Circuit Court for Frederick County
Case No. C-10-CV-19-000900

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2134

September Term, 2022

ASPLUNDH TREE EXPERT LLC, *et al.*,

v.

JONATHAN M. METZGER

Graeff,
Ripken,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: January 12, 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).

This appeal involves several allegations of error by the Circuit Court for Frederick County in a lawsuit alleging negligence by Asplundh Tree Expert, LLC, which resulted from an incident involving a multi-vehicle collision. After a series of pretrial hearings and an eight-day trial, the case was submitted to a jury, which determined that Asplundh's employees were negligent and, hence, Asplundh was liable for damages. Asplundh noted a timely appeal and asserts multiple reversible errors.

ISSUES PRESENTED FOR REVIEW

Asplundh presents the following questions for our review, which we have condensed and rephrased as follows:[1]

[1] Rephrased and consolidated from:

I. Did the Circuit Court err and abuse its discretion in allowing Plaintiff's expert Simpson to proffer new and undisclosed material facts and opinion testimony at the 2022 trial?

II. Did the Circuit Court err and abuse its discretion in allowing Plaintiff's expert Simpson to proffer new and undisclosed opinion testimony regarding uneven or angled vehicle damage?

III. Did the Circuit Court err and abuse its discretion by precluding Asplundh Defendants from cross-examination of Plaintiff's expert Simpson on his opinions and analysis in his accident reconstruction report on [the] basis that it was outside the scope of Plaintiff's direct-examination?

IV. Did the Circuit Court err and abuse its discretion in allowing Plaintiff's expert Simpson to proffer new and undisclosed opinion testimony at trial regarding the crown of the roadway surface at the site of the accident and its impact [on] Plaintiff's vehicle that was never disclosed?

V. Did the Circuit Court err and abuse its discretion in allowing Plaintiff to proffer new and previously-undisclosed evidence including hundreds of pages of documents regarding Plaintiff's economic losses dating back to 2018 and a new economic loss report first produced less than one week before the rescheduled trial?

VI. Did the Circuit Court err and abuse its discretion by granting Plaintiff's Motion *in Limine* precluding Defendants from making reference to or use of the allegations in *Metzger II*, [the] second lawsuit filed by Plaintiff for [the] same accident and injuries?

I. To the extent preserved, whether the court erred when it permitted Plaintiff's experts to testify about allegedly previously undisclosed material facts and opinions.

II. Whether the court erred by instructing the jury on vicarious liability, and by declining to instruct the jury on assumption of the risk.

III. Whether the court erred by declining to allow Asplundh to cross-examine a witness using questions outside the scope of his direct examination testimony.

IV. Whether the court erred when it granted Metzger's motion *in limine* to preclude cross-examination based on *Metzger II*.

For the reasons articulated below, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of a December 2017 multi-vehicle collision which occurred in an exit lane of Interstate 70 ("I-70") in Frederick County. The relevant portion of I-70 is a four lane stretch of highway. The two left-most lanes proceed on I-70 ("the through-lanes"); the two right-most lanes ("the exit lanes") lead drivers to an exit ramp, which feeds onto Interstate 270 ("I-270"). Immediately before the crash, a vehicle driven by the appellee, Johnathan Metzger ("Metzger"), was traveling in the left I-70 East exit lane which leads to I-270 South.

At the same time, a convoy of three trucks owned by the appellant Asplundh Tree Expert, LLC ("Asplundh") and operated by Asplundh employees, was traveling eastbound

VII. Did the Circuit Court err and abuse its discretion in failing to give the pattern assumption of risk jury instruction over Asplundh Defendants' objections?

VIII. Did the Circuit Court err and abuse its discretion in giving Plaintiff's requested modified jury instruction regarding vicarious liability, over Asplundh Defendants' objection, where jury was not being asked to decide vicarious liability and Asplundh was not named on the verdict sheet?

in the right through-lane of I-70.[2] Those trucks were a 2014 Ford F-150 ("the F-150"), a 2014 Ford F-250 ("the F-250"), and a 2012 Ford F-450 ("the F-450") which was towing a trailer-mounted woodchipper.

At trial, Metzger testified that prior to the collision, he was driving approximately fifty to fifty-five miles per hour. Metzger testified that he first observed the three Asplundh trucks traveling in the I-70 through-lane to his left and noted that all the Asplundh vehicles were traveling faster than his vehicle and were in the process of passing him on his left. Metzger indicated that at this point, there were no other vehicles in his lane between his car and the exit ramp toward I-270. Metzger stated that one of the vehicles in the convoy, the F-250, entered his lane "like he was preparing to exit [onto I-270]." Metzger then adjusted his speed by removing his foot from the gas pedal and tapping his brakes to provide a "comfort zone" between his car and the other vehicle, although he testified that the Asplundh vehicle merging into his lane was "no big deal."

Metzger testified further that the next vehicle to enter his lane was the F-450, which resulted in his "comfort zone [] definitely decreasing substantially," even as he continued to decrease his speed. After the F-450 merged, per Metzger, the last Asplundh truck, the F-150, merged right, and entered fully into his lane directly in front of his vehicle. Metzger stated that "my comfort zone was gone. . . . [T]he vehicle was way too close at that point."

Shortly thereafter, the F-450, the first truck in the Asplundh convoy, stopped abruptly due to slow-moving traffic on the exit ramp lanes in front of the F-450. The F-

[2] At trial, Asplundh stipulated that the drivers were employees acting under the scope of their employment at the time of the accident.

250, following behind, had insufficient time and space to fully stop, and crashed into the woodchipper being towed by the F-450. Similarly, the F-150 was unable to stop in time, and its front end collided with the F-250. Metzger's vehicle, following behind, likewise was unable to stop before colliding into the rear of the F-150. A fifth automobile, which was behind Metzger's vehicle, crashed into Metzger.[3]

As a result of the collision, Metzger suffered injuries and loss of income, and filed a negligence action against Asplundh and each of the drivers of the involved trucks. In preparation for trial, Metzger provided responses to interrogatories, and was later deposed. After Metzger was deposed, but before trial, Metzger's attorney filed a second lawsuit ("*Metzger II*") against additional former Asplundh employees who had been traveling in a vehicle that was not involved in the collision; subsequently, *Metzger II* was voluntarily dismissed.

The case proceeded to trial and at its conclusion, the jury found each of the Asplundh drivers liable for negligently causing Metzger's injuries. The jury also found that Metzger was not contributorily negligent, and awarded him $58,335 for past medical bills, $175,000 for non-economic damages, $730,869 for past economic damages, and $1,165,452 for future economic damages. Additional facts will be included as they become relevant to the issues.

[3] The driver of that vehicle, Paul Miller, was also named as a defendant in Metzger's suit. The jury found that he was not liable, and we do not disturb its determination, as neither Metzger nor Asplundh challenge that finding.

DISCUSSION

I. ASPLUNDH'S GENERAL CONTENTIONS THAT METZGER'S EXPERTS SHOULD NOT HAVE BEEN PERMITTED TO TESTIFY ABOUT PREVIOUSLY UNDISCLOSED FACTS AND OPINIONS ARE UNPRESERVED.

A. The Parties' Contentions

Asplundh asserts that the trial court erred and abused its discretion on multiple occasions beginning when it permitted "[Metzger] to proffer new material facts and expert testimony, without good cause, and contrary to [Metzger's] proffer." While Asplundh argues that the testimony of Metzger's reconstruction expert, Charles Simpson, ("Simpson") should have been excluded in its entirety, Asplundh also identifies two specific lines of testimony by Simpson that it is contended should have been excluded: Simpson's testimony pertaining to "angled impact/damages" and testimony regarding the "crown of the roadway." Similarly, Asplundh asserts that the court abused its discretion when it allowed Metzger's damages expert, Thomas Borzilleri ("Borzilleri") to testify because Borzilleri relied upon documents and an updated economic loss report that were not shared with Asplundh in a timely manner prior to trial.

Preliminarily, Metzger asserts that we need not address the merits of the arguments because Asplundh failed to preserve the issues for our review. Additionally, Metzger disputes Asplundh's characterization of the trial court's decisions, arguing that the court was well within its discretion to permit the introduction of the challenged evidence and testimony. In support of this contention, Metzger correctly asserts that an abuse of discretion does not occur unless the ruling is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally

acceptable." *Valentine-Bowers v. Retina Grp. of Wash., P.C.*, 217 Md. App. 366, 378 (2014) (internal quotation marks and citation omitted). In the alternate, Metzger asserts that if an abuse of discretion occurred, the resultant errors were harmless.

B. Preservation

Pursuant to Maryland Rule ("Md. Rule") 8-131, this Court "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131. Therefore, when a party contests the admission or exclusion of evidence on appeal, we do not consider the issue unless it has been properly preserved for review. The reason being that "the purpose of the Rule 'is to allow the court to correct trial errors, obviating the necessity to retry cases had a potential error been brought to the attention of the trial judge.'" *Halloran v. Montgomery Cnty. Dept. of Pub. Works*, 185 Md. App. 171, 201 (2009) (quoting *Sydnor v. State*, 133 Md. App. 173, 183 (2000)).

To preserve a challenge to the admission of evidence, "an objection . . . shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." Md. Rule 2-517(a). A motion *in limine* to exclude evidence, if denied by the court, does not constitute an objection for purposes of preservation; rather, a party seeking appellate review of the admission of evidence must lodge an objection at the time the evidence is admitted at trial. *See Collier v. Eagle-Picher Industries, Inc.*, 86 Md. App. 38, 62 (1991) ("A motion *in limine* to exclude evidence that is denied does not ordinarily eliminate the need to object when the offending evidence is offered.").

"If the trial judge admits the . . . evidence, the party who made the motion ordinarily

must object at the time the evidence is actually offered to preserve his objection for appellate review." *Turgut v. Levine*, 79 Md. App. 279, 286 (1989); *see also Beghtol v. Michael*, 80 Md. App. 387, 393 (1989); *State Farm Fire & Gas. Co. v. Carter*, 154 Md. App. 400, 408 (2003). A party may preserve their objection to the evidence through a continuing objection or by making a specific objection to the evidence every time it is introduced. *See Beghtol*, 80 Md. App. 387, 394 (1989); *Schreiber v. Cherry Hill Const. Co. Inc.*, 105 Md. App. 462, 481–82 (1991); *see also* Md. Rule 2-517(b) ("At the request of a party or on its own initiative, the court may grant a continuing objection to a line of questions by an opposing party. For purposes of review by the trial court or on appeal, the continuing objection is effective only as to questions clearly within its scope."). Accordingly, "absent a continuing objection, an 'appellant waive[s] its objection to [the] admission [of testimony] by permitting subsequent testimony to the same effect to come in without objection.'" *Pulte Home Corp. v. Parex, Inc.*, 174 Md. App. 682, 763–64 (2007) (quoting *State Roads Comm'n v. Bare*, 220 Md. 91, 95 (1959)).

C. Analysis

Prior to trial, Metzger submitted a Plaintiff Expert Witness Designation which included two individuals who would ultimately submit reports and testify at trial. The first witness, Borzilleri, was certified as an economist for the purpose of present value calculations for lost earnings, among other topics, and the second witness, Simpson, was certified as an expert in accident reconstruction.

1. The Economic Expert

Three days before the start of trial, Asplundh filed a motion *in limine* to preclude

testimony by Borzilleri, as well as the introduction of evidence of the expert's updated economic loss calculations, which Asplundh contended should have been disclosed earlier. In support of its position at the hearing on the motion, Asplundh asserted that the late disclosure of the reports was an "egregious discovery violation" and that appropriate relief would be the exclusion of evidence because they had only received the updated report in the week before trial. The trial court denied the motion *in limine.*

We agree with Metzger that the issue of whether Borzilleri's testimony should have been excluded was not preserved for our review. Following the court's denial of Asplundh's motion *in limine*, the preservation rules required Asplundh to then object to Borzilleri's testimony when it was offered at trial to preserve the issue for our review. *See Pulte Home Corp.*, 174 Md. App. at 763–64. However, Asplundh did not object to the substance of Metzger's questions or Borzilleri's testimony regarding Metzger's lost economic value due to the collision. In fact, during Borzilleri's direct examination, Asplundh objected on only two occasions, once based on the form of a question, and once based on a question unrelated to the unpreserved issues.[4] By making a specific objection to the form of the question, Asplundh has not preserved other possible alternate grounds for objection to the same testimony. *See U.S. Gypsum Co. v. Mayor and City Council of Baltimore*, 336 Md. 145, 175 (1994) (quoting *Thomas v. State*, 301 Md. 294, 328 (1984) ("It is, of course, well settled that where specific grounds are delineated for an objection, the one objecting will be held to those grounds and will ordinarily be deemed to have

[4] The second objection, which the court sustained, was to a question which asked Borzelleri's personal opinion of Metzger's counsel's honesty.

waived grounds not specified.") (internal quotation marks omitted)).

Even if Asplundh objected generally to the question it would not have served to preserve the contention for our review, because no other relevant objection was made during the entirety of Borzilleri's testimony about present loss value. Nor did Asplundh make a motion to strike the testimony at the close of direct examination, when it conducted cross examination, or at the close of redirect. Thus, the issue was not sufficiently raised before the circuit court to preserve it for our review. *See Beghtol*, 80 Md. App. at 394 (ruling that an issue was not preserved when the appellant, after appellant's motion *in limine* was denied, objected only to the form of the questions).

2. The Accident Reconstruction Expert

In October of 2022, Asplundh renewed its original motion *in limine* to exclude Simpson—the original motion was filed in 2021 before the trial was postponed. The motion *in limine* asserted that "[t]he entirety of Mr. Simpson's report and opinions [were] clearly unreliable and unhelpful" because "Simpson does not know the basis for his calculations and conclusions" nor was the report and underlying information accurate and reliable. In the event the court did not grant the motion, Asplundh requested the exclusion of a list of specific opinions held by Simpson that it alleged were "unhelpful[,]" including any opinions within the province of the jury as finder of fact, opinions that the defendants caused the accident or cut off plaintiff, as well as any credibility determinations. In November of 2018, the court held a hearing on the motion *in limine*.

The trial court granted the motion in part and denied it in part, precluding Simpson from testifying "as to who was negligent, as to what was the cause of the accident, as to

who was at fault with the accident." The court denied the remainder of the motion. The court explained in detail that it anticipated a renewal of the motion depending on the testimony; however, based on the information presented during the hearing, it "seem[ed] more appropriate [for] traditional cross-examination and impeachment[.]"

After testimony by Metzger, but before Simpson was called as a witness, Asplundh renewed the motion to strike Simpson on the basis that Metzger testified to a new version of events without providing updated discovery or reports. As the basis for the motion, Asplundh reasserted the same grounds as the original motion, in addition to arguing that the testimony by Simpson would constitute unfair surprise because the report relied upon by Asplundh was created in 2021 and it had not been updated, making it inconsistent with Metzger's testimony. Metzger contended that Asplundh should address the matter by raising specific points during direct examination that would prove prejudice or unfair surprise. Metzger did identify the opinions he intended to elicit from Simpson and explained how each opinion had not changed from the original report. Ultimately, the court noted the objection for the record, but reiterated its denial of the motion *in limine*.

After reviewing the record, we conclude that the issue of whether the trial court erred when it allowed Simpson to testify was not preserved for our review. *See Collier*, 86 Md. App. at 62. Asplundh made two distinct motions *in limine* prior to Simpson testifying as plaintiff's accident reconstruction expert, and because the court denied the motions Asplundh was required to either request a continuing objection at the time the evidence was offered or object each time Simpson testified to the "same effect." *Pulte Home Corp.*, 174 Md. App. at 763–64. Yet, during Simpson's direct examination, Asplundh's objections

were expressly based on form, thereby belying any other objection to the question because of the specific nature of the objection. *See U.S. Gypsum Co.*, 336 Md. at 175. Only one objection by Asplundh addressed the contents of a question by Metzger, and even then, it was only tangentially related to Simpson's testimony.[5] As such, the introduction of Simpson's testimony was not preserved for our review.

Similarly, Asplundh did not preserve for our review the assertion that the trial court erred when it permitted Simpson to testify about the crown of the roadway surface. As discussed *supra*, to preserve this contention for our review, Asplundh was required to object at the time the testimony about the crown of the roadways was offered. Yet, Simpson testified without objection regarding the crown of the roadway. Nor did Asplundh move to strike the testimony at any subsequent time. Asplundh's failure to request a continuing objection to testimony about the crown of the roadway or make an objection each time the topic was raised prevents this Court from reviewing the issue. *See e.g. Beghtol*, 80 Md. App. at 394. ("Appellant could easily have preserved the issues had he either made a continuing objection which covered [the topic at hand] when the issue was first raised or had he objected to every question[.]").

Nor was Asplundh's contention that the court erred when it permitted Simpson to testify about the angled impact of the vehicles and resulting damages preserved for this Court's review. In the same vein as Asplundh's other contentions, when the trial court

[5] Asplundh objected to a question inquiring if Simpson had the opportunity to inspect the vehicle, which initiated a discussion between parties as to whether Asplundh received notice to preserve the car for inspection.

denied its renewed motion *in limine*, Asplundh was required to request a continuing objection to Simpson's testimony about the angled impact, object to each question, or make a motion to strike following the objectionable testimony. *See Pulte Home Corp.*, 174 Md. at 763–64. Yet, Simpson's lengthy testimony about the damage to the vehicles and how it informs the angles at which the vehicles collided was not interrupted by objections but for objections to the form of the questions.

While on cross examination, however, after eliciting answers from Simpson about his prior testimony regarding the angle of vehicle impact and when the information about the angles was discovered, Asplundh moved to strike "all that testimony." Even so, it does not serve to preserve the issue because the objection was not contemporaneous. *See Morton v. State*, 200 Md. App 529, 540–41 (2011) (quoting *Klauenberg v. State*, 355 Md. 528, 536 (1999) (explaining that "when a motion in limine to exclude evidence is denied, the issue of the admissibility of the evidence that was the subject of the motion is not preserved for appellate review unless a contemporaneous objection is made at the time the evidence is later introduced at trial."). Thus, because Asplundh was already aware that the testimony by Simpson would likely invoke information about the angles of the vehicle at impact, as evidenced by its renewed motion *in limine*, the necessity of an objection should have been apparent to Asplundh as soon as the related questions were asked of Simpson. *See* Md. Rule 2-517(a).

Moreover, during redirect of Simpson, Asplundh failed to reassert its objection to questions that invoked the angle of impact theory as it limited its objection to the final question in a series of three that invoked the angle of impact theory. This failure by

Asplundh to reassert an objection when the angle of impact testimony was reintroduced is further support that the issue was not properly preserved. *See Pulte Home Corp.*, 174 Md. at 763–64. Asplundh was presented with multiple opportunities to preserve its objection and having failed to do so, we determine the issue is not preserved for this Court's review.

Accordingly, we conclude that Asplundh's contentions that the court erred when it permitted Metzger's experts to testify about previously undisclosed facts and opinions are not preserved for our review.

II. THE CIRCUIT COURT DID NOT ERR IN INSTRUCTING THE JURY.

A. The Parties' Contentions

Asplundh contends that the court made two errors in instructing the jury. First, it claims that the court erred in failing to provide an instruction on assumption of the risk. Asplundh asserts that the instruction on contributory negligence was insufficient to properly instruct the jury on the legal consequences of Metzger's actions and that the evidence warranted a separate instruction on assumption of the risk. Second, Asplundh claims the court erred by instructing the jury on vicarious liability. It argues that the vicarious liability instruction caused prejudice and confusion, as Asplundh was not itself named on the verdict sheet.

Metzger disagrees and asserts that the circuit court did not err in instructing the jury. Metzger argues that the court acted within its discretion in both decisions. He claims that the assumption of risk instruction was inapplicable to the facts of the case, and that the court's decision to provide a modified instruction on vicarious liability was reasonable as Asplundh was named as the lead defendant in the case, although its name did not appear

on the verdict sheet. In the alternate, Metzger argues that if either action by the court was erroneous, any resulting error was harmless.

B. Standard of Review

"We review the circuit court's decision regarding which jury instructions to employ for abuse of discretion." *USB Financial Services, Inc. v. Thompson*, 217 Md. App. 500, 523 (2014). More specifically, we evaluate "whether the requested instruction was a correct exposition of the law, whether that law was applicable in light of the evidence before the jury, and finally whether the substance of the requested instruction was fairly covered by the instruction actually given." *Zografos v. Mayor and City Council of Balt.*, 165 Md. App. 80, 109 (2005) (internal quotation marks and citation omitted). The Supreme Court of Maryland has stated that "so long as the law is fairly covered by the jury instructions, reviewing courts should not disturb them." *Farley v. Allstate Ins. Co.*, 355 Md. 34, 46 (1999). Additionally, a "court need not grant a requested instruction if the matter is fairly covered by instructions actually given." *Id.* (quoting Md. Rule 2-520(c)).

C. The Assumption of the Risk Instruction

Asplundh asserts that the circuit court committed reversible error by declining to give its requested jury instruction on assumption of the risk. At trial, Asplundh urged the court to give Maryland Civil Pattern Jury Instruction ("MPJI-Cv") 19:14, which states: "A plaintiff cannot recover damages if the plaintiff has assumed the risk of an injury. A person assumes the risk of an injury if that person knows and understands, or must have known and understood, the risk of an existing danger and voluntarily chooses to encounter that danger." Asplundh requested the instruction because, in its view, Metzger "recognized that

there was an accident in his lane, and instead of coming to a stop, he chose to tap his brakes, look to his left, look to his right, look around and . . . then finally committed" to attempting a complete stop. The court disagreed that the facts gave rise to assumption of the risk and declined to provide the instruction.

Assumption of the risk is a doctrine whereby a plaintiff's intentional and voluntary exposure to a known danger relieves a defendant of liability for harm resulting from those risks to which the plaintiff exposed themself. *Am. Powerlifting Ass'n v. Cotillo*, 401 Md. 658, 668 (2007). In Maryland, to establish the defense of assumption of the risk, a defendant must demonstrate the plaintiff: "(1) had knowledge of the risk of the danger; (2) appreciated that risk; and (3) voluntarily confronted the risk of danger." *ADM P'ship v. Martin*, 348 Md. 84, 90–91 (1997). In assessing the voluntariness of the exposure to the risk, "'there must be some manifestation of consent to relieve the defendant of the obligation of reasonable conduct.'" *Id.* at 92 (quoting W. Page Keeton*, Prosser and Keeton on the Law of Torts* § 68 at 488 (5th Ed. 1984)).

Here, there was no court error in the determination that the facts did not support an inference that Metzger assumed the risk, and subsequently, declining to provide MPJI-Cv 19:14, the instruction on assumption of the risk. It is axiomatic that "[a] party is entitled to an instruction that correctly states the law only if that law is applicable to some issue in the case[.]" *Wilber v. Suter*, 126 Md. App. 518, 525 (1999). Here, the facts showed that at the time Metzger observed evidence of the accident in front of him, he had "two to three seconds" to act. In that time, he checked both adjacent lanes, determined it was unsafe to change lanes, checked his rearview mirror to assess how far away the car behind him was,

and then "slammed on [his] brakes."

On these facts, the court did not err in determining that Metzger's two-to-three second delay in fully braking, during which he considered the alternative dangers of either swerving into a different lane, or immediately attempting to come to an abrupt stop, did not entail "voluntarily confront[ing] the risk," or otherwise manifesting his consent to do so. *ADM P'ship*, 348 Md. at 91. Rather, the court concluded, that Metzger was placed in an inherently dangerous situation with no good options, and his rapid consideration of the few choices available to him, during an exceedingly brief and stressful time period, did not support the proposition that he understood the risk of a crash, and chose to confront it of his own free will. Thus, as the facts did not show that Metzger voluntarily chose to encounter the danger, the law was not "applicable in light of the evidence before the jury" and thus, the court was not obligated to give the requested instruction. *Zografos*, 165 Md. App. at 109. We agree with the circuit court that the doctrine of assumption of the risk was not applicable to facts of the case, and accordingly, we discern no error. [6]

[6] Even if the court erred in failing to instruct the jury on the assumption of the risk, which it did not, any resultant error would have been harmless. Here, the jury was instructed on the issue of Metzger's potential contributory negligence, which was *also* predicated on the contention that he failed to deploy his brakes in a timely fashion. To be sure, assumption of the risk and contributory negligence are distinct doctrines. *See S&S Oil, Inc. v. Jackson*, 428 Md. 621, 630 (2012). However, here, the jury considered the issue of Metzger's actions immediately before the collision and determined that Metzger was not contributorily negligent. That determination "precluded a finding that he assumed the risk" because the same conduct was asserted as the basis for the contributory negligence claim. *See Balt. Gas and Elec. Co. v. Flippo*, 348 Md. 680, 707–08 (1998) (noting that where assumption of the risk and contributory negligence were predicated on the same conduct, a defendant needed to "bear a somewhat heavier burden of proof" to show assumption of risk, and therefore, by deciding that there was no contributory negligence, "the jury in essence found that the

D. The Vicarious Liability Instruction

Asplundh's next assertion of error as to the court's jury instructions is no more convincing. Asplundh claims that the court confused the jury and introduced prejudice by providing a jury instruction on the issue of vicarious liability. The court's instruction, which was a modified version of MPJI-Cv 3:3, read as follows:

> An employer or principal is responsible for injuries or damages caused by the wrongful act or negligent acts of employees if those acts causing the injuries or damages were within the scope of employment. [The drivers of the trucks] were acting as the employees of the defendant Asplundh at the time of the acts at issues in this case, and the employer is responsible if the employee did the acts that are the subject of the plaintiff's claim.

Under Md. Rule 2-520, a requested jury instruction "must be given" when the instruction is (1) a correct statement of the law, (2) applicable in light of the evidence before the jury, and (3) is not fairly covered by the instructions actually given. *CSX Transp., Inc. v. Continental Ins. Co.*, 343 Md. 216, 240 (1996). Here, Asplundh does not assert that the court's instruction on vicarious liability was either an incorrect statement of law, that the instruction was already covered by other instructions, or that vicarious liability was inapplicable to the evidence. Rather, it asserts that because Asplundh was itself not named on the verdict sheet, giving the instruction served to introduce prejudice and confusion into the jury's deliberation. We disagree.

As the drivers of the Asplundh vehicles were employees of Asplundh acting within the scope of their employment, vicarious liability is unambiguously "applicable in light of

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factual basis for that defense was not established." *Id.* at 707 (internal quotation marks and citations omitted)).

the evidence before the jury." *Id.* (quotation omitted). Moreover, the court's rationale for giving the instruction was reasonable, as "[t]he main purpose of a jury instruction is to aid the jury in clearly understanding the case[.]" *Robertson v. State*, 112 Md. App. 366, 385 (1996). In the court's view, the fact that Asplundh was both the lead defendant and had been heavily referenced at trial, but did not appear on the verdict sheet, was itself likely to engender confusion in the jury; to remedy that confusion, the court chose to inform the jury on the doctrine of vicarious liability.[7] Here, the instruction was correct, applicable, and not otherwise fairly covered by other instructions. *See Farley*, 355 Md. at 46–47. Nor has Asplundh demonstrated prejudice arising from an instruction which correctly informed the jury that Asplundh was responsible for its employees' actions. *See id.* at 47 ("[T]he standard for reversible error places the burden on the complaining party to show both prejudice and error.") We find no error arising from the court's instructions to the jury.

III. THE COURT DID NOT ERR IN PRECLUDING ASPLUNDH FROM CROSS-EXAMINING METZGER'S EXPERT ABOUT TOPICS OUTSIDE THE SCOPE OF DIRECT EXAMINATION.

Asplundh's next assertion of error arises due to the circuit court sustaining several objections to cross examination questions during the testimony of Metzger's accident reconstruction expert, Simpson. Specifically, Asplundh argues that the court erred and abused its discretion by preventing the cross-examination of Simpson about certain

[7] We note that Asplundh expressly stipulated to and agreed to the jury being informed that the truck drivers were employees of Asplundh and were acting within the scope of their employment. In accepting the stipulation, the court stated to counsel that "you can alert the jury to that fact, or I can do it, whichever you want at the appropriate time[,]" to which Asplundh assented.

contents of his previously generated report, which were not discussed during direct examination. At trial, Simpson did admit that, on at least some topics, he had changed his opinion from that which was in the original report based on his updated understanding of the facts of the collision.

Asplundh claims that it was prejudiced because it was "prevented from showing the jury the actual analysis that Mr. Simpson did[,]" which prevented it from "effectively cross-examining and impeaching Mr. Simpson[.]" Metzger disagrees and asserts that the court acted well within its discretion to limit the scope of cross-examination.[8]

Cross-examination of an expert witness "should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." Md. Rule 5-611(b)(1). A court has the discretion to allow an expert witness to be cross-examined on matters outside the scope of direct examination but is under no obligation to do so. *Id.* "The trial court is vested with broad discretion in determining the scope of cross-examination, and we will not disturb the exercise of that discretion in the absence of clear abuse." *Farewell v. State*, 150 Md. App. 540, 575 (2003) (internal quotation marks and citation omitted). Abuse of discretion occurs when a trial court's decision is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court

[8] Metzger notes that Asplundh provides no caselaw in support of its contention, and asserts that therefore, Asplundh has waived its claim by expressing "mere disagreement" with the circuit court. To be sure, "[t]his Court is not obligated to address an issue where a party provides only conclusory statements without sufficient factual or legal support." *Selective Way Ins. Co. v. Fireman's Fund Ins. Co.*, 257 Md. App. 1, 56 (2023). However, in the context presented, Asplundh's legal claim is comprehensible, and we will address the claim.

deems minimally acceptable." *Dehn v. Edgecombe*, 384 Md. 606, 628 (2005) (quoting *North v. North*, 102 Md. App. 1, 13–14 (1994)). Additionally, a court may exclude evidence on the basis that its probative value would be substantially outweighed by its potential to confuse the issues, mislead the jury, or by considerations that the presentation would result in an undue delay or waste of time. Md. Rule 5-403. This decision is also "left to the sound discretion of the trial judge and will be reversed only upon a clear showing of abuse of discretion. *Malik v. State*, 152 Md. App. 305, 324 (2003).

Here, the circuit court declined to allow Asplundh to cross-examine Simpson about topics outside the scope of direct examination. In doing so, it followed the guidance of Md. Rule 5-611; in this context, we cannot say that the court's decision was "beyond the fringe" of what we find "minimally acceptable." *Edgecombe*, 384 Md. at 628.

Nor is Asplundh's assertion that it was precluded from impeaching Simpson's credibility grounds for reversal. Here, parts of Simpson's report were predicated on information that he later determined to be incorrect, and he subsequently amended his opinion to conform with the updated data. The practice of altering one's opinion when new or more accurate data is available is at the core of the scientific method and is minimally probative of an expert's credibility. Additionally, the court concluded that during Simpson's cross examination the jury was "exhausted and it's been very difficult for them to follow along." At the time of the alleged error, the jury was already aware that Simpson's opinion had, in some respects, changed from the opinion he expressed in his initial report. The court could, and did, exercise its discretion to limit evidence based on the potential to confuse the jury, delay the proceedings, or preclude needless presentation of cumulative

evidence. Md. Rule 5-403.

Here, that the court did not allow Asplundh to further inquire about a report predicated on prior data, and containing opinions Simpson no longer held, was not an abuse of discretion. Accordingly, we determine no error arose from the circuit court's limitation of Asplundh's cross-examination of Simpson.

IV. THE CIRCUIT COURT DID NOT ERR IN PREVENTING ASPLUNDH FROM REFERENCING METZGER'S VOLUNTARILY DISMISSED SUIT AT TRIAL.

Asplundh asserts that the court abused its discretion in granting Metzger's motion *in limine* to preclude Asplundh from referencing or making use of the allegations included in *Metzger II*, Metzger's separate and previously voluntarily dismissed suit against additional former Asplundh drivers not involved in the crash.

A. The Parties' Contentions

Asplundh argues that the court's refusal to allow it to question Metzger and Simpson, using the contentions asserted in *Metzger II* prejudiced it, and the court's decision amounts to reversible error. Specifically, Asplundh claims that the assertions in *Metzger II*, which included that Asplundh employees not named as defendants in the instant case were responsible for the collision, constituted prior inconsistent statements, and therefore were valid subjects for impeachment of Metzger. In support, Asplundh correctly notes that in Maryland, a prior inconsistent statement is generally admissible to impeach a witness's credibility. *See* Md. Rules 5-613, 5-616(a)(1). Asplundh also notes that multiple Maryland appellate decisions have held that the initial version of an amended pleading is potentially admissible as evidence although an amended complaint has been superseded and is no

longer the operative pleading in the case. *See State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 513–15 (2014); *MEMC Materials, Inc. v. BP Solar Intern., Inc.*, 196 Md. App. 318, 348–49 (2010).

As a threshold matter, Metzger argues that Asplundh failed to preserve its challenge. In so arguing, Metzger notes that in making its ruling, the circuit court allowed for the possibility, depending on the contents of Metzger's testimony, of Asplundh inquiring into whether Metzger had previously considered that other people were involved in the collision. Therefore, in Metzger's view, Asplundh's failure to "lay[] the groundwork at trial" and inquire about Metzger's previous understanding of the cause of the collision resulted in a waiver of its argument that the court improperly granted the motion *in limine*.

In the alternate, Metzger asserts that the circuit court did not err, as the court correctly found that there was no indication that Metzger had personal knowledge of the *Metzger II* claims when they were filed by his counsel, and as such, any statements included in the pleading could not be attributed to him or used to impeach him. Metzger further posits that even had the court erred, any such error would be harmless.

B. The Court's Ruling

During the motions hearing, both parties presented arguments as to the admissibility of the assertions made in *Metzger II*. Specifically, Metzger's counsel contended that it had filed *Metzger II* essentially as a precautionary measure, as Asplundh had only disclosed the existence of the additional truck and the identity of the *Metzger II* defendants when the

expiration of the statute of limitations was imminent.[9] In making its determination, the court noted that: "through counsel [Metzger has] made these allegations, but there is nothing under oath anywhere that's been presented to the Court that indicates . . . that he's ever taken a contrary position." The court also distinguished the instant case from cases "where an original pleading has been amended and they're going to trial on the amended pleading and the original complaint is brought in to show that there's an inconsistency. This case is very different. We're going to trial on the original complaint." The court noted that while *Metzger II* alleged that different defendants were involved, "that case was never fully litigated," and "it doesn't appear from anything that's been before me that there was any discovery completed, anything done under oath or represented to support that factual allegation in the subsequent pleading complaint that was dismissed."

Accordingly, the court granted Metzger's motion, although as noted previously, it included a caveat that depending on the nature of Metzger's trial testimony, Asplundh could potentially cross-examine him regarding any past suspicions about who was responsible for the crash.

C. Analysis

As a preliminary matter, we determine that Asplundh's challenge to the court's ruling on the motion *in limine* is preserved for our review. As the Supreme Court of

[9] Metzger did not directly accuse Asplundh of deliberately failing to comply with discovery, but noted that "certain documents, certain evidence obviously had been withheld." Metzger also noted that the investigation and filing of *Metzger II* occurred during the height of the COVID-19 pandemic, when there was "great uncertainty" around the applicability of temporarily extended statutes of limitation.

Maryland has noted, "[w]hen motions *in limine* to exclude evidence are granted, normally no further objection is required to preserve the issue for appellate review." *Reed v. State*, 353 Md. 628, 638 (1999). This principle applies here. The court's explanation that it might allow some cross-examination related to Metzger's prior understanding of who had caused the collision, depending on the nature of his testimony on direct examination, does not obviate that the court clearly granted Metzger's motion to preclude discussion of *Metzger II*. Therefore, Asplundh was not obligated to subsequently attempt to violate the court's ruling or lodge a further objection to preserve the issue for our review. *See* Md. Rule 2-517(d) ("A formal exception to a ruling or order of the court is not necessary.").

Thus, we turn to the substance of Asplundh's contention. We review the grant of a motion *in limine* under an abuse of discretion standard. *Saxon Mortg. Servs., Inc. v. Harrison*, 186 Md. App. 228, 252 (2009). As previously noted, to overturn a ruling based on abuse of discretion, "the trial court's decision must be 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Devincentz v. State*, 460 Md. 518, 550 (2018) (quoting *North*, 102 Md. App. at 14).

Here, the court considered the arguments of both sides as well as memoranda of law. Ultimately, the court excluded the evidence because Metzger had never been shown to have personal knowledge of the claims included in *Metzger II*, nor was there evidence that Metzger "ever [took] a contrary position" to the one he advanced at trial. The court was not inherently required to impute the statements made in *Metzger II* to Metzger himself. *See BP Solar Intern., Inc.*, 196 Md. App. at 348–49 (noting that the admissibility

of a prior complaint "has to be determined on a case by case basis, after due consideration of the relevance, potential prejudice, and any rule of exclusion that might be applicable to specific content. Admissibility may also be affected if the complaint was signed, verified, or even reviewed by a party[.]").

The court, in making its ruling, explained that because *Metzger II* had been voluntarily dismissed prior to any discovery or any representations under oath by Metzger himself, there was no "estoppel or admission on the part of Metzger." In so deciding, the court had a variety of contentions offered by Metzger to consider, which included that *Metzger II* was filed by counsel in response to a late disclosure of the existence of the additional vehicle by Asplundh close to the expiration of the statute of limitations. Additionally, available for consideration was Metzger's contention that excluding inquiry into *Metzger II* would "avoid the prejudice, the potential for a mistrial, and the spectacle of having to try and delve into counsel-client communications and why this information was not provided in a timely fashion."

Noting the court's finding that there was no indication that Metzger himself was aware of the contentions in *Metzger II*, as well as representations regarding the potential prejudice and delay that introducing the *Metzger II* evidence would cause, we find no error in the court's exclusion of the evidence under Md. Rule 5-403 and determination that any assertions within *Metzger II* were not applicable as impeachment evidence under Md. Rule 5-616. Therefore, we conclude that the court's grant of the motion *in limine* was well within the bounds of its discretion and discern no error.

JUDGMENTS OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.