Circuit Court for Calvert County
Case No.: C-04-CV-18-000396

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0218

September Term, 2020

CASEY LOU DEANE

v.

SOUTHERN MARYLAND ORAL AND MAXILLOFACIAL SURGERY, P.A., et. al.

Arthur,
Beachley,
Battaglia, Lynne, A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: August 11, 2021

In August of 2018, Casey Lou Deane, Appellant, filed a malpractice claim against Dr. Bennett Frankel and Southern Maryland Oral and Maxillofacial Surgery, P.A. ("Southern Maryland"). Ms. Deane alleged that she suffered a permanent loss of feeling in her tongue as a result of Dr. Frankel having severed lingual nerves in her jaw, during the process of extracting her wisdom teeth. Ms. Deane subsequently amended her complaint to add a defendant, Dr. Clay Kim, another dentist with Southern Maryland who had treated her after her surgery, but only after Dr. Frankel and Southern Maryland had filed separate motions for summary judgment and an initial as well as evidentiary hearing had occurred. Dr. Kim joined Dr. Frankel and Southern Maryland in filing an answer to the amended complaint, but Dr. Kim never personally participated in the summary judgment proceedings.[1] In December of 2019 the trial court issued a Memorandum and

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[1] Neither Ms. Deane's initial complaint nor the Answer, jointly filed by Dr. Frankel and Southern Maryland, addressed Dr. Clay Kim or any allegations against him.

Nevertheless, before this Court, Appellees, in their brief, repeatedly represent that before September 13, 2019 Dr. Kim actually filed pleadings and personally participated in the proceedings:

> On July 9, 2019, Dr. Frankel and Dr. Kim filed separate Motions for Summary Judgment based on Deane's failure to produce sufficient admissible expert opinion testimony regarding breaches in the standard of care and causation of injury. Dr. Frankel and Dr. Kim each extensively briefed and argued that Deane's experts' opinions and theories of liability were inadmissible[.] Dr. Frankel and Dr. Kim also argued the expert opinion theories of liability were inadmissible as they were not permissible "inference" of medical negligence under the facts and pursuant to Maryland law. Dr. Frankel and Dr. Kim also requested that the Court conduct a Frye-Reed hearing based on the arguments raised.
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> Dr. Frankel and Dr. Kim submitted their Bench Memorandum [sic] Regarding Admissibility of Expert Opinion Evidence and provided the

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> expert testimony transcripts and several scientific literature sources as a basis for expert opinion evidence preclusion.
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> * * *
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> [T]he Court heard argument and directed Dr. Frankel and Dr. Kim to submit an additional Reply Memorandum Regarding Admissibility of Expert Opinion Evidence.

The docket entries in the instant case do not support these representations because Dr. Kim was not added as a party defendant until September 13, 2019. Dr. Kim filed a joint Answer with Dr. Frankel and Southern Maryland on September 27, 2019.

It appears that counsel for Ms. Deane and counsel for Southern Maryland and Dr. Frankel had agreed between themselves that Dr. Kim was going to be treated as a party defendant and so informed the judge in July of 2019, during summary judgment proceedings before Dr. Kim was actually impleaded.

The trial judge acknowledged what counsel stated, although did not apparently sanction what had been agreed upon until April of 2020, when, in a Memorandum Opinion and Order granting summary judgment, he iterated the following:

> This matter came before the Court on August 7, 2019 and September 12, 2019 for hearings for Defendant Bennett F. Frankel, DMD's . . . and Defendant Southern Maryland Oral and Maxillofacial Surgery, P.A.'s . . . . Motions for Summary Judgment. Additionally, at the conclusion of the August 7, 2019, hearing, it was essentially understood and agreed by all parties that Plaintiff would subsequently file an Amended Complaint to add Clayton Kim, DDS, . . . as a Defendant as an agent or employee of Defendant Southern Maryland . . . and that the Motions for Summary Judgment, oppositions and respective Bench Memoranda filed and oral arguments made up to then would apply to all allegations including those in the Amended Complaint to be filed. Furthermore, the Court notes that the parties argued the merits of these claims against Dr. Kim in the pleadings and at the hearing as if he was already a Defendant, even though the Amended Complaint had yet to be filed. As such, both parties had the opportunity to make full argument with respect to Dr. Kim.
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> Plaintiff filed the Amended Complaint on September 13, 2019. All three present Defendants, Dr. Frankel, Dr. Kim, and [Southern Maryland] filed Answers to the Amended Complaint and timely filed a Reply Memorandum Regarding Admissibility of Expert Opinion Evidence.
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> The Court notes that this unusual procedure of allowing and considering motions, oppositions and arguments, before the Amended Complaint adding Dr. Kim as a Defendant was filed, was agreed to by all

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Opinion of the Court granting summary judgment.

Ms. Deane, in her appeal, raises three questions:

1. Where an expert offers an opinion regarding a plaintiff's diagnosis, based on a widely accepted neurosensory test, is the expert's opinion unreliable merely because he did not review the medical notes from the plaintiff's prior visits to oral surgeons?

2. Where an expert offers an opinion regarding the cause of a plaintiff's injury, based on a reliable diagnosis, the plaintiff's testimony regarding her current condition, and an inference derived from the expert's review of relevant medical literature and his own experience in avoiding the specific injury suffered by the plaintiff, is the expert's opinion admissible?

3. Where there is a question of fact concerning a patient's failure to return to a dentist for a recommended follow-up, and where a defendant does not raise the issue in its motion for summary judgment, can a motion court *sua sponte* dismiss the plaintiff's claims based on contributory negligence?[2]

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parties and the Court, to promote judicial efficiency, thereby precluding a third hearing on Summary Judgment, *Frye-Reed* and related aspects being held. That, while well intentioned, nevertheless, contributed to the complications and complexity, which needed to be dealt with in this Memorandum Opinion, to resolve all the issues.

Because we are reversing the grant of summary judgment and remanding for a full trial on the merits, we need not address the propriety of the "unusual procedure." We note, however, that on remand, any actions taken with respect to Dr. Kim before he was effectively impleaded must be parsed out by the court.

[2] The Appellees attempt to restate Ms. Deane's questions as follows:

1. Was Appellant's expert opinion evidence regarding causation of a purported bilateral lingual nerve "severing" injury inadmissible pursuant to the requirements of Maryland Rule 5–702, and when applying the *Daubert* standard?

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We shall reverse the trial court's grant of summary judgment, because the judge erred as a matter of law.

Ms. Deane, in her original complaint, alleged that Dr. Frankel and Southern Maryland were negligent in the extraction of her wisdom teeth and the after-surgery care she received. The averments in the complaint, in part, recited:

> 13. Plaintiff was a patient of the Defendants from January 5, 2016 through April 14, 2016 ("the Treatment Period").
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> 14. On or about January 5, 2016, Defendants examined the Plaintiff and informed her that she should have her four third molars (commonly referred to as wisdom teeth), teeth #1, 16, 17 and 32 extracted, along with another tooth, #2.
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> * * *
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> 17. During the procedure, Dr. Frankel failed to take proper precautions, and in the process of extracting teeth #17 and 32, severed or otherwise traumatized the Plaintiff's left lingual nerve and the Plaintiff's right lingual nerve.

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> 2. Was Appellant's expert opinion evidence regarding "inferred" breaches in the standard of medical/surgical care and causation of a purported nerve injury admissible pursuant to the requirements of Maryland Rule 5–702, and when applying the *Daubert* standard?
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> 3. Did the Circuit Court appropriately grant summary judgment in favor of Appellees on the issue of admissibility of the Appellant's expert opinion evidence needed for a *prima facie* case of medical negligence, or was summary judgment necessarily based on an erroneous finding of contributory negligence?

18. Defendants owed to the Plaintiff a duty of care consistent with the standard of care, which duty was breached by the following:

a. by failing to order or otherwise obtain a CT scan of the Plaintiff's mouth and nerves when the x-ray revealed impacted teeth #17 and 32;

b. by failing to administer steroids in a timely manner, a known protocol which should be followed immediately upon learning of the nerve injury;

c. by failing to immediately refer the patient to an oral surgeon who specializes in nerve surgery or for the proper care and treatment of lingual nerve injuries on an emergent basis.

19. As a direct and proximate result of the Defendants' breaches of the standard of care, the Plaintiff was proximately injured, sustaining bilateral lingual nerve injuries that keep a large area of her mouth and tongue permanently numb, and which interfere with her ability to taste and enjoy food, and other functions, and causing her to bite her tongue very often.

* * *

In her amended complaint, Ms. Deane restated her earlier allegations and added specific allegations against Dr. Kim, as follows:

24. During the procedure, Dr. Frankel failed to take proper precautions, and in the process of extracting teeth #17 and 32, severed or otherwise traumatized the Plaintiff's left lingual nerve and the Plaintiff's right lingual nerve.

25. After the procedure, when Plaintiff returned complaining of bilateral tongue numbness and loss of sensation, Dr. Kim negligently failed to take appropriate diagnostic tests.

26. After learning that Plaintiff had bilateral lingual nerve injuries, Dr. Kim failed to refer the Plaintiff to a micro neurosurgeon specializing in repairs of the lingual nerve in a timely fashion.

27. Defendants owed to the Plaintiff a duty of care consistent with

the standard of care, which duty was breached by the following:

> a. by failing to order or otherwise obtain a CT scan of the Plaintiff's mouth and nerves when the x-ray revealed impacted teeth #17 and 32;
>
> b. by failing to administer steroids in a timely manner, a known protocol which should be followed immediately upon learning of the nerve injury;
>
> c. by failing to immediately refer the patient to an oral surgeon who specializes in nerve surgery or for the proper care and treatment of lingual nerve injuries on an emergent basis.

* * *

Ms. Deane designated two expert witnesses: Dr. Richard Kramer, who, Ms. Deane explained in her Plaintiff's Designation of Expert Witnesses, which she filed in January of 2019, would "testify that [she] sustained bilateral injury to her lingual nerve that is more likely than not a severance of the nerve, based on his neurosensory evaluation tests, and the injury is permanent."

Dr. Armond Kotikian, whom Ms. Deane had designated as her expert on the applicable standard of care and causation, was to "opine that [she] suffered a full anesthesia of her tongue, bilaterally, caused by a likely severance of her lingual nerves, bilaterally, following the extraction of teeth #17 and 32 by Dr. Bennett F. Frankel, on 1/14/16." Additionally, Ms. Deane represented that Dr. Kotikian would opine that "these injuries could have been prevented if a retractor or periosteal elevator (#9) had been placed between the lingual plate and the periosteum during the time of sectioning and/or adequate buccal and distal troughs were done around the teeth." Dr. Kotikian, Ms. Deane further asserted, would opine that Dr. Kim's records of his examination of Ms. Deane

were inaccurate, as they were inconsistent with Dr. Kramer's finding of "complete anesthesia of the patient's tongue." Dr. Kotikian would also opine, according to Ms. Deane, that Dr. Frankel and Southern Maryland, "deviated from the standard of care, and in so doing, caused injury to [Ms. Deane]."

Following discovery, Dr. Frankel, in July of 2019, moved for summary judgment based on his assertions that Ms. Deane had failed to present "sufficient factual and/or scientific evidence to support the expert's opinion of an 'inference' of surgical negligence and injury in this case." This was so, according to Dr. Frankel, because the injury that Ms. Deane allegedly had suffered, was a well-known risk of the procedure she underwent and, therefore, could not be evidence of negligence. In addition, Dr. Frankel asserted that Dr. Kramer's opinion was based on his review of an incomplete medical record, because Dr. Kramer had not reviewed records of treatment rendered by himself and Dr. Kim. With respect to Dr. Kotikian's opinion, Dr. Frankel asserted that it was based on an impermissible inference of negligence, because there was no direct evidence that Ms. Deane had suffered an injury.

In its motion for summary judgment, Southern Maryland asserted that Ms. Deane had failed to generate a genuine issue of material fact concerning the actions of Dr. Kim, who had seen Ms. Deane in April of 2016, and who Southern Maryland therein identified as its agent, because he had a "contractual relationship" with Southern Maryland. Southern Maryland also proffered the same arguments that had been made by Dr. Frankel.

Ms. Deane, in opposing the motions, asserted that there were disputes of material facts, including:

> 1) the credibility and accuracy of Dr. Kim's records; 2) the accuracy of Dr. Kim's findings; 3) the credibility and accuracy of Drs. Kramer and Kotikian and their findings; 4) the credibility of the Plaintiff's responses to the nerve testing performed and description of her symptomology; and 5) the likely causation of the injury to Plaintiff's tongue.

During a hearing on both summary judgment motions, which occurred in August of 2019, the judge tentatively granted summary judgment regarding claim 18(c) that Southern Maryland had negligently failed to refer Ms. Deane to a nerve specialist, but explained "that a written opinion was to follow." The court continued the hearing for the purpose of addressing evidentiary issues related to claim 17, whether Dr. Frankel was negligent in his extraction of Ms. Deane's teeth. At the evidentiary hearing, which took place in September of 2019, the judge ruled that Ms. Deane's expert opinion evidence was inadmissible.

In April of 2020, the judge issued an Order of Court Granting Summary Judgment, in which he granted both motions. A Memorandum Opinion and Order, which was issued the same day, set forth the bases for his ruling, that being the experts proffered by Ms. Deane could not testify. Ms. Deane timely filed a notice of appeal with this Court.

At the crux of the trial court's summary judgment determination was its ruling that the opinions of Dr. Kramer and Dr. Kotikian were inadmissible. The trial court held that Dr. Kramer's opinion regarding the nature of Ms. Deane's injury was inadmissible, because it lacked a sufficient factual basis. The judge concluded that Dr. Kramer's

opinion was based "mainly [on] the subjective self-reporting by [Ms. Deane] and his diagnostic tests." Additionally, the judge found that Dr. Kramer, in rendering his opinion, had not "reviewed the professional and detailed notes and records of Dr. Frankel and Dr. Kim and particularly the analysis of Dr. Kim's treatment and examination of [Ms. Deane] and to have weighed and compared them against her uncertain versions of her treatment history with all of the Defendants[.]"

Dr. Kotikian's opinions were inadmissible, according to the judge, because they failed to meet the standard for inferences of negligence, articulated by the Court of Appeals in *Meda v. Brown*, 318 Md. 418 (1990). According to the judge, "due to an absence of any physical, radiographic, or imaging evidence of injury and any noted problems or complications during the extraction, Dr. Kotikian is **only** able to **infer** any negligence." (emphasis in original). He added that an inference of negligence can be drawn "**only** when the alleged condition or complication does not normally occur in the absence of negligence." (emphasis in original). The judge determined that, in the instant case, "numbness, loss of taste, and loss of sensation are known to occur with regularity without negligence on the part of the treating dentist." Additionally, the judge determined that Dr. Kramer's opinion had "serve[d] as the lynchpin of Dr. Kotikian's expert opinions of violations of standard of ordinary care[.]"

With respect to the decision to admit or exclude evidence, the Court of Appeals, in *Levitas v. Christian*, 454 Md. 233, 243 (2017), explained the scope of appellate review:

> It is often said that decisions to admit or exclude expert testimony fall squarely within the discretion of the trial court. *See, e.g., Bryant v.*

> *State*, 393 Md. 196, 203 (2006) (collecting cases). A discretionary ruling, however, is not boundless and must be tethered to reason. We have explained that an abuse of discretion is "**discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.**" *Neustadter v. Holy Cross Hosp. of Silver Spring, Inc.*, 418 Md. 231, 241 (2011) (emphasis added) (quoting *Touzeau v. Deffinbaugh*, 394 Md. 654, 669 (2006)). Appellate courts will not affirm a trial court's discretionary rulings "when the judge has resolved the issue on unreasonable or untenable grounds." *Id.* (internal quotation marks omitted). Such grounds include "when a trial judge exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law." *Garg v. Garg*, 393 Md. 225, 238 (2006) (citation omitted). The trial court must apply the correct legal standard and "**a failure to consider the proper legal standard in reaching a decision constitutes an abuse of discretion**." *Neustadter*, 418 Md. at 242 (emphasis added).

(footnote omitted).

With respect to summary judgment at the trial level, it may be granted when "there is no genuine dispute as to any material fact and . . . the party is entitled to judgment as a matter of law." Rule 2–501(a).[3] When there is no dispute of material fact, we review a summary judgment decision "to determine whether the trial court was legally correct."

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[3] Rule 2–501(a), which governs motions for summary judgment, provides:

> (a) **Motion.** Any party may file a written motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law. The motion shall be supported by affidavit if it is (1) filed before the day on which the adverse party's initial pleading or motion is filed or (2) based on facts not contained in the record. A motion for summary judgment may not be filed: (A) after any evidence is received at trial on the merits, or (B) unless permission of the court is granted, after the deadline for dispositive motions specified in the scheduling order entered pursuant to Rule 2–504(b)(1)(E).

Md. Cas. Co. v. Blackstone Int'l Ltd., 442 Md. 685, 694 (2015) (citation omitted). We consider only the grounds relied on by the trial court in its determination in our review. *Rodriguez v. Clark*, 400 Md. 39, 70-71 (2007) (citation omitted).

Ms. Deane, herein, asserts that the trial judge erroneously granted summary judgment, a decision which, she argues, was based on his erroneous exclusion of the opinions of Dr. Kramer and Dr. Kotikian. According to Ms. Deane, the trial court's basis for excluding Dr. Kramer's expert opinion, namely that it failed to consider Dr. Frankel's and Dr. Kim's records of treatment, was in error because there is no requirement in the law to do so.

Ms. Deane also asserts that the trial judge erroneously ruled that Dr. Kotikian's opinions were inadmissible because they had relied, in part, on Dr. Kramer's opinion. It was also error, Ms. Deane asserts, for the trial court to conclude that Dr. Kotikian could not draw an inference of negligence because the type of injury she suffered allegedly was a known risk of surgery.

Dr. Frankel, Dr. Kim, and Southern Maryland, who are represented herein by the same counsel, assert that the Circuit Court correctly precluded the opinions of Dr. Kramer and Dr. Kotikian.[4] They emphasize that "there is no physical or objective

[4] Before the trial court, Dr. Frankel and Southern Maryland allegedly challenged the admissibility of the opinions of Drs. Kramer and Kotikian, in part, based on *Frye-Reed*, which provides that when expert testimony was based on a novel scientific principle or discovery its admissibility was predicated on its general acceptance "in the particular field in which it belongs." *See Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *Reed v. State*, 283 Md. 374 (1978). In *Rochkind v. Stevenson*, 471 Md. 1 (2020), the Court of Appeals supplanted the "general acceptance" test with the *Daubert*

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evidence of the claimed bilateral 'severing' injury. There is no physical evidence [of] how the purported 'severing' took place. . . . And most importantly, there is no evidence of the physical facts that must exist for the 'severing' injury to have occurred." They assert that because Dr. Kramer failed to review the records of Dr. Frankel and Dr. Kim, he did not consider evidence that may have led him to reach a different conclusion regarding Ms. Deane's injury. They assert that Dr. Kotikian's inferences of negligence were impermissible, because such inferences "must have a sufficient factual basis including 1) the alleged injury is not something that would ordinarily happen in the absence of negligence, and 2) the theory must be based on physical facts, direct evidence, and sound reasoning and not speculation."

It is axiomatic that in order to establish negligence in a medical malpractice case, four elements must be proven: "(1) the defendant's duty based on the applicable standard of care, (2) a breach of that duty, (3) that the breach caused the injury claimed, and (4) damages." *Am. Radiology Servs. v. Reiss*, 470 Md. 555, 579 (2020). The Court of Appeals has explained that, "Juries are not permitted to simply infer medical negligence in the absence of expert testimony because determinations of issues relating to breaches of standards of care and medical causation are considered to be beyond the ken of the

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standard, which entails the application of "a list of flexible factors to help courts determine the reliability of expert testimony." *Id.* at 5 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)).

The bases for the trial court's rulings on admissibility, although referring to *Frye-Reed*, did not implicate the "general acceptance" standard nor did they invoke the analytical factors put forth in *Daubert*.

average layperson." *Id.* at 580. The role of a medical expert, therefore, is "to establish the [standard of care] and to explain how the professional's breach caused the injury." *Id.*

Rule 5–702, which governs expert witness testimony, provides:

> 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.[5]

A "sufficient factual basis," which is the third prong of Rule 5–702 and the focal point of the alleged deficiencies in the instant expert opinions, requires that such an opinion be based on an adequate supply of data. The Court of Appeals has elucidated that, "[a]n expert's factual basis 'may arise from a number of sources, such as facts obtained from the expert's first-hand knowledge, facts obtained from the testimony of others, and facts related to an expert through the use of hypothetical questions.'" *Levitas v. Christian*, 454 Md. at 254 (quoting *Sippio v. State*, 350 Md 633, 653 (1998)). An expert opinion that is based on inadequate data is "mere speculation or conjecture." *Roy v. Dackman*, 455 Md. 23, 42 (2015).

According to his deposition testimony offered by Ms. Deane in opposition to the motions for summary judgment, Dr. Kramer opined that Ms. Deane's lingual nerves were

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[5] In the instant appeal, the qualifications of Dr. Kramer and Dr. Kotikian and the appropriateness of expert testimony were not challenged.

completely severed based upon his examination of her in April of 2018, as well as tests he administered that required Ms. Deane to respond as to whether her tongue detected sensations of pressure, temperature, and taste. It was without dispute that Dr. Kramer did not review the records of Drs. Frankel and Kim. Thus, in order to determine that failure to review such records rendered Dr. Kramer's opinion inadmissible, the judge had to have determined that review of such records was mandated as a matter of law.

We have found no precedent that supports the notion that in a medical malpractice case an expert's opinion regarding injury is legally inadmissible when records of the treating physicians are not reviewed. Rather, the failure to consider various pieces of data available, such as treatment records, goes to the weight assigned to the expert's testimony by the fact finder, rather than to its admissibility. *See Levitas v. Christian*, 454 Md. at 254 (rejecting the conclusion of the trial judge that a medical expert in a lead exposure case lacked a sufficient factual basis to render an opinion, because he had not "me[t the Plaintiff], his family, his teachers, or his treating physicians."). That Dr. Kramer did not consider the records of treatment "'is the grist for cross-examination . . . and for resolution by the relative weight assigned by the fact-finder.'" *Id.* (quoting *Roy v. Dackman*, 455 Md. at 52).

The judge also concluded that Dr. Kotikian's opinion was inadmissible, not only because he relied on Dr. Kramer's opinion, but also because Dr. Kotikian allegedly had relied on impermissible inferences of negligence. It is undeniable that negligence, in general, may "be established by the proof of circumstances from which its existence may be inferred." *Meda*, 318 Md. at 427-28 (quoting *W. Md. R.R. Co. v. Shivers*, 101 Md. 391,

393 (1905)). In order for a jury to draw an inference of negligence in a medical malpractice case, expert witness testimony is required. *Id.* at 428.

The trial judge in the present case determined, though, that Dr. Kotikian could not infer negligence because the judge had found that the loss of sensation on the tongue was a known risk of the surgery performed on Ms. Deane by Dr. Frankel.[6] After so finding, the judge based his ruling on what he viewed was the holding in *Meda*:

> Pursuant to *Meda*, a party may provide an expert opinion based on "inference of negligence" theory from the circumstances of [the] particular case provided there is sufficient direct and/or circumstantial evidence that the subject injury would not happen in the absence of medical negligence when the facts considered by the experts "had support in the record, and the reasoning employed was based on logic rather than speculation or conjecture."

(quoting *Meda*, 318 Md. at 428).

In *Meda*, Ms. Brown had suffered a nerve injury in her arm during a bilateral breast biopsy, for which she was under general anesthesia. *Meda*, 318 Md. at 421. Ms. Brown alleged that the injury was caused by the failure of the anesthesiologist, who had treated her while she underwent surgery, to properly position her arm within a cushioned arm board. *Id.*

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[6] The trial judge, in the Memorandum Opinion and Order, found that "complications that Plaintiff complains of are well known complications of the procedure Plaintiff underwent and do occur in the absence of negligence by the surgeon." The judge based this finding on "medical authorities cited by both parties", Dr. Kramer's deposition testimony, as well as the Consent for Extractions and Anesthesia form, which Ms. Deane signed prior to surgery.

An expert, who testified on Ms. Brown's behalf during the trial, opined that her injury had occurred while she was in the operating room and that it was caused by one of several possible ways in which an arm can become improperly positioned within a cushioned arm board. *Id.* at 427. A second medical expert provided similar testimony in support of Ms. Brown's case, but neither doctor was able to identify the particular mode by which Ms. Brown sustained the injury. *Id.* As the Court explained "each doctor relied in part on circumstantial evidence in reaching his opinion that Dr. Meda was negligent." *Id.* Ms. Brown prevailed.

During the trial, however, the judge concluded that because the experts had relied on inferences, their opinions were insufficient to support the jury's verdict and, as a result, granted Dr. Meda's motion for judgment notwithstanding the verdict. *Id.* We reversed, and in so doing, highlighted that Ms. Brown's injury occurred in a part of her body that was not the subject of her surgery. *Id.* at 420. Thus, we reasoned that, "laymen could properly infer negligence from the happening of an unusual injury to a healthy part of the patient's body remote from the area of the operation[.]" *Id.*

Upon certiorari, Dr. Meda argued that the inferential reasoning employed by Ms. Brown's experts was impermissible "speculation or conjecture," because they "could not identify with particularity the specific act of negligence and precise mechanism of injury." *Id.* at 427. The Court of Appeals disagreed and affirmed, because it concluded that the experts had permissibly drawn inferences from "the physical facts they considered, and the medical facts they added to the equation to reach the conclusion they

did. The facts had support in the record, and the reasoning employed was based upon logic rather than speculation or conjecture." *Id.* at 428.

In holding that the experts had drawn permissible inferences, the Court emphasized the importance of their opinions to Ms. Brown's case: "If this plaintiff had offered no expert testimony, but had simply shown the onset of an ulnar nerve injury to her arm following a breast biopsy, the jury would not have been permitted to infer negligence from the facts alone." *Id.* It was precisely because experts had testified on Ms. Brown's behalf, the Court explained, that "the jurors were not asked to draw an inference unaided by expert testimony." *Id.*

In the present case, in granting summary judgment to the medical providers, the trial judge was interpreting the *Meda* holding to say that inferences of negligence may be drawn only when the alleged injury would not happen in the absence of medical negligence. In this he erred, because *Meda*, while discussing the proposition to distinguish *res ipsa loquitor* and impermissible inferences of negligence drawn by jurors, embodies the holding that in a medical malpractice case expert testimony must be adduced in order to prove negligence through inference.

Ms. Deane, finally, challenges the trial judge's ruling that her failure to attend a follow-up appointment with either Dr. Kim or Dr. Frankel constituted contributory negligence as a matter of law. The judge relied on our decision in *Chudson v. Ratra*, 76 Md. App. 753 (1988), to support his conclusion that Ms. Deane's "failure . . . to return for follow-up appointments and possible further treatment as instructed and recommended without satisfactory justification constituted contributory negligence[.]"

A plaintiff is contributorily negligent when they fail to exercise "reasonable and ordinary care . . . in the face of an appreciable risk which cooperates with the defendant's negligence in bringing about the plaintiff's harm." *McQuay v. Schertle*, 126 Md. App. 556, 568 (1999) (citations omitted). The question of contributory negligence is normally reserved for the jury, and "[i]t is only when the minds of reasonable persons cannot differ that the court is justified in deciding the question [of contributory negligence] as a matter of law. *Chudson v. Ratra*, 76 Md. App. at 756.

In *Chudson*, the family of Ms. Tzemach, who had died of breast cancer, sued her doctor, Jessica Ratra, alleging that the doctor had "failed to diagnose the cancer, to recommend or take appropriate action after Ms. Tzemach reported a lump in her breast, and to inform Ms. Tzemach of the risks of non-intervention." *Id.* at 754. Dr. Ratra had discovered masses within Ms. Tzemach's breasts during a routine exam and advised her to monitor the masses through self-examination. The doctor's recommendation was based on her determination that the masses were relatively common fibrocystic changes related to the menstrual cycle. Several months later, Ms. Tzemach returned to the doctor, having discovered additional masses, and was, once again, advised to monitor the masses through self-examination. *Id.* at 757.

Several more months passed before Ms. Tzemach, having detected changes in the masses, returned to Dr. Ratra, who ordered a mammogram, which did not reveal cancer. *Id.* at 758. Ms. Tzemach continued to monitor changes in the masses but did not see Dr. Ratra again for approximately eight months, at which time, Dr. Ratra referred her to a surgeon. A biopsy revealed the masses to be cancerous. *Id.* at 760.

A jury found that Dr. Ratra had been negligent in her treatment of Ms. Tzemach, who had died prior to the trial. *Id.* at 760. The jury also found that Ms. Tzemach had been contributorily negligent by delaying her return to Dr. Ratra. *Id.*

On appeal to this Court, Ms. Tzemach's family "concede[d] that [her] delay in seeking medical advice constituted contributory negligence[,]" but also argued that the delay in diagnosis constituted a "loss of chance" whereby, were Dr. Ratra to have acted within the standard of care, the cancer would have been detected in time to cure. *Id.* at 755. In essence, then, the issue in *Chudson* was, in reality, whether the breast cancer in issue had reached a level of lethality due to misdiagnosis, prior to Ms. Tzemach's decision not to return to Dr. Ratra.

The issue of Ms. Tzemach's contributory negligence, though, had been submitted to the jury as the fact finder. *Chudson*, thus, does *not* stand for the proposition that, *as a matter of law*, the failure to return to a doctor for follow-up visits constitutes contributory negligence as a bar to recovery.

In conclusion, we hold that the trial judge erred as a matter of law when he granted summary judgment in the instant case.

JUDGMENT OF THE CIRCUIT COURT FOR CALVERT COUNTY REVERSED. COSTS TO BE PAID BY APPELLEES.