VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 30th day of December, 2015.

Stephanie L. Bailey, Administrator of
the Estate of Sloan Lenee Bailey, Appellant,

against Record No. 150394
Circuit Court No. CL11-2580

Charles Erdman, et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Hampton.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that the circuit court erred in granting the motion to strike and entering judgment as a matter of law.

Sloan Lenee Bailey presented to the emergency department of Sentara CarePlex Hospital complaining of chest pain, mild shortness of breath, nausea, and pain radiating down her left arm. She was treated by Dr. Charles Erdman, an emergency medicine physician, who discharged her approximately seven and a half hours after she first presented to the emergency department. Before Dr. Erdman discharged Sloan, he spoke by telephone to Dr. Thomas Klevan, a cardiologist. One week later, Sloan died of a left ventricular arrhythmia secondary to coronary artery disease. Sloan's administrator filed a wrongful death action alleging medical malpractice against Dr. Erdman and his employer, Peninsula Emergency Physicians, Inc. (collectively "Dr. Erdman").[1] When the case was tried before a jury, the circuit court granted Dr. Erdman's motion to strike the Administrator's evidence on the grounds that the Administrator failed to prove a prima facie case that Dr. Erdman violated the applicable standard of care. The circuit court also

[1] Although the complaint also named Dr. Klevan, and his employer, Cardiology Consultants, Ltd., the Administrator nonsuited Dr. Klevan and his employer prior to trial.

granted Dr. Erdman's motion for judgment as a matter of law on the grounds that Dr. Klevan's negligence was a superseding cause of Sloan's death.

On appeal, the Administrator argues that the circuit court erred in granting the motion to strike her evidence. At trial, the Administrator introduced expert testimony from Dr. Jeffrey Garrett, a cardiologist, and Dr. Richard Serra, an emergency medicine physician, both of whom testified that Dr. Erdman deviated from the standard of care in the course of his treatment of Sloan. Dr. Erdman introduced expert testimony from Dr. Jeffrey Smith and Dr. Michael Blaivas, emergency medicine physicians, both of whom testified that Dr. Erdman did not deviate from the standard of care. The issue of whether Dr. Erdman deviated from the standard of care, therefore, was subject to conflicting opinions and presented a classic "credibility battle" among experts. "'Conflicting expert opinions constitute a question of fact'" for the jury. Riner v. Commonwealth, 268 Va. 296, 329, 601 S.E.2d 555, 574 (2004) (quoting Mercer v. Commonwealth, 259 Va. 235, 242, 523 S.E.2d 213, 217 (2000)). Accordingly, we agree with the Administrator that the circuit court erred in granting the motion to strike.[2]

The Administrator also argues that the circuit court erred in granting Dr. Erdman's motion for judgment as a matter of law in ruling that the acts and/or omissions of Dr. Klevan were a superseding cause of Sloan's death. "In order to relieve a defendant of liability for his negligent act, the negligence intervening between the defendant's negligent act and the injury must so entirely supersede the operation of the defendant's negligence that it alone, without any contributing negligence by the defendant in the slightest degree, causes the injury." Jenkins v. Payne, 251 Va. 122, 129, 465 S.E.2d 795, 799 (1996); see also Atkinson v. Scheer, 256 Va. 448, 454, 508 S.E.2d 68, 71-72 (1998). A court decides the issue of proximate causation as a matter of law only when reasonable persons could not differ. See Jenkins, 251 Va. at 128, 465 S.E.2d at 799. As we previously noted, the evidence was in conflict with regard to the substance of the phone conversation between Dr. Erdman and Dr. Klevan and the nature and extent of Dr.

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[2] Although Dr. Erdman argues the evidence proved, as a matter of law, that he acted within the standard of care by consulting with Dr. Klevan, a cardiologist, the evidence was in conflict as to the substance of the phone conversation between Dr. Erdman and Dr. Klevan. Thus, issues of fact existed with regard to whether a consult took place, as well as the nature and efficacy of any such consult.

Klevan's involvement in Sloan's care.[3] Therefore, the issue of whether Dr. Klevan's conduct constituted a superseding cause of Sloan's death was a question of fact for the jury, and the circuit court erred in determining this issue as a matter of law.

Dr. Erdman assigns cross-error to the circuit court's ruling denying his motion in limine to limit Dr. Klevan's testimony and in permitting Dr. Klevan to offer improper hypothetical testimony. Because this issue will likely arise again upon remand, we briefly address it here. See Harman v. Honeywell Int'l, Inc., 288 Va. 84, 95-96, 758 S.E.2d 515, 522 (2014). Decisions concerning the admission of evidence are committed to the sound discretion of the circuit court and will not be disturbed absent a finding of abuse of that discretion. See John Crane, Inc. v. Jones, 274 Va. 581, 590, 650 S.E.2d 851, 855 (2007).

As a lay witness, Dr. Klevan was permitted to testify as to any relevant matter upon which he had "personal knowledge." Va. R. Evid. 2:602. Furthermore, it was permissible for Dr. Klevan to offer lay witness opinion testimony that was "reasonably based upon [his] personal experience or observations." Va. R. Evid. 2:701; see also Harman, 288 Va. at 98, 758 S.E.2d at 523 ("The first prong of Rule 2:701 requires personal knowledge."). Because Dr. Klevan did not testify as an expert, it was not permissible for him to render an opinion on a hypothetical question or draw from facts outside of his personal knowledge. See Va. R. Evid. 2:703(a) (basis of expert testimony in civil cases); Code § 8.01-401.1 (same).[4]

To the extent that Dr. Klevan's testimony was based upon his personal knowledge and experience, his testimony was properly admitted. For example, it was permissible for Dr. Klevan to testify that he did not see Sloan, was not asked for a formal consultation, and did not become

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[3] Dr. Klevan had no recollection of the phone conversation with Dr. Erdman but denied that Sloan was his patient, that he was formally consulted, or that he was involved in the management of Sloan's care.

[4] Although the Administrator sought to admit Dr. Klevan's testimony as evidence of habit, a proper foundation was not laid that the challenged testimony involved his regular response to a particular repeated specific situation. See Code § 8.01-397.1; Va. R. Evid. 2:406; Kimberlin v. PM Transp., Inc., 264 Va. 261, 269, 563 S.E.2d 665, 669 (2002) (admissibility of habit evidence requires showing of sufficiently numerous and repeated examples). The admissibility of Dr. Klevan's testimony turned on whether it was based on his personal knowledge and experience, as required for lay witness testimony, or impermissibly crossed the line into hypothetical opinion.

her treating physician. It was also permissible for Dr. Klevan to testify as to what he has never done or said as a consulting physician and his procedure for responding to requests for consults from emergency department physicians. Such testimony was based on his personal knowledge and experience. On the other hand, to the extent that Dr. Klevan rendered opinions based on facts outside of his personal knowledge and experience, they were inadmissible. Dr. Klevan had no personal knowledge of the facts surrounding Sloan's condition. Because he did not testify as an expert, it was not permissible for Dr. Klevan to answer hypothetical questions. Accordingly, on remand, the admission of any testimony by Dr. Klevan should be guided by these principles.

For the foregoing reasons, we reverse the judgment of the circuit court and remand this case for a new trial.

This order shall be certified to the said circuit court.

A Copy,

Teste:

Patricia L Harrington

Clerk