CONCUR; and Opinion Filed July 24, 2019.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00719-CV

CAMERON MCPHERSON, Appellant
V.
BRIAN DAVID RUDMAN, M.D., Appellee

On Appeal from the 162nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-05858

CONCURRING OPINION ON DENIAL OF RECONSIDERATION EN BANC

Concurring Opinion by Justice Schenck

Cameron McPherson brought this medical malpractice case. A Dallas County jury rejected his claim, and the trial court rendered a take nothing judgment. On appeal, McPherson attributed his loss to the trial court's decision to permit the testimony of one of his own treating physicians, Dr. Norma Melamed, and sought reversal on that basis. He now seeks reconsideration en banc, urging, ironically as it will prove, that the panel "opinion does not accurately set forth the evidence" and does not "analyze the applicable law in a manner commensurate with the magnitude of this case and his injuries." He also maintains, as the nominal basis for en banc reconsideration, that "this Court's decision to allow Dr. Melamed's opinions" is "inconsistent with other of this Court's decisions," citing us to *Beinar v. Deegan*, 432 S.W.3d 398, 407 (Tex. App.—Dallas 2014, no pet.), a case he asserts is "strikingly similar" with "the exception of which side's expert was . .

. challenged." McPherson's motion does not cite or discuss the standard that governs this appeal. Because the standard of review controls this and every appeal we hear, and because it and the equally controlling "record" and "applicable law" are evidently less well understood than they might be, this further opinion appears necessary to explain the proper disposition of this appeal and McPherson's motion.

As detailed below, this appeal, like *Beinar,* is governed by the abuse of discretion standard of review, as McPherson acknowledged before the panel. That standard does not call for, or even permit, us to decide whether "to allow" or to exclude evidence at trial. That decision—regardless of which side of the docket is affected—is for the trial court. We answer only whether the trial court acted arbitrarily, considering not only the rationales cited by the trial court or even raised by the parties below, but also the entire record, and we "should uphold the ruling" if there "is any ground for doing so." *State Bar of Tex. v. Evans,* 774 S.W.2d 656, 658 n.5 (Tex. 1989).

Even the most ephemeral application of the standard immediately forecloses the only conceivable ground for reconsideration here, as *Beinar,* like this case, announces simply that the trial judge's decision is something less than an abuse of discretion. That standard would also require us to consider the record in full and in light of all the many rationales available to support the trial court's ruling, quickly revealing McPherson's motion and appeal as grossly incomplete and counter-factual.

I will begin with a very brief recounting of the issue presented and the facts as they played out below.

Proceedings Below

McPherson underwent foot surgery and subsequently experienced nerve damage. He sued his orthopedic surgeon, Dr. Cook, and the anesthesiologist, Dr. Rudman, claiming malpractice. Before trial, McPherson non-suited his claims against Dr. Cook. After the surgery, McPherson

was seen and treated by Dr. Melamed, who would later appear to testify at trial with respect to McPherson's surviving claim against Dr. Rudman.

Both parties in this case made requests for initial disclosure, triggering their respective right to basic discovery of specific categories of information. *See* TEX. R. CIV. P. 194.[1] Both parties disclosed Dr. Melamed and had contact with her thereafter, as will be discussed in greater detail below.

At trial, Dr. Melamed testified over two days concluding her testimony on a Friday. The following Monday, McPherson filed a motion to strike Dr. Melamed's testimony claiming Rudman failed to disclose a change in Dr. Melamed's causation opinion in violation of rule 193.5, requiring exclusion under rule 193.6. *Id.* 193.5 (providing for duty to amend or supplement discovery); *id.* 193.6 (providing remedy for failure to timely amend or supplement discovery response).

Rule 193.6 functions in two parts. First, the party seeking exclusion on the basis of inadequate disclosure or supplementation must show the significance of the omitted information and the foreknowledge of his opponent. While exclusion is often said to be "automatic" upon this initial showing, the Texas Supreme Court opinion that gives rise to that description confirms that it is not. *See Fort Brown Villas III Condo. Ass'n, Inc. v. Gillenwater,* 285 S.W.3d 879, 881 (Tex. 2009). Rather, where a party has failed to acquit itself of the duty to disclose or supplement, the trial court continues to analyze the issue with the burden shifting to the non-disclosing party to

[1] Disclosures do not supplant other discovery tools that are designed to develop the case and promote the ultimate truth-seeking function of trials. *See e.g, id.* 195.4 (in addition to disclosures, parties "may obtain discovery concerning the subject matter on which the expert is expected to testify, the expert's mental impressions and opinions, the facts known to the expert . . . that relate to or form the basis of the testifying expert's mental impressions and opinions, and other discoverable matters, including documents not produced in disclosure, only by oral deposition of the expert" or by written report if required). *See also United States v. Harper*, 662 F.3d 958, 961 (7th Cir. 2011); *Jacobson v. State*, 398 S.W.3d 195, 200 n.21 (Tex. Crim. App. 2013); *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 405 (Tex. 1993); *Walker v. Packer*, 827 S.W.2d 833, 846–47 (Tex. 1992) (orig. proceeding) (Doggett, J., dissenting); *Houston v. State*, 208 S.W.3d 585, 589 (Tex. App.—Austin 2006, no pet.); *Stein v. Am. Residential Mgmt., Inc.*, 781 S.W.2d 385, 388 (Tex. App.—Houston [14th Dist.] 1989, no pet.).

show either good cause for the failure to timely disclose or a lack of unfair surprise or prejudice. TEX. R. CIV. P. 193.6(a)–(b). Reflecting their preference for merits dispositions and the role of the trial and pre-trial process as truth-seeking efforts more than sport,[2] the rule goes on to make clear that a trial court is not obliged to strike the testimony even where the non-disclosing party fails to show good cause or lack of prejudice but may grant a continuance or postpone the trial to allow further development of the issue. *Id.* 193.6(c).

In this case, the trial court denied McPherson's motion to strike Dr. Melamed's testimony, noting, in the court's opinion, that the objection came too late on the Monday following its Friday admission. And at no point did McPherson request a continuance.

With this basic backdrop and recognition that McPherson's complaint concerns a ruling on the admission of evidence, I will now discuss the standard of review applicable to McPherson's complaint and its application to the facts as revealed by the record.

Appellate Review and Abuse of Discretion

I will begin with the most basic norm: "Appellate courts review trial courts' judgments not opinions." Recognizing that we are, at best, systemically secondary in an already slow and expensive process (and have a grossly unfair advantage of time over the trial courts) compels us to accept that we cannot function like an instant replay booth. *Michigan v. Lucas,* 500 U.S. 145, 155 (1991) (Stevens, J., dissenting) ("We sit, not as an editorial board of review, but rather as an appellate court. Our task is limited to reviewing 'judgments, not opinions.'").[3] Thus, we do not

[2] *E.g., Gee v. Liberty Mut. Ins. Co.,* 765 S.W.2d 394, 396 (Tex. 1989) (discussing and rejecting "mechanical" interpretation of rules governing failure to supplement interrogatory responses and stressing need for discretion in promoting the purpose of rule).

[3] While the famous "judgments not opinions" phraseology originates and is most often repeated in the federal courts, it is universal in application—and certainly where abuse of discretion review is involved. *D.L. v. R.B.L.,* 741 So. 2d 417 (Ala. 1999); *Artec Servs. v. Cummings,* 295 P.3d 916, 920 (Alaska 2013); *City of Phoenix v. Geyler,* 697 P.2d 1073, 1080 (Ariz. 1985) ("We recognize the obligation of appellate courts to affirm where any reasonable view of the facts and law might support the judgment of the trial court. This rule is followed even if the trial court has reached the right result for the wrong reason."); *Robertson v. State,* 829 So. 2d 901 (Fla. 2002); *People v. Reed,* 838 N.E.2d 328, 332 (Ill. App. Ct. 2005); *Price v. Ind. Dep't of Child Servs.,* 80 N.E.3d 170, 173 (Ind. 2017); *St. Tammany Parish Sch. Bd. v. Hartford Cas. Ins. Co.,* 2017 CA 1254, 2018 WL 3979466 (La. Ct. App. Aug. 20, 2018) ("appellate courts review judgments, not reasons for judgment"); *Harvey v. Director of Revenue,* 371 S.W.3d 824, 828 (Mo. App. 2012); *Cortez v. Gindhart,* 90 A.3d 653 (N.J. Super. Ct. App. Div. 2014); *Regester v. Regester,* Nos. CA-7932, CA-7939, CA-7940, 1990 WL 83991 (Ohio App. June 18, 1990) ("it is axiomatic that this court reviews judgments, not rationales");

"allow" Dr. Melamed's opinion in this case any more than we "struck" the plaintiff's expert in *Beinar*. We, instead, simply review the trial court's decision according to the record, the governing law, and the applicable standard of appellate review.

Of course, we cannot even begin to consider reversing a trial court without "error." *Wells Fargo Bank, N.A. v. Leath*, 425 S.W.3d 525, 538 (Tex. App.—Dallas 2014, pet. denied). So, with the exception of a very few things that would amount to "plain" or "fundamental" error, we begin with the requirement that the appellant must have preserved the issue below with a timely, specific, objection, motion, or request that forced the trial judge to make a decision. *See Bryant v. Jeter*, 341 S.W.3d 447, 449–50 (Tex. App.—Dallas 2011, no pet.). Even then, a ruling that is wrong, in the face of the timely objection or request, is necessary but not sufficient to be actionable on appeal. *See e.g.*, *Langley v. Bell Sports, Inc.*, No. 05-96-00120-CV, 1997 WL 752635, at *9 (Tex. App.—Dallas Dec. 5, 1997, no pet.) (not designated for publication). Our standard of review determines whether the claimed error is actionable on appeal.

Decisions concerning pre-trial case management or mid-trial decisions on the admission of evidence are, by necessity, largely committed to the discretion of the trial court. We will find error exceedingly rarely and only in the most extreme circumstances where the judge's decision amounts to an "abuse of discretion." *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001); *Hanley v. Hanley*, 813 S.W.2d 511, 516 (Tex. App.—Dallas 1991, no writ).[4] In that context, and because we review judgments, not opinions or rationales, we look not to a particular reason given but to *any reason* that might have been considered in reaching the ruling below, whether it

Pub. Advocate & Consumers Educ. & Protective Ass'n v. City of Philadelphia, 662 A.2d 686, 687 n.2 (Pa. Commw. Ct. 1995); *State v. Olmos*, 120 P.3d 129 (Wash. App. 2005). Where things get complicated in Texas is in seemingly minor variations on the theme—like what an appellate court may or must do as part of its review—a concept that in part drove our disagreement in *St. John Missionary Baptist Church v. Flakes*, 547 S.W.3d 311 (Tex. App.—Dallas 2018, pet. pending) (en banc).

[4] In our review of more than 8,000 cases over the past five years, we found reversible error in five instances in cases where the appellant insisted that the trial court's overruling an evidentiary objection constituted reversible error.

was raised or not. *Evans*, 774 S.W.2d at 658 n.5; *Zhu v. Lam*, 426 S.W.3d 333, 341 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

Moving forward, the fact that the trial court erred or abused its discretion does not compel reversal. *Fed. Deposit Ins. Corp. v. Morris*, 782 S.W.2d 521, 523 (Tex. App.—Dallas 1989, no writ). Putting further meat on the "we-review-judgments-not-opinions" bone, the appellant must show that error or abuse of discretion probably resulted in an improper judgment or precluded his ability to pursue the appeal. TEX. R. APP. P. 44.1; *Evans*, 774 S.W.2d at 658–59; *Tanner v. Karnavas*, 86 S.W.3d 737, 741 (Tex. App.—Dallas 2002, pet. denied).

Abuse of Discretion Review and Rule 193.6 as Applied to the Facts of this Case

With this proper standard in mind, we review the trial court's decision overruling McPherson's motion to strike as untimely not only for error in finding waiver but for any other ground available that would support the decision. *See Aluminum Co. of Am. v. Bullock*, 870 S.W.2d 2, 3 (Tex. 1994); *Norfolk S. Ry. Co. v. Bailey*, 92 S.W.3d 577, 580 (Tex. App.—Austin 2002, no pet.) (upholding trial court's evidentiary ruling if any legitimate basis exists to support ruling). Thus, putting aside the trial court's waiver determination, which is itself sufficient grounds for affirmance, McPherson's Motion for En Banc Reconsideration would oblige us to undertake a plenary review of his motion to strike below. Mirroring the burdens as they played out before the trial court, then, the first step in our review is to determine whether the trial court would have abused its discretion if it found Rudman had no duty to supplement his disclosure.

In his Motion for En Banc Reconsideration, McPherson states "Rudman's designation of Melamed as a non-retained, testifying treating physician indicated that she would 'express the opinion, based upon reasonable medical probability, that there are several possibilities as to the cause of Cameron McPherson's alleged injury and that it is difficult to say which cause is probable, if any.'" McPherson goes on to state that, based upon Dr. Melamed's notes, at trial he expected

that she would say there were three possible causes of McPherson's injury, (1) tourniquet placement during surgery, (2) pain pump placement post-surgery, or (3) cast placement post-surgery, and it is difficult to say which cause is probable, if any.[5] He further contends that only Rudman's counsel knew the second possibility was clearly out of the picture and beguiled McPherson by not supplementing his disclosures. He notes that defense counsel met with Dr. Melamed three weeks before trial and makes the following allegation:

> ***Defense counsel knew at that point that Melamed's opinion was no longer that there were "several possibilities," but that there were only two,*** that she no longer believed that it was difficult to say which cause was probable, and that her opinion now was that McPherson's nerve damage was not due to Rudman damaging the nerve during the pain pump placement.

(emphasis added). Thus, urges McPherson, Dr. Melamed's opinion was "known to Rudman but unknown to McPherson and undisclosed by Rudman to McPherson."

Nothing in the cited portions of the reporter's record even remotely suggests that defense counsel was aware prior to trial that Dr. Melamed would rule out the second possible cause of the injury. On the contrary, as it played out before the trial court, the only clear disclosure of the complained-of opinion was to McPherson's counsel and, ironically, the record suggests nowhere that McPherson supplemented his own disclosure with this helpful factual development at any time prior to trial.[6] Because those record facts are essential to McPherson's argument, I will detail them immediately below.

The Record Before the Trial Court Showed Only McPherson Was Aware of the Complained-of Opinion

While McPherson is compelled to show abuse of discretion in permitting his physician to testify, and, in particular, that he was so deceived by his adversary that the jury should have been

[5] The pain pump placement is the only potential cause of injury that could be attributed to Dr. Rudman. The tourniquet and cast or splint placement were associated with Dr. Cook.

[6] As noted hereinafter, see *infra* n.6, one question and answer could be read to show both parties had knowledge, albeit much earlier in McPherson's case.

barred from hearing that testimony, the record hardly shows a lack of disclosure *by his adversary*. In fact, the record shows that Dr. Melamed told McPherson's counsel of her complained-of causation opinion before trial without disclosure to Rudman.

On September 19, 2013, more than two years prior to trial, McPherson's counsel contacted Dr. Melamed in writing, asking Dr. Melamed to "sign a letter . . . [about] the likely cause of [McPherson's] injuries." McPherson's counsel took the "liberty of drafting such a letter to save [her] time using [her] records." McPherson's counsel wanted Dr. Melamed to opine that the injuries she treated were most likely caused by the tourniquet and pain pump placements following the distal tibia procedure. Dr. Melamed refused to sign the letter and sent it back, unsigned, to McPherson's counsel. She told McPherson's counsel she would be happy to discuss everything about the case under oath.

On April 28, 2014, McPherson responded to Rudman's request for disclosure and identified Dr. Melamed as a person having knowledge of relevant facts. McPherson did not identify any expert witnesses at that time.

McPherson's counsel had noticed Dr. Melamed's deposition for August 15, 2014. One week prior to the scheduled deposition, one of McPherson's lawyers met with Dr. Melamed to discuss her opinions. Seven days later, on August 12, McPherson's counsel sent Dr. Melamed a letter canceling her August 15 deposition and requesting that she refund the $1,600 deposition retainer that McPherson had paid. If the record stopped at this point, we would have an interesting question as to whether the trial court could properly infer McPherson's advance knowledge of Dr. Melamed's opinion concerning placement of the pain pump as the possible cause of his injury, or at least the same opportunity to discover it. The record, however, does not stop there.

Almost a year later, on July 8, 2015, McPherson supplemented his disclosures, to, among other things, designate expert witnesses. In addition to identifying Dr. Melamed as a person with

knowledge of relevant facts, McPherson now identified her as a treating physician and then included her, and others, as designated non-retained experts.

On August 17, 2015, Rudman also designated Dr. Melamed as an expert witness with the following description:

> Norma Melamed, M.D. is a neurologist who has treated Cameron McPherson. Defendant anticipates that Dr. Melamed will testify regarding her education, training and experience and will testify regarding her knowledge of the condition and care and treatment of Cameron McPherson. Defendant further anticipates that Dr. Melamed will testify and render opinions regarding the causes or potential causes of Cameron McPherson's alleged injuries or damages. Defendant further anticipates that Dr. Melamed will express the opinion, based upon reasonable medical probability, that there are several possibilities as to the cause of Cameron McPherson's alleged injury and that it is difficult to say which cause is probable, if any. Defendant further anticipates that Dr. Melamed will testify consistently with her deposition testimony, which is anticipated in this cause.

On November 20, 2015, Dr. Melamed met with defense counsel for the first time. Trial began just a few weeks later, on or about December 9, 2015.

At trial, Dr. Melamed testified over two days. On the first day, she testified about multiple possible causes for McPherson's nerve injury. On the next day, defense counsel pushed her for detail on Dr. Rudman's placement of the pain pump. She answered, as reflected in notes she made subsequent to her initial note identifying three possible causes of McPherson's injury, that it was not possible to say within a reasonable medical probability that the nerve injury was caused by the pump in view of the placement of the needle.

Critically, Dr. Melamed further testified that during her August 2014 meeting with McPherson's counsel she had been asked what her opinions were about the case. Dr. Melamed explained that, at that meeting, she "discussed it similarly to now" and then got a communication a week later saying the deposition was canceled and requesting a return of her $1,600 fee. In response to defense counsel's question concerning what she had told McPherson's counsel about

her "opinion in reasonable medical probability as to whether or not this man got into this nerve with a needle and catheter and damaged it," Dr. Melamed responded:

> ***I would have said exactly what I'm saying now***, but I cannot remember the exact details of my conversation except that what I said -- what I'm saying now is I have to review this level of detail before the deposition. So it was when I really got into the details of the case was before that deposition, ***so I discussed exactly all of this at our brief meeting, saying that -- that the injection of the anesthetic was not the primary cause***. It was recognized at that point that we had the discussion. It was more to this case and the anesthesiologist, and they recognize that there had been an issue with dropping other focus or on this lawsuit.

(emphasis added).

On re-cross, McPherson's counsel confirmed that Dr. Melamed had a meeting with one of McPherson's lawyers.[7] McPherson's counsel then asked Dr. Melamed if she told the lawyer she could not really tell which of the three possible causes she put down were more likely than not the cause of McPherson's injury. She responded, contrary to the premise of McPherson's argument below and here, emphatically, "No, I did not."

As to her meeting with defense counsel, Dr. Melamed testified at trial that defense counsel

> . . . came and actually just had a chat with me about you -- gosh, I've never met them before and asked if I was involved in the case and, you know. And you had come to do a deposition on me and then canceled the deposition. They had no idea that I had not been utilized by anybody. They thought a neurologist was really important in understanding this case because there was no neurologist in the case. And actually chatted for a very little while and then they said they might want to subpoena me.

The Monday following Dr. Melamed's testimony, McPherson's counsel moved to strike her testimony, now claiming it varied materially from the disclosure by Rudman and alleged that Rudman knew of the variance and failed to seasonably amend the disclosure. McPherson had no evidence to support this assertion. Worse, the record shows McPherson had the opportunity to

[7] She responded "But yes. And actually what I told you about or your brother about in that meeting was exactly what I said to [defense counsel]. You know, you-all then after that canceled the deposition on me and that was the end of it." This testimony is not very clear. If it can be inferred from this testimony that Dr. Melamed told defense counsel the same thing she told plaintiff's counsel more than a year later, at best it would lead to the conclusion that both parties had the same information and would not be surprised by her testimony.

find out what opinions Dr. Melamed would offer at the time of trial, knew she was not supportive of his causation theory, declined to depose her, and made no amendment to his own disclosure.

The trial court permitted McPherson's counsel to read to the jury a statement contradicting Dr. Melamed's testimony concerning their prior conversations. As McPherson does not acknowledge or discuss the abuse of discretion standard that governs here, he also makes no effort to explain why a trial judge would abuse his discretion in crediting the testimony of a witness where the witness and counsel disagree.[8]

The Trial Court Also Would Not Have Abused Its Discretion in Finding Good Cause and Lack of Surprise in View of the Trial Testimony

Assuming, generously, that the trial court would have been compelled to find a duty to supplement on the part of Rudman, despite the lack of any evidence that he (rather than McPherson) was aware of her unhelpful opinion, the next step in the abuse of discretion analysis would require us to examine whether the trial court would have been likewise compelled to reject the conclusion that the record showed neither good cause for the non-disclosure nor the lack of unfair surprise to McPherson. TEX. R. CIV. P. 193.6(a). The trial court's ruling requires us to assume it would have drawn both conclusions in our exploration for abuse. *See Bailey*, 92 S.W.3d at 581 (record must support a finding of good cause or lack of unfair surprise); *see also* TEX. R. CIV. P. 193.6(b).

Here, the record establishes McPherson had designated this witness—who was also his own treating physician—as an expert, scheduled and then cancelled her deposition after his counsel met with her, presumably foreclosing any need or argument for supplementation. There is no evidence that Rudman's counsel learned anything new or different about Dr. Melamed's

[8] Such a rule would presumably streamline trial greatly as we might suspend the trial after opening statements.

opinions during his visit with her three weeks before trial, notwithstanding McPherson's allegation and mis-citations to the record.[9]

McPherson's counsel was also aware that Dr. Melamed had received *from him* a letter in September of 2013 proposing a different, more helpful causation opinion with respect to the placement of the pain pump. McPherson's counsel was also aware that Dr. Melamed did not sign the letter. Thus, at best, McPherson's counsel would have expected Dr. Melamed's testimony to be unhelpful in establishing the causation opinion he needed, and he anticipated and indeed designated other experts to carry that burden. The trial judge also heard Dr. Melamed testify that she had told McPherson's counsel the same thing she said at trial prior to the cancellation of her deposition.

Moving forward, even if the trial court could not have found waiver and would have been compelled on this record to find that Rudman failed without good cause in his duty to supplement, resulting in unfair surprise, it would have been required to go on to consider continuing the trial, if requested. *See* TEX. R. CIV. P. 193.6(c). McPherson, of course, did not request a continuance. Generally, the failure to seek a continuance severely undermines an assertion that the trial court abused its discretion. *Smithson v. Cessna Aircraft Co.*, 665 S.W.2d 439, 443 (Tex. 1984). Given that McPherson already knew that he needed to produce another expert because Dr. Melamed would not identify any helpful opinion as to causation, a continuance would have been unhelpful in any event as Dr. Melamed had the right to her opinion, whatever it was, *forever*. *See, e.g., State v. Wood Oil Distrib., Inc.*, 751 S.W.2d 863, 865 (Tex. 1988) (holding trial court did not abuse its discretion in denying motion to continue, noting that "[t]he fact that Wood did not have an

[9] To his credit, McPherson does not even attempt to argue that the record's lack of a denial of knowledge of a change in Dr. Melamed's opinion by Rudman's counsel is proof that he was aware of a change, or that the trial court abused its discretion in failing to find that he (McPherson) met his initial burden of showing a failure to disclose. Only at that point would the burden shift to Rudman to show good cause for the lack of supplementation or lack of unfair surprise.

opportunity to review the depositions of its own witnesses or depose the State's witness is a predicament of its own making . . . [and] a risk Wood took by not diligently pursuing discovery.").

Even if McPherson Had Attempted to Show Abuse of Discretion in All of These Respects, He Would Still Have to Show Harm

Finally, putting aside McPherson's manifest failure to show error or an abuse of discretion, he would be required to show harm in the form of the ultimate judgment. *Cardona v. Simmons Estate Homes I, LP*, No. 05-14-00575-CV, 2016 WL 3014792, at *2 (Tex. App.—Dallas May 25, 2016, no pet.) (mem. op.). As noted, the record contains evidence McPherson was aware that Dr. Melamed would not support his theory of causation and thus procured other opinion testimony. Ignoring that the trial court had numerous grounds available for its decision, Dr. Melamed's causation opinion relative to Dr. Rudman's placement of the pain pump was cumulative of like testimony from other experts, which was also fatal to McPherson's case. "The erroneous admission of testimony that is cumulative of properly admitted testimony is harmless error." *See Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394, 396 (Tex. 1989).

Lastly, ignoring the lack of any viable argument of error, abuse of discretion, or substantive harm, the trial judge went to the extraordinary extent of allowing McPherson's counsel to cross-examine the testifying doctor about her interactions with both counsel (which did little to aid his cause) and to read to the jury his own prepared statement giving his side of events in an attempt to discredit Dr. Melamed. Thus, McPherson was able to fully put on his case, including his own arguments with his treating physician over what she had told his counsel before trial. Against this backdrop, asserting there was error, much less an abuse of discretion, is incredible. Suggesting that refusing to strike the doctor's testimony altered the result in this case is equally implausible.

The Court's Waiver Determination

Of course, McPherson's Motion for En Banc Reconsideration would also require us to revisit the trial court's explicit determination that he waived his rule 193.6 disclosure objection by

waiting until the Monday following Dr. Melamed's Friday testimony to lodge it.[10] Of course, the general rule regarding preservation is well established. To be timely an objection must be "made at the first opportunity or as soon as the basis for the objection becomes apparent." *Alvarado v. State*, No. 05-03-01718-CR, 2004 WL 2378368, at *7 (Tex. App.—Dallas Oct. 25, 2004, no pet.); *see also Guadalupe–Blanco River Auth. V. Kraft*, 77 S.W.3d 805, 807 (Tex. 2002). Thus, we have observed "when it is reasonably obvious that a question calls for inadmissible evidence, an objection must be made before the witness answers that question." *Alvarado*, 2004 WL 2378368, at *7 (citing *Beall v. Ditmore*, 867 S.W.2d 791, 794 (Tex. App.—El Paso 1993, writ denied)). Rather than attempting to announce a bright-line test that would needlessly tie our hands in future cases, I would prefer simply to note, as the panel did here, that the trial court did not err in treating the objection as waived.

Conclusion

McPherson's request for reconsideration en banc rests on an erroneous assertion of conflict in our panel precedent, a counter-factual presentation of the record, and a profound lack of appreciation or recognition of the governing standard of review. For all of these reasons, the court's majority properly declines his invitation.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

Bridges, Whitehill, J.J. join this concurring opinion

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[10] While McPherson objected contemporaneously to some of Dr. Melamed's testimony on other grounds, such as competency, he did not claim a violation of discovery protocols until the following Monday.