dr. Borow] violated the "20% Rule," should the trial court have struck their CQE due to statutory non-compliance and dismissed their suit?
>
> II. Did the trial court err by denying appellant's motion for mistrial where appellees' opening statement was laden with prejudicial statements, violating the "golden rule?"
>
> III. Should the trial court have granted appellant's motion(s) for judgment or, alternatively, motion for judgment notwithstanding the verdict where appellees' case was entirely predicated on unsubstantiated testimony by a single "expert"?

For the reasons discussed below, we conclude that there was no error or abuse of discretion and thus affirm the judgment of the circuit court.

BACKGROUND

A. Medical Care

In July of 2006, Barbara became pregnant with her second child, Molly. Barbara sought prenatal care from appellant, the same OB/GYN that delivered her first child five months earlier. Due to Barbra's age and the short interval between her first and second pregnancies, among other factors, Barbara's pregnancy was deemed high risk, and she was referred to a maternal fetal medicine specialist, William Sweeney, M.D., to perform a transvaginal ultrasound.

On October 16, 2006, Barbara saw Dr. Sweeney, and he performed a transvaginal ultrasound. Barbara returned to Dr. Sweeney for a follow up on November 27, 2006. Dr. Sweeney noted that "[t]he cervix appeared shortened transabdominally so a transvaginal sonogram was done." The transvaginal sonogram showed "a total cervical length of 2.6 cm[,]" or 26 mm, and Dr. Sweeney reported this measurement as "normal." Dr. Sweeney noted that "[t]he cervix is closed with no evidence of funneling."

Shortly thereafter on November 30, 2006, Barbara had an episode of vaginal bleeding and cramping while shopping, and immediately called appellant. She spoke with a doctor employed by appellant who instructed her to go to the emergency room because she might be having a miscarriage. Barbara drove herself to the Baltimore Washington Medical Center emergency room where they performed a physical exam and a sonogram, and discharged her later that day. Barbara called appellant to notify them of the results of her emergency room visit. Appellant advised Barbara to rest until her next appointment, which was set for December 4, 2006.

Barbara went to her scheduled appointment on December 4, 2006, where she was examined by a doctor employed by appellant. The doctor measured Barbara's stomach and performed a Doppler exam, which indicated that Molly's heartbeat was "strong." The doctor did not perform any sort of physical exam and did not indicate that Barbara had any sort of restrictions, such as pelvic rest. Despite the recent emergency room visit, Barbara left the appointment believing that the baby was healthy and that "[t]he pregnancy was fine."

Late Saturday evening on December 9, 2006, Barbara had another episode of

vaginal bleeding and cramping, and was taken by ambulance to Chester River Medical Center emergency room. At the hospital, a doctor performed a pelvic exam and pelvic ultrasound, which indicated that Molly's heartbeat was healthy and that she was "confirmed to be in the uterus." Barbara was discharged later that evening, with instructions to call her doctor on Monday, and to call the on-call doctor for any additional problems over the weekend. In addition, the emergency room doctor instructed Barbara that she was not to go to work until approved by her OB doctor, to "rest as much as possible[,]" and to "stay off [her] feet as much as possible." When Barbara called appellant that Monday, December 11, 2006, she spoke with a nurse about her most recent emergency room visit. After hearing the details of Barbara's visit, the nurse advised Barbara that, "[i]f nothing changed, come back on your next scheduled appointment," which was over three weeks later on January 3, 2007.

Barbara went to her appointment on January 3, 2007, and was seen by Alok Kumar, M.D., an employee and/or agent of appellant. Dr. Kumar did not perform a sonogram, but performed a Doppler exam, which again indicated that Molly's heartbeat was "strong." Concerned with her two emergency room visits, Barbara requested that Dr. Kumar refer her to Dr. Sweeney so she could make an appointment with him. That same day, Dr. Sweeney saw Barbara and performed an abdominal ultrasound and a transvaginal ultrasound to check Barbara's cervix. Upon examination, Dr. Sweeney told Barbara "to go across the street to the hospital, to not go home, to not go to work, to go across the street to the hospital now, and to hope to stay there until [her due date in] April."

Barbara immediately went to the hospital, where she was taken to a room in the

Labor and Delivery Department. On January 7, 2007, four days later while still in the hospital, Barbara's water broke, and she was rushed to the operating room where an emergency C-section was performed. Molly was born at twenty-four weeks gestation and was taken to the Neonatal Intensive Care Unit ("NICU"). Molly was treated in the NICU until she passed away on January 9, 2007.

B. Procedural History

On December 30, 2009, appellees filed a Statement of Claim against appellant with HCADRO. On June 24, 2010, appellees filed a Certificate of Qualified Expert and Report signed by Dr. Borow, pursuant to Maryland's Health Care Malpractice Claim Act ("HCMCA"), CJ § 3–2A–04(b)(1)(i), stating that appellant departed from the standard of care and that such departure was the proximate cause of the alleged injury. Consistent with CJ § 3–2A–04(b)(1)(i), Dr. Borow also attested that he devoted less than 20 percent of his professional activities to testimony in personal injury claims. Thereafter, on May 10, 2011, appellees filed an Election to Waive Arbitration, and the case ("*Messick I*") was transferred to the Circuit Court for Anne Arundel County. However, when appellees could not meet the court's scheduling deadline for expert designation and could not secure additional time from the court, appellees, with appellant's consent, voluntarily dismissed *Messick I* without prejudice.

Appellees refiled their complaint on November 14, 2012, against appellant in the Circuit Court for Anne Arundel County, alleging medical negligence on the part of appellant and its servants, agents, and/or employees, relating to the care and treatment of Barbara and Molly. Specifically, appellees alleged five counts of medical negligence:

Count I, Wrongful Death, surviving parent (Barbara); Count II, Wrongful Death, surviving parent (Michael); Count III, Negligence (Barbara, individually); Count IV, Loss of Consortium (Barbara and Michael); Count V, Negligence (Survival Action by Barbara as Personal Representative of Molly's Estate). The parties stipulated that the requirement to "file a certificate of qualified expert has been satisfied for the above-captioned, re-filed case[,]" because both parties had previous filed their respective certificates.

The first trial, which began on February 4, 2014, resulted in a mistrial. The mistrial was granted because of (1) a dispute over whether appellees' medical expert, Dr. Borow, was qualified under the Twenty Percent Rule and would perjure himself if he testified at trial, and (2) the court's concern over the parties' failure to resolve such dispute pre-trial as required by the Scheduling Order. Thereafter, Dr. Borow withdrew from the case, and appellees filed a motion to substitute expert witness. Appellant then filed a motion to strike appellees' CQE signed by Dr. Borow and a motion to dismiss. Appellees responded with a motion under CJ § 3-2A-04(b)(5) for "an extension of time to file a certificate of qualified expert and [for] the substitution of a certificate of merit executed by Steven Pliskow, M.D., FACOG, FACFE i[n] place of the certificate executed by Dr. Borow." After a hearing on the motions, the circuit court granted both of appellees' motions, allowing them to refile their CQE signed by Dr. Pliskow and to substitute him as their medical expert, and denied appellant's motions to strike and dismiss.

The second trial began on September 29, 2015, and lasted five days. During appellees' opening statement, counsel presented a PowerPoint slide that read "Be a voice for Molly . . . ." Appellant moved for a mistrial based on that statement, as well as other

statements made during appellees' opening that were allegedly violative of the "golden rule." The circuit court denied the motion but issued a curative instruction.

Thereafter, appellees presented their case-in-chief wherein their medical expert, Dr. Pliskow testified that appellant breached the standard of care owed to Barbara, which caused Molly's premature birth and ultimate death. Appellant objected to Dr. Pliskow's testimony, arguing that he lacked a sufficient factual basis because Dr. Pliskow did not rely on any medical literature in forming his opinions. The court overruled appellant's objection.

At the end of appellees' case-in-chief on October 1, 2015, appellant made a motion for judgment, which was granted as to Count V, survival action, but denied as to the other counts. At the close of trial on October 5, 2015, appellant renewed its motion for judgment, which the trial court granted as to Count III, Barbara's negligence claim, and Count IV, appellees' loss of consortium claim, but denied as to Counts I and II, wrongful death. Later that day, the jury returned a verdict in favor of appellees on Counts I and II and awarded appellees $250,000. On October 15, 2015, a judgment was entered against appellant in the amount of $250,000. After the court denied appellant's motion for judgment notwithstanding the verdict on November 13, 2015, appellant filed this timely appeal on November 30, 2015.

Relevant facts will be added below as necessary for resolution of the questions presented in this appeal.

DISCUSSION

Appellant makes three challenges on appeal. *First*, appellant argues that the circuit

court abused its discretion by denying its motion to strike Dr. Borow's CQE and motion to dismiss. *Second*, appellant contends that the court abused its discretion by not granting a mistrial when appellees' counsel made prejudicial comments during opening statement. *Third*, appellant claims that appellees produced insufficient evidence to submit the case to the jury, and therefore, the court erred in denying appellant's motions for judgment and motion for judgment notwithstanding the verdict. For the reasons stated below, we disagree with all three of appellant's contentions.

I. Motions to Strike Dr. Borow's CQE and to Dismiss

"The decision whether to grant a motion to strike is within the sound discretion of the trial court." *Bacon v. Arey*, 203 Md. App. 606, 667 (internal quotation marks and citation omitted), *cert. denied*, 427 Md. 607 (2012). This Court has explained:

> An abuse of discretion occurs where no reasonable person would take the view adopted by the [trial] court[ ] . . . or when the court acts without reference to any guiding principles, and the ruling under consideration is clearly against the logic and effect of facts and inferences before the court [ ] . . . or when the ruling is violative of fact and logic.

Id. (citations and internal quotation marks omitted) (alterations and omissions in original).

Under the HCMCA, a plaintiff filing a medical malpractice suit in Maryland "must file a certificate of qualified expert in which the claimant must attest that the defendant(s) departed from standards of care and that the departure(s) proximately caused the alleged injury." *Streaker v. Boushehri*, 230 Md. App. 101, 109 (2016) (citing CJ § 3-2A-04(b)(1)(i)). To be a "qualified" expert as defined by CJ § 3-2A-04(b)(1)(i), the health care provider 'may not devote annually more than 20 percent of the expert's professional

activities or activities that directly involve testimony in personal injury claims.'" *Id*. at 110 (quoting CJ § 3-2A-04(b)(4)). This rule is commonly referred to as the "Twenty Percent Rule." *Id*. The Court of Appeals has explained that obtaining a CQE is a "condition precedent" to bringing a medical malpractice action, and courts must dismiss, without prejudice, an action in which the plaintiff has failed to file a certificate of qualified expert. *See Walzer v. Osborne*, 395 Md. 563, 577-78 (2006).

Pursuant to the HCMCA, appellees filed their CQE and report signed by Dr. Borow, and designated him as their standard of care and causation expert witness.[1] Appellant deposed Dr. Borow on December 18, 2013, and through the notice of deposition *duces tecum*, requested that Dr. Borow bring the following documents:

> 1099 forms, W-2's, bills and invoices, book-keeping and tax records and tax returns, and any other documents, which identifies or reflects in whole or in part income you have earned from your work as an expert consultant for attorneys and expert locator organizations in each of the past three (3) years and to date for the current calendar year, specifically 2010, 2011, 2012, and partial 2013.

Dr. Borow failed to bring the requested materials to the deposition and failed to answer deposition questions posed to him regarding the percentage of his income attributable to

[1] As discussed above, pursuant to the HCMCA, appellees originally filed their malpractice claim in the HCADRO with the CQE and report signed by Dr. Borow. After the case was transferred to the Circuit Court for Anne Arundel County and dismissed without prejudice, appellees refiled their complaint. When appellees refiled their complaint, both parties stipulated that the requirement to "file a certificate of a qualified expert has been satisficed for the above-captioned, re-filed case as a result of the fact that certificates…were filed by [appellees] in HCADRA Claim Number 2009661, and by [appellant] in case number C-11-162423 . . . which case is the predecessor to the above-captioned case."

work as an expert witness.

As a result, on January 8, 2014, appellant filed a motion to compel the production of the previously requested documents regarding Dr. Borow's financial information. The parties attended a pre-trial conference before the trial court on January 9, 2014, at which conference appellant did not bring up the motion to compel. Thereafter, on January 28, 2014, appellees filed a response to the motion to compel, stating that they would provide Dr. Borow's 1099's for the years 2010, 2011, and 2012, and "Dr. Borow's [corporate] tax [ ] returns, redacted of all information other than expert witness testimony." On January 30, 2014, appellant opposed appellees' response for failure to "fully respond" to appellant's motion to compel. One day before trial, February 3, 2014, appellant filed a motion for sanctions to preclude Dr. Borow from testifying at trial.

On February 4, 2014, the first day of trial, appellees complied with the motion to compel by producing the documents requested by appellant. Upon review of the documents, appellant believed that "they reflect[ed] that [Dr. Borow] d[id] not comply with the 20 [P]ercent [R]ule." Appellant notified the court and "advised [appellees'] counsel that there's clear evidence that Dr. Borow has or will commit perjury[,]" and that "if Dr. Borow testifies[,] he needs to be advised that his testimony could be perjurious." Appellant then made an oral motion to exclude Dr. Borow as an expert witness based on his failure to comply with the Twenty Percent Rule. The court heard argument from both parties on the issue, but reserved ruling on the motion.

When the court re-called the case the following day, February 5, 2014, appellees notified the court that Dr. Borow was seeking counsel based on appellant's allegations that

he was in violation of the Twenty Percent Rule and that he "has or will commit perjury." In light of these allegations, appellees requested a continuance of the trial. In hearing from both sides, the court questioned appellant's counsel about why he did not bring the motion to compel up at the pre-trial conference if he had not received Dr. Borow's documents from appellees. The court expressed dismay that as a result of both sides going beyond the court's Scheduling Order, issues normally settled during discovery were still in dispute on the first day of trial. At the conclusion of the hearing, the court stated:

> I have to tell you I have some serious concerns about whether or not this case can proceed forward and with a fair trial . . . [M]y concerns were with the failure to comply with the Scheduling Order and that has resulted in this dilemma that we have with [appellees'] sole expert and whether or not the expert complies with the 20 [P]ercent [R]ule . . . [A]n issue that hasn't been resolved before trial [and] that should have been resolved before trial . . . The bottom line is that discovery should have been done to come up with and this should have been ferreted out long before a pretrial -- a trial.
>
> We'll have a jury sitting back there now. And if this case were to go forward, they would continue to sit while I do -- while I take time to resolve some of the things that have to be resolved which -- and it's been exacerbated now by the introduction of potential claims of perjury that have -- that's led the expert to tell counsel he wants his own lawyer. This is simply not the way a case is tried and prepared. I'm sorry.

The court then *sua sponte* exercised its discretion and granted a mistrial.[2]

Immediately thereafter, Dr. Borow withdrew from the case. On February 27, 2014, appellees filed a motion to substitute an alternate expert witness, Dr. Pliskow for Dr.

[2] It appears that the trial court did not rule on appellant's motion to exclude Dr. Borow or appellees' motion for a continuance.

Borow. On March 4, 2014, appellant filed a motion to strike appellees' original CQE signed by Dr. Borow and to dismiss the case due to Dr. Borow's violation of the Twenty Percent Rule. On April 24, 2014, appellees filed a motion for a "good cause" extension of time for filing a CQE under CP § 3-2A-04(b)(5), requesting the circuit court to grant "an extension of time to file a certificate of qualified expert and allow the substitution of a certificate of merit executed by Steven Pliskow, M.D., FACOG, FACFE i[n] place of the certificate executed by Dr. Borow." Appellant filed an opposition to that motion on May 19, 2014. After a hearing on the motions, the circuit court granted appellees' "good cause" motion and motion to substitute expert witness, and denied appellant's motion to strike and motion to dismiss. In a footnote in the order, the court stated that its reasoning for granting appellees' "good cause" motion was the same as for granting a mistrial on February 5, 2014.

Appellant contends that the circuit court abused its discretion when it denied appellant's motion to strike Dr. Borow's CQE, because Dr. Borow devoted "far more than 20% of his professional time to activities involving medical-expert testimony." According to appellant, had the circuit court granted its motion to strike, the court would have then granted appellant's motion to dismiss, because appellees would "have been without the CQE, a condition precedent to maintaining their action[.]" Appellees respond that the issue is moot because the circuit court granted appellees' "good cause" motion to substitute Dr. Pliskow's CQE for the one signed by Dr. Borow, and granted appellees' motion to

substitute expert witnesses.[3] We agree with appellees.

Under CJ § 3-2A-04(b)(1)(i), a claim shall be dismissed without prejudice, if the "plaintiff fails to file a certificate of a qualified expert with the [court] attesting to departure from standards of care, and that the departure from standards of care is the proximate cause of the alleged injury, within 90 days from the date of the complaint[.]" The Court of Appeals has acknowledged that "[t]here is, however, some flexibility in this deadline." *Kearney v. Berger*, 416 Md. 628, 661 (2010). Specifically, CJ § 3-2A-04(b)(1)(ii) provides that "the court 'shall' extend the deadline by 'no more than' an additional 90 days" if: (1) "'[t]he limitations period applicable to the claim or action has expired'" and (2) "'[t]he failure to file the certificate was neither willful nor the result of gross negligence.'" *Id.* (quoting CJ § 3-2A-04(b)(1)(ii)). Moreover, CJ § 3-2A-04(b)(5) "mandates that a further extension of the filing deadline '*shall be granted for good cause shown*.'" *Id.* (emphasis added) (quoting CJ § 3-2A-04(b)(5)). The Court of Appeals has explained that "the HCMCA's good cause provisions 'require the claimant to establish good cause and do not

[3] Appellees also argue that the issue is moot for two other reasons, neither of which has merit. First, appellees argue that the issue is moot because appellant signed and filed the Stipulation and Waiver of Supplemental Certificate of Qualified Expert on November 7, 2013, after appellees refiled the case. Because the stipulation and waiver were filed merely for procedural purposes, and not for substantive challenges to Dr. Borow's statutory qualifications under CJ § 2-3A-04, the issue is not moot for that reason.

Second, appellees make a separate argument about a different motion to strike. Appellees argue that the motion to strike is moot because appellant expressly withdrew an identical oral motion on February 4, 2014. A review of appellant's brief makes clear that appellant is appealing the denial of its written motion to strike made on March 4, 2014. The prior withdrawal of a motion does not moot out the denial of a subsequent identical motion.

permit an extension without such a showing, but, . . . [the provisions] are silent as to the timing of a request, and they do not expressly limit the length of any extension.'" *Id.* (alterations in original) (quoting *Navarro-Monzo v. Washington Adventist*, 380 Md. 195, 203 (2004)). In this Court's opinion in *Kearney v. Berger*, 182 Md. App. 186, 200 (2008), we held that the appellants were entitled to present their argument for good cause under CJ § 3-2A-04(b)(5) to the circuit court and that a motion for a good cause extension could be filed at any time after the 180-day time period specified in CJ § 3-2A-04(b)(1)(ii). Finally, good cause may be shown "when the complaining party exercised 'that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances.'" *Kearney*, 416 Md. at 664 (quoting *Heron v. Strader*, 361 Md. 258, 271 (2000)).

In the instant case, it is undisputed that appellees timely filed their CQE signed by Dr. Borow. Both parties stipulated as much in their Stipulation and Waiver of Supplemental Certificate of Qualified Expert. In response to appellant's motion to strike Dr. Borow's CQE, appellees filed a motion for a "good cause" extension of time for filing a CQE under CJ § 3-2A-04(b)(5). Appellees argued that good cause existed because they exercised "that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances." *Kearney*, 416 Md. at 664 (internal quotation marks and citation omitted). Specifically, appellees argued that they "extensively vetted Dr. Borow on the 20% Rule prior to his being retained and prior to his executing the CQE." Appellees pointed out that in the CQE, Dr. Borow represented that "[l]ess than twenty percent (20%) of [his] professional activities directly involve testimony in either medical

malpractice or personal injury claims." (Some alterations in original). Moreover, according to appellees, Dr. Borow had withdrawn from the case and would not testify as a result of appellant's threats that Dr. Borow would be "committing 'perjury' if he testified in [appellees'] case." Appellees argued that, because of Dr. Borow's withdrawal, they could not adequately respond to appellant's motion to strike based on Dr. Borow's alleged violation the Twenty Percent Rule, for appellees would have to rely on "deposition testimony from other cases[,] in which Dr. Borow was an expert[,]" instead of "an affidavit or other evidence obtained directly from Dr. Borow." Accordingly, appellees requested that the circuit court grant them a "'good cause' extension [of time] to allow Dr. Pliskow's CQE to be substituted in place of Dr. Borow's contested CQE."

In our view, the circuit court properly exercised its discretion when it granted appellees' motion for a "good cause" extension to file a CQE, as well as the motion to substitute expert witness. The court explained that it granted the "good cause" motion for the same reasons that it granted the mistrial on February 5, 2014. Those reasons included the parties' failure to resolve the Twenty Percent Rule dispute over Dr. Borow prior to trial, "the introduction of potential claims of perjury[,]" and Dr. Borow wanting his own lawyer.

Because of the substitution of CQEs and expert witnesses, Dr. Borow's qualifications under the Twenty Percent Rule were irrelevant and no longer at issue in the case. Thus appellant's motion to strike Dr. Borow's CQE based on his alleged violation of the Twenty Percent Rule and motion to dismiss became moot. Accordingly, we conclude that the circuit court did not abuse its discretion by denying appellant's motion to strike Dr. Borow's CQE and denying appellant's motion to dismiss.

II. Motion for Mistrial for Prejudicial Opening Statement

Appellant next argues that the circuit court abused its discretion when it denied appellant's motion for a mistrial based on statements made in appellees' opening statement that violated the "golden rule." As the moving party, appellant has the burden of demonstrating that a new trial is necessary. *Brewer v. State*, 220 Md. App. 89, 111 (2014). "Because the decision of whether to grant a mistrial lies within the sound discretion of the trial judge, [appellate courts] will only disturb its denial if we find that there was an abuse of that discretion." *Goldberg v. Boone*, 396 Md. 94, 114 (2006). An abuse of discretion occurs "where no reasonable person would take the view adopted by the [trial] court," or where "the court acts without reference to any guiding rules or principles." *Powell v. Breslin*, 430 Md. 52, 62 (2013) (alteration in original) (internal quotation marks and citation omitted). An appellate court will find an abuse of discretion when a ruling is "clearly against the logic and effect of facts and interferences before the court[,]" or when the decision is clearly an "untenable judicial act that defies reason and works an injustice." *Id.* (some alterations in original) (internal quotation marks and citation omitted).

The statements at issue came during appellees' opening statement, when counsel presented the following narrative to the jury:

> And if you go across the Bay Bridge, go over the Bay Bridge, you go through Kent Island, 301 splits off through Route 50, you take 301 North. And then a couple miles up the road, there's 213. You take 213 towards Chestertown, that's where [appellees] live.
>
> Go through that old historic town, go through that one main street -- that I got lost on Sunday going to. And on the north side of town,

about a mile and a half out of town, you get to a road called Devon Drive.

Normal community, three- four-bedroom homes. You pull into the development, you see kids on their bicycles, kids playing, neighbors talking to neighbors, yards nicely manicured. Go all the way down that street, and you come to 230 Devon, where [appellees] live.

You pull up in their house, yard's nicely down [sic]. There was a pickup truck in the driveway with more than on dent on it, and a couple of scratches. You walk up to the front door, and the Autumn flowers are out, and nice. Big pots, I guess, vases, I don't know what you call them.

Knock on the door, you go inside, one of those meticulous houses that you could eat off the floor. I don't have one of those.

At this point, appellant asked the court if the parties could approach the bench. The following bench conference ensued:

[APPELLANT'S COUNSEL]: **I try not to object during opening - - . . . statements, but this is not an opening statement, it's a closing.**

THE COURT: (Inaudible) I'm wondering if all of this is actually going to come into evidence, or if this is just Counsel testifying?

[APPELLEES' COUNSEL]: Your Honor, I'm talking in the third person, and there's a symbolism that I'm going to get to in about 30 seconds, if you'd just let me - - give me a little bit of latitude, I can sum this up for you.

[APPELLANT'S COUNSEL]: Well, the only problem is, we've gotten

	down a bunch of roads, and we've gone in between (inaudible) three-bedroom houses, we're talking about plants and flowers, and this is closing, Your Honor. This isn't opening.
THE COURT:	It does seem like you're already appealing to emotion and sympathy rather than telling facts. So, I'd ask that you (inaudible) - -
[APPELLEES' COUNSEL]:	Yes, Your Honor.
THE COURT:	-- it is an opening. [ ]
[APPELLEES' COUNSEL]:	Yes, Your Honor, thank you.

(Emphasis added).

After the bench conference ended, appellees' counsel resumed his opening statement:

> [I]f you walk into the home, you would see pictures of children. There wouldn't be a picture of Molly Messick. You wouldn't see that. She was on the earth for only a day, and there's no record of it.

Appellees' counsel concluded his opening statement:

> Now, what am I asking you to do? What I'm asking you to do is to listen to all the evidence. Listen, if everything I just said flushes [sic] out on the stand - -

Appellant interrupted and asked the court if the parties could approach the bench for a second time. At the time of appellant's interruption, appellees' counsel had presented the jury with a PowerPoint slide that had the phrase "Be a voice for Molly. . ." written on

it.[4] The following bench conference ensued wherein a motion for mistrial was made by appellant:

[APPELLANT'S COUNSEL]: Your Honor, I object to that - -

* * *

[APPELLANT'S COUNSEL]: -- (inaudible) at least for Molly, that's appropriate. I object to it (inaudible).

THE COURT: I'll grant that request (inaudible).

* * *

[APPELLANT'S COUNSEL]: **Going along with (inaudible) how it started, and how it ended.** That statement to this jury is (inaudible) for them to be able to (inaudible), in my mind is so inflammatory, that it requires me to ask this Court for a mistrial.

[APPELLEES' COUNSEL]: There is (inaudible).

[APPELLANT'S COUNSEL]: That one statement is not only inappropriate at a closing, when you can make statements that are not (inaudible) in evidence or you can (inaudible) the evidence. But it is fundamentally flawed and incredibly prejudicial as we start this case. **And I move for a mistrial.**

THE COURT: You want to respond?

* * *

[4] The PowerPoint slide is discussed at the bench conference although not transcribed or a part of the record.

[APPELLEES' COUNSEL]:	Your Honor, this slide's the last slide of the presentation. I'm allowed to ask the jury to empower them to look at the evidence in an impartial, objective way, and to be an advocate for a little girl that died.
THE COURT:	**Well, you put them in [appellees'] shoes that asked - - to put themselves in [appellees'] shoes (inaudible) emotion and sympathy in an opening statement.**
[APPELLEES' COUNSEL]:	Understood, Your Honor. I'll move on.

* * *

THE COURT:	So, I will **grant a curative instruction** and deny the mistrial **at this point**.
[APPELLEES' COUNSEL]:	Thank you, Your Honor.

(Emphasis added).

Following the conclusion of the second bench conference, the trial court gave the jury the following curative instruction:

> Ladies and gentlemen, let me give you an additional instruction, in light of the last slide. The slide said, "Be a voice for Molly . . .", the child who died.
>
> The Court is instructing you that it is not your job as jurors to put yoursel[ves] in the shoes of the child, the parents, the doctors, or anyone [else] in this case. You are to be neutral.
>
> You are not to decide the case based on sympathy for, anger against, prejudice for or against either side. Your job is ultimately just going to be to decide what the facts are, if there was in fact, a violation of the standard of care, and if there's compensation appropriate, what would be fair.

Appellant argues that the circuit court abused its discretion in denying its motion for mistrial because "[a]ppellees' entire opening statement was designed to prime and emotionally charge the jury against [a]ppellant[,]" and such statements "contaminated the case against [a]pellant from [d]ay 1." According to appellant, the statements were so inflammatory that they could not be overcome by a curative instruction. Appellant concludes that such unfairly prejudicial statements made to the jury required the grant of a mistrial.

Appellees counter that appellant's motion for mistrial was limited only to the phrase "Be a voice for Molly" and not to the entire opening statement. Consequently, appellees characterize the Powerpoint slide that stated "Be a voice for Molly" as only "*one* statement that was presented on *one* Powerpoint slide" at the end of appellees' opening statement. According to appellees, the "one statement" was not prejudicial to appellant's case. Even if it was, the judge's instruction cured any prejudice, and appellant was not denied a fair trial.

Upon our review of the record, appellant's counsel made two objections during appellee's opening statement. The motion for mistrial appears to be in response to the cumulative effect of the turn-by-turn directions to appellees' home, description of the home, lack of photographs of Molly, and the phrase on the slide "Be a voice for Molly." Accordingly, appellant's motion for mistrial concerned the phrase on the slide and other comments that appealed to the jury's sympathy and emotion. Therefore, we will address the cumulative effect of the statements of appellees' counsel in his opening statement.

The Court of Appeals has explained that "[t]he primary. . . purpose of an opening

statement. . . is to apprise, with reasonable succinctness, the trier of facts with the questions involved" in the case it is about to hear, and what the parties expect to prove, "so as to prepare [the] trier of facts for the evidence to be adduced." *Clark v. State*, 238 Md. 11, 19 (1965). "A 'golden rule' argument is one in which a litigant asks the jury to place themselves in the shoes of the victim, or in which an attorney appeals to the jury's own interests[.]" *Lee v. State*, 405 Md. 148, 171 (2008) (internal citations omitted). The Court stated that attorneys "should not implore jurors to consider their own interests in violation of the prohibition against the 'golden rule' argument." *Id.* Additionally, the term "golden rule" is often used more broadly to describe all arguments that prey on the prejudices of the jury. For example, instead of asking the jury to place themselves in the shoes of the victim, an attorney's statements may call "for the jury to indulge itself in a form of *vigilante justice* rather than engaging in a deliberative process[.]" *Id.* at 173. Both types of arguments, however, are improper because they "invite[] the jurors to disregard their oaths and to become non-objective viewers of the evidence which has been presented to them, or to go outside that evidence to bring to bear on the issue of damages purely subjective considerations[.]" *Leach v. Metzger*, 241 Md. 533, 536-37 (1966).

Here, both the narrative of the neighborhood and home, as well as the PowerPoint slide were improper. The first set of statements laying out a picturesque scene of appellees' home lacking Molly's picture preyed on the jury's emotions and sympathy. Although there may have been some marginal relevancy of these facts to the issues of the case, the narrative did not introduce the jury to the questions involved in the case, what the parties expect to prove, or what evidence would be adduced. *See Clark*, 238 Md. at 19. In

addition, the PowerPoint slide, which read "Be a voice for Molly[,]" was a violation of the golden rule by requesting the jury "to become non-objective viewers of the evidence." *Leach*, 241 Md. at 537.

Having concluded that the statements of appellees' counsel were improper, however, does not end our inquiry, because not every improper statement requires the grant of a mistrial. *See Lee*, 405 Md. at 173. As stated *supra*, "the decision whether to grant a motion for a mistrial rests in the discretion of the trial judge, and [ ] appellate review is limited to whether there has been an abuse of discretion in denying the motion." *Hopkins v. Silber*, Md. App. 319, 340 (2001) (internal quotation marks and citation omitted). Moreover, "[t]he failure to declare a mistrial after counsel has made improper remarks to the jury does not usually constitute an abuse of discretion. Indeed, [e]ven when a clearly improper remark is made, a mistrial is not necessarily required." *Id.* (some alterations in original) (internal quotations and citation omitted). The Court of Appeals has explained that "improper or prejudicial statements, remarks or arguments of counsel generally are cured by reproof by the trial judge[,]" and "only in the exceptional case, the blatant case, will his [or her] choice of cure and his [or her] decision as to its effect be reversed on appeal." *Goldberg*, 396 Md. at 115 (internal quotation marks and citation omitted).

In responding to improper comments made by counsel to the jury, the trial judge "'has many options.'" *Hopkins*, 141 Md. App. at 340 (quoting *Ferry v. Cicero*, 12 Md. App. 502, 509 (1971)). The judge may "take no action, . . . admonish the jury, . . . restrict or forbid altogether any further argument on the point, . . . permit opposing counsel to respond, . . . declare a mistrial . . . [or] take any other appropriate action." *Id.* (internal

quotation marks and citation omitted). As a result, we must determine "whether the trial judge took sufficient curative measures to overcome that prejudice, or whether the prejudice was so great that, in spite of the curative measures, the moving party was denied a fair trial." *Goldberg*, 396 Md. at 115.

Instructive to our analysis is the Court of Appeals' decision in *Leach*. 241 Md. 533. In that case, the plaintiff brought a personal injury action for damages sustained as a result of a car accident. *Id.* at 535. During closing, the plaintiff's counsel told the jury to award damages "as though it was your wife." *Id.* at 536. After denying defendant's counsel's motion for a mistrial, the trial court issued a curative instruction, advising the jury that the argument was improper:

> [T]o the argument that [the plaintiff's counsel] has just made that you are to consider the situation . . . as though it was your wife involved. That is not the test, and really that's not proper argument. I have told the jury the elements they may consider for the determination of this case, and I am sure they will follow that instruction. It isn't a question as though it's your wife, anybody else's wife, you or anybody else. It's a question of what is fair and reasonable and proper compensation, based on the evidence and the instructions you have received.

Id. at 536.

On appeal, the Court of Appeals held that the trial judge did not commit reversible error in failing to grant a mistrial after the use of an improper argument. *Id.* The Court reasoned that there was no error because the trial judge "promptly and unequivocally instructed the jurors to disregard the argument, and . . . succinctly reminded them of his earlier instructions, to which no objection ha[d] been made." *Id.* at 537. Explaining that "the trial judge is of necessity empowered with wide discretion in deciding whether the

prejudicial effect of counsel's remark can be erased by corrective instructions or if a mistrial is required[,]" the Court concluded that the trial judge did not abuse his discretion in issuing the curative instruction. *Id.*

In the case *sub judice*, we similarly conclude that the trial court did not abuse its discretion. Immediately after the statements of appellees' counsel and presentation of the PowerPoint slide, the trial judge promptly issued a curative instruction to not "put yoursel[ves] in the shoes of the child, the parents, the doctors, or anyone else in this case. You are to be neutral." The trial judge's instruction was unequivocal, stating that "[y]ou are not to decide the case based on sympathy for, anger against, prejudice for or against either side." He reiterated to the jury that their job was "to decide what the facts are, if there was in fact, a violation of the standard of care, and if there's compensation appropriate, what would be fair." Furthermore, just as in *Leach*, there was no objection to the curative instruction. Thus the trial judge's prompt and unequivocal actions stifled any potential prejudicial effect that the statements in question had on the jury. *See Leach*, 241 Md. at 537. Accordingly, we hold that the trial court did not abuse its discretion in denying appellant's motion for mistrial.

III. Motions for Judgment & Judgment Notwithstanding the Verdict

Finally, appellant argues that the circuit court erred in denying its motions for judgment and judgment notwithstanding the verdict because appellees' medical expert, Dr. Pliskow, lacked the qualifications and sufficient factual basis to offer an expert opinion as to causation.

At trial, Dr. Pliskow was accepted "as a Board certified OB/GYN and expert[.]" He testified that in the past 25 years, (1) he has treated numerous women with shortened cervixes; (2) he is familiar with the literature on the treatment of shortened cervixes; and (3) he is trained in and has performed emergency cerclages, history-indicated cerclages, and exam-indicated cerclages.[5] Dr. Pliskow stated that for a vaginal delivery, the delivery occurs "through the vagina as the cervix would efface . . . or dilate which means open." Dr. Pliskow explained that a transvaginal ultrasound is used to measure "the external oss which is the outer core portion of the cervix to the internal oss which is the inner structural portion of the cervix that actually holds the pregnancy in the uterus." Dr. Pliskow testified that measuring from the "external oss to the internal oss[,]" there was no dispute that Barbara's cervix was shortened.

Reviewing the medical records in the case, Dr. Pliskow opined that appellant violated the standard of care owed to Barbara. Dr. Pliskow stated that within a reasonable degree of medical certainty the standard of care owed to Barbara was violated on December 4, 2006, when appellant failed to perform a transvaginal ultrasound measurement of her cervix. Had appellant performed or referred Barbara to receive a transvaginal ultrasound on December 4, 2006, it "would have shown that the cervix had further shortened from the 26 millimeters[,]" measured on November 27, 2006, indicating that intervention was required at that time.

[5] "The placing of a nonabsorbable suture around an incompetent cervical os." *Stedman's Medical Dictionary* 349 (28th ed. 2006).

Dr. Pliskow opined that as of December 4, 2006, Barbara's cervix was less than 25 millimeters. Appellant objected, to which Dr. Pliskow responded that he had a reasonable basis for his opinion based on studies regarding patients that have cervical incompetence. Appellant notified the court that Dr. Pliskow stated in his deposition that he would not be relying upon literature for his opinions in the case. The court overruled the objection, and instructed appellees' counsel to limit questions to generalized references to the American Congress of Obstetricians and Gynecologists technical bulletin from 2014 referenced during Dr. Pliskow's deposition and to limit references to articles that had been disclosed during discovery.

Dr. Pliskow then testified to a reasonable degree of medical certainty based on his education, training, and experience that (1) Barbara had an incompetent cervix[6] as of November 27, 2006; (2) the measurement of Barbara's cervix on December 4, 2006 was 21 to 22 millimeters; and (3) the measurement of Barbara's cervix on December 11, 2006 was 18 millimeters. Further, Dr. Pliskow opined that appellant breached the standard of care: on December 4, and 11, 2006, by not placing a cerclage on Barbara's cervix, and on December 11, 2006, by not ordering a transvaginal ultrasound. Dr. Pliskow explained that, if a cerclage had been placed either on December 4th or 11th, the pre-mature "delivery would have been prevented."

At the close of appellees' case-in-chief on October 1, 2015, appellant made a motion

[6] According to an American Congress of Obstetricians and Gynecologists Practice Bulletin admitted into evidence, "[t]he inability of the uterine cervix to retain a pregnancy is referred to as cervical insufficiency."

for judgment claiming that there was no "foundation for an injury, the cause of an injury[,] or what the injury even would be[,]" and that Dr. Pliskow's testimony about appellant's violation of the standard of care was unfounded. The circuit court denied appellant's motion for judgment on all counts except the survival action, Count V, because of insufficient evidence that Molly experienced conscious pain and suffering. At the close of all of the evidence on October 5, 2015, appellant renewed its motion for judgment, arguing, *inter alia*, that "the entire case [was] fatally flawed because it rest[ed] on Dr. Pliskow having five to six cases in his entire career, no other foundation, no literature, no ACOG guidelines, no seminar, no nothing." The court denied the renewed motion as to the wrongful death counts, Counts I and II, but granted the motion as to Counts III and IV, Barbara's negligence claim and appellees' loss of consortium claim, respectively. On October 5, 2015, the jury returned a verdict in favor of appellees on Counts I and II. Appellant filed a motion for judgment notwithstanding the verdict on October 14, 2015. The court entered judgment against appellant on October 15, 2015, and denied appellant's motion for judgment notwithstanding the verdict on November 13, 2015.

Appellant argues that the circuit court erred by denying its motions for judgment and motion for judgment notwithstanding the verdict. Specifically, appellant contends that, because Dr. Pliskow lacked the qualifications and factual basis to testify, his testimony was "inappropriate for consideration by a jury." According to appellant, "[a]ppellees' primary allegation at trial was that, had a cerclage been placed on [Barbara's] cervix, it would have prevented [Molly's] premature delivery." Appellant asserts that "given the focus on cerclages and cervical length[,]… there was no foundation laid with respect to Dr.

Pliskow's expertise on either subject." (Emphasis omitted). According to appellant, Dr. Pliskow had placed "'exam-indicated cerclage[s]'" in only "'a handful, five, [or] six' patients." Finally, appellant claims that Dr. Pliskow lacked a sufficient factual basis because he did not rely on any medical literature in opining about appellant's breach of the standard of care and causation.

Appellees respond that Dr. Pliskow had the qualifications to testify because he had 25 years of experience as an OB/GYN, had delivered 9,000 babies, and placed 50 to 60 cerclages. According to appellees, Dr. Pliskow's expert testimony was "based off his extensive and significant career as an OB/GYN physician, placing cerclages and monitoring cervix[es.]" Appellees also argue that as a medical expert witness, Dr. Pliskow was "not specifically required to formulate a qualified expert opinion based solely on literature, but rather, a medical expert witness can formulate an opinion with a sufficient factual basis on significant experience combined with his review of [appellees'] medical records." Appellees conclude that Dr. Pliskow's experience, coupled with his review and assessment of Barbara's medical records, provided him with a sufficient factual basis to formulate an opinion pursuant to Rule 5-702(3), and therefore the court did not err in denying appellant's motions for judgment and judgment notwithstanding the verdict.

"We review the denial of a motion for judgment and a motion for judgment notwithstanding the verdict ("JNOV") under the same appellate lens." *Giant Food, Inc. v. Booker*, 152 Md. App. 166, 176, *cert. denied*, 378 Md. 614 (2003). This Court has explained:

> A party is entitled to a judgment not withstanding the verdict

> (JNOV) [and judgment] when the evidence at the close of the case, taken in the light most favorable to the nonmoving party, does not legally support the nonmoving party's claim or defense. In reviewing the denial of a JNOV, we must resolve all conflicts in the evidence in favor of the plaintiff and must assume the truth of all evidence and inferences as may naturally and legitimately be deduced therefrom which tend to support the plaintiff's right to recover. If the record discloses any legally relevant and competent evidence, however slight, from which the jury could rationally find as it did, we must affirm the denial of the motion. If the evidence, however, does not rise above speculation, hypothesis, and conjecture, and does not lead to the jury's conclusion with reasonable certainty, then the denial of the JNOV was error. Nevertheless, only where reasonable minds cannot differ in the conclusions to be drawn from the evidence, after it has been viewed in the light most favorable to the plaintiff, does the issue in question become one of law for the court and not of fact for the jury.

Id. (alteration in original) (internal quotation marks and citations omitted). A plaintiff may defeat a motion for judgment or motion for judgment notwithstanding the verdict "by producing legally sufficient evidence to send the case to the jury." *Id.*

"As in other negligence cases, a plaintiff alleging medical malpractice must prove the standard elements of a negligence case[.]" *Davis v. Armacost*, 234 Md. App. 71, 85 (2017). The elements of the tort action for medical malpractice are: (1) "duty (standard of care)"; (2) "breach of the standard of care"; (3) "causation of injury"; and (4) "damages." *Unv. of Maryland Med. Sys. Corp. v. Gholston*, 203 Md. App. 321, 330, *cert. denied*, 427 Md. 65 (2012). "In virtually all non-informed consent medical malpractice claims, a plaintiff's proof that the defendant breached the standard of care must be adduced through the testimony of an expert witness." *DeMuth v. Strong*, 205 Md. App. 521, 539 (2012). As discussed above, at trial, appellees offered Dr. Pliskow's testimony in support of their theory that appellant breached the standard of care and such breach proximately caused

Molly's premature birth and subsequent death.

Expert testimony is governed by Maryland Rule 5-702. Rule 5-702 states that "[e]xpert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." To determine whether the testimony will assist the trier of fact, the trial court evaluates 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 the particular subject[;] and (3) whether a sufficient factual basis exists to support the expert testimony." Md. Rule 5-702; *see also Levitas v. Christian*, 454 Md. 233, 245 (2017).

In evaluating the expert witness factors, "the trial court is only concerned with whether the expert's testimony is admissible." *Levitas*, 454 Md. at 246. According to the Court of Appeals, "[o]bjections attacking an expert's training, expertise or basis of knowledge go to the weight of the evidence and not its admissibility." *Id.* (internal quotation marks and citation omitted). An expert's qualifications and methods may be scrutinized during cross-examination. *Id.* Because the fact-finder need not accept an expert's opinion, the jury may assess how much weight to give an expert's testimony. *Id.* at 247.

Appellant's argument focuses on the first and third factors: experience/knowledge and sufficient factual basis. Under the first factor, "an expert may be qualified to testify if he [or she] 'is reasonably familiar with the subject under investigation.'" *Levitas*, 454 Md. at 245 (quoting *Roy v. Dackman*, 445 Md. 23, 41 (2015)). An expert's familiarity can come

from "professional training, observation, actual experience, or any combination of these factors." *Id.* (internal quotation marks and citation omitted). Appellant argues that Dr. Pliskow was not qualified by experience, training, or education to render his opinions in this case. We disagree.

A review of the record reveals that Dr. Pliskow was "reasonably familiar with the subject under investigation" based on his "professional training, observation, [and] actual experience." *See id.* (internal quotation marks and citation omitted). Dr. Pliskow testified that he is licensed to practice medicine in the State of Florida, graduated from Albany Medical College of Union University in 1986, and completed his residency in OB/GYN at the University of Miami, Jackson Memorial Medical Center. During his residency, Dr. Pliskow received training in a multitude of areas relevant to this case including: placement of cerclages, transvaginal sonography, assessment of cervixes, and shortened cervixes. Following his residency, Dr. Pliskow entered private practice and obtained privileges to practice at Palm West Hospital in Loxahatchee, Florida and Wellington Regional Medical Center in Wellington, Florida.

Dr. Pliskow testified that he was engaged in the medical community beyond his private medical practice. He was "a member of Palm Beach Graduate Medical Education Group" where he taught OB/GYN to medical students who did their third and fourth year rotations in Florida. Previously, Dr. Pliskow served as chairman of the OB/GYN department, as a member on the Medical Executive Board, on the Peer Review

Committee,[7] and on the OB/GYN Quality Assurance Committee at the Palm West Hospital.

Dr. Pliskow's position at the time of trial was an OB/GYN at Advance Women's OB/GYN Associates. Dr. Pliskow had been in the same practice for twenty-five years, had delivered "anywhere from 250 to 300 [babies per year,]" and had delivered over 9,000 babies since his residency program. Dr. Pliskow placed "two to three" cerclages per year and in his career, had placed fifty to sixty cerclages. Relevant to this case, Dr. Pliskow had placed five or six exam-indicated cerclages in his career.[8]

A review of Dr. Pliskow's background paired with his testimony summarized above, demonstrates he was well qualified to offer his expert opinion in this case. As an OB/GYN, Dr. Pliskow was familiar by training and experience with shortened cervixes and how to treat them to prevent a premature birth. Having performed a number of exam-indicated cerclages, Dr. Pliskow was familiar by training and experience to offer an opinion about the effect of such cerclage on a shortened cervix. In addition, having delivered over 9,000 babies, Dr. Pliskow was familiar by training and experience to opine about fetal viability.

Moreover, we reject appellant's argument that Dr. Pliskow was not qualified to opine about cerclages because he had only placed five or six exam-indicated cerclages in

[7] Dr. Pliskow testified that peer review is "very similar to reviewing a chart in a med[ical]-mal[practice] case, but it's a chart that's been given to you to review the care and treatment of the patient of your peers in the hospital."

[8] The court did not permit appellees from eliciting testimony about the five or six exam-indicated cerclages, because there was no evidence concerning any other medical conditions that the patients may have had or whether their conditions bore any similarity to Barbara's conditions.

his career. In *Roy v. Dackman*, the Court of Appeals held that "a doctor is not required to have *ever* performed the surgery in question or even to have observed that specific patient who may be the plaintiff." 445 Md. 23, 41 (2015) (emphasis added). The Court explained that "[i]nquiries about a doctor's personal experience performing a certain procedure goes to the weight, not the admission vel non, of the doctor's testimony." *Id.* Accordingly, we conclude that Dr. Pliskow had the qualifications to offer expert medical testimony about the breach of the standard of care and causation.

Next, appellant argues that Dr. Pliskow did not have a sufficient factual basis to offer his opinions. The third factor of Rule 5-702 requires an expert to have "an adequate factual basis" so that their testimony is "more than mere speculation or conjecture." *Levitas*, 454 Md. at 246 (internal quotation marks and citations omitted). The Court of Appeals has stated that under Rule 5-702, "[a]n adequate factual basis requires: (1) an adequate supply of data; and (2) a reliable methodology for analyzing the data." *Id.* In forming a factual basis, an expert can rely on facts and data "'of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject[.]'" *Id.* (quoting Md. Rule 5-703(a)). Moreover, the Court has explained that "[a]n expert's factual basis 'may arise from a number of sources, such as facts obtained from the expert's first-hand knowledge, facts obtained from the testimony of others, and facts related to an expert through the use of hypothetical questions.'" *Id.* (quoting *Sippio v. State*, 350 Md. 633, 653 (1998)).

Appellant claims that Dr. Pliskow did not rely on any medical literature, and therefore, he had "absolutely no medical foundation for rendering his opinions." Appellant

points out that there was no transvaginal ultrasound performed on December 4, 2006. Thus, according to appellant, "Dr. Pliskow had no [transvaginal] ultrasound by which to measure [Barbara's] cervix length on December 4, 2006, leaving him to rely upon external sources of information for his conclusion [that] the cervix would have been shortened[.]" (emphasis omitted). Because Dr. Pliskow did not rely on any medical literature, appellant concludes that he lacked a sufficient factual basis, but was nonetheless permitted to offer "unbridled opinions forbidden by Maryland law." Again, we disagree.

In support of its position that Dr. Pliskow was required to rely on medical literature, appellant cites to cases that are distinguishable from the case *sub judice*. First, appellant cites to *Giant Food*, where a pulmonologist testified that exposure to Freon caused the onset of plaintiff's asthma, despite conceding "that he had never read about, nor knew of, asthma being caused by exposure to Freon." 152 Md. App. at 176. This Court stated that the expert's testimony "was not the product of the application of reliable principles and methods[,]" because "he did not rely on a single medical or scientific study suggesting a causal relationship between Freon exposure and asthma[,]" "did not conduct an exhaustive medical textbook or journal review[,]" or review the plaintiff's medical records prior his visit. *Id.* The expert's theory "provided no rational explanation for why that had occurred, other than simply coming to that conclusion." *Id.* at 180.

Second, appellant points to *City Homes, Inc. v. Hazelwood*, 210 Md. App. 615, 690, *cert. denied*, 432 Md. 468 (2013), where this Court held that a pediatrician lacked the qualifications and factual basis to opine that the plaintiff suffered an IQ loss and brain impairment as a result of lead exposure. In *Hazelwood*, the pediatrician testified that the

plaintiff sustained "an IQ loss of seven to ten IQ points" as a result of lead exposure, but conceded that he had never examined the plaintiff, never administered an IQ test, and did not know how to score an IQ test. *Id.* at 686. He explained that he concluded that the plaintiff lost seven to ten IQ points based "on articles he read that correlated diminished IQ with lead exposure." *Id.* at 690. We held that the pediatrician lacked a sufficient factual basis because he "simply described the injuries and failed to provide any basis underlying the opinion," and his testimony was "pure conjecture based upon general literature." *Id.* at 691 (internal quotation marks and citations omitted). We explained that, because the pediatrician could not explain how he came to the conclusion that the plaintiff lost seven to ten IQ points as a result of the exposure to lead, his testimony amounted to a "because I think so, or because I say so, situation." *Id.* (internal quotation marks and citation omitted).

In the instant case, Dr. Pliskow relied on an adequate supply of data in offering his opinions as to standard of care and causation. Specifically, Dr. Pliskow reviewed: (1) Barbara's medical records, both from her first pregnancy and from her pregnancy with Molly, (2) Dr. Sweeney's transvaginal sonograms of Barbara from October 16, 2006, and November 27, 2006, and (3) Dr. Sweeney's report from November 27, 2006, stating that Barbara's cervix was 26 millimeters.

Dr. Pliskow also utilized a reliable methodology. Before providing any specific opinions, Dr. Pliskow gave a general background of the female reproductive system and described how doctors determine whether a woman has a shortened cervix. Dr. Pliskow stated that, based on his experience, knowledge, and training, a woman's cervix shortens over time depending on whether the cervix is incompetent or not. Dr. Pliskow explained

that "[i]n a patient with a competent cervix, they shorten very slowly, millimeters over several, several weeks, and in patients that have an incompetent cervix, it usually shortens about half a centimeter a week." Based on a review of the medical records and sonograms from November 27, 2006, Dr. Pliskow testified that Barbara had an incompetent cervix as of November 27, 2006. Dr. Pliskow pointed to Barbara's history of a cervical laceration in her previous pregnancy, a normal early second trimester ultrasound, a late second trimester transvaginal ultrasound showing a shortening of her cervix to 26 millimeters, and a bleed with cramping that required a visit to the emergency room. Dr. Pliskow used the cervical measurement of 26 millimeters taken by Dr. Sweeney on November 27, 2006, as well as his understanding that incompetent cervixes shorten "about half a centimeter a week," to opine that Barbara's cervix would have measured 21 or 22 millimeters on December 4, 2006, indicating that intervention was required at that time.

Thus, unlike the doctors in *Giant Food* and *Hazelwood*, Dr. Pliskow was able to adequately explain how he came to the conclusion that Barbara's cervix was shortened on December 4, 2006. His opinions were not based on guesswork or conjecture, and the explanation for his opinions did not amount to "because I think so," or "because I say so," opinions. As the circuit court aptly put it, Dr. Pliskow's opinion about the shortening cervix "sounded like simple arithmetic."

Moreover, as *Hazelwood* demonstrates, a factual basis cannot be predicated on mere reliance of medical literature. We disagree with appellant that Dr. Pliskow was required to consult medical literature in forming his opinions. As stated above, an expert's factual basis may "arise from a number of sources," including "the expert's first hand knowledge,

[and] facts obtained from the testimony of others[.]" *Levitas*, 454 Md. at 255 (internal quotation marks and citation omitted). Here, Dr. Pliskow's factual basis came from his first-hand knowledge as an experienced OB/GYN and review of the medical records in the case. Further, the Court of Appeals has explained that an expert's testimony is proper as long as it "will assist the trier of fact in understanding the evidence or determining a fact at issue[.]" *Id.* at 257. Dr. Pliskow's testimony did just that. He adequately explained the various medical processes at issue in the case, and opined based on his experience and review of the records that on December 4, 2006, Barbara needed a cerclage because of her shortened cervix and had it been placed, Molly would not have been born prematurely.

For the above reasons, we conclude that Dr. Pliskow had the qualifications and sufficient factual basis to render an expert opinion on the issues of breach of the standard of care and causation. As the fact-finder, the jury could assess how much weight to give Dr. Pliskow's expert testimony. If credited, jurors could reasonably find that Molly's premature delivery and ultimate death were caused by appellant's breach of the standard of care. We, therefore, hold that the circuit court did not err in denying appellant's motions for judgment and motion for judgment notwithstanding the verdict.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.