Circuit Court for Baltimore City
Case No. 24-C-21-001218

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 2173

September Term, 2022

SABRINA KIEBLER, ET AL.

v.

JOHNS HOPKINS BAYVIEW MEDICAL CENTER, INC.

Graeff,
Arthur,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: September 24, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

P.[1] was born at thirty weeks' gestation and now suffers from spastic diplegic cerebral palsy.[2] Appellants, Sabrina Kiebler and Donald Kiebler, Jr., as parents and next friend of their son, P., filed a negligence action on his behalf against Johns Hopkins Bayview Medical Center ("Bayview"), appellee, in the Circuit Court for Baltimore City, alleging that negligence by Bayview's doctors before and during P.'s delivery caused him to sustain permanent and catastrophic brain injuries.

Bayview filed a motion to exclude appellants' causation and standard-of-care experts. Following a two-day *Daubert*[3] hearing, the circuit court issued an order excluding appellants' causation experts, and it thereafter granted Bayview's motion for summary judgment. This timely appeal from that judgment ensued and raises the following issues,[4] which we have restated for clarity:

---

[1] This case is a medical malpractice action brought on behalf of a child. To protect the child's privacy, throughout this opinion, we designate him by a randomly selected initial.

[2] "Cerebral palsy (CP) is a group of disorders that affect a person's ability to move and maintain balance and posture." *About Cerebral Palsy*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/cerebral-palsy/about/index.html (last visited Aug. 30, 2024). "People with spastic CP have increased muscle tone. This means their muscles are stiff and, as a result, their movements can be awkward." *Id.* For a person suffering from spastic diplegic cerebral palsy, "[m]uscle stiffness is mainly in the legs, with the arms less affected or not affected at all. Tight hip and leg muscles cause legs to pull together, turn inward, and cross at the knees (also known as *scissoring*), making walking difficult." *Id.*

[3] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

[4] Precisely what issues appellants raise is not altogether clear. The "QUESTIONS PRESENTED" section of Appellants' Brief lists the following questions:

(continued…)

---

1. May the court ignore expert opinions relying upon differential diagnosis and made to a reasonable degree of medical probability in its *Daubert* analysis?

2. May trial judges weigh the evidence and focus on conclusions rather than evaluating principles and methodology in conducting a *Daubert* analysis?

3. May trial judges ignore an expert's background, training, and experience in a medical malpractice case?

4. May trial judges impose a higher standard than "preponderance of the evidence" in a *Daubert* analysis?

5. Was the trial court judge required to disclose potential conflicts involving his OB-GYN spouse in this case and thereafter recuse himself?

These questions do not completely coincide with the point headings in the subsequent pertinent sections of their brief. There, the headings are:

A. The trial court erred in its rigid application of *Daubert* in a medical malpractice case.

B. The court erred in ignoring the overwhelming caselaw supporting admission of Appellant's expert opinions.

C. The court erred in weighing expert opinions and focusing on conclusions rather than principles and methodology.

D. The court improperly weighed in on what constitutes a "sentinel event."

E. [The trial judge] erred in not disclosing material facts about his spouse's occupation and association with Appellee.

Not surprisingly, Bayview, in turn, has recast the questions presented as follows:

1. Did the trial court abuse its discretion when excluding Plaintiff's experts' causation testimony on the timing of [P.'s] injury?

2. Did the trial judge abuse his discretion and commit reversible error by neither recusing himself nor vacating his [Md.] Rule 5-702 ruling?

(continued…)

> I. Whether the circuit court abused its discretion in excluding appellants' causation experts; and
>
> II. Whether the trial judge erred or abused his discretion in denying appellants' motion for recusal.

Because, under the deferential standard of review applicable to a circuit court's *Daubert* rulings, we find no abuse of discretion, and because the trial judge did not abuse his discretion in declining to recuse himself, we shall affirm.

BACKGROUND

The Premature Delivery of P. and Initiation of Legal Proceedings

As the circuit court observed in its Memorandum Opinion, the "facts of this case are largely undisputed[,]" and we therefore liberally draw upon its factual summary. "In 2013, Ms. Sabrina Kiebler became pregnant and had an uneventful pregnancy for the first approximately 29 weeks of the pregnancy." On December 23, 2013, Ms. Kiebler presented at Bayview, "complaining of decreased, but not absent, fetal movement, which had been ongoing for two days." A fetal biophysical profile ("BPP"), a non-invasive test using ultrasound to assess various components of fetal well-being, was performed, and a score of 8/10 (in the "normal" range) was recorded. A fetal heart monitor was attached to Ms. Kiebler, and the electronic fetal monitoring ("EFM") tracings that were recorded at that

---

We agree with appellee that the questions, as presented in Appellants' Brief (specifically questions I through IV), are unnecessarily tendentious and serve to obscure rather than to clarify the central issue, which is whether the circuit court abused its discretion in applying the *Daubert*-*Rochkind* factors to the facts of this case.

time were classified as Category I, which is generally regarded as "normal."[5] At that time, Ms. Kiebler was discharged from the hospital.

Two days later, on Christmas Day, she returned to the hospital, "complaining of two further days of decreased fetal movement." Another BPP was done, resulting in a diminished score of 6/10. Moreover, it was determined that Ms. Kiebler had elevated liver

[5] "External fetal monitoring, which is most frequently used, involves the placement of two transducers placed on the maternal abdominal wall: one overlying the fetal heart to record the FHR [fetal heart rate] and one over the uterine fundus to record contractions." Trevor Kauffmann & Michael Silberman, *Fetal Monitoring*, NAT'L LIBR. OF MED., https://www.ncbi.nlm.nih.gov/books/NBK589699/ (last visited Aug. 30, 2024). The recorded waveforms (also known as tracings) generally are classified into three categories.

"Category I patterns must have a normal baseline FHR, moderate variability, and no variable or late decelerations . . . . These patterns are normal and reassure clinicians that labor may continue without intervention." *Id.*

"Category II patterns may involve tachycardia, bradycardia, reduced or marked variability, and/or occasional variable or late decelerations." *Id.* "Category II patterns may resolve spontaneously to become category I, at which point no intervention is necessarily warranted. However, closer observation is needed as the pattern may deteriorate to category III." *Id.*

"Category III patterns include at least one of the following findings: absent variability with bradycardia, absent variability with recurrent late and/or variable decelerations, or a sinusoidal pattern." *Id.* (Bradycardia is "slowness of the heartbeat, as evidenced by slowing of the pulse rate to less than 60." *Dorland's Medical Dictionary* 241 (33rd ed. 2020).) "These patterns are predictive of significant hypoxia or acidosis and predispose to neurologic injury and other poor perinatal outcomes." Kauffmann & Silberman, *Fetal Monitoring*. (Hypoxia is the "reduction of oxygen supply to tissue below physiologic levels despite adequate perfusion of the tissue by blood." *Dorland's* at 896. Acidosis is "the accumulation of acid and hydrogen ions or depletion of the alkaline reserve (bicarbonate content) in the blood and body tissues, resulting in a decrease in pH." *Id.* at 16.) "Clinicians observing category III patterns should investigate, resuscitate, and prepare for operative delivery with urgency." Kauffmann & Silberman, *Fetal Monitoring*. "Delivery should be expedited to prevent the category III pattern from persisting for greater than ten minutes, and operational vaginal delivery or Cesarean section may be performed to accomplish this goal." *Id.*

enzymes and elevated blood pressure, and she was diagnosed as having "severe preeclampsia[,]" a "complication of pregnancy characterized by hypertension, edema, and/or proteinuria[.]" *Dorland's Medical Dictionary* 1486 (33rd ed. 2020). After it was determined that delivery was not imminent, Ms. Kiebler was admitted to the hospital "for further testing and possible preterm delivery."

Bayview doctors prescribed her betamethasone, "a steroid given to accelerate fetal lung maturity and mitigate neonatal respiratory complications[,]" that is, in anticipation of an impending induced delivery. Doctors also administered magnesium sulfate and Cervidil®, the former "to provide neuroprotection and seizure prophylaxis" and the latter "to start cervical ripening in an attempt to induce labor."

Fetal heart monitoring was performed on a continual basis beginning shortly after Ms. Kiebler was admitted to Bayview. From the time Ms. Kiebler was admitted on December 25, 2013, until 3:30 a.m. the following morning, the EFM waveforms were Category I, similar to those recorded two days earlier. Beginning at 3:30 a.m., the EFM tracings were Category II, which are indeterminate.[6] "After 7:00 a.m. (according to [appellants'] expert testimony) or 8:00 a.m. (according to [Bayview's] expert testimony), the decelerations became recurrent, potentially an indication of fetal distress."

[6] According to the court, "[b]ased on studies, Category II tracings occur in approximately 80% of deliveries." A 2013 paper authored by Steven L. Clark, M.D., et al., supported this conclusion, and appellants' expert stated in his deposition that he agreed with it. Steven L. Clark, et al., *Intrapartum management of category II fetal heart rate tracings: towards standardization of care*, 209(2) Am. J. Obstet. & Gynecol. 89 (2013).

Because of the change in the EFM tracings, at 8:17 a.m., Douglas Michael Bourque, M.D., the attending physician, obtained Ms. Kiebler's consent to perform an emergency Cesarean delivery. The parties' experts disputed whether a Category III tracing was detected near the time of delivery.

P. was delivered by Cesarean section at 8:50 a.m. His Apgar scores[7] were 2 and 6 at one and five minutes after delivery, respectively. He was "initially non[-]vigorous, with no respiratory effort," and his fetal heart rate was less than 100 beats per minute. Umbilical cord blood gas sampling disclosed that P. was suffering from acidemia, a pathological condition resulting from excessively low blood pH.[8] *Dorland's* at 16. On the other hand, P. had no seizures, no sign of intracranial hemorrhage, and no indication of organ dysfunction, and moreover, ultrasound images of his head were normal. Based on these observations, as well as the rapid recovery suggested by the positive change in Apgar score between one and five minutes, treating physicians elected not to perform brain scans or MRI imaging.

P. was admitted to the neonatal intensive care unit, where it was noted that he had "respiratory distress, metabolic acidosis, and poor muscle tone." Bayview doctors

[7] An Apgar score is "a numerical expression of the condition of a newborn infant, usually determined at 60 seconds after birth, being the sum of points gained on assessment of the heart rate, respiratory effort, muscle tone, reflex irritability, and color." *Dorland's* at 1654. The scale is from 1 to 10, and a higher score "reflects a better subjective assessment than a lower score."

[8] Immediately after delivery, P.'s blood was determined to have a pH of 6.93, with a base deficit of -18 mmol/liter.

"identified no evidence" of hypoxic ischemic encephalopathy ("HIE")[9] or "other brain injury" at the time of birth, a conclusion disputed by appellants' experts. Ultimately, at two years of age, P. was diagnosed with spastic diplegic cerebral palsy.

In March 2021, appellants filed a two-count complaint in the Circuit Court for Baltimore City,[10] alleging medical negligence and failure to obtain informed consent. The gravamen of their complaint was that Bayview's physicians breached the standard of care in failing to deliver P. by emergency Cesarean section by midnight rather than 8:17 a.m. on December 26, 2013,[11] and that, had they done so, he would not have suffered his birth injury.

Appellants' Causation Experts

Appellants offered as causation experts Robert L. McDowell, Jr., M.D., a board-certified pediatrician and neonatologist, and Michael S. Cardwell, M.D., a board-certified maternal fetal medicine specialist and obstetrician-gynecologist. During

---

[9] Encephalopathy means "any degenerative disease of the brain." *Dorland's* at 608. HIE is "encephalopathy resulting from asphyxia." *Id.* "In infants presumed to have suffered prenatal or perinatal asphyxia, common symptoms are lethargy, feeding difficulties, and convulsions; serious cases may involve necrosis of neurons in the brain with psychomotor retardation and spastic motor deficits such as cerebral palsy." *Id.*

[10] Appellants already had complied with the statutory preconditions to filing their negligence action and obtained an order of transfer from the Health Care Alternative Dispute Resolution Office.

[11] Although appellants initially claimed that the standard of care required that P. be delivered by 12:00 a.m. December 26, they later claimed that a Cesarean section should have been performed at a somewhat later time. During the *Daubert* hearing, Robert L. McDowell, Jr., M.D., one of appellants' causation experts, would opine that the injury occurred during "the hour and a half right before delivery." That would imply that Bayview's physicians should have delivered P. no later than 7:00 a.m. December 26.

his deposition, Dr. McDowell agreed that "we still lack reliable assessment tools of fetal and neonatal status which are both sensitive and specific to an intrapartum insult that correlates with long-term outcome." He insisted, however, that "we're better and better at pinning that down, and this is a case where the details allow you to do that." When pressed to provide "any literature that stands for the proposition that intrapartum asphyxia or HIE that leads to cerebral palsy in a preterm infant of this gestational age would commonly result in spastic diplegia[,]" Dr. McDowell declared that "it's kind of common knowledge, at least for me." Pressed further, he conceded that "we simply do not have a definitive test or set of markers that reliably identify an infant in whom neonatal encephalopathy is attributable to an acute intrapartum event." Dr. McDowell nonetheless insisted that "there are times, such as this case, where the data falls together in a pattern that lets you more likely than not make a statement as to what has happened." He concluded, without citation to authority, that the consensus view that "neither spastic diplegic nor spastic hemiplegic cerebral palsy is likely to have its origin in birth hypoxia" applies only to babies delivered full term, not preterm as in this case.

During his deposition, Dr. Cardwell, relying upon the "ACOG monograph"[12] and an article by Steven L. Clark, M.D., et al., "Intrapartum management of category II fetal heart rate tracings: towards standardization of care," 209(2) Am. J. Obstet. & Gynecol. 89 (2013), opined that fetal heart rate tracings exhibiting "minimal variability and repetitive" late decelerations are properly classified as Category III tracings, in an apparent attempt to

[12] *Neonatal Encephalopathy and Neurologic Outcome*, American College of Obstetricians and Gynecologists (2d ed. 2019).

claim that P. had exhibited such tracings prior to delivery. When asked whether he agreed that, "as of 2013, there was an absence of scientific evidence to support the contention that intervention based on any single fetal heart rate pattern or combination of patterns prevents cerebral palsy or other neurologic impairment[,]" Dr. Cardwell replied that he agreed "from a population perspective" but not "from an individual patient perspective[.]" In reaching that conclusion, he did not rely on "any particular literature[.]"

Bayview's Motion to Exclude Causation Experts under Md. Rule 5-702 and *Daubert*

In October 2022, appellee filed a motion to exclude appellants' experts' "unfounded causation and standard of care opinions[,]" invoking Maryland Rule 5-702 and *Daubert*.[13] In that motion, appellee asserted that appellants' claim rests on a "debunked" hypothesis—that "intervening in labor with cesarean delivery in response to certain fetal heart rate (FHR) patterns, even without a sentinel event, might reduce the incidence of cerebral palsy or neurologic injury." According to appellee, "[d]ecades of obstetrical research have shown" that such interventions "are generally *ineffective* at preventing cerebral palsy and other neurologic injuries." Appellee further maintained that there was no "sentinel event" in this case that required its medical personnel to induce premature delivery prior to when they did so.

In its motion, Bayview contended, among other things, that appellants' causation opinion evidence failed to satisfy Maryland Rule 5-702(3) because the "only scientific support" for it "flatly *rejects*" their position; appellants' causation theory "fails to

[13] We recite only facts relevant to the exclusion of appellants' causation experts because that is the only issue before us in this appeal.

adequately rule out or account for other far more likely causes of injury, including prematurity"; appellants' causation theory "fails to adequately account for the signs of fetal injury *before* any alleged negligence"; and consideration of additional factors beyond P.'s fetal heart rate patterns "does not resolve the unreliability" of appellants' causation theory because those additional factors "lack any positive predictive value for timing the injury and correlation to long-term injury."

Attached to its motion were ten exhibits. Perhaps the most noteworthy was Exhibit D, an affidavit signed by Steven L. Clark, M.D., expressly disclaiming appellants' reliance upon the 2013 article for which he was the lead author, "Intrapartum management of category II fetal heart rate tracings: towards standardization of care." According to Dr. Clark, that article does not support appellants' theory of causation. Dr. Clark declared:

> To this day, the glaring absence of any valid scientific support for [appellants'] causation theory remains, and [appellants'] causation theory still is not generally accepted in the obstetrical or maternal-fetal medicine community. Just recently, and before I became aware of this litigation, I published a scientific commentary (Exhibit C) rejecting [appellants'] causation theory as "junk science," because not only is that premise *unsupported* in the peer-reviewed literature, it squarely *conflicts* with the overwhelming weight of scientific literature on this issue[.]

Appellants' Opposition

Appellants filed an opposition to Bayview's motion to exclude their causation and standard-of-care experts. In their motion, appellants contended, among other things, that neither their causation nor standard-of-care experts relied upon the Clark article; Bayview misstated their causation theory, which, according to appellants, was not based upon "whether science has established a causal link between minimal variability/Category II

tracings and neurologic injury[,]" but rather, was based upon persistent Category II tracings with minimal variability despite observation and intervention, which ultimately became Category III tracings prior to delivery; appellants' experts have "adequately considered" and ruled out "other potential causes of injury"; and appellants' experts "have appropriately ruled out the possibility that the fetus was injured before the alleged negligence."

Hearing on Bayview's Motion

The circuit court held a two-day hearing on Bayview's *Daubert* motion, focusing primarily on appellants' theory of causation and appellee's challenge to it. Three witnesses testified: Dr. Cardwell and Dr. McDowell for appellants, and Dr. Clark for appellee. Following the conclusion of the hearing, the circuit court held the matter sub curia, and four weeks later, it issued a memorandum opinion, excluding appellants' causation experts.

The Circuit Court's Ruling

The circuit court began by summarizing appellants' theory of causation, declaring:

> First, [appellants] must prove the time of the alleged intrapartum event that resulted in injury in order to show that the injury occurred after the standard of care was breached. Next, [appellants] must show that the alleged post breach intrapartum event resulted in actual neurological injury such as encephalopathy. Finally, [appellants] must prove that the encephalopathy or other neurological injury developed into cerebral palsy. If any of the links are not supported, the causation opinion should be excluded.
>
> In arriving at their conclusions, [appellants'] experts examine a series of medical findings or markers, such as fetal heart tracings during the delivery and blood gas results taken after the birth. The experts, based on their training and experience, then use these findings and markers to look back to determine the time of the event when the fetus was allegedly injured, and how this event led to neurological injury in the baby. For the reasons set forth below, the Court finds that the factual and analytical underpinnings for their opinions are flawed. The experts, in arriving at their conclusions, ignore the clear limitations and lack of reliability for these findings and markers,

> and stand by their opinions simply by invoking their training and experience, and hiding behind a "more like so than not" standard.[14]

The circuit court then examined in detail the testimony of appellants' two causation experts, Dr. Cardwell (who testified only as to "obstetrical causation") and Dr. McDowell. Dr. Cardwell testified that, had P. been delivered prior to 7:00 a.m. on December 26, 2013, he would not have had acidemia.

Because Dr. McDowell conceded that acidemia alone could not be used to determine when an alleged hypoxic injury occurred or to link hypoxic injury to neurological injury, the court turned its attention to the remainder of his testimony to discern what he claimed as a theory of causation. According to Dr. McDowell, although each factor (including fetal heart tracings, acidemia, nucleated red blood cell count, and neuroimaging), in isolation, has no reliable predictive value in determining whether a newborn will suffer neurological injury, those factors "cumulatively" are predictive to a preponderance of the evidence.

The circuit court found that Dr. McDowell's causation opinion "defies common sense and epitomizes the *ipse dixit* of a flawed expert opinion." In the court's words, "[t]his is the classic 'analytical gap' between the data which cannot reliably prove anything (other than possible correlation), and the opinion which says that the data in fact does prove something."

---

[14] In a footnote, the circuit court acknowledged that an expert's experience, alone or in combination with other knowledge, skill, training, or education, can establish a sufficient foundation for expert testimony, but a court will nonetheless exclude expert testimony based on belief or speculation, or when it is not supported by the record.

The circuit court then reviewed medical literature submitted by the parties (including the ACOG monograph and the Clark paper) and noted that "Dr. McDowell's concurring testimony as to the lack of reliability of individual markers is certainly consistent with" that medical literature.

Finally, the circuit court addressed the issue of whether a "sentinel event" occurred during P.'s delivery because it sensed that appellants' counsel was "attempting to raise" the occurrence of a sentinel event as "an alternative theory to bolster" their "otherwise deficient" theory of causation. The court observed that appellants' "own standard of care expert, Dr. Fred Duboe, . . . agreed with" the definition of "sentinel event" as stated in a 2017 article by Shankaran, et al.,[15] and further agreed "that no sentinel event occurred in this case." In addition, the court declared that Dr. Cardwell "further confirmed that none of the physical events" described in the Shankaran article as sentinel events "occurred in this case." Drs. McDowell and Cardwell claimed, however, without citing any literature and contrary to the Shankaran article, that a sentinel event occurs whenever a bradycardia tracing occurs (as in this case). The circuit court, quoting *Rochkind v. Stevenson*, 471 Md. 1, 35 (2020), rejected what it termed an "unsupported opinion [that] appears to be one formed 'expressly for the purposes of testifying' in this case[.]"

[15] Seetha Shankaran, et al., *Acute Perinatal Sentinel Events, Neonatal Brain Injury Pattern, and Outcome of Infants Undergoing a Trail of Hypothermia for Neonatal Hypoxic-Ischemic Encephalopathy*, 180 J. Pediatr. 275-278.e2 (2017).

The circuit court concluded[16]:

> Although the bases for [appellants'] experts' causation opinions appear to be a moving target, there are a series of facts or factors, on which [appellants'] experts rely from time to time to opine as to the timing of the alleged injury to the fetus, and as to the connection between the alleged event and possible neurological injury to the baby. However, while a sufficient factual basis will permit "an expert to reasonably extrapolate from existing data[,] . . . when the only connection between opinion testimony and the data is the expert's assertion, without more, such testimony cannot support general causation." [*Sugarman v. Liles*, 460 Md. 396, 427 (2018)]. Similar to the expert in *Walter v. State*, 239 Md. App. 168, 197 (2018), Dr. McDowell "kept no statistics and could point to no peer-reviewed studies to support [his] conclusion, so [he] appears to have based [his] opinion on only an extrapolation from [his] own experiences." As noted above, Dr. McDowell used facts which he agreed were individually ***not*** reliably predictive, and decided, without any medically supported research, that such unreliable facts could be combined into a reliable amalgam based on his training and experience. In *Walter*, the Appellate Court expressed the following concern about the bases for an expert's opinion: "Did she rely on her own, subjective evaluation of the validity of the claim of abuse? Or did she draw the conclusion from a conflation [of] all of the claims that she had heard, without distinguishing the true from the false or *the reliable from the disproven*?" *Id.* at 197 (emphasis supplied). In this case, Dr. McDowell does not even attempt to distinguish the "reliable from the disproven," he readily admits that he is relying on the unreliable and unknown.
>
> The Court is aware that other courts in unreported opinions have permitted causation testimony in cases involving cerebral palsy after a *Daubert*-type hearing, *see Koval v. Kincheloe*, 2001 WL 34748892 (W.D. Okla.); and other courts have excluded such testimony after a *Daubert*-type hearing, *see Fleming v. Rice*, 2009 WL 1556519 (Ct. App. Michigan). The Court has not located, and the parties have not provided, any Maryland appellate authority directly on this issue. Nonetheless, it is clear that rulings in cases such as the present one are dependent on the specific unique underlying facts, the specific expert opinions, and the articulated bases for such opinions, including the specific medical literature and research presented to the court. The Court has closely considered the extensive pleadings and attachments, the testimony of the expert witnesses, and the

[16] For good measure, the court included an appendix (Court's Exhibit One) summarizing the medical literature, submitted by the parties, that it had consulted in arriving at its conclusions.

> medical literature submitted by the parties. The Court is aware that it is only to be a "gatekeeper" and not an "armed guard." [*State v. Matthews*, 479 Md. 278, 322 (2022)]. Ultimately, however, under [Md.] Rules 5-104 and [5-702], it is [appellants'] burden to show by a preponderance of the evidence that the causation opinions are admissible. They have not met that burden and the Court will not admit [appellants'] expert causation testimony in this case.

Appellants' Post-Trial Motions and the Circuit Court's Rulings

After the circuit court's ruling, granting appellee's motion to exclude the testimony of appellants' causation experts and effectively ending their case, appellants filed motions for recusal and for reconsideration. The circuit court held a hearing on those motions and denied them. It then granted summary judgment in favor of appellee. This timely appeal followed.

DISCUSSION

I.

Appellants present a barrage of verbal shrapnel in a vain attempt to attack the integrity of the trial judge in this case.[17] We shall not attempt to engage in a point-by-point

---

[17] Among other things, appellants assert that:

> I. The circuit court erred in "rigid[ly]" applying *Daubert* in a medical malpractice case without "acknowledg[ing] that medical malpractice cases are inherently not amenable to traditional *Daubert* analysis." According to appellants, the circuit court "ignored many *Daubert* factors and instead focused almost entirely on a few, unrepresentative publications[.]" Appellants criticize what they maintain is the circuit court's excessive reliance on "'statements' and 'practice bulletins' from ACOG, a physician advocacy group actively involved in 'tort reform.'"
>
> II. The circuit court erred in "ignoring the overwhelming caselaw supporting admission of Appellants' expert opinions."

(continued…)

refutation of their assertions; instead, our focus shall be to examine the trial court's rulings, apply the appropriate legal standards, and determine whether the trial judge abused his discretion in applying those standards to the facts of this case.

Standard of Review

We "review a trial court's decision concerning the admissibility of expert testimony under Maryland Rule 5-702 for abuse of discretion."[18] *Katz, Abosch, Windesheim,*

> III. The circuit court erred in "weighing expert opinions and focusing on conclusions rather than principles and methodology." According to appellants, the "trial court's decision here involved improper fact finding and determinations about the weight of the evidence[,]" which is "precisely what the *Rochkind* [C]ourt warned against[.]" (Citing *Rochkind*, 471 Md. at 34.) Appellants complain that they "produced an abundance of evidence and literature" to establish their theory of causation but that the circuit court "ignored" the literature they provided. Thus, according to appellants, the circuit court invaded the province of the jury.
>
> IV. And finally, the circuit court "improperly weighed in on what constitutes a 'sentinel event.'" According to appellants, the circuit court "gratuitously attacked" their experts, Dr. McDowell and Dr. Cardwell, for their opinion that bradycardia is regarded as a "sentinel event" and that "[e]ven the American Journal of Obstetrics and Gynecology has recently acknowledged this[.]" Thus, according to appellants, "the trial judge took sides in this debate in the medical community, contrary to significant practice and literature which confirms that bradycardia can be a 'sentinel event.'"

[18] Courts throughout the country have disagreed about the standard of review that should apply to appellate review of a trial court's *Daubert* rulings. Some courts apply a two-step analysis, reviewing a trial court's "reliability determination" under the *Daubert* factors without deference, but reviewing case-specific factors, "such as whether the witness has sufficient expertise, whether the evidence can assist the trier of fact in that case, and whether the relevant theory or technique can properly be applied to the facts in issue[,]" under a deferential standard. *State v. Olenowski*, 304 A.3d 598, 628 (N.J. 2023). *See*, *e.g.*, *State v. Sharpe*, 435 P.3d 887, 889 (Alaska 2019); *Lee v. Martinez*, 96 P.3d 291, 296 (N.M. 2004); *Taylor v. State*, 889 P.2d 319, 331-32 (Okla. Crim. App. 1995); *State v. Dahood*,

(continued…)

Gershman & Freedman, P.A. v. Parkway Neuroscience & Spine Inst., 485 Md. 335, 360-61 (2023). Although the "admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute ground for reversal[,]" we will nonetheless reverse if the trial court's ruling "is founded on an error of law or some serious mistake, or if the trial court clearly abused its discretion." *Rochkind*, 471 Md. at 10-11 (quotation marks and citations omitted).

The Supreme Court of Maryland has further elaborated on the standard of review:

> Under [the abuse of discretion] standard, an appellate court does "not reverse simply because the . . . court would not have made the same ruling." *Devincentz v. State*, 460 Md. 518, 550 (2018) (internal quotation marks and citation omitted). "Rather, the trial court's decision must be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Id.* (internal quotation marks and citation omitted); *see also Williams v. State*, 457 Md. 551, 563 (2018) ("An abuse of discretion occurs where no reasonable person would take the view adopted by the circuit court."); *Jenkins v. State*, 375 Md. 284, 295-96 (2003) ("Abuse occurs 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.").

---

814 A.2d 159, 161-62 (N.H. 2002); *State v. Beard*, 461 S.E.2d 486, 492 n.5 (W.Va. 1995); *State v. Lyons*, 924 P.2d 802, 805 (Or. 1996). Our Supreme Court has made it clear that it rejects this view. *Rochkind*, 471 Md. at 37. *Reed v. State*, 283 Md. 374 (1978), which *Rochkind*, 471 Md. at 5, expressly overruled, had applied a two-tiered standard—"*de novo* for *Frye*-*Reed* [i.e., whether scientific or technical evidence has been generally accepted in the relevant scientific community] and abuse of discretion for [Md.] Rule 5-702[.]" *Rochkind*, 471 Md. at 37. *See Oglesby v. Balt. Sch. Assocs.*, 484 Md. 296, 326-27 (2023) (explaining that "[b]efore *Rochkind*, appellate courts reviewed a trial court's decision as to the admissibility of expert testimony under two different standards of review, with a trial court's determinations under *Frye*-*Reed* reviewed *de novo* and a trial court's determinations under Maryland Rule 5-702 reviewed for abuse of discretion"). But in *Rochkind*, the Supreme Court of Maryland adopted a unitary abuse-of-discretion standard. *Rochkind*, 471 Md. at 37.

Katz, 485 Md. at 361 (further quotation marks omitted) (quoting *State v. Matthews*, 479 Md. 278, 305-06 (2022)).

"Summary judgment is appropriate where 'there is no genuine dispute as to any material fact and [ ] the [moving] party is entitled to judgment as a matter of law.'" *Oglesby v. Balt. Sch. Assocs.*, 484 Md. 296, 327 (2023) (quoting Md. Rule 2-501(a)). We review a trial court's grant of a motion for summary judgment without deference. *Id.* In so doing, we "'review[] the record in the light most favorable to the nonmoving party, and construe[] any reasonable inferences that may be drawn from the facts against the moving party.'" *Id.* (quoting *State v. Rovin*, 472 Md. 317, 341 (2021)).

Analysis

Maryland Rule 5-702 governs expert testimony in Maryland courts and 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.

At issue in this case is the third subpart of the rule, "whether a sufficient factual basis exists to support the expert testimony."

In its landmark decision in *Rochkind*, *supra*, 471 Md. 1, the Supreme Court of Maryland adopted the standard first articulated by the Supreme Court of the United States in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny,

which interpreted Federal Rule of Evidence 702, after which the Maryland rule was patterned. "[I]n conducting its analysis under [Md.] Rule 5-702, a trial court should consider a number of factors in determining whether the proffered expert testimony is sufficiently reliable to be provided to the trier of fact." *Matthews*, 479 Md. at 310. Those factors include:

> (1) whether a theory or technique can be (and has been) tested;
>
> (2) whether a theory or technique has been subjected to peer review and publication;
>
> (3) whether a particular scientific technique has a known or potential rate of error;
>
> (4) the existence and maintenance of standards and controls; . . .
>
> (5) whether a theory or technique is generally accepted[;]
>
> * * *
>
> (6) whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying;
>
> (7) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;
>
> (8) whether the expert has adequately accounted for obvious alternative explanations;
>
> (9) whether the expert is being as careful as he or she would be in his or her regular professional work outside his or her paid litigation consulting; and
>
> (10) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

Id. at 310-11 (cleaned up) (quoting *Rochkind*, 471 Md. at 35-36).

We find neither error nor abuse of discretion in the circuit court's application of these factors. Factors (1), (2), (5), (7), and (10) all weigh against Dr. McDowell's causation theory—that such factors as fetal heart tracings, acidemia, nucleated red blood cell count, and neuroimaging, none of which, individually, is predictive of neurological injury, may nonetheless, when considered cumulatively, support a causal link to that injury. Factor (8) also weighs against Dr. McDowell's causation theory because, as the medical literature submitted in this case demonstrates and as appellants' experts acknowledge, P.'s risk of cerebral palsy attributable to his prematurity alone was approximately forty to fifty times greater than that of a baby born at full term. As for appellants' experts' belated assertion that a "sentinel event" occurred prior to delivery, we agree with the circuit court that this assertion appears to have been formed "expressly for the purposes of testifying" in this case, *Rochkind*, 471 Md. at 35 (cleaned up), and therefore, factor (6) also weighs against appellants' causation experts' opinions.

Even were we applying de novo review, we would affirm the circuit court's ruling, excluding appellants' causation experts. We therefore (and necessarily) find no abuse of discretion. We agree with the circuit court that this was a "classic case" of an "analytical gap between the data and the opinion proffered." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).[19]

II.

[19] Once it is established that the circuit court did not err or abuse its discretion in excluding appellants' causation experts, it follows that the grant of summary judgment was appropriate. Appellants do not contend otherwise; instead, their argument focuses exclusively on the circuit court's ruling excluding their causation evidence.

Finally, appellants contend that Judge Peters, the judge who presided over the case and ruled on the dispositive motions, should have recused himself because his wife, a retired obstetrician-gynecologist, previously had worked for Johns Hopkins and that he had failed to disclose that fact prior to issuing his ruling in this case. According to appellants, they "learned that Judge Peters is married to a board-certified OB-GYN who practiced in the Baltimore area for decades until 2020[,]" but only after Judge Peters had granted appellee's motion to exclude appellants' causation experts. Appellants further complain that Judge Peters's spouse had "completed her postgraduate training and residency at Johns Hopkins Hospital" and had "worked there for several years." As further evidence of a potential conflict of interest, appellants point out that Judge Peters's spouse is a member of ACOG, the "organization whose literature the court cited heavily in justifying its ruling." Based on these purported conflicts, appellants contend that Judge Peters erred or abused his discretion in denying their recusal motion because "any reasonable person would question the court's impartiality."

Appellee counters that appellants' motion was "frivolous" and that it was based upon "nothing more than the fact that the trial judge's wife, a retired obstetrician and member of the American College of Obstetricians and Gynecologists, was trained at Hopkins and briefly taught there more than 30 years ago." Contending that appellants fail to cite "any favorable case law" in support of their position, appellee maintains that, "[i]n any event, the occupation of the judge's wife was easily knowable—if not already known—to a law firm that specializes in Maryland birth-injury litigation." Thus, according to appellee, we should reject appellants' untimely recusal motion which, it contends, is an

attempt "to create something out of nothing" and is nothing more than a desperate attempt to avoid the circuit court's unfavorable ruling on the merits of the case.

Analysis

Standard of Review

There is a "'strong presumption'" that "'judges are impartial participants in the legal process, whose duty to preside when qualified is as strong as their duty to refrain from presiding when not qualified.'" *Conner v. State*, 472 Md. 722, 738 (2021) (quoting *Jefferson-El v. State*, 330 Md. 99, 107 (1993)). In Maryland, "the question of recusal . . . ordinarily is decided, in the first instance, by the judge whose recusal is sought[.]" *Surratt v. Prince George's Cnty.*, 320 Md. 439, 464 (1990) (citing *Doering v. Fader*, 316 Md. 351, 358 (1989)). "When bias, prejudice or lack of impartiality is alleged, the decision is a discretionary one, unless the basis asserted is grounds for mandatory recusal."[20] *Id.* at 465. We review a trial judge's refusal to recuse himself for abuse of discretion. *Id.* In this context, the standard is "'whether a reasonable member of the public knowing all the circumstances would be led to the conclusion that the judge's impartiality might reasonably be questioned.'" *S. Easton Neighborhood Ass'n, Inc. v. Town of Easton*, 387 Md. 468, 499 (2005) (quoting *In re Turney*, 311 Md. 246, 253 (1987)). "Recognized grounds implicating possible partiality include a significant financial interest in a party or outcome, a pre-judicial relationship as an attorney with a party or counsel for a party, or a personal bias or prejudice concerning a party." *Id.*

[20] Appellants state no grounds for mandatory recusal.

Analysis

Appellants' motion to recuse is without merit. As appellee points out, Judge Peters's wife's affiliation with Johns Hopkins concluded many years before this case arose. During the hearing on the recusal motion, Judge Peters pointed out that his wife had "not done any work, to [his] knowledge, or medical work [of] any sort at Hopkins for the past 30 years." As Judge Peters further pointed out, she retired in 2020 and, to his knowledge, "does not intend . . . to ever practice again." Finally, her membership in the American College of Obstetricians and Gynecologists is of no more consequence than an attorney's membership in the American Bar Association or the Maryland State Bar Association; it provides no basis whatsoever to impugn either her or the judge's integrity or impartiality. There is no basis to believe that "a reasonable member of the public knowing all the circumstances would be led to the conclusion that [Judge Peters's] impartiality might reasonably be questioned." *S. Easton*, 387 Md. at 499 (cleaned up). Judge Peters did not abuse his discretion in denying appellants' motion to recuse.

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