UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0911

September Term, 2012

UNIVERSITY OF MARYLAND
MEDICAL SYSTEM CORPORATION

v.

RODNEY SHELDON, ET AL.

Eyler, Deborah S.,
Wright,
Nazarian,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: September 19, 2013

In the Health Claims Alternative Dispute Resolution Office ("HCADRO"), Rodney Sheldon and his wife, Jaye Sheldon, the appellees, filed a statement of claim alleging medical malpractice against the University of Maryland Medical Systems Corporation ("UMMS"), the appellant. In an e-mail exchange we shall discuss later in this opinion, counsel for the Sheldons agreed not to name individually any UMMS health care providers in their Certificate of Qualified Expert ("Certificate") and counsel for UMMS agreed not to oppose a motion for extension of the deadline for the filing of the Sheldons' Certificate. The next day, the Sheldons filed a Certificate signed by Martin J. Raff, M.D. Six days later, they unilaterally waived arbitration, filing their complaint with attached Certificate and a demand for jury trial in the Circuit Court for Baltimore City.

Ultimately, the case was tried to a jury, which returned a verdict of $1,711,768 in favor of Rodney Sheldon, and $125,000 in favor of the Sheldons for loss of consortium. Thus, the total verdict was $1,836,768. The court granted a motion to revise the verdict to adhere to the Maryland statute limiting recovery of non-economic damages. *See* Md. Code (1973, 2006 Repl. Vol., 2012 Supp.), § 11-108 of the Courts and Judicial Proceedings Article ("CJP"). It reduced the combined loss of consortium award and non-economic damages award, which totaled $696,000, by $46,000, to equal $650,000. The court denied a motion by UMMS for a new trial and also to dismiss for failure to file a proper Certificate.

UMMS noted an appeal, presenting three questions for review, which we have combined and reworded:

> I. Did the trial court err in allowing the Sheldons to modify their allegations against UMMS during trial, contrary to Maryland law and

to the parties' express agreement, and in denying UMMS's post-trial motion to strike the Certificate and to dismiss?

II. Did the trial court err in allowing counsel for the Sheldons to make a "missing witness" closing argument?

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

FACTS AND PROCEEDINGS

This medical malpractice action focused on the post-discharge antibiotic care rendered to Mr. Sheldon. On September 27, 2007, Mr. Sheldon fell off a ladder at his house on the Eastern Shore, sustaining a very serious injury to his left ankle. He was transported by helicopter to the Shock Trauma Unit of UMMS. There he was diagnosed with a broken left ankle, more specifically, a Type IIIA open left bimalleolar ankle fracture. The break was in multiple bones of the ankle, there were portions of bone missing, and the broken bones had punctured the skin.

On September 28, 2007, the orthopedic team at UMMS irrigated and debrided the wound and performed open reduction and internal fixation surgery in which hardware was inserted to repair Mr. Sheldon's severely broken left ankle. There is no dispute that the surgery was necessary and was competently performed.

About four days after the operation, while still in the hospital, Mr. Sheldon began to experience signs and symptoms of infection at the site of the wound. He was started on intravenous ("IV") antibiotics. Cultures taken of the wound site grew out five different microbes. On October 3 and 5, 2007, the orthopedic doctors performed an irrigation and

debridement of the wound with placement of a vacuum-assisted closure device. Then, on October 11, 2007, another irrigation and debridement was performed, this time with the placement of beads containing the antibiotics Tobramycin and Vancomycin.

On October 12, 2007, an Infectious Disease ("ID") consult was performed. The attending ID physician on duty developed a plan to treat the infection as if it were osteomyelitis, which is an infection of the bone. On October 15, 2007, a procedure was performed by the orthopedists in which a "free flap," was placed over the left ankle and the bone, muscle, and soft tissue were debrided.[1]

Mr. Sheldon remained hospitalized and on IV and oral antibiotics until October 22, 2007. By that time, Ellis Caplan, M.D., the Chief of Infectious Disease at UMMS, had taken over for Ronald Rabinowitz, M.D., as Mr. Sheldon's ID specialist. That day, Dr. Caplan performed a second ID consult, as part of Mr. Sheldon's discharge planning. Dr. Caplan's plan was that Mr. Sheldon would be discharged to a rehabilitation facility, where he would receive two antibiotics, Ampicillin and Ertapenem, both by IV.

Mr. Sheldon and his wife were under the impression that the reason for his being discharged to a rehabilitation facility was for physical therapy. Given that he was not permitted to bear weight on his ankle or even to "dangle" it, they did not understand how physical therapy would be helpful. For this reason, Mrs. Sheldon asked a nurse why her

---

[1]Expert witnesses testifying at trial explained that a "free flap" is a piece of skin removed from the patient's body and then used to cover an open wound to fend off infection.

husband could not be discharged to their home instead. After consultation with physicians on the ID team, the discharge plan was changed so that Mr. Sheldon would be sent home on oral Ampicillin and on IV Ertapenem, to be administered once a day for four weeks. The ID team decided to change the IV Ampicillin to oral Ampicillin because the IV Ampicillin would have had to be administered four times per day, which would have been very difficult in a home setting. In order to carry out the revised plan, a Peripherally Inserted Central Catheter ("PICC") line was placed for the administration of the IV Ertapenem.

Dr. Caplan expected that Mr. Sheldon would attend an outpatient facility near his home on a daily basis for administration of the IV Ertapenem. And, he expected that the UMMS ID team would make the necessary arrangements with an outside health care provider for Mr. Sheldon to be able to go to that health care provider's facility daily for his IV Ertapenem. The ID team also could make arrangements for visiting nurses to come to Mr. Sheldon's house on a daily basis to administer the IV Ertapenem, although often that kind of service is not covered by insurance and, in any event, the Sheldons did not have health insurance at that time. To Dr. Caplan's knowledge, however, the ID team did not make arrangements for either kind of IV administration logistics.

Immediately before Mr. Sheldon was discharged from UMMS, he was given handwritten prescriptions for oral Ampicillin and IV Ertapenem; for Lovenox, an anti-clotting medication; for prescription pain medication; and for "visiting nurse service for

wound care." All of the prescriptions were signed by Saadi Alhalbouni, M.D.,[2] a resident in UMMS's Shock Trauma Unit who discharged Mr. Sheldon.

After her husband was discharged from the hospital, Mrs. Sheldon went to a local pharmacy to fill the prescription for Ertapenem. She was unable to fill the prescription, however, because Ertapenem for IV administration is not a drug that can be obtained at a pharmacy. It only can be obtained through a hospital, health care facility, or home health care/visiting nurse organization.

On October 25, 2007, Mrs. Sheldon returned to UMMS. That day, Dr. Caplan was the ID team member covering Shock Trauma. Mrs. Sheldon met with a nurse in the Shock Trauma clinic and told her that she had been unable to fill the prescription for Ertapenem. The nurse told Mrs. Sheldon that she would speak to a physician about the problem. Shortly thereafter, the nurse gave Mrs. Sheldon a new prescription for a different antibiotic, Ciprofloxacin ("Cipro"), to be taken orally in place of the prescription for IV Ertapenem.[3] Mr. Sheldon's medical chart does not contain any notes reflecting Mrs. Sheldon's visit to UMMS on October 25, 2007. There is a record, however, that Jennifer Adamski, f/k/a Jennifer Donnelly ("Nurse Adamski"), a nurse practitioner in the Shock Trauma Unit, wrote

---

[2]The parties spell Dr. Alhalbouni's name as "Alhalboni." We use the spelling appearing in the UMMS records.

[3]Mrs. Sheldon testified at trial that she was certain she returned to UMMS on October 23, 2007, the day after her husband was discharged. Mr. Sheldon corroborated her testimony. Mrs. Sheldon could not explain why the UMMS records reflect that she filled the prescription for oral Cipro at the UMMS pharmacy on October 25, 2007, however.

the prescription for oral Cipro that day. Although Dr. Caplan does not specifically recall this, he testified at trial that "in all probability," he approved the change in antibiotics, and that the use of oral Cipro instead of IV Ertapenem was medically proper.

On October 30, 2007, Mr. Sheldon returned to UMMS for his first post-operative visit, during which the PICC line was removed. He was kept on the Ampicillin and Cipro regimen. Once Mr. Sheldon completed the four-week course of those medications, no more antibiotics were prescribed.

Mr. Sheldon returned to UMMS for routine post-operative visits in the months to follow. During his January 2008 visit, the notes in his chart reflect that an orthopedic surgeon discussed with Mr. Sheldon the possibility that he had a "chronic ongoing infection" in his ankle and also discussed the possibility of ankle fusion or below-the-knee amputation. Mr. Sheldon was given an order for blood work.

Mr. Sheldon's blood work showed an elevated sedimentation rate and elevated c-reactive protein -- both signs of infection -- and serous drainage from his wound. Cultures taken during a February 2008 appointment revealed the infectious agent to be methicillin-resistant staphylococcus aureus ("MRSA"). Mr. Sheldon was started on a short course of antibiotics at that time.

Mr. Sheldon's wound infection worsened. On April 19, 2008, Mrs. Sheldon brought her husband to the UMMS emergency department after his "wound ruptured," producing a "copious" amount of drainage. Mr. Sheldon was admitted and was diagnosed with

osteomyelitis. He underwent surgery for irrigation and debridement of the bone, muscle, and tissue, and to remove the indwelling hardware.

Mr. Sheldon was discharged from UMMS on April 25, 2008 to a rehabilitation facility where he remained for one month. During that time, he received IV antibiotics and wound care.

In the months to follow, Mr. Sheldon experienced "persistent drainage" from the wound site. At a July 14, 2008 follow-up appointment, Mr. Sheldon was advised by an orthopedic surgeon at UMMS that amputation or ankle fusion surgery were likely to be necessary due to the chronic infection.

Mr. Sheldon sought a second opinion from an orthopedic surgeon at Union Memorial Hospital. Ultimately, on September 28, 2008, he underwent surgery at that hospital to fuse his ankle.

On April 14, 2011, the Sheldons filed a three-count complaint against UMMS. Count I set forth a claim of medical negligence against UMMS "acting directly and/or by and/or through its actual and/or apparent agents, servants, and/or employees." Mr. Sheldon alleged that health care providers working for UMMS failed to appropriately identify, assess, and treat his infection and that UMMS violated "institutional standards of care" by failing to put in place adequate discharge planning systems to ensure that patients would receive "appropriate treatment and follow-up care after discharge." Count II set forth a claim for lack of informed consent, alleging that UMMS and its agents failed to counsel him about the

risks and benefits of the various "modalities" for treating his infection and that, had he been advised of the risks of "forgoing the appropriate IV antibiotic regimen," he would have chosen to remain on IV antibiotics. Count III set forth a claim for loss of consortium.

At trial, Dr. Raff, the Sheldons' standard of care expert, testified that Dr. Caplan's original discharge antibiotic plan for Mr. Sheldon to be sent to a rehabilitation facility to receive IV Ampicillin and IV Ertapenem for four weeks and his revised discharge plan for Mr. Sheldon to be discharged home to take Ampicillin orally for four weeks and IV Ertapenem for four weeks both satisfied the standard of care and, if adhered to, would have cured the infection in the ankle and would have prevented the ultimate development of osteomyelitis and ankle fusion surgery. Dr. Raff testified that it was a breach of the standard of care for members of the ID team not to take steps to arrange either for Mr. Sheldon to be seen in a particular clinic near his home on a daily basis for the IV administration of the Ertapenem or to have an infusion or home health nursing care provider to come to his house to administer the IV Ertapenem daily. He further testified that it was a breach of the standard of care by Dr. Caplan or whoever on the ID team did so to change the discharge antibiotic plan to oral Ampicillin and oral Cipro.

The expert witnesses for UMMS opined that there was no breach of the standard of care and that the infection that Mr. Sheldon ultimately developed, and that caused his osteomyelitis, was not related to the infection he had suffered when he was in the hospital for the original ankle surgery, which had been cured by the antibiotics he took upon his

discharge. Moreover, they opined that ankle fusion surgery always had been a likely outcome of the ankle break.

The jury returned its verdict on April 17, 2012. The final judgment, after rulings on post-trial motions, was entered on June 6, 2012. UMMS filed its notice of appeal on June 20, 2012.

Additional facts will be included as relevant to the issues as we discuss them.

DISCUSSION

I.

UMMS contends that, before trial, its counsel and counsel for the Sheldons entered into an agreement about the scope of the breach of the standard of care allegations the Sheldons would advance. Specifically, it maintains that, in exchange for the Sheldons agreeing that Dr. Caplan was the only UMMS agent who had breached the standard of care,[4] UMMS would not file a motion to dismiss based on inadequacy of the Sheldons' Certificate, namely, that the Certificate was deficient in that it did not identify Dr. Caplan as the health care provider who was alleged to have violated the standard of care. UMMS asserts that, during the trial, the Sheldons "reneged" on that agreement by "expand[ing] their claim . . . from targeting a single [ID] physician, Dr. Caplan, to the entire Shock Trauma team."

---

[4]Originally, the Sheldons were unsure whether Dr. Caplan or Dr. Rabinowitz was the ID specialist on duty at the time of Mr. Sheldon's discharge. During discovery, they learned that Dr. Caplan was on duty and therefore Dr. Rabinowitz's care was not at issue during trial.

Moreover, UMMS argues Dr. Raff only was qualified to opine about the standard of care for ID physicians and that he should not have been permitted to testify about breaches in the standard of care by non-physician staff of UMMS or by physicians whose specialities were unknown. UMMS maintains that the trial court should have granted its post-judgment motion to strike the Certificate, on the ground that the Sheldons breached the agreement and therefore UMMS was free to attack the Certificate, and that the Certificate was deficient; and, upon finding the Certificate to be deficient, the court should have dismissed the complaint for failure to file a proper Certificate. Alternatively, UMMS argues that the "effect of the improprieties of the ever-changing target health care provider" and other error required that the trial court grant its motion for new trial.

The Sheldons respond that an agreement indeed was reached, but UMMS has mischaracterized it. In particular, the agreement did not limit the Sheldons' right to present evidence of breaches by health care providers other than Dr. Caplan. The Sheldons counter further that UMMS waived any objection to Dr. Raff opining to breaches by physicians and medical staff other than Dr. Caplan by failing to object to his testimony at trial.

We agree with the Sheldons that there was no agreement between counsel limiting their right to put on evidence that members of the ID team at UMMS in addition to Dr. Caplan breached the standard of care by failing to provide proper antibiotic discharge planning and by changing Mr. Sheldon's prescription from IV Ertapenem to oral Cipro. We also agree that UMMS failed to preserve its argument that Dr. Raff was not qualified to opine

as to breaches by any members of the ID team other than Dr. Caplan when it failed to object to his testimony that members of the ID team generally, not just Dr. Caplan, breached the standard of care. We explain.

A. The Pre-Filing Agreement

The pre-filing agreement entered into between counsel for UMMS and counsel for the Sheldons is comprised of four e-mails all exchanged on April 7, 2011, which, as mentioned, was the day before the Sheldons filed their Certificate and one week before they waived arbitration and filed their complaint in the circuit court.

The first of these e-mails was from counsel for the Sheldons to counsel for UMMS. That e-mail asked counsel for UMMS to "confirm in writing . . . that it was ID (. . . either [Dr. Caplan or Dr. Rabinowitz]) who changed Mr. Sheldon's originally prescribed IV antibiotic therapy to Cipro PO."[5] It is apparent from the e-mail that counsel for UMMS already had orally confirmed this information in a recent conversation.

UMMS's counsel responded by e-mail as follows:

> You are correct. The antibiotic for Mr. Sheldon was changed by infectious disease (ID) docs at [UMMS]. This confirms our telephone discussion.
>
> Given this confirmation, can you file a [Certificate] or do you need an extension?
>
> If you intend to file the [Certificate] w/in 30 days I will not oppose your motion to extend. Although, if you can get the [Certificate]/Report before the

---

[5]"PO" stands for "per os," which means by mouth. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 1341, 1409 (32nd ed. 2012).

> deadline, that would certainly be better. Also, now that I've confirmed this, I understand you will withdraw your motion to compel the deposition of the HCP's. Correct? That was our understanding. I will, if you do, then withdraw my opposition and attendant motion for sanctions.

One hour later, counsel for the Sheldons responded by e-mail:

> Thank you. This e-mail will also confirm that *all of the health care providers whose care is at issue in this case, namely the ID team, including, Drs. Caplan and Rabinowitz, were agents, servants and/or employees of UMMS and were at all times acting within the scope of their employment in their care and treatment of Mr. Sheldon.* ***Moreover, I have agreed not to individually name any of the doctors at issue in any [Certificate] and Report I file, and you have agreed not to raise that any such [Certificate] and Report is defective for not doing so.*** Lastly, you have agreed to produce the health care providers for deposition and I will be permitted to treat them as if they were individually named for purposes of deposition and trial.
>
> If anything in this e-mail is unclear, incorrect and/or a misunderstanding about our conversation, please let me know.
>
> As I discussed, it is my plan to file the [Certificate] and Report tomorrow, along with a Waiver of Arbitration.

(Emphasis added.)

UMMS counsel responded less than twenty minutes later with a one word e-mail: "Agreed."

In Dr. Raff's Certificate, which in fact was filed the following day, he opined that there were "deviations from the accepted and applicable standards of care on the part of the Defendant Health Care Providers, acting through their medical staff, specifically including [UMMS], acting by and/or through its agents, servants, and/or employees" and that these breaches of the standard of care were the actual and proximate cause of Mr. Sheldon's

injuries. In his attached Report, Dr. Raff elaborated, identifying two primary breaches of the standard of care: 1) the "fail[ure] to make the proper arrangements for Mr. Sheldon's IV antibiotic administration, as well as his home nursing care"; and 2) the decision to "cancel[] and/or discontinue[]" IV Ertapenem and replace it with oral Cipro. The Sheldons' complaint, filed one week later, made identical allegations.

B. Pretrial Discovery and Agreements

In July of 2011, counsel for UMMS deposed Dr. Raff. Counsel inquired about the basis of his opinion that oral Cipro was not effective against the bacteria present in Mr. Sheldon's wound and about whether the originally prescribed IV antibiotic regimen would have prevented the development of the staph infection. Dr. Raff was not asked any questions about his opinion that UMMS's discharge planning for Mr. Sheldon deviated from the standard of care.

In October of 2011, counsel for the Sheldons deposed Dr. Caplan. Dr. Caplan testified that at the time of Mr. Sheldon's discharge, he expected that UMMS staff, either a case manager or social worker, would make the appropriate arrangements for him to go to an outpatient facility on a daily basis to receive IV Ertapenem. Dr. Caplan was asked who made the decision on October 25, 2007 to "put [Mr. Sheldon] on oral antibiotic and take out the PICC line." He replied: "It wasn't [me]. When I – the last I saw or knew of [Mr. Sheldon], he was to go home on IV [E]rtapenem and PO [A]mpicillin."

On March 22, 2012, the court held a pretrial conference. Prior to the start of the conference, counsel for UMMS advised counsel for the Sheldons that he intended to file a motion *in limine* to limit Dr. Raff's standard of care testimony to deviations occurring between October 22, 2007 (the date Mr. Sheldon was discharged from UMMS), and October 25, 2007 (the date Mr. Sheldon's IV Ertapenem was changed to oral Cipro).

Following the conference, counsel for UMMS e-mailed counsel for the Sheldons to "confirm [their] agreement that the only standard of care issue in this case at trial is the change of IV Ertapenem to oral Cipro." He asked counsel to advise if he was "mistaken" about this. He further stated that he was "confirm[ing] that Dr. Caplan was the physician who authorized the change of IV Ertapenem to Cipro" and that "[Nurse] Adamski executed the order (wrote the prescription) . . . ." The record does not reflect a response to this e-mail from the Sheldons' counsel.

That same day, the Sheldons filed their pretrial statement. In their "Statement of Facts," they asserted that, upon Mr. Sheldon's discharge from UMMS on October 22, 2007, "*the Defendants* never had a plan in place to coordinate exactly how Mr. Sheldon was to receive the IV antibiotics"; that when Mrs. Sheldon returned to UMMS on October 25, 2007, "*a health care provider* canceled the order for IV Ertapenem and instead ordered a different antibiotic . . . that was to be given orally, not by IV"; and that "*the Defendants* were negligent in their discharge of Mr. Sheldon and in their management of Mr. Sheldon's infection,

including but not limited to failing to have an adequate plan in place for the administration of IV antibiotics and in switching the IV antibiotics to oral antibiotics." (Emphasis added.)

The following day, March 23, 2012, counsel for UMMS again e-mailed counsel for the Sheldons, asking if the parties were in agreement that "the issues in the case do not pre-date 10/22/07 ([Mr. Sheldon's] discharge [date]) or after 10/25/07 when the IV Ertapenem was changed to oral Cipro." Again, the record does not reflect a response from opposing counsel.

Also on that day, counsel for UMMS e-mailed counsel for the Sheldons an attached letter setting forth the contours of the "mutual[] agree[ment]" reached at the pretrial conference "regarding the standard of care issue in the case." Counsel for UMMS advised that the motion *in limine* to limit Dr. Raff's trial testimony already had been filed inadvertently, but stated that he would "file a Line withdrawing the [motion]" and asked counsel for the Sheldons to advise him "immediately if [he was] mistaken as to [their] agreement." Counsel for UMMS in fact filed a Line withdrawing the motion.[6]

---

[6]For reasons that are unclear from the record, the Line withdrawing the motion *in limine* (filed March 21, 2012) actually was filed before the filing of the motion *in limine* (filed March 23, 2012). The cover letter for the Line is dated March 20, 2012 and the cover letter for the motion *in limine* is dated March 21, 2012, both prior to the date of the pretrial conference.

The Sheldons opposed the motion *in limine* on April 6, 2012. In their opposition, they argued that Dr. Raff would testify consistent with his deposition testimony. They agreed that Dr. Raff would not opine to any breaches occurring prior to October 22, 2007, but emphasized that the breach of the standard of care on October 25, 2007 was in the nature of a "continuing violation" because Mr. Sheldon never received the antibiotics that the standard

(continued...)

On March 25, 2012, counsel for UMMS e-mailed counsel for the Sheldons "[i]n follow-up" to confirm that "Dr. Caplan was [the physician on duty for] ID for October 25, 2007."

On March 27, 2012, counsel for the parties exchanged e-mails confirming that the Sheldons would not be asserting at trial that Nurse Adamski breached the standard of care and that the Sheldons would not raise the issue of Social Security Disability at trial.

Also that day, counsel for UMMS e-mailed counsel for the Sheldons to confirm, based on a discussion that day, that "Dr. Raff [would] not be offering standard of care opinions regarding any of the care before October 22, 2007 " and that the only breaches he would testify to would be "the prescription for oral Ampicillin and its dosage on October 22nd and the change of IV Ertapenem to oral Cipro on October 25th."

Counsel for the Sheldons responded the following day. He confirmed that his clients were not alleging any breaches of the standard of care prior to October 22, 2007. His e-mail continued as follows:

> As for nailing down Dr. Raff's standard of care opinions with such specificity as you set forth in your email, I don't want to restrict my ability to question Dr. Raff or to fully elicit his standard of care opinions at trial. So I'm not agreeing to your proposed language. I'm not trying to be cute or introduce some brand new violation. But you've deposed Dr. Raff and elicited his opinions. He will testify consistent with his [Certificate] and deposition.

---

[6](...continued)
of care required.

Counsel for UMMS replied an hour later: "Gotcha. So what we may do is then say to the court that the issue of before the 22nd is moot but we may need to discuss the [motion *in limine*] re post discharge."

C. Trial

Trial commenced less than two weeks later. Following jury selection, the court heard argument on outstanding motions, including the motion *in limine* pertaining to Dr. Raff's testimony. (As mentioned, UMMS already had filed a Line purporting to withdraw the motion.) Counsel for the Sheldons represented to the court that his clients were not asserting any breaches in the standard of care prior to October 22, 2007, but otherwise were not "restrict[ing] [Dr. Raff]'s opinions at [that] point." UMMS stated that "[b]ased on Counsel's representation, defense will withdraw that motion."

Dr. Raff testified on the second day of trial. As relevant here, he testified that the original discharge plan for Mr. Sheldon -- that he be discharged to a rehabilitation facility where he would receive Ampicillin and Ertapenem, both by IV -- was medically appropriate. Dr. Raff stated that Mr. Sheldon's file reflected that the ID team at UMMS created this plan, and he explained that it was "not uncommon that more than one person in the group will be seeing any given patient because not everybody works every day."

Dr. Raff then was asked about the change in the discharge plan to allow Mr. Sheldon to go home, instead of to a rehabilitation facility, and to alter his antibiotic regimen from IV ampicillin to oral ampicillin. He explained that the notes in Mr. Sheldon's chart were made

by Dr. Alhalbouni, who was the same resident physician who wrote all of the prescriptions for Mr. Sheldon upon his discharge. The notes did not reflect whether members of the ID team approved the change.

Dr. Raff opined that "discharging Mr. Sheldon home [with a handwritten prescription] for IV antibiotics to go fill himself" was "[a]bsolutely" a deviation from the standard of care. He explained that discharging a patient with an ongoing infection to home to continue IV therapy is a "multi-person endeavor." It would have required 1) approval by orthopedics; 2) a determination by the ID team as to the appropriate antibiotics; 3) arrangements by nurse management or a social worker for the care of the patient as an outpatient; and 4) a "clear and succinct discussion with the patient and their family, showing them what needs to be done." In Dr. Raff's opinion, a failure of the ID team to coordinate care in this manner was an "egregious deviation" from the standard of care, because it could (and, in fact, did) lead to a "break in treatment." This testimony all came into evidence without objection.

Dr. Raff also opined that the decision on October 25, 2007, to change Mr. Sheldon's IV Ertapenem to oral Cipro, was a deviation from the standard of care because oral Cipro is not effective against the type of bacteria growing in Mr. Sheldon's wound in the presence of in-dwelling metal hardware. Dr. Raff then was questioned about who made the decision to change Mr. Sheldon's prescription to Cipro:

> [PLAINTIFF'S COUNSEL]: Well, let me just ask you a little bit about this transition to the Cipro, factually. Who on the [UMMS] team changed the plan?

[DR. RAFF]: I have no idea.

[PLAINTIFF'S COUNSEL]: Why don't you know?

[DR. RAFF]: Because it's not in the chart.

[PLAINTIFF'S COUNSEL]: Should such a thing be in the chart?

[DR. RAFF]: Of course.

* * *

[PLAINTIFF'S COUNSEL]: When Dr. [C]aplan, who was . . . the head of the [ID] [who] made the original plan to discharge Mr. Sheldon on IV antibiotics, did you read his deposition?

[DR. RAFF]: I did.

[PLAINTIFF'S COUNSEL]: Was he asked whether he approved the plan to be changed from IV antibiotics to Cipro?

[DR. RAFF]: He explicitly said, "No."

[PLAINTIFF'S COUNSEL]: When Nurse [Adamski], the woman who actually wrote the prescription for Cipro, when she was asked whether or not she had the authority to do that on her own, what did she say?

[DR. RAFF]: She said, "No."

[PLAINTIFF'S COUNSEL]: It would have to have been approved by some member of the team at [UMMS]?

[DR. RAFF]: Of course. A nurse can't fill a prescription without a doctor's order. Now, the nurse can take the doctor's order verbally. . . .

* * *

[PLAINTIFF'S COUNSEL]: And was [Nurse Adamski] specifically asked in her deposition who had approved the order?

[DR. RAFF]: Yes. And she said she didn't know.

[PLAINTIFF'S COUNSEL]: Regardless, Doctor, of what member of the team changed it, was it a deviation from the applicable standards of care to change the IV antibiotics to oral Cipro at that time?

[DR. RAFF]: Yes.

All of the above testimony also came in without objection.

Shortly thereafter, Dr. Raff was asked whether there was any indication in Mr. Sheldon's medical record that Dr. Caplan ever had been informed of the October 25, 2007 change in Mr. Sheldon's antibiotic regimen. He replied that there was not. Dr. Raff was asked if there was any indication in Mr. Sheldon's chart that Dr. Caplan or "any member of the [ID] Department" ever had any follow-up appointments with Mr. Sheldon. He replied that there was not. He opined that the lack of post-discharge follow-up by the ID team also was a breach of the standard of care. This testimony came in without objection as well.

The only time counsel for UMMS objected to any questions eliciting the substance of Dr. Raff's standard of care testimony was when Dr. Raff was asked whether the "[UMMS] team ha[d] a duty to comply with the standards of care as [Dr. Raff had] explained them?" At the bench conference that followed, counsel for UMMS argued that because Dr. Raff was board certified in Infectious Disease and had "certified the case against the infectious disease doctor," he only could opine as to a breach of the standard of care by an infectious disease doctor, not by the "surgeons, plastic surgeons, case managers, [and] nurse practitioners." Counsel for the Sheldons responded that he had used the word "team"

because the UMMS records did not reveal who had changed Mr. Sheldon's prescription. The court sustained UMMS's objection, concluding that it was a "legal fact" that physicians must adhere to the standard of care and hence the question was not proper. Following the bench conference, questioning of Dr. Raff on direct continued and he opined that "whoever changed that order away from Dr. [C]aplan's plan to oral Cipro" had deviated from the standard of care. There was no objection or motion to strike.

On cross-examination, Dr. Raff acknowledged that Nurse Adamski had testified in her deposition that she had spoken to a physician on October 25, 2007, before she changed Mr. Sheldon's antibiotic prescription. He also acknowledged that Dr. Caplan was the ID doctor on duty in the Shock Trauma Unit on that day. Dr. Raff disagreed, however, that these facts made it more likely than not that it was Dr. Caplan who ordered Nurse Adamski to change Mr. Sheldon's prescription from IV Ertapenem to oral Cipro.

At the close of the Sheldons' case, counsel for UMMS moved for judgment, arguing, *inter alia*, that the only breach of the standard of care identified by Dr. Raff was the change from IV Ertapenem to oral Cipro, but that Dr. Raff and the Sheldons' causation witness both had testified that oral Cipro was effective against the bacteria present in Mr. Sheldon's wound. The court denied the motion.

In its case, UMMS played Nurse Adamski's *de bene esse* deposition for the jury. She testified that on October 22, 2007, "Dr. Caplan and his team" created the plan for Mr. Sheldon to be discharged to his home with prescriptions for IV Ertapenem and oral

Ampillicin and that, as was the typical practice in Shock Trauma, a resident, Dr. Alhalbouni, "physically [wrote] the prescriptions."

With respect to October 25, 2007, Nurse Adamski testified that she met with Mrs. Sheldon in the Shock Trauma clinic that day. After learning that Mrs. Sheldon had been unable to fill the prescription for IV Ertapenem, Nurse Adamski advised Mrs. Sheldon that she (Nurse Adamski) was "going to contact the [ID] specialist to consult and to change." Dr. Caplan was the ID specialist on duty that day. Nurse Adamski had no recollection of contacting Dr. Caplan, but it was her usual practice to call him on his cell phone or page him. She believed that it was Dr. Caplan who ordered the change in Mr. Sheldon's antibiotic regimen. On cross-examination, she testified that she had no actual recollection of speaking to Mrs. Sheldon on October 25, 2007, nor did she recall speaking to Dr. Caplan and getting his approval for the change in the prescription.

Dr. Caplan testified that, when Mr. Sheldon was discharged, it was his (Dr. Caplan's) understanding that Mr. Sheldon would receive his daily IV Ertapenem dose at an outpatient facility. With respect to the October 25, 2007 change in prescription from IV Ertapenem to oral Cipro, Dr. Caplan testified that he had "no recollection" of ordering the change, but that he believed it was "logical" that he was the doctor who ordered the change and, in any event, had he been "presented with the same circumstances, [he] would have done exactly the same thing."

At the start of fifth day of trial, the court discussed jury instructions with the parties. During the discussion, counsel for UMMS repeatedly argued that the only issue before the jury was whether Dr. Caplan had breached the standard of care by directing Nurse Adamski to change Mr. Sheldon's prescription from IV Ertapenem to oral Cipro. Counsel for the Sheldons maintained that their allegations of negligence were broader than that, extending to the negligent "administration of antibiotics" by the ID team, including Dr. Caplan.

The most relevant exchange occurred when counsel for UMMS took issue with the court's decision to give Maryland Civil Pattern Jury Instruction ("MCPJI") 27:5, pertaining to the standard of care applicable to a hospital.[7] He argued that "[t]he only question here is whether or not this antibiotic change was a breach." He maintained that MCPJI 27:5 would "invite[] the jury to go beyond what the law demands and that is that a board certified physician in the same or similar field offer a standard of care opinion against [the individual alleged to have breached the standard of care.] So I'm concerned that this then invites them to guess about everyone."

Counsel for the Sheldons responded that the instruction was necessary because UMMS, not Dr. Caplan, was the defendant, and because the ID team at UMMS, not just one physician, had allowed Mr. Sheldon to "fall through the cracks."

---

[7]MCPJI 27:5 states: "A hospital is negligent if it does not use that degree of care and skill that a reasonably competent hospital, acting in similar circumstances, would use."

Counsel for UMMS rejoined that under Maryland law, in his or her Certificate, a plaintiff is required to identify "by name" the health care provider alleged to have breached the standard of care, and to have an expert practicing in the same or a related field as that health care provider opine to breaches of the standard of care.

The court interjected to ask counsel for the Sheldons why he had filed his claim against "[UMMS] and no named defendants." Counsel responded "[t]hat's because there's a stipulation with my law firm and the Risk Management at [UMMS] that . . . no employee ever gets personally named and we don't hear these arguments, which I'm starting to hear and I'm getting a little perturbed by it."

Counsel for UMMS did not deny the existence of the agreement described by counsel for the Sheldons, but maintained that the Sheldons should not be permitted to argue in closing that the team at UMMS breached the standard of care, given that its only standard of care expert witness testified to "particular" breaches by a "particular individual."

The court ruled that it would give MCPJI 27:5.

UMMS also argued that the court should propound a non-pattern jury instruction explaining that the only negligence alleged was "that [UMMS] committed medical malpractice with regard to antibiotic regimen prescribed to [Mr. Sheldon] upon discharge." Counsel for the Sheldons agreed that the case was about "[inappropriate] discharge and then change of the I.V. antibiotics, failing to . . . follow the care plan put in place by Dr. Caplan,"

but disagreed that a non-pattern instruction was necessary or appropriate. The court declined to give the proposed instruction.

At the close of UMMS's case, the Sheldons recalled Mrs. Sheldon in rebuttal. She was asked whether she recognized Nurse Adamski as the nurse at UMMS who had changed her husband's prescription from IV Ertapenem to oral Cipro. She replied that Nurse Adamski was not the nurse she met with on October 25, 2007 and that she had "never seen her before."

At the close of all the evidence, counsel for UMMS did not renew his motion for judgment. The court instructed the jurors. At the conclusion of the instructions, counsel for UMMS objected to the court's giving MCPJI 27:5 and its failure to give the non-pattern instruction UMMS had requested.

In closing, counsel for the Sheldons argued that Dr. Caplan created a medically appropriate discharge plan for Mr. Sheldon to receive IV Ertapenem and oral ampicillin at his home and assumed that it would be carried out by his "team," but that his team failed him, allowing Mr. Sheldon to "fall through the cracks." He also argued that there was no way to know who had made the decision to change the antibiotic plan for Mr. Sheldon from IV Ertapenem to Cipro, but that the evidence did not support UMMS's position that it was Dr. Caplan. Rather, the evidence suggested that Dr. Caplan was "taking one for the team."

UMMS's counsel argued in closing that the crux of the case was whether the change from IV Ertapenem to oral Cipro on October 25, 2007, had caused Mr. Sheldon to develop

osteomyelitis, leading to the need for ankle fusion surgery. UMMS maintained that the change from IV Ertapenem to oral Cipro was made by Dr. Caplan, was not a breach of the standard of care, and was effective in curing the infection. It also maintained that the ankle fusion surgery Mr. Sheldon underwent was necessitated by the severity of his injury and always was a probable outcome of his severely broken ankle.

In rebuttal, counsel for the Sheldons argued that ankle fusion surgery was not a positive or likely outcome and only was necessary because of the improperly treated infection that destroyed part of what was left of Mr. Sheldon's ankle bones. He also reiterated his argument that Dr. Caplan was "taking one for the team":

> Dr. Caplan is a good doctor. He's a terrific doctor. And if his plan would have been followed, we wouldn't be here. I don't believe for a second that Dr. Caplan's the one who changed that plan. . . . . Nobody knows. Nobody knows who changed that plan and why they did it to oral [Cipro].

Counsel for UMMS made one objection during closing arguments, which was sustained and is not relevant to the issues on appeal.

D. Post-Judgment Motions

Following the adverse jury verdict, UMMS filed a motion for new trial and a motion to strike the Certificate and Report and to dismiss. In its motion for new trial, UMMS argued that it had withdrawn its motion *in limine* to limit Dr. Raff's standard of care testimony based upon the Sheldons' counsel's representation that the plaintiffs' case would focus on the decision by Dr. Caplan to change Mr. Sheldon's antibiotic regimen on October 25, 2007. It argued that Dr. Raff's trial testimony had been consistent with these representations but in

closing argument counsel for the Sheldons argued that the "Shock Trauma Team," rather than Dr. Caplan, was to blame, which was inconsistent with his prior representation.

In its motion to strike Dr. Raff's Certificate and to dismiss the case, UMMS argued that in his Certificate, Dr. Raff "criticized the change of antibiotics," but did not name a "specific medical provider who allegedly breached the standard of medical care" and that for this reason, the Certificate was deficient as a matter of law. UMMS explained that it had not previously moved to dismiss, however, because the parties had a "clear understanding" that Dr. Caplan "was the physician against whom the allegations were being made." Despite this understanding, during trial the Sheldons' theory of the case "morphed" into one in which Dr. Caplan was blameless and an unknown actor at UMMS was responsible for the antibiotic change alleged to have caused Mr. Sheldon's injury. UMMS argued that dismissal was mandated because the Certificate was deficient as a matter of law and a proper Certificate is a statutory prerequisite to filing and pursuing a medical malpractice action in Maryland.

The Sheldons opposed the motions, arguing that "the parties had an express agreement in place before the Certificate was filed and before litigation began, that the [Sheldons] would **not** identify any specific healthcare provider in their Certificate and Report, and that [UMMS] would not argue that the Certificate and Report were deficient for not doing so." (Emphasis in original.) In light of this good faith agreement and the fact that UMMS waited until after an adverse jury verdict to challenge the Certificate, the Sheldons asserted the motions should be summarily denied. The Sheldons also strongly disputed UMMS's

assertion that they had changed their theory of negligence during the trial. The Sheldons attached to their opposition the April 7, 2011 e-mails memorializing the pre-filing agreement and the March 28, 2012 e-mails in which counsel for the Sheldons refused to limit Dr. Raff's standard of care testimony as requested by counsel for UMMS.

E. Analysis

The Maryland Health Care Malpractice Claims Act ("the Act"), codified at CJP sections 3–2A–01 *et seq.*, is intended to "weed out non-meritorious medical malpractice claims but not to create roadblocks to the pursuit of meritorious medical malpractice claims." *Hinebaugh v. Garrett County Memorial Hosp.*, 207 Md. App. 1, 18 (2012). "All claims, suits, and actions . . . by a person against *a health care provider* for medical injury allegedly suffered by the person" are subject to the requirements of the Act. CJP § 3-2A-02(a)(1) (emphasis added). CJP section 3-2A-04(b)(1)(vi) provides, in relevant part, that "a claim or action . . . shall be dismissed, without prejudice, if the claimant or plaintiff fails to file a [Certificate] with [HCADRO] attesting to departure from standards of care, and that the departure from standards of care is the proximate cause of the alleged injury, within 90 days from the date of [the filing of its claim with HCADRO]." In order to be compliant with the Act, a Certificate must "mention explicitly the name of the licensed professional who allegedly breached the standard of care." *Carrol v. Konits*, 400 Md. 167, 196 (2007). If the named health care professional is board certified in a specialty, then the expert attesting to

a departure from the standard of care in the Certificate must be board certified "in the same or a related specialty." CJP § 3-2A-02(c)(2)(ii)B.

As discussed, the Certificate and Report of Dr. Raff filed by the Sheldons in April of 2011 did not name an individual health care provider at UMMS. Rather, it named UMMS as the "defendant." In the Certificate and Report, Dr. Raff, who is board certified in infectious disease, opined that UMMS "acting through [its] medical staff" committed the alleged breaches of the standard of care. As such, the Sheldons' Certificate failed to comply with the statutory prerequisites to maintaining an action against a health care provider and, ordinarily, would have been subject to dismissal without prejudice.

Identification of a particular physician health care provider in a Certificate and Report can carry negative ramifications for the physician named. Under CJP section 3-2A-04(a)(1)(I), when a physician is named in a Certificate as the health care provider who breached the standard of care, the Director of HCADRO "shall forward copies of the claim to the State Board of Physicians." Before the case at bar was filed, the law firm representing the Sheldons and UMMS routinely had agreed that Certificates and Reports filed on behalf of plaintiffs would name UMMS as the defendant health care provider and would not name individual UMMS physicians.

It was in the context of this routine agreement that counsel in the case at bar exchanged the April 7, 2011 e-mails. In these e-mails, the Sheldons' counsel sought confirmation that "ID" had made the critical change in Mr. Sheldon's antibiotic regimen on

October 25, 2007. Dr. Caplan's name was raised as one of two possible doctors who might have authorized that change. UMMS confirmed that the antibiotic had been "changed by infectious disease [] docs." In response to this confirmation, counsel for the Sheldons confirmed his understanding that "all of the health care providers whose care is at issue in this case, namely the ID team, ***including*** [] Dr[.] Caplan . . ." were employed by UMMS at the relevant times. (Emphasis added.) He also confirmed the preexisting agreement with UMMS that he would not identify any individual health care providers in his Certificate and Report and that UMMS would not seek to dismiss the claim as being based on a deficient Certificate and Report (for not identifying individual health care providers). UMMS agreed to those terms.

The April 7, 2011 e-mails cannot reasonably be read as limiting the Sheldons' right to allege and pursue breaches of the standard of care by members of the ID team other than Dr. Caplan. The e-mails do not include any such promise by the Sheldons and, in fact, expressly reserve the Sheldons' right to allege and pursue breaches by multiple UMMS health care providers, "including [] Dr[.] Caplan." Moreover, UMMS's contention that its agreement not to oppose a motion to extend the deadline for the filing of the Certificate was contingent upon the Sheldons' agreeing to limit their claim to breaches by Dr. Caplan is baseless.[8] The offer by UMMS's counsel not to oppose a motion to extend was made

---

[8]It is worth noting that even if the Sheldons had agreed to limit their claim to pursue only breaches by Dr. Caplan, that agreement certainly would have been subject to (continued...)

contingent only upon the Sheldons' filing their Certificate within 30 days. The Sheldons complied with the terms of the April 7, 2011 agreement by filing their Certificate and Report the following day, and doing so without naming any individual health care providers. It was UMMS, not the Sheldons, that violated the agreement by filing a motion to dismiss and to strike the Certificate for failing to name any individual health care providers despite an express agreement not to challenge the Certificate on that basis.

If there was any question that the Sheldons were alleging negligence by the ID team at UMMS, not just by Dr. Caplan, Dr. Raff's Certificate and Report, filed the day after the April 7, 2011 e-mail exchange, removed all doubt. The Report stated that "agents, servants and employees" of UMMS were negligent in managing Mr. Sheldon's discharge on October 22, 2007 and that UMMS also deviated from the standard of care when it changed Mr. Sheldon's antibiotic regimen post-discharge. The Certificate and Report both refer to the "Defendant Health Care Providers" in the plural form. The Sheldons plainly were not alleging negligence by only one health care provider.

Moreover, the pretrial negotiations over the scope of the Sheldons' claim did not limit the Sheldons' right to present evidence that the ID team, in addition to Dr. Caplan, was negligent. Despite numerous attempts by counsel for UMMS to get counsel for the Sheldons to place limits on Dr. Raff's standard of care opinions in the run up to trial, counsel for the

---

[8](...continued)
modification when Dr. Caplan testified in deposition that he was not the doctor who ordered the change in Mr. Sheldon's antibiotic regimen.

Sheldons expressly refused to do so. Counsel for the Sheldons emphasized that Dr. Raff would testify consistent with his deposition testimony and his Certificate, which included allegations that multiple members of the ID team involved in Mr. Sheldon's discharge planning and post-discharge care had deviated from the standard of care.

Thus, UMMS had to have been aware before the start of trial that the Sheldons' standard of care expert would testify about breaches in the standard of care by members of the ID Team at UMMS, including Dr. Caplan, who were involved in planning, managing, and implementing the treatment of Mr. Sheldon's infection upon his discharge. In addition to all of the pretrial communications from counsel for the Sheldons confirming this fact, UMMS knew that Dr. Caplan had denied his own involvement in the critical decision to change Mr. Sheldon's antibiotic regimen and that UMMS's own records did not disclose who had made that decision. Thus, the treatment change that was the core deviation alleged by the Sheldons had been authorized by an unknown health care provider, possibly Dr. Caplan, but possibly someone else. Under these circumstances, UMMS's suggestion that it was blindsided by the Sheldons' theory of negligence at trial does not hold water.

Even if we were to agree with UMMS that the Sheldons entered into a good faith agreement to limit their claim against UMMS to breaches by Dr. Caplan, which we do not for the reasons already discussed, UMMS nonetheless would have been obligated to make the court aware of this agreement and to object when Dr. Raff was asked about breaches by the ID team generally and when counsel for the Sheldons argued about deviations by the ID

team in summation. *See generally* Md. Rule 2-517(a) (objection to the admission of evidence must be made at the time evidence is offered or as soon as the grounds for objection become known). *See also, e.g.*, *Icgoren v. State*, 103 Md. App. 407, 442 (1995) (failure of trial counsel to interpose a "immediate [or] belated objection" to challenged closing arguments resulted in issue being unpreserved for appeal). UMMS did neither. In fact, at the outset of trial, UMMS withdrew its motion *in limine* seeking to limit Dr. Raff's testimony when counsel for the Sheldons represented that Dr. Raff would testify consistent with his Certificate and deposition, which he then did.

Dr. Raff testified without objection that Mr. Sheldon's medical record did not reflect who made the decision to allow Mr. Sheldon to be discharged to his home, instead of to a rehabilitation facility, with a prescription for IV Ertapenem; that Dr. Alhalbouni was the only doctor who made notes in Mr. Sheldon's chart with reference to that decision; that the standard of care required that the ID team arrange either for in-home, visiting nursing care to administer Mr. Sheldon's IV Ertapenem or for him to attend an outpatient infusion clinic near his home; that this was a "multi-person endeavor" requiring cooperation between the ID team and other UMMS staff; and that the failure of the ID team to coordinate Mr. Sheldon's discharge care appropriately was "[a]bsolutely" a deviation from the standard of care. Dr. Raff also testified without objection that Mr. Sheldon's medical records did not reveal who decided to change his prescription from IV Ertapenem to oral Cipro, but that whoever made that decision breached the standard of care. Finally, he testified without

objection that the lack of post-discharge follow-up care for Mr. Sheldon by Dr. Caplan or "any member of the [ID] Department" was a breach of the standard of care. Thus, consistent with all of the Sheldons' pretrial representations and with Dr. Raff's Certificate and Report, Dr. Raff opined to breaches by the ID team in managing and treating Mr. Sheldon's infection at the time of discharge and thereafter.

In closing argument, counsel for the Sheldons argued without objection that Dr. Caplan set up a plan for Mr. Sheldon's discharge which, if followed, would have properly treated the infection in his ankle and prevented his eventual osteomyelitis and ankle fusion surgery. Instead of being discharged pursuant to this plan, Mr. Sheldon was discharged home with handwritten prescriptions that could not be filled at a local pharmacy and without adequate instruction and information about how to arrange for outpatient infusion therapy. When Mrs. Sheldon returned to UMMS for help, she was given a new prescription. No one at UMMS documented in Mr. Sheldon's chart a reason for that change.

The Sheldons' theory of negligence was consistent throughout trial. It was that Dr. Caplan's team failed him and allowed him to "fall through the cracks." All of the above described testimony and argument came in without objection. Having failed to object at a time when the trial court could have taken some action to correct any error, UMMS may not be heard to argue on appeal that the Sheldons violated an express agreement not to argue this theory of negligence or that their expert was unqualified to opine as to the specific breaches alleged. *See Lawson v. State*, 389 Md. 570, 609-10 (2005) (Harrell, J., concurring)

("Objections alert the trial judge and permit him or her to consider the legal propriety of the particular question, piece of documentary evidence, or argument and, if appropriate, whether a curative measure may be fashioned to overcome or substantially ameliorate the possible prejudice of a legal misstep.")

II.

UMMS also contends the trial court erred in allowing counsel for the Sheldons to give a "missing witness" argument in summation. It asserts that this error (in conjunction with its other contention of error, which we have rejected) required the grant of its motion for a new trial. The Sheldons respond that this argument is unpreserved and, in any event, lacks merit.

The "missing witness" rule allows that "'if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.'" *Bereano v. State Ethics Comm'n*, 403 Md. 716, 741 (2008) (quoting *Graves v. United States*, 150 U.S. 118, 121 (1893)). As the *Bereano* Court explained, an adverse inference only may be drawn if the witness is "peculiarly" within the control of one party. *Id.* at 742.

In the instant case, the "missing witness" argument pertained to Dr. Alhalbouni, who, as discussed, was a resident physician working in the Shock Trauma Unit at the time of Mr. Sheldon's discharge in October of 2007 and was the physician who charted the change in Mr. Sheldon's discharge plan from discharge to a rehabilitation facility to discharge to home. He

also was the physician who handwrote the prescriptions for IV Ertapenem, oral Ampicillin, and "visiting nurse services."

On October 11, 2011, approximately six months before trial, counsel for UMMS e-mailed counsel for the Sheldons regarding the requested depositions of two UMMS physicans, one of whom was Dr. Alhalbouni. UMMS advised that it had been unable to locate Dr. Alhalbouni. The letter stated that if counsel for the Sheldons located Dr. Alhalbouni, he should advise counsel for UMMS because they intended to "represent [his] interests in this case."

In February of 2012, counsel for UMMS sent another letter to counsel for the Sheldons advising that Dr. Alhalbouni still had not been located.

As discussed, *supra*, Dr. Alhalbouni's role in Mr. Sheldon's care was raised at various times at trial because he was the physician who wrote the prescription for IV Ertapenem. On the morning of the third day of trial, counsel for UMMS raised with the court the issue of Dr. Alhalbouni's absence. He represented to the court that his firm had "made diligent efforts to attempt to locate [Dr. Alhalbouni]," without success. Dr. Alhalbouni was no longer employed by UMMS and it was "not exactly sure from what institution he [had been] rotating through [UMMS Shock Trauma in October of 2007]." He argued that Dr. Alhalbouni was not "uniquely" within UMMS's control and, for that reason, it would be improper to allow counsel for the Sheldons to argue to the jurors that they could infer from UMMS's failure to produce Dr. Alhalbouni at trial that his testimony would have been damaging to its case.

Counsel for the Sheldons responded that, because Dr. Alhalbouni had been UMMS's employee and UMMS intended to represent him should he be located, he was uniquely within their control. He maintained that he should be able to argue to the jury:

> [Who] is Dr. Alhalbouni?] . . . [W]hy isn't he here, why did he do this, how convenient that the person that had knowledge as to why my client allegedly refused to go to a nursing home, which is what they have interjected into this case . . . .
>
> So I think we're entitle[d] to argue the facts as they exist and that's all it is, it's a fact. There's this guy, worked at [UMMS]. He was a doctor at [UMMS]. He made these, what we are saying errors, and he is not here. And we have a direct letter from [counsel for UMMS] back on February 24[, 2012], that days he is a former employee.

The court ruled that the facts did not warrant a missing witness instruction, but that the court would not "prevent arguments by Counsel of facts and inferences that the jury could draw." UMMS objected to that ruling.

In closing argument, counsel for the Sheldons made passing reference to Dr. Alhalbouni when discussing UMMS's discharge planning for Mr. Sheldon:

> Who gave him the prescriptions [upon discharge]? Who is, who is Dr. [Alhalbouni]? Who is he? Nobody knows. University of Maryland Shock Trauma, here's the name that's changing the orders of Dr. Caplan, and nobody even knows who he is. And he writes, he hands a prescription to somebody, he doesn't put it in a prescription that Ms. Sheldon (inaudible) at the Wal-Mart. He's supposed to coordinate the care with a facility that knows they can get, that knows how to mix the [E]rtapenem. ***And you didn't hear from Dr. [Alhalbouni] (inaudible) this case. They don't even know who he is and why he's doing these things.*** And why he would discharge a patient with a handwritten script for this antibiotic which their own (inaudible) says this is not how you do it. But is this acceptable? Is this good patient care? . . . . But when you have a situation like this and the left hand in medicine doesn't know what the right hand is doing, and you've got residents who nobody even knows

> who they are changing orders and giving prescriptions. People fall through the cracks.

(Emphasis added.)

UMMS did not renew its objection during or after closing argument. For this reason, this issue is not preserved for our review. *See* Md. Rule 8-131(a); *see also, e.g.*, *Shelton v. State*, 207 Md. App. 363, 385 (2012) (counsel must object during closing argument to any alleged improper statements in order to preserve the issue for appellate review).

Even if preserved, UMMS's contention of error lacks merit. UMMS argues that a missing witness inference was not appropriate in this case because Dr. Alhalbouni was not peculiarly within its control, having left its employ more than five years prior to trial. The Sheldons did not argue that the jurors should draw an adverse inference from Dr. Alhalbouni's absence, however. The Sheldons' counsel made just one reference to Dr. Alhalbouni's absence from trial and did not suggest that his absence was intentional on the part of UMMS. To the contrary, he used Dr. Alhalbouni's absence and the lack of any record of who he was and why he was involved in Mr. Sheldon's care as a means of underscoring his argument that there was mismanagement by UMMS at the time of Mr. Sheldon's discharge. This was well within the range of legitimate closing argument and, thus, even if preserved, we would conclude that it was not error for the court to permit it. *See, e.g.,*

Mitchell v. State, 408 Md. 368, 380-81 (2009) (discussing the "broad scope of permissible closing argument").

JUDGMENT AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.