

**UNREPORTED**

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1818

September Term, 2016

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TRACY BROWN-RUBY

v.

MONTGOMERY COUNTY, MARYLAND

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Meredith,  
Graeff,  
Arthur,

JJ.

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Opinion by Meredith, J.

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Filed: October 10, 2017

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 claim before the Maryland Worker's Compensation Commission (the "Commission"). In 2013, Tracy Brown-Ruby, appellant, filed a claim for workers' compensation benefits against Montgomery County (the "County"), appellee. She alleged that a work-related injury to her knee that had occurred on April 12, 2006, was a source of deterioration of her knee in 2013. Following a hearing, the Commission denied Brown-Ruby's request for authorization for a total knee replacement, and similarly denied her request for temporary total disability benefits. Brown-Ruby timely appealed the Commission's decision to the Circuit Court for Montgomery County.

At the beginning of the trial, the trial judge granted the County's motion *in limine* to preclude Brown-Ruby's expert from testifying as to any causal connection between Brown-Ruby's prior partial knee replacement surgery in 2009 and her April 2006 injury. In addition, the trial judge granted the County's motion *in limine* to preclude evidence that the County had paid for the 2009 surgery.

The jury found that, although a total knee replacement surgery *was* medically necessary, it was not causally related to the April 2006 injury. Brown-Ruby timely appealed to this Court. She presents the following question for our review, which we have condensed and restated as follows:<sup>1</sup>

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<sup>1</sup> Brown-Ruby's question presented, as stated in her Brief, is:

I. Was It Judicial Error For The Circuit Court To Preclude Portions Of The Claimant's Expert's Testimony That Were Essential To Establishing The Basis Of The Expert's Ultimate Opinion That The Claimant's Need For A Total Knee Replacement Was Caused By The Work Injury, As The

continued...

Did the trial judge err in granting the County's motion *in limine* precluding Brown Ruby's expert witness, Dr. Panagos, from testifying as to the cause of Brown-Ruby's 2009 partial knee replacement?

Because we perceive no reversible error, we will affirm.

### **FACTS AND PROCEDURAL HISTORY**

In the course of serving as a volunteer EMT and ambulance driver for Montgomery County, Brown-Ruby experienced two separate knee injuries. Brown-Ruby suffered her first knee injury in November 2003, when she tore her meniscus as a result of an ambulance door swinging into her knees. This torn meniscus required arthroscopic surgery. On April 12, 2006, Brown-Ruby suffered a second knee injury stemming from a sudden onset of pain she experienced while on a treadmill during a work-related physical examination. This injury required a second arthroscopic surgery in 2006. Brown Ruby filed a claim with the Commission in connection with her April 2006 injury, and the Commission awarded Brown-Ruby compensation in the form of temporary total disability benefits.

Although Brown-Ruby's knee stability improved following this second surgery, she continued to experience pain in her knees. In 2009, Brown-Ruby underwent a partial knee replacement of her left knee. Brown-Ruby asserts that the Commission compensated her and required the County to pay for this 2009 surgery; however, the

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Stricken Testimony Was Part Of A Progression Of Medical Care That Culminated In The Total Knee Replacement?

County disputes this claim. Following her 2009 partial knee replacement, Brown-Ruby came under the care of Dr. Andrew Panagos.

Brown-Ruby's knee problems persisted beyond the date of the 2009 partial knee replacement surgery. Consequently, in October 2013, Brown-Ruby requested that the Commission authorize a total knee replacement surgery. Prior to making a decision on the merits, the Commission issued an order, dated March 19, 2014, directing "that the parties are to agree on a third opinion from an orthopedic knee specialist to determine whether a total knee replacement is necessary, . . . and if so, [whether] the need for said surgery [is] causally connected to this case . . . ." The parties agreed to obtain this third opinion from Dr. Henry Boucher, who is board certified in orthopedic surgery. Following an examination of Brown-Ruby on July 10, 2014, Dr. Boucher issued a report that expressed an opinion that a total knee replacement is "not reasonable, necessary or related to [Brown-Ruby's] injury on 4/12/2006." Dr. Boucher's report included this discussion of Brown-Ruby's left knee:

In my opinion, Ms. Brown is not a good candidate for total knee replacement in either knee. The left knee has an objectively well functioning partial knee but yet is chronically painful. Even though she has some degenerative change in the lateral compartment, I would expect her to have little improvement in her pain and function with a conversion to a total knee. Major portions of her exam today are non-physiologic. Further treatments and surgery of the left knee are not reasonable, necessary or related to her injury on 4/12/2006. Further treatments are related to pre-existing arthritic disease.

After receiving Dr. Boucher's opinion, Brown-Ruby renewed her request for the Commission to authorize a total knee replacement. By ruling dated December 9, 2015, the Commission denied this request, stating:

The Commission finds on the issues presented that authorization for medical treatment (left total knee replacement) is denied. The Commission finds that the requested treatment is not causally related to the accidental injury sustained on April 12, 2006 as the parties agreed to a third opinion, and the third opinion provides not causally related, and relates to prior osteoarthritis. The Commission further finds that the claim for temporary total disability from date of surgery to present and continuing is denied.

Brown-Ruby timely appealed the Commission's decision to the Circuit Court for Montgomery County. While her appeal to the circuit court was pending, Brown-Ruby received the total knee replacement at issue on January 6, 2016.

In preparation for her trial in the circuit court, Brown-Ruby designated Dr. Panagos as an expert to testify on her behalf, and took his *de bene esse* deposition, wherein he opined on several matters, including the causal connection between Brown-Ruby's 2009 partial knee replacement and her 2006 injury. Dr. Panagos testified as follows with regard to this causal connection:

[BY COUNSEL FOR BROWN-RUBY]

Q: Do you have an opinion, doctor, to a reasonable degree of medical probability regarding whether or not her partial knee replacement surgery on March 12, 2009 was caused by the April 2006 treadmill injury, noting your objection, counsel. You can answer.

[BY DR. PANAGOS]: I believe that the 2006 injury was responsible for the hemi-arthroplasty as an event that accelerated a process that had been in place since 2003, but, yes, it exacerbated it and led to it.

Prior to trial, the County filed a motion *in limine* to exclude Dr. Panagos's testimony in its entirety. The trial judge denied this motion, but granted the County's alternative motion *in limine* to preclude the above-quoted portion of Dr. Panagos's deposition testimony, and to preclude evidence regarding the County's alleged payment for the 2009 surgery. The court did not preclude Dr. Panagos from expressing an opinion on whether the 2006 injury was causally related to the need for the 2016 total knee replacement.

The trial judge explained that he was granting the County's alternative motion because the testimony regarding the cause of the 2009 surgery would be "highly prejudicial" and could mislead the jury regarding the issues that were before them. The court stated:

I'm going to grant the County's motion in limine and the plaintiff's, claimant's doctor be precluded from testifying as to the causal relation of the 2009 partial knee replacement. The jury will be considering only the 201[6] full knee replacement. I think it'd be highly prejudicial to the County for the doctor to opine as to the 2009 causal connection and they might just think well [s]he had a partial knee there so of course now you have a full knee, it's just irrelevant and I think the case [h]as to rise and fall based on the 201[6] replacement.

With respect to the County's alleged payment for the 2009 surgery, the court stated:

I think it's highly prejudicial. . . . [I]t tells the jury, look they paid for this and they got to pay for that. It's a partial there and now it's a full. . . . I think it's, it would be highly prejudicial to the County to tell the jury that the County paid for a 2009 partial knee replacement. I think it's like it's almost tantamount to telling them then they certainly should pay and the[y're] obligated, it's causally connect it [sic] to the full knee replacement

in 2016. So, I'll grant the County's motion in limine with respect to the County having paid . . . .

At the conclusion of the jury trial, the jury found that, although "the left total knee replacement surgery performed on January 6, 2016 [was] reasonable and necessary," it was not "causally related to the accidental injury of April 12th, 2006." Additional facts relevant to this appeal are included in the discussion below.

### DISCUSSION

In her brief, Brown-Ruby contends that the trial judge erred in excluding the portion of Dr. Panagos's testimony relating to the causal connection of her 2009 partial knee replacement to the 2016 surgery, as well as evidence regarding the County's payment for the 2009 surgery. Brown-Ruby argues that the testimony should have been admitted because Dr. Panagos had a sufficient factual basis to support his testimony on this issue, and because the County "opened the door" as to the excluded testimony at trial. We see no merit in these arguments.<sup>2</sup>

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<sup>2</sup> Brown-Ruby also makes an additional argument on a point that was not decided by the trial court. Brown-Ruby asserts: "The County's Objections To Preclude Dr. Panagos's Testimony Because There Was Allegedly 'No Discovery Provided To Put The County on Notice' Is False And Therefore, The Testimony is Admissible." We decline to address this argument because the alleged discovery violation was not the basis for the trial judge's ruling. Although the County did argue that Brown-Ruby failed to adequately disclose that there would be testimony on this issue, the trial judge made no mention of this in explaining the court's rationale for granting the County's motion, stating:

I think it'd be highly prejudicial to the County for the doctor to opine as to the 2009 causal connection and they might just think well [s]he had a partial knee there so of course now you have a full knee, it's just irrelevant and I think the case [h]as to rise and fall based on the 201[6] replacement.

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**I. Exclusion of the testimony.**

Brown-Ruby's primary contention on appeal is that the trial judge erred in excluding Dr. Panagos's testimony because the "causal relationship between all of Ms. Brown-Ruby's prior surgeries and her work injury is the ultimate issue in the case at bar . . . ." Therefore, Brown-Ruby argues, Dr. Panagos's testimony as to the complete history of treatment to her knee was necessary to inform the jury's decision as to the need for a total knee replacement in 2016. Brown-Ruby further asserts that the "crux of the dispute rests solely upon . . . whether a sufficient factual basis exists to support [the excluded] expert testimony . . . [and whether testimony regarding] her 2009 partial knee replacement is necessary to establish causation for the total knee replacement in 2016." She maintains that, because a factual basis exists for the excluded testimony, the testimony should have been admitted. In support of this argument, Brown-Ruby relies on our decision in *Giant Food, Inc. v. Booker*, 152 Md. App. 166 (2003).

The County, on the other hand, points out that there were only two issues that needed to be decided by the jury on appeal: "(1) [The] reasonableness and necessity of the 2016 surgery and (2) [the] causal relationship of the 2016 surgery to the 2006 accident." The County asserts that Dr. Panagos *was* permitted to testify and express

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The trial judge reached a similar conclusion with regard to testimony as to the County's alleged payment for Brown-Ruby's 2009 partial knee replacement, noting that "it's highly prejudicial . . . it tells the jury, look they paid for this and they got to pay for that." There is no indication in the record that Brown-Ruby's discovery responses played any role in the trial judge's decision to grant the County's motion.



opinions as to *both* of these issues. And the County argues that the trial judge properly exercised his discretion to preclude very limited portions of Dr. Panagos’s testimony pursuant to Maryland Rule 5-702, because Brown-Ruby’s 2009 surgery “was not on appeal in this case and [the testimony was] properly excluded as inappropriate.”

Although Maryland Rule 5-402 provides that, subject to exceptions, “all relevant evidence is admissible,” Maryland Rule 5-403 qualifies this presumption of admissibility, and states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

If the trial judge determines the probative value of the evidence is outweighed by the danger of unfair prejudice, or possible confusion of the issues, or misleading the jury, “Rule 5-403 permits the exclusion of even relevant evidence.” *City of Frederick v. Shankle*, 367 Md. 5, 16 (2001). The trial judge’s decision in this regard is reviewed for abuse of discretion. *Franch v. Ankney*, 341 Md. 350, 364 (1996).

In addition to these general rules regarding relevance, Maryland Rule 5-702 addresses the admissibility of expert testimony. Rule 5-702 requires a trial court to determine the satisfaction of three factors prior to admitting an expert’s testimony:

Expert 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. In making that determination, the court **shall determine** (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.

(Emphasis added.)

The Court of Appeals has recognized that “[a] trial court is given broad discretion in ruling on the admissibility of expert testimony . . . .” *Hartless v. State*, 327 Md. 558, 576 (1992) (citations omitted). *See also Raithel v. State*, 280 Md. 291, 301 (1977) (citations omitted) (“[T]he admissibility of expert testimony . . . will seldom constitute a ground for reversal.”) The Court of Appeals explained that a trial judge’s decision to admit or exclude expert testimony under Rule 5-702 is reviewed on appeal for abuse of discretion in *Franch, supra*, 341 Md. at 364 (internal citations omitted):

A trial judge’s decision to admit or exclude expert testimony will be reversed only if it is founded on an error of law or some serious mistake, or if the judge has abused his discretion. Further, if an expert’s opinion testimony is based upon a premise which is shown to be unsound or faulty, the judge should strike the testimony.

In the present case, we agree with the County that the trial court did not abuse its discretion in excluding very limited portions of Dr. Panagos’s testimony. The court’s explanation of its ruling on the County’s motion *in limine* indicates that the trial judge excluded Dr. Panagos’s testimony under the “appropriateness” prong of Rule 5-702, and the exceptions to the admission of otherwise relevant evidence under Rule 5-403. Although the judge did not use the words “unfairly prejudicial,” his explanation clearly indicated that he was excluding this particular testimony because it was “highly prejudicial” and created a danger of confusing the jury, or misleading the jury, about the issues they were going to be asked to decide in this case. Even if that assessment could

be debated, it was within the range of reasonable judicial conclusions, and was therefore not an abuse of discretion.

As noted, Dr. Panagos's opinion on the cause of Brown-Ruby's 2009 surgery was the only portion of testimony redacted from Dr. Panagos's video deposition when it was played at trial. Dr. Panagos was permitted to opine on the issues on appeal, and to testify in great detail regarding the 2009 surgery. For example, Dr. Panagos provided detailed testimony as to the circumstances "that [he believed] ultimately led to [Brown-Ruby's] 2009 surgery," in addition to testimony that, in his opinion, Brown-Ruby had "degenerative findings" in her knee at the time of this 2009 partial knee replacement. Moreover, Dr. Panagos was permitted to testify as to whether he believed this 2009 surgery was related to Brown-Ruby's claimed need for the 2016 total knee replacement. The following question and answer were played for the jury:

[BY COUNSEL FOR BROWN-RUBY]:

Q: Okay and are you aware that she had that total knee replacement in January of 2016?

[DR. PANAGOS]: I am aware.

[COUNSEL FOR BROWN-RUBY]: My apologies. Do you have reason, an opinion to a reasonable degree of medical probability Doctor, regarding whether or not her total knee replacement surgery that took place on January 6th, 2016, was related to the 2009 partial knee replacement[?]

[DR. PANAGOS]: Well, the 2009 partial knee replacement was designed to improve her symptoms from medial compartment disease that she had. It didn't do anything for the lateral compartment disease that she had and she did not receive sustained benefit from that medial compartment arthroplasty beyond the first couple of years. So, ultimately, I think that procedure did not serve her well and she ended up needing a total knee.

Accordingly, we hold that the trial judge's decision to grant the County's motion *in limine* to preclude the above-quoted portions of Dr. Panagos's testimony was not an abuse of discretion.

## **II. The "opening the door" doctrine.**

Both doctors testified at trial via video deposition. Brown-Ruby played Dr. Panagos's deposition during her case-in-chief. The County played Dr. Boucher's deposition during its case-in-chief. There was no rebuttal.

During a portion of Dr. Boucher's video deposition played at trial, counsel for Brown-Ruby asked the doctor on cross-examination if he had an opinion as to whether Brown-Ruby's 2009 partial knee replacement was causally related to her 2006 work-related injury. After the County noted an objection, Dr. Boucher testified that he did not believe there was a causal relationship. The colloquy referred to in Brown-Ruby's brief as opening the door was as follows:

[BY COUNSEL FOR BROWN-RUBY]

Q: [. . .] Despite the fact that [Brown-Ruby's] treating surgeon performed the surgery that we discussed, removing portions of the cartilage from her knee in 2006, and despite the fact that you agree that there is a tear in the meniscus, the cartilage in the knee, and that can result in post-traumatic arthritis. It is your opinion that her surgery tear and 2006 surgery has absolutely zero contribution to her need for the 2009 partial knee replacement?

[COUNSEL FOR THE COUNTY]: Objection. Relevance. Go ahead, doctor.

[DR. BOUCHER]: The way I would put it is that I do not believe her partial knee replacement in 2009 was related to her treadmill injury in 2006. That does not mean that Dr. Weiss did an inappropriate surgery for

arthritis, but that would have been related to an existing condition that was getting worse over time.

[COUNSEL FOR BROWN-RUBY]: Okay, and to be clear, it's your opinion that the incident that we agree resulted in a tear and a surgery in 2006 --

[DR. BOUCHER]: Correct.

[COUNSEL FOR BROWN-RUBY]: -- has absolutely zero contribution for the need for that surgery?

[COUNSEL FOR THE COUNTY]: Objection, Asked and answered, Counselor. You can answer again, Doctor.

[DR. BOUCHER]: Yes, I believe that her partial knee is not related to that injury in 2006.

Although the County objected to this testimony at the time the deposition was recorded, neither party objected when the deposition was played at trial, despite the fact that, prior to trial, the trial judge had granted the County's motion *in limine* to exclude opinion testimony on this topic from Dr. Panagos.

Brown-Ruby did not ask the trial court to revisit the rulings relative to Dr. Panagos *after* Dr. Boucher's deposition was played at trial, and did not ask to play the excluded portion of Dr. Panagos's testimony in rebuttal. But Brown-Ruby now contends, for the first time on appeal, that the County "opened the door" to Dr. Panagos's excluded testimony by playing the above portion of Dr. Boucher's video deposition wherein he opined on the lack of any connection between Brown-Ruby's 2009 surgery and her 2006 injury. This argument was not made at trial, and cannot be raised for the first time on appeal.

**JUDGMENT OF THE CIRCUIT  
COURT FOR MONTGOMERY  
COUNTY AFFIRMED. COSTS TO  
BE PAID BY APPELLANT.**