Circuit Court for Anne Arundel County
Case No.: C-02-CV-19-003123

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1802

September Term, 2022

KARA DECICCO

v.

OUIDA FLUCK

Reed,
Beachley,
Harrell, Glenn T., Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: January 10, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

In 2017, a vehicle operated by Kara Decicco, appellant, struck a vehicle in which Ouida Fluck, appellee, was a passenger. Two years later, Fluck filed suit against Decicco in the Circuit Court for Anne Arundel County. After the court granted summary judgment in favor of Fluck on the issue of liability, a ruling not challenged on appeal, the issue of damages was tried to a jury over three days. The jury returned a special verdict finding that Fluck was injured because of the accident and awarding her $32,000 in non-economic damages and $0 in future medical expenses. Fluck moved for a new trial, arguing that the verdict was against the weight of the evidence. The court granted Fluck's motion and denied Decicco's motion for reconsideration of that ruling. After a second trial on damages, the jury returned a verdict in favor of Fluck for $1,042,000 in non-economic damages.[1] The circuit court denied Decicco's motion for a new trial and for remittitur, but granted her motion to revise the verdict consistent with Maryland's cap on non-economic damages.

Decicco appeals, presenting four questions,[2] which we combine, rephrase, and reorder:

[1] As we will discuss, Fluck did not advance a claim for future medical expenses in the second trial.

[2] The questions posed by Decicco are:

> 1. Did the first trial court abuse its discretion by interjecting its own opinions regarding the credibility and weight of Decicco's expert's testimony, and granting Fluck's request for a new trial?
>
> 2. Did the first trial court abuse its discretion when it granted a new trial based on Decicco's testimony related to her unemployment, when Fluck voluntarily elicited the testimony and therefore waived her right to rely on this testimony in support of her request for a new trial?

(continued…)

1. Did the first trial court abuse its discretion by granting Fluck's motion for a new trial?

2. Did the second trial court abuse its discretion by its response to a jury note during deliberations?

3. Did the second trial court err or abuse its discretion by overruling objections Decicco's counsel lodged during Fluck's counsel's closing argument?

For the following reasons, we affirm the circuit court's grant of a new trial, but hold that the trial court abused its discretion in the second trial by its response to the jury note regarding itemization of damages, necessitating reversal of that judgment. We remand for further proceedings.

BACKGROUND

On the afternoon of 24 August 2017, Fluck, then age 60, was the front seat passenger in a Hyundai Elantra, operated by her sister, Melinda Smythe, travelling on Evergreen Road, a two lane roadway in Severna Park. An SUV operated by Decicco entered that roadway from Holly Avenue, a side street controlled by a stop sign, crossed one lane of traffic, and broadsided Smythe's vehicle on the driver's side. The force of the collision caused the airbags in the Hyundai to deploy, the vehicle's window glass to shatter, and the sedan to spin around. In the immediate aftermath of the accident, Fluck was "mumbling

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3. Did the second trial court err by permitting Fluck's counsel to introduce inflammatory arguments in closing that were unsupported by evidence and a clear and patent attempt to mislead and inflame the jury?

4. Did the second trial court abuse its discretion by not answering the jury's questions related to economic damages, thereby permitting the jury to speculate about damages not sought by Fluck nor at issue in the case?

and incoherent[.]" She was transported by ambulance to the emergency department at the Anne Arundel Medical Center complaining of a headache and neck pain.

A week later, Fluck sought treatment at a RightTime Medical Center. She continued to complain of a headache, was dizzy, nauseous, fatigued, was sensitive to noise and light, had difficulty concentrating, and was irritable. She was diagnosed with a concussion, fractured ribs, and referred for a CT scan of her head, which produced a normal reading. She continued in follow up treatment with RightTime until May 2018, when she was discharged from its care.

For three months in early 2018, Fluck received speech and language therapy at the Baltimore-Washington Medical Center. She was discharged from that program in March 2018 because she met all her treatment goals.

On 30 September 2019, Fluck filed suit against Decicco. On 15 April 2021, the circuit court granted summary judgment in favor of Fluck on the issue of liability. About four months later, the first trial commenced on the issue of damages.

The First Trial

In her case, Fluck testified and called four witnesses: Smythe; her husband, Alan Fluck; Amy Innerbichler, a coworker; and Pedro Buarque de Macedo, M.D., a neurologist who treated Fluck since November 2019.

Smythe testified that the collision was "violent"; her sister was incoherent immediately after the accident; and she complained that her ears were ringing. Since the accident, Fluck had trouble with memory, with word retrieval, and was less patient.

Her husband testified that he called Fluck's cell phone right after the accident and, in the conversation, she "couldn't form words[.]" Since the accident, Fluck had a "hard time bringing up words that she wants to say." When she first returned to her job as a special education teacher for Anne Arundel County Public Schools, Fluck had the stamina only to work half-days and would fall asleep on their couch for hours immediately after she got home. She lacked patience with their adult daughter, who lived with them due to her multiple disabilities.

Innerbichler testified that she worked as a speech language pathologist for Anne Arundel County Schools and worked with Fluck for a decade. They collaborated routinely on individual educational plans for special education students and in providing services to students. In Innerbichler's view, Fluck had changed "greatly" since the accident. When Fluck first returned to work in September 2017, she was "extremely fatigued [and] confused." Even on her reduced schedule, Fluck was noticeably sleepy at work for months after the accident. Since then, Fluck had "really struggled with problem solving," which "impacted her work performance." Her inability to focus and lack of short-term memory caused Fluck frustration and had affected her mood, which she described as depressed.

Dr. Macedo, accepted as an expert in neurology, testified that he began treating Fluck in November 2019. He reviewed her medical records from Anne Arundel Medical Center; RightTime Medical Center; and Baltimore-Washington Medical Center, which confirmed his view that Fluck suffered a concussion, also known as a mild traumatic brain injury ("MTBI"), in the motor vehicle accident in August 2017. He explained that an MTBI is "caused by a blow or a jolt to the head that disrupts the function of the brain" and does

not cause necessarily a loss of consciousness. Neuroimaging findings are expected to be normal in the aftermath of an MTBI.[3] Motor vehicle accidents are a leading cause of MTBIs.

Dr. Macedo opined that Fluck exhibited all the classic symptoms of an MTBI in the weeks following the accident. These included headaches, nausea, fatigue, photophobia, dizziness, brain fog, irritability, memory issues, and difficulty concentrating. When Dr. Macedo began seeing Fluck as a patient, he ordered an MRI of her brain and a neuro-psychological assessment. The MRI revealed atrophy or shrinkage of her brain in the two years since she had the CT scan, which showed a normal brain volume. Dr. Macedo determined to repeat the MRI in 6 months to determine if the atrophy was progressive. The second MRI showed additional brain shrinkage. Fluck's neuro-psychological assessment, which lasted 8 hours over two days, showed that she was very intelligent, but revealed significant deficits in executive functioning, verbal fluency, and visual memory.

Dr. Macedo opined further that it would be expected that after Fluck's symptoms from the acute injury – the concussion – resolved, she would have a period of improvement before the effects of the progressive brain atrophy began to impact her. He opined that concussion is a well-documented cause of brain atrophy, as shown in research titled as "Toronto Brain Injury Study," which followed concussed patients over time and determined that a "significant group of patients . . . would start to get brain atrophy over

[3] Dr. Macedo explained that RightTime ordered the CT scan to rule out a brain hemorrhage or skull fracture. Normal structural neuroimaging findings are "definitional" to a concussion diagnosis.

time." Fluck also had a prior concussion when she was 16 years old. Dr. Macedo opined that the brain only has "a certain amount of reserve" and that a second concussion often causes much more severe injury than a first. This is known as "second blow effect."

Dr. Macedo opined, to a reasonable degree of medical certainty, that the brain atrophy was caused by the concussion Fluck sustained in the August 2017 accident and that the injury was both "permanent and progressive." He opined further that Fluck would continue to experience cognitive decline, and, over the next five years, it would begin to interfere significantly with her daily activities. Within ten years, he opined that Fluck would require full-time assisted living care. He testified that the lowest level of assisted living care costs between $8,000 and $14,000 per month.

On cross-examination, defense counsel questioned Dr. Macedo about other causes of brain atrophy, including Huntington's disease and Alzheimer's disease. He agreed that both conditions caused brain atrophy, but opined that Fluck "clearly" did not have Huntington's disease based upon her age and "definitely" did not have Alzheimer's disease because her neuro-psychological testing was inconsistent with that diagnosis. On redirect examination, he clarified that the atrophy in Fluck's brain appeared in different locations than in patients with Alzheimer's disease and that her weaknesses in the neuro-psychological testing also were in areas inconsistent with that diagnosis.

Fluck, then age 64, testified that, when the collision occurred, she was "knocked around from side to side." In the emergency room, she recalled that she had a severe headache, neck pain, and nausea. She tried to return to work right away because it was the

start of the new school year, but the noise and the lights were intolerable, and she had to leave. Over the next months, the nausea went away, but headaches continued.

She described other changes since the accident, including short-term memory issues, irritability, and other executive function issues. She compensates for these deficits by making checklists that she posts around her house and her workplace to remind her of the steps to complete certain tasks.

In the defense case, Decicco testified and called Gary London, M.D., a neurologist, as her medical causation expert. Dr. London had retired from clinical practice in 2016. He reviewed all of Fluck's medical records and examined her in August 2020. His impression of Fluck was that her speech was "completely normal[,]" and her neurological and musculoskeletal exams showed no abnormalities. She scored perfect on a mini-mental examination and scored in the normal range on the Montreal Cognitive Assessment.

Dr. London opined, to a reasonable degree of medical certainty, that Fluck sustained a mild soft tissue injury to her neck in the August 2017 accident, with associated headaches caused by muscle contractions in her neck. She also sustained two left rib fractures. In his view, these were "the only injuries." He found no evidence supporting a diagnosis of a concussion or of post-concussion syndrome.

Dr. London based his opinion on the "actual facts" of the accident, including that the emergency room physicians who treated Fluck did not note a head injury, the fact that Fluck did not lose consciousness in the accident, and the lack of post-traumatic amnesia. He found it significant also that, based upon his review of her medical records, all her complaints had resolved within a few months of the accident.

Dr. London did not dispute the MRI findings of brain atrophy. He disagreed, however, with Dr. Macedo's conclusion that the atrophy was caused by the August 2017 accident. He noted that Fluck's CT scan immediately after the accident was completely normal and opined that the change between that scan and the MRI in 2019 "had to be due to something else" and could have been caused by "her numerous medical problems," including hypertension, high cholesterol, and type two diabetes. Dr. London mentioned also that Fluck's earlier concussion, at age 16, was brain trauma that could have caused the atrophy. Dr. London opined that he did not "know for sure" what had caused the brain atrophy, but that he did "know for sure" that it was "not related to the automobile accident[.]"

On cross-examination, Dr. London conceded that, because Fluck's CT scan a week after the accident had been completely normal, her concussion when she was 16 could not have been a precipitating cause of her subsequent brain atrophy. Dr. London was confronted also with witness statements in this case describing Fluck in the immediate aftermath of the accident as incoherent and mumbling and describing continued difficulties with executive function and word retrieval which persisted after her discharge from RightTime and speech therapy, which statements he had not reviewed in reaching his conclusions in this case.[4]

[4] Counsel for Decicco represented during argument in this Court that Dr. London was asked whether knowing that information would have changed his opinion and said no. After our review of the transcript of the first trial, we could not find any question posed to Dr. London during redirect inquiring whether knowing this information would have changed his opinion. An objection to a question asking him whether "anything [plaintiff's counsel] asked you here today" changed his opinions was sustained.

Before Decicco testified, Fluck's counsel objected on relevancy grounds, arguing that Decicco had no pertinent information to offer bearing upon Fluck's damages and that defense counsel was just trying to "garner sympathy for her." Defense counsel responded that Decicco should be permitted to testify about "the force" of the accident and "what happened to the vehicles[.]" The court agreed and permitted her to testify.

Decicco testified that she lives in Pasadena, Maryland, with her three young adult children, adding that she was widowed nine years earlier. Defense counsel inquired if she was employed, and she replied: "I'm in between jobs. I do need to go back to work, but I'm staying at home right now and pulling money from my 401K . . . ." The court sustained plaintiff's counsel's objection to that line of questioning.

Defense counsel began exploring then the circumstances of the accident. Before Decicco described how the accident occurred, she stated that she was a "very conscientious driver." The court admonished her to answer the questions. Decicco described the events leading up to the accident, noting that there was a large tree blocking her line of vision. The court sustained an objection to that testimony, directed Decicco to listen to the question, and directed defense counsel to "ask a focused question that's relevant to what [he] proffered" she would testify. As Decicco began to testify again about her actions before the accident, the court directed defense counsel to "lead" her to "get into the specific questions . . . that you proffered were relevant." Ultimately, Decicco testified that she "could not have been going very fast" when she collided with the vehicle in which Fluck was a passenger because she had been at a "complete stop" before she entered the roadway.

She traveled across one lane of traffic before colliding with the vehicle. The vehicles "turned sideways" as a result of the collision.

On cross-examination, plaintiff's counsel asked Decicco about how long she had been out of the workforce. She clarified that she had not worked outside the home in 22 years.

At the close of all the evidence, the case was sent to the jury on a special verdict sheet asking them 1) whether they found that Fluck was injured as a result of the 24 August 2017 accident and, if so, 2) what amount of (a) future medical expenses and (b) non-economic damages they found she incurred. After deliberating for less than 30 minutes, the jurors returned a verdict, answering "Yes" to the first question, found that Fluck would incur no future medical expenses, and that she incurred $32,000 in non-economic damages.

Fluck's Motion for a New Trial

Four days later, Fluck filed her motion for a new trial, arguing that the "weight of the evidence was greatly in favor of [Fluck] and it strongly preponderate[d] against [the] verdict." She maintained that the testimony of her witnesses and other evidence showed undisputedly that she was suffering from cognitive effects of a MTBI sustained in the motor vehicle accident and that the condition was progressive and irreversible. Decicco's medical expert, Dr. London, did not dispute that Fluck had developed brain atrophy after the accident, but attributed it to her "age or other non-specified causes." She noted that Decicco's testimony at trial that she was "between jobs" and using funds from her 401(k) account was misleading and a "clear plea for sympathy[.]" Fluck asserted that the short

period of deliberation in this complex case evidenced that the jurors did not "reach a properly considered decision[.]"

Decicco opposed the motion, arguing that whether Fluck sustained a concussion and whether any injury was permanent was the issue contested substantially at trial. Given the "contradictory medical evidence" offered by the parties' experts, she maintained that Fluck had not shown that the verdict was wholly against the great weight of the evidence or that there was a gross injustice.

The court held a hearing on the motion and took the matter under advisement.

On 1 November 2021, the court entered an order granting the motion for a new trial. In a footnote on the order, the court explained its reasoning as follows:

> This Court concludes that justice was not done in this case as outlined by Plaintiff's counsel in his brief and argument. Of particular concern is the severity of the accident and the impact, as well as the short time for deliberation. While it is true that the expert for the defense disagreed with the causation of the brain injury and the future damages, he pointed to no other likely cause, nor did he consider the evidence presented by Plaintiff in the form of multiple witnesses who described exactly the type of symptoms one would expect with a brain injury as severe as described by the Plaintiff's expert. The defense expert was not aware of their testimony and obviously did not take it into consideration when developing his opinion. In addition, the testimony that was proffered by the Defendant regarding her financial issues was improper as Plaintiff's counsel argued. Consider[ing] these issues and others, this Court having had the opportunity to view all of the evidence believes that the verdict in this case is against the weight of the evidence to such a degree that a new trial is warranted.

Decicco's motion for reconsideration of that ruling was denied.[5]

[5] Decicco did not argue in her motion for reconsideration that the first trial judge mischaracterized Dr. London's opinions with regard to the brain injury, as she did in her argument in this Court. She also did not make that argument in her opening brief to us. She made it for the first time in her reply brief.

Fluck's Motions *in Limine*

Prior to the second trial, Fluck moved to exclude Dr. London from testifying, arguing that the first trial court determined that he lacked a "proper foundation for his testimony" when it granted the motion for a new trial. Decicco opposed that motion, arguing, in part, that it was inaccurate to characterize the first trial court's ruling on the motion for a new trial as a determination that Dr. London lacked a factual basis for his opinion. A different judge presiding over the second trial agreed with Decicco, ruling that the first trial judge had not gone that far. The "new" judge denied the motion *in limine* on the first day of the second trial, determining that any weaknesses in Dr. London's opinions were grist for cross-examination.

Fluck moved also to exclude Decicco from testifying again on the same relevancy grounds argued at the first trial. In denying that motion, the second trial court instructed defense counsel that there could be no mention of Decicco's financial status or employment because it was "totally inappropriate that any of that came out at the [first] trial[.]"

The Second Trial

At the second trial, Fluck called Dr. Macedo, Smythe, her husband, and Innerbichler as witnesses, but did not testify herself. The lay witnesses testified consistent with their testimony from the first trial, with minor changes not relevant to the issues on appeal. Dr. Macedo testified consistent with the opinions offered in the first trial with some supplementation not pertinent to the issues on appeal.

In Decicco's case, she testified, called Dr. London, and read excerpts of Fluck's deposition testimony. Dr. London's opinions did not differ substantively from those

offered in the first trial. Decicco's testimony was more limited than in the first trial, consistent with the court's ruling on the motion *in limine*.

At the close of all the evidence, the case was sent to the jury on a special verdict sheet. Because Fluck elected not to submit a claim for future medical expenses to the jury in the second trial, the jury was asked to decide 1) whether Fluck was injured in the accident and, if so, 2) the amount of non-economic damages she incurred. The jury found in favor of Fluck on the first issue and awarded her $1,042,000 in non-economic damages.

Decicco moved for a new trial or, alternatively, for remittitur or revision of the verdict. The court granted the motion to revise, reducing the damages award to $830,000, consistent with the statutory cap on non-economic damages. It otherwise denied the motions. This timely appeal followed. We shall include additional facts in our discussion as relevant to our analysis of the questions presented.

DISCUSSION

I.

Grant of Motion for New Trial

Decicco, relying upon this Court's decision in *Yiallouros v. Tolson*, 203 Md. App. 562 (2012), contends that the first trial court abused its discretion by granting Fluck's motion for a new trial because it "impermissibly rejected the established foundation and reasoned opinions of Dr. London and substituted [its] own determinations and opinions for that of the jury." She asserts that it was improper for the court to consider Decicco's testimony about her employment in granting the motion for new trial because Fluck waived

any challenge to that testimony by cross-examining her about it and by not requesting mistrial or curative instruction.

Fluck counters that Decicco misconstrues the holding from *Yiallouros*. To the contrary, she maintains that that decision and the Supreme Court of Maryland's decision in *Buck v. Cam's Broadloom Rugs, Inc*., 328 Md. 51 (1992), support her position that the first trial court had broad discretion to assess whether the verdict in the first trial was against the weight of the evidence and that its determination to grant a new trial was not an abuse of that discretion. She maintains that it is well-established that a party does not waive an exception to erroneously admitted testimony by cross-examining the witness on that subject, nor was she obligated to request other relief in order to argue that this error was one ground upon which the motion for a new trial should be granted.

We begin our analysis with *Buck*, which also involved a motor vehicle accident. Kenneth Buck and his wife sued Cam's Broadloom Rugs ("CBR"), alleging that the negligence of CBR's driver caused an auto accident that injured Buck. 328 Md. at 53. The jury found in favor of Buck on liability, awarded him nearly $4,000 in compensatory damages, but awarded no damages for loss of consortium. *Id*. Buck moved for a new trial on the issue of damages, arguing that the award was grossly inadequate and likely was a "product of a series of improper questions, comments, and arguments" made by defense counsel during trial. *Id*. The trial court granted the motion for a new trial on damages, but

denied it on the loss of consortium claim. *Id*. at 54. In a second jury trial,[6] the jury awarded Buck $87,000 in damages. *Id*.

CBR appealed, arguing that the first trial court abused its discretion by granting the motion for a new trial. This Court agreed and reversed, holding that the failure by Buck's counsel to object to most of the allegedly improper closing arguments was a significant factor that should have weighed against the grant of Buck's motion and that the trial court's finding that the damages were "unreasonably low" did not suggest that the award shocked the conscience. *Cam's Broadloom Rugs, Inc. v. Buck*, 87 Md. App. 561, 576-79 (1991). Although the first trial court's discretion was broad, this Court concluded that the trial judge "clearly went too far." *Id*. at 579.

The Supreme Court of Maryland granted Buck's petition for a writ of *certiorari* and reversed, holding that the first trial court did not abuse its discretion by its grant of the motion for a new trial. *Buck*, 328 Md. at 62. The Court considered first whether the grant of a motion for a new trial is unreviewable, noting that there was Maryland precedent to that effect. *See, e.g., Griffith v. Benzinger*, 144 Md. 575, 597 (1924) ("[T]he action of a trial court in granting or refusing a new trial is within the discretion of such court and will not be reviewed on appeal."). By the 1960s, however, the Court qualified its earlier absolutism, reasoning that "the action of the trial court in allowing or refusing a new trial will *rarely, if ever,* be reviewed on appeal." *Leizear v. Butler*, 226 Md. 171, 178 (1961)

[6] The defendant noted an immediate appeal from the grant of the motion for a new trial on damages, but this Court dismissed that appeal as not having been taken from a final judgment. *See Cam's Broadloom Rugs v. Buck*, 314 Md. 628 (1989) (denying petition for writ of *certiorari*).

(emphasis added); *see also Carlile v. Two Guys*, 264 Md. 475, 477 (1972) (reasoning that "a trial judge's granting or refusing a new trial – fully, partially, conditionally, or otherwise – is not reviewable on appeal except under the most extraordinary or compelling circumstances"). After considering this precedent, the Supreme Court determined that the grant or denial of a motion for a new trial is reviewable for an abuse of the trial court's discretion. *Buck*, 328 Md. at 57 (citing *Mack v. State*, 300 Md. 583, 600 (1984)).

Turning to the breadth of the trial court's discretion, the Court emphasized that a trial court has the "broadest range of discretion . . . 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." *Id.* Conversely, a trial court lacks discretion to refuse to consider newly discovered evidence that bears upon a party's entitlement to a new trial and, if that evidence "clearly indicates that the jury has been misled, a new trial should be granted." *Id*. at 58 (citing *Washington, B. & A. Elec. R. Co. v. Kimmey*, 141 Md. 243 (1922)). Likewise, a trial court lacks discretion to deny a motion for a new trial if "competent extrinsic evidence discloses that a jury's consideration of the case was seriously distorted by information that should not have been before the jury[.]" *Id*. (citing *Wernsing v. Gen. Motors Corp*., 298 Md. 406, 420 (1984)).

The Court opined:

> Accordingly, it may be said that the breadth of a trial judge's discretion to grant or deny a new trial is not fixed and immutable; rather, it will expand or contract depending upon the nature of the factors being considered, and the extent to which the exercise of that discretion depends

> upon the opportunity the trial judge had to feel the pulse of the trial and to rely on his own impressions in determining questions of fairness and justice.
>
> In the case before us, the range of discretion of the trial judge was necessarily at its broadest. The motion for a new trial did not deal with the admissibility or quality of newly discovered evidence, nor with technical matters. Instead, it asked the trial judge to draw upon his own view of the weight of the evidence; the effect of an accumulation of alleged errors or improprieties by defense counsel, no one of which may have been serious enough to provoke a request for, or justify the granting of, a mistrial; and the allegedly inadequate verdict, in determining whether justice would be served by granting a new trial. Under circumstances such as this, the power to grant a new trial is "an equitable one in its nature." *Waters v. Waters*, 26 Md. 53, 73 (1866). *Because the exercise of discretion under these circumstances depends so heavily upon the unique opportunity the trial judge has to closely observe the entire trial, complete with nuances, inflections, and impressions never to be gained from a cold record, it is a discretion that will rarely, if ever, be disturbed on appeal.* It is that concept which led this Court in the past to state, albeit too broadly in the context of *all* motions for new trial, that such a decision is effectively unreviewable.

Id. at 58-59 (emphasis added). The Court quoted approvingly from a decision of the Superior Court of Pennsylvania that reasoned that a "'jury's verdict should not be casually overturned"' because "'[i]n our system of justice, the jury is sacrosanct and its importance is unquestioned."' *Id*. at 59 (quoting *Boscia v. Massaro*, 529 A.2d 504, 508 (Pa. Super. Ct. 1987)). That court went on to say, however, that the trial judge's power to grant a new trial is one check upon the jury's wisdom because, like the jury, the trial judge "develops a feel for the human pulse of the case." *Id.* at 60 (quoting *Boscia*, 529 A.2d at 508).

On the merits of Buck's motion for a new trial, the Court remarked that "[t]he gist of [his] motion . . . was that the verdict, insofar as it related to damages, was against the weight of the evidence." *Id*. That was "a proper ground for the grant of a new trial." *Id*. The Court distinguished between a legal challenge to the sufficiency of the evidence, "a

task which an appellate court as well as a trial court may accomplish[,]" and a claim that the verdict is against the weight of the evidence, which "requires assessment of credibility and assignment of weight to evidence – a task for the trial judge." *Id.* Because the latter claim was at issue, the Court declined to "substitute [its] judgment for that of the trial judge[.]" *Id.* at 61.

The Court addressed also the propriety of considering unpreserved errors as a ground upon which a new trial should be granted. *Id.* It reasoned that "the failure of the moving party to object to an alleged error or impropriety at trial is a significant factor to be considered by the trial judge when that error is later argued in support of a motion for new trial." *Id.* at 62. Because Buck's primary argument was that the damages verdict was against the weight of the evidence, however, and he pointed to a pattern of conduct by defense counsel during closing argument merely to "bolster" that argument, the Court concluded that it was proper for the trial court to consider the overall closing argument, not only the remarks to which objections were lodged, in assessing "the possible cause of a verdict which [it] found to be against the weight of the evidence[.]" *Id.*

Two decades later, this Court explored the reach of the *Buck* decision in *Yiallouros*, 203 Md. App. 562, which likewise involved a motor vehicle accident. The plaintiff, Yiallouros, sustained a fracture of his kneecap that required surgery to place pins in his leg for structural integrity. *Id*. at 565 n.2. Due to limitations on lifting, stair climbing, and walking, Yiallouros lost his job as a maintenance mechanic because there were not suitable other positions available for him. *Id*. at 565-66.

Yiallouros filed suit against the other driver, Tolson, seeking damages for "pain and suffering, medical expenses, loss of present and future earnings, and loss of consortium." *Id*. at 564. At trial, Yiallouros's medical expert testified that he was capable of working in jobs that required less lifting and bending, but noted that he was not qualified to opine on Yiallouros's education and training for such jobs. *Id.* at 567. Yiallouros called also an expert in the field of vocational rehabilitation counseling and employment, who was accepted without objection. *Id*. at 567. She opined that, in light of his injuries, education and training, and age, Yiallouros was not employable and had "sustained a total loss of earning capacity." *Id*. at 567. The jury returned a verdict in favor of Yiallouros, finding that he sustained over $32,000 in past medical expenses and $35,000 in past lost wages, over $400,000 for loss of future wages, and $224,010.16 each for pain and suffering and for loss of consortium. *Id*. at 570. Tolson moved for remittitur and for a new trial. *Id.*

The trial court granted Tolson's motion for a new trial, ruling that the vocational expert's testimony was admitted in error because she "totally lacked any factual basis" for her opinion under Rule 5-702 and Rule 5-703. *Id.* at 571. The trial court reasoned that the erroneously admitted testimony "fundamentally affected the decision[,]" that it should have been excluded, and that the expert's opinion that Yiallouros was unemployable was "nonsensical." *Id*. The court found also that the award of non-economic damages was so "grossly excessive that [it] shocked the conscience of the court[.]" *Id*. at 571. Relying upon his extensive experience as a litigator and trial judge, the court found that that award was "against the weight of the evidence[,]" emphasizing that the amount awarded was identical to the award for loss of consortium. *Id*. at 572.

Prior to the second trial, Tolson moved to exclude the vocational expert's testimony under Rule 5-702. *Id*. The circuit court denied the motion, determining that the expert had an adequate factual basis for her opinion and that cross-examination was the appropriate vehicle to flesh out the weaknesses in her reasoning. *Id*. at 573. At the second trial, the jury found that Tolson was negligent, that Yiallouros was contributorily negligent and awarded no damages. *Id*.

On appeal, this Court reversed, in part, the grant of the motion for a new trial. After discussing the *Buck* decision at length, we rejected Tolson's position that the trial court's discretion to grant the motion for a new trial was at its broadest because it was dependent upon the court's "evaluation of the character of the testimony, [its] assessment of the credibility of the witnesses, and [its] assignment of weight to the evidence presented at trial[.]" *Id*. at 575 (quotation marks omitted). Rather, because the trial court's decision was grounded in its determination that the vocational expert lacked a factual basis for her opinions, we explored the underlying findings that might support that ruling.

We explained:

> [The expert]'s opinion was a proposition, drawing a conclusion from a set of facts using logical inference. As such, it was subject to three primary criticisms, each falling along the spectrum of discretion: first, that the expert misrepresented her knowledge of the given facts; second, that the given facts are objectively untrue; and third, that the conclusion does not follow logically from the given facts.

Id. at 576 (emphasis omitted). The trial court's discretion was at its widest under the first category because it was "essentially a question of truthfulness[,]" and at its narrowest under the third category, which challenged the validity of the expert opinion and was a

"'technical' matter unobscured even after the record 'cools' on appeal." *Id*. at 576-77. The trial court's ruling fell within the second category, taking issue with the "substantive falsity of [the expert's] 'factual basis[.]'" *Id*. at 577. We emphasized that, in this regard, the court relied upon "phantom contradictions" between the evidence that Yiallouros was physically capable of working and the vocational expert's testimony that "he lacked the skill, training, and experience that [suitable] positions demanded." *Id*. We reasoned that "[t]here simply was no contradiction between this opinion and the medical opinions given at trial[.]" *Id*. at 578.

Our conclusion was bolstered by *Buck*'s reasoning that the failure to object to an alleged error or to raise an issue at trial should be a significant factor weighing against the grant of a new trial on the basis of that error. *Id*. Because Tolson's "arguments did not indict the jury's subjective weighing of the evidence, but rather the basis for [the vocational expert]'s opinion testimony," this was "a matter that could have (and should have) been raised during trial." *Id*. (emphasis omitted). In sum, we held that when the circuit court granted Tolson's motion for a new trial, "it interjected itself and confused the weight of the evidence with its admissibility." *Id*. at 579. Its determination that the vocational expert lacked a factional basis for her opinions later was rejected by the second trial court. *Id*. For those reasons, we reversed the grant of the new trial on liability and economic damages.

We affirmed the trial court's grant of the motion for a new trial on the non-economic damages, however, because that was "an independent factual matter" and the court's decision was grounded in its vast experience. *Id*. at 579-80. For that reason, we remanded

for a new trial on the issue of non-economic damages only and otherwise reinstated the verdict in the first trial. *Id*. at 580.

With this analysis in mind, we return its application to the case at bar. We are satisfied that the first trial court's discretion was "at its broadest" here because it did not ground its ruling upon "the admissibility" of Dr. London's testimony or "technical matters." *Buck*, 328 Md. at 59. The trial court set out several reasons for its decision, including the severity of the accident and the impact, the short time that the jury deliberated, the relative weakness of Dr. London's medical causation opinion, and the effect of Decicco's improper testimony that she was widowed, unemployed, and drawing money from her 401(k). The trial court's skepticism about Dr. London's opinion, that Fluck was not concussed in the accident, was not a determination that his testimony was inadmissible and should have been excluded, as in *Yiallouros*. Rather, the trial court weighed that opinion against Dr. Macedo's opinion and found it lacking. As the Supreme Court made clear in *Buck,* the trial court is permitted to assign weight to evidence in exercising its discretion to grant or deny a motion for a new trial.

The trial court considered properly the effect of Decicco's testimony on the verdict. Fluck's counsel objected vociferously to Decicco being permitted to testify. The trial court allowed her testimony based on counsel's proffer that the testimony would not stray from the only area upon which it was relevant to damages: Decicco's impressions about the force of the accident and the damage to her vehicle. The testimony elicited from Decicco exceeded the proffer. That Fluck's counsel sought to lessen the impact of that testimony by asking Decicco a single question about her employment on cross-examination did not

preclude the trial judge from considering the impact of that improper testimony when exercising its discretion to grant a new trial.

"[T]he power to grant a new trial is 'an equitable one in its nature.'" *Buck*, 328 Md. at 59 (quoting *Waters*, 26 Md. at 73). The first trial court concluded based upon its unique opportunity to hear the evidence and '"develop[] a feel for the human pulse of the case"' that justice was not served. *Id*. at 60 (quoting *Boscia*, 529 A.2d at 508). Whether we would rule differently had we been trial judges is beside the point. Appellate judicial intervention is unwarranted here. Thus, we decline to substitute our judgment for that of the trial court.

II.

Response to the Jury Note in the Second Trial

Before presenting the parties' contentions on this question, we provide the following background. In the second trial, Dr. Macedo opined that Fluck would require assisted living care in approximately five to seven years. Unlike in the first trial, however, he was not asked about the cost of that care.

At the conclusion of the evidence, Fluck elected not to submit a claim for future medical expenses to the jury, seeking non-economic damages only. The court propounded a modified version of Maryland Civil Pattern Jury Instruction 10:2, *Compensatory Damages for Bodily Injury*, which stated:

> In an action for damages in a personal injury case, you shall consider the following. One, the personal injuries sustained and their extent and duration; two, the [e]ffect such injuries have on the overall physical and mental health and well[-]being of the plaintiff; and three, the physical pain and mental anguish suffered in the past, and that with reasonable probability may be expected to be experienced in the future.

> *In awarding damages in this case, you must itemize your verdict or award to show the amount intended for the non-economic damages sustained in the past and reasonably probable to be sustained in the future*. All damages that you find for pain, suffering, inconvenience, and physical impairment.

(Emphasis added.)

During closing argument, Fluck's counsel argued that the jury should compensate her for nearly 26 years of pain and suffering – the 5 years since the accident and the almost 21 years until she reached her life expectancy. He noted that Dr. Macedo opined that the brain atrophy would continue to worsen and that Fluck would require assisted living.

The jury deliberated briefly in the late afternoon on the second day of trial before being released for the night. The next morning, shortly after the jury reconvened, the court received a jury note asking: "What does it mean to itemize the verdict? Break down the money amounts? Pain suffering? Assisted Living?"[7]

In discussing the appropriate response to the note, the court remarked that it had wondered if the jury would be confused by the instruction to "itemize," given that there was only one category of damages being sought. Defense counsel emphasized that any response should specify that Fluck was not seeking future medical expenses. The court proposed answering the question: "[B]ased on the evidence and testimony you are to answer each question on the verdict sheet. No further breakdown is required." Defense counsel disagreed that that response was sufficient, reiterating that there was no claim for

[7] The jury also submitted a note six minutes into their deliberations on the first day that asked: "What are the questions we need to answer[?] Calculator. Is there a hard stop-time[?]" The record does not reflect whether an answer was provided to this note. Only the response to the second note is at issue in this appeal.

future medical expenses, including assisted living expenses, and there was no evidence before the jury about the cost. The court commented that it was part of plaintiff's closing argument that assisted living was "what her future now looks like." Defense counsel responded that plaintiff originally sought future medical expenses, but then withdrew it. He expressed concern that the jury was considering itemizing assisted living expenses because "they cannot order an amount for future medical expenses" and to do so without evidence would be speculative. The court said, "Well, I'm not going to say you can't include assisted living." Defense counsel asked the court to include in the response to the question that there was no claim for future medical expenses because otherwise the jury would be confused. Plaintiff's counsel maintained that the instructions and argument made clear that only pain and suffering was at issue.

The court stated that its inclination was to respond: "[Y]ou are to just list a figure for non-economic damages, based on the evidence." Plaintiff's counsel agreed to that. Defense counsel asked the court to specify "pain and suffering," but the judge declined to do so, noting that the verdict sheet and instructions both stated non-economic damages and that that figure could include inconvenience and physical impairment. Defense counsel asked the court to add that the jury was not "to include . . . any future medical expense." The court replied: "I'm not going to do that any further." Defense counsel replied, "All right. Well."

The court wrote out the response on the jury note as follows: "Your verdict need only to provide an answer to the first question and, if necessary, a figure for non-economic damages, based on the evidence at trial." Defense counsel did not note an objection on the

record and both counsels signed the note. Twenty minutes after the answer was given to the jurors, they returned their verdict in favor of Fluck, awarding $1.4 million in non-economic damages.

On appeal, Decicco argues that the note "demonstrated that the jury was focused on the cost of future assisted living expenses, which were not claimed." Fluck responds that by not lodging an objection to the court's determination not to further instruct the jury on the damages claims before it, Decicco waived this contention of error. On the merits, she maintains that the second trial court's response was proper and was not an abuse of its broad discretion.

As a threshold matter, because Decicco made known to the court her position that further instruction was necessary to ensure that the jury was not considering improperly a claim for future medical expenses that was not before them, she did not waive her objection by signing off administratively on the response the court elected to give. *See* Md. Rule 4-323(c) ("For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court.").

Rule 2-520(a) "requires that the trial court instruct the jury at the close of the evidence and permits the court to supplement the instructions at a later time, 'when appropriate.'" *Jones v. State*, 240 Md. App. 26, 40 (2019) (discussing the parallel rule applicable to criminal causes). "The decision of whether to provide a supplemental instruction, including an instruction given in response to a question from the jury, is within

the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion." *Id*. "Certainly, trial courts have a duty to answer, as directly as possible, the questions posed by jurors." *Appraicio v. State*, 431 Md. 42, 53 (2013)

In this case, we conclude that the trial court abused its discretion by failing to answer fully the question posed by the jury and that Decicco was prejudiced by this error. The jury note reflected confusion both about the instruction to itemize damages when only one category of damages was listed on the verdict sheet *and* about the damages they were permitted to award. As discussed, Fluck's counsel made a strategic choice not to submit a claim for future medical expenses to the jury at the second trial. Consequently, there was no evidence before the jury about the cost of future medical expenses, which would include the cost for assisted living care. Despite that fact, in the note, the jurors asked whether they should itemize the damages for "pain and suffering" and "assisted living." It was plain from this question that the jury was speculating on the cost of assisted living and the court had an obligation to instruct them, as requested by defense counsel, that future medical expenses were not before them for consideration. The failure to do so introduced the possibility that the verdict was infected with improper considerations of damages that Fluck did not seek. *Cf. Giant of Md., LLC v. Webb*, 249 Md. App. 545, 573 (2021) (holding that when a jury instruction permits the jurors to speculate regarding matters that are not before them, prejudice cannot be ruled out and reversal is necessary). Consequently, we shall reverse the judgment from the second trial and remand for further proceedings.

III.

Closing Argument

Though not necessary to our decision (but because it may arise again on re-trial), we address briefly Decicco's argument that the court erred by overruling her objection to plaintiff's counsel's remark during his rebuttal closing argument (in response to Decicco's counsel's assertion during closing arguments that "[you] haven't heard from this plaintiff, it makes it a difficult case for you. You know, they're not allowing you to assess her fully") that Fluck had not attended the trial because it was too painful for her to hear discussion about her cognitive decline.[8] This argument was improper because there were not facts in evidence supporting it and the objection to it should have been sustained. *See Fuentes v. State*, 454 Md. 296, 319 (2017) ("Arguing facts not in evidence is highly improper."). Because of our resolution of the second issue, we need not determine whether this error was prejudicial.

ORDER GRANTING NEW TRIAL AFFIRMED. JUDGMENT IN FAVOR OF APPELLEE REVERSED AND CASE REMANDED TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY APPELLEE.

[8] We note that Decicco's counsel's argument that Fluck's absence from the trial was problematic and made it harder for the jury to assess her claim for relief also was improper. Fluck's attorney did not object to these remarks, however.

The correction notice(s) for this opinion(s) can be found here:

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