UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2348

SEPTEMBER TERM, 2014

SEAN HANNON, *et al.*

v.

MERCY MEDICAL CENTER, INC., *et al.*

Eyler, Deborah S.,
Graeff,
Kenney, James A., III
(Retired Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: January 11, 2016

In the Circuit Court for Baltimore City, Sean Hannon ("Sean"), individually and as Personal Representative of the Estate of Andrew Hannon ("the Estate"), and his brother Ryan Hannon ("Ryan"), the appellants, brought medical malpractice wrongful death and survival actions against Beth Jolly, M.D., and Mercy Medical Center, Inc. ("Mercy"), the appellees.[1] They were represented by Paul Bekman, Wendy Shiff, and Salsbury, Clements, Bekman, Marder & Adkins, LLC ("Trial Counsel").

On September 5, 2014, Trial Counsel moved to withdraw their appearance pursuant to Rule 2-132(b). The appellants did not oppose that motion. In two subsequent orders, the circuit court granted Trial Counsel's motion to withdraw. Two weeks later, Sean filed a motion for reconsideration, which the court denied on October 28, 2014. The appellants retained new counsel on November 14, 2014.

The appellants did not secure their sole expert witness to testify at trial, and they did not schedule him for a *de bene esse* deposition. Dr. Jolly and Mercy filed a motion for summary judgment on the ground that, without expert testimony, the appellants could not make out a *prima facie* case. After a hearing on November 17, 2014, the circuit court granted summary judgment in favor of Dr. Jolly and Mercy. Judgment was entered on November 26, 2014. This timely appeal followed.

The appellants raise two questions for review, which we rephrase as follows:

I. Did the circuit court abuse its discretion by granting Trial Counsel's motion to withdraw appearance?

[1] For ease of discussion, we shall refer to members of the Hannon family by their first names.

II. Did the circuit court err by granting summary judgment in favor of Dr. Jolly and Mercy?

For the following reasons, we shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

Andrew Hannon ("Andrew"), Sean and Ryan's father, suffered from multiple diseases and conditions for many years. They included chronic kidney disease, kidney failure requiring hemodialysis, paraplegia, diabetes mellitus type II, sepsis, septic shock, aortic valve endocarditis, anemia, atrial fibrillation, hypertension, and lower extremity ulcers. Due to his ailments, Andrew took multiple medications and was fed through a tube in his stomach.

On May 11, 2009, Andrew was transported by ambulance to Mercy, presenting with facial swelling and a fever. He was admitted and remained in the hospital for monitoring. On May 13, 2009, around 11:40 a.m., a nurse notified Dr. Jolly (a resident at the time) that Andrew's oxygen saturation level had lowered and that he had vomited earlier that morning. Dr. Jolly discontinued Andrew's feeding tube and placed him on oxygen, which returned his saturation levels to normal. She ordered a chest x-ray and requested that a respiratory therapist see Andrew "stat."

An hour later, an x-ray technician found Andrew unresponsive. An emergency response code was called. Andrew was intubated and transferred to the Intensive Care Unit ("ICU"). He had experienced cardiorespiratory arrest. Two hours later, he was fully alert. The doctors performed a bronchoscopy to determine the cause of his

breathing impairment.[2] The bronchoscopy showed that a large, "concreted" mucous plug had blocked Andrew's left lung, making it difficult for him to breathe.[3] The doctors successfully removed the mucous plug. Andrew continued to be treated for his presenting conditions. On June 16, 2009, he was discharged to Levindale Nursing and Rehabilitation Center, where he remained for several months.

While at Levindale, Andrew developed a urinary tract infection and septic shock. At various times he was transferred to hospitals for treatment. In November of 2009, he was admitted to the University of Maryland Medical System ("UMMS"), where he was placed in the ICU. He remained in the ICU for 125 days. On March 17, 2010, he died of septic shock with multi-organ failure.

On May 14, 2013, the appellants filed their complaint and election for jury trial in the circuit court.[4] They alleged that Dr. Jolly had breached the standard of care by failing to perform immediate deep nasal suctioning on the morning of May 13, 2009, when she learned that Andrew's oxygen saturation levels had lowered and that he had vomited

[2] A bronchoscopy is a procedure where a bronchoscope passes through the trachea and permits inspection of the interior tracheobronchial tree. It is used for the diagnosis and removal of, *inter alia*, mucous plugs. *See* 4 Robert K. Ausman & Dean E. Snyder, *Medical Library, Lawyer's Edition* 167 (1989).

[3] Mucous plugs are "abnormally thick mucus occluding the bronchi and bronchioles[.]" *Dorland's Illustrated Medical Dictionary* 1469 (32d ed. 2012).

[4] They initially filed suit in the Health Claims Alternative Dispute Resolution Office ("HCADRO") on May 12, 2012. They unilaterally waived arbitration and proceeded directly to the Circuit Court for Baltimore City.

earlier that day; that, as a result, a "massive aspiration" of tube feeding went into his lungs; that the "massive aspiration," and not the mucous plug, had caused his cardiorespiratory arrest; and that Dr. Jolly's negligence was the proximate cause of Andrew's death on March 17, 2010. Mercy was sued for vicarious liability as Dr. Jolly's employer. The court issued a Scheduling Order establishing a discovery cutoff date of April 8, 2014.

During the discovery phase of the litigation, Sean and Ryan failed to cooperate and comply with discovery requests. In response to a motion to compel, the circuit court ordered that Sean and Ryan make themselves available for depositions and answer interrogatories and requests for production of documents by a specified date. The court postponed the trial date until October 30, 2014.

Sean failed to appear for his deposition, and he and Ryan failed to produce documents and furnish complete written discovery. On July 15, 2014, Dr. Jolly and Mercy filed a motion for sanctions. The appellants filed an opposition.

On August 13, 2014, Trial Counsel sent Sean and Ryan a letter stating their intent to withdraw as counsel pursuant to Rule 2-132(b). The letter stated that "a conflict has arisen whereby we believe we cannot comply with the Maryland Lawyer's Rules of Professional Conduct." The letter further advised Sean and Ryan that they should arrange to have another attorney enter an appearance or they should notify the court that they intended to proceed *pro se*. Trial Counsel offered to meet with Sean and Ryan about the withdrawal. Ryan met with Trial Counsel, but Sean declined.

On August 25, 2014, the court held a hearing on the motion for sanctions and granted it in part, dismissing, with prejudice, Sean's wrongful death claim and all of the claims for economic loss by all the appellants.[5] The court's ruling left outstanding the survival action and Ryan's wrongful death claim.

On September 5, 2014, Trial Counsel filed their motion to withdraw appearance. They asserted that "[m]ultiple circumstances have arisen within the past several weeks between the Plaintiffs and the undersigned counsel that warrant counsel withdrawing their representation of the Plaintiffs in this case." The August 13, 2014 letter to Sean and Ryan and the required certification under Rule 2-132(b) were attached. No opposition was filed.

By order of October 3, 2014, docketed on October 9, 2014, the court granted Trial Counsel's motion to withdraw with respect to Sean. By order dated October 7, 2014, docketed on October 21, 2014, the court granted the motion to withdraw with respect to Ryan.

On October 23, 2014, Sean filed a motion for reconsideration as to both orders. He argued that Trial Counsel was aware of any existing conflict before entering their appearance and that allowing Trial Counsel to withdraw would have a "material adverse effect on" the appellants' interests. On November 3, 2014, the court entered an order denying Sean's motion.

[5] The appellants do not challenge this ruling on appeal.

In the meantime, Sean and Ryan scheduled a *de bene* esse deposition, by videotape, of Elliot Goldstein, M.D., their sole expert witness. On October 14, 2014, they notified counsel for Dr. Jolly and Mercy that the deposition was cancelled and had not been rescheduled. On October 29, 2014, Dr. Jolly and Mercy filed a motion for summary judgment on the ground that the appellants could not present a *prima facie* case of medical negligence without expert testimony.

The parties appeared before the court on October 30, 2014, at which time the appellants requested a postponement. The court scheduled a hearing on pending motions for November 17, 2014, and postponed the trial to December 1, 2014.

On November 14, 2014, the appellants retained new counsel. Neither new counsel nor the appellants individually filed an opposition to the motion for summary judgment. At a hearing on November 17, 2014, the court granted the motion.

DISCUSSION

I.

The appellants contend the circuit court abused its discretion by granting Trial Counsel's motion to withdraw their appearance. They argue that "[t]here is nothing in the record which would have warranted [Trial Counsel's] withdrawal from [representing] the Estate . . . or Ryan" and that the court "received no information from [Trial Counsel] upon which a rational decision maker could conclude that" a conflict existed. They maintain that Trial Counsel violated their ethical duties under the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") by moving to withdraw, that the court's

ruling adversely affected them, and that the court violated their constitutional right to counsel by granting the motion to withdraw.[6]

Dr. Jolly and Mercy counter that Trial Counsel complied with Rule 2-132(b), that Sean conceded in his motion for reconsideration that a conflict existed, and that the court acted within its discretion by granting Trial Counsel's motion to withdraw. They argue that the appellants were not prejudiced by the court's ruling because they retained new counsel less than a month later.

In *Serio v. Baystate Properties, LLC*, 209 Md. App. 545 (2013), we explained:

> To grant or deny a motion to withdraw as counsel . . . is "in the sound discretion of the trial court." *Das v. Das,* 133 Md. App. 1, 31 (2000) (quoting *Thanos v. Mitchell,* 220 Md. 389, 392 (1959)). We review the trial court's decision for an abuse of discretion and "unless [the] court acts arbitrarily in the exercise of that discretion, [its] action will not be reviewed on appeal." *Id.* at 26. We will reverse the circuit court only in "exceptional instances where there was prejudicial error." *Thanos,* 220 Md. at 392. *See also Das,* 133 Md. App. at 26. An abuse of discretion occurs "where no reasonable person would take the view adopted by the court" or if the court acts "without reference to any guiding rules or principles." *North v. North,* 102 Md. App. 1, 13 (1994).

Id. at 554 (alterations in original, parallel citations omitted).

[6] The appellants cite to the Maryland Constitution, Articles 5(a)(1)(c), 20, and 23 for the proposition that there is an "absolute" right "not subject to alteration except upon amendment" to "both litigate and be represented by counsel[.]" This argument is misplaced, as there is no constitutional right to representation in a civil case under the laws of Maryland. *See Abrishamian v. Wash. Med. Grp, P.C.*, 216 Md. App. 386, 407 (2014) (holding that appellants in civil, as opposed to criminal cases, "enjoy . . . no such constitutional right to counsel").

Rule 2-132 governs the procedure for attorney withdrawal in civil cases.[7] It states, in relevant part:

> **(a) By Notice**. When the client has another attorney of record, an attorney may withdraw an appearance by filing a notice of withdrawal.
>
> **(b) By Motion.** When an attorney is not permitted to withdraw an appearance by notice under section (a) of this Rule, the attorney wishing to withdraw an appearance shall file a motion to withdraw. Except when the motion is made in open court, the motion shall be accompanied by the client's written consent to the withdrawal or the moving attorney's certificate that notice has been mailed to the client at least five days prior to the filing of the motion, informing the client of the attorney's intention to move for withdrawal and advising the client to have another attorney enter an appearance or to notify the clerk in writing of the client's intention to proceed in proper person. Unless the motion is granted in open court, the court may not order the appearance stricken before the expiration of the time prescribed by Rule 2-311 for responding. The court may deny the motion if withdrawal of the appearance would cause undue delay, prejudice, or injustice.
>
> **(c) Notice to Employ New Attorney.** When, pursuant to section (b) of this Rule, the appearance of the moving attorney is stricken and the client has no attorney of record and has not mailed written notification to the clerk of an intention to proceed in proper person, the clerk shall mail a notice to the client's last known address warning that if new counsel has not entered an appearance within 15 days after service of the notice, the absence of counsel will not be grounds for a continuance. The notice shall also warn the client of the risks of dismissal, judgment by default, and assessment of court costs.

The MLRPC are adopted by Rule 16-812 and are set forth in an appendix to that rule. MLRPC 1.16 is entitled "Declining or Terminating Representation. In subsection

[7] Rule 2-132, as shown above, was in effect during the underlying litigation. The rule was amended on March 2, 2015, and the amendment became effective on July 1, 2015. Changes were made to subsections (a) and (d). The changes are not relevant to this appeal.

(a), it provides that if a lawyer has complied with Rule 2-132 regarding notice to the client, and unless the tribunal orders otherwise, a lawyer "shall withdraw from the representation of a client if: (1) the representation will result in violation of the [MLRPC] or other law." Comment [3] to this rule states, in pertinent part:

> [C]ourt approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. ***The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient***. . . .

(Emphasis added.)

Here, Trial Counsel "complied with the procedural requirements of the Maryland Rules in terminating [their] representation." *Serio*, 209 Md. App at 554. The appellants were on notice as of August 13, 2014, that Trial Counsel intended to withdraw their appearance and that they should retain new counsel. Trial counsel represented in the motion to withdraw that "[m]ultiple circumstances have arisen within the past several weeks between the Plaintiffs and the undersigned counsel that warrant counsel withdrawing their representation of the Plaintiffs in this case"; and the August 13, 2014 letter from Trial Counsel to Sean and Ryan, stating that "a conflict has arisen whereby we believe we cannot comply with the [MLRPC]," was attached to the motion. In that

circumstance, Trial Counsel was required to withdraw, and the court did not abuse its discretion in granting Trial Counsel's motion to withdraw.[8]

II.

The appellants designated Dr. Goldstein, a board certified internist, as their sole expert witness.[9] His discovery deposition was taken on August 12, 2014. On October 1, 2014, the appellants notified Dr. Jolly and Mercy that they intended to take a videotaped deposition of Dr. Goldstein for use at trial. (The notice of service and attached letter did not specify where and when the deposition would take place.) The trial was scheduled to commence on October 30, 2014. On October 14, 2014, Sean e-mailed Dr. Jolly and Mercy's counsel, cancelling Dr. Goldstein's videotaped deposition. In the e-mail, Sean stated that he was "looking for another lawyer." At that point, Dr. Goldstein had not been paid and was not secured to testify at trial.

As explained above, Dr. Jolly and Mercy filed a motion for summary judgment arguing that the case involved complex medical issues and that the appellants could not prove a *prima facie* case of medical malpractice without expert testimony. No opposition to the motion for summary judgment was filed.

[8] We note that Sean's motion for reconsideration provides details that make plain that a conflict of interest had arisen between Trial Counsel and Sean and Ryan with respect to all claims.

[9] Dr. Goldstein signed Sean and Ryan's certificate and report of qualified expert in the HCADRO.

On November 17, 2014, the circuit court held a hearing on pending motions, including the motion for summary judgment. By then, the appellants had retained new counsel. The court heard arguments from both sides. Counsel for the appellants did not argue that Dr. Goldstein had been retained to testify in the upcoming trial.

The court granted the motion for summary judgment, stating:

> Now, with respect to the Defendants' Motion for Summary Judgment, . . . the Court finds, and it is also undisputed, that the Plaintiffs in this case cannot put forth a *prima facie* case.
>
> And so the Defendants of this case, were the case even to proceed to trial, would be granted a directed verdict, if you will, or judgment at the close of Plaintiffs' case, because the Plaintiff [sic] has not produced expert testimony. This is a complex-medical-issue case, not just a medical-issue case, a complex-medical-issue case for which an expert would be required.
>
> And the Plaintiffs do not have one. And there is no -- there is nothing we could put in front of the jury on causation or anything else without such an expert. . . .
>
> However, nonetheless, without an expert -- particularly with the Decedent in this case having so many health issues over the years -- there is absolutely no way this case could go to a jury without expert testimony. Which the Plaintiffs -- it's undisputed that the Plaintiffs just do not have.

The appellants contend the court's ruling was in error because Dr. Goldstein had opined, in his discovery deposition, that Dr. Jolly breached the applicable standard of care and that that breach was the proximate cause of Andrew's death.

Dr. Jolly and Mercy respond that Dr. Goldstein's videotaped deposition—which was to be used in lieu of his appearance at trial—was cancelled and was not rescheduled, and that the appellants had not secured Dr. Goldstein's appearance for trial. Without any expert testimony at trial, the appellants could not make out a *prima facie* case for medical malpractice.

Rule 2-501 provides in relevant part:

> **(f) Entry of Judgment.** The court shall enter judgment in favor of or against the moving party if the motion and response show that ***there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law***. . . .

(Emphasis added.) The standard of review "on the grant of a motion for summary judgment . . . is 'whether the trial court's grant of the motion was legally correct.'" *Puppolo v. Adventist Healthcare, Inc.*, 215 Md. App. 517, 532–33 (2013) (quoting *Laing v. Volkswagen of Am., Inc.*, 180 Md. App. 136, 152–53 (2008)); *see also Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 440 (2007) ("[T]his Court reviews a trial court's grant of summary judgment *de novo* in order to determine whether the trial court was legally correct.").

It is well established that the plaintiff in a complex medical malpractice action must introduce expert testimony to prove a breach of the standard of care and causation. *Mathews v. Cassidy Turley Md., Inc.*, 435 Md. 584, 624-25 n.43 (2013) ("[E]xpert testimony is generally necessary to establish the requisite standard of care owed by the professional. This is because the professional standards are often beyond the ken of the average layman[.]" (internal citations omitted)); *Rodriguez v. Clarke*, 400 Md. 39, 71 (2007) ("Because the gravamen of a medical malpractice action is the defendant's use of suitable professional skill, which is generally a topic calling for expert testimony, this Court has repeatedly recognized that expert testimony is required to establish negligence and causation.") (internal citations omitted)).

In the case at bar, where Andrew had a history of complex medical problems prior to the alleged negligence, the propriety of Dr. Jolly's treatment would not be within the knowledge of the average layperson, and the causal connection, if any, between Dr. Jolly's acts or omissions and Andrew's death over a year later also is not within such common knowledge, expert witness testimony *at trial* on the standard of care and causation was essential to prove a *prima facie* case.

There is no merit to the argument that summary judgment should not have been granted because Dr. Goldstein gave adequate opinions on standard of care and causation in his discovery deposition. Even if his opinions were adequate (which Dr. Jolly and Mercy argued they were not), that is irrelevant because his discovery deposition would not be admissible in evidence. Either Dr. Goldstein had to appear in court and testify in person at trial, or his testimony had to be admitted by means of a *de bene esse* deposition. Neither was going to happen, and therefore Sean and Ryan would not be able to present a *prima facie* case. The court correctly granted summary judgment.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY THE APPELLANTS.