UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0610

September Term, 2015

AMANDA TYLER

v.

JILL W. JUDD, PERSONAL REPRESENTATIVE OF THE ESTATE OF MICHAEL GORDON JUDD, ET AL.

Meredith,
Woodward,
Friedman,

JJ.

Opinion by Woodward, J.

Filed: June 30, 2016

This case arises out of a failed sterilization procedure performed on Amanda Tyler, appellant. Despite having a sterilization procedure performed in October 2009, appellant subsequently became pregnant and gave birth to a healthy baby boy. As a result, appellant filed suit against her OB/GYN, Dr. Michael Judd, and his practice, Chesapeake Women's Health, LLC ("Chesapeake"), appellees, in the Circuit Court for Talbot County. Among other things, appellant alleged that Dr. Judd failed to obtain her informed consent before performing the procedure, because he erroneously told her that it was "a non reversible one hundred percent sterilization" and "pain free." Before the case could proceed to trial, however, Dr. Judd committed suicide.[1] Appellant asked the court to impose sanctions against appellees for destruction of evidence, with the evidence being Dr. Judd himself. The court denied the motion. The case proceeded to trial and appellant presented her case-in-chief, after which the court granted judgment in favor of appellees.

On appeal, appellant presents two questions for our review, which we have rephrased:[2]

[1] After Dr. Judd's death, Jill W. Judd, Personal Representative of the Estate of Michael Gordon Judd, was substituted for Dr. Judd as a defendant in the instant case. Our use of the term "appellees" shall hereafter refer to the personal representative of Dr. Judd's estate and to Chesapeake.

[2] Appellant's questions, as presented in her brief, are as follows:

1. Did the trial court err by granting a directed verdict in favor of Appellees?

(continued...)

1. Did the trial court err by entering judgment in favor of appellees at the conclusion of appellant's case-in-chief?

2. Did the trial court abuse its discretion by denying appellant relief for destruction of evidence?

We answer both questions in the negative and, accordingly, affirm the judgment of the circuit court.

BACKGROUND

Appellant first came into contact with Dr. Judd on September 6, 2004. She was pregnant at the time and met with Dr. Judd regarding a possible miscarriage. Appellant did miscarry, but became pregnant again quickly afterwards with her second child. Thereafter, appellant continued her OB/GYN care with Dr. Judd at Chesapeake. As early as August 2007, appellant discussed the possibility of a tubal ligation and other forms of birth control with a midwife at Chesapeake. At the time, appellant and her husband had two children. By 2009, they decided that they did not want to have any additional children. Appellant told her husband that she wanted a tubal ligation, because both her mother and sister had the procedure done without any complications.

On September 16, 2009, appellant met with Dr. Judd for her annual appointment. She informed Dr. Judd that she wanted to schedule a tubal ligation. Appellant testified that Dr. Judd responded to this request by talking to her about a different kind of sterilization

[2](...continued)

2. Did the trial court err by denying Appellant relief following the Self-Inflicted Death of her Treating Physician?

procedure called Essure. Essure is a sterilization procedure whereby coil devices are placed in the fallopian tubes, causing scar tissue to form over the coils. The scar tissue prevents sperm from passing through the tubes to the egg, thus preventing pregnancy. Appellant stated that Dr. Judd told her that the Essure procedure was "a non reversible one hundred percent sterilization. Pain free in the same day procedure in office." She stated that she was not provided with any pamphlets concerning the procedure, and that they did not discuss potential side effects. Dr. Judd's note from the visit stated:

> We discussed all contraceptive options including hormonal contraception, barrier methods, and both male and female sterilization. We also discussed natural family planning, abstinence, and the IUD. Pt interested in in [sic] office [E]ssure.

Based on her conversation with Dr. Judd, appellant decided to undergo the Essure procedure.

On October 29, 2009, Dr. Judd performed the Essure procedure on appellant. Four months later, in February 2010, Dr. Judd took an X-ray to confirm that the Essure coils were properly placed and appellant's tubes were blocked. Despite such confirmation, appellant claims that she suffered from constant, stabbing abdominal pain in the months following the procedure. Furthermore, in November 2010, appellant discovered that she was pregnant with a third child. On July 5, 2011, appellant gave birth to a healthy baby boy. Subsequent to such birth, appellant had another doctor remove the coils, after which she was pain free.

On July 22, 2013, appellant filed suit in the Circuit Court for Talbot County against Dr. Judd and Chesapeake for lack of informed consent, breach of express warranty, and loss of consortium.[3] With regard to the informed consent count, appellant alleged that

> [b]y failing to accurately and fully inform [] [appellant] of the risks associated with the Essure Procedure, including that of an unwanted pregnancy and years of moderate to severe abdominal pain, [Dr.] Judd breached his duty to secure the fully informed consent of [appellant] prior to commencing the Procedure. . . Had [appellant] been aware that such a result would have ensued, she would have either remained on oral contraceptive birth control, which had been previously successful for many years, or undergone a tubal ligation.

On July 30, 2014, in the middle of the discovery phase of the litigation, Dr. Judd committed suicide. Dr. Judd's wife, Jill Judd, became the personal representative of his estate, and was substituted for him as a defendant in this action.

On August 29, 2014, appellant filed a motion for sanctions pursuant to Maryland Rule 2-433. In her motion, appellant asserted that, by taking his own life, Dr. Judd had intentionally destroyed evidence that would have been obtained through his testimony. Appellant asked the court for relief in the form of "[a]ny and all remedies set forth in Maryland Rule 2-433 up to and including an[] Order of Default." A hearing was held on the motion on November 3, 2014. The trial court denied the motion for sanctions, stating:

> This is a terrible situation. And mental illness is a fatal disease or can be a fatal disease. Like cancer. And apparently Dr. Judd had a fatal disease and he died of the disease. **I don't think that his purpose**

[3]Appellant never alleged that the sterilization procedure itself was incorrectly performed. Appellant's husband joined her as a plaintiff on the lack of consortium count.

> **was to frustrate this litigation. His purpose was to end his life for whatever reasons and we don't know. I'd look at this as different from somebody taking a shredder and shredding documents or taking a hard drive and burning it.** It is a sad end to his life and I'm going to deny your motion.

(Emphasis added).

Prior to trial, appellant did not identify any medical experts that she planned to call as witnesses. Appellees identified several medical experts, including Dr. Samuel Akman. Dr. Akman's deposition was taken on October 13, 2014. In his deposition, Dr. Akman testified about the Essure procedure and its risks and effectiveness, as well as the alternatives to Essure, and their risks and effectiveness. He identified tubal ligation and vasectomy as the main alternatives. Dr. Akman stated that the success rate for the Essure procedure is approximately 99.8 percent and that the success rate for tubal ligation is somewhere between 99-99.5 percent. He also testified that the failure rate for birth control pills is around eight to ten percent per year. Dr. Akman testified that no sterilization procedure is 100 percent effective in preventing pregnancy.[4] Although appellant initially subpoenaed Dr. Akman to testify at trial, she later released him from his subpoena and instead decided to read selected portions of his deposition into evidence.

[4] Dr. Akman did state that, although some doctors are of the opinion that a hysterectomy is 100 percent effective, he knew of one case where a patient had an ectopic pregnancy after a hysterectomy.

On November 5, 2014, prior to trial, the trial court granted a Motion for Partial Summary Judgment in favor of appellees on the loss of consortium claim. Appellant does not challenge that ruling on appeal.[5]

The trial on the remaining two claims commenced on May 26, 2015. After opening statements, appellant read designated portions of Dr. Akman's deposition into evidence. The portion of the deposition read to the jury covered the Essure procedure and its risks, sterilization and its risks, and what informed consent means. Appellant did not read any aspects of the deposition that related to the success rate of Essure, the alternatives to Essure, or the risks and success rates of alternatives.

After Dr. Akman's deposition was read, appellant took the stand and testified. She reiterated her claim that she was interested in a tubal ligation, but was convinced by Dr. Judd that an Essure procedure was preferable because it was "one hundred percent, non reversible" and "pain free." Appellant conceded that she signed a Documentation of Informed Consent on the day of her procedure. The form contained the following language, along with the signature of Dr. Judd:

> I have informed the patient of the above diagnosis [V25.2 sterilization] and provided sufficient information about the above procedure [Essure tubal] for the patient to give informed consent. The patient has been made aware of treatment options as well as the potential risks and benefits, side effects, likelihood of success and potential problems with recuperation of the planned treatment and other options.

[5] Accordingly, appellant's husband is not a party to the instant appeal.

The form then contained a statement, with appellant's signature, that appellant had discussed the above information with Dr. Judd. The form contained no specifics regarding the "sufficient information" given by Dr. Judd to appellant.

After testifying, appellant presented several more fact witnesses, but did not call any medical experts to testify. At the close of appellant's case, appellees made a motion for judgment, arguing that appellant failed to present expert medical testimony that was required for a prima facie case of a lack of informed consent. In reference to Dr. Akman's testimony and the requirement of expert testimony, appellees argued:

> This is the only testimony before this jury and this Court with regard to the issues, elements and requirements of informed consent. In *Sard v. Hardy*, [281 Md. 432 (1977)], [*McQuitty v. Spangler*, 410 Md. 1 (2009)], *Shannon* [*v. Fusco*, 438 Md. 24 (2014)], all of those cases have very specific requirements. It needs to start out with the concept that the Plaintiff did not identify any expert with regard to the standard of informed consent as a primary case in chief expert. . . . The requirement under the three cases that I've referenced requires that the Plaintiff establish that there is a duty to provide options or alternatives. Those alternatives and options must be discussed and explained so that a person knows what they are as opposed to just saying them. Number two, there must be testimony with regard to the probability of success of any proposed options or treatments. There must be expert testimony to testify about the risks of any options and the potential of those risks. The risks that are required under the law are not all of the risks but rather material risks. "Material risks are those risks that a doctor should understand that a reasonable person would need to know in reaching an informed decision." **Expert [testimony] in summary is required, experts are required for options and alternatives, to explain the nature of the options, the**

> **alternatives, to identify and explain material risks, the frequency of the risks and the probability of success**.

(Emphasis added).

The trial court granted the motion for judgment in favor of appellees on both claims.[6] In granting judgment on the lack of informed consent claim, the court stated:

> The primary count in this matter required very little evidence which was readily available and not produced. ***Sard v. Hardy*** **as [appellees'] counsel notes, requires that expert testimony is needed to establish the nature of the risks inherent in a particular treatment. The probabilities of therapeutic success, the frequency, the occurrence of a particular risk, the nature of available alternatives to treatment and whether or not disclosure would be detrimental to the patient.** In this case expert testimony is necessary to support Count 1 to assert what the risks were, what the alternative treatments were and would [be] reasonable, such that a jury could conclude that a reasonable person in [appellant's] position would have opted for a different procedure or some different alternatives. I have read Dr. Akman's deposition three times. My law clerk has read the deposition. There is more than adequate evidence in the deposition to show there are risks with respect to the Essure procedure. **There is not one wit of testimony with respect to alternatives, with respect to the percentages of their failure, IE, even the percentage of the Essure failure.** For the reasons set forth by [appellees'] counsel and the Motion for Judgment I regret that I must grant the Motion for Judgment with respect to Count 1 also.

(Emphasis added).

On June 1, 2015, appellant filed her notice of appeal.

[6] Appellant does not challenge the judgment in favor of appellees on her breach of express warranty claim.

DISCUSSION

I. Motion for Judgment

"In reviewing the denial of a motion for judgment, an appellate court conducts the same inquiry as the trial court . . . ." *Nissan Motor Co. Ltd. v. Nave*, 129 Md. App. 90, 116 (1999), *cert. denied*, 357 Md. 482 (2000).

> "[T]he trial court assumes the truth of all credible evidence on the issue and of all inferences fairly deducible therefrom, and considers them in the light most favorable to the party against whom the motion is made. If there is any legally relevant and competent evidence, however slight, from which a rational mind could infer a fact in issue, then a trial court would be invading the province of the jury by declaring a directed verdict. In such circumstances, the case should be submitted to the jury and a motion for a directed verdict denied."

Id. at 116-17 (quoting *Impala Platinum Ltd. v. Impala Sales (U.S.A.), Inc.*, 283 Md. 296, 328 (1978)).

"A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence." Md. Rule 2-519(a). "When a motion for judgment is made . . . the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made." Md. Rule 2-519(b). "A judge must grant a civil defendant's motion for judgment as a matter of law if the plaintiff failed to present evidence that could persuade the jury of the elements of the tort *by a preponderance of the evidence*." *Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 270 (2004) (emphasis in original).

When appellees made their motion for judgment, the trial court agreed that appellant failed to present a sufficient prima facie case for a claim of lack of informed consent, because appellant did not present expert testimony on the success rate of Essure, the alternatives to Essure, the success rate of those alternatives, and the material risks and the frequency of the occurrence of such risks, of Essure and its alternatives. On appeal, the parties disagree on the necessity of expert testimony. To determine whether the trial court was correct in ruling that expert testimony was required for appellant's prima facie case, we must look to the case law in Maryland on a claim of a lack of informed consent.

The law regarding informed consent in Maryland was established by the Court of Appeals in *Sard*, 281 Md. at 432. The Court described the doctrine as follows:

> [T]he doctrine of informed consent imposes on a physician, before he subjects his patient to medical treatment, the duty to explain the procedure to the patient and to warn him of any material risks or dangers inherent in or collateral to the therapy, so as to enable the patient to make an intelligent and informed choice about whether or not to undergo such treatment.
>
> This duty to disclose is said to require a physician to reveal to his patient the nature of the ailment, **the nature of the proposed treatment, the probability of success of the contemplated therapy and its alternatives, and the risk of unfortunate consequences associated with such treatment**.

Id. at 439-40 (emphasis added) (citations omitted).

The Court focused on three aspects of an informed consent cause of action: (1) the scope of the physician's duty to disclose, (2) the requirement of expert testimony, and (3)

causation. *Id.* at 440. The Court first focused on the duty to disclose, and concluded that "the appropriate test is not what the physician in the exercise of his medical judgment thinks a patient should know before acquiescing in a proposed course of treatment; rather, the focus is on what data the patient requires in order to make an intelligent decision." *Id.* at 442. Furthermore, "since the patient must suffer the consequences, and since he bears all the expense of the operation and post-operative care, fundamental fairness requires that the patient be allowed to know what risks a proposed therapy entails, alternatives thereto, and the relative probabilities of success." *Id.* at 443. Finally, the Court held that "that the scope of the physician's duty to inform is to be measured by the materiality of the information to the decision of the patient. A material risk is one which a physician knows or ought to know would be significant to a reasonable person in the patient's position in deciding whether or not to submit to a particular medical treatment or procedure." *Id.* at 444. In other words, "[w]hether a physician has fulfilled his duty to disclose, then, is to be determined by reference to a general standard of reasonable conduct and is not measured by a professional standard of care." *Id.*

Although this Court adopted the materiality test to define the scope of the duty to disclose, the Court of Appeals disagreed with our holding "that the information withheld here by [the] appellee would not, as a matter of law, have been material to the decision of a reasonable person in the position of Mrs. Sard." *Id.* at 445. The Court explained:

> First, **there is evidence that [the] appellee never directly disclosed to Mrs. Sard that the operation might not be 100% successful regardless of what technique he employed; nor that other surgical methods would have been significantly more effective**. **What is more, Mrs. Sard testified that appellee had affirmatively assured her before the operation that she would not bear any more children after the sterilization.** Evidence was also produced to the effect that Mrs. Sard elected to undergo sterilization because she was concerned about the possibility of damage to her physical well-being and the financial burden of raising a third child. Given these facts, a jury could have found that a reasonable person in Mrs. Sard's position would have attached considerable significance to the projected risk of failure for the tubal ligation, and therefore should have been informed of the risk of fertility.
>
> **Moreover, it is undisputed that [the] appellee chose not to inform Mrs. Sard about the increased risk of failure inherent in sterilizations performed at the time of Caesarean delivery.** She was therefore denied the opportunity of deciding whether to undergo sterilization at delivery or at a later time when the risk of failure would have been drastically reduced. The jury could reasonably have concluded that this information would have been of material significance to a woman desirous of permanently preventing childbirth in the most effective manner. Finally, there was evidence permitting the jury to find that Dr. Hardy did not discuss the possibility of vasectomy with either appellant, even though, as [the] appellee himself acknowledged, it was customary for physicians to discuss this subject when consulted by patients about sterilization.
>
> **We hold only that all of this evidence, taken together, was sufficient in this sterilization case to warrant submission to the jury the question whether the information withheld in this case was material to the patient's decision.**

Id. at 445-46 (emphasis added).

Additionally, the Court held that, by adopting the materiality test instead of the professional standard of care, "neither the scope nor the breach of the physician's duty [was

required] to be established by expert medical testimony." *Id.* at 447. The Court, however, clarified its holding by stating:

> We are not to be understood as holding, however, that expert medical testimony can be dispensed with entirely in cases of informed consent. **Such expert testimony would be required to establish the nature of the risks inherent in a particular treatment, the probabilities of therapeutic success, the frequency of the occurrence of particular risks, the nature of available alternatives to treatment and whether or not disclosure would be detrimental to a patient**. Thus, in the case at hand, [the] appellants would be required to produce expert testimony to show the nature of the various methods of sterilization or birth control available to them in 1967 (i. e., tubal ligation, vasectomy, oral contraception); the nature of the specific operative procedures, if any, employed to effect sterilization by a particular method (e. g., Madlener, Irving, Pomeroy, Uchida procedures); the respective failure rates for each of the methods and procedures, both when performed at the time of a Caesarean section and at other times; and the risk of harm to mother and child inherent in each available method or procedure. In addition, as we have indicated, nothing we say here is intended to prohibit the physician from presenting expert testimony as to the medical standard of care.

Id. at 447-48 (emphasis added) (citations and footnote omitted).

Finally, the Court addressed the issue of causation. "All courts recognizing the doctrine of informed consent require proof of proximate causation." *Id.* at 448. The Court held

> that the causality requirement in cases applying the doctrine of informed consent is to be resolved by an objective test: **whether a reasonable person in the patient's position would have withheld consent to the surgery or therapy had all material risks been disclosed**. If disclosure of all material risks would not have changed the decision of a reasonable person in the position of the patient, there is no causal connection between nondisclosure and his damage. If,

> however, disclosure of all material risks would have caused a reasonable person in the position of the patient to refuse the surgery or therapy, a causal connection is shown. Under this rule, the patient's hindsight testimony as to what he would have hypothetically done, though relevant, is not determinative of the issue.
>
> Here, there was sufficient evidence of proximate cause to permit a jury to decide [the] appellants' informed consent case. **The same considerations which support an inference of materiality with respect to the scope of disclosure also support an inference of proximate causation in this case.**

Id. at 450 (emphasis added). In the context of the *Sard* case, the Court determined that

> a jury could conclude that the effectiveness of the sterilization was of such importance to appellant or to a reasonably prudent person in her position that the failure to reveal data about risks of failure and more efficient alternative methods would have induced [the] appellant to consent to the operation, while she would not have done so had adequate disclosure been made.

Id. at 451. As the Court explained *supra*, expert testimony "would be required to establish the nature of the risks inherent in a particular treatment, the probabilities of therapeutic success, the frequency of the occurrence of particular risks, the nature of available alternatives to treatment and whether or not disclosure would be detrimental to a patient." *Id.* at 448. Therefore, without such expert testimony, the causation element of an informed consent case would be deficient.

The requirements of an informed consent action were further explored in the more recent case of *Shannon*, 438 Md. at 24. *Shannon* involved an informed consent lawsuit arising from the death of a patient from a skin disorder that he developed after using a drug,

Amifostine, that was prescribed by Dr. Shannon. *Id.* at 32. During the discovery phase, the plaintiffs designated a pharmacist, Dr. Travato, as an expert. *Id.* at 33. Dr. Shannon responded by filing a motion for summary judgment, claiming that he was entitled to judgment as a matter of law, because Dr. Travato was not qualified to testify about the standard of care in this case. *Id.* The motion was denied. *Id.* Dr. Travato then gave a *de bene esse* deposition wherein he offered his opinion that Amifostine should not have been used. *Id.* at 34. After the deposition, Dr. Shannon filed a motion in limine to exclude Dr. Travato's testimony and renewed his motion for summary judgment,

> arguing that the [plaintiffs] had failed to prove by expert testimony the material risks of Amifostine, reiterating many of the arguments set forth in the motion in limine, namely that Dr. Trovato was not qualified to offer an opinion in this matter. **Additionally, Dr. Shannon argued that Dr. Trovato had not testified to the nature of the risks of Amifostine, the probability of success of Amifostine**; the frequency of occurrence of risks of Amifostine, and the availability of alternatives to Amifostine, which Dr. Shannon asserted was required by this Court's decision in *Sard v. Hardy*, 281 Md. 432, 379 A.2d 1014 (1977).

Shannon, 438 Md. at 35. The trial court granted the motion in limine to exclude Dr. Tavato's *de bene esse* testimony, but denied the motion for summary judgment. *Id.* at 36. The court also refused to permit Dr. Travato to testify at trial. *Id.* at 39. Ultimately, the case went to the jury, and the jury returned a verdict in favor of Dr. Shannon, finding that a reasonable person, having been informed of the material risks, would not have refused treatment. *Id.* at 42.

The Court of Special Appeals reversed, ruling that Dr. Travato's testimony should not have been excluded. *Id.* at 43. The case went to the Court of Appeals, which summarized the issue:

> The issue queued up by the instant case is whether Dr. Trovato, a pharmacist, was qualified to testify in this informed consent action against Dr. Shannon. **We begin by addressing the necessity of expert testimony in an informed consent action, specifically with respect to material risks, because we have not squarely addressed this issue in the past.** In *Sard* we opined in *dicta* that, "[s]uch expert testimony would be required to establish the nature of the risks inherent in a particular treatment, the probabilities of therapeutic success, the frequency of the occurrence of particular risks, the nature of available alternatives to treatment and whether or not disclosure would be detrimental to a patient." *Sard*, 281 Md. at 448, 379 A.2d at 1024. Likewise, in [*Univ. of Maryland Med. Sys. Corp. v.*] *Waldt*, [411 Md. 207, 232 (2009)] we opined, again in *dicta,* that, "[e]xpert testimony is necessary to establish the material risks and other pertinent information regarding the treatment or procedure", and observed that the Waldts had relied on the neurologist to establish the material risks of the neuroform stent procedure. *Waldt*, 411 Md. at 232, 983 A.2d at 127.
>
> **Although our pronouncements in *Sard* and *Waldt* were *dictum,* it is clear, nevertheless, that expert testimony is necessary to assist the trier of fact in understanding the severity and the likelihood of a risk so that the trier of fact may assess the material risks of the proposed treatment.**
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> ***
>
> **The likelihood that certain risks will occur when medicine is administered and the severity of such risks are complex medical matters that will generally fall outside the scope of lay knowledge, and thus, expert testimony is necessary to "assist the trier of**

> **fact . . . to determine a fact in issue",—the material risks of proposed medical treatment.**

Shannon, 438 Md. at 49-51 (emphasis added) (alterations in original) (footnote omitted).

Accordingly, the Court in *Shannon* affirmed the necessity of expert testimony in informed consent cases to determine the material risks of proposed medical treatment, which is a necessary component of the physician's duty to disclose. *Id.* at 51. The Court then held that, "[b]ecause Dr. Trovato did not opine about the likelihood and severity of the risks implicated in the administration of Amifostine, we cannot say that Judge Green abused his discretion in excluding Dr. Trovato's testimony." *Id.* at 58-59 (footnotes omitted).

Considering these cases together, it is clear to this Court that expert testimony is required in informed consent cases to show "the nature of the risks inherent in a particular treatment, the probabilities of therapeutic success, the frequency of the occurrence of particular risks, the nature of available alternatives to treatment and whether or not disclosure would be detrimental to a patient." *Sard*, 281 Md. at 448. Such expert testimony is necessary to a jury's determination of both the scope of the physician's duty to disclose and causation. *Id.* at 450.

In the instant case, appellant contends that she satisfied the requirements of the *Sard* case, because "there was trial testimony that Dr. Judd failed to properly advise [appellant] that Essure was anything but '100%' or pain-free." Appellant argues that "a jury could have

found that a reasonable person in the position of [appellant] would have attached considerable significance to the representations made by Dr. Judd." According to appellant,

> a jury could have concluded that Dr. Judd's failure to reveal numerous and material risks associated with the ESSURE device and his minimizing or misrepresenting those risks would have induced [appellant] to consent to the procedure while she would not have done so had adequate and accurate disclosure been made.

Although appellant acknowledges that she did not allege that Dr. Judd failed to advise her about alternatives or the efficacy rates of alternatives, she argues that she was not obligated to do so under *Sard*. Appellant asserts that her only claim was that Dr. Judd failed to advise her about the material risks of Essure, and that the trial court noted that those risks were adequately supported by expert testimony. Appellant concludes that no cases suggest that a plaintiff "must adduce evidence, and expert evidence at that, of risks associated with procedures other than those of which she claims her treating doctor failed to advise her."

Appellees respond that appellant failed to

> produce expert testimony pursuant to *Sard* and *Shannon* regarding: (1) the probabilities of therapeutic success of Essure, (2) the severity of the risks of Essure, (3) the frequency of the occurrence of particular risks of Essure, (4) the nature of available alternatives to Essure, and (5) whether or not disclosure would have been detrimental to [appellant]. [Appellant] only presented risks that may be associated with Essure.

Appellees contend that "[o]nly having an expert witness agree that there are certain risks of the Essure procedure without any reference to the severity if [sic] the risks and the likelihood

of the risks occurring nor any discussion of options and their risks does not come close to satisfying the requirements of *Sard* and *Shannon*." We agree with appellees.

The only expert testimony in the instant case was a small portion of Dr. Akman's deposition testimony that appellant read to the jury. That specific portion of Dr. Akman's deposition covered the potential lack of Essure's therapeutic success, along with other risks generally associated with Essure, including: unanticipated health risks, ectopic pregnancy, infection, pelvic pain, painful intercourse, perforation of the uterus, perforation of the fallopian tubes, tubal blockage occurring only on one side, vaginal bleeding, nausea, vomiting, general pain associated with the procedure, adverse reaction to anesthesia, future regret, pelvic inflammatory disease, infection, subsequent surgery, and nickel allergy.

Appellant's evidence established a prima facie case that Dr. Judd *breached his duty* to disclose. Appellant testified that Dr. Judd advised her that the Essure procedure was "a non reversible one hundred percent sterilization. Pain free in the same day procedure in office." Appellant then presented expert testimony regarding the risks associated with Essure, including unwanted pregnancy and pelvic pain.

Appellant's evidence, however, did not sufficiently address the issue of causation. To prove causation, a plaintiff needs to show that a reasonable person would have made a different choice if all the necessary information had been disclosed. *See Sard*, 281 Md. at 450. The necessary information that must be shown is "the nature of the risks inherent in a particular treatment, the probabilities of therapeutic success, the frequency of the occurrence

of particular risks, the nature of available alternatives to treatment and whether or not disclosure would be detrimental to a patient." *Id.* at 448. Here, the jury never learned about the probabilities of therapeutic success of Essure, the frequency of the occurrence of particular risks, or the nature of available alternatives to Essure. With no expert testimony on those matters, the jury could not determine what a reasonable person in the position of appellant would have done if given all of the pertinent information. Appellant thus failed to produce a prima facie case, and accordingly, the trial court was correct to grant judgment in favor of appellees.

II. Sanctions for Destruction of Evidence

"Our review of the trial court's resolution of a discovery dispute is quite narrow; appellate courts are reluctant to second-guess the decision of a trial judge to impose sanctions for a failure of discovery. Accordingly, we may not reverse unless we find an abuse of discretion." *Sindler v. Litman*, 166 Md. App. 90, 123 (2005) (citations omitted).

Rule 2-433 allows the trial court to award sanctions for discovery violations. In the instant case, appellant filed a motion for sanctions, asserting that Dr. Judd intentionally destroyed evidence. The alleged evidence at issue was Dr. Judd himself, with appellant arguing that Dr. Judd "intended to destroy and succeeded in destroying himself" by committing suicide, thus depriving appellant of Dr. Judd's deposition and trial testimony. The trial court denied the motion, stating that Dr. Judd's suicide was caused by mental illness, not this pending litigation, and that his purpose was not to frustrate this litigation.

Appellant concedes that there are no cases supporting the concept of suicide as a means of destroying evidence, namely the potential testimony of the person committing suicide. Nevertheless, appellant argues that, by applying the general rules on destruction of evidence and spoliation, Dr. Judd's potential testimony qualifies as "evidence" that was purposefully destroyed to frustrate this case. We disagree.

Appellant has the burden of proving the

> four elements generally regarded as being prerequisite to a court's imposition of spoliation sanctions:
>
> > (1) An act of destruction;
> >
> > (2) Discoverability of the evidence;
> >
> > (3) **An intent to destroy the evidence**; and
> >
> > (4) Occurrence of the act at a time after suit has been filed, or, if before, at a time when the filing is fairly perceived as imminent."

Klupt v. Krongard, 126 Md. App. 179, 199 (emphasis added), *cert. denied*, 355 Md. 612 (1999).

In our view, appellant failed to prove that she is entitled to spoliation sanctions, much less that the trial court abused its discretion. First, appellant presented no evidence of an intent on the part of Dr. Judd to intentionally destroy evidence, the third required factor under *Klupt*. Second, there can be no rational inference of an intent to destroy evidence from the evidence in the record of this case.

Appellant submitted no evidence that Dr. Judd killed himself with the intent of destroying the evidence that was in his mind. The only evidence on this issue is the existence of the instant lawsuit and Dr. Judd's suicide during the pendency of that suit. There was no evidence adduced regarding Dr. Judd's reaction to the lawsuit. Dr. Judd's partner, Dr. Patrick O'Brien, was deposed in the instant case before Dr. Judd's suicide. Dr. O'Brien testified that he never spoke to Dr. Judd about his deposition. Appellees also point out that appellant was previously the subject of a completely separate medical malpractice lawsuit, and that "he did not commit suicide before his deposition or during the pendency of that case."

In addition, no rational juror could infer from the facts of the case *sub judice* that destroying evidence was Dr. Judd's intention in committing suicide. Appellant provides no link between the act of suicide and an intent to destroy evidence. Appellant's argument that Dr. Judd's suicide could be viewed as an attempt to avoid the shame and embarrassment of an adverse malpractice verdict is wholly speculative. Furthermore, although the procedure in this case was unsuccessful, the ultimate outcome was that appellant gave birth to a healthy baby. Given such outcome, an inference that this case was the reason for Dr. Judd's suicide is even more speculative.

Finally, it is unlikely that appellant suffered any actual prejudice as a result of Dr. Judd not being available to testify. First, there is no way to know what the allegedly destroyed evidence was, because Dr. Judd had not yet testified by way of a deposition.

Second, with Dr. Judd no longer available, the only evidence in this case was appellant's testimony and Dr. Judd's notes. Dr. Judd's notes were very general, simply mentioning that he had discussed the various birth control options and alternatives with appellant. Thus appellant was probably better off without Dr. Judd's testimony, because he most likely would have contradicted appellant's claims regarding whether he accurately discussed the risks and success rate of Essure, as well as the nature of the available alternatives. Without Dr. Judd's testimony, appellant's version of events remained unchallenged. Therefore, there was no showing of actual prejudice to appellant as a result of Dr. Judd's suicide.

For the foregoing reasons, we hold that the trial court did not abuse its discretion when it denied appellant's motion for sanctions.

JUDGMENT OF THE CIRCUIT COURT FOR TALBOT COUNTY AFFIRMED; APPELLANT TO PAY COSTS.