Circuit Court for Baltimore City
Case No. 24C16002895

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1127

September Term, 2017

JAMES E. WOOD

v.

TARIQ NAYFEH, ET AL.

Meredith,
Graeff,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: February 19, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal arises out of an incident between two doctors – appellant, Dr. James E. Wood, and appellee, Dr. Tariq Nayfeh – that occurred during a simultaneous bilateral knee replacement surgery. On May 13, 2016, Dr. Wood filed a complaint against Dr. Nayfeh in the Circuit Court for Baltimore City, alleging that Dr. Nayfeh's negligence in operating a surgical instrument caused "severe and permanent damage" to his dominant left arm, thus ending his career as an orthopedic surgeon. Following an eight-day trial, a jury found that Dr. Nayfeh was not negligent. Dr. Wood noted a timely appeal, and presents four questions for our review, which we have rephrased as follows:

1. Did the trial court abuse its discretion by excluding a critical eyewitness from Dr. Wood's case in chief and rebuttal when he disclosed the witness's identity and proffered testimony as soon as he determined the witness had personal knowledge of facts material to this case?

2. Did the trial court abuse its discretion when it admitted expert witness testimony that was both materially different from the expert's deposition testimony and lacked a factual basis?

3. Did the trial court err in giving the jury an instruction that Dr. Wood assumed the risk when there was no testimony that he understood the risk of an existing danger and voluntarily encountered that danger?

4. Did the trial court abuse its discretion when it denied Dr. Wood's motion for new trial based on "new evidence" that was discovered during trial?

For the reasons discussed below, we discern no error and affirm.

FACTS AND PROCEEDINGS

On May 11, 2015, Dr. Wood and Dr. Nayfeh, both orthopedic surgeons at MedStar Harbor Hospital ("MedStar"), were performing bilateral total knee replacements on a patient. Dr. Wood, who is left-hand dominant, operated on the patient's left knee, and Dr. Nayfeh, who is right-hand dominant, operated on the patient's right knee. Each surgeon

had a team of individuals assisting with the surgery, including surgical technicians who handed them tools, so that they could stay focused on their respective surgical sites.

In order for a replacement knee to fit and function properly, the bone must be cut with precision. Because of the importance of this step in the procedure, surgeons use cutting guides that attach to the patient's bone with pins. During the procedure, Dr. Nayfeh successfully placed the first pin in the cutting guide and his surgical technician handed him a loaded pin driver to place the second pin. At that moment, Dr. Wood was operating his drill with his left arm in alignment with the patient on his side of the table. As Dr. Nayfeh brought the pin driver forward, it made contact with Dr. Wood's left elbow. Dr. Wood felt "a searing pain in [his] left elbow," and his hand started shaking. He screamed, dropped his drill, and fell back, away from the patient. A nurse helped him out of his surgical gown, discovered he was bleeding, and poured some antiseptic on the wound. Dr. Wood left the operating room for approximately fifteen minutes. He then returned and finished the surgery.

After he returned to complete the surgery, Dr. Wood noticed that his thumb would not extend properly. Shortly after the incident, he felt weakness and a loss of sensation in his left arm and hand along with poor coordination and restricted movement. These conditions worsened over the following weeks. Prior to receiving a formal diagnosis, Dr. Wood performed twelve more surgeries before concerns about patient safety forced him to stop performing surgery. After consulting with a neurologist and neurosurgeon, Dr. Wood learned that his ulnar nerve was permanently damaged and could not be repaired with surgery. Eventually, in November 2015, MedStar considered Dr. Wood disabled and

terminated his contract.

On May 13, 2016, Dr. Wood filed a complaint in the Circuit Court for Baltimore City alleging that Dr. Nayfeh's actions were negligent and grossly negligent. On July 24, 2017, after eight days of trial, the jury found that Dr. Nayfeh was not negligent. On July 31, 2017, Dr. Wood filed a timely appeal to this Court. Additional facts will be provided as necessary to address the issues raised on appeal.

DISCUSSION

I. Exclusion of Rosemary Talansky's Testimony

On July 10, 2017, three days before trial, Dr. Wood advised his counsel that he "had come across" a résumé for Rosemary Talansky ("Ms. Talansky"). Ms. Talansky had applied for a job at MedStar and may have been in the operating room as a part of an interview when the incident occurred. However, her name did not appear on the perioperative report that identified everyone in the operating room. After Dr. Wood's attorneys failed to reach Ms. Talansky at the phone number on her résumé, they hired a private investigator to find her. They eventually made contact with her daughter on Wednesday, July 12, but were unable to speak directly to Ms. Talansky until Friday, July 14, the second day of trial. During that conversation, she confirmed that she was in the operating room when the incident occurred. Ms. Talansky agreed to discuss her potential testimony with Dr. Wood's attorney and private investigator the next day (Saturday, July 15). Dr. Wood's attorneys, after contacting Dr. Nayfeh's attorneys, obtained a statement from Ms. Talansky after 5:00 p.m. on Saturday, July 15.

In her statement, Ms. Talansky reported that she was in the operating room as a part of a job interview at MedStar. That morning, she introduced herself to the team and was signed into the hospital's records. During the surgery, she was standing at the patient's midline, and had a clear view of both doctors' surgical fields. Ms. Talansky stated that she saw Dr. Nayfeh reach back, receive a drill, and take a wide angle back to his area, crossing over into Dr. Wood's field. Immediately thereafter, she claimed Dr. Nayfeh's "drill hit the back of Dr. Wood's substantially motionless arm." When Dr. Wood returned to the operating room, Ms. Talansky stated that she approached him, asked how he was doing, and adjusted his bandage. After the surgery was over, she said she was escorted to the exit, and never heard from MedStar concerning her employment application.

After Dr. Wood's attorneys finalized Ms. Talansky's statement that Saturday evening, one of the attorneys called the trial judge at home. The judge instructed Dr. Wood's attorney to bring Dr. Nayfeh's attorney into the call. Once Dr. Nayfeh's attorney joined the call, Dr. Wood's attorney informed the judge that "there was a last-minute discovery of a witness and [that he] wanted permission to call the witness as well as to put on the record that he was offering an opportunity for [Dr. Nayfeh's attorney] to depose the witness on Sunday afternoon." The judge advised the attorneys to call her back at 10:00 a.m. on Sunday. On Sunday morning, the judge learned that Dr. Wood's lawyers had unsuccessfully attempted to send a memorandum on the issue to the judge's personal e-mail. It does not appear from the record that the parties discussed the merits of the issue with the trial judge on Sunday morning. Both parties submitted memoranda to the trial judge on Monday morning.

A. CIRCUIT COURT PROCEEDINGS

On Monday, July 17, the court held a hearing on this issue before the jury arrived. Dr. Wood argued that Ms. Talansky should be allowed to testify despite not being disclosed during discovery because the hospital records did not accurately identify all individuals who were present in the operating room at the time of the incident – namely, Ms. Talansky. Dr. Wood argued that because Dr. Nayfeh and MedStar controlled the hospital's records, he should not be precluded from calling Ms. Talansky, a person Dr. Wood claims should have been included in the records. Dr. Nayfeh's counsel argued that, because Ms. Talansky was not identified in the perioperative record, neither she nor Dr. Nayfeh had ever heard mention of Ms. Talansky until the telephone call from Dr. Wood's attorney on Saturday, July 15. Additionally, Dr. Nayfeh noted that none of the other individuals who were present in the operating room identified Ms. Talansky as being present. Dr. Nayfeh asserted that Dr. Wood should be precluded from calling Ms. Talansky because, despite knowing of her existence on July 10, two days before the beginning of trial, Dr. Wood waited until Saturday, July 15, to disclose Ms. Talansky as a potential witness. After considering the parties' arguments, the circuit court, relying on *Taliaferro v. State*, 295 Md. 376 (1983), precluded Dr. Wood from calling Ms. Talansky as a witness in his case-in-chief.

B. *TALIAFERRO* FACTORS FOR EXCLUSION OF WITNESS TESTIMONY

On appeal, Dr. Wood disputes the trial court's exclusion of Ms. Talansky's testimony. Initially, we note that both parties acknowledge in their appellate briefs that the *Taliaferro* factors apply to a court's decision to exclude a witness. Dr. Wood argues that

he did not violate the discovery rules and was not responsible for any delay in identifying Ms. Talansky as a potential witness. He therefore argues that the decision to exclude "her testimony wholesale" was "manifestly wrong and substantially injurious."

Although the trial court has discretion to exclude a witness, "the imposition of such a draconian sanction must be supported by circumstances that warrant the exercise of the court's discretion in such a manner." *Maddox v. Stone*, 174 Md. App. 489, 501 (2007). However, "[i]n its exercise of that discretion, the trial court must consider [the *Taliaferro* factors]." *Lowery v. Smithsburg Emergency Med. Serv.*, 173 Md. App. 662, 674 n.6 (2007) (noting that the *Taliaferro* factors "must be given considerable weight" in cases that do not involve "extraordinarily complex litigation[.]").

In *Taliaferro*, the Court of Appeals set forth five factors for trial courts to consider when excluding witness testimony due to discovery violations. 295 Md. at 390-91. The Court held that,

> Under the approach taken by most courts, whether the exclusion of alibi witness testimony is an abuse of discretion turns on the facts of the particular case. Principal among the relevant factors which recur in the opinions are whether [1] the disclosure violation was technical or substantial, [2] the timing of the ultimate disclosure, [3] the reason, if any, for the violation, [4] the degree of prejudice to the parties respectively offering and opposing the evidence, [5] whether any resulting prejudice might be cured by a postponement and, if so, the overall desirability of a continuance. Frequently these factors overlap. They do not lend themselves to a compartmental analysis.

Id. In *Taliaferro*, on the last day of trial, Mr. Taliaferro sought to call an alibi witness that he had not previously disclosed to the State. *Id.* at 378. Exercising its discretion, the circuit court precluded the alibi witness from testifying because his identity was not disclosed as

required by the applicable Maryland Rule. *Id*. at 383. The Court of Appeals held that the trial court did not abuse its discretion because "the rule violation was a gross one. There was no attempt at compliance." *Id*. at 391. The Court noted that Mr. Taliaferro did not "present any excuse justifying the violation. . . . The only justification which Taliaferro attempted to present was that he had not been able to locate [the witness]. That explanation did not persuade the trial court to ignore the violation." *Id*. at 391-92. The Court held that there was prejudice to the State because "[t]he prosecution's case rested on an identification only by the victim. However, had the trial court permitted [the witness] to testify . . . the State would have been severely prejudiced. It would have had no opportunity to investigate [the witness's] background or to investigate the alibi[.]" *Id*. at 394. While a continuance would have allowed the State to investigate, "the short continuance for which [Mr. Taliaferro] contends could never equate with the opportunity to prepare [in the discovery period] . . . [that] the State was entitled to under Rule 741[1]." *Id*. at 395. The Court further noted that the potential for a continuance was complicated by an upcoming federal holiday and that any continuance would likely cause half of the jurors to extend service beyond their scheduled jury-service termination date. *Id*.

C. ANALYSIS

1. Exclusion from Case in Chief

As stated above, the parties agree that *Taliaferro* applies in our review of the trial

[1] Current "Maryland Rule 4-263 was derived from former Maryland Rule 741." *Johnson v. State*, 360 Md. 250, 265 (2000).

court's ruling. They disagree, however, about the trial court's application of the *Taliaferro* factors and its ultimate conclusion to preclude Ms. Talansky's testimony.

We begin our analysis by quoting from the trial judge's lengthy bench ruling:

> I do agree that . . . I have to go through the factors of the Taliaferro case. Because what it boils down to really, at the end of the day, is prejudice. It boils down to that. But before I get to that, I want to go over what you all have talked about factually.
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> * * *
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> [I]t is clear to me . . . that it is highly probable that prior to Monday, nobody knew of this person. Highly probable.
>
> * * *
>
> But there came a time where there was an inkling that there was a witness, fact witness, to this case. And from [Dr. Wood's] filings and argument, that inkling came on Monday, maybe Tuesday morning.
>
> I will say this about whether anybody knew. It is hard for me, though, when I think about and I read about all that this witness said that her encounter was with Dr. Wood, that . . . not only was she there, but she follows him out. She helps him adjust the bandage. They talk about the wound. They talk about the pain. That this is the most life-changing incident, perhaps, that has probably happened to Dr. Wood.
>
> And I can't imagine . . . that you don't remember that one person who would have been there, because this is the only person who I understand, even from listening to the other witness, that even bothered to ask . . . Dr. Wood how he was doing.
>
> * * *
>
> I don't think that Dr. Nayfeh was in a better position to know this, because Dr. Nayfeh didn't have the encounter with this woman that was extensive as Dr. Wood. So I don't think that there is a willful discovery violation.
>
> I don't think that anybody -- I have no evidence that tells me that one side or the other sat back and held this witness and says we're going to hold her; we're going to hide her; and not let her get out; and not let anybody else know about her. I don't believe that from either side.
>
> But then we arrive on . . . Monday, when Dr. Wood does find the resume. Tuesday morning, from what I understand, is when [Dr. Wood's

counsel] did, in fact, find out. We didn't get together, meaning this court and you-all . . . until Wednesday morning, which would have been July the 12th. . . .

At that time, [Dr. Wood] knew that there was someone who may have been in that room. . . . That is the point when I think the willfulness took over. Because at that point, somebody should have been saying . . . "Judge, before we move on, I need to let everybody know that there may have been a witness in that room."

That may change the focus of all, most of, many of the fact arguments that we were having here, particularly the animations that both sides have gone up, and we put the people in their places. That changes all of that. It contradicts, based on . . . if [she] was in the room -- and like I said, at that point, it's a "may have been" in the room. On Wednesday morning, it's a "may have been" in the room.

If she may have been in the room, then that then means that you-all may have had to go back to the drawing board. That would have been the time when you would have said, "Judge, we need to step back, put this case on hold for a couple of days, and let us . . . try to locate this witness." So that if she was in the room, then you know what? It makes sense to ask the [c]ourt to send you over to postponement court so that then you-all can do due diligence as it relates to this. But it was kept close to [Dr. Wood's] chest.

* * *

But Wednesday morning, we sat here and we went through the motions, and nobody said a peep, not one word. Thursday was when I believe I selected a jury; am I right? We go through the witnesses list. Even at that point, nobody said to me, "Judge, we got an issue here. There may be this witness. We don't know yet. Can we have her voir-dired just in case somebody on the panel knows her name?" Because if you don't use her, you don't use her, but you have the information, but you held it close to your chest.

* * *

I find that delay willful. You all had every opportunity, I think every obligation, to say to [Dr. Nayfeh] on Tuesday, to say to the [c]ourt on Wednesday, because you may not have gotten any satisfaction in saying it to [Dr. Nayfeh], I don't know. But at least to say it to me, that, "Judge, there is this witness that is possible, could have been in the room. We don't know."

But Dr. Wood found . . . her resume, and there's -- I mean, I don't look at a resume and just automatically say, "Oh, that person might have been

there." There's some inkling that Dr. Wood had that she was in there. Otherwise, one resume wouldn't make a single bit of difference to you. It wouldn't have caused him to even raise an eyebrow at it.

But there was something about it that Dr. Wood believed that perhaps she could have been in the room, could have seen the incident. So I think the obligation was there long before Saturday, when [Dr. Nayfeh's counsel] was contacted and when I was contacted.

* * *

This is a fact witness. This is what all of this turns on, is what happened. Was it an accident or was it negligence? It turns on that. And that's why I think the disclosure should have come, and I think it's a substantial one.

* * *

The degree of prejudice to [Dr. Nayfeh], clearly [there is] prejudice . . . because if this witness -- and I don't assume that she's not going to testify as [Dr. Wood] indicated in [his] filings. If she were going to testify in that way, they should have had the opportunity to test this person's credibility.

* * *

And it's interesting, because all of those witnesses, the ones -- I believe we talked to four fact witnesses[.] . . . I can't unring that bell in the jury's head now. They've already testified. Can't do it.

* * *

I think the prejudice is extreme to [Dr. Nayfeh].

Our review of the trial judge's ruling reveals that she explicitly addressed the *Taliaferro* factors. The court found that the disclosure violation was "a substantial one" because Ms. Talansky, a previously undisclosed witness, would be testifying about facts central to the issue of negligence. As to the timing of the disclosure, the court noted that Dr. Wood found Ms. Talansky's résumé on Monday, July 10, yet Dr. Nayfeh's counsel was not made aware of Ms. Talansky until Saturday, July 15. The court concluded that the delay was significant because Dr. Wood made no mention of the potential witness at the July 12 motions hearing, nor was the issue raised during jury selection on July 13. The

court characterized the delay as willful because Dr. Wood had "every opportunity . . . every obligation" to advise Dr. Nayfeh of the potential witness on Tuesday, July 11, and the court on Wednesday, July 12.

In considering the reason for the violation, the court initially noted that it was "highly probable" that the witness was unknown to the parties until Monday, July 10. Nevertheless, the court recognized that Dr. Wood had Ms. Talansky's résumé in his possession before July 10, and it was that document that caused Dr. Wood to believe that Ms. Talansky may have been in the operating room. Additionally, the court noted that Ms. Talansky encountered Dr. Wood after the incident, helped him adjust his bandage, and discussed his wound and the pain he was experiencing. Accordingly, the court expressly found that Dr. Nayfeh was not in a better position than Dr. Wood to have knowledge of Ms. Talansky as a potential witness. Although not critical to the trial court's decision, one could reasonably infer from the court's comments that Dr. Wood's lack of diligence caused the delay in disclosing Ms. Talansky as a witness.

As to *Taliaferro*'s prejudice factor, the court was explicit, finding "extreme" prejudice to Dr. Nayfeh. Given the centrality of Ms. Talansky's proffered testimony, the court determined that Dr. Nayfeh "should have had the opportunity to test [Ms. Talansky's] credibility." The court further noted that four witnesses had already testified, and that Ms. Talansky's testimony would contradict many of the arguments and an animation[2] that had

[2] A video animation was made depicting the parties' movements at the time of the incident.

already been presented to the jury.

Finally, as to *Taliaferro*'s fifth factor – whether any resulting prejudice might be cured by a postponement – we note that the court considered this motion at the beginning of the third day of an eight-day trial. Because the trial had already begun, the court implicitly determined that a postponement at that point was inappropriate, stating:

> If [Ms. Talansky] may have been in the room, then that then means that you-all may have had to go back to the drawing board. That would have been the time when you would have said, "Judge, we need to step back, put this case on hold for a couple of days, and let us . . . try to locate this witness." So that if she was in the room, then you know what? It makes sense to ask the [c]ourt to send you over to postponement court so that then you-all can do due diligence as it relates to this. But it was kept close to [Dr. Wood's] chest.

In essence, the court expressed its view that a continuance during the trial was impractical, and that Dr. Wood had every opportunity to seek a continuance prior to the commencement of trial.

In sum, the circuit court clearly addressed the *Taliaferro* factors and properly exercised its discretion when it did not allow Ms. Talansky to testify. Because the circuit court's determination was one that a "reasonable person would take" and was not "violative of fact and logic[,]" we hold that the circuit court did not abuse its discretion in excluding Ms. Talansky's testimony from Dr. Wood's case in chief. *Wilson v. John Crane, Inc.*, 385 Md. 185, 198 (2005) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997)).

2. Exclusion from Rebuttal

Dr. Wood also argues that the court erred in excluding Ms. Talansky's testimony in

rebuttal. On July 20, Dr. Wood sought to call Ms. Talansky as a rebuttal witness. The court heard argument and denied Dr. Wood's motion for the same reasons given for excluding her in Dr. Wood's case in chief, and because she would not be a true rebuttal witness.

On appeal, Dr. Wood argues that Ms. Talansky's testimony would have rebutted the testimony of John Geiger (Dr. Nayfeh's surgical technician) and Dr. William Andrews (Dr. Nayfeh's expert witness) that Dr. Wood's elbow crossed the middle line separating the surgical fields. Dr. Wood further argues that he "reserved the right to call unidentified impeachment and rebuttal witnesses in his pre-trial statement." We disagree that the trial court abused its discretion in precluding Ms. Talansky as a rebuttal witness.

The trial court exercises its discretion when it decides whether to admit rebuttal testimony. *Women First OB/GYN Assocs., L.L.C. v. Harris*, 232 Md. App. 647, 687, *cert. denied*, 456 Md. 73 (2017). "In Maryland, an appellate court will not reverse for error in this determination 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 v. State*, 31 Md. App. 525, 532 (1976)). "[R]ebuttal evidence is any competent evidence which explains, is a direct reply to or a contradiction of material evidence introduced by . . . a party in a civil action." *Riffey*, 36 Md. App. at 645. It cannot be "an attempt by [a party] to adduce evidence in rebuttal which properly should have been elicited in [his] case in chief, or merely cumulative evidence[.]" *Id*. at 646.

In *Riffey*, for example, the key issue at trial was whether Riffey suffered a pulmonary embolism that ultimately led to her death. *Id*. Tonder, her doctor, relied heavily on an

autopsy report during the defense case to dispute that Riffey suffered the embolism. *Id*. at 639-41. In response to the defense's reliance on the autopsy report, Riffey sought to introduce a rebuttal witness who would undermine Tonder's reliance on the autopsy report. *Id*. at 642-43. The trial court declined to allow Riffey's rebuttal witness to testify. *Id*. at 645. This Court, however, reversed the trial court, noting that the rebuttal witness would have "produce[d] evidence which truly tended to answer and contradict the testimony offered during [Tonder's] presentation of the defense." *Id*. at 646.

Later, in *Women First*, this Court again addressed rebuttal witness testimony. In *Women First*, the issue was whether a doctor breached the standard of care when performing a laparoscopic hysterectomy. 232 Md. App. at 682-83. Two of Women First's expert witnesses had testified in a discovery deposition that Ms. Harris's injury was caused "by a disruption of the blood supply . . . which would have been undetectable at the time of surgery." *Id*. at 683. However, at trial, both experts offered a new opinion, specifically, that the injury was caused by a subsequent test performed by a different doctor. *Id*. at 683-84. One witness testified live, the other by a *de bene esse* video deposition recorded the night before. *Id*. at 683. Ms. Harris was able to cross examine the live witness[3] and then sought to call the doctor who performed the subsequent test as a rebuttal witness. *Id*. at 684. Citing *Riffey*, the trial court granted Ms. Harris's request and allowed the rebuttal testimony. *Id*. at 685. On appeal, this Court held that the trial court did not abuse its

[3] It is unclear what cross-examination options were exercised in the *de bene esse* video deposition. However, Ms. Harris's counsel was present for the deposition. *Id*. at 683 n.18.

discretion. *Id*. at 687. We explained that the opinions expressed at trial "supported undisclosed novel defense theories that Ms. Harris could not have anticipated before trial" and the rebuttal testimony "exclusively and directly addressed the new matters first raised by [expert witnesses] in their trial testimony[.]" *Id*. at 688. Furthermore, the rebuttal testimony "did not echo . . . [the opinion] in Ms. Harris's case-in-chief" and, despite the rebuttal witness not being designated prior to trial, was "an appropriate solution in response to what was essentially a discovery dispute over Women First's failure to disclose the altered opinions of its expert witnesses." *Id*.

In this case, the trial court did not abuse its discretion when it precluded Ms. Talansky from testifying as a rebuttal witness. In its ruling, the court quoted from 5 Lynn McClain, *Maryland Practice: Maryland Evidence State & Federal* § 300.2(i) (3d ed. 2013):

> In the interest of both fairness and judicial economy, a party is generally required to put on all known evidence relevant to her claim in her case in chief, so that the opponent may respond in the case in defense. Rebuttal is to be reserved for evidence refuting matters that were brought up for the first time in the case in defense. Proper rebuttal evidence explains, replies to, contradicts, or impeaches new issues and evidence presented by the opposing party in his case.

Here, Ms. Talansky would have testified that Dr. Nayfeh entered Dr. Wood's surgical field. The respective positions of Dr. Wood and Dr. Nayfeh in the operating room were central to the determination of whether Dr. Nayfeh was negligent. As such, Dr. Wood's request to call Ms. Talansky as a rebuttal witness constituted "an attempt . . . to adduce evidence in rebuttal which properly should have been elicited in [his] case in chief[.]" *Riffey*, 36 Md. App. at 646. *See also Wright v. State*, 349 Md. 334, 354 (1998) (holding that because

defendant's confession should have been presented by the State as substantive evidence in its case-in-chief, it was error to permit the State to introduce confession as rebuttal evidence). Moreover, we note that the court had previously concluded that allowing Ms. Talansky to testify would have resulted in "extreme prejudice" to Dr. Nayfeh. Accordingly, the trial court did not abuse its discretion in determining that Ms. Talansky's testimony was not proper rebuttal evidence.

II. Dr. Andrews's Expert Testimony

Dr. Nayfeh retained Dr. William C. Andrews, Jr. to provide expert testimony "regarding duty, breach, proximate cause, and damages." To prepare for his June 25, 2017 discovery deposition, Dr. Andrews reviewed Dr. Wood's medical records, the operative note, and various witnesses' depositions, including the depositions of Dr. Wood; Dr. Nayfeh; and John Geiger, Dr. Nayfeh's surgical technician. At his discovery deposition, Dr. Andrews opined that

> [Dr. Nayfeh] was not negligent. And the basis for that is the following set of information: Number one, I read the operative note. I did not see any – anything about the note that implied or allowed me to infer any negligence on the part of Dr. Nayfeh.
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> * * *
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> And as I went over the depositions, it was my opinion that I did not see any fault in Dr. Nayfeh in terms of keeping his eye on the jig as he was putting the next K-wire in. I think that's reasonable and prudent surgical technique. And as I read the testimony on both sides, I do not see any part in that where I thought there was anything that Dr. Nayfeh did was negligent.

Later in the discovery deposition, the following exchange occurred:

> [DR. WOOD'S COUNSEL]: Can we agree that Dr. Wood was drilling the intramedullary guide on the femur at the moment of impact?
>
> * * *

> [DR. ANDREWS]: I don't know whether he was drilling it or whether he was pulling back from drilling it. I don't think -- that wasn't clear to me. But he was in that stage of the procedure . . . when the injury occurred.

Eleven days later, on July 6, the parties video recorded Dr. Andrews's *de bene esse* testimony. The only new information Dr. Andrews reviewed were the videos of Dr. Nayfeh's deposition. At the *de bene esse* deposition, Dr. Andrews testified to the following:

> It's my opinion from review of all the materials that Dr. Wood with his left arm was drilling the femur . . . [a]nd then was pulling his arm back from having drilled it at the same time that Dr. Nayfeh had taken the drill . . . with the guide pin[.] . . . And he was . . . moving forward. Dr. Wood was moving back. An accident occurred. And they just collided at that point.
>
> And . . . the testimony of Mr. Geiger is that the elbow of Dr. Wood came into his visual field. So it came across where Dr. Nayfeh was working.

Dr. Andrews maintained that he did "not feel that [Dr. Nayfeh] was at fault with regard to this incident. . . . I think what happened was a pure accident."

During cross-examination, Dr. Wood's counsel engaged in the following exchange:

> [DR. WOOD'S COUNSEL]: And you testified in this case, did you not, that you don't know whether Dr. Wood was drilling or pulling back?
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> [DR. ANDREWS]: No. And the reason that I said what I think happened . . . is that Mr. Geiger saw Dr. Wood's arm come into their field. And so basically if he were drilling the arm would not even be close to their field.
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> It would be much above and not even close to their field. But if he's pulling out it would be right in the field.
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> * * *
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> [DR. WOOD'S COUNSEL]: And do you recall testifying that you don't know whether Dr. Wood was drilling or whether he was pulling back from drilling it? That . . . wasn't clear to you.

> [DR. ANDREWS]: From what Dr. Wood said it wasn't. But when I was asked what do I think happened and I explained it I think there's no question basing it on all the information that he had to have been pulling back.
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> [DR. WOOD'S COUNSEL]: Doctor, let me give you a copy of your deposition.
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> * * *
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> All right. So your testimony seven days ago was that you didn't know whether or not Dr. Wood was drilling, pushing in, or removing, pulling back, when he got hit?
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> [DR. NAYFEH'S COUNSEL]: Objection.
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> [DR. ANDREWS]: Yes. And as I explained, to get his arm into the field that Mr. Geiger saw he had to have been pulling back. There's no other way that he could get into that visual field.

Dr. Wood lodged no objection to any of the above-quoted testimony.

A. CIRCUIT COURT PROCEEDINGS

On July 19, the day before Dr. Nayfeh planned to present Dr. Andrews's *de bene esse* testimony, Dr. Wood hand-delivered a letter to the trial judge objecting to the "undisclosed new opinions . . . which are the opposite of [Dr. Andrews's] testimony from his discovery deposition" on the grounds that "[e]xpert witnesses are not permitted to offer new opinions on the eve of trial which directly contradict their deposition testimony." Specifically, Dr. Wood claimed that at the discovery deposition on June 25, Dr. Andrews testified that he did not know whether Dr. Wood's arm was "pulling back" at the time of impact, yet at the *de bene esse* deposition, Dr. Andrews asserted that Dr. Wood "was pulling his arm back" as Dr. Nayfeh moved forward with his surgical drill. The court heard arguments on the issue the next morning. In response to Dr. Wood's contentions, Dr. Nayfeh argued that: (1) the letter was "procedurally inappropriate" because the deadline

for motions *in limine* had passed,[4] and (2) that Dr. Andrews did not introduce any new opinions. Dr. Nayfeh argued that Dr. Andrews was "[p]utting all the testimony together, this [was his] opinion as to how [Dr. Wood] was moving" and that "the only . . . opinion-based theory that Dr. Andrews [was] offering [was] that he believe[d] that Dr. Nayfeh was moving safely, and that he was moving appropriately and carefully. That hasn't changed. That was the same from deposition to trial."

After considering the parties' arguments, the court denied Dr. Wood's motion to exclude Dr. Andrews's "new opinion." In the court's view, there was a change in the foundation of Dr. Andrews's opinion, "[b]ut the ultimate opinion did not change." Moreover, the court found that Dr. Wood had the opportunity to object at the *de bene esse* deposition, but failed to do so.

B. FAILURE TO PRESERVE

It is a "well established rule that a trial judge has the power to exclude trial testimony that constitutes a material departure from what the witness testified to at deposition." *Hill v. Wilson*, 134 Md. App. 472, 481-82 (2000). "Excluding that kind of evidence 'is a matter of basic fairness and of assuring that litigation is pursued in an efficient and professional manner.'" *Livingstone v. Greater Wash. Anesthesiology & Pain Consultants, P.C.*, 187 Md. App. 346, 380 (2009) (quoting *Marcantonio v. Moen*, 406 Md. 395, 419 (2008) (Wilner, J., concurring)). The purpose is to prevent an "ambush" close to trial. *See id.*

[4] Dr. Andrews's *de bene esse* testimony was completed before the deadline for motions *in limine*.

It is likewise well established that it is incumbent upon a party to object to testimony in order to preserve it for appellate review. In *CSX Transp., Inc. v. Pitts*, CSX challenged the admissibility of videotaped deposition testimony which was adverse to it. 203 Md. App. 343, 371-72 (2012). Similar to the instant case, this Court noted that the adverse testimony was elicited by CSX during cross-examination, and CSX failed to object to any response provided by the witness. *Id.* at 380. Citing Rules 2-416(g) and 2-517(a), we held that CSX failed to preserve its objection to the deposition testimony. *Id*. at 380-81. *See* Md. Rule 2-416(g) ("Objections to all or part of the deposition shall be made in writing within sufficient time to allow for rulings on them and for editing of the electronic audio or audio-video recording before the trial or hearing.").

Similarly, here, the vast majority of the objectionable testimony was adduced by Dr. Wood during his cross-examination of Dr. Andrews at the *de bene esse* deposition. And as in *CSX Transp.*, Dr. Wood failed to object to any response provided by Dr. Andrews, either during direct or cross-examination. Accordingly, we conclude that Dr. Wood failed to preserve his objection to Dr. Andrews's "new opinion" purportedly given at the *de bene esse* deposition.[5]

[5] Although we decline to reach the merits of Dr. Wood's arguments concerning Dr. Andrews's testimony, it is unlikely that the court abused its discretion in concluding that Dr. Andrews's ultimate opinion had not changed. The circuit court found that "there was a change in the . . . foundation of his opinion. But the ultimate opinion did not change." That determination was one that a "reasonable person would take" and was not "violative of fact and logic[.]" *Wilson*, 385 Md. at 198 (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. at 312).

III. Jury Instruction on Assumption of the Risk

In his proposed jury instructions, Dr. Nayfeh included Maryland Pattern Jury Instruction 19:14 on assumption of the risk. This instruction reads

> 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.

MPJI-Cv 19:14.

Dr. Wood argued at trial that the instruction should not be given because there was no evidence that Dr. Wood assumed the risk of any injury resulting from Dr. Nayfeh's actions during surgery. Dr. Nayfeh countered that the evidence showed that Dr. Wood was familiar with the procedures for simultaneous bilateral knee replacement surgeries and assumed the risk of what could happen when two surgeons work in close proximity. Furthermore, Dr. Wood testified that he knew Dr. Nayfeh had the pin driver in his hand at the time of the incident. After consulting *Poole v. Coakley & Williams Const., Inc.*, 423 Md. 91 (2011), the circuit court decided to give the instruction.

Both parties referred to assumption of the risk in their closing arguments. The court reviewed the verdict sheet with the jurors before dismissing them for deliberation. The court stated:

> The first question says: "Do you find that Plaintiff, Dr. James E. Wood proved by a preponderance of the evidence that Defendant Dr. Tariq Nayfeh was negligent during the bilateral knee replacement surgery on May 11th, 2015?" Your answer, unanimously, is either yes or no.
>
> If your answer to Question 1 is no, stop there and notify the clerk. That means you're done.

The written jury verdict sheet instructed the jury that "***[i]f your answer to Question 1 is "No" stop here, and notify the clerk***." The jury answered "No" to Question 1 and therefore did not consider the question concerning assumption of risk (Question 3 on the verdict sheet).

On appeal, Dr. Wood argues that the circuit court erred in giving the assumption of risk instruction "because it skipped over the threshold determination of whether the conditions in the operating room that day were such that Dr. Wood had actual knowledge of the risk before he could have been found to have assumed it." Dr. Wood claims that there was no evidence that his injury could reasonably have been expected in an operating room, and he could not have assumed the risk.

"It has long been the policy in this State that this Court will not reverse a lower court judgment if the error is harmless." *Barksdale v. Wilkowsky*, 419 Md. 649, 657 (2011) (quoting *Flores v. Bell*, 398 Md. 27, 33 (2007)). The "harmless error" analysis applies to jury instructions in civil cases. *Id*. at 660. In order for this Court to hold that the error was not harmless

> a party challenging an erroneous jury instruction in a civil case must demonstrate to the court why the error was prejudicial. An erroneous instruction may be prejudicial if it is misleading or distracting for the jury, and permits the jury members to speculate about inapplicable legal principles.

CSX Transp., 203 Md. App. at 390 (quoting *Barksdale*, 419 Md. at 669). In order to show prejudice, the "complaint must show that prejudice was 'likely' or 'substantial.'" *Barksdale*, 419 Md. at 662.

In *Livingstone*, this Court considered whether a trial court erred in denying a jury instruction related to the substantial factor test for causation. *Livingstone*, 187 Md. App. at 361-62. In that case, the verdict sheet, in part, asked the jury

> 1. (A) Do you find that Richard Margolis, M.D., committed a breach in the standard of care when providing care to Tracy Orr on November 9, 2002?
>
> Yes ____ No ____
>
> [If yes proceed to 1(B) if no skip to question 2]
>
> (B) Do you find that the standard of care breach by Richard Margolis, M.D. was a proximate cause of Tracy Orr's death?
>
> Yes ____ No ____
>
> 2. (A) Do you find that Stephen Martin, M.D., committed a breach in the standard of care when providing care to Tracy Orr on November 9, 2002?
>
> Yes ____ No ____
>
> [If yes proceed to 2(B) if no proceed to question 3 on the following page if you answered yes to 1(B)]
>
> (B) Do you find that the standard of care breach by Stephen Martin, M.D. was a proximate cause of Tracy Orr's death?
>
> Yes ____ No ____
>
> [If yes proceed to 2(C) on the following page, if no to BOTH 1(B) and 2(B) then STOP, if yes to 1(A) and/or 1(B) then proceed to question 3 on the following page]

Livingstone, 187 Md. App. at 365-66. The *Livingstone* Court concluded:

> The jury here answered "no" to questions 1(A) and 2(A), *i.e.*, they found that neither Dr. Margolis nor Dr. Martin committed a breach in the standard of care when providing care to Dr. Orr. Thus, the jury did not proceed to determine the question of causation. Accordingly, similar to *Landon* [*v. Zorn*, 389 Md. 206 (2005)], appellants cannot show prejudice as

> a result of the trial court's refusal to give their requested "substantial factor" instruction when giving its instructions on causation.

Id. at 366. The Court held that "even if the causation instruction was erroneous, there would be no ground to reverse the jury's verdict." *Id.* at 369.

In our view, *Livingstone* is controlling. The verdict sheet here clearly instructed the jury that, in the event it determined that Dr. Nayfeh was not negligent, it should not answer any additional questions on the verdict sheet. Because the jury never reached the question concerning assumption of the risk, Dr. Wood cannot demonstrate prejudice based on the trial court's alleged error in giving an assumption of the risk instruction. In short, any error was harmless.

IV. Motion for New Trial

On July 31, 2017, Dr. Wood filed a motion for new trial pursuant to Md. Rule 2-533, which the court denied without a hearing. On appeal, Dr. Wood argues that the circuit abused its discretion when it denied his motion. He argues that Ms. Talansky's testimony was "newly discovered evidence" and the exclusion of the evidence "clearly misled" the jury and caused the jury to believe it was "an unavoidable accident."

"The granting or denial of a motion for a new trial is a matter within the discretion of the trial court and will not be reversed on appeal absent the abuse of that discretion." *Market Tavern, Inc. v. Bowen*, 92 Md. App. 622, 650 (1992). "[A]n appellate court does not generally disturb the exercise of a trial court's discretion in denying a motion for a new trial." *Buck v. Cam's Broadloom Rugs, Inc*., 328 Md. 51, 57 (1992) (quoting *Mack v. State*, 300 Md. 583, 600 (1984)). Despite this discretion, a trial court "has virtually no

'discretion' to refuse to consider newly discovered evidence that bears directly on the question of whether a new trial should be granted." *Id*. at 58. A new trial is warranted when

> the court is persuaded that (1) the evidence has been discovered since the trial, i.e., the evidence is "newly discovered;" (2) the moving party was diligent in attempting to discover the evidence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is "material" to the issues involved; and (5) the evidence is of such a nature that a different outcome would probably result if it was considered.

Holden v. Blevins, 154 Md. App. 1, 9 (2003).

Here, the court did not abuse its discretion in denying Dr. Wood's motion for a new trial. First, Ms. Talansky's testimony did not constitute "newly discovered" evidence because the substance of her testimony was known, at the latest, after the third day of trial. *E.g.*, *Great Sw. Fire Ins. Co. v. S.M.A., Inc.*, 59 Md. App. 136 (1984) (declining to find abuse of discretion when the information in question was known *before trial*); *Angell v. Just*, 22 Md. App. 43 (1974) (holding that evidence *obtained after trial* based on testimony presented at trial constituted new evidence). Had Dr. Wood timely disclosed Ms. Talansky as a potential witness, there is no reason to suppose that her testimony would not have been admissible, as substantive evidence, in Dr. Wood's case-in-chief. Accordingly, Ms. Talansky's testimony was not "newly discovered." Moreover, the court had already determined that permitting Ms. Talansky's testimony would cause extreme prejudice to Dr. Nayfeh, primarily because Dr. Nayfeh did not have the opportunity to test Ms. Talansky's credibility. Under these circumstances, we see no abuse of discretion in the trial court's

denial of Dr. Wood's motion for a new trial.[6]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[6] On appeal, Dr. Wood contends that the trial court's denial of Ms. Talansky's testimony, its admission of Dr. Andrews's testimony, and the presence of the assumption of the risk question on the verdict sheet created "cumulative errors" that were prejudicial to Dr. Wood. Dr. Wood failed to make a cumulative error argument in his motion for a new trial and therefore failed to preserve the argument for appeal. Md. Rule 8-131(a).