Circuit Court for Baltimore City
Case No. 24X14000378

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1191

September Term, 2016

LLOYD E. MITCHELL, INC.

v.

PATRICK ROSSELLO

Graeff,
Leahy,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: July 6, 2018

Appellee, Patrick Rossello, brought suit in the Circuit Court for Baltimore City against appellant,[1] Lloyd E. Mitchell, Inc. ("LEM"), alleging that his exposure to asbestos-containing products used by LEM during construction at his workplace in 1974 caused the pleural malignant mesothelioma with which he was diagnosed in 2013. LEM moved for summary judgment, but after a hearing on the matter, the trial court denied LEM's motion as to the counts of negligence and strict liability.[2]

Following the ensuing trial, a jury returned a verdict in favor of Mr. Rossello, awarding him $8,114,166.79 in compensatory damages. The trial court entered final judgment in the amount of $2,682,847.26.[3]

LEM filed post-trial motions for judgment notwithstanding the verdict ("JNOV"), a new trial, and/or remittitur. The court denied LEM's post-trial motions. Thereafter, LEM noted a timely appeal, raising the following questions for our review, which it phrases as follows:

1. Did the circuit court err in denying appellant's motion for summary judgment?

2. Did the circuit court err in precluding appellant from calling a key witness and depriving appellant of an opportunity to present evidence

[1] Mr. Rossello's complaint named numerous defendants, but by the time of trial, LEM was the only one remaining.

[2] Mr. Rossello conceded on the issues of fraud, breach of warranty, civil conspiracy/aiding and abetting, and market share liability, and as a consequence, the trial court granted LEM's motion for summary judgment as to those counts.

[3] The final judgment reflected the court's decision to direct judgment in favor of LEM as to its cross-claims against Georgia-Pacific, LLC, and Union Carbide Corporation, and to recognize a set-off for payment Mr. Rossello had received from a personal injury settlement trust.

that it was not the contractor that performed the services associated with plaintiff's alleged exposure?

3. Did the circuit court err [in] denying appellant's motion for judgment notwithstanding the verdict when the only identification of the appellant was plaintiff's self-serving and contradictory testimony?

Perceiving no error, we shall affirm the judgment of the trial court.

I.

Background

In 1973 Mr. Rossello enrolled in Union Trust Bank's management trainee program. As a trainee, he was expected to work in various Union Trust branches and departments for four to six weeks each over the course of one year to gain on-the-job training and experience in retail banking.

Mr. Rossello, in the summer of 1974, was placed at the Union Trust branch on Guilford Avenue in Baltimore City and tasked with reviewing federal banking regulations. At that time, the three-story bank building where he worked was undergoing construction to add fourth and fifth floors.

Mr. Rossello was assigned a desk on the incomplete fourth floor of the building, in an area sectioned off with hanging plastic sheets. The plastic sheets were to separate the area where Mr. Rossello had his desk, from ongoing drywall and electrical work. According to Mr. Rossello, while he was at the site three or four LEM workers were on the job every day, applying drywall with asbestos-containing Georgia-Pacific Ready Mix joint compound and sanding the walls. The dust from sanding, he said, would settle on the floor and on his clothing and desk during his workday. He wiped off the dust from his desk

every morning and when he returned from outings from the office. He also dusted off his suits each evening.

Mr. Rossello testified at trial that he knew that it was LEM workers who performed the drywall work because he had seen LEM's name on tool carts in the elevator and on the fourth floor and frequently saw a truck with LEM's name on it parked near the entrance to the work site. He also occasionally saw Georgia-Pacific Ready Mix joint compound cans on the LEM tool carts. Mr. Rossello produced invoices from Georgia-Pacific Corporation evidencing sales of hundreds of containers of Ready Mix to LEM in 1974, although no invoice showed a particular job site to which the containers were delivered.

Mr. Rossello was diagnosed with pleural malignant mesothelioma in 2013. His doctors predicted he would die within 18 months.

Mr. Rossello filed suit against LEM in July 2014, with counts sounding, *inter alia*, in strict liability and negligence. He alleged that his regular and frequent exposure to the asbestos-containing dust from LEM's sanding and clean-up of the drywall work at the Union Trust Bank in 1974 was a substantial contributing factor in the development of his malignant mesothelioma. Mr. Rossello conceded, during his November 2015 deposition and at trial, that he also had pipes in the basement of his home that were wrapped with flaking asbestos-containing material, but he said he had never touched the pipes and "had it all removed" once he was diagnosed with mesothelioma.

On February 29, 2016, LEM filed a motion for summary judgment as to all counts in Mr. Rossello's complaint, arguing that even after the conclusion of all discovery, Mr.

Rossello still could not produce sufficient evidence to prove he had been exposed to any asbestos-containing product for which LEM was responsible. Mr. Rossello opposed the motion and asserted, *inter alia*, that very little evidence of product nexus is required to withstand a motion for summary judgment. He also asserted that he had, through discovery, produced sufficient evidence of regular and frequent exposure to asbestos-containing products used by LEM to support his theories of liability. More specifically, he contended that his deposition testimony in which he identified LEM as the drywall contractor on the Union Trust Bank addition, by his observation of trucks and tool carts bearing LEM's name, was sufficient to create questions of material fact that a jury should resolve.

In its reply, LEM disputed that Mr. Rossello's deposition testimony supported his claim that LEM had performed the drywall application and sanding work at the Union Trust Bank in 1974. LEM stressed that despite Mr. Rossello's testimony that he had seen a tool cart and truck with LEM's name printed on them at the job site, Mr. Rossello had not identified a single witness or piece of documentary evidence to prove that LEM had actually worked as a drywall contractor at the Union Trust branch in 1974. According to LEM, the only admissible evidence—Baltimore City construction permits—showed that LEM had been engaged as a plumbing contractor on the project. Nothing in those permits indicated that LEM's workers performed drywall work at the site. In addition, LEM continued, Mr. Rossello's reliance on the Georgia-Pacific invoices showing sales of hundreds of containers of Ready Mix joint compound to LEM in 1974 did not support the

conclusion that the compound was actually used at the Union Trust Bank site, especially in light of the undisputed fact that LEM was involved in various other construction projects during the same time period.

LEM attached to its reply to Mr. Rossello's opposition to the summary judgment motion, an affidavit, signed on April 7, 2016, by Donald Hopkins, LEM's Project Manager from 1960 through 1977. Mr. Hopkins said in his affidavit that, to his knowledge, LEM "did not apply or sand dry wall joint compound at the Union Trust Bank site located at 210 Guilford Avenue in Baltimore, Maryland."

Mr. Hopkins's affidavit was filed on April 7, 2016, which was only five days before the scheduled date for a hearing on LEM's summary judgment motion. At the hearing, plaintiff's counsel argued that the affidavit should not be considered because LEM had violated the terms of the scheduling order by not producing Mr. Hopkins for deposition prior to March 8, 2016. The motions judge said that she would not consider Mr. Hopkins's affidavit. She gave her reasons for excluding the affidavit as follows:

> THE COURT: On the issue of whether I should consider the affidavit, I am ruling that I should not consider the affidavit. It just strikes me that April 7th is awfully late to tell someone something vital to the case, which is the information that is now indicated that Mr. Hopkins would testify to.
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> As I understand the arguments of both counsel, that specific piece of information was never given before, and therefore, they [counsel for plaintiff] are surprised. They are surprised two days in advance of the motions hearing as to that very fortunate piece of evidence that the defendants now produce. And I think it's unfair.

The way to get that evidence in would be to call Mr. Hopkins, obviously if the defendants want him to testify. And that's another fact witness, I assume. And so, it strikes me that person should have been indicated as a fact witness a long time ago. But was he designated as a fact witness?

[LEM'S COUNSEL]: Yes, Your Honor.

THE COURT: And had they been provided with what he might have said, they might have taken different action well before - - excuse me, close to the 3-8 date when they were - - when your - - which was your deadline. So I am not going to consider the affidavit.

The motions judge then ruled:

Okay. In light of not considering [Mr. Hopkins's] affidavit, though, still, I think that summary judgment has to be denied. It's a close call, I have to say, but there [is] still some evidence - - [i]t's circumstantial evidence, in my view, but you could say that the jurors may decide that they think it's quite a coincidence.

Even if Mr. Hopkins were to testify that that kind of work was not done on the job site, that they define their work as including plastering work. That particular compound [Georgia-Pacific Ready Mix] was sent to them in mass quantity, even though you can't pinpoint it to that site. They may find that as circumstantial evidence of the fact that they did do it. And you have the testimony of Mr. Rossello saying that he believes they were LEM workers. It's very slight evidence, but he did see the cart, he did see the trucks there during the period of time he was there.

He said he saw people, as I understand the evidence, saw people doing plastering work there, and he only identified, as I understand, the electrical contractors and the plasterers. So that kind of limits it. So, obviously, the electrical contractors - - or at least I would assume - - would not be the ones putting the plaster on. And they may find that that's sufficient circumstantial evidence.

So for that reason, I think there are some facts in dispute. The jury can make that decision. And so, I am going to deny the summary judgment. . . . And on those other [counts], we are going to just grant the summary

> judgment in the breach of warranty, fraud, civil conspiracy, market share, and aiding and abetting.[4]

During trial, LEM raised three primary issues: 1) Were LEM employees the workers who performed the drywall work at the Union Trust Bank in 1974; 2) Was Mr. Rossello's exposure to asbestos from joint compound, if any, a substantial contributing cause of his mesothelioma; and, 3) Were there other exposures to explain his disease. Although Mr. Rossello said he saw LEM trucks and tool carts at the Union Trust Bank site, LEM stressed that Mr. Rossello did not remember seeing workers actually use tools they took from the cart. According to LEM, there was no substantial evidence that the workers Mr. Rossello saw on the fourth floor were employed by LEM, especially in light of the fact that building permits introduced at trial listed LEM as a plumbing contractor, not a plastering contractor. In addition, LEM emphasized, there were other contractors on site. LEM also suggested that the thermal asbestos insulation on pipes in Mr. Rossello's home may have been a contributor to his mesothelioma.[5]

[4] Later during the motions hearing, the court also granted LEM's unopposed motion for partial summary judgment as to the unavailability of punitive damages.

[5] When presented with a hypothetical, which assumed the facts that Mr. Rossello alleged were true, Mr. Rossello's medical experts, Drs. John Maddox and Arthur Frank, opined that his four to six week exposure to asbestos-containing products at Union Trust Bank would have been sufficient to cause his mesothelioma and that other exposures to asbestos would not have negated that risk. In Dr. Maddox's opinion, assuming that Mr. Rossello had been exposed to asbestos at the Union Trust Bank, that exposure was a significant cause of his mesothelioma. And, unless Mr. Rossello had disturbed the asbestos-containing coating on the pipes in his house, it "probably" did not contribute to

(continued . . .)

(Continued)

At the close of Mr. Rossello's case-in-chief, LEM moved for judgment, incorporating the arguments made in its motion for summary judgment and reiterating its argument that Mr. Rossello had not met his burden of creating a question of fact sufficient for the jury to find that LEM was the contractor whose employees applied and sanded the asbestos-containing joint compound at the Union Trust Bank in 1974.[6] The court denied LEM's motion for judgment as to strict liability and negligence counts.

After the court refused to allow LEM to call Donald Hopkins as a witness, LEM elected to rest its case without introducing any evidence.

On May 23, 2016, LEM moved for JNOV, new trial, and/or remittitur arguing that Mr. Rossello's trial testimony "contradicted all available documents concerning the identity of contractors at that site," and also contradicted the anticipated testimony of an excluded former employee of LEM, Donald Hopkins. In other words, LEM continued, Mr. Rossello "failed to provide legally sufficient evidence to show LEM was the drywall contractor at the Union Trust jobsite." Movant further asserted that Mr. Rossello's identification of LEM as the employer of the drywall workers at the site was based only on

(. . . continued)

his mesothelioma. Moreover, even if Mr. Rossello had been exposed to asbestos in his home, it only would have added to his cumulative exposure from the "confirmed source of component exposure," i.e., the joint compound used at the Union Trust Bank.

[6] LEM also argued that a conditional judgment should be granted on its cross-claims against Union Carbide and Georgia-Pacific in the event that the jury found against LEM inasmuch as the jury could not find against LEM unless it also concluded that LEM had used Georgia-Pacific asbestos-containing joint compound that was supplied by Union Carbide. The court granted that portion of the motion.

(Continued)

his memory of seeing the name "Lloyd E. Mitchell" on a cart and/or trucks. Such testimony, according to LEM, amounted to unsupported speculation insufficient to permit a reasonable juror to reach a legally-supportable conclusion that LEM performed the drywall work.

LEM's request for remittitur was based on its claim that the jury's award of non-economic damages in the amount of $7,500,000.00 was excessive.[7] Its motion for new trial was based, *inter alia*, on its assertion that the trial court erred in excluding the trial testimony of Donald Hopkins. LEM's post-trial motions were denied, except for the reduction of the judgment to $2,682,847.26.

II.

Denial of LEM's Summary Judgment Motion

LEM first contends that the trial court erred in denying its motion for summary judgment on the counts of negligence and strict liability because Mr. Rossello did not present sufficient evidence to the motions court to prove that LEM was the drywall contractor at the Union Trust Bank job site where Mr. Rossello was allegedly exposed to mesothelioma-causing asbestos. According to LEM, the court's denial of its motion invited Mr. Rossello to present trial testimony that directly contradicted his own deposition testimony and allowed plaintiff to connect LEM to the alleged asbestos exposure without

[7] The balance ($614,166.79) of the $8,114,166.79 was for past medical expenses ($345,166.00) and "Past and future economic loss" ($260,000.00).

any direct or even circumstantial evidence of LEM's involvement. The trial court's denial of LEM's motion, in its view, permitted the jury to render a verdict based on sympathy.

> [O]rdinarily *no party is entitled to a summary judgment as a matter of law*. It is within the discretion of the judge hearing the motion, if [she] finds no uncontroverted material facts, to grant summary judgment or to require a trial on the merits. *It is not reversible error for [her] to deny the motion and require a trial*.
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> As indicated, *a trial court may even exercise its discretionary power to deny a motion for summary judgment when the moving party* has met the technical requirements of summary judgment. Thus, on appeal, the standard of review for a denial of a motion for summary judgment is whether the trial judge abused [her] discretion and in the absence of such a showing, the decision of the trial judge will not be disturbed.

Dashiell v. Meeks, 396 Md. 149, 164-65 (2006) (citations, footnotes, and quotation marks omitted) (emphasis added). *See also, Foy v. Prudential Insurance Co.*, 316 Md. 418, 424 (1989).

In *Pasteur v. Skevofilax*, 396 Md. 405, 418-19 (2007), the Court said:

> The analytical paradigm by which we assess whether a trial court's actions constitute an abuse of discretion has been stated frequently. In *Wilson v. John Crane, Inc.*, 385 Md. 185, 867 A.2d 1077 (2005), for example, we iterated
>
> > [t]here is an abuse of discretion "where no reasonable person would take the view adopted by the [trial] court[ ]" . . . or when the court acts "without reference to any guiding principles." An abuse of discretion may also be found where the ruling under consideration is "clearly against the logic and effect, of facts and inferences before the court [ ]" . . . or when the ruling is "violative of fact and logic."
> >
> > Questions within the discretion of the trial court are "much better decided by the trial judges than by appellate courts, and the decisions of such judges should be disturbed where it is apparent that some serious error or abuse of

> discretion or autocratic action has occurred." In sum, to be reversed "[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court[ ] deems minimally acceptable."
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> 385 Md. at 198-99, 867 A.2d at 1084 (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312-13, 701 A.2d 110, 118-19 (1997)). An abuse of discretion, therefore, "should only be found in the extraordinary, exceptional, or most egregious case." *Wilson*, 385 Md. at 199, 867 A.2d at 1084.

As can be seen, any appellant that attempts to reverse a circuit court judge for the *denial* of a motion for summary judgment, is faced with an almost impossible challenge. A challenge that is *not* met by proof that the movant presented sufficient evidence to the motions court to justify the grant of summary judgment. Appellant must also prove that "no reasonable person would share the view taken by the [motions] judge," *Brown v. Daniel Realty Co.*, 409 Md. 565, 601 (2009), or that the denial was "beyond the fringe of what [a reviewing court] deems minimally acceptable." *Wilson v. John Crane, Inc.*, 385 Md. 185, 199 (2005) (citation and quotation marks omitted). In this case, we shall hold that LEM did not meet that formidable challenge.

As we explained in *Anchor Packing v. Grimshaw*, 115 Md. App. 134, 187 n.11 (1997) (citation omitted), in asbestos-exposure mesothelioma cases,

> [a]s long as plaintiff has presented some evidence to support his theory of liability, the trial court should submit the issue to the jury. Then, it is the duty of the jury, as trier of fact, to weigh the evidence and determine whether the plaintiff has proven by a preponderance of evidence that the plaintiff has mesothelioma, he worked in proximity to the defendant's product, and inhaled asbestos fibers from the product of a particular defendant.

See also Eagle-Picher Industries, Inc. v. Balbos, 326 Md. 179, 210 (1992) (the factors to be evaluated in an asbestos case include "the nature of the product, the frequency of its use, the proximity, in distance and in time, of a plaintiff to the use of a product, and the regularity of the exposure of that plaintiff to the use of that product."). Whether the exposure of a bystander to an asbestos-containing product will be legally sufficient to permit a finding of substantial factor causation is fact specific, and circumstantial evidence of the plaintiff's exposure to asbestos-containing products is sufficient for a finding of substantial factor causation. *Id*.

The evidence before the motions court, taken in the light most favorable to Mr. Rossello was that: 1) Mr. Rossello was a Union Trust Bank management trainee in 1974; 2) he was assigned workspace on the incomplete fourth floor of the Guilford Avenue branch of the bank, which was being renovated during his time there; 3) construction permits verified that LEM was a contractor retained for the Union Trust Bank project; 4) during Mr. Rossello's employment at the Guilford Avenue building, contractors applied drywall using asbestos-containing joint compound and sanded the walls, which created visible dust on the fourth floor; and 5) Mr. Rossello contracted mesothelioma as a result of exposure to asbestos.

Mr. Rossello testified, during his deposition, that only drywall and electrical work were being conducted on the fourth floor during his employment at the Guilford Avenue bank branch, and that the electrical work lasted only a few days, while the drywall work was undertaken every day he worked in the building. He said in his deposition that on a

daily basis, during his rotation at the branch, he saw several workers hanging drywall using Georgia-Pacific joint compound. He identified the asbestos by testifying that he saw the Georgia-Pacific logo and Ready Mix name emblazoned on the metal cans of joint compound at the job site.[8] In his deposition, he testified that he knew that the drywall workers were LEM employees because he saw at least one truck with LEM's name on it, in the driveway outside the bank building while the work was being done, along with tool carts on the fourth floor bearing the LEM name. He also testified that he was exposed to visible dust from the drywall sanding on a daily basis, and he had to wipe it off his desk and clothes numerous times each day.

LEM argues that although "[p]laintiff provided circumstantial evidence that LEM was at the site, he did not provide any evidence to show it performed drywall work." That argument overlooks the fact that, according to Mr. Rossello's deposition testimony, while he was at the site there were only two types of work being done. There were people doing electrical work and others doing drywall work; the electrical workers were only there "two or three days and gone" while the drywall workers were there "every day;" "[t]hey were there in the morning [and] . . . there when I left." LEM never contended that it did electrical work at the site and Mr. Rossello testified that he knew the men putting up drywall were employed by LEM because LEM's name was printed on the tool carts they used to haul their equipment and also LEM's name was on a truck parked in front of the job site.

[8] There was no dispute that the Georgia-Pacific joint compound contained asbestos.

If a jury were to believe Mr. Rossello's testimony that after two or three days, only drywall work was being done for the remaining part of four to six weeks, and also believed that he had seen a truck with LEM's name on it outside the bank building while the drywall work was being done, and that he also saw tool carts with LEM's name on it during that period, the jury could rationally infer that workers employed by LEM were doing the drywall work while Mr. Rossello was at the site. Additional circumstantial evidence showing the nexus between LEM and the site was: 1) LEM's own sales brochures published in the 1974 period listed drywall work as one of the services LEM provided; and 2) Georgia-Pacific invoices to LEM evidencing sale of large amounts of Ready Mix joint compound to LEM around the time of the bank construction.

Based on the foregoing, we cannot say that the trial court abused its discretion in denying LEM's motion for summary judgment.

III.

Disallowance of Mr. Hopkins's Trial Testimony

LEM contends that the trial court abused its discretion by not allowing LEM to call Mr. Hopkins as a witness at trial. To understand that argument, it is necessary to discuss, in some detail, what occurred prior to trial.

A. Discovery

From the outset of this case, counsel for Mr. Rossello knew that Mr. Hopkins had appeared at a deposition in 1994, in which he testified as LEM's corporate designee. At that deposition, Mr. Hopkins testified that he had worked as a project manager in the

carpentry, acoustical and lathing/plastering divisions of LEM from 1960 through 1977. During his 1994 deposition, he named several job sites at which LEM had used asbestos-containing materials in its drywall finishing work. At one point during that deposition, an attorney for one of the parties read a long list of job sites and asked Mr. Hopkins whether LEM did any plastering work at those sites. As to some Mr. Hopkins said "yes" and as to others he said "no," but in the 1994 deposition he was not asked whether LEM did any work at the Guilford Avenue Union Trust Bank site. The apparent reason he was not asked about the Union Trust Bank job site was because: 1) in 1994 Mr. Rossello was not a party to the lawsuit in which Mr. Hopkins gave a deposition; and 2) none of the attorneys who attended the 1994 deposition claimed that their client(s) were injured as a result of LEM performing plastering work at that site.[9]

At his 1994 deposition, Mr. Hopkins conceded that LEM did use George-Pacific joint compound for drywall work during his tenure with the company and agreed as well that trucks that were driven to job sites had a LEM, Inc. logo on their doors. He also admitted that joint compound would have to be sanded after application and that sanding created visible dust.

[9] In the subject case, as in the cases in which the 1994 deposition was taken, the plaintiffs were represented by the law firm of Peter G. Angelos. In its brief, LEM's counsel asserted that Mr. Rossello's counsel (the Peter Angelos law firm) could have asked Mr. Hopkins in the 1994 deposition whether LEM did drywall work at the Union Trust Bank job site. This assertion, while true, is irrelevant because in 1994, the Angelos law firm didn't represent Mr. Rossello. That being so, the law firm could scarcely be expected to conduct discovery in 1994, concerning a client who, at the time of the deposition, had not retained it.

A part of what Mr. Hopkins said in the 1994 deposition was useful to Mr. Rossello in the case *sub judice* because it was consistent with Mr. Rossello's testimony identifying the trucks with the LEM name on the side and also consistent with Mr. Rossello's description of the pre-mix joint compound product that came packaged in five gallon cans. In his 1994 deposition testimony, Mr. Hopkins also confirmed that LEM purchased and used Georgia-Pacific joint compound – the same product identified by Mr. Rossello. Because nothing Mr. Hopkins said in the 1994 deposition was unfavorable to the plaintiff and some of what he said was favorable to him, and because Mr. Hopkins appeared at the 1994 deposition as LEM's corporate designee, his counsel, prior to trial, intended to use excerpts from that deposition at trial. Such testimony was admissible as an exception to the hearsay rule, i.e., statement of a party opponent. *See* Md. Rule 5-803(a)(1).

On June 25, 2015, the circuit court issued its pre-trial scheduling order, which provided, in relevant part, that December 16, 2015 was the last day for depositions of the plaintiff's fact witnesses whom the plaintiff was able to voluntarily produce for deposition without a subpoena being issued by defendants; January 4, 2016 was the deadline for the plaintiff to name his "most likely to use" general product identification fact witnesses from the original fact witness list who have been previously deposed; January 18, 2016 was the last day for depositions of the plaintiff's fact witnesses who the plaintiff was unable to voluntarily produce for deposition without a subpoena; February 1, 2016 was *the deadline for the defendant to provide the names of all witnesses who may testify at trial and to "provide addresses of fact witnesses they cannot voluntarily produce for deposition*"; and

February 19, 2016 was the last day for depositions of defense fact witnesses. (Emphasis added). That February 19, 2016 deadline was later, by agreement of the parties, moved to March 8, 2016.

Counsel for Mr. Rossello propounded interrogatories to LEM, asking LEM to name each witness it intended to call at trial and to identify the subject matter about which they would testify. On February 1, 2016 LEM responded, stating in its interrogatory answers that it would "designate witnesses according to the deadline" in the scheduling order.

Both Mr. Rossello and LEM named Donald Hopkins as a fact witness most likely to be called at trial. But in LEM's designation it never specified "the subject matter upon which [he would] testify."

Counsel for Mr. Rossello, pursuant to Md. Rule 2-412(d), filed a notice to take the deposition of LEM's corporate designee. In response, LEM named Mr. Hopkins as its corporate designee. The deposition was set for March 8, 2016, but, on February 26, 2016, counsel for LEM notified plaintiff's counsel that Mr. Hopkins was "no longer willing to act as LEM's corporate designee[.]" Counsel said that she was advised of Mr. Hopkins's unwillingness to serve as corporate designee on that same date, i.e., February 26, 2016. Counsel for Mr. Rossello, on February 26, 2016, promptly sent back an email inquiring whether LEM was going to name anyone else as a corporate designee.

On March 3, 2016, counsel for LEM emailed Mr. Rossello's counsel and said:

> Unfortunately, it does not appear that we will be able to offer a corporate designee with personal knowledge of the site involved in Mr. Rossello's case. Although we believed Mr. Hopkins would be willing to serve as a corporate designee, he advised us late last week that he no longer wished to serve in

> that capacity. Of course, we reserve the right to call Mr. Hopkins to testify at trial pursuant to a subpoena, but we will not be able to present him as a corporate designee on behalf of LEM. Otherwise, LEM's sole remaining director is its registered agent, Barry Isaac, an accountant in private practice who does not have personal knowledge of LEM's work at the Union Trust site. The only information available to him is from prior corporate depositions of LEM witnesses and documents exchanged in this case. Please let us know how you would like to proceed.

Counsel for Mr. Rossello emailed counsel for LEM on March 5 stating that he would consult with the "rest of the trial team on Monday [March 7, 2016]" as to whether they wished to take Mr. Isaac's deposition. Counsel for Mr. Rossello also advised that "we will object to any attempt to use Mr. Hopkins, or any other witness for that matter, that you have not offered up for a discovery deposition within proper deadlines as specified in the scheduling order" as modified by agreement.

Counsel for LEM, on March 7, 2016, emailed Mr. Rossello's counsel and told him "you are certainly free to conduct a non-corporate fact witness deposition of Mr. Hopkins."

The parties then made arrangements to take Mr. Isaac's deposition testimony on March 23, 2016. In an email dated March 14, 2016, counsel for LEM said, in relevant part:

> Regarding Mr. Hopkins, we do not believe that it would be appropriate for your office to contact him. He is a former Lloyd E. Mitchell employee. We understood that he would be willing to testify in a corporate designee capacity, and we reasonably relied on that understanding when speaking with him in connection with the Rossello matter. As far as your objection to him appearing as a fact witness at trial is concerned, we find plaintiff's position to be without merit. Plaintiff listed Mr. Hopkins on his own witness list, and your office knew at least two weeks before the deadline for fact witness depositions that we would not be able to present him as a corporate designee. As such, there was sufficient time for plaintiff to notice a fact witness deposition of Mr. Hopkins. Nevertheless, if you would like to depose Mr. Hopkins in the Rossello case, as you deposed Mr. Miskelly in Hiett, we would not object to the timing.

Please let us know how you would like to proceed.

Plaintiff's counsel declined LEM's suggestion that plaintiff subpoena Mr. Hopkins to appear at a deposition. Counsel for Mr. Rossello's position was that he did not want to take a deposition of a witness when he didn't know what that witness was going to say and couldn't contact him to find out what he knew about the case.

The deposition of Mr. Isaac was taken on March 23, 2016.

Mr. Isaac said that the only knowledge he had concerning the Union Trust Bank project was based on records that had been supplied to him. Based on those records, he determined that LEM was hired to do plumbing work only at the Union Trust Bank job site. He admitted, however, that he had no independent knowledge as to whether any other work was done by LEM at that job site. Mr. Isaac also testified that he had not spoken with any former LEM employees, including Donald Hopkins, and had never been apprised of Mr. Hopkins's recollection of LEM's work at the Guilford Avenue project.

On April 7, 2016, which was only five days before the hearing on LEM's motion for summary judgment, LEM filed Mr. Hopkins's affidavit in which he disclosed the following:

- He was LEM's Baltimore Metro area Project Manager from approximately 1960 to 1977.
- He was personally familiar with LEM's Baltimore Metro area acoustical projects.
- To his knowledge, LEM and its employees "did not apply or sand dry wall joint compound at the Union Trust Bank site" on Guilford Avenue.
- To his knowledge, LEM's acoustical department did not perform work at the Union Trust Bank site.

At a hearing on April 11, 2016, counsel for Mr. Rossello made an oral motion to strike the Hopkins's affidavit. Counsel put forth two reasons. First, the modified scheduling order, with one exception, required that LEM, by March 8, 2016, voluntarily produce for deposition all defense fact witnesses that it intended to use at trial. The one exception concerned the deadline for naming fact witnesses that could not be voluntarily produced for deposition; as to those witnesses, defendant's counsel was to provide addresses to plaintiff by another deadline. Counsel for Mr. Rossello argued, and counsel for LEM never argued otherwise, that Mr. Hopkins, a former employee of LEM, was a person that LEM could have voluntarily produced for deposition. Therefore, according to Mr. Rossello's counsel, because LEM had never voluntarily produced Mr. Hopkins for deposition prior to the March 8, 2016 deadline, his testimony could not be used at trial nor should his affidavit be considered. In counsel's words:

> They didn't even tell us that he was going to give this affidavit saying that he is going to . . . try and bring him here to say that [LEM] wasn't there. We would have said what we continue to say, if you are going to bring him [to trial], make him available. He is your witness. Make him available. We get the right to depose him. He wasn't made available and this last-minute affidavit is certainly unfair and violates the case rules.

A second reason counsel for Mr. Rossello gave to exclude the affidavit was that, under the Maryland Rules, a corporation's designated agent is required to inform himself, or herself, about facts known by the corporation. Yet, when Mr. Isaac, the corporate designee, testified at deposition, he acknowledged that he made no effort to find out what

Mr. Hopkins knew about the case even though, by that time, counsel for LEM knew that Mr. Hopkins, if called to testify, would provide testimony in accordance with the affidavit.

In rebuttal, LEM's counsel elected not to take issue with plaintiff's reading of the scheduling order, i.e., that as to witnesses that LEM could voluntarily produce for deposition, LEM was required to produce such witnesses for deposition by March 8, 2016. Moreover, LEM's counsel gave no explanation to the motions judge as to why it had not fulfilled its duty to educate its corporate designee, Mr. Isaac, as to what knowledge Mr. Hopkins possessed concerning the Union Trust Bank job site.

In opposition to the motion to strike Mr. Hopkins's affidavit, LEM argued that plaintiff's counsel was not surprised by what Mr. Hopkins said in his affidavit. LEM's counsel argued:

> This [the affidavit] isn't any different than the position that we have taken in the case based on the evidence that has always existed. It's consistent with our interpretation of the Baltimore City inspection documents showing [LEM] as a plumbing contractor, not a plasterer, the historical testimony of [LEM's] witnesses, which says nothing about doing plastering work in this case, and the . . . absence of any evidence to the contrary.

Counsel for LEM also stressed that plaintiff's counsel had listed Mr. Hopkins as a fact witness that he intended to call. In this regard, LEM's counsel urged the court to reject plaintiff's explanation for listing Hopkins, i.e., that he was on the list because plaintiff intended to read into evidence excerpts from Mr. Hopkins's 1994 deposition. Counsel for LEM, evidently referring to the Maryland rule disallowing hearsay, argued that in order to

read into evidence excerpts from the 1994 deposition, plaintiff's counsel would have to prove that Mr. Hopkins was not available as a witness.[10]

Counsel for LEM also read into the record parts of the emails that counsel had exchanged between February 26 and March 14, 2016. In this regard, LEM's counsel argued that in the March 14, 2016 email, plaintiff's counsel was told that "[w]e didn't have control over [Mr. Hopkins] to offer him for a fact witness deposition." In this regard, we note that LEM's counsel was incorrect. What was actually said in the March 14, 2016 email was that Mr. Hopkins refused to act as a corporate designee – not that he would refuse to voluntarily give a deposition as a fact witness.

The trial judge, as previously stated, granted plaintiff's counsel's motion to strike Mr. Hopkins affidavit on April 11, 2016.

On April 13, 2016, LEM's counsel filed a "Motion to Permit Video Trial Testimony of Donald H. Hopkins." LEM alleged that on April 7, 2016, it had served a trial subpoena on Mr. Hopkins, but since then Mr. Hopkins had told counsel that he was 89 years old, lived in Westminster, Maryland, and had asked whether he would be able to give his trial testimony by videotape deposition because of his "age, health, and the hardship of traveling from his home to appear live at trial." LEM's counsel also advised that he had consulted with Mr. Rossello's attorney, who indicated that plaintiff would not consent to the

[10] LEM's counsel was mistaken in this regard. What Mr. Hopkins said in the 1994 deposition was a statement by a party opponent. Maryland Rule 5-803(a)(1) provides that a party's own statement, in either an individual or representative capacity, is admissible without the necessity of proving the unavailability of the declarant.

videotape deposition and also objected to LEM calling Mr. Hopkins at trial because he had not been produced by LEM for a fact witness deposition in this case.

On the same date that LEM filed its motion to permit the videotape deposition, Mr. Rossello's counsel filed a motion to quash the trial subpoena served on Mr. Hopkins. In its written submission, Mr. Rossello's counsel maintained, once again, that LEM had failed to abide by the terms of the scheduling order by failing to offer Mr. Hopkins for deposition prior to the March 8, 2016 deadline. A second reason for not allowing Mr. Hopkins to appear as a trial witness, was based on Maryland Rule 2-412(d), which reads:

> [A] party may in a notice and subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, managing agents, or other persons who will testify on its behalf regarding the matters described and may set forth the matters on which each person designated will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. *The persons so designated shall testify as to matters known or reasonably available to the organization.*

(Emphasis added.)

Counsel for Mr. Rossello argued, citing *Saxon v. Harrison*, 186 Md. App. 228, (2009), that under Rule 2-412(d) LEM was required to educate Mr. Isaac about all relevant matters irrespective of Mr. Isaac's lack of personal knowledge. Mr. Rossello's counsel went on to point out that despite

> LEM's discussions with Mr. Hopkins on [February 26, 2016] concerning his role as the corporate designee, LEM did not convey Mr. Hopkins' knowledge of the Guilford Avenue project [to Mr. Isaac] and [LEM] thus failed to fulfill its requirement that it educate the corporate designee as to all available

> personal knowledge regarding the [p]laintiff's exposures at [the] Guilford Avenue project.

In the motion to quash, Mr. Rossello's counsel stressed that during his deposition, Mr. Isaac admitted that he had never contacted any former LEM employee in preparation for the deposition, had never spoken to Mr. Hopkins, and had no knowledge as to what Mr. Hopkins's recollection might be concerning LEM's work at the Union Trust Bank site.

LEM filed a written opposition to plaintiff's motion to quash the trial subpoena of Mr. Hopkins in which it reiterated many of the arguments that it had made in opposition to the motion to strike the Hopkins affidavit. LEM provided no explanation, however, as to why it had not fulfilled its duty to educate its corporate designee, Mr. Isaac, as to what Mr. Hopkins would say if called to be a witness. Moreover, LEM did take issue with plaintiff's argument that the scheduling order required LEM to produce Mr. Hopkins for deposition by March 8, 2016, unless Mr. Hopkins would not voluntarily appear. Instead, LEM argued that at the time of Mr. Isaac's deposition, "Mr. Hopkins had indicated his desire not to volunteer to participate in this matter." There was, however, no affidavit, email or other documents that supported that last mentioned assertion. Compare Md. Rule 2-311(d) ("[a] motion or a response to a motion that is based on facts not contained in the record shall be supported by affidavit and accompanied by any papers on which it is based"). Moreover, the record affirmatively shows that in the email exchanges, LEM's counsel never told plaintiff's counsel that Mr. Hopkins "had indicated his desire not to volunteer to participate in this matter." Instead, plaintiff's counsel was advised that Mr. Hopkins would not volunteer to act as a corporate designee.

The pending motions (motion to allow videotape deposition of Mr. Hopkins and motion to quash the Hopkins subpoena) were heard by the trial court on April 18, 2016, which was the day before trial was set to commence. The arguments for and against the pending motions were basically the same as those set forth in the written submissions. Notably, LEM's counsel, once again, did not provide any explanation as to why, prior to the corporate designee's deposition, Mr. Isaac was not educated as to what knowledge Mr. Hopkins had in regard to the situation.

The trial judge granted the motion to quash the Hopkins subpoena, denied LEM's motion to take a videotape deposition of Mr. Hopkins for use at trial, ruled that Mr. Hopkins would not be allowed to testify at trial, and indicated that she would allow plaintiff's counsel to read to the jury excerpts from Mr. Hopkins's 1994 deposition.

B. Merits of Appellant's Argument That the Court Abused its Discretion in Not Allowing Mr. Hopkins to Testify at Trial

In its opening brief, LEM argues:

> The trial court improperly excluded Donald Hopkins from testifying at trial except through his 1994 deposition. Both parties repeatedly disclosed Mr. Hopkins as a witness in this case. As such, LEM's subpoena to Mr. Hopkins did not violate the trial court's scheduling order or prejudice Plaintiff in any material way. Even if LEM were required to produce Mr. Hopkins, a retired former employee who declined to participate as a corporate designee, for a non-party fact witness deposition, there is no credible argument that LEM committed an "egregious" violation of the court's order or engaged in the type of "willful or contemptuous" behavior required to justify the extreme order of precluding Appellant from calling this witness at trial.

For the proposition that a key witness may be excluded only for egregious violations of the court's order and that the violations must involve willful or contemptuous or

otherwise opprobrious conduct, appellant cites *Pfeifer v. Phoenix Ins. Co.*, 189 Md. App. 675, 686 (2010) quoting *Maddox v. Stone*, 174 Md. App. 489, 507 (2007). But, as appellee points out, the full quote from *Maddox* clarifies that this legal principle applies only if excluding testimony would "effectively dismiss[ ] a potentially meritorious claim without a trial[.]" *Maddox*, 174 Md. App. at 507. Here, LEM asserted neither a claim nor a counter-claim. Moreover, at least arguably, LEM's conduct in this case was willful. We say this because there is strong evidence that LEM endeavored to hide from plaintiff's counsel the fact that Hopkins would testify in accordance with what he said in his affidavit. Notably, LEM refused to allow plaintiff's counsel to informally talk to Mr. Hopkins and, contrary to the requirements of Md. Rule 2-412(d), presented for deposition a corporate designee, without educating that corporate designee as to what knowledge Mr. Hopkins had about the subject matter of this case.

What was said in *Saxon v. Harrison*, 186 Md. App. at 256-57, is here relevant:

> Maryland Rule 2-412(d) provides that, upon notice and subpoena by a party seeking to depose a corporation, a corporate party shall designate one or more persons to testify on its behalf during depositions requested by an opposing party and that the "*persons so designated shall testify as to matters known or reasonably available to the organization*." Appellees both refer to the decision of the United States District Court for the District of Columbia in *Rainey v. Am. Forest & Paper Ass'n., Inc.*, 26F.Supp.2d 82, 94 (D.D.C. 1998), wherein the Rainey Court held that, under Federal Rule of Civil Procedure 30(b)(6), the federal counterpart to Maryland Rule 2-412(d), "*a corporation cannot later proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition" of the corporation's designee, unless it can prove that the information was neither known nor accessible at the time*.
>
> We decline to address whether Maryland Rule 2-412 should be construed consistent with the reasoning in *Rainey* in all instances. However,

> *we agree that appellant was on notice to prepare its designee to be able to give responsive answers on its behalf. See Wilson v. Lakner*, 228 F.R.D. 524, 528 (D.Md. 2005) ("There can be no question that [Rule 30(b)(6)] imposes a 'duty to prepare the designee[ ] . . . [that] goes beyond matters personally known to the designee or to matters in which that designee was personally involved."') (citations omitted). McCreary's affidavits presented new information about the extent of the mortgage debt on the property, which was relevant in determining the extent of appellant's injury when it was prevented from recovering the insurance proceeds. *There is an element of unfairness inherent in allowing appellant to disclose this information after the deposition of its corporate designee and the closure of discovery, when the opposing parties have justifiably relied on the corporate designee's deposition in developing their litigation strategies.*

(Footnotes omitted.) (Emphasis added.)

As plaintiff's counsel argued below, the record shows that LEM's counsel talked to Mr. Hopkins on February 26, 2016; therefore LEM must have known, at least by that date, what Mr. Hopkins recalled. Moreover, in the circuit court, LEM never even suggested that its counsel did not know, at least by February 26, 2016, that Mr. Hopkins would testify that LEM workers did not apply or sand drywall compound at the Union Trust Bank site.

Pursuant to Md. Rule 2-412(d), counsel for LEM should have educated Mr. Isaac as to Mr. Hopkins's recollections prior to Mr. Isaac's deposition. If LEM had properly educated its corporate designee, counsel for appellee would have known what Mr. Hopkins would say thirty-six days before trial – not twelve.

As in *Saxon*, LEM "was on notice to prepare its designee to be able to give responsive answers on its behalf." But it did not do so. What was said in *Saxon* is equally applicable here, *viz.*: it would be unfair to allow LEM "to disclose this information after the deposition of its corporate designee and the closure of discovery," when plaintiff had

justifiably relied on the corporate designee's deposition in developing his litigation strategy.

In its opening brief, LEM makes no attempt to justify its failure to comply with the requirements of Md. Rule 2-412(d) despite the fact that in the trial court, this was one of the main grounds that plaintiff relied on to exclude Mr. Hopkins's testimony.[11]

Appellant also argues that because the trial court did not explain its reasoning for preventing Mr. Hopkins from testifying at trial, or for disallowing LEM from taking a videotaped deposition to be used at trial, "it is impossible to determine whether the court considered the appropriate factors" in precluding that testimony. We disagree. In considering a trial court's rulings, an appellate Court "must assume that the [lower] court carefully considered all the various grounds" that the parties asserted. *Thomas v. City of Annapolis, et al.*, 113 Md. App. 440, 450 (1997). Moreover, trial judges are assumed to know the law and correctly apply it and a judge is "not required to set out in detail each and every step of his [or her] thought process." *Id.*

In *Shelton v. Kirson*, 119 Md. App. 325, 331 (1998), Judge Moylan, speaking for this Court, said:

[11] In its reply brief, LEM asserts that the scheduling order did not require it to voluntarily put Mr. Hopkins up for deposition even if it could voluntarily produce him for deposition. This argument was not made in the circuit court and will not be considered here. *See* Maryland Rule 8-131(a)(ordinarily, except for certain jurisdictional issues, an appellate court will not decide any issue that was never raised or argue below). Moreover, the argument was not made in LEM's opening brief. Maryland case law makes it clear that we will not consider an issue raised by an appellant for the first time in its reply brief. *Berkson v. Berryman*, 63 Md. App. 134, 140-41 (1985).

> The guidelines that assist a judge in exercising discretion with respect to a sanction for a discovery violation were well spelled out in the opinion by Judge Rodowsky for the Court of Appeals in *Taliaferro v. State*, 295 Md. 376, 390-91, 456 A.2d 29 (1983):
>
> > Under the approach taken by most courts, whether the exclusion of . . . testimony is an abuse of discretion turns on the facts of the particular case. Principal among the relevant factors which recur in the opinions are whether the disclosure violation was technical or substantial, the timing of the ultimate disclosure, the reason, if any, for the violation, the degree of prejudice to the parties respectively offering and opposing the evidence, whether any resulting prejudice might be cured by a postponement and, if so, the overall desirability of a continuance. Frequently these factors overlap. They do not lend themselves to a compartmental analysis.

We will consider each of these factors *seriatim*. In our view, the violations of the discovery rules were substantial, not merely technical. LEM intentionally hid the substance of Mr. Hopkins's anticipated testimony from plaintiff's counsel by: 1) forbidding plaintiff's counsel from informally talking to Mr. Hopkins; 2) failing to produce Mr. Hopkins for a fact witness deposition on or before March 8, 2016; and 3) failing to educate Mr. Isaac concerning the information held by Mr. Hopkins.

The timing of the ultimate disclosure was well after the deadline for all discovery to be completed.

There was no valid reason presented to the circuit court as to why LEM refused to produce Mr. Hopkins for deposition. In this regard, we note that in the trial court, LEM never contended that Mr. Hopkins refused to voluntarily appear *as a fact witness*. Moreover, in the trial court, LEM's counsel gave no excuse for failing to abide by the requirements of Maryland Rule 2-412(d) concerning the testimony of a corporate designee.

In regard to the degree of prejudice, the plaintiff was entitled to plan its trial strategy based on the information provided in discovery. LEM infringed on those rights by waiting until after discovery had closed to reveal what Mr. Hopkins knew. As the trial judge stated, April 7, 2016 was "awfully late to tell someone something [so] vital to the case[.]" Admittedly, LEM was also prejudiced by the exclusion because, evidently, Mr. Hopkins was the only available witness who could testify that, to the best of his knowledge, LEM did not apply or sand drywall joint compound at the Union Trust Bank site. Therefore, as to that factor, the court was required to balance the prejudice on both sides.

The last *Shelton* factor, whether the prejudice might be cured by a postponement, favors the appellee. The trial was anticipated to be lengthy (it lasted nine days) and any postponement would have caused a great deal of inconvenience to witnesses and the court. It was perhaps for this reason that neither party even asked that the case be continued.

Taking these *Shelton* factors into consideration, and considering what must be shown in order to show an abuse of discretion (*see Pasteur v. Skevofilax*, 396 Md. at 418-19), we cannot say that the trial judge abused her discretion in prohibiting Mr. Hopkins from testifying.

LEM argues that precluding Donald Hopkins from testifying at trial, while allowing testimony from his 1994 deposition, was an abuse of discretion. As mentioned, plaintiff's counsel was allowed to read into evidence excerpts from Mr. Hopkins's 1994 deposition. This did not violate any rule of evidence and LEM sets forth *no valid* reason in its brief as

to why plaintiff should have been prevented from reading into evidence excerpts from the deposition.

The reason LEM does provide in its brief is that in the 1994 deposition "they failed to ask him any questions about this job site, in order to establish the impermissible inference that LEM must have used joint compound at 210 Guilford Avenue." There is no merit in this argument. The "they" in the above argument means, presumably, the attorneys that participated in the 1994 deposition. But, Mr. Rossello was not a party-plaintiff when the deposition was taken and therefore neither he, nor anyone acting on his behalf, failed to ask Mr. Hopkins any questions in order to establish an "impermissible inference."

IV.

Denial of LEM's Post-Trial Motions

Finally, LEM avers that the trial court committed reversible error in denying its motion for JNOV and motion for new trial.[12] The standard of review for appellant's motion for JNOV was set forth in *DeMuth v. Strong*, 205 Md. App. 521, 547 (2012) as follows:

> We review the decision to grant or deny a motion for judgment (in whole or in part) *de novo*. In the trial of a civil action, if, from the evidence adduced that is most favorable to the plaintiff, a reasonable finder of fact could find the essential elements of the cause of action by a preponderance

[12] Although LEM asserts that the trial court should have granted its "post-trial motions," one of which was a motion for remittitur of the jury's verdict, it sets forth no factual or legal support for remittitur in its brief. Therefore, we shall not consider the propriety of the trial court's denial of that motion. *See Marquis v. Marquis*, 175 Md. App. 734, 758 (2007) (quoting *Sodergren v. Johns Hopkins Univ. Applied Physics Lab.*, 138 Md. App. 686, 707 (2001)) ("'It is not our function to seek out the law in support of a party's appellate contentions.'").

> standard, the issue is for the jury to decide, and a motion for judgment should not be granted. . . .
>
> The standard of review of a decision to grant or deny a motion for judgment notwithstanding the verdict is the same as the standard of review for the grant or denial of a motion for judgment. The issue is strictly legal.

(Internal citations omitted.)

The standard of review for the grant or denial of a motion for new trial was set forth in *Buck v. Cam's Broadloom Rugs, Inc.*, 328 Md. 51, 57-58 (1992):

> We turn to the question of whether Judge Murphy abused his discretion in granting Buck a new trial. In so doing, we are obliged to consider the breadth of discretion that is afforded a trial judge in making this type of decision. *As we have seen in tracing the history of our treatment of this issue, the emphasis has consistently been upon granting the broadest range of discretion to trial judges whenever the decision has necessarily depended upon the judge's evaluation of the character of the testimony and of the trial when the judge is considering the core question of whether justice has been done*. We noted, for example, that "[w]e know of no case where this Court has ever disturbed the exercise of the lower court's discretion in denying a motion for a new trial because of the inadequacy or excessiveness of damages." *Kirkpatrick v. Zimmerman*, 257 Md. 215, 218, 262 A.2d 531 (1970).

(Emphasis added.)

Appellant's *entire* argument in support of it's position that the trial judge erred in denying LEM's motion for judgment, erred in failing to grant its motion for JNOV and erred in failing to grant LEM's new trial motion is as follows:

> As indicated above, summary judgment was appropriate in this case due to the insufficiency of Plaintiff's identification testimony regarding LEM as a drywall contractor at the jobsite. At the close of evidence in this case, the only additional evidence Plaintiff presented was testimony that directly contradicted his prior deposition testimony. Specifically, prior to trial, he testified that he had no idea how the drywall workers arrived at the fourth floor. At trial, however, he testified that he saw the drywall workers take

> ready-mix joint compound from a truck with "Lloyd E. Mitchell" written on the side, put them onto a tool cart with "Lloyd E. Mitchell" written on it, and take them on the elevator to the floor where he was working.
>
> The Court has held in the context of a motion for summary judgment, that a material contradiction under 2-501(e) is a factual assertion that is significantly opposite to the affiant's previous sworn statement so that when examined together the statements are irreconcilable. *Marcantonio v. Moen*, 406 Md. 395, 409 (2008). Plaintiff's new version of events at trial certainly qualifies as a material contradiction. Plaintiff would not have been permitted to add these conflicting details if the case had properly been dismissed in the summary judgment phase. Nor would he have been able to make these assertions unchallenged if the trial court had permitted LEM to call Mr. Hopkins to testify as a fact witness at trial. Under the circumstances, LEM respectfully submits that the trial court should have disregarded Plaintiff's new version of events at trial due to the material contradiction with his deposition testimony and either granted LEM's motion for judgment or its post-trial motions.

(References to record extract omitted.)

We shall first address the denial of the motion for judgment and the denial of the motion for JNOV. In that regard, whether there was a material contradiction between what Mr. Rossello said at deposition and what he said at trial is irrelevant. The sole question to be decided when an appellant claims that either a motion for judgment or a motion for JNOV should have been granted is whether, taking the evidence in the light most favorable to the non-moving party, movant was entitled to judgment as a matter of law. *DeMuth*, 205 Md. App. at 547-48. At trial, and in its post-trial motion, LEM's sole basis for claiming that judgment should be entered in its favor was because, purportedly, plaintiff had not proven that LEM, and not some other contractor, was the employer of the workers who used asbestos-containing products at the bank site.

Taking the evidence in the light most favorable to plaintiff, the evidence showed: 1) during the four to six week period that Mr. Rossello worked at the Union Trust Bank site, Mr. Rossello was stationed at a desk on the fourth floor of the bank building; 2) while sitting at his desk, Mr. Rossello was only 40 to 70 feet away from the drywall workers who were installing Georgia-Pacific Ready Mix joint compound in the cracks (and sanding it) in places where drywall had been installed; 3) the drywall workers did this work on perimeter walls and columns, a process that created visible dust; 4) Mr. Rossello knew that LEM was the employer of the drywall workers because of what was written on the cart and the trucks that were at the site; 5) Mr. Rossello described the tool cart by saying that it "had four legs to it, rollers, a couple of shelves," and had the LEM name on it; 6) he further testified that the workers stored what appeared to be five gallon cans of Georgia-Pacific Ready Mix joint compound on the cart; 7) Mr. Rossello frequently saw the drywall workers hanging around a truck with LEM's name printed on the door; 8) the drywall workers were at the work site every day that he was present; and 9) Mr. Rossello saw the drywall workers load up their cart with the joint compound from the truck and take it up the elevator to the fourth floor.

The evidence just summarized, if believed by the jury, sufficiently identified LEM as the drywall contractor working at the Guilford Avenue Union Trust Bank building during the four to six weeks that Mr. Rossello was there. Thus the trial judge did not err in denying either LEM's motion for judgment or its motion for JNOV.

We turn now to the contention that the trial judge erred in denying LEM's motion for a new trial. LEM contends that the trial judge abused her discretion by not disregarding Mr. Rossello's "new version of events" to which he testified at trial.

There may well be some cases where the contradiction between what a witness says at trial is so inconsistent with what that witness said at a pre-trial deposition, that the trial judge could, in his or her discretion, grant a new trial on that basis. In such cases, the judge must consider the "core question of whether justice has been done." *Buck*, 328 Md. at 57.

The inconsistency in the testimony, upon which LEM relies, is that Mr. Rossello was asked at his deposition:

> How did the workers, these folks doing the drywall and the electrical workers, the electricians, how did they get to the fourth floor to do their work?
>
> He answered: "I have no idea."

At trial, however, Mr. Rossello testified as follows:

> Q. [Plaintiff's attorney]: Why do you believe, Mr. Rossello, the trucks you identified - - why do you believe the trucks you identified as Lloyd E. Mitchell trucks at the 210 Guilford Avenue location were associated with the drywall workers performing the work on the fourth floor?
>
> * * *
>
> A: [Mr. Rossello] Sometimes I could see the guys there at the trucks, you know, with their stuff. And they would load up their cart and hop on the elevator with me and go upstairs. It didn't happen every day, it just happened every now and then.
>
> Q. And when you say "the guys," you mean the guys performing the drywall work?
>
> A. Yeah, the guys also associated with the truck.

* * *

Q. When you say "at the truck," what do you mean, Mr. Rossello?

A. What you typically see with guys in that line of work, they are getting their stuff out. In this case, the Ready-Mix was the big thing, you know, the joint compound. They popped that on their carts and . . . . No, they would pop them on their carts and roll it in, you know, on the elevator and upstairs. It didn't happen every day, you know, just an occasional thing.

Q. You saw it - - that took place while you were at the Guilford Avenue location?

A. Yes, if I got there early enough, yes.

The testimony just quoted, as can be seen, is inconsistent, with what Mr. Rossello said in deposition. For that reason, LEM's counsel extensively cross-examined Mr. Rossello in regard to those inconsistencies. Mr. Rossello's explanation was that in deposition he was not asked specifically whether he rode in the elevator with LEM workers or whether he saw joint compound on the tool carts in the elevator when he shared the elevator with the workers.

In closing argument, counsel for LEM devoted considerable attention to the aforementioned inconsistencies. And, in the trial judge's jury instruction, the jury was told that in considering the credibility of trial witnesses they should consider, *inter alia* "whether - - and the extent to which the witness's testimony in . . . [c]ourt differed from statements made by the witness on any previous occasion."

In the subject case, in considering whether to grant a new trial based on inconsistencies between what the plaintiff said at deposition and what he said during trial, the trial judge had "the broadest range of discretion[.]" *Buck*, 328 Md. at 57.

We reject LEM's argument that in deciding whether to grant a new trial, due to a "material contradiction" on Mr. Rossello's part, the trial judge "should have disregarded [Mr. Rossello's] new version of events" as testified to at trial. The trial judge did not explain her reasons for denying the new trial motion and she was not required to do so. But it is clear that the judge would have been entirely justified in denying the motion on the grounds that it was for the jury to decide whether Mr. Rossello's trial testimony should be believed inasmuch as: 1) the discrepancies at issue were thoroughly examined by LEM's counsel during cross-examination and by counsel for both sides in closing argument, and 2) the jury was properly instructed in regard to the issue of whether a witness should be believed or disbelieved. Under such circumstances, LEM has failed to convince us that the trial judge abused her very broad discretion when she denied the new trial motion.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.