Circuit Court for Prince George's County
Case No. CAL17-06092

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3377

September Term, 2018

BRENDA BROWN

v.

FALIK & KARIM P.A., ET AL.

Fader, C.J.,
Friedman,
Gould,

JJ.

Opinion by Friedman, J.

Filed: October 2, 2020

After her husband died from complications following back surgery, Brenda Brown brought a lawsuit alleging medical malpractice against Dr. Joel Falik and Falik & Karim, P.A. The main issue in this appeal, however, is whether Brown's expert witness, Dr. Sanford Davne was in compliance with the so-called "twenty-percent rule," which generally precludes testimony in medical malpractice cases by experts who spend more than twenty percent of their time acting as expert witnesses. *See* MD. CODE, COURTS & JUDICIAL PROCEEDINGS "(CJ") §3-2A-04(b)(4).[1]

BACKGROUND

Because her claim included counts sounding in medical malpractice, Brown was required to, and did, file a certificate of a qualified expert. The certificate indicated that Dr. Davne, an orthopedic surgeon, would testify that the surgery performed by Dr. Falik, a neurosurgeon, violated the applicable standard of care by failing to recognize that Brown's husband was a high risk patient and for not opting for less invasive alternatives to surgery. Included in the certificate was the required statement that no more than twenty percent of

[1] The precise wording of the statute at the time Brown's case was filed provides:

> A health care provider who attests in a certificate of a qualified expert or who testifies in relation to a proceeding before an arbitration panel or a court concerning compliance with or departure from standards of care may not have devoted more than 20 percent of the expert's professional activities to activities that directly involve testimony in personal injury claims.

CJ §3-2A-04(b)(4). As of October 1, 2019, the statute has been amended to increase the threshold from 20 to 25% and to clarify that the relevant period for calculation is the 12 months immediately before the claim is filed. Those changes are not at issue in this case.

Dr. Davne's annual activities were related to testifying as an expert witness. *See* CJ §3-2A-04(b)(4).

During discovery, Dr. Falik sought information regarding Dr. Davne's income and activities in an effort to determine his compliance with the twenty percent rule. Dr. Falik issued a notice of deposition duces tecum, seeking both documents and testimony, relating to Dr. Davne's income and activities. Dr. Davne failed to produce any responsive documents. Dr. Davne later testified during his voir dire that he did not keep specific documentation relevant to his compliance with the twenty percent rule. In response to this discovery failure, Dr. Falik filed two motions: (1) a motion to compel Dr. Davne's tax documents (from which Dr. Falik hoped to deduce whether Dr. Davne was in compliance with the twenty percent rule); and (2) a motion to preclude Dr. Davne from testifying at the upcoming trial. The trial court granted Dr. Falik's motion to compel but denied his motion to preclude Dr. Davne from testifying. Afterwards, Dr. Davne produced an affidavit again attesting to compliance with the twenty percent rule and provided some tax returns and other documents.

At trial, as expected, Brown called Dr. Davne as her expert witness. Dr. Falik objected, arguing that Dr. Davne had not produced sufficient documentary evidence from which to ascertain compliance with the twenty percent rule. The trial court decided that despite Dr. Davne's failure to produce the relevant documents, Dr. Davne was nonetheless qualified to testify. At the conclusion of Brown's case, Dr. Falik moved for judgment. Dr. Falik's argument proceeded in three steps: *first*, Dr. Davne was not in compliance with the twenty percent rule; *second*, that without Dr. Davne, Brown had no evidence to support her

claim that Dr. Falik had violated the standard of care; and *third*, that in the absence of evidence of violation of the standard of care, Dr. Falik was entitled to judgment. The trial court declined to rule on Dr. Falik's motion for judgment, deferring until after the jury's verdict. After the close of the defense's case, Dr. Falik renewed his motion for judgment on the same grounds. Again, the trial court declined to rule and deferred its decision. The jury returned a verdict for Brown as to the malpractice claim and awarded damages in the amount of $911,227.02.[2]

After trial, Dr. Falik filed a written memorandum renewing his motions for judgment on the same grounds. This time, the trial court reconsidered and found that it had erred in allowing Dr. Davne to testify. It, therefore, granted a judgment notwithstanding the verdict.

DISCUSSION

Brown raises two challenges to the trial court's ruling, a procedural one and a substantive one. We will address them in turn.

I. THE TRIAL COURT DID NOT ERR BY CORRECTING ITS MISTAKE

Brown argues that because the trial court admitted Dr. Davne as an expert during trial, it erred by granting Dr. Falik's motion for judgment on the ground that Dr. Davne

[2] Brown's suit also alleged that her husband had not provided informed consent prior to his back surgery. The jury found he did, in fact, provide informed consent and that Dr. Falik was not liable under this theory. Lack of informed consent and medical malpractice claims are "separate, disparate theories of liability." *McQuitty v. Spangler*, 410 Md. 1, 18 (2009).

was not qualified. We think the trial court's ruling complied with the Maryland Rules and comported with common sense.

As reported above, Dr. Falik filed motions at the conclusion of Brown's case and at the conclusion of all the evidence. Although the titles of Dr. Falik's motions were of motions for judgment, we think that these were each better understood as consisting of two motions: (1) a motion for reconsideration of the refusal to exclude Dr. Danve; and (2) a motion for judgment (assuming the motion for reconsideration was granted). Substantively, that's precisely what Dr. Falik argued in each motion. And, we are compelled to determine the nature of a motion by its substance, not by its title. *See, e.g.*, *Montgomery Cty., Maryland v. Fraternal Order of Police, Montgomery Cty. Lodge 35, Inc.*, 427 Md. 561, 569-70 (2012); *see also* MD. RULE 1-201 (requiring that the Maryland Rules "be construed to secure simplicity in procedure [and] fairness in administration"). Because the decision of whether to permit or refuse the expert was a non-final order subject to revision any time before final judgment is entered, the trial court was permitted to reconsider that ruling. MD. RULE 2-602(a)(3) (permitting reconsideration of certain rulings). Furthermore, in light of its decision to grant reconsideration, the trial court was then permitted to grant the motion for judgment, which had converted to a motion for judgment notwithstanding the verdict. MD. RULE 2-532(b) ("If the court reserves ruling on a motion for judgment at the close of all the evidence, that motion becomes a motion for judgment notwithstanding the verdict if the verdict is against the moving party").[3] We hold

[3] Moreover, a motion for judgment notwithstanding the verdict "invoke[s] the court's revisory power," *Southern Management Corp. v. Taha*, 378 Md. 461, 494 (2003),

that the trial court's understanding and application of the Maryland Rules was correct as a matter of law.

Moreover, it makes sense. It would be a foolish rule indeed that didn't generally allow judges to correct their own errors. Here, when the trial court learned or realized it had erred in admitting Dr. Davne as an expert witness, it was not required to compound the error. Instead, it allowed the jury the opportunity to decide the case and then corrected its own error.

II. THE TRIAL COURT DID NOT ERR IN DISQUALIFYING DR. DAVNE UNDER THE TWENTY PERCENT RULE

Brown's main argument is that the trial court abused its discretion in disqualifying Dr. Davne. We disagree.

As plaintiff, Brown bore both the burden of producing sufficient evidence and the burden of persuading the trial court that Dr. Davne did not "devote annually more than 20 percent of [his] professional activities to activities that directly involve testimony in personal injury claims." *See* CJ § 3-2A-04(b)(4); *Bd. of Trs., Cmty. Coll. of Baltimore Cty. v. Patient First Corp.*, 444 Md. 452, 469 (2015) (discussing the plaintiff's burden of production). As the Court of Appeals has explained:

> [T]o discern whether an expert is qualified to testify under this requirement, we must perform a mathematical equation: we must identify those activities that "directly involve testimony in personal injury claims" (the numerator) and then divide it by

permits the court to exercise control over a previous judgment, and "if the action was tried before the court …, [allows the court to] take any action that it could have taken under Rule 2-534." MD. RULE 2-535(a). Thus, even if we weren't treating Dr. Falik's motion as including a motion for reconsideration, we would still come to the same result.

> those activities that comprise the body of "professional activities" in general (the denominator).

Univ. of Maryland Med. Sys. Corp. v. Waldt, 411 Md. 207, 222 (2009). Although we don't require an exhaustive accounting of an expert's timesheets, we need sufficient information from which to make an accurate calculation. *Streaker v. Boushehri*, 230 Md. App. 101, 116-17 (2016). Here, Brown failed to satisfy both her burden of production and her burden of persuasion.

Prior to the deposition, Dr. Falik requested a list of medical malpractice cases that Dr. Davne reviewed or in which he acted as an expert witness, as well as all documents accounting for the time he spent on professional activities, such as patient care, surgeries, and supervising medical care. Dr. Davne did not produce any responsive documents. Additionally, at no point did Brown or Dr. Davne provide any timekeeping logs, calendars, or other financial records that would verify how Dr. Davne spent his time. Although Dr. Davne's affidavit described his professional and testimonial activities, it was insufficient on its face, as it did not contain the data necessary to perform the mathematical operation described in *Waldt.* 411 Md. at 222. Similarly, the tax returns and other documents that Dr. Davne provided after the deposition were insufficient to perform the calculation that the Court of Appeals has mandated. *Falik v. Hornage*, 413 Md. 163, 187-88 (2010). In sum, there was insufficient information for the trial court to determine either a numerator or denominator under the twenty percent rule calculation outlined in *Waldt*. As a result, the trial court was left without the ability to corroborate the assertion that Dr. Davne satisfied

the twenty percent rule. In such a circumstance, we hold that the trial court did not abuse its discretion in finding that Brown failed to satisfy her burden of production.[4]

Moreover, Dr. Davne's testimony significantly undercut the value of the documents that he did produce. Dr. Davne stated during voir dire examination that he did not keep "any documentation that allows [him] to determine how much time [he] spends testifying in … medical malpractice or medical legal matters, preparing to testify, reviewing and evaluating records to testify, [and] consulting with counsel to testify in cases." Dr. Davne also testified that he had discarded certain tax forms that would have provided a clear picture of his income and activities and stated that without those records, even he could not determine the income he earned from serving as an expert witness. Furthermore, Dr. Davne gave contradictory testimony on the issue of how much income he generated from testifying as a medical expert during the relevant period. He stated first at his deposition that his time providing expert testimony comprised approximately 70% of his income but

[4] Brown attributes her failure to satisfy her burden of production to what she views as the trial court's erroneous decision to grant Dr. Falik's Motion to Compel Dr. Davne to produce his financial records in the absence of a subpoena. We disagree with her analysis for the following reasons. *First*, Brown knew that Dr. Davne's financial records were required because they were identified by Dr. Falik in the notice of deposition duces tecum. *Second*, the requirements of the twenty percent rule are outlined clearly in CJ § 3-2A-04(b)(4) and the cases that apply it. *Falik v. Hornage*, 413 Md. 163, 187-88 (2010). Brown was, therefore, aware that she needed to produce financial records sufficient to support Dr. Davne's assertion that he was qualified under the rule. And, *third*, in its oral ruling on the Motion to Compel, the trial court, in effect, reminded Brown of her burden of production by stating that Dr. Davne's financial records were necessary to determine compliance with the twenty percent rule. Given all this, it was well within the trial court's discretion to require production of Dr. Davne's financial documents.

then stated at trial that 77-83% of his income was derived from expert testimony.[5] Given the degree to which Dr. Davne undermined his own position, it could be of little surprise that the trial court was not persuaded. Nothing in our review has persuaded us that the trial court abused its discretion in not being persuaded that Dr. Davne was in compliance with the twenty percent rule.

Once the trial court determined that Dr. Davne was barred by the twenty percent rule, Brown had no evidence to support the notion that Dr. Falik violated the appropriate standard of care. As such, the only appropriate remedy was to grant the judgment notwithstanding the verdict.

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

[5] Of course, neither of these estimates would result in Dr. Davne satisfying the twenty percent rule.