

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on* Friday *the* 12th *day of* December, 2014.

Anita V. McFadden,

Appellant,

against

Record No. 140369

Circuit Court No. CL-2013-316

Paul D. Kiernan, et al.,

Appellees.

Upon an appeal from a
judgment rendered by the Circuit
Court of Fairfax County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that any error in the judgment of the circuit court was harmless.

In 2009, Anita McFadden (Ms. McFadden) began experiencing "general cold symptoms, like a chest congestion, congestion with breathing" that persisted longer than normal. As a result, she visited a general practitioner and had a CT scan in March of 2009. She also had a CT/PET scan done in May of 2009. The scans showed a mass, consisting of calcified and enlarged lymph nodes, in Ms. McFadden's chest cavity.

Ms. McFadden visited Paul D. Kiernan, M.D. (Dr. Kiernan), a thoracic surgeon, to seek a diagnosis. After reviewing both the CT and CT/PET scans, Dr. Kiernan determined that he could not properly diagnose her condition without further investigation. He recommended a tissue biopsy to determine whether the mass in Ms. McFadden's chest cavity was malignant.

Dr. Kiernan took a tissue sample from the mass during a biopsy procedure on May 22, 2009. Ms. McFadden alleges that Dr. Kiernan negligently punctured her esophagus during the procedure and that she suffered lasting injury as a result of Dr. Kiernan's negligence.

Ms. McFadden filed a civil complaint against Dr. Kiernan and his medical practice, Cardiac, Vascular & Thoracic Surgery Associates, P.C., in the Circuit Court of Fairfax County. Ms. McFadden alleged in her complaint that Dr. Kiernan failed to offer "a less invasive means of evaluating her [enlarged lymph nodes]" and that he negligently performed the biopsy procedure that resulted in her esophageal injury. She also alleged that Dr. Kiernan failed to obtain her informed consent and consequently committed tortious battery in performing the biopsy.

Before trial, the circuit court ordered the parties to designate expert witnesses in accordance with Rule 4:1(b)(4)(A)(1). Dr. Kiernan designated two expert witnesses in the field of thoracic surgery, Joseph Friedberg, M.D. (Dr. Friedberg) and Daniel L. Miller, M.D. (Dr. Miller). Dr. Kiernan also designated himself as an expert witness who would testify "in accordance with the medical care he rendered to Ms. McFadden and consistent with his medical records and deposition testimony in this case."

At trial, Ms. McFadden called Dr. Kiernan as an adverse witness and asked him, "Now, when you looked at the CAT scan and the PET scan, did you compare the CAT scan from March to the CAT scan portion of the PET scan in May?" Dr. Kiernan responded, "Yes." He clarified,

I say that I compared. I look at both. I always look at the films. But they are not really made for comparison. They are two different kinds of tests. And I actually traditionally have favored CT scanning - CT scans, the - computer tomography is what it stands for, CT. So I look at that just as avidly as I do the PET scan.

But when you say compare them, compare and contrast, I would say one is better to compare and contrast a CT with a CT, not a CT with a CT PET. The CT PET gives you a different - a totally different visual.

Ms. McFadden also presented expert testimony from two witnesses, Pierre R. Theodore, M.D. (Dr. Theodore) and Joel Cooper, M.D. (Dr. Cooper). Dr. Theodore testified that the standard of care required that Dr. Kiernan continue to observe Ms. McFadden "with another CAT scan in approximately three to six months." Dr. Theodore also stated that in comparing the CT scan with the CT/PET scan, there was "no significant difference between those two scans with respect to the size" of the mass.

Dr. Cooper opined that the standard of care for thoracic surgeons would require a comparison of Ms. McFadden's CT and CT/PET scans. Dr. Cooper used slides to show side-by-side images of Ms. McFadden's CT and CT/PET scans to the jury. He opined that it was proper to put the two scans side-by-side, as he had done, and to measure the growth with a ruler or with a computer to determine if the mass had grown. Using the side-by-side images, he testified that the mass in Ms. McFadden's chest cavity had shrunk between the time the March CT scan was taken and the time the May CT/PET scan was taken.

While presenting its case, the defense called its designated experts in thoracic surgery, Dr. Miller and Dr. Friedberg. Dr.

Miller testified that it was inappropriate to compare a CT scan to a CT/PET scan and that it was within the standard of care to perform a "diagnostic biopsy." He further opined that "to simply put a one-dimensional ruler on two comparative CT or PET CT pictures and compare them and make a diagnostic decision based upon that comparison" was not "within the standard of care." He also stated that based upon a comparison of the two scans, it did not appear that the size of the mass had increased. Similarly, Dr. Friedberg testified that there was no change in the size of the mass, but he added that comparing the two types of scans is like comparing "apples to oranges" because "it's not the same resolution."

Dr. Kiernan then testified on his own behalf. Defense counsel requested "that [he] be recognized as an expert in the field of thoracic surgery and be permitted to offer opinions in that area in this case." The circuit court overruled Ms. McFadden's objection based on her argument that Dr. Kiernan was the third expert in the field of thoracic surgery and that only two experts in the same field were allowed to testify. The court also rejected Ms. McFadden's argument that Dr. Kiernan was not designated to testify about comparing CT and CT/PET scans and that he was limited to testifying specifically about the medical care he provided to Ms. McFadden.

As he had done as an adverse witness, Dr. Kiernan stated that he had reviewed Ms. McFadden's CT and CT/PET scans and that after doing so he did not discern a change in the size of the mass in her chest cavity. Dr. Kiernan also testified about the impropriety of comparing CT and CT/PET scans as Dr. Cooper had done and used the

same slides that Dr. Cooper had used to explain why he believed Dr. Cooper was wrong in concluding that the mass had decreased in size between the March and May scans.

At the conclusion of trial, a jury rendered a verdict in favor of Dr. Kiernan, and the circuit court entered judgment accordingly. Ms. McFadden appeals.

Ms. McFadden claims that the circuit court erred by permitting Dr. Kiernan to testify beyond the scope of his designation and in violation of Code § 8.01-581.20(C). According to Ms. McFadden, Dr. Kiernan's expert designation indicated only that he would testify as to his treatment and care of her as a patient consistent with her medical records and his deposition testimony. Ms. McFadden asserts that neither her medical records nor Dr. Kiernan's deposition testimony referred to his comparing the two scans.

"This Court reviews a trial court's decision to admit or exclude expert testimony under an abuse of discretion standard." Condominium Servs., Inc. v. First Owners' Ass'n of Forty Six Hundred Condo., Inc., 281 Va. 561, 575, 709 S.E.2d 163, 172 (2011). We perform de novo review of the trial court's interpretation of statutes and procedural rules. Findlay v. Commonwealth, 287 Va. 111, 114, 752 S.E.2d 868, 870 (2014).

Assuming without deciding that the circuit court erred in admitting Dr. Kiernan's expert testimony regarding the proper comparison of Ms. McFadden's CT and CT/PET scans, we hold that the error was harmless. Generally, this Court presumes that a trial court's erroneous admission of evidence is prejudicial "unless it plainly appears that it could not have affected the result." Harman v. Honeywell Int'l, Inc., 288 Va. 84, 94, 758 S.E.2d 515,

521 (2014) (citation and internal quotation marks omitted); see also Code § 8.01-678 ("When it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached, no judgment shall be arrested or reversed . . . [f]or any other defect, imperfection, or omission in the record, or for any error committed on the trial.").

"Improper admission of evidence does not create reversible error when it is merely cumulative of other competent evidence properly admitted." Greenway v. Commonwealth, 254 Va. 147, 154, 487 S.E.2d 224, 228 (1997). Dr. Kiernan's testimony about comparing Ms. McFadden's CT and CT/PET scans was cumulative of the testimony of three other expert witnesses. He testified that one could not discern a decrease in the size of the mass in Ms. McFadden's chest cavity based on a comparison of her CT and CT/PET scans. One of Ms. McFadden's experts, Dr. Theodore, similarly testified that there was no difference in the size of the mass in the March CT scan and in the May CT/PET scan. Likewise, Dr. Miller and Dr. Friedberg each stated that there was no discernible increase in the size of the mass, and each indicated that comparing the two different types of scans was inappropriate.

"Thus, the evidence improperly admitted was merely cumulative and did not deprive [Ms. McFadden] of a fair trial." See id. We hold that any error in the circuit court's admission of Dr. Kiernan's testimony was harmless.

Accordingly, the Court affirms the judgment of the Circuit Court of Fairfax County. Appellant shall pay to the appellees two hundred and fifty dollars damages.

This order shall be certified to the said circuit court.

A Copy,

Teste:

Deeth L H Amington

Clerk