UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2259

September Term, 2014

PATRICIA CHANCE, ET AL.

v.

BON SECOURS HOSPITAL, ET AL.

Meredith,
Friedman
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.
Dissenting Opinion by Friedman, J.

Filed: May 2, 2017

After her son committed suicide, Patricia Chance, individually and as Personal Representative of the Estate of Brandon Mackey ("Chance"), appellants, filed suit in the Circuit Court for Baltimore City against Dr. Leroy M. Bell ("Dr. Bell") and Bon Secours Hospital Baltimore, Inc. ("Bon Secours"), appellees, alleging that Dr. Bell had negligently discharged her son (Brandon Mackey) from involuntary inpatient psychiatric treatment at Bon Secours and caused his death by suicide. At the conclusion of a jury trial, the jury awarded appellants $6,112 in economic damages and $2,300,000 in non-economic damages. The amount of the award for non-economic damages was reduced to $695,000, the statutory limit on non-economic damages imposed by Maryland Code (1973, 2013 Repl. Vol.), Courts and Judicial Proceedings Article, § 3-2A-09.

Dr. Bell and Bon Secours filed a Motion for Judgment Notwithstanding the Verdict or Alternatively Motion for a New Trial. After conducting a hearing, the trial court granted the motion for judgment notwithstanding the verdict, and entered judgment in favor of appellees. Chance filed this appeal.

QUESTIONS PRESENTED

Chance presents the following questions for our consideration:

> I. Did the circuit court err when it required the appellants to prove that "no reasonable physician" would have released Brandon Mackey from involuntary confinement under the circumstances in this case?
>
> II. Did the circuit court err when it ruled that appellants did not produce legally sufficient evidence on which a reasonable fact-finder could find the elements of medical malpractice by a preponderance of the evidence?
>
> III. Did the circuit court err by *sua sponte* raising new arguments not raised by the appellees in their motions for judgment and JNOV?

Because we answer the second question in the affirmative, we shall reverse the circuit court's judgment, and remand the case for further proceedings.

FACTUAL BACKGROUND

Brandon Mackey, who was twenty-three years old at the time of his death by suicide on April 10, 2011, had suffered from mental illness since he was a teenager. In 2011, Mackey was admitted to Bon Secours and placed under the care of Dr. Bell twice prior to Mackey's suicide. The first admission to Bon Secours was on March 13, 2011, after Mackey attempted to cut his wrists. Mackey was placed under the care of Dr. Bell, who initially diagnosed Mackey with "major depressive disorder, rule out bipolar disorder, major depressive disorder." On March 21, 2011, Mackey was released.

Less than two weeks after his March 2011 discharge, Mackey was readmitted to Bon Secours on April 1, 2011, after he made another suicide attempt. Two clinicians signed certificates for him to be involuntarily admitted, and he was again placed under the care of Dr. Bell. Dr. Bell made a diagnosis of "schizoaffective disorder, bipolar type," and prescribed the medication Risperdal (also known as Risperidone). Dr. Bell discharged Mackey on April 9, 2011. The next day (April 10, 2011), Mackey committed suicide by jumping in front of a Metro train.

Chance sued Dr. Bell and Bon Secours, alleging that negligent medical care provided by Dr. Bell was a proximate cause of Mackey's untimely death, and that Bon Secours was vicariously liable for the negligence of Dr. Bell. (At trial, the parties stipulated that Dr. Bell was an employee of Bon Secours.) The case was tried to a jury.

We are required to view the trial evidence, and all inferences from the evidence, in the light most favorable to the parties in whose favor the jury returned a verdict. *See, e.g.*, *Houston v. Safeway Stores, Inc.*, 346 Md. 503, 521 (1997). Bearing in mind that obligation, we note that the record reflects that, at the jury trial, Chance called Dr. Nicola G. Cascella, a board-certified psychiatrist employed by Sheppard Pratt Health System, to testify as an expert witness on the standard of care and causation. Dr. Cascella testified that he completed his residency in psychiatry at Johns Hopkins in 1999, and was then hired as an assistant professor at Johns Hopkins in the Department of Psychiatry and Behavioral Sciences, where he served until 2011, when he left Johns Hopkins and moved his practice to Sheppard Pratt. During the time he was an assistant professor at Johns Hopkins, he was in charge of the schizophrenia consultation clinic.

Dr. Cascella testified that, in his opinion, Dr. Bell breached the applicable standard of care by discharging Mackey before confirming that the prescribed medication was showing adequate impact, and that the premature release was a proximate cause of Mackey committing suicide the day after his release. Dr. Cascella's testimony included the following on direct examination:

> Q. [BY PLAINTIFFS' COUNSEL] Now, Doctor, do you have an opinion as to whether Dr. Bell's act of prescribing Risperdal on April 6, 2011, an[d] ultimately discharging Brandon Mackey on April 9 of 2011, whether that met the standard of care?
>
> [An objection to the form of the question was overruled.]
>
> THE WITNESS: Yes
>
> Q. What is that opinion?

A. [BY DR. CASCELLA] . . . in my opinion, of course, the time that lapsed between the institution of the treatment and the response – to assess the response to the core symptoms, as we said – because, I mean, after all, that was the intention behind the prescription – of – of Risperidone at the time [--] was not sufficient.

Q. Were the core symptoms that you observed in the records that were not – did not appear to be treated by the Risperdal?

A. Right.

Q. And they were present on April – were they present on April 9, 2011?

A. Mmm-hmm, based on the reports, you know, even the day before, as we saw the four – you know, he seemed to respond to internal stimuli, although he denied hallucinations and delusions.

Q. Is there anything else, Doctor, in terms of –

A. Those are the, you know, three, four elements. You know, if you go from diagnosis; to implementation of treatment; you know, collection of prior records as we discussed; obtaining collateral information from the relatives of the patient; and then, of course, you know, the treatment plan at time of discharge.

And I think you know the somehow disconnection, you know, between, you know, the assessment that the staff had made at the time just even 24 hours prior to his discharge and, you know, the fact that he was deemed poor insight, insightless. I actually, quite insightless and with poor judgment. You know, that convinced me that indeed there was a breach in that standard of care.

Q. Doctor, in your opinion, was Dr. Bell's decision to discharge Brandon Mackey on April 9, 2011, in accordance with the standard of care.

A. I just said no.

Q. **Doctor, was defendant Bell's breach of the standard of care the proximate cause of Brandon Mackey's death?**

A. We are talking in terms of, as we said, you know, in the beginning, probabilistic, you know, **medical probability**. So it's not a certainty as you say, but **I would say there is a relation between what happened, you know, on the unit at the time of discharge and then the outcome of this case.**

Q. **So more likely than not, it was the cause?**

A. **More likely than not; right.**

* * *

Q. Doctor, just so the record's clear – I think some of it was already covered – was Dr. Bell's care and treatment of Brandon Mackey, in your opinion, in accordance with the standard of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time the alleged act giving rise to my client's cause of action?

A. In my opinion, it was not.

(Emphasis added.)

On cross-examination, Dr. Cascella testified:

Q. [BY DEFENSE COUNSEL] Now, in this case, I mean, you're not – it's not your opinion that all signs and symptoms of psychosis need to be gone prior to a discharge; right?

A. Mmm-hmm, definitely, yeah.

Q. Definitely what?

A. That not all signs of the psychosis have to disappear. That's for sure, yes.

Q. Right.

A. But, you know, I want to – you know, as a – you know, I would say I would like to see some significant decrease of those symptoms before I release the patient.

> **Q. So I think – and maybe I can ask it this way. A physician can comply with the standard of care if they see improvement in the psychotic symptoms, but discharge the patient that still has some symptoms of psychosis?**
>
> **A. Yeah, definitely. But this was not the case with Mr. Mackey, unfortunately, as we went on this morning, but anyway.**

(Emphasis added.)

On redirect examination, Dr. Cascella again expressed his opinion that Dr. Bell should not have discharged Mackey on April 9:

> Q. [BY PLAINTIFFS' COUNSEL] Is it your opinion that Brandon Mackey was at too great of a risk to discharge on April 9, 2011?
>
> [An objection to the question as leading was overruled by the court.]
>
> THE WITNESS [DR. CASCELLA]: It was determined by, you know, objective risk assessment that he was at high risk.
>
> BY [PLAINTIFFS' COUNSEL]
> Q. But is it your opinion though that –
>
> A. It is my opinion, yes.
>
> Q. -- he was at too high of a risk to discharge on April 9, 2011? Yes?
>
> A. Yes.

Dr. Cascella also testified that, at the time Mackey was discharged by Dr. Bell, Mackey continued to meet the criteria for involuntary commitment:

> Q. Is it your opinion on April 9th, 2011, that Brandon Mackey continued to meet all five criteria [for involuntary commitment]?
>
> A. All five criteria . . . I would say yes.

* * *

> My opinion, I think he would have met, you know, the criteria of retaining him and going in front of the judge for a hearing.

Appellees' witnesses at trial included Dr. Bell and Dr. John R. Lion, a psychiatrist, who testified as an expert witness. At the close of the appellants' case, and again at the close of all evidence, appellees moved for judgment, arguing that Dr. Cascella's testimony was inadequate to permit the jury to find a breach of the standard of care on the part of Dr. Bell or to find causation. The trial judge denied the motions, and the case was submitted to the jury, which returned a verdict that awarded Chance $6,112 in economic damages and $2,300,000 in non-economic damages. This verdict was reduced to $701,112 to comply with the statutory limit of $695,000 for non-economic damages.

Dr. Bell and Bon Secours filed a Motion for Judgment Notwithstanding the Verdict or Alternatively Motion for a New Trial. In their supporting memorandum, appellees argued that Chance failed to produce sufficient evidence that Dr. Bell breached the standard of care, or that any alleged breach caused Mackey's suicide. After holding a hearing, the trial court granted the motion for judgment notwithstanding the verdict, and entered judgment in favor of appellees. (The trial court made no separate mention of the alternative motion for new trial.) This appeal followed.

STANDARD OF REVIEW

We review the decision of the circuit court *de novo. Univ. of Md. Med. Sys. Corp. v. Gholston*, 203 Md. App. 321 (2012). In *Gholston*, Judge Deborah Eyler explained:

> The standard of review of a question of the sufficiency of the evidence is *de novo*. *Polk v. State*, 378 Md. 1, 7–8 (2003). In a civil case, the evidence is legally sufficient to support a finding in support of the prevailing party if, on the facts adduced at trial viewed most favorably to that party, any reasonable fact finder could find the existence of the elements of the cause of action by a preponderance of the evidence. *Hoffman v. Stamper*, 385 Md. 1, 16, 867 A.2d 276 (2005). In a jury trial, the quantum of legally sufficient evidence needed to create a jury question is slight. *Id.* If there is legally sufficient evidence to support a finding in favor of the party bearing the burden of proof, it would be error on the part of the trial judge to grant a motion for judgment in favor of the opposing party and withhold the case from the jury for decision.
>
> The standard of review of a court's denial of a motion for JNOV is the same as the standard of review of a court's denial of a motion for judgment at the close of the evidence, *i.e.*, whether on the evidence presented a reasonable fact-finder could find the elements of the cause of action by a preponderance of the evidence. *Washington Metro. Area Transit Auth. v. Djan*, 187 Md. App. 487, 491–92, 979 A.2d 194 (2009).

Id. at 229.

DISCUSSION

In order to prevail on a claim of medical malpractice, a plaintiff must prove the applicable standard of care; that the standard of care was violated by the defendant; and that the violation proximately caused the injury for which damages are sought. *Crise v. Maryland Gen. Hosp., Inc.*, 212 Md. App. 492, 520–21 (2013) (citing *Sterling v. Johns Hopkins Hosp.*, 145 Md. App. 161, 169 (2002); *Jacobs v. Flynn*, 131 Md. App. 342, 354 (2000)).

"Ordinarily, the duty of care in a medical malpractice action arises from the health care provider-patient relationship." *Crise*, 212 Md. App. at 521 (citing *Dehn v. Edgecombe*, 384 Md. 606, 620 (2005)). "That duty, stated more fully, is to exercise the degree of care or skill expected of a reasonably competent health care provider in the same or similar circumstances." *Id.* at 521 (citing *Shilkret v. Annapolis Emergency Hosp. Assoc.*, 276 Md. 187 (1975)). "With few exceptions, the applicable standard of care, *i.e.*, the nature and scope of the duty owed, is proven by expert testimony (as is the issue whether the applicable standard of care was breached)." *Id.* at 522.

On appeal, Chance contends that she "presented legally sufficient evidence upon which the Jury could, and did, find the elements of medical malpractice were satisfied by a preponderance of the evidence." In the circuit court, and in their briefs in this Court, appellants had argued that Dr. Bell breached standards of care by: (1) failing to consult Mackey's family for additional information; (2) failing to obtain records of Mackey's prior psychiatric treatment; (3) failing to diagnose Mackey correctly; (4) failing to implement an appropriate course of treatment with the prescription of Risperdal; and (5) prematurely discharging Mackey without an improvement in his core symptoms. At oral argument in this Court, however, appellants focused upon a single issue: whether Dr. Bell's decision to discharge Mackey from Bon Secours just three days after prescribing Risperdal and while Mackey was still experiencing symptoms such as internal stimuli breached the standard of care.

We agree with appellants that the dispositive question is whether there was evidence from which the jury could have concluded that Dr. Bell breached the standard of care by discharging Mackey on April 9, and whether that was a proximate cause of Mackey's death on April 10. Because we must consider the evidence presented at trial in the light most favorable to the party for whom the verdict was rendered, we conclude that sufficient evidence was presented at trial for the jury to find, based upon the testimony of Dr. Cascella: (1) that the standard of care required Dr. Bell not to discharge Mackey until his symptoms of psychosis were significantly reduced by Risperdal, (2) that, at the time Dr. Bell discharged Mackey, the patient continued to present symptoms of responding to internal stimuli, as well as poor insight and poor judgment, indicating that Mackey's symptoms had not yet been significantly reduced by the Risperdal, and (3) that Mackey's premature discharge from Bon Secours was a proximate cause of his death. There was sufficient evidence to support the jury's finding of liability. Therefore, the motion for judgment notwithstanding verdict should not have been granted.

In granting the motion for judgment notwithstanding the verdict, the trial court ruled that Dr. Cascella's testimony was insufficient to satisfy plaintiffs' burden of establishing the applicable standard of care and that appellees' breach of that standard of care proximately caused Mackey's suicide. But, it appears to us that, in reaching this conclusion, the trial court did not view Dr. Cascella's testimony in the light most favorable to appellant. The trial court commented: "Even when Dr. Cascella sought to bring all the strands [of his opinions] together, the Court is left with the settled conclusion that Dr. Cascella's opinion

was not an objective evaluation of what a reasonable psychiatrist was required to do in the circumstances presented, but an opinion informed heavily and impermissibly by hindsight." This is not an evaluation of the *legal sufficiency* of the testimony, but, rather, an expression of opinion that that testimony was not persuasive to the trial judge – *i.e.*, an assessment of weight and credibility rather than legal sufficiency. The court had accepted Dr. Cascella as an expert in the same field of medicine as that of the defendant psychiatrist, and there was ample testimony before the jury that Dr. Cascella had maintained a lengthy affiliation with one of this State's most distinguished universities. The question of how much weight should be given to Dr. Cascella's testimony was a question for the jury.

On another point, the trial court stated that,

> [o]n the critical issue of when Dr. Bell should have discharged Mr. Mackey, Dr. Cascella did not opine that a reasonable psychiatrist is trained to hold the patient in the hospital for five days or ten days or one month after beginning treatment with Rispderal. Instead, Dr. Cascella only said Dr. Bell could have held Mr. Mackey at least through the weekend. The consequences of Dr. Bell's decision are all too easy to see in hindsight, but Dr. Cascella never gave the jury any clear basis to conclude that no reasonable physician would have discharged Mr. Mackey in these circumstances.

But, when we review Dr. Cascella's testimony in the light most favorable to the appellants, we see that he actually did opine that the patient should be held until the psychiatrist can "see some significant decrease of those symptoms," which was not done in the case of Mackey. Dr. Cascella also testified that recent literature had shown that Risperdal can take two weeks, or even longer, to be effective. We are satisfied that, when the evidence is considered in the light most favorable to the appellants, there was a clear basis for the jury to conclude that it was a breach of the standard of care for Dr. Bell to

discharge Mackey on April 9, at a point in time when his core symptoms had not significantly decreased.

On the issue of causation, appellees contend that appellants failed to prove that alleged breach of the standard of care was a proximate cause of Mackey's suicide. In support of this contention, appellees assert that Dr. Cascella testified that it was probable that Mackey would have attempted suicide again, which undermines the argument that Mackey would not have committed suicide but for Dr. Bell's negligence. But, as the trial court noted in rejecting this argument, the likelihood that Mackey may have committed suicide at some point later in his life does not refute the appellants' claim that he would not have died on April 10 if he had not been prematurely discharged by Dr. Bell. Again, considering the evidence in the light most favorable to the appellants, a rational jury could have found that Dr. Bell's breach of the standard of care in discharging Mackey on April 9 was a proximate cause of his death.

We observed in *Gholston*, *supra*, 203 Md. App. at 329: "In a jury trial, the quantum of legally sufficient evidence needed to create a jury question is slight." In *Gholston*, we considered a challenge to the sufficiency of the evidence in a medical malpractice action against a hospital. The mother of Darryl Gholston, a child born with brain damage, sued University of Maryland Medical System alleging that obstetricians negligently failed to perform a caesarian section "stat" upon becoming aware of a high risk that blood flow to the infant would be cut off by the position of the umbilical cord in the mother's cervix. After the jury returned a verdict for Gholston, the hospital appealed, contending that

Gholston failed to prove causation. The hospital argued that Gholston's injury was not caused by the hospital's negligence, but by the mother's premature labor. We rejected this argument, reasoning:

> UMMS presented expert witnesses with contrary views, and a reasonable jury could have credited those views. The point, however, was that there was sufficient evidence from Darryl's expert witnesses to make the mechanism of injury, that is, the question of causation in fact, an issue for the jury to decide.

Gholston, 203 Md. App. at 338.

So, too, in this case, the expert witnesses presented the jury with contrary views, and a reasonable jury could have credited the opinions of the appellees' experts instead of crediting the opinions of Dr. Cascella. But the decision of which testimony to credit was the jury's to make. We therefore conclude that the trial court erred in granting the motion for judgment notwithstanding the verdict.

As noted above, the circuit court made no separate comment or ruling relative to the appellees' alternative motion for new trial. Therefore, although we reverse the judgment entered by the circuit court because we conclude that it erred in granting the appellees' motion for judgment notwithstanding the verdict, we are remanding the case to the circuit court for disposition of the alternative motion for a new trial.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED; CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEES.

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The majority considers that "the dispositive question is whether there was evidence from which the jury could have concluded that Dr. Bell breached the standard of care by discharging Mackey on April 9, and whether that was a proximate cause of Mackey's death on April 10." Ante at 10. The trial judge, in his very carefully crafted Opinion granting Defendants' Motion for Judgment Notwithstanding the Verdict, found that Dr. Bell's decision to discharge Mackey on April 9 could not, *as a matter of law*, constitute a violation of the standard of care.[1] Because I agree with that analysis, I must, respectfully dissent.

As I understand it, Dr. Cascella's opinion was that the breach of the standard of care came in releasing Mackey too early, before his Risperidone intake resulted in "some significant decrease" in his "core symptoms." Moreover, Dr. Cascella noted that it can take up to 2 weeks administration of Risperidone for the drug to have such an effect. Necessary to Dr. Cascella's conclusion then, was his view that the standard of care required Dr. Bell to involuntarily commit Mackey. Thus, Dr. Cascella was saying that any physician who decided not to commit his patient under these circumstances, would be open to civil liability. That is precisely what the Court of Appeals, in *Williams v. Peninsula Regional Medical Center*, said could not be the basis for civil liability. 440 Md. 573 (2014).[2]

[1] Because I would find no breach of the standard of care, I need not reach questions of proximate causation.

[2] Appellants also argue that the trial court's reliance on *Williams* in the Order granting Judgment Notwithstanding the Verdict was inappropriate. They are mistaken. They misinterpret *Williams* as changing the law and requiring Dr. Cascella to provide additional evidence that was not required at the time of trial. In my view, *Williams* merely

Under sad circumstances very similar to those presented here, the question presented by *Williams* was whether Section 10-618 of the Health—General Article of the Maryland Code provided civil immunity only for the decision to admit patients involuntarily or also for the decision not to admit. *Williams*, 440 Md. at 578-79. The Court of Appeals stated that "the statutory scheme protects the *discretion* of health care providers tasked with deciding whether to involuntarily admit an individual." *Id*. at 587 (emphasis in original). The Court of Appeals then quoted this Court:

> Understanding the deep concern for patient rights and stringent requirements for involuntary admittance, it would lead to an absurd result if we were to interpret the immunity provision to only apply when someone is actually admitted. In one breath the statute would discourage admitting individuals before a careful evaluation, but in the next breath provide immunity only when the decision is to admit. Out of fear of liability, mental health professionals might err on the side of admittance, instead of properly exercising their discretion and following the stringent requirements before taking away someone's liberty.

Id. (quoting *Williams v. Peninsula Reg'l Med. Ctr.*, 213 Md. App. 644, 658 (2013)).

Dr. Cascella's proposed standard of care would produce the same "absurd" result; the only way to avoid violating the standard of care, and thus, the only way to avoid potential civil liability, would be to err on the side of involuntary admission. Thus, I would

explained the law of Maryland as it had existed since 1970, *see Williams*, 440 Md. at 585 (explaining history), that the discretion involved in the decision to involuntarily admit or not admit cannot form the basis of civil liability.

hold that Dr. Cascella's proposed standard of care is inconsistent with Maryland law and cannot, as a matter of law, serve as the basis for civil liability.[3] As a result, I would affirm.

[3] I am also not troubled—as the majority clearly was—by the trial court's repeated use of the word "hindsight" in its Order. I read the trial court as criticizing Dr. Cascella's testimony as failing to identify a clear standard of care, but instead simply looking back and saying, in effect, that because Mackey committed suicide, Dr. Bell must have done something wrong. That critique, contrary to the majority's view, goes to legal sufficiency not credibility and was an appropriate basis on which to grant the motion.