UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0070

September Term, 2015

DAMON COLKLEY, et al.

v.

STEWART LEVITAS, et al.

Wright,
Arthur,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: August 11, 2016

* 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 is a lead-paint case. A Baltimore City jury found in the plaintiffs' favor, but awarded them considerably less in damages than they had sought. The plaintiffs moved for a new trial, arguing, among other things, that in voir dire two jurors had given inaccurate answers about their prior litigation experiences and that the trial court erred in admitting certain expert testimony.

The circuit court denied the motion for a new trial. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Negligence Action

Ms. Cromer was born in August 1992. Her cousin Mr. Colkley was born in September 1996. From birth until at least 1999, both Ms. Cromer and Mr. Colkley resided at 1317 North Central Avenue. During that time, the Central Avenue property had chipping, peeling, and flaking paint throughout its interior.

Both Ms. Cromer and Mr. Colkley had elevated blood-lead levels when they resided at the Central Avenue property. Ms. Cromer's blood-lead level ranged from 15μg to 35μg of lead per deciliter of blood when she was between the ages of two and four. Mr. Colkley's blood-lead level ranged from 15μg to 27μg of lead per deciliter of blood from when he was nine months old until he was two and a half years old.

On November 30, 2012, Mr. Colkley filed a complaint in the Circuit Court for Baltimore City against Stewart Levitas, State Real Estate, Inc., and several testamentary trusts (collectively, the "Levitas parties"). In an amended complaint, Mr. Colkley, joined by Ms. Cromer, raised additional claims against the Levitas parties. Mr. Colkley and Ms.

Cromer alleged that they had suffered injuries as a result of their exposure to lead-based paint inside the Central Avenue property, which was owned and operated by the Levitas parties.[1]

B. The Evidence Produced at Trial

The case proceeded to a jury trial in January 2015. Mr. Colkley and Ms. Cromer established that between 1994 and 1998 their documented blood-lead levels far exceeded the maximum acceptable range.[2] Various expert witnesses testified for each side about whether the Levitas parties had caused that lead exposure and to what extent Mr. Colkley and Ms. Cromer had been injured as a result of their lead exposure.

The first of the plaintiffs' expert witnesses was an accredited lead-paint inspector and risk assessor. An inspection of the Central Avenue property in December 2013 showed that the first floor of the property (which was under construction) had deteriorated, lead-based paint on many interior surfaces. Based on that inspection report, deposition transcripts, photographs of the home's interior during the 1990s, and

[1] Mr. Colkley filed his complaint as a minor through his mother and next friend. Ms. Cromer was no longer a minor when she was added to the case.

[2] Mr. Colkley and Ms. Cromer correctly asserted that their blood-lead levels were as much as five to seven times higher than the "CDC action level." The Center for Disease Control and Prevention currently uses "a reference level of 5 micrograms per deciliter to identify children with blood lead levels that are much higher than most children's levels." U.S. Center for Disease Control and Prevention, New Blood Lead Level Information, *available at* http://www.cdc.gov/nceh/lead/ACCLPP/blood_lead_levels.htm (last visited July 20, 2016). This reference level "is based on the U.S. population of children ages 1-5 years who are in the highest 2.5% of children when tested for lead in their blood." *Id.*

Baltimore City Health Department records from that time, the expert concluded that the property contained lead-based paint hazards when Mr. Colkley and Ms. Cromer lived there.

Mr. Colkley and Ms. Cromer called several medical professionals, including an expert in pediatric medicine, an expert in the fields of neurology and epidemiology, and their treating physician. Collectively, those doctors testified that Mr. Colkley and Ms. Cromer had both registered very high levels of lead in the blood when they lived at the Central Avenue property; that the most probable source of their lead exposure was lead-based paint in the house; and that Mr. Colkley and Ms. Cromer sustained permanent brain injuries as a result of their lead exposure. The pediatric expert explained that the brain injuries were evidenced by underperformance in psychological testing, including drops in IQ scores, and that these deficits posed barriers to Mr. Colkley's and Ms. Cromer's academic success. The treating physician reported that both Mr. Colkley and Ms. Cromer had been struggling in school and that Mr. Colkley had special educational needs and had been diagnosed with ADHD.

The court accepted Morris Lasson, M.D., as an expert in the fields of neuropsychology and clinical psychology. Dr. Lasson testified that he had conducted a battery of tests to determine whether Mr. Colkley and Ms. Cromer suffered from brain dysfunction or related cognitive deficits. He concluded that Ms. Cromer suffered from a permanent brain dysfunction, as evidenced by weaknesses in IQ and other areas, and that this brain dysfunction had affected her cognitive development and her academic achievement. Mr. Colkley had performed even more poorly than his cousin on the same

battery of tests. According to Dr. Lasson, Mr. Colkley suffered from permanent brain dysfunction, he had "difficulty remembering and making decisions," and his dysfunction had "affected his intellectual capacity and cognitive skills[.]"

The plaintiffs' vocational rehabilitation expert testified that both Mr. Colkley and Ms. Cromer suffered from cognitive disabilities and had therefore experienced "barriers to success" in education and in the workplace, which reduced their income potential. The plaintiffs' expert economist concluded that, as a result of their various deficits, Mr. Colkley and Ms. Cromer had suffered net economic losses, including lost future earnings. He calculated that Mr. Colkley had suffered economic losses of $1,398,124, while Ms. Cromer had suffered economic losses of $1,060,197.

The Levitas parties countered with their own battery of experts. The Levitas parties' expert in environmental medicine, epidemiology, and toxicology testified that there was insufficient evidence to demonstrate that the Central Avenue property was the source of Mr. Colkley's and Ms. Cromer's lead exposure. Their expert in environmental risk assessment criticized the methods employed by Mr. Colkley's and Ms. Cromer's risk assessor, pointing to household toys or soil around the home as possible sources of their lead exposure. Their vocational rehabilitation expert opined that neither Mr. Colkley nor Ms. Cromer had sustained "vocational loss," loss of earning capacity (relative to what they would have earned without the lead exposure), or "reduced work life expectancy."

The Levitas parties called Neil Hoffman, M.D., whom the court accepted as an expert in the "field of psychology and the effects of lead poisoning." The Levitas parties established that Dr. Hoffman was a psychologist with experience assessing child patients

who had been exposed to high levels of lead. Dr. Hoffman ran Mr. Colkley and Ms. Cromer through a series of tests similar to those applied by their expert psychologist, Dr. Lasson. Dr. Hoffman concluded that, despite their documented lead exposure, neither Mr. Colkley nor Ms. Cromer demonstrated evidence of the cognitive deficiencies, loss of skills, or diminished IQ that he had commonly seen in patients who had been exposed to high levels of lead.

The jury returned a verdict in favor of Mr. Colkley and Ms. Cromer on their negligence claims.[3] The jury determined that Mr. Colkley was entitled to economic damages of $225,000 (related to his loss of earnings or earning capacity) and to noneconomic damages of $240,000 (including pain, suffering, and humiliation), for a total award of $465,000. The jury determined that Ms. Cromer was entitled to $80,000 in economic damages and $20,000 in noneconomic damages, for a total award of $100,000.

C. The Motion for Partial New Trial as to Damages Only

Within a week after the verdict, Mr. Colkley and Ms. Cromer filed a motion styled as "Plaintiff's Motion for Partial New Trial as to Damages Only and Request for Hearing." Throughout their written motion, Mr. Colkley and Ms. Cromer expressed their belief that the damage award was inadequate because the jury had awarded them only a fraction of the economic damages that their economic expert had calculated.

[3] The pleadings included counts for negligent misrepresentation and violations of the Maryland Consumer Protection Act. At the close of the plaintiffs' case-in-chief, the court granted the Levitas parties' motion for judgment on those claims.

Mr. Colkley and Ms. Cromer raised several grounds in support of their request for a new trial on damages only. First and foremost, they asserted that, shortly after the trial, they had learned that two of the jurors had not given accurate answers to voir dire questions about their involvement in other civil cases. Mr. Colkley and Ms. Cromer also asserted that they had been prejudiced by the admission of an expert opinion on causation from the Levitas parties' expert psychologist, Dr. Hoffman, and by other questions and comments from the Levitas parties' attorney during the course of the trial.

While that motion was pending, the clerk of the circuit court entered judgments against the Levitas parties, jointly and severally, in the amounts of $465,000 in favor of Mr. Colkley and $100,000 in favor of Ms. Cromer. Shortly thereafter, the Levitas parties filed a written opposition to the new-trial motion, and Mr. Colkley and Ms. Cromer filed a written reply. In their reply, Mr. Colkley and Ms. Cromer argued that the verdict on damages "was clearly against the weight of the evidence and inequitable and insufficient, whether it was due to the jurors' misconduct and bias or the other issues raised" in their motion.

A few weeks later, the court issued a single-paragraph order denying the motion for new trial without a hearing. Mr. Colkley and Ms. Cromer filed a timely notice of appeal.

QUESTIONS PRESENTED

Mr. Colkley and Ms. Cromer present three questions for review, which we quote:

1. Did the trial court err or abuse its discretion in failing to grant a hearing to consider and then denying Appellants' Motion for Partial New Trial as to Damages on the grounds of newly discovered

evidence of jurors' misconduct for non-disclosure during the *voir dire* process regarding issues of potential bias and lack of impartiality that likely prejudiced the outcome of the trial?

2. Did the trial court abuse its discretion in allowing a neuropsychologist to testify on behalf of the Levitas parties as to issues of medical causation when the witness was not properly qualified to render such expert opinions and it was probable that such testimony influenced the outcome of the trial?

3. Did the trial court abuse its discretion in denying Appellants' Motion for Partial New Trial as to Damages when multiple prejudicial errors occurred during the trial that was likely to have impacted the outcome of the jury's award of damages?

We answer each question in the negative. Accordingly, we shall affirm the judgment below.

DISCUSSION

I. Juror Misconduct

Mr. Colkley's and Ms. Cromer's primary argument is that the circuit court erred or abused its discretion in denying their motion for a partial new trial as to damages without holding an evidentiary hearing to address their allegations of juror misconduct in answering voir dire questions. In general, the decision about whether to grant or deny a new trial based on "matters concerning juror misconduct or other irregularities that may affect the jury" rests in the trial judge's discretion, and the decision will not be disturbed on appeal except for the most extraordinary and compelling reasons. *Owens-Corning Fiberglas Corp. v. Mayor & City Council of Baltimore City*, 108 Md. App. 1, 29 (1996) (citations omitted).

We conclude that the circuit court was not required to grant the motion on the ground that Mr. Colkley and Ms. Cromer advanced in support of it.

A. Evidence of Alleged Juror Misconduct

The allegations of juror misconduct concern two empaneled jurors: prospective Juror Number 6032, seated as Juror Number 4 ("Juror #4"); and prospective Juror Number 6034, seated as Juror Number 5 ("Juror #5").

During voir dire, the court asked: "Does any member of the jury panel have a civil action pending before the Circuit Court for Baltimore City?" None of the prospective jurors gave an affirmative response to that question.

Shortly thereafter, the court asked: "Have you or any members of your immediate family been a party or a witness to a civil action or made a claim as a result of personal injury sustained?" Some of the prospective jurors answered affirmatively to that question, but neither Juror #4 nor Juror #5 gave an affirmative response.

The record reflects that Juror #5 was a 23-year-old college student. In his responses to other voir dire questions, Juror #5 indicated that the trial might cause him to miss the start of his next semester, that he had some background knowledge about medicine because his father was a dentist, that he had some knowledge of the effects of lead, and that his uncle had done lead-abatement work in the past. He stated that those matters would not prevent him from serving impartially, and none of the parties challenged him.

During the trial, Juror #5 wrote a note to the court asking whether he could be excused because he was "missing too much during the first week of school." The judge

did not excuse Juror #5, but offered to write a letter to the university explaining the reasons for his absence.

In their motion for new trial, Mr. Colkley and Ms. Cromer asserted that, a few days after the verdict, their counsel discovered that that Juror #5 and his father were co-defendants in an automobile negligence action in the Circuit Court for Baltimore City, in which they were represented by counsel from their insurance company.[4] The action against Juror #5 had been filed nine months before the start of trial in this case. The initial complaint sought damages of $75,000 for personal injuries and property damage. Juror #5 and his father admitted liability, but contested the amount of damages. The action was pending at the time of jury selection in the instant trial. The plaintiff had submitted a pretrial statement demanding $40,000 to settle the case. At the settlement conference, the case settled for $20,000.

Earlier, Juror #5 had been a named defendant in an auto-tort action in the District Court of Maryland for Baltimore County. That case was transferred to the circuit court before it was settled in 2011.

[4] Mr. Colkley and Ms. Cromer stated that one of their attorneys served as a volunteer mediator in the Circuit Court for Baltimore City on Friday, February 6, 2015, the same morning on which mediation was scheduled in Juror #5's case.

In their motion, Mr. Colkley and Ms. Cromer also presented information that Juror #4, a 58-year-old woman, had given no affirmative response to either of the above voir dire questions even though she too had been a party to a few legal disputes.[5]

The first two matters were debt collection actions in Baltimore City district court, both of which resulted in default judgments against Juror #4 in 2013. In the third matter, Juror #4 had filed a petition for judicial review in the Circuit Court for Baltimore City in July 2013. Representing herself, she challenged an administrative appeals board's decision that she was ineligible for unemployment insurance benefits because she had been discharged from employment for gross misconduct. The circuit court upheld the denial of benefits in February 2014, one year before the trial in this case. None of the actions involving Juror #4 were pending at the time of jury selection in the instant matter.[6]

B. Grounds Advanced in Support of Motion for New Trial

In their motion for a partial new trial, Mr. Colkley and Ms. Cromer recited the information that they had uncovered regarding Juror #4 and Juror #5. Mr. Colkley and

[5] Mr. Colkley and Ms. Cromer did not expressly say *when* they uncovered the information about Juror #4. In their appellate brief, they tell us that, after their counsel learned about the pending case against Juror #5, they "researched the litigation history of all jurors" because they were "[c]oncerned about this potential juror misconduct and the incongruous damage award."

[6] In their motion Mr. Colkley and Ms. Cromer incorrectly stated that Juror #4 had participated in a judicial review hearing "[o]n January 8, 2015, just two weeks before the instant trial[.]" The hearing actually occurred on January 8, 2014, over a year before the trial in this case.

Ms. Cromer contended that they had suffered prejudice as a result of the jurors' failure to answer the questions fully and accurately. They asserted that, because neither juror had responded to the questions about their involvement in civil litigation, "further inquiry into any potential biases on behalf of either juror . . . was never explored at all." They further asserted that, if the jurors had disclosed that information during voir dire, they would have moved to strike them either for cause or through a peremptory challenge.[7]

Citing *Williams v. State*, 394 Md. 98, 102 (2006), Mr. Colkley and Ms. Cromer stated that the "test for determining the grant of a new trial based on juror misconduct" was that "where information *inadvertently* is withheld by a juror's failure to respond to *voir dire* inquiry, [the decision] should be left to the sound discretion of the trial judge unless: a) actual prejudice is demonstrated, or b) the withheld information, in and of itself, gives rise to a reasonable belief that prejudice or bias by the juror is likely." (Emphasis added.)

Although that standard governs situations in which a juror "inadvertently" fails to disclose information, Mr. Colkley and Ms. Cromer did not clearly address the question of whether the two jurors in this case had inadvertently, rather than intentionally, failed to disclose the information. At one point, Mr. Colkley and Ms. Cromer asserted that Juror #5's failure to inform the court of the pending tort action against him was "apparently intentional." At another point, however, they suggested that the jurors' states of mind

[7] Because the jury had actually ruled in their favor on their negligence claims, their theory of prejudice was tied to their assertion that the jury had awarded them an inadequate amount of *damages*.

were immaterial, stating that whether the non-disclosures were "inadvertent or not, the ability . . . to probe for bias was lost." Looking past the intermediate issue of whether the jurors had either intentionally or inadvertently withheld information, Mr. Colkley and Ms. Cromer invited the court to apply the test for inadvertent non-disclosures and to determine actual or likely prejudice.

Mr. Colkley and Ms. Cromer argued that they suffered "actual prejudice" because the two voir dire questions were material to the issue of bias and because they lost their opportunity to uncover any such bias when the jurors failed to respond to the questions. As an alternative, Mr. Colkley and Ms. Cromer argued that the litigation experiences of Juror #4 and Juror #5, on their own, gave rise to a reasonable belief that those jurors were likely to have been biased against them. They asserted: "It is reasonable to assume given the extensive litigation history of both jurors that bias and prejudice by the Jurors against [them] is likely[.]" Mr. Colkley and Ms. Cromer concluded that "a new trial as to damages only must be granted" based on a determination of either actual prejudice or the likelihood of bias or prejudice.

In sum, Mr. Colkley and Ms. Cromer focused their juror-misconduct argument on the prejudice prong of the test quoted from *Williams*. Mr. Colkley and Ms. Cromer did not ask the court to make any finding about whether the non-disclosures were intentional or inadvertent. Their motion seemed to assume that any ability to do so had been lost.

In *Williams*, 394 Md. at 102, the Court of Appeals approved of an analytical framework for assessing claims of misconduct based on a juror's inadvertent failure to

disclose information during voir dire. That framework derived from the opinion of this Court in *Burkett v. State*, 21 Md. App. 438 (1974).

In voir dire in *Burkett*, the trial court had asked: "Does any member of the panel have any member of your immediate family who is or was a member of a law enforcement agency as I have defined [it]?" *Id.* at 441. The court's definition of a "law enforcement agency" included the State's Attorney's Office. *Id.* at 440. After his conviction, Burkett learned that one of the jurors had failed to disclose that his daughter was a secretary in the State's Attorney's Office. *Id.* at 441. He moved for a new trial on that ground.

At a hearing on the new-trial motion, the juror testified that he had not heard the words "State's Attorney's Office" during voir dire. *Id.* The circuit court determined that the juror's non-disclosure had been wholly inadvertent and that any resulting prejudice did not warrant a new trial. *Id.* at 447. In affirming the judgment, this Court held that, where the court determines that a juror inadvertently failed to respond to a voir dire inquiry, the decision to grant a new trial is not mandatory unless the party shows actual prejudice or the information withheld gives rise in itself to a reasonable belief that prejudice or bias by the juror was likely. *Id.* at 445.

Three decades later, in *Williams*, the defendant moved for a new trial upon learning that in voir dire a juror had failed to disclose that her sister worked as a secretary in the State's Attorney's Office. *Id.* at 103-04. At a hearing on the defendant's new-trial motion, the juror was not called to testify about why she did not disclose her familial relationship with an employee of the agency that was prosecuting the defendant. The

trial judge denied the motion on the ground that the juror's relationship to the State was "'pretty remote.'" *Id.* at 105. In a 4-3 decision, the Court of Appeals reversed the convictions and remanded the case for a new trial. *Id.*

In reaching its decision, the *Williams* majority reasoned that, although the information about the juror's connection to the State's Attorney's Office would not have resulted in a finding of prejudice as a matter of law, the disclosure of the information would have allowed the defendant to inquire further into the juror's ability to render an impartial verdict. *Id*. at 112. The Court distinguished *Burkett*, because in that case the trial court actually made the necessary investigation into the juror's state of mind and the reasons for the non-disclosure at an evidentiary hearing "after the fact." *Id.* at 102, 113. The Court emphasized: "Where the juror is available for further voir dire and is further voir dired, a trial court may exercise the discretion *Burkett* requires it to exercise[,] [b]ut the trial court's sound discretion can only be exercised *on the basis of the information that voir dire reveals and the findings the trial court makes as a result*." *Id.* at 113 (emphasis in original). The Court summarized its holding as follows: "[W]here there is a non-disclosure by a juror of information that a voir dire question seeks and the record does not reveal whether the non-disclosure was intentional or inadvertent, the defendant is entitled to a new trial." *Id.* at 114 (footnotes omitted).[8]

[8] Chief Judge Bell wrote the majority opinion in *Williams*. Judge Raker dissented, joined by two others. The dissent argued that the proper remedy was not to reverse the judgment but to remand the case "for an evidentiary hearing to permit the trial court to determine whether the juror non-disclosure . . . was intentional, and if it was, whether there was any prejudice to the appellant." *Williams*, 394 Md. at 119 (Raker, J., dissenting).

Under *Williams*, when a party alleges that a juror has failed to disclose information sought by a voir dire question, the next step is to make a determination of whether the non-disclosure was intentional or inadvertent. A juror's intentional concealment of information may give rise to "'a rebuttable presumption of prejudice[.]'" *Id.* at 116 (quoting *People v. Blackwell*, 191 Cal. App. 3d 925, 929 (Cal. Ct. App. 1987)). "'Only where a juror's intentional nondisclosure does not involve a material issue, or where the nondisclosure is *unintentional*, should the trial court inquire into prejudice.'" *Williams*, 394 Md. at 116-17 (quoting *Doyle v. Kennedy Heating & Serv., Inc.*, 33 S.W.3d 199, 201 (Mo. Ct. App. 2000)).[9]

In their motion in this case, Mr. Colkley and Ms. Cromer insisted that the court should determine actual or likely prejudice, but did not ask the court to inquire into whether the non-disclosures were intentional or inadvertent. In response, the Levitas parties, understandably, did not recognize the new-trial motion to include any request to take testimony about the mental states of the two jurors.

In their written opposition to the motion, the Levitas parties made two arguments. First, they contended that Mr. Colkley and Ms. Cromer had waived any objection by failing to exercise "due diligence" to discover information that was publicly available before the verdict through a search on the Maryland Judiciary website,

[9] Mr. Colkley and Ms. Cromer rely heavily on *Doyle*, a Missouri case cited in *Williams*. *Doyle* is readily distinguishable because in that case the juror intentionally chose not to disclose information sought by a voir dire question. Consequently, the court applied the presumption of prejudice resulting from a juror's intentional concealment of information. *See Doyle*, 33 S.W.3d at 200-01.

http://casesearch.courts.state.md.us/casesearch//inquiry-index.jsp.[10] Second, the Levitas parties argued that there was no indication that the two jurors were actually biased against Mr. Colkley and Ms. Cromer.

Mr. Colkley and Ms. Cromer submitted a written reply, most of which was devoted to a new argument that the jury's verdict on damages was against the weight of the evidence. They disputed the Levitas parties' contentions that they had waived their claim by failing to research the jurors until after the verdict. In addition, they argued that they did not have to show actual bias because "[t]he facts detailed in [their] motion demonstrate that neither juror could reasonably be expected to make a decision with absolute impartiality."

The circuit court denied the new-trial motion without holding a hearing and without issuing a statement of its reasons.

C. Grounds Properly Preserved for Purposes of Appeal

On appeal, Mr. Colkley and Ms. Cromer raise two separate grounds for reversal on this issue. First, they assert that they are entitled to a partial new trial as to damages because "[t]he record is devoid of evidence as to whether the jurors' non-disclosures were intentional or inadvertent[.]" Second, they contend that, "in and of itself, the factual

[10] The Levitas parties pointed out that during the trial their counsel had successfully moved to strike one of the alternate jurors because of his failure to disclose a disqualifying criminal conviction. Defense counsel appears to have obtained that information from the Maryland Judiciary website. The information about Juror #4 and Juror #5 was equally available during trial on the Maryland Judiciary website.

record before the circuit court gives rise to a reasonable belief that the non-disclosures were not inadvertent and that prejudice or bias by the jurors was likely."

We conclude that Mr. Colkley's and Ms. Cromer's first argument is not preserved because Mr. Colkley and Ms. Cromer did not adequately raise that issue in the circuit court. We conclude that the second argument, although it was adequately raised in the circuit court, lacks merit.

No principle of Maryland appellate procedure is better established than the rule that the appellate court ordinarily will not decide an issue that does not "plainly appear[] by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). The purpose of this rule is to advance fairness "by requiring counsel to bring the position of their client to the attention" of the trial court so that it "can pass upon, and possibly correct any errors in the proceedings." *Barber v. Catholic Health Initiatives, Inc.*, 180 Md. App. 409, 438 (2008) (citation and quotation marks omitted). For the purpose of appellate review of any ruling in a civil case other than one on the admission of evidence, an issue is sufficiently raised if "a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court." Md. Rule 2-517(c). On a motion for new trial filed within 10 days after the entry of judgment, "[a]ll grounds advanced in support of the motion shall be filed in writing within the time prescribed for the filing of the motion, and no other grounds shall thereafter be assigned without leave of court." Md. Rule 2-533(b). Consistent with these rules, the appellate court should not consider grounds for

granting a new trial if a party failed to mention those grounds in the motion for new trial. *See, e.g.*, *Patras v. Syphax*, 166 Md. App. 67, 82 (2005).

As the primary grounds for reversal on appeal, Mr. Colkley and Ms. Cromer raise a new argument that is substantially different from (and in some ways inconsistent with) the arguments advanced in support of their new-trial motion. Mr. Colkley and Ms. Cromer contend that "[t]he trial judge denied the motion without any testimony from the jurors as to whether the non-disclosures were intentional or inadvertent, and the trial judge failed to make findings based on [that] information." Mr. Colkley and Ms. Cromer fault the circuit court for failing to conduct an evidentiary hearing to take testimony from the two jurors before the court ruled on their motion. Supported by a thorough discussion of the facts and holding of *Williams*, they argue that "[b]ecause the record is devoid of the reasons for the jurors' non-disclosure, [they] are entitled to a new trial as to damages."

Mr. Colkley and Ms. Cromer should have brought the inadequacy of the record to the circuit court's attention in the first instance. In their motion, Mr. Colkley and Ms. Cromer relied on *Williams* not for its holding, but for the test that it endorsed for situations "'where information inadvertently is withheld by a juror's failure to respond to voir dire inquiry[.]'" *Williams*, 394 Md. at 102 (quoting *Burkett*, 21 Md. App. at 445).[11] Their entire argument focused on the issues of actual or likely prejudice – issues that

[11] Mr. Colkley and Ms. Cromer also cited *Williams* to establish general propositions about the purpose of the voir dire.

should be reached only after the court makes a factual determination of whether the non-disclosures were intentional or inadvertent.

In their motion, however, Mr. Colkley and Ms. Cromer did not request that the court hold an evidentiary hearing or make a finding as to whether the non-disclosures were intentional or inadvertent. The present argument, that the court could not properly decide the issue of the juror's motivations and issue of prejudice, stands in stark contrast to their request that the circuit court actually decide the issue of prejudice in their favor based solely on the written information detailed in their motion. Overall, the argument in support of the motion was insufficient to alert the circuit court that it was supposed to conduct an evidentiary hearing, at which it would have to compel Juror #4 and Juror #5 to appear so that it could question them about whether the disclosures were intentional or inadvertent.

Although Mr. Colkley and Ms. Cromer requested a hearing in their motion and their response, those requests did not inform the court that it was required to convene an *evidentiary* hearing, send the sheriffs out with subpoenas to secure the jurors' appearances, and interrogate them about why they did not respond to questions at voir dire. Ordinarily, when a party files a motion for new trial under Rule 2-533, the court is required to hold a hearing only if the court grants the motion. *See* Md. Rule 2-311(e). A party desiring a hearing on a motion "other than a motion filed pursuant to . . . Rule 2-533" may request a hearing under the heading "Request for Hearing" and state in the title of the motion that a hearing is requested. Md. Rule 2-311(f). Mr. Colkley's and Ms. Cromer's generic request was at most sufficient to inform the court that they wished to

argue the issues raised in their multi-part motion. Mr. Colkley and Ms. Cromer did nothing to differentiate any hearing request on the juror misconduct issue from their hearing request on the majority of the issues that they raised, for which no hearing was required. Moreover, nothing in their submissions suggested that the court should take the additional (and unusual) steps of compelling the presence of the two jurors as witnesses at an evidentiary hearing at which the court would inquire about their reasons for not responding affirmatively to certain questions in voir dire.

In sum, we cannot fault the court for failing to conduct an *evidentiary* hearing in accordance with *Williams* and *Burkett* where Mr. Colkley and Ms. Cromer did not apprise the court of the need to conduct such a hearing. *See Ley v. Forman*, 144 Md. App. 658, 683 (2002) (holding that party failed to preserve argument on appeal that court was required to hold hearing on a motion by failing to raise the issue in the court); *see also Stone v. State*, 178 Md. App. 428, 452 (2008) (holding that defendant failed to preserve argument that trial judge deprived him of right where the defendant did not assert that right, but only asked the court to exercise its discretion in his favor). Mr. Colkley and Ms. Cromer asked the court to make its determination on the likelihood of prejudice or bias based on the existing record, and the court did exactly that. The argument properly preserved for our review is the argument that Mr. Colkley and Ms. Cromer actually raised: that the existing factual record surrounding the two jurors gave reason to believe that those jurors were likely biased or prejudiced against Mr. Colkley and Ms. Cromer.

D. Likelihood of Prejudice Based on the Undisclosed Information Itself

On this point, Mr. Colkley and Ms. Cromer offer little more than conclusory characterizations of the jurors' litigation history. They assert that both Juror #4 and Juror #5 "had significant personal involvement as parties to lawsuits involving personal monetary awards, either concurrent with the instant action, or within a year, which would not be forgotten, and in and of itself, likely predisposed them to bias and partiality."

The information regarding Juror #4 generates nothing beyond the purest speculation that she would have been biased against either party in determining the amount of damages in a lead poisoning case. Juror #4 had been defaulted as a defendant in two debt-collection actions in district court a few years before the trial. Additionally, she had unsuccessfully represented herself in a petition for judicial review of an administrative appeals board's denial of her unemployment insurance benefits one year before the trial date. Juror #4 should have disclosed the information in response to the court's compound question about whether any juror had "been a party or a witness to a civil action or made a claim as a result of personal injury sustained" (assuming that she understood the question, including the legalistic term "civil action"). But Mr. Colkley and Ms. Cromer offer no reason (and we perceive none) why this information itself generates reason to believe that she was likely to be biased against Mr. Colkley and Ms. Cromer.

The parties' arguments focus more on Juror #5, who had been a defendant in two auto-tort cases, including one that was pending in the Circuit Court for Baltimore City at the time of jury selection. Based on that information, Mr. Colkley and Ms. Cromer assert

that that Juror #5 had "personal experience[] and resulting emotions regarding monetary awards from litigation[.]" They also assert that, "based on the factual circumstances surrounding [Juror #5's] significant involvement in ongoing litigation in the same courthouse contemporaneous with the trial, the non-disclosure was apparently intentional."

In response, the Levitas parties argue that the record does not generate any reason to believe that Juror #5 was likely to be biased against Mr. Colkley and Ms. Cromer. The Levitas parties argue that Juror #5 probably had little active involvement in the litigation against him because the defense was being managed by his insurance company; that the auto-tort claim against Juror #5 was "minor" and "unrelated" to the lead-paint action; that Juror #5 may not have understood the legal jargon used in the voir dire questions; and that it is implausible that Juror #5 would have been intentionally concealing a disqualifying bias while he "actively tr[ying] to avoid jury service" so that he would not miss the first week of his next college semester. Citing *Cooch v. S & D River Island, LLC*, 216 Md. App. 275 (2014), the Levitas parties further argue that the presumption of prejudice from juror misconduct is not as strong in a civil case where the jury awards a substantial verdict in a plaintiff's favor as it would be in a criminal case where the juror votes to convict a defendant.

In *Burkett*, 21 Md. App. at 445, this Court reasoned that information that a juror was the parent of a person working as a secretary in a law enforcement agency, in and of itself, did not give rise to a reasonable belief that prejudice or bias by the juror against a criminal defendant was likely. The Court of Appeals similarly reasoned that information

of a juror's close family relationship with an employee of the State's Attorney's Office "would not have resulted in a finding of prejudice as a matter of law" and would not automatically amount to cause to strike the juror. *Williams*, 394 Md. at 112. As part of its analysis, the Court stated that information about whether a juror in a civil case had ever sustained injuries similar to the plaintiff's is "clearly not so prejudicial as a direct family relationship to a member of the State would be" in a criminal case. *Id.* at 114 n.10 (distinguishing *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984)).

We conclude that the likelihood that a juror would be biased against the plaintiffs in a lead paint case because of the juror's status as a defendant in a minor auto-tort case in which he was represented by an insurance company is not materially greater than the likelihood that a juror would be biased against a criminal defendant based on a family relationship with an employee of a law enforcement agency. Because Juror #5 and his father had conceded liability in a case in which the demand appears to have been within policy limits, the only issue in the case was how much of *it*s money the insurance company would pay to settle. In those circumstances, a layperson – even a relatively well-educated layperson, like Juror #5 – might well think that the dispute was really between the plaintiff and the insurance company. Accordingly, we reject the contention that the information about Juror #5, in and of itself, gives rise to a reasonable belief that Juror #5 was likely prejudiced against Mr. Colkley and Ms. Cromer. The circuit court did not err when it was rejected Mr. Colkley's and Ms. Cromer's arguments on that issue.

In summary, we have concluded: (1) that Mr. Colkley and Ms. Cromer failed to preserve their argument that the court erred by failing to hold a hearing to determine

whether the jurors' non-disclosures were inadvertent by failing to raise that issue in the trial court; and (2) that the undisclosed information about the two jurors does not in itself give rise to a reasonable belief that prejudice or bias by those jurors against Mr. Colkley and Ms. Cromer was likely.

E. Independent Bases for the Exercise of the Court's Discretion

As independent bases for upholding the court's ruling, we conclude that other key features distinguish the present case from *Williams*, the main authority cited by Mr. Colkley and Ms. Cromer.

The Court of Appeals expressly decided *Williams* against the backdrop of the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights, which guarantee a criminal defendant's right to a fair and impartial jury. *See Williams*, 394 Md. at 105-06. In general, "the right to a fair and impartial trial is no less deserving of protection in a civil setting as it is in the criminal courts." *Dinkins v. Grimes*, 201 Md. App. 344, 361 (2011). The Court in *Williams* did not explicitly discuss the extent to which its holding applies to civil cases, but the court did rely on a number of opinions in civil cases from other state and federal courts.[12] Accordingly, we have assumed that *Williams* generally governs new-trial motions in civil cases.

Williams establishes that a trial judge does not have discretion to speculate about whether a juror's failure to disclose information in response to voir dire questions was intentional or inadvertent. *See Williams*, 394 Md. at 114 n.9. Nevertheless, nothing in

[12] Similarly, the dissenting opinion proposed a standard for handling motions in both criminal and civil cases. *See Williams*, 394 Md. at 118-19 (Raker, J., dissenting).

Williams indicates that the Court of Appeals intended to override other established principles regarding other bases for the court's exercise of discretion in denying a motion for new trial. *See Scott v. State*, 175 Md. App. 130, 146 (2007) (explaining that, under *Williams*, "[t]he failure of *voir dire* to disclose potentially disqualifying information does not, in all cases, entitle [a party] to a new trial," and holding that a party waived a complaint about the jurors' failure to disclose information through voir dire where the party was aware of the undisclosed information before the verdict, but failed to alert the trial court until after the verdict).

Throughout their brief, Mr. Colkley and Ms. Cromer assert that their motion for new trial was based on "newly discovered evidence" of juror misconduct. Generally speaking, "to grant a new trial on the grounds of newly discovered evidence, a trial court must find" not only that "the evidence was discovered since the trial" but also that "there was diligence in attempting to discover the evidence on the part of the movant[.]" *Market Tavern, Inc. v. Bowen*, 92 Md. App. 622, 649 (1992) (citations omitted). The Levitas parties have vigorously contested whether Mr. Colkley and Ms. Cromer met this diligence requirement. The Levitas parties assert that all of the information offered in support of their motion for new trial was easily discoverable before the verdict. The Levitas parties further assert that Mr. Colkley and Ms. Cromer were "on notice" of the availability of that information because the Levitas parties had successfully moved to strike an alternate juror based on a disqualifying criminal conviction that they discovered through the Maryland Judiciary website.

In response, Mr. Colkley and Ms. Cromer argue that they satisfied the requirement of diligence through the voir dire process itself. Citing language from a different context in *Williams*, 394 Md. at 112, Mr. Colkley and Ms. Cromer argue that they were entitled to expect that the venire members would answer the questions applicable to them fully and truthfully. We agree with Mr. Colkley and Ms. Cromer that it would be unfair to hold that, after a verdict, a party automatically waives a claim for a new trial based on later-discovered evidence regarding jurors that was discoverable before the verdict.

However, it would also be unwise to automatically permit parties to wait until after an unsatisfactory verdict to uncover easily discoverable information that might expose inaccuracies in voir dire answers. The question of diligence in discovering juror dishonesty during voir dire should be addressed to the trial judge's discretion, and that discretion should be informed by factors such as the ease of discovering the information, the length of the trial and the opportunities to discover the information, and the reasons why the party waited until after trial to attempt to uncover the information.[13] On the record in this case, the trial judge had discretion to conclude that Mr. Colkley and Ms. Cromer had insufficient justification for waiting to pursue the information only after the verdict.

[13] In their written reply to the Levitas parties' opposition, Mr. Colkley and Ms. Cromer suggested that the primary reason that they researched the jurors was because they were dissatisfied with the damage award. They told the trial court that "[i]t was not until the jurors returned a verdict that . . . was so inequitable and insufficient that [they] reasoned that there must have been some bias or prejudice at play[.]"

As another independent basis for upholding the court's ruling, we note that the trial court has discretion to deny a motion for new trial in a civil case "because the plaintiff insist[s] upon a new trial limited to damages." *Bienkowski v. Brooks*, 386 Md. 516, 555 (2005). A trial court may decide to deny a plaintiff's motion for partial new trial as to damages where the judge believes that it would be "unfair" to "to keep intact the favorable parts of the jury's verdict but have a re-trial only on the unfavorable parts." *Id.* In their submissions to the circuit court, Mr. Colkley and Ms. Cromer maintained that they were not requesting a new trial on the issue of liability that the jury decided in their favor. Asking the court not only to find a basis for a new trial but to find a good reason to limit that new trial to the issue of damages is the type of "'double or nothing' gamble" in litigation that "almost always yields 'nothing.'" *Thomas v. State*, 397 Md. 557, 575 (2007) (citations and further quotation marks omitted). The trial court had discretion to deny their motion solely based on perceived unfairness of a one-sided request for new trial, especially where the allegations of juror misconduct related to two different jurors and would have affected the entire trial and all of the questions on the verdict sheet.

II. Expert Testimony on Causation

Mr. Colkley and Ms. Cromer argue that the trial court abused its discretion by permitting Dr. Hoffman, accepted by the court as an expert "in the field of psychology and the effects of lead poisoning," to testify on matters of medical causation. They argue that Dr. Hoffman was properly qualified to testify about his evaluation of cognitive deficits in Mr. Colkley and Ms. Cromer, but that he was not qualified to render an expert opinion about the cause of those deficits. They theorize that Dr. Hoffman's testimony

probably affected the jury's determination of the amount of damages they had sustained as a result of their injuries from lead exposure.[14]

A. Dr. Hoffman's Qualifications

In a motion in limine, Mr. Colkley and Ms. Cromer argued that Dr. Hoffman was not qualified to offer opinions as to medical causation. In response, the Levitas parties asserted that Dr. Hoffman had been received as a causation expert in a separate lead paint case and that determining the cause of cognitive impairments was "absolutely" part of his professional experience. Based on those arguments, the court stated that it was "inclined" to permit Dr. Hoffman to address matters of causation in his testimony, subject to Mr. Colkley's and Ms. Cromer's ability to "cross-examine Dr. Hoffman on his qualifications."

At trial, the Levitas parties sought to qualify Dr. Hoffman "as a licensed psychologist with expertise in evaluating children with a history of lead ingestion." They established that Dr. Hoffman is a licensed psychologist with a Ph.D. from the University of Maryland and that, for 29 years until his retirement in 2010, he had acted in various capacities for the Johns Hopkins Hospital and the Johns Hopkins University School of Medicine, Kennedy Krieger Institute (KKI). Dr. Hoffman had evaluated and treated

[14] Mr. Colkley and Ms. Cromer identified Dr. Hoffman's testimony as one of the grounds for their motion for partial new trial. Unlike their other two questions presented, Mr. Colkley and Ms. Cromer did not expressly limit this question to whether that the court abused its discretion in denying the new-trial motion. Nevertheless, they assert that Dr. Hoffman's testimony affected "the jury's consideration of the appropriate award of damages," and they contend that they are "entitled to a new trial as to damages" as a result.

"around 5,000 children" at KKI, several hundred of whom were patients referred "for evaluation by the [KKI] Lead Clinic who had histories of lead ingestion." He said that he had become very familiar with the "studies [and] literature related to lead ingestion[.]"

Dr. Hoffman had training and experience in evaluating and treating people with various developmental, psychological, or emotional difficulties. His role as a neuropsychologist involved looking from a "brain-related perspective" to assess a patient's "general level of functioning" and areas of a patient's cognitive strengths or weaknesses. In response to questions from Mr. Colkley's and Ms. Cromer's attorney, he made it clear that he never "ma[d]e the diagnosis of lead poisoning," that he "just did evaluations," and that he was never specifically asked in his practice to determine whether "a child was injured from their lead poisoning[.]"

While not disputing Dr. Hoffman's qualifications to make neuropsychological evaluations, Mr. Colkley and Ms. Cromer challenged Dr. Hoffman's qualifications "to provide causation opinions." After a bench conference, the court ruled that Dr. Hoffman would be "permitted to testify on causation." The court announced that the jury would "hear and consider the testimony of Dr. Neil Hoffman as that of an expert in the field of psychology and the effects of childhood lead poisoning."

B. Dr. Hoffman's Testimony

Dr. Hoffman testified at length about his examinations of Ms. Cromer and Mr. Colkley. Having reviewed their medical and academic records, he administered a series of psychological and neuropsychological tests (aimed at assessing skills, overall IQ, memory, perceptual reasoning, and the like). He testified that Ms. Cromer achieved test

results ranging from "solidly within the average range" to "the high average range . . . , almost near the superior range" in some areas. He said that her full-scale IQ and her overall performance of these tests was "a little bit above th[e] mean[.]" Mr. Colkley achieved lower overall results on the same tests, scoring "generally within the average range," including a full-scale IQ "in the average range[,] . . . albeit the lower end of it[.]" Dr. Hoffman noted that these results "were higher for both [Ms. Cromer and Mr. Colkley]" than the results from similar tests administered by Dr. Lasson, the psychology expert for Mr. Colkley and Ms. Cromer.[15]

Dr. Hoffman concluded that Ms. Cromer was "solidly of average intelligence" and that she had the ability to obtain a four-year college degree. He highlighted Ms. Cromer's successes in middle school (where she graduated with the second-highest grades) and her graduation from the selective Baltimore School for the Arts. Despite her exposure to high levels of lead as a child, he saw "absolutely no evidence" that Ms. Cromer had lost any IQ points or skills or that "her development was delayed[.]" Dr. Hoffman explained that when a person suffers a brain injury that results in cognitive deficits or loss in skills or IQ points, it is a "very, very significant issue" that will be noticeable to parents and teachers. He said that he "did not see any neuropsychological inefficiencies or deficits" in Ms. Cromer. Although Ms. Cromer had dropped out of

[15] Overall, Dr. Lasson had measured Ms. Cromer's full-scale IQ to be 90, which put her on the lowest end of the average range, and Mr. Colkley's full-scale IQ to be 84, which put him below the average range. Dr. Hoffman measured Ms. Cromer's full-scale IQ to be 104, slightly above average, and Mr. Colkley's full-scale IQ to be 92, near the bottom end of the average range.

college, Dr. Hoffman "could not find any cognitive, neuropsychological or academic reason why she didn't do well."

As for Mr. Colkley, Dr. Hoffman conceded that his academic record indicated that he had experienced some struggles in school. Specifically, Mr. Colkley needed to repeat the first grade, he sporadically had low marks in various subjects, and he had been diagnosed with ADHD. Dr. Hoffman listed a number of life factors that "seemed to come together in the eighth grade for Mr. Colkley" and "hit him like a ton of bricks" – he was "with a different set of kids[;]" "a friend of his was shot six or seven times[;]" "his relationship with his father kind of deteriorated[;]" he suffered from eczema; and that year "was the onset of the daily use of marijuana." Dr. Hoffman concluded that all of those factors may have "interfered[,] and from then on his grades really fell in school." Dr. Hoffman nevertheless concluded that Mr. Colkley "has the ability to succeed in . . . a two-year associate arts degree of his choice, should he be motivated to do so." Dr. Hoffman specifically stated that he saw "no evidence" that Mr. Colkley had lost IQ points.

When assessing whether there was "any evidence of any disability or impairment with regard to [Mr. Colkley,]" Dr. Hoffman admitted that Mr. Colkley "was a little more symptomatic" than Ms. Cromer. He noted that Mr. Colkley had had an Individualized Education Program (IEP) in school, and he again identified the issue of ADHD – with which Mr. Colkley had been diagnosed, but which Dr. Hoffman himself had not observed. He went on to note that social and familial factors can account for much of a

person's IQ, cognitive functioning, and academic performance. More specifically, he testified that the biggest contributing factor to ADHD was "familial."

During these exchanges, the following testimony was admitted without objection:

> [COUNSEL FOR THE LEVITAS PARTIES:] Doctor, have you had occasion to evaluate pediatric patients over the years with IQ, achievement, and neuropsychological test results very similar to, if not identical to in some instances, as [Ms. Cromer] and [Mr. Colkley], who had no history at all of lead ingestion.
>
> [DR. HOFFMAN:] Oh, absolutely. Their . . . profiles are not particularly unique or different.

The Levitas parties' counsel proceeded to ask Dr. Hoffman a number of questions about whether Mr. Colkley or Ms. Cromer had suffered any injuries "due to" or "related to" lead. Counsel asked whether Dr. Hoffman had "formed any opinions, to a reasonable degree of psychological probability, on whether [Ms. Cromer] has sustained any *injuries due to lead*?" (Emphasis added.) Over objection from Mr. Colkley and Ms. Cromer, Dr. Hoffman answered, "I did not see any." Counsel asked Dr. Hoffman the same question with respect to Mr. Colkley, to which Dr. Hoffman replied (again over objection) that he "did not see any that [he] could definitively say that were related to lead."

Pressing on, counsel asked Dr. Hoffman whether he had any opinions about "the basis or potential contributing factors" that would explain why Mr. Colkley "was not doing as well as his cousin[.]" Without objection, Dr. Hoffman answered:

> [DR. HOFFMAN:] Sure . . . . I think the main one[s] probably are the ADHD and the depression or suspected depression . . . . And given that there's no . . . behavioral signature; in other words, there's no specific pattern of deficits that has been determined that has been uniquely related to lead at this point. There may be down the road. Right now there is not.

> And therefore . . . to attribute any pattern of deficits or any area of deficit to lead, 15 years later, is very difficult to do with certainty, if you will.

Lastly, the Levitas parties' counsel asked Dr. Hoffman whether there was anything in "the IQ test functioning or achievement test functioning or your review of the medical or school records, factors for [Ms. Cromer] and [Mr. Colkley] that one could identify and point to as uniquely related to or attributable to lead as opposed to other issues?" Dr. Hoffman, over another set of objections, responded, "No, there was nothing that could be directly attributed to lead, again, because there is none of that behavioral signature that is unique." Dr. Hoffman further opined, again over objection, that not every person who has ingested lead will sustain an injury.[16]

At the end of his testimony, Dr. Hoffman concluded that he did not observe at any time any loss of skills, regression in development, or loss of IQ points from either Mr. Colkley or Ms. Cromer.

C. Appellate Challenge Based on Dr. Hoffman's Testimony

Mr. Colkley and Ms. Cromer argue that the trial court abused its discretion by permitting Dr. Hoffman to testify as to the "medical cause of cognitive deficits or weaknesses identified in his evaluations." They contend that while the doctor has the "knowledge . . . to be able to identify cognitive deficits from his psychological education and training[,]" he lacks the knowledge, skill, and experience to testify about

[16] During cross-examination, Dr. Hoffman clarified that he could not "totally rule out" the possibility that lead exposure had some impact on Mr. Colkley's functioning. He reiterated his opinion that without "what they call . . . that 'behavioral signature' that 'pattern of deficits,' it [was] hard to attribute lead to his deficits."

"complicated medical causation issues." Mr. Colkley and Ms. Cromer focus on the standards for expert testimony set forth in Md. Rule 5-702:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

"To satisfy the first requirement, . . . 'a witness may be competent to express an expert opinion if he [or she] is reasonably familiar with the subject under investigation, regardless of whether this special knowledge is based upon professional training, observation, actual experience, or any combination of these factors.'" *Roy v. Dackman*, 445 Md. 23, 41 (2015) (quoting *Radman v. Harold*, 279 Md. 167, 169 (1977)). "'A witness is qualified to testify as an expert when he exhibits such a degree of knowledge as to make it appear that his opinion is of some value, whether such knowledge has been gained from observation or experience, standard books, maps of recognized authority, or any other reliable sources.'" *City Homes, Inc. v. Hazelwood*, 210 Md. App. 615, 677 (2013) (quoting *Radman*, 279 Md. at 169-70).

Mr. Colkley and Ms. Cromer insist that Dr. Hoffman did not meet the standard set forth in Rule 5-702(1) because he "does not have the requisite sufficient knowledge to assist the jury as to the medical cause of Appellants' neuropsychological deficits." They argue that, by allowing Dr. Hoffman to give opinions on causation beyond the scope of his expertise, the trial court committed an error that probably affected the damage awards. According to Mr. Colkley and Ms. Cromer, "Dr. Hoffman prejudiced

Appellants' case by offering opinion testimony, without the requisite knowledge, training, or skill, as to the ultimate issue: that Appellants were *not* injured in any manner as a result of exposure to lead."

In response, the Levitas parties contend that Dr. Hoffman was "uniquely qualified" to render an opinion that neither Mr. Colkley nor Ms. Cromer "suffered a cognitive deficit as a result of lead ingestion, and more specifically, that they did not suffer any cognitive deficit at all." The Levitas parties further contend that it was ultimately inconsequential whether or not Dr. Hoffman could properly opine about the cause of their injuries because the essence of his testimony was that he observed "no cognitive injuries of any kind or from any source."

D. Prejudice from the Admission of Dr. Hoffman's Testimony

Assuming (without deciding) that the court should not have permitted Dr. Hoffman to opine about the cause of Mr. Colkley's and Ms. Cromer' injuries, we conclude that any error in permitting those causation-based opinions does not merit reversal of the judgment.

Maryland Rule 5-103(a) provides, in pertinent part, that "[e]rror may not be predicated upon a ruling that admits . . . evidence unless the party is prejudiced by the ruling" and "a timely objection or motion to strike appears of record[.]" This Court will not reverse a judgment in a civil case based on a trial court's determination on the admissibility of expert testimony unless the determination was "'both manifestly wrong and substantially injurious.'" *Brown v. Contemporary OB/GYN Assocs.*, 143 Md. App.

199, 252 (2002) (quoting *Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md. App. 605, 641 (1997)). As the Court of Appeals has explained:

> It is the policy of this Court not to reverse for harmless error and the burden is on the appellant in all cases to show prejudice as well as error. Prejudice will be found if a showing is made that the error was likely to have affected the verdict below. It is not the possibility, but the probability, of prejudice which is the object of the appellate inquiry. Courts are reluctant to set aside verdicts for errors in the admission or exclusion of evidence unless they cause substantial injustice. Substantial prejudice must be shown.

Crane v. Dunn, 382 Md. 83, 91-92 (2004) (citations and quotation marks omitted).

In this case, Mr. Colkley and Ms. Cromer present an unusual theory of prejudice. Mr. Colkley and Ms. Cromer have conceded that Dr. Hoffman was qualified to give expert opinions about whether (and the extent to which) Mr. Colkley and Ms. Cromer suffered cognitive injuries, an issue that was central to the question of damages. Mr. Colkley and Ms. Cromer have challenged Dr. Hoffman's ability to opine only about the cause of their injuries. According to Mr. Colkley and Ms. Cromer, Dr. Hoffman's testimony was not harmless because his "medical opinions on the ultimate issue of medical causation . . . directly impacted the jury's consideration of the appropriate award of damages[.]"

The jury in this case, however, actually rejected Dr. Hoffman's conclusions on the issue of medical causation. The court instructed the jury that, "[f]or the Plaintiff to recover damages, the Defendant's negligence must be a cause of the Plaintiff's injury[,]" and that the jury should "go on to consider the question of damages" only "[i]n the event that [they found] for the Plaintiffs on the issue of liability." On the verdict sheet, the jurors answered in the affirmative to the questions of whether the Central Avenue

property contained lead-based paint, whether the Levitas parties were negligent with respect to the property, and whether Mr. Colkley and Ms. Cromer had been injured as a result of the Levitas parties' negligence.

If the jury had indeed credited Dr. Hoffman's statements that Mr. Colkley and Ms. Cromer did not sustain any injuries caused by lead exposure, the jury would not have found that Mr. Colkley and Ms. Cromer had been injured as a result of the Levitas parties' negligence, and it would not have even reached the question of damages. In essence, Mr. Colkley and Ms. Cromer are complaining about improper testimony on a question that the jury decided in their favor. *See Feeney v. Dolan*, 35 Md. App. 538, 550-51 (1977) (concluding that appellant was not prejudiced by exclusion of expert causation testimony, where jury must have concluded that causation element was established when it returned a verdict in appellant's favor, and perceiving no effect of that causation testimony on the amount of the verdict); *cf. Flores v. Bell*, 398 Md. 27, 36 (2007) (holding that improper submission of an issue to the jury usually does not constitute reversible error "when the question is answered in favor of the complaining party").

Even if the jury had not specifically determined the causation question in favor of Mr. Colkley and Ms. Cromer, we would still conclude that the likelihood of prejudice from the challenged portions of Dr. Hoffman's testimony was minimal. Independent of the statements at issue, Dr. Hoffman stated the following opinions without objection: that pediatric assessments for Mr. Colkley and Ms. Cromer were "invariably marked as normal"; that Ms. Cromer's intelligence was slightly above average and that she had the ability to earn a four-year college degree; that Mr. Colkley's intelligence was within the

average range and that he had the ability to complete high school and attend some college despite his other difficulties; that their overall profiles were comparable to other persons with no history of lead ingestion; and (most importantly) that neither Ms. Cromer nor Mr. Colkley showed loss of skills, loss of IQ points, or delayed development.

Dr. Hoffman concluded that, in his assessment, there was no evidence that Mr. Colkley and Ms. Cromer had suffered cognitive injuries of any kind, particularly the kinds of injuries that had been identified by Mr. Colkley's and Ms. Cromer's experts. Thus, the most prejudicial features of his testimony were already before the jury though his other testimony. The marginal prejudicial effect of his additional opinions, that Mr. Colkley and Ms. Cromer had not sustained cognitive injuries that could be specifically attributed to lead, is not sufficient to require reversal. *See Brown v. Daniel Realty Co.*, 409 Md. 565, 595-96 (2009) (holding that any error in admission of testimony was harmless where "the damaging features" of the testimony were "already were before the jury" through other properly admitted evidence); *CSX Transp., Inc. v. Bickerstaff*, 187 Md. App. 187, 217-19 (2009) (holding that any error in admission of evidence was not prejudicial where other properly admitted evidence was "more prejudicial" on that issue and thus "overshadow[ed] any prejudice that may have resulted"); *see also Hollingsworth & Vose Co. v. Connor*, 136 Md. App. 91, 134-35 (2000) (holding that any error in admission of certain hearsay through expert witness was harmless where "there was other testimony that used similar language and produced similar results").

In sum, Mr. Colkley and Ms. Cromer have not met their burden of showing a probability that, but for Dr. Hoffman's statements that Mr. Colkley and Ms. Cromer had

sustained no injuries as a result of lead exposure, the jury would have reached a different conclusion about the amount of damages Mr. Colkley and Ms. Cromer sustained as a result of their lead exposure.

III. Miscellaneous Challenge

In their last challenge, Mr. Colkley and Ms. Cromer assert that the circuit court abused its discretion in denying their motion for a partial new trial as to damages "when multiple prejudicial errors occurred during the trial" that likely affected the jury's damage award. In evaluating this challenge, we keep in mind that the range of a trial judge's discretion in deciding a motion for new trial is "necessarily at its broadest" when the motion asks the judge to draw upon his or her own view of "the effect of an accumulation of alleged errors or improprieties by [opposing] counsel[.]" *Buck v. Cam's Broadloom Rugs, Inc.*, 328 Md. 51, 59 (1992).

First, Mr. Colkley and Ms. Cromer contend that opposing counsel made an improper "golden rule" argument by telling the jury that the jurors themselves had been exposed to lead and had some level of lead in their own blood. Second, they contend that opposing counsel "peppered the trial with improper suggestions that Appellants' grandmother contributed to their lead poisoning, by failing to have the health department inspect their home for the presence of lead-based paint." Mr. Colkley and Ms. Cromer argue that "[a]ll of these compounding errors unfairly deprived Appellants of a substantial right to a fair trial and denied them a just result." We conclude that the court was not required to grant the motion for partial new trial on either of these grounds.

A. The "Golden Rule" Arguments

During the Levitas parties' opening statement, their counsel told the jurors that there is "a lot of environmental lead out there, to which most of us have been exposed over the years." After mentioning environmental sources such as gasoline, soil, and water, counsel stated: "From the 1970s to the 1990s, we know, from well-published studies that that general population all have . . . some blood-lead levels."

Counsel for Mr. Colkley and Ms. Cromer promptly objected to that statement, arguing that the comment was not based on evidence and that the comment was "encroaching upon the Golden Rule, which is, 'If you have lead, I have lead; ergo, you must be okay, so the plaintiff must be okay, too.'" The attorney for the Levitas parties responded that he intended, through his expert witnesses, to offer evidence about "mean population lead levels." The court instructed the attorney to "emphasi[ze]" what he "intended to prove" through those witnesses. At that point, the attorney continued his opening statement, stating that his experts would tell the jury about published studies "about the many sources of environmental lead and the lead in the general population."

During closing argument, counsel for the Levitas parties argued, among other things, that Mr. Colkley and Ms. Cromer had not proved that they had been exposed to lead-based paint hazards at the Central Avenue property. He pointed out that the December 2013 inspection report, which had revealed lead-based paint hazards on some interior surfaces, also noted that other parts of the property were under construction. He continued:

> [COUNSEL FOR THE LEVITAS PARTIES:] Now, the courthouse we're in is a hundred years old. There's lead somewhere. As a matter of fact, we're all being exposed to lead –
>
> [COUNSEL FOR MR. COLKLEY AND MS. CROMER:] Objection.
>
> THE COURT: Sustained.
>
> [COUNSEL FOR THE LEVITAS PARTIES:] – right now. But if we were to bring in a construction crew to this courthouse and the construction crew were to start taking out walls, floors or ceilings to the point where it was unsafe to walk on the floor, lead that might be many layers of unleaded or latex paint or under boards or panels that would have been in place for decades would be brought to the surface. . . .

On appeal, Mr. Colkley and Ms. Cromer contend that the Levitas parties' attorney made improper "golden rule" arguments to the jury. *See generally Leach v. Metzger*, 241 Md. 533, 536-37 (1966) (holding that arguments that "urge jurors to deal with counsel's clients as they would wish to be dealt with if they were in such client's position" are improper "golden rule" arguments, but holding that trial judge had discretion to issue a curative instruction rather than to grant a mistrial). Mr. Colkley and Ms. Cromer assert that, after hearing the attorney's comments, the jury was likely to "render a damage award based on a personal view of their own subjective health, rather than view the evidence presented objectively as to the proper amount of damages, based on the law and facts." The Levitas parties respond that the attorney's statements were not invocations of the golden rule but rather proper comments on the evidence.

Unlike this Court, the trial judge had the opportunity "to feel the pulse of the trial and to rely on his own impressions" (*Buck*, 328 Md. at 59), to determine whether the attorney was attempting to improperly influence the jurors' emotions. "Because the

exercise of discretion under these circumstances depends so heavily upon the unique opportunity the trial judge has to closely observe the entire trial, complete with nuances, inflections, and impressions never to be gained from a cold record, it is a discretion that will rarely, if ever, be disturbed on appeal." *Id.*

Nevertheless, even from a cold transcript, it is apparent that the attorney was not asking the jurors to render a damage award based on subjective views. The challenged comments from the opening statement anticipated testimony about the possibility that lead exposure can come from a host of environmental sources, including the soil surrounding the homes.[17] The challenged comments from the closing argument were part of an effort to undermine the inference that a lead inspection in December 2013, while parts of the property were under construction, proved the existence of chipping, peeling, or deteriorated lead-based paint in the 1990s. In both instances, counsel was not directly appealing to emotion or asking the jurors imagine themselves in the place of others; he was commenting (in overly general terms) on evidence relevant to the issue of whether the Central Avenue property was the source of Mr. Colkley's and Ms. Cromer's lead exposure.

To the extent that the statements were improper, the court did not abuse its discretion in denying the motion for partial new trial. In *Hopkins v. Silber*, 141 Md. App. 319, 338-41 (2001), this Court held that a trial court had not abused its discretion in

[17] The Levitas parties offered evidence that the yard directly across from 1317 Central Avenue contained lead many times in excess of what is considered a hazardous level.

denying a motion for mistrial as a remedy for improper golden rule arguments. In that case, the plaintiff in a medical malpractice action requested over a million dollars in non-economic damages, and opposing counsel asked the jury during an opening statement to think about how many work hours it would take for them to earn that amount of money. *Id.* at 338. The trial court sustained an objection, but denied the plaintiff's motion for mistrial. *Id.* at 339. On appeal, this Court concluded that the trial judge's response was appropriate and that his overall instructions on the role of opening statements and the proper measure of damages cured any prejudice from the improper comments. *Id.* at 340.

In this case, the trial judge took appropriate steps by first admonishing the Levitas parties' attorney during the opening statement to limit his comments to the evidence that he planned to offer and by sustaining Mr. Colkley's and Ms. Cromer's objection to the comment during closing arguments. As in *Hopkins v. Silber*, 141 Md. App. at 340, the potential for prejudice was minimal in light of the court's other instructions to the jury about considering the evidence and evaluating the arguments in determining damages. Under the circumstances, the court did not abuse its discretion by denying a motion for partial new trial as an additional remedy for the attorney's comments.

B. References to "Contributory Negligence"

Finally, we are unpersuaded by the argument that the court was required to grant a new trial on damages because the Levitas parties' attorney made comments during the trial that may have suggested that Mr. Colkley's and Ms. Cromer's grandmother, Mary Sterrett, contributed to their lead poisoning.

Before trial, Mr. Colkley and Ms. Cromer moved in limine to preclude the Levitas parties from introducing evidence of contributory negligence by the Sterrett family. The Levitas parties explained at the pretrial motions hearing that they were "not going to be offering any evidence in this case" that "the negligence of [their] parents, or grandparent was a superseding cause of Mr. Colkley[']s and Ms. Cromer's injuries." In response to this explanation, Mr. Colkley and Ms. Cromer withdrew their motion.

At trial, the Levitas parties introduced, without objection, City Health Department records indicating that on two occasions, in 1995 and in 1998, Mary Sterrett had refused to allow inspectors from the department to enter the home to conduct lead inspections. The Levitas parties asked several expert witnesses from both sides about the significance of those records. They cross-examined Mary Sterrett about those events, but she could not remember ever refusing an inspection. In their opening statement and closing argument, counsel for the Levitas parties argued that, as a consequence of her refusal to permit those inspections, the jury was deprived of direct evidence of the condition of the Central Avenue property during the period of tenancy.

In their motion for partial new trial, Mr. Colkley and Ms. Cromer argued that the real purpose of the various questions and comments about the refusal to permit inspections was to "illegally blame Mary Sterrett for [their] continued lead exposure." On appeal, they argue that the Levitas parties "peppered the trial with improper suggestions that Appellants' grandmother contributed to their lead poisoning, by failing to have the health department inspect their home for the presence of lead-based paint." They point out that, under Maryland law, a landlord cannot escape liability for failing to

protect occupants from lead poisoning by blaming the child or her family for failing to clean up flaking and chipping paint. *See Barksdale v. Wilkowsky*, 419 Md. 649, 671 (2011) (citing *Caroline v. Reicher*, 269 Md. 125 (1973)).

Mr. Colkley and Ms. Cromer cite over a dozen instances from the trial record in which a witness or the Levitas parties' attorney discussed Mary Sterrett's refusal to permit inspections of the property. On almost all of those occasions, Mr. Colkley and Ms. Cromer raised no objection.[18] The Court of Appeals has held that "the failure of the moving party to object to an alleged error or impropriety at trial is a significant factor to be considered by the trial judge when that error is later argued in support of a motion for new trial." *Buck*, 328 Md. at 62. "A motion for new trial should not be an opportunity to 'sandbag' an opponent, nor ordinarily to correct oversights that might have been remedied at trial if seasonably noted." *Id.* Mr. Colkley's and Ms. Cromer's failure to object to the series of remarks that they now consider improper weighs heavily in favor of the trial court's decision not to require a new trial.

In any event, contrary to Mr. Colkley's and Ms. Cromer's characterization of the events at trial, at no point did the Levitas parties state or argue that any member of their family was responsible for their lead poisoning. On the several occasions when the

[18] On one of the instances cited by Mr. Colkley and Ms. Cromer, the witness (defendant Stewart Levitas) did not even mention the inspections, but merely testified that the Sterrett family had not advised him of any health department inspections. The court overruled an objection to one question about Mary Sterrett's refusal to permit inspections, long after several other witnesses had introduced that information. The court sustained one of the objections during the cross-examination of Mary Sterrett herself. On the remaining occasions, Mr. Colkley and Ms. Cromer made no objection at all to the testimony or to the arguments from the Levitas parties.

Levitas parties referred to the Health Department Records, they did so for entirely different purposes: to show that toys and dirt were suspected sources of lead exposure; to explain that the Levitas parties had no available lead-test results from 1995 and 1998, the dates when the health department had gone to the home to conduct inspections; to mention Mary Sterrett's actions as explanation for the long gap in lead-testing results; and to cross-examine Mary Sterrett, who, when asked why the Health Department records indicated that she refused lead inspection, stated that she did not recall doing so.

In sum, the trial court acted within its discretion in refusing to grant a new trial, either because the court recognized that Mr. Colkley and Ms. Cromer had failed to raise the issue despite many opportunities to do so during the trial (*see Buck*, 328 Md. at 62), or because the court was unconvinced that the challenged remarks resulted in unfair prejudice to Mr. Colkley and Ms. Cromer sufficient to warrant a new trial as to damages only. *See Goldberg v. Boone*, 396 Md. 94, 120 (2006).

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