Circuit Court for Montgomery County
Case No. 398456V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 413

September Term, 2016

SIU T. NG-WAGNER et al.

v.

ANDREW HOTCHKISS et al.

Kehoe
Berger,
Leahy,

JJ.

Opinion by Leahy, J.

Filed: May 18, 2018

While under the care of Dr. Sui Ng-Wagner at Women's Fertility and Health Center ("WFHC" or collectively with Dr. Wagner as "Appellants"), Mr. Andrew Hotchkiss and Mrs. Marnie Hotchkiss entered a gestational carrier contract with Ms. Christina Jensen. Ms. Jensen failed to disclose her history of pregnancy complications and Dr. Wagner proceeded with an embryo transfer without first receiving prior medical records and a clearance from Ms. Jensen's regular obstetrician. Ms. Jensen developed severe, life-threatening preeclampsia and underwent an emergency C-section delivery 25 weeks into the pregnancy—just on the edge of viability. The child, Finley Hotchkiss, lived for only 21 days.

Mr. Hotchkiss, individually and as the personal representative of Finley Hotchkiss, and Mrs. Hotchkiss (collectively, "Appellees") filed a complaint against Appellants in the Circuit Court for Montgomery County. A jury returned a verdict in Appellees' favor for $44.1 million, and the circuit court granted Appellants' motion for a remittitur to the statutory cap but denied their motion for a new trial.

Appellants now present the following questions for our review, which we have condensed slightly:

I. "Whether the trial court erred in permitting Mrs. Hotchkiss to resume the stand in 'rebuttal' when no new matters were raised in Appellant's case?"

II. Whether Appellees' arguments during summation were improper and justify reversing the jury's verdict?[1]

[1] Appellants presented Issue II as two separate questions:

"Whether the trial court erred in permitting Appellees to argue a 'duty [to] disclose' as a theory of liability when there was no evidentiary basis for such a claim and the trial court dismissed Appellees' lack of informed consent claim at the close of evidence?"

III. "Whether there was sufficient evidence of conscious pain and suffering of the premature infant to sustain the Estate's claim and/or permit the jury to consider damages on this basis?"

IV. "Whether the []44.1 million dollar verdict 'shocked the conscience' such that justice demanded a new trial?"

We hold that, although Mrs. Hotchkiss' rebuttal testimony was improper because it was cumulative and did not address any new material introduced during the defense's case, her five brief responses were not "so substantially injurious" to warrant reversing the jury's verdict below. We also hold that counsel's summation regarding Dr. Wagner's failure to inform the Hotchkisses that she had not received Ms. Jensen's medical records was proper and consistent with plaintiffs' negligence claim. Although plaintiffs' counsel did inject improper 'golden rule' argument into his summation, we conclude the trial court did not abuse its discretion by issuing a curative instruction to the jury rather than granting a new trial. On the issue of sufficient evidence of conscious pain and suffering, we hold that the facts, viewed in the light most favorable to Appellees, were sufficient to create an inference that Finley was suffering physical and mental anguish. Finally, we hold that the trial court was within its discretion in granting Appellants' motion for remittitur rather than ordering a new trial.

"Whether the Appellees violated the 'golden rule' in closing arguments thereby depriving appellant of a fair trial?"

BACKGROUND

A. The Hotchkisses' Efforts to Conceive a Child

Mr. Andrew Hotchkiss and Mrs. Marni Hotchkiss first sought fertility care from WFHC in 2009. After unsuccessful surgical attempts to make Ms. Hotchkiss's uterus viable, Dr. Wagner suggested that the couple consider a gestational carrier. The Hotchkisses, instead, sought a second opinion from a specialist at George Washington University Hospital. When additional surgery was also unsuccessful, the Hotchkisses returned to Dr. Wagner and WFHC and began discussing the option of using a gestational carrier surrogacy.[2] With the help of an attorney, the Hotchkisses began searching for a suitable surrogate and interviewing potential candidates. The Hotchkisses identified two to three candidates before eventually choosing Ms. Christina Jensen as a gestational carrier. Dr. Wagner recommended against at least one of the prior candidates based on the candidate's history of preeclampsia.[3] Then, around May 2011, the Hotchkisses informed Dr. Wagner that Ms. Jensen was a potential candidate.

As she had with prior candidates, Dr. Wagner asked Mrs. Hotchkiss to obtain copies of Ms. Jensen's prior medical records and clearance from her obstetrician. After "a bunch of back and forth" between Mrs. Hotchkiss and Ms. Jensen, Ms. Jensen was still struggling to get copies of her records to Mrs. Hotchkiss. On May 10, 2011, Ms. Hotchkiss emailed

[2] Gestational carrier surrogacy is a procedure in which the sperm and egg of the intended parents are combined in vitro and, once a viable embryo forms, the embryo is transferred to the uterus of a surrogate who will gestate the pregnancy.

[3] Preeclampsia is a complication during pregnancy characterized by elevated maternal blood pressure that may result in serious injury or death to the mother or fetus.

Ms. Jensen and told her, "I hope Wagner gets your stuff today. . . . Wagner is very anxious to make sure you check out." After even more "back and forth," Ms. Hotchkiss emailed Ms. Jensen again, this time stating: "I really need to know what's up, what is up with [the] medical records. I know your pregnancy records got returned back to you, but those are still important for my doctor and I [to] have, and of course nothing can be done until we get the hysteroscopy results. If there's anything I can do to get those, please let me know."

B. The Surrogacy Relationship with Ms. Jensen

On May 16, 2011, the Hotchkisses entered into a gestational carrier contract with Ms. Jensen, which memorialized the responsibilities between the parties and provided $30,000 compensation plus expenses for Ms. Jensen. The contract identified Dr. Wagner as the "Attending/IVF Physician." Each party to the contract warranted "that his or her decision to enter into this Agreement is a fully informed decision, made with due diligence as to the serious medical, psychological and legal implications associated with a gestational surrogacy agreement." At this point, Ms. Jensen's medical evaluation was still not completed, and, although she had forwarded her psychiatric evaluation and her hysteroscopy/mock transfer reports from a prior surrogacy to Dr. Wagner, Ms. Jensen had not sent her STD results, prior medical records, or obstetric clearance. The contract included an "Escape Clause," which allowed either party to terminate the agreement prior to the cycle injections without further obligation other than already-incurred expenses.

Dr. Wagner's records indicated that on May 16 and again on May 19, 2011, Dr. Wagner spoke with Mrs. Hotchkiss and reminded her to ask Ms. Jensen to submit the remainder of her records—including a clearance from her regular obstetrician. Mrs.

Hotchkiss testified at trial that she believed Ms. Jensen would bring the rest of her medical records to her upcoming appointment with Dr. Wagner. At that visit on June 14, 2011, Dr. Wagner performed a trial transfer to test Ms. Jensen's uterus. Ms. Jensen informed Dr. Wagner verbally that she had been cleared by her obstetrician and brought a copy of her blood test results but not her clearance report. Mrs. Hotchkiss testified that Dr. Wagner called her after meeting with Ms. Jensen and told her "everything looked great" and "we're ready to go."

In December 2011, following a successful embryo transfer, Ms. Jensen became pregnant with the Hotchkisses' child. Dr. Wagner cared for Ms. Jensen for the first 8 weeks of the pregnancy, at which point Ms. Jensen transferred her care to her obstetrician in Pennsylvania. The Hotchkisses attended Ms. Jensen's 20-week ultrasound appointment in Harrisburg, PA, where they overheard Ms. Jensen's obstetrician mention that Ms. Jensen had a history of preeclampsia. On the drive back to Maryland following the ultrasound, Mrs. Hotchkiss called Dr. Wagner to ask about Ms. Jensen's medical history, and Dr. Wagner stated that her records listed "pending" next to Ms. Jensen's medical records, indicating that she had still not received them.

Eventually, a review of Ms. Jensen's prior medical records revealed that Ms. Jensen had five uneventful prior pregnancies, followed by a miscarriage in her sixth, and that her seventh pregnancy in 2010—also as a gestational carrier—resulted in the premature birth of the baby, five weeks early, after Ms. Jensen developed preeclampsia. An expert for the Hotchkisses, Dr. Richard Grazi, testified that "severe preeclampsia is known . . . to worsen with each pregnancy[,]" so Ms. Jensen's medical history should have disqualified her from

being a gestational carrier.[4]

According to Dr. Grazi's review of the medical records, Ms. Jensen "developed life-threatening, severe preeclampsia very preterm, at 25 weeks, just on the edge of viability." To save Ms. Jensen's life and the life of the child, Ms. Jensen underwent an emergency C-section delivery on May 17, 2012. The child, Finley Hotchkiss, weighed one-and-a-half pounds at birth, 25 weeks and five days into the term.

C. Finley's Life

The Hotchkisses immediately drove to Harrisburg to meet their daughter after learning about the emergency delivery. Over the course of Finley's brief life, the Hotchkisses took turns between spending time between Pennsylvania with Finley and their home in Bethesda with their four-year-old son. It took a day for Finley's eyes to unfuse, but once they did, she was able to make eye contact. Shortly thereafter, Finley developed an infection and was put on a respirator due to trouble breathing. She developed a fever and rapid heartbeat as well. Her parents helped the hospital staff change her diapers and take her temperature. Mrs. Hotchkiss testified at trial that Finley would cry and "fuss a lot" when people touched her. Mr. Hotchkiss also testified that Finley was constantly getting pricked and had tubes up her nose, and that the medical staff "couldn't get her to stay still."

After only 21 days, Finley succumbed to her infection and passed away on June 6,

[4] Dr. Grazi also testified that Ms. Jensen "is what we call a grand multipara, she's already had six deliveries, that would have been, from the reproductive endocrinology point of view, that would have disqualified her [from being a surrogate]."

2012. According to expert testimony at trial from Dr. Michael Cone, Finley died of "overwhelming sepsis secondary to extreme prematurity." Dr. Cone explained that premature babies are more susceptible to sepsis because of the frequency with which they need IVs, the thinness of their skin, and their limited nutrition, which hinders their ability to fight off infection.

D. The Trial

On December 15, 2014, Appellees filed a complaint against Appellants in the Circuit Court for Montgomery County. The complaint alleged four counts each against Dr. Wagner and WFHC: (1) medical negligence, (2) wrongful death, (3) survival action, and (4) informed consent. In the medical negligence claim against Dr. Wagner, Appellants alleged that it was Dr. Wagner's responsibility to screen potential surrogates, obtain the surrogate candidate's prior and current medical records, "disclose to Andrew and Marni Hotchkiss any potential medical concerns or issues that could potentially complicate the surrogacy," and to "allow Andrew and Marni Hotchkiss to make the final decision as to whether they should proceed with a particular surrogate by obtaining informed consent."

The case proceeded to trial on Monday, March 7, 2016, and lasted all five days of that week. Both Mr. and Mrs. Hotchkiss testified, as did Dr. Wagner, as well as two expert witnesses for each side. Before submitting the case to the jury, the court granted judgment to Appellants on the informed consent claims (Counts VII & VIII). Then, on Friday, March 11, the jury returned a verdict finding Dr. Wagner liable for breaching the standard of care and causing Finley's death. The jury awarded Finley's estate $5,000 in funeral expenses as well as $2.1 million in non-economic damages and awarded the Hotchkisses $42 million

in non-economic damages. The trial court certified the judgment on March 16.

Two days later, Appellants filed a motion for remittitur, asking the court to reduce the award of economic damages to $2,669.75 (the amount the Hotchkisses paid in funeral expenses), and non-economic damages to $887,500.00, the statutory cap pursuant to Maryland Code (1973, 2013 Repl. Vol.), Courts & Judicial Proceedings Article ("CJP"), § 3-2A-09. Appellants also filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, based on several alleged errors committed by the trial court, including those raised on appeal. On April 10, the court granted the remittitur, reducing the plaintiffs' combined award for non-economic damages to $887,500.00, and the award for economic damages to $2,669.75. In that same order, the court entered judgment against Appellants in the amount of $890,169.75. Then, in an order entered on April 19, the court denied Appellants' motion for judgment notwithstanding the verdict or a new trial. Appellants noted their timely appeal to this Court on May 6, 2016. We include additional facts as necessary throughout the discussion.

DISCUSSION

Appellants assert on appeal that (1) the trial court allowed improper rebuttal testimony, (2) Appellees' counsel used improper and inflammatory tactics during closing arguments, (3) there was insufficient evidence to support the Estate's claim for Finley's conscious pain and suffering claim, and (4) the verdict shocked the conscience. We will address each of these issues in turn. In doing so, we recognize that the moving party bears the burden of demonstrating that a new trial is necessary. *Brewer v. State*, 220 Md. App. 89, 111 (2014). As Appellants point out, citing *In re Petition for Writ of Prohibition*, 312

Md. 280, 326 (1998), "a new trial will be appropriate when the verdict is against the evidence or against the weight of the evidence, or put simply, if the trial court is not satisfied with the evidence and its relationship to the verdict." Ultimately, however, the decision "to grant a new trial lies within the sound discretion of the trial court, whose decision will not be disturbed on appeal absent an abuse of discretion." *Id.* (citing *Argyrou v. State*, 349 Md. 587, 600 (1998)). An abuse of discretion is a decision that is arbitrary or capricious or otherwise unlawful. *Id.*

I.

Improper Rebuttal Testimony

Appellants argue that the trial court erred by allowing Mrs. Hotchkiss to provide improper rebuttal testimony that addressed matters already addressed in the plaintiffs' case-in-chief. At the close of the defense's case, plaintiffs' counsel informed the court and opposing counsel that he planned to recall Mrs. Hotchkiss to offer rebuttal testimony. The court asked for a proffer as to what that testimony would consist of and the following colloquy ensued:

> [PLAINTIFFS' COUNSEL]: I'll make a proffer. Dr. Wagner got on the stand, and said that my client said certain things to her. I think I have a right to have [my client] testify that those things, in fact, were not said by her.
>
> [DEFENSE COUNSEL]: Well, that's not rebuttal. . . .
>
> * * *
>
> [PLAINTIFFS' COUNSEL]: . . . [S]he said things that my client said to her in two categories. One category were things that were not addressed during our case-in-chief at all, in which case I'm going to have her for the first time be able to testify that, no, I didn't say those things to Dr. Wagner; I did not make those representations.

* * *

[PLAINTIFFS' COUNSEL]: The second category is my client said certain things during her case-in-chief during direct that she said were not true in a sense. I mean she didn't point the - -

THE COURT: That Wagner said that was not true?

[PLAINTIFFS' COUNSEL]: Well, she said just the opposite that those conversations didn't take place.

THE COURT: Yes. That's not rebuttal.

* * *

[PLAINTIFFS' COUNSEL]: . . . If during the Defense case they create an issue that suggests or even implies fabrication on the part of my client, I have the right to bolster her with a prior consistent statement, and that's what I'm planning on doing.

* * *

THE COURT: I disagree. It's not rebuttal.

* * *

THE COURT: I mean just to give you some guidance, . . . [i]f you're going to get into stuff she's already said, and Wagner said something to the contrary, she doesn't get to say the last word just because rebuttal's available to the plaintiff. . . .

[PLAINTIFFS' COUNSEL]: Well, the rule is very specific that I'm allowed to - - the only thing I really need to do, and I don't even know if I need to use her for it, but I guess I need her to authenticate it is to put in the prior consistent statement.

THE COURT: Well, you've got the prior consistent statement from your case-in-chief.

When plaintiffs' counsel could not specify which prior consistent statements he was referring to exactly, the court decided "to take it as it comes." Mrs. Hotchkiss then took

the stand again, and the following exchanges took place:

> [PLAINTIFFS' COUNSEL]: . . . There w[ere] some things addressed by Dr. Wagner I wanted to ask you about. Did she ever tell you in a conversation that you had with her, with Dr. Wagner, that made recommendations or suggestions of any sort about you going to see a surrogate agency?
>
> [MRS. HOTCHKISS]: No.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> * * *
>
> [PLAINTIFFS' COUNSEL]: . . . Did you tell Dr. Wagner that [Ms.] Jensen had been cleared?
>
> [MRS. HOTCHKISS]: No.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> * * *
>
> [PLAINTIFFS' COUNSEL]: . . . [D]id Dr. Wagner ever tell you that she did not review OB/GYN records?
>
> [MRS. HOTCHKISS]: No.
>
> [DEFENSE COUNSEL]: Objection.
>
> [MRS. HOTCHKISS]: It was the opposite.
>
> THE COURT: Overruled.
>
> [PLAINTIFFS' COUNSEL]: What did she tell you?
>
> [MRS. HOTCHKISS]: That she would, in fact, review them.

Appellants assert that the defense did not present any new evidence during their

case; yet, the trial court permitted Mrs. Hotchkiss to provide rebuttal testimony on three points already addressed in the plaintiffs' case-in-chief. They highlight plaintiffs' counsel's own acknowledgment that the testimony was repetitive when he proffered that Mrs. Hotchkiss would "bolster her [previous testimony] with a prior consistent statement[.]" Appellants press that an opposing party's contradictory testimony does not provide a legal basis for rebuttal testimony—particularly when the plaintiffs were made aware of those contradictions during discovery. Appellants complain that the trial court stated twice *in limine* that this testimony was not proper rebuttal testimony, but then declined to make a definitive ruling and instead allowed Mrs. Hotchkiss to respond to each duplicative question over the defense's objection. They suggest that the trial court's question-by-question approach put the defense in the position of objecting to each question the plaintiffs posed to a grieving mother, even though the entire testimony was improper, and the court should not have allowed it to begin with. By doing so, Appellants say that the trial court allowed Mrs. Hotchkiss to testify on exactly what it ruled she couldn't and gave Mrs. Hotchkiss the last word in what had been an emotional trial.

Appellees respond that Dr. Wagner's testimony went beyond Mrs. Hotchkiss's direct testimony by introducing, for the first time, evidence of her own affirmative statements of the parties' responsibilities—including that it was not her responsibility to do a surrogacy screening, review Ms. Jensen's obstetrician records, or provide obstetrician clearance. Also, Appellees claim Dr. Wagner testified for the first time that she had provided Mrs. Hotchkiss the name of a surrogacy agency, and that Mrs. Hotchkiss called her to advise her that Ms. Jensen obtained obstetrical clearance. Accordingly, Appellees

contend that because Dr. Wagner's testimony addressed new points and questions, it was necessary that Mrs. Hotchkiss be able to rebut her testimony so the jury would not be left with an "erroneous impression." Appellees suggest that Appellants' argument relies on an overly-constrictive and erroneous interpretation of what constitutes "new evidence." They believe it would have been patently unfair to permit Dr. Wagner to attack Mrs. Hotchkiss's credibility without permitting Mrs. Hotchkiss to do the same. Finally, Appellees argue that it was within the trial court's discretion to consider plaintiffs' counsel's questions one at a time. And, as a matter of logic, Appellees posit, Mrs. Hotchkiss's rebuttal testimony could not, simultaneously, be both duplicative and substantially injurious.

The Court of Appeals has instructed that "[r]ebuttal evidence 'includes any competent evidence which explains, or is a direct reply to, or a contradiction of, any *new matter* that has been brought into the case by the defense.'" *State v. Hepple*, 279 Md. 265, 270 (1977) (emphasis added) (citations omitted). "'[F]or evidence to be admissible as "true" rebuttal . . . it must respond to a new matter.'" *Schwartz v. Johnson*, 206 Md. App. 458, 503-04 (quoting Joseph F. Murphy, Jr., Maryland Evidence Handbook 104 (Matthew Bender, 4th ed., 2010)). This Court in *Schwartz* recently reiterated the standard by which we review a trial court's admission of rebuttal evidence:

> Because it is not always easy to draw the line between what is rebutting evidence and what is evidence properly adducible in chief, it is often stated that the admissibility of rebuttal testimony rests within the sound discretion of the trial court. [. . .] The trial judge has discretion to exclude rebuttal[.] . . . No trial judge, however, has discretion to make an erroneous finding of fact. When the question is whether proffered evidence does or does not explain, contradict, and/or reply to new matter introduced by the other side, the trial judge's finding of fact will be affirmed unless clearly erroneous. When the question is whether rebuttal . . . evidence was

> erroneously admitted or excluded for some other reason, the trial judge's ruling will be affirmed unless it was manifestly wrong.

Id. at 504 (quoting *Holmes v. State*, 119 Md. App. 518, 525 n.1 (1998) (our alterations in brackets). We will not reverse the erroneous admission of rebuttal testimony, however, "unless the ruling of the trial court was both 'manifestly wrong' and 'substantially injurious.'" *Riffey v. Tonder*, 36 Md. App. 633, 646 (1977) (quoting *Hepple*, 31 Md. App. at 532).

In *Hepple*, the Court of Appeals considered consolidated appeals from two criminal trials in which the scope of proper rebuttal testimony was at issue. During Hepple's trial, the State called as a witness a man named Romm who was found in possession of a stolen camper cap. *Id.* at 268. Romm testified that he received a call from a man named Woolford regarding the sale of a camper cap from Hepple. *Id.* The defense called Woolford as its only witness and he testified "that he had no business discussions with Romm concerning Hepple, that he had not talked to Romm and Hepple until after Romm had been arrested, that he could not remember if he had ever given Romm Hepple's telephone number, and that he had never asked Hepple to call Romm." *Id.* Then, over the defense's objection, the State called a man named Washenfeldt as a rebuttal witness, who testified that he had stolen campers several times for Hepple and this camper cap had been the first. *Id.*

During the second trial, the state's main witness, Denise, testified that the defendant, Jones, solicited her and several other girls to engage in prostitution and that Jones beat and burned her because he believed she double-crossed him. *Id.* at 269. Two other girls corroborated her testimony about the assault and one also testified that she and Denise both

prostituted for Jones. *Id.* After the defense presented five witnesses of its own, the State called a rebuttal witness over the defense's objection to testify that she too was beaten and "put on the streets" by Jones. *Id.* The trial court permitted her to testify that Jones solicited her to engage in prostitution but did not allow her to testify about the assault. *Id.* at 269-70.

This Court reversed both convictions and the Court of Appeals affirmed. *Id.* The Court of Appeals explained that, when considering whether to allow rebuttal testimony, the trial court must consider whether the evidence "'explains, or is a direct reply to, or a contradiction of, *any new matter* that has been brought into the case by the [accused].'" *Id.* at 270 (citations omitted) (emphasis added). The Court disposed of Hepple's case quickly, opining that Washenfeldt's testimony that he had stolen the camper for Hepple "can by no stretch of the imagination be said to explain, reply to, or contradict the testimony of Woolford, the defense's only witness." *Id.* at 272. In the *Jones* case, the Court reasoned that "a 'tendency' to restore the credibility of a State witness, where that witness' testimony has merely been contradicted by the defendant's denials rather than substantially impeached, cannot justify the admission of additional testimony which is cumulative and which could have been offered in chief." *Id.* (internal citations omitted). Further, even assuming the rebuttal witness contradicted the defendant's testimony, a defendant's denial of the alleged activity coupled with an assertion to the contrary "does not necessarily constitute 'new matter' entitling the State to present additional evidence on the same subject it originally sought to prove." *Id.*

Several years later, this Court held that rebuttal testimony was permissible in

Thimatariga v. Chambers, 46 Md. App. 260 (1980). The plaintiff's medical expert, Dr. Combs, testified during the plaintiff's case-in-chief that, based on his analysis of a pathology slide, there was no evidence that the plaintiff suffered from chronic pelvic inflammatory disease. *Id.* at 280. Then, during the defendant's case, the defendant introduced enlarged photos of the slide and his expert testified that those photos demonstrated that the plaintiff did in fact have chronic pelvic inflammatory disease. *Id.* Following this testimony, the plaintiff called Dr. Combs as a rebuttal witness and he testified, "I see no evidence in those photographs that would support any diagnosis of chronic pelvic inflammatory disease[.]" *Id.* On appeal, this Court concluded that the trial court had not abused its discretion: "It is clear from the record before us that the trial judge did not cavalierly permit Dr. Combs' rebuttal testimony but carefully weighed every objection [the defendant] interposed to such testimony." *Id.* Although Dr. Combs' rebuttal referred to the pathology slides he discussed during the plaintiff's case-in-chief, this Court emphasized that "it appears to have been solely for the purpose of rebutting Dr. Woodruff's analysis of the photographs used by him in the course of his testimony on behalf of the appellant." *Id.*

Recently in *Women First OB/GYN Associates, L.L.C. v. Harris*, this Court considered the propriety of rebuttal testimony in a medical negligence action. 232 Md. App. 647, *cert. denied sub nom.*, 456 Md. 73 (2017). In Ms. Harris' case-in-chief, her expert testified that Ms. Harris' doctor breached the standard of care while performing her hysterectomy. *Id.* at 682. Another expert testified that pyelogram images taken of Harris showed she had an obstruction and leak in her left ureter at the level of her uterine artery.

Id. at 683. The defense then presented two experts who testified that the leak was below the uterine artery and, thus, below where the doctor performed the hysterectomy, and that another doctor, Dr. Karr, actually caused the leak while he performed the pyelogram procedure. *Id.* at 684. The court then permitted Ms. Harris to call Dr. Karr as a rebuttal witness to testify that the defense experts read the pyelogram images incorrectly. *Id.* at 685. We held that the trial court did not abuse its discretion by doing so because "the[] opinions exclusively and directly addressed the new matters first raised by [the defense experts] in their trial testimony; they did not echo [Ms. Harris' expert's] opinion in Ms. Harris' case-in-chief." *Id.* at 687-88.

Returning to the case before us, Dr. Wagner's 'rebuttal' testimony did not address any new evidence or issues. Mrs. Hotchkiss testified during plaintiffs' case-in-chief that: she understood her duty to be to find a suitable candidate and then "pass them off" to Dr. Wagner for medical clearance; she believed Ms. Jensen would bring her obstetrician's clearance to her appointment with Dr. Wagner; she anticipated a call from Dr. Wagner following that appointment because she believed from a conversation she had with Dr. Wagner that Dr. Wagner would clear Ms. Jensen during that visit, and; that Dr. Wagner did in fact call Mrs. Hotchkiss to inform her that she cleared Ms. Jensen during that visit, telling her, "everything looked great" and "we're ready to go." Testifying for the defense, Dr. Wagner said she told Mrs. Hotchkiss that she does not do surrogacy screenings or obstetric clearances or review obstetric records, and that, prior to her meeting with Ms. Jensen, Dr. Wagner was told that Ms. Jensen had her obstetric clearance.

In the subsequent colloquy at the close of the defense's case, plaintiffs' counsel

sought to recall Mrs. Hotchkiss as a witness and proffered that he would address only *new* issues on rebuttal but could not specify what those would be. Despite recognizing, correctly, that it was improper rebuttal for Mrs. Hotchkiss to simply refute Dr. Wagner's version of their conversations, the trial court permitted Mrs. Hotchkiss to do just that. The testimony did not address any new material introduced during the defense's case and was merely cumulative. *See Hepple*, 279 Md. at 271-72. The facts at issue were critical to plaintiffs' case and it was incumbent on them to anticipate that Dr. Wagner would dispute material facts during the defense's case. *Cf. Riffey*, 36 Md. App. at 646 (holding that rebuttal was proper when there was no reason for the plaintiff to anticipate the defense's evidence). Because Mrs. Hotchkiss's rebuttal testimony "'d[id] not explain, contradict, and/or reply to a *new matter* introduced by the other side,'" the trial judge erred by allowing the testimony. *See Schwartz*, 206 Md. App. at 504 (emphasis added) (citation omitted).

Even though we conclude the court erred in admitting the rebuttal testimony, it is the second part of the relevant two-part analysis we undertake that bars Appellants from their desired relief. As we stated above, we may reverse the trial court only if the decision to admit improper rebuttal testimony was "substantially injurious." *Thimatariga*, 46 Md. App. at 281. Our decision in *Thimatariga* disposed of a similar claim on appeal. There, after the defendant testified at length about a conversation he had with the plaintiff just prior to her operation, plaintiff's counsel recalled her to ask whether the conversation occurred. *Id.* at 281. Even though she had already testified in chief that she had not seen the defendant just prior to her operation, the court permitted her to respond on rebuttal: "No, it never took place." *Id.* This Court held that "[t]he admission of this five word

sentence, even if assumed to be error, was not so substantially injurious to the rights of the appellant as to require a reversal of the judgment entered on the jury's verdict." *Id.* Similarly, here, we hold that Mrs. Hotchkiss's cumulative testimony, which consisted of five brief responses, was not "so substantially injurious" to warrant reversing the jury's verdict below. In the context of all the evidence presented at trial, there was nothing striking about Mrs. Hotchkiss's rebuttal testimony.

II.

Improper Summation

Appellants contend that the trial court erred by permitting plaintiffs' counsel to make improper arguments during closing argument, including arguing informed consent when the issue was not before the jury, violating the "golden rule," as well as several other improprieties during Appellees' closing argument that had the effect of inflaming the jurors' passions and prejudicing Appellants. Appellants maintain that the cumulative effect of these statements deprived Dr. Wagner and WHFC of a fair and impartial trial. Appellees retort that their closing arguments were proper and, even if improper, did not prejudice Appellants. We will address each argument in turn.

The Court of Appeals has instructed that during closing arguments, generally, it is "within the range of legitimate argument for counsel to state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence; and such comment or argument is afforded a wide range." *Wilhelm v. State*, 272 Md. 404, 412 (1974), *abrogation on other grounds recognized in Simpson v. State*, 442 Md. 446, 458 n.5 (2015). "There are no hard-and-fast limitations within which the argument of

earnest counsel must be confined—no well-defined bounds beyond which the eloquence of an advocate shall not soar." *Id.* at 413. But, "[i]t cannot rightly be said that the zeal of advocacy knows no bounds. There are bounds[.]" *Ferry v. Cicero*, 12 Md. App. 502, 508 (1971). "What exceeds the limits of permissible comment or argument by counsel depends on the facts of each case." *Smith and Mack v. State*, 388 Md. 468, 488 (2005). Generally, "counsel may not 'comment upon facts not in evidence or . . . state what he or she would have proven.' It is also improper for counsel to appeal to the prejudices or passions of the jurors, or invite jurors to abandon the objectivity that their oaths require[.]" *Mitchell v. State*, 408 Md. 368, 381 (2009) (internal citations omitted).

A trial judge faced with counsel's improper remarks has broad discretion to determine whether to issue a curative instruction or to grant a mistrial due to the judge's "opportunity to hear the attorney as well as to appraise the effect of his words on the jurors before him" or her. *Leach v. Metzger*, 241 Md. 533, 537 (1966) (citation omitted). "The failure to declare a mistrial after counsel has made improper remarks to the jury does not usually constitute an abuse of discretion. Indeed, '[e]ven when a clearly improper remark is made, a mistrial is not necessarily required.'" *Hopkins v. Silber*, 141 Md. App. 319, 339-340 (2001) (quoting *Hill v. State*, 355 Md. 206, 223 (1999)). The trial court "has many options" short of a mistrial. *Ferry*, 12 Md. App. at 509. It "may conclude to take no action, [] may admonish the jury, [] may restrict or forbid altogether any argument on the point, [] may permit opposing counsel to respond," or "may take any other appropriate action." *Id.* This choice is within the trial court's discretion, "and only in the exception case, the blatant case, will his choice of cure and his decision as to its effect be reversed on appeal." *DeMay*

v. Carper, 247 Md. 535, 540 (1967) (citations omitted). We will not reverse the trial court unless it "clearly abused the exercise of its discretion and prejudiced the [moving party]." *Degren v. State*, 352 Md. 400, 431 (1999). To determine whether the trial court abused its discretion, we consider: "the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence[.]" *Spain v. State*, 386 Md. 145, 158-59 (2005).

A. Informed Consent

Appellants contend that, during summation, plaintiffs' counsel argued facts and a theory of recovery pertaining to an informed consent claim despite the trial court having granted judgment in Appellees' favor on that issue. Appellants also contend that there was a lack of evidentiary foundation for this argument. Accordingly, Appellants posit that the jury may have incorrectly believed that it could find Dr. Wagner negligent for failing to disclose that she had not received Ms. Jensen's written obstetrical clearance, and therefore a new trial is warranted. Because the jury's verdict was, at best, equivocal, and the trial court failed to cure this prejudice, Appellants urge that we cannot determine whether the jury was misled.

Appellees respond that, "although the trial judge dismissed the informed consent claims . . . , he nonetheless made clear that such ruling did not preclude Appellees from claiming that Dr. Wagner failed to inform them that necessary records were not received and reviewed prior to moving forward with Ms. Jensen's surrogacy." As a result, Appellees argue, the trial court's ruling permitted them to present expert testimony on the standard of care and that Dr. Wagner breached that standard by advising Mrs. Hotchkiss

that Ms. Jensen was cleared to act as a surrogate. As to Appellants' argument that plaintiffs' closing argument lacked an evidentiary basis, Appellees argue that this issue was not raised when Appellants' counsel objected and is thus forfeited on appeal. Regardless, Appellees contend that Dr. Grazi's testimony that Dr. Wagner breached the standard of care by telling Mrs. Hotchkiss that Ms. Jensen was cleared provided the evidentiary basis for the closing argument. And, Appellees continue, even if the argument was somehow improper, Appellants cannot show that they were prejudiced by "such discrete comments in the context of a weeklong trial[.]"

Appellants reply that the trial court's grant of judgment on the issue of informed consent means the only issue before the jury was: "whether the standard of care required Dr. Wagner to directly obtain and review the surrogate's past medical records, as opposed to relying upon the surrogate's verbal representations[.]" The issue was not, Appellants continue, whether Dr. Wagner failed to inform or disclose certain information to the Hotchkisses. Appellants insist that Appellees' trial arguments belie their contention here that the negligence claim included the duty to disclose claim. According to Appellants, Appellees' trial counsel was well aware and in agreement that Dr. Grazi's standard of care testimony was limited to whether Dr. Wagner "didn't get a clearance letter and didn't get records to review as an alternative to a clearance letter[,]" and that the plaintiffs did not elicit or proffer any testimony that Dr. Wagner breached her standard of care by failing to notify the Hotchkisses. Despite this, Appellants argue, Appellees' trial counsel argued in closing that informed consent was a basis on which the jury could find her culpable, and this was error.

We begin our analysis by noting that the court granted judgment on Counts VII and VIII, which were the informed consent claims.[5] Count I of the complaint (medical negligence against Dr. Wagner), which was not dismissed, alleged that Dr. Wagner failed to "disclose to Andrew and Marni Hotchkiss any potential medical concerns or issues that could potentially complicate the surrogacy," and to "allow Andrew and Marni Hotchkiss to make the final decision as to whether they should proceed with a particular surrogate by obtaining informed consent." As Appellees point out, throughout the trial proceedings, the trial judge expressed repeatedly that Appellees' informed consent claims were better characterized as "pure" or "straightforward negligence[.]" For instance, when defense counsel argued that a reproductive endocrinologist's duty to advise the patient of a surrogate's medical history goes to informed consent, the court replied, "It may go to negligence." Then the following colloquy ensued:

> [PLAINTIFFS' COUNSEL]: [I]t's clear that [] it does go to negligence in the sense that he has to relay that to his, his patients, what information there is, what the reports indicate[] in terms of prior complications before moving forward. It's to receive the report and make sure the patients are aware of that.
>
> THE COURT: And does he say it goes along with a recommendation to the donor parent?
>
> [PLAINTIFFS' COUNSEL]: Sure, of course. That's all part and parcel of the recommendation.

[5] Counts VII and VIII alleged that Dr. Wagner and WFHC, respectively, owed a duty to inform the Hotchkisses: (1) of any and all risks that could result from using Ms. Jensen as a gestational surrogate, (2) that they had an option of using a different surrogate, and (3) that the applicable standard of care required rejecting Ms. Jensen as a surrogate candidate. Additionally, the counts alleged that Appellees had a duty to learn that Ms. Jensen had preeclampsia and then to inform the Hotchkisses of this.

> [DEFENSE COUNSEL]: That's informed consent.
>
> [PLAINTIFFS' COUNSEL]: No, it's not, Your Honor.
>
> THE COURT: All right. I don't think it's informed consent. It's, if it's boxed up as informed consent, then your point would be well taken, but I perceive it as being just straight forward negligence, not doing the right thing under the circumstances.

Although the trial court granted judgment to the defendants on the informed consent claims (Counts VII and VIII), the court stated that it was "not so sure" the informed consent claims and medical negligence claims were not just a "distinction without a difference," because the negligence claims "clearly address the issue of duty to obtain records, failure to obtain records, duty to disclose, failure to disclose, precluding opportunity to make a determination about proper candidacy and so forth[.]" After removing the jury from the courtroom, the trial judge continued: "So as I said I'm going to grant the motion on informed consent because I do think that this is not an informed consent case, that *the negligence claims cover the substance* of what is attempted to be boxed as an informed consent claim[.]" In other words, the trial court understood Dr. Wagner's alleged duty to inform the Hotchkisses to be subsumed within Appellees' negligence claim. Plaintiffs' counsel's argument in summation was consistent with this understanding. Appellants do not challenge on appeal that the trial court erred by allowing Appellees' negligence claim to include a duty to inform, but instead challenge the closing arguments made consistent with this ruling. We therefore find no impropriety in trial counsel's argument before the jury that Dr. Wagner was negligent in not informing the Hotchkisses that she had not received Ms. Jensen's medical records.

B. Golden Rule

Next, Appellants argue that plaintiffs' counsel violated the golden rule by appealing to the jury's passions and prejudices when he instructed the jury to award damages "and hope it never happens again." The argument at issue came at the conclusion of plaintiffs' counsel's summation:

> [W]hat we're asking you to do is to give a verdict in favor of the plaintiffs, both Marni and Andy Hotchkiss, as well as Finley Hotchkiss, and give them justice, and give them a fair and reasonable shake for what happened to them, *and hope it never happens again.* Thank you.

(Emphasis added).

The trial judge then began dismissing the alternate jurors. During this process, the trial judge paused and asked defense counsel if he was standing for a reason. Defense counsel responded "Eventually —" "—when Your Honor's ready." The trial judge concluded his instructions to the jury, swore the bailiff, and excused the jury. As the jury left the courtroom the trial judge asked defense counsel, "did you want to talk to me about something before the jury goes back?" Defense counsel responded: "No," then, as soon as the jury left the courtroom, moved for mistrial, asserting that plaintiffs' counsel "essentially request[ed] the jury to send a message monetarily in the context of money damages[.]"

After a brief recess to retrieve a transcript of the proceedings, the parties began to argue the merits of the motion. The court "disagree[d] that it's a clear send a message, save the community [] kind of thing." But the court found that it was "enough in that direction" "to give the jury an instruction to disregard that; that their verdict has to be based on all the things that I've already instructed them about;" and their verdict is "in no way is

. . . a vehicle to send a message to somebody." The court denied Appellants' motion for a mistrial and instructed the bailiff to bring the jury back to the courtroom "right away." The bailiff noted that the jury hadn't started deliberating yet. Before the bailiff returned with the jury, the trial judge asked defense counsel if he had a preference on the specifics of the instruction, to which counsel responded: "I agree with the Court['s] preference[.]"

Once the jury reentered the courtroom, the trial judge instructed:

> I said to you a number of times what you're to base this case on, and I've already instructed you on that, of course, base it solely on the evidence without consideration of certain things, and you'll recall what I said, and you have the jury instructions back with you.
>
> I do want to add to that your verdict must be based on the evidence, and it must not be based on anything else. And *your verdict is not to send a message to somebody, or to punish somebody*. Your verdict must be based solely on the evidence, and it will end with what happens in this courtroom.

(Emphasis added).

1. Preservation

Appellees contend that Appellants did not preserve this objection for appeal because they did not object until after the jury went to deliberate. Appellants reply that they did not forfeit the issue because defense counsel stood to object as soon as Appellees' trial counsel made the comment.

We conclude that Appellants preserved their "golden rule" argument. The Court of Appeals' decision in *Hill* is instructive. 355 Md. at 213. There, the defendant "moved for a mistrial based on the closing argument of the State regarding [the jury] 'sending a message' [with its verdict]." *Id.* (footnote omitted). As in the instant case, however, the defendant did not make that motion until after the court swore the bailiff and sent the jury

to deliberate. *Id.* The trial court denied the motion on the merits—not because it was untimely. *Id.* at 215. The Court of Appeals held that the defendant had preserved his objection because "he did not[] . . . wait an inordinate amount of time, but presented his request as soon as the court concluded its various remarks." *Id.* at 219. It explained:

> When, as here, . . . (1) the motion is not unduly delayed and timeliness is not raised as a defense in the trial court, (2) the trial court does not consider timeliness, even as an alternative ground, but denies the motion on the ground that *no* further relief is called for, (3) no prejudice to the court or either party is indicated, and (4) the appellate court determines that the complaint underlying the motion is valid, a complaint that the motion was improperly denied should be added on appeal and not found unpreserved.

Id. at 220-21 (emphasis in original).

We observe that the argument to which Appellants objected and now contest on appeal was the last line of Appellees' closing argument, at which point defense counsel stood and the court acknowledged him. Although he waited until after the jury left the room before he made his motion, the trial court then ruled on the merits of that motion immediately, recalled the jury, and issued a curative instruction before the jury began deliberations. Accordingly, as the Court of Appeals held in *Hill*, counsel's objection was sufficient to preserve the issue for appeal. *See id.* at 219-21.

2. The Merits

According to Appellants, the "golden rule" argument inherently made the jury abandon its objectivity and go outside the evidence to award damages based on subjective prejudices. Although the trial court gave the jury a curative instruction on this point, Appellants complain that the proverbial cat was out of the bag already and the damage was done. Because the jury was excused to deliberate before the curative instruction was given

is exactly why Appellants insist that "the bell could not be unrung," and a new trial is required.

Appellees characterize counsel's statement—"and hope it never happens again"—as six "innocuous words," spoken in a "very low voice," which the trial court then cured with an instruction. They also point out that Appellants did not request any alternative or additional language for the curative instruction. Further, Appellees argue that the argument was not even improper. Unlike the cases on which Appellants relies, trial counsel's closing argument was not meant to be inflammatory or prejudicial, did not ask the jury to put itself in the plaintiffs' position, and was not repeated numerous times.

"A 'golden rule' argument is one in which a litigant asks the jury to place themselves in the shoes of the victim, or in which an attorney appeals to the jury's own interests[.]" *Lee v. State*, 405 Md. 148, 171 (2008) (internal citations omitted). The Court of Appeals has also instructed that attorneys "should not implore jurors to consider their own interests in violation of the prohibition against the 'golden rule argument.'" *Id.* "The vice inherent in such argument is that it invites the jurors to disregard their oaths and to become non-objective viewers of the evidence which has been presented to them, or to go outside that evidence to bring to bear on the issue of damages purely subjective considerations[.]" *Leach*, 241 Md. at 536-37 (in which the plaintiff's attorney asked the jury to consider the situation "as though it was your wife involved").

The term "golden rule" is sometimes used more expansively to encompass all arguments that prey on the prejudices of the jury. In discussing the golden rule, the Court of Appeals in *Lee* referred to its prior decision in *Hill*, in which "the prosecutor, during

opening arguments, told the jury that they were 'chosen to send a message to protect [the] community' and to 'keep [ ][the] community safe.'" *Lee*, 405 Md. at 171 (quoting *Hill*, 355 Md. at 211-12). The Court in *Hill* held that these comments "were 'wholly improper and presumptively prejudicial,' and iterated that 'appeals to jurors to convict a defendant in order to preserve the safety or quality of their communities are improper and prejudicial[.]'" *Lee*, 405 Md. at 171 (quoting *Hill*, 355 Md. at 216, 219-20). Like *Hill*, the prosecutor in *Lee* "asserted during [] rebuttal argument that residents of Baltimore City have a right to be safe and requested the jurors to protect their community and clean up the streets." *Id.* at 170. The Court held that this violated the golden rule. "Essentially, the State was calling for the jury to indulge itself in a form of *vigilante justice* rather than engaging in a deliberative process of evaluating the evidence." *Id.* at 173 (emphasis in original). The Court found these comments improper even though they asked the jurors to teach a lesson to the defendant, rather than sending a message to the community as a whole, "because they asked the jury to view the evidence in th[e] case, not objectively, but consonant with the juror's personal interests." *Id.*; *see also Beads v. State*, 422 Md. 1, 11-13 (2011) (holding that it violated the golden rule to ask jurors to consider their own personal safety by imploring them to "say enough" to gun violence by rendering a guilty verdict).

As the trial court acknowledged, plaintiffs' counsel's closing argument exceeded the scope of a permissible summation of facts. While not the most explicit plea for a punitive verdict, the argument preyed on the passion of the jury by asking them to "hope it never happens again." This argument was clearly improper.

Not every improper argument requires a mistrial, however. *See Lee*, 405 Md. at 174. The decision to grant a mistrial is within the trial court's sound direction and "appellate review 'is limited to whether there has been an abuse of discretion in denying the motion.'" *Hopkins*, 141 Md. App. at 339 (quoting *Hill*, 355 Md. at 221) (additional quotation marks and citation omitted). This Court explained in *Hopkins* that the trial court's denial of a mistrial "after counsel has made improper remarks to the jury does not usually constitute an abuse of direction. Indeed, '[e]ven when a clearly improper remark is made, a mistrial is not necessarily required.'" *Id.* at 339-40 (quoting *Hill*, 355 Md. at 223). Generally, counsel's improper or prejudicial remarks "are cured by reproof by the trial judge; . . . only in the exceptional case, the blatant case, will his [or her] choice of cure and [] decision as to its effect be reversed on appeal." *DeMay*, 247 Md. at 540. The trial judge may, in his or her discretion, "take no action, . . . admonish the jury, . . . restrict or forbid altogether any further argument on the point, . . . permit opposing counsel to respond, . . . declare a mistrial . . . [or] take any other appropriate action." *Ferry*, 12 Md. App. at 509.

In *Leach*, for instance, a case for damages resulting from injuries Ms. Estelle Metzger sustained in a car accident, her counsel asked the jury to award damages "as though it was your wife." 241 Md. at 535-36. The trial court denied the defense's motion for a mistrial but instructed the jury that the argument was improper:

> [T]o the argument that [plaintiff's counsel] has just made that you are to consider the situation as though . . . it was your wife involved. That is not the test, and really that's not proper argument. I have told the jury the elements they may consider for the determination of this case, and I am sure they will follow that instruction. It isn't a question as though it's your wife,

> anybody else's wife, you or anybody else. It's a question of what is fair and reasonable and proper compensation, based on the evidence and the instructions you have received.

Id. at 536. Leach, the defendant, appealed the court's failure to grant a mistrial. The Court of Appeals held that the trial court had not committed reversible error "because he promptly and unequivocally instructed the jurors to disregard the argument, and as well succinctly reminded them of his earlier instructions, to which no objection has been made." *Id.* at 537. The Court explained that the trial judge's ability to hear the statement and appraise its effect on the jury necessitated empowering the trial court with a wide range of "discretion in deciding whether the prejudicial effect of counsel's remarks can be erased by corrective instructions or if a mistrial is required." *Id.* On the facts before it, the Court found no abuse of discretion. *Id.*

Similarly, we find no abuse in discretion by the trial court below. The trial court recalled the jury before they began deliberating and gave them a curative instruction, reiterating to the jury that they must base their verdict on the evidence alone and not attempt to use the verdict to send a message or punish anyone. The trial court took care to address the specific issue without quoting or highlighting the actual remarks so not to remind the jury and focus their attention on the impropriety. Given the wide discretion we afford a trial court as well as the trial court's prompt and targeted steps to ameliorate any prejudicial effect, we conclude that Appellants are not entitled to a new trial on these grounds.[6]

[6] We note that the trial court rebuked plaintiffs' counsel for several additional the improprieties. For example, the court *sua sponte* asked plaintiffs' counsel to control his client's emotional outbursts. When this attempt was unsuccessful, the judge removed Mr. Hotchkiss from the courtroom. The court also stopped plaintiffs' counsel from using a

III.

Conscious Pain and Suffering

Appellants argue that the trial court erred by permitting Appellees' claims for non-economic damages to go to the jury because Appellees failed to produce sufficient evidence of Finley's conscious pain and suffering—one of the four elements a plaintiff must prove in a medical malpractice action. In Maryland, Appellants insist, a plaintiff must present evidence—often through testimony—from which the jury can reasonably infer that the victim was both conscious and in pain. Although Appellants concede that generally "a lay person's observations may be acceptable in certain circumstances to establish the elements of conscious pain and suffering," they assert that expert testimony was required in this specific case given Finley's extreme prematurity.

To the contrary, Appellees argue that consciousness and pain and suffering are factual questions that the jury may infer from the testimony of layperson eyewitnesses, from expert testimony, or from evidence that in normal experience would allow a juror to conclude that the victim experienced fear or pain. Appellees suggest that the following evidence established these elements below: (1) Dr. Cone's testimony about the connection between Dr. Wagner's negligence and Finley's prematurity, which resulted in her thin skin and eventual admission to intensive care and (2) the Hotchkisses' testimony that they

picture of Finley during closing arguments. Not every improper or prejudicial act by trial counsel warrants a mistrial, and we afford trial judges great leeway to manage a trial based on their ability to hear the remarks and perceive their effect on the jury. Despite the heightened emotions of this trial and several attempts by plaintiffs' counsel to play to the jury's passions, we believe the trial court acted well within its discretion by admonishing plaintiffs' counsel in each instance and instructing the jury when necessary.

observed Finley move, make eye contact, experience breathing problems, and cry—including a "different kind of cry" when she was "messed with." There was no need for an expert to testify that Finley could feel pain, Appellees insist, because it is logical to infer that a conscious human being can experience pain. Further, according to Appellees, the trial court instructed the jury that it could award non-economic damages for Finley's mental anguish, which the evidence at trial also established. Regardless, Appellees conclude, this point is moot because the wrongful death judgment exceeded the statutory cap without including the Estate's claim for pain and suffering.

Appellants reply that the statutory cap does not moot this issue because having to witness Finley's alleged pain and suffering was a component of the Hotchkisses' own pain and suffering claim. They contend that any arguments about Finley's pain and suffering that were not scientifically proven were improperly allowed into evidence and "impacted not only the Estate's claim for noneconomic damages ($2 million), but the Hotchkisses' claim for noneconomic damages ($42 million) as well."

When an appellant challenges the sufficiency of the evidence submitted to a jury, we review the evidence in the light most favorable to the non-moving party below. *Univ. of Md. Med. Sys. Corp. v. Malory*, 143 Md. App. 327, 335-36 (2001). We seek to "to determine whether 'there [was] some evidence in the case, including all inferences that may permissibly be drawn therefrom, that, if believed and if given maximum weight, could logically establish all of the elements necessary to prove that the . . . tort[-]feasor committed the tort[.]" *Id.* at 336 (quoting *Starke v. Starke*, 134 Md. App. 663, 678-79 (2000)).

In an action for the recovery for conscious pain and suffering, "the plaintiff must

establish, by a preponderance of the evidence, that the defendant's negligence was the direct and proximate cause of the incident and that the deceased experienced conscious pain and suffering as defined by Maryland law." *Id.* at 346 (citing *Ory v. Libersky*, 40 Md. App. 151, 159-60 (1978)). In *Ory*, this Court adopted the following definition of conscious: "'(a)ware or sensible of an inward state or outward fact' or 'mentally awake, physically active or acute; in a state of consciousness; knowing.'" 40 Md. App. at 161 (quoting 15A C.J.S. Conscious at 571). We explained:

> The mere fact of consciousness after an accident causing bodily injury does not inescapably lead to a conclusion that pain is being experienced. Additional evidence must be presented on this question in order for an award of damages for conscious pain and suffering to be upheld.
>
> Evidence as to body sounds, such as moaning, gurgling, and heavy breathing, is insufficient to show consciousness or suffering on the part of the victim. On the other hand, exclamations from the victim may establish both consciousness and suffering.

Id. at 161-62 (internal citations omitted).

The decedent in *Ory*, Mr. Holden, succumbed to injuries suffered in a car accident. *Id.* at 154. A first-responder testified that he believed the decedent was conscious when he arrived at the scene. *Id.* at 160. The first-responder relayed that the victim "was breathing rather laborly (sic) and he apparently had swallowed some blood because [t]here was a gurgling sound in breathing, and he made no moans as such, other than this common gasping sound for breath[.]" *Id.* Further, he testified that, "on the way to the hospital, Mr. Holden's eyes were open as if in a stare, but that he made no movements and did not respond orally [] at any time." *Id.* at 161. Another rescue-squad responder testified that Mr. Holden appeared to be unconscious and a nurse stated that he had no blood pressure

by the time he arrived at the hospital. *Id.* This Court held that this evidence was insufficient to establish conscious pain and suffering because "[t]here was no verbal communication from the victim, and no movement of his arms or other parts of his body to signify the sensation of pain." *Id.* at 162. The first-responder's testimony was not enough, the Court explained, because he did not testify that Mr. Holden was experiencing pain and no medical expert testified that, if conscious, Mr. Holden was still capable of experiencing pain. *Id.*

In *Benyon*, however, the Court of Appeals ruled that "damages for emotional distress or mental anguish are recoverable in Maryland, provided that it is proximately caused by the wrongful act of the defendant and it results in a physical injury, or is capable of objective determination." *Beynon v. Montgomery Cablevision Ltd. P'ship*, 351 Md. 460, 504-05 (1998). The Court held that an automobile creating 71½ feet of skid marks and the driver's resulting fatal injuries from the crash were the physical injury and independent objective manifestation required to prove the driver's pre-impact fright. *Id.* at 507.

This Court distinguished *Beynon* in *Malory*, *supra*, 143 Md. App. at 347-48. As in the instant case on appeal, *Malory* involved a survival action brought on behalf of a small child. The two-year-old child in *Malory* was hospitalized with symptoms consistent with hypoxia (desaturated blood oxygen levels and dusty skin color, as well as trouble breathing). *Id.* at 334. After monitoring the child in the ER for around four hours, doctors discharged him; the child died at some point that night as he slept next to his mother. *Id.* at 334-35. A jury awarded the child's estate $202,344, and the hospital appealed, arguing in relevant part that the trial court erred by submitting to the jury the estate's claim for conscious pain and suffering. *Id.* at 333, 345. This Court reversed the award for conscious

pain and suffering, reasoning that because the child was already unconscious from the time his mother found him until his death, testimony of the type of pain the child could have felt consistent with his cause of death was "mere speculation." *Id.* at 348. We declined to follow the analysis in *Benyon*, because that case "pertained to a conscious driver, who was certain to incur injuries from a known obstacle." *Id.* In *Malory*, by contrast, there was no direct evidence that the child was conscious in the time leading up to his death, capable of experiencing fear or fright. *Id.*

Then, in *Freed*, the Court of Appeals distinguished *Malory*. *DRD Pool Serv., Inc. v. Freed*, 416 Md. 46, 58-59 (2010). The decedent in *Freed* was a small child who drowned in a pool with no witnesses. *Id.* at 52. The parties' experts "disagreed on whether it was possible to determine [the child's] actual conscious pain and suffering." *Id.* at 53. The estate's expert testified "to a reasonable degree of medical certainty" that the child experienced pain and suffering during the approximate two and a half minutes it would have taken a five-year-old to drown. *Id.* at 53. In response, the defense "argued that because no one saw [the child] drown, the claim of conscious pain and suffering was not supported by any objective evidence and was therefore precluded." *Id.* at 54. The Court of Appeals announced that "[o]nly a reasonable inference of conscious pain and suffering is required in order to submit the survivorship claim to the jury[.]" *Id.* at 57.

The *Freed* Court held that there was sufficient evidence from which the trier of fact could reasonably infer conscious pain and suffering because on the child's "medical history, the autopsy report, and [the estate's expert's] opinion[,]" which "all support[ed] the inference that [the child] was conscious when he entered the water and suffered while

drowning." *Id.* at 57. The Court distinguished *Malory*, in which "there was no case-specific evidence that the infant was conscious, [and] expert testimony opining that the infant experienced conscious pain and suffering was speculative." *Id.* at 59 (citing 143 Md. App. at 348). By contrast, in drowning cases, "eyewitness testimony is not essential" and "autopsy reports and expert testimony may be sufficient evidence from which to infer conscious pain and suffering[.]" *Id.* at 60.

The thread tying together the cases on which Appellants rely is the question of consciousness. When this Court in *Malory* declined to apply the *Benyon* Court's analysis, we explained that it was because the driver in *Benyon* was *conscious* and thus "certain to incur injuries from a known obstacle." 143 Md. App. at 348. And when the Court of Appeals later distinguished the facts of *Malory*, it did so because "there was no case-specific evidence that the infant was conscious" in *Malory*. *See Freed*, 416 Md. at 59. Here, however, there is no dispute that Finley was conscious over the 21 days that she lived. The issue, then, is whether she suffered. As we explained in *Ory*, "exclamations from the victim may establish both consciousness and suffering." 40 Md. App. at 161. "*Only a reasonable inference* of conscious pain and suffering is required in order to submit the survivorship claim to the jury[.]" *Freed*, 416 Md. at 57 (emphasis added).

In this case, Finley's parents testified that she could make eye contact, and that she cried a "different kind of cry" when she was "messed with" by hospital staff caring for her. Mrs. Hotchkiss testified that Finley would cry and "fussed a lot" when people touched with her, and that the medical staff "couldn't get her to stay still" when they would give her IVs and put tubes in her nose. On the facts of this case—viewed in the light most favorable to

Appellees—we conclude that the Hotchkisses' observations of Finley's responses to pain, and their description of her cries were sufficient to create an inference that Finley was suffering physical and/or mental anguish. *See Malory*, 143 Md. App. at 335-36. We find no merit to Appellants argument that the Hotchkisses had to offer scientific prove of a premature infant's capacity to feel pain to establish their own mental suffering as parents.[7]

IV.

Size of the Judgment

Finally, Appellants argue that the $44.1 million award shocks the conscience. This judgment is unconscionable, they maintain, because the question at trial was limited to whether Dr. Wagner was entitled to rely on the medical history that a patient provides or had an affirmative obligation to obtain the patient's medical records. To this point, Appellants assert, Dr. Wagner was not Ms. Jensen's obstetrician, she did not make the decision to deliver Finley prematurely, and she was not involved in treating Finley's prematurity or sepsis. The magnitude of the jury's damages award goes beyond sympathy, according to Appellants, and instead evinces intent to "send[] a message"—just as plaintiffs' counsel encouraged them to do. Appellants conclude that because the verdict was based on passion or sympathy, rather than law or fact, a new trial is required.

Appellees respond that it is within the trial judge's discretion to determine whether a judgment shocks the conscience and whether a verdict is so excessive as to warrant a

[7] As Appellees point out, the circuit court reduced the $44.1 million award of non-economic damages to the statutory cap of $887,500.00. Thus, even if there was insufficient evidence to support the $2.1 million award to Finley's estate, the jury's award of non-economic damages alone well exceeded the statutory cap.

remittitur or new trial. Appellees suggest that Appellants want a *de facto* ruling that a verdict of $44.1 million must have resulted from improper motivation or influence, without attempting to consider that verdict in the light of Appellees' losses and how the verdict relates to similar wrongful death actions. Then, to normalize the size of the award, Appellees point us to several multi-million-dollar awards in Maryland for non-economic damages in medical malpractice cases, some of which involve the death of children. In light of the evidence at trial—including the Hotchkisses' struggles to have a child and their efforts to save Finley—Appellees do not believe their verdict was shocking or unfair. Finally, Appellees argue that the excessive verdict issue is moot since the trial court reduced the award from $44.1 million to $887,500.

Determining "whether a verdict 'shocked [the] conscience,' was 'grossly excessive,' or merely 'excessive[]'" is within the trial judge's discretion. *Conklin v. Schillinger*, 255 Md. 50, 69 (1969) (citation omitted). The Court of Appeals has explained:

> A trial judge, upon finding a verdict excessive, *may* order a new trial unless the plaintiff will agree to accept a lesser sum fixed by the court. The standard to be applied by a trial judge in determining whether a new trial should be granted on the ground of excessiveness of the verdict has been variously stated as whether the verdict is "grossly excessive," or "shocks the conscience of the court," or is "inordinate" or "outrageously excessive," or even simply "excessive." The granting or refusal of a remittitur is largely *within the discretion of the trial court*.

Banegura v. Taylor, 312 Md. 609, 624 (1988) (internal citations omitted) (emphasis added).

We will not, therefore, override a trial court's decision to reduce a verdict or grant a new trial unless the court abused its discretion. *Id.* There is no per se rule that an

excessive verdict—even one that is extraordinarily so (such as the largest verdict in county history)—requires the trial court to grant a new trial rather than a remittitur. For the proposition that a new trial was, in fact, "required," Appellants rely on this Court's decision in *Sobus v. Knisley*, 11 Md. App. 134 (1971). That case, however, stands for the proposition that the issue is one within the trial court's discretion.

Kinsley, the plaintiff in a personal injury suit following a car accident, testified at trial regarding his extensive military record in World War II, the awards he received, and that he chose to stay and fight after being wounded twice. *Id.* 135, 141. The defendant-appellant argued that he was prejudiced because this "served only to arouse the emotions and sympathy of the jury." *Id.* at 141. This Court enunciated that it was for *the trial court* to consider on a motion for a new trial whether a jury's emotions and sympathy "w[ere] so aroused and its verdict affected[.]" *Id.* Ultimately, this Court concluded that even if the trial court erred in allowing additional testimony of Kinsley's war record following the defense's objection, the error was harmless. *Id.* at 142.

The trial court here ordered a remittitur from $44.1 million to $887,500. Just because a trial court *may* grant a new trial rather than ordering a remittitur, *see Conklin*, 255 Md. at 66, does not mean that it abuses its discretion by choosing to simply reduce the verdict. Given the evidence presented at trial, we hold that the trial court was within its discretion in granting Appellants' motion for remittitur rather than ordering a new trial.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.