

NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Reporter, Supreme Court of New Hampshire, One Charles Doe Drive, Concord, New Hampshire 03301, of any editorial errors in order that corrections may be made before the opinion goes to press. Errors may be reported by email at the following address: reporter@courts.state.nh.us. Opinions are available on the Internet by 9:00 a.m. on the morning of their release. The direct address of the court's home page is: <https://www.courts.nh.gov/our-courts/supreme-court>

THE SUPREME COURT OF NEW HAMPSHIRE

Rockingham
Case No. 2024-0429
Citation: Rivas v. Ciecko, 2026 N.H. 2

CHRISTINE RIVAS

v.

NADIA CIECKO

Argued: October 9, 2025
Opinion Issued: January 27, 2026

Boynton, Waldron, Doleac, Woodman & Scott, P.A., of Portsmouth
(Michael H. Darling on the brief and orally), for the plaintiff.

Friedman Feeney Getman PLLC, of Concord (David Betancourt on the
brief and orally), for the defendant.

GOULD, J.

[¶1] The plaintiff, Christine Rivas, appeals from a jury verdict in Superior Court (Kennedy, J.). The jury found the defendant, Nadia Ciecko, legally at fault for an automobile accident and awarded the plaintiff damages. The jury also found that the injuries the plaintiff sustained in the accident did not cause

or substantially contribute to causing the plaintiff's subsequent fall down a set of stairs. On appeal, the plaintiff seeks a retrial both on damages and on the defendant's liability for the fall. We affirm in part, reverse in part, and remand.

I. Background

[¶2] The jury could have found the following facts. The parties were involved in an automobile accident in Kensington on the afternoon of July 2, 2020. The plaintiff sustained injuries as a result. A camera mounted in the defendant's vehicle captured video of the accident. Over a year later, on October 9, 2021, the plaintiff attended her sister-in-law's birthday party, where she consumed several alcoholic drinks and later fell down a set of exterior stairs and fractured her leg.

[¶3] On October 26, 2021, the plaintiff sued the defendant for negligence. A jury trial was held over the course of five days. As relevant to the issues raised on appeal, the plaintiff claimed that as a result of the automobile accident she suffered "multiple injuries, including a traumatic brain injury," and that her "ongoing symptoms include migraine headaches, light sensitivity, and memory deficits." The plaintiff also claimed to have experienced syncope (in this instance manifesting as light-headedness and fainting) attributable to the injuries sustained in the accident and to have had a fainting spell on October 9, 2021, which caused her to fall and break her leg.

[¶4] The plaintiff called two expert witnesses. Dr. Bruce Myers opined that the plaintiff had suffered a whiplash-type injury resulting in permanent injury to her neck. Dr. Peter Warinner, a neurologist, testified that the forces exerted by a whiplash can cause a concussion because the brain can strike the interior of the skull. He stated that he had reviewed the plaintiff's medical records, had met with the plaintiff, and had reviewed the video of the accident. From this, Warinner concluded that the plaintiff had suffered "brain trauma induced consequences," which included the exacerbation of the plaintiff's migraines, sleep disruption, and vestibular dysfunction. Warinner testified that because of the brain injury the plaintiff was more susceptible to episodes of syncope, her "physiologic response to the alcohol . . . was different," and at the October 9, 2021 birthday party she experienced syncope, causing her to lose consciousness, fall, and fracture her leg.

[¶5] The defendant denied liability for any injury resulting from the July 2, 2020 accident and contested the plaintiff's allegation that the October 9, 2021 fall was caused by injuries from the automobile accident. The defendant also asserted that the plaintiff's damages were barred by her comparative fault. See RSA 507:7-d (2010). The defendant called two experts at trial. Dr. Michael Alexander, a neurologist, testified that he had reviewed the plaintiff's medical records and the video of the accident and concluded that the plaintiff had not suffered a brain injury. Dr. Michael Whitekus, a toxicologist, testified that he

had reviewed the plaintiff's medical records from her emergency room visit following the fall. Based upon the results of a blood draw taken at the hospital, he opined that the plaintiff's blood alcohol concentration (BAC) at the time of her fall was between 0.122 and 0.152 percent, which he observed was consistent with the notation in the medical records that the plaintiff was "obviously intoxicated." Whitekus also testified that an individual with the plaintiff's BAC is ten times more likely to fall and be injured than is a sober individual and opined that alcohol impairment was "a cause" of the plaintiff's fall.

[¶6] The jury found the defendant at fault for the automobile accident and awarded the plaintiff \$28,119.46 in damages. The jury found that the injuries from the automobile accident, however, were not a substantial contributing factor to the plaintiff's later fall. The plaintiff filed a motion to set aside the verdict, arguing that the trial court had erred in certain evidentiary rulings and that defense counsel had made an improper argument in closing regarding the absence of certain witnesses at trial. The trial court denied the motion. This appeal followed.

II. Analysis

[¶7] The plaintiff argues on appeal that the trial court erred when it: (1) admitted Whitekus's testimony; (2) limited the plaintiff's cross-examination of Alexander; (3) declined to strike or give a curative instruction regarding defense counsel's reference in her closing argument to the absence of several witnesses at trial; (4) precluded the plaintiff from introducing a follow-up question and answer from her deposition; and (5) denied her motion to set aside the verdict. We address each argument in turn.

A. Whitekus Expert Testimony

[¶8] The plaintiff filed a motion in limine to exclude Whitekus's testimony. The trial court denied the motion, finding that Whitekus was qualified to testify to the plaintiff's BAC at the time of her fall, the effects of such a BAC on the human body, and the increased risk of falling associated with the plaintiff's BAC. The court also ruled that Whitekus's methods for calculating BAC and the likelihood of falls at certain BAC levels were reliable. While Whitekus was permitted to testify to the plaintiff's BAC at the time of the fall and the relationship between alcohol consumption and fall injuries, the trial court precluded him from testifying that the plaintiff's alcohol consumption was the cause of the fall. Instead, the trial court ruled that Whitekus could testify that the plaintiff's alcohol consumption "could have been a cause" of the fall. Accordingly, at trial, Whitekus explained how he determined the plaintiff's BAC at the time of the fall and what physiological impacts such a BAC has on a person. He also opined that the plaintiff's BAC was "a cause" of her fall.

[¶9] The plaintiff argues that her BAC was irrelevant and that Whitekus’s opinion that the elevated BAC was a cause of the fall should not have been admitted, both because Whitekus was not qualified to opine on how a person’s elevated BAC could be a causally contributing factor in an incident and because the testimony was unreliable. We disagree.

[¶10] The plaintiff sued the defendant for negligence. To prove actionable negligence, a plaintiff must establish that the defendant owed a duty to the plaintiff, breached that duty, and the breach caused the claimed injury. Estate of Joshua T. v. State, 150 N.H. 405, 407 (2003). The cause element includes both the cause-in-fact and the legal cause of the injury. Id.; see Bronson v. The Hitchcock Clinic, 140 N.H. 798, 801 (1996). Legal cause “requires a plaintiff to establish that the negligent conduct was a substantial factor in bringing about the harm.” Estate of Joshua T., 150 N.H. at 408. “[T]he negligent conduct need not be the sole cause of the injury,” but “a plaintiff must prove that the defendant’s conduct caused or contributed to cause the harm.” Id.

[¶11] The plaintiff claimed that the defendant was responsible not only for the injuries she sustained as a result of the car accident but also for the injuries she sustained fifteen months later when she fell. The plaintiff therefore bore the burden of proving that the defendant’s negligent conduct was a substantial factor in bringing about the fall. Id. At trial, the plaintiff sought to establish causation by presenting evidence that she fainted at the party as a result of neurological injuries sustained in the automobile accident. In response, the defendant presented evidence of an alternative contributing cause of the fall, namely that the plaintiff was intoxicated. The plaintiff’s BAC and Whitekus’s testimony regarding the impact of that BAC on a person’s judgment, perception, and psychomotor skills were relevant both to the issue of causation and to the defendant’s defense of comparative fault. See RSA 507:7-d.

[¶12] We now consider whether the trial court erred when it concluded that Whitekus could reliably testify to the plaintiff’s BAC at the time of the fall, to the relationship between alcohol consumption and fall injuries, and that alcohol consumption was a cause of the fall. New Hampshire Rule of Evidence 702 authorizes the trial court to admit expert testimony. To be admissible, expert testimony must rise to a threshold level of reliability. Stachulski v. Apple New England, LLC, 171 N.H. 158, 163 (2018). “To determine the reliability of expert testimony, the trial court must apply RSA 516:29-a, portions of which codify principles outlined by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592-95 (1993),” which were adopted by this court in Baker Valley Lumber v. Ingersoll-Rand, 148 N.H. 609, 614 (2002). Moscicki v. Leno, 173 N.H. 121, 124 (2020). RSA 516:29-a enumerates several factors courts must consider when assessing the reliability of expert opinions.

[¶13] When considering these factors, the trial court functions as a gatekeeper, “ensuring a methodology’s reliability before permitting the fact-finder to determine the weight and credibility to be afforded an expert’s testimony.” *Id.* at 124-25. “The overall purpose of Rule 702 and RSA 516:29-a is to ensure that a fact-finder is presented with reliable and relevant evidence, not flawless evidence.” *Id.* at 125. “[A]s long as an expert’s . . . testimony rests upon reliable grounds, it should be tested by the adversary process, rather than excluded from jurors’ scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies.” *Id.*

[¶14] We review the trial court’s determination of expert reliability under our unsustainable exercise of discretion standard. *Baxter v. Temple*, 157 N.H. 280, 286 (2008). To show that the trial court’s decision was not sustainable, the plaintiff, as the appealing party, must show that the ruling was “clearly untenable or unreasonable to the prejudice of [her] case.” *Milliken v. Dartmouth-Hitchcock Clinic*, 154 N.H. 662, 665 (2006) (quotation omitted).

[¶15] The plaintiff has not made this showing. Whitekus determined the plaintiff’s BAC at the time of the fall based on a blood draw conducted at the emergency room after the fall, the time that elapsed after the fall, the plaintiff’s estimate of the number and strength of drinks consumed, and the average alcohol metabolism rate. As the trial court noted in its order, Whitekus’s methodology is substantially similar to the methodology that we have determined to be reliable. *See State v. Lavoie*, 152 N.H. 542, 546 (2005) (finding reliable a calculation of BAC at the time of the accident that considered the time elapsed, the average “social drinker” burn-off rate and the amount of alcohol in the stomach that would not yet be absorbed (quotation omitted)). Whitekus’s testimony regarding the impact of a BAC in the range calculated for the plaintiff on a person’s judgment, perception, and psychomotor skills was likewise reliable. His testimony was supported by numerous scientific studies he cited that reflect the commonsense proposition that as BAC increases impairment becomes more severe.

[¶16] The plaintiff has also not shown that the trial court’s ruling permitting Whitekus to opine that the plaintiff’s alcohol consumption was “a cause” of her injuries was untenable or unreasonable. The plaintiff asserts that Whitekus’s opinion “relied entirely on an improper correlation argument,” that “[c]orrelation does not establish causation,” and that evidence that she was more likely to fall given her elevated BAC does not mean that “when she fell, it could only have been because she had been drinking.” While we agree that mere correlation — *i.e.*, the coincidence of two or more facts or events with no causal link between them — proves little, that is not a fair characterization of Whitekus’s testimony. Rather, he testified, based on the literature in his field and the results of the plaintiff’s blood draw, that an individual with a BAC in the range of the plaintiff’s at the time of her fall would experience physiological impairment making a fall ten times more likely. There was

therefore ample evidence of a causal link between the plaintiff's BAC and her impairment and fall.

[¶17] Nor did Whitekus testify, as the defendant argues, that when the plaintiff fell, "it could only have been because she had been drinking." To the contrary, the trial court precluded Whitekus from opining that the alcohol consumption was the cause of the fall. Whitekus himself testified that he would not be able to render such an opinion. He did testify, however, that alcohol was a factor in the fall, an opinion the plaintiff's expert witness, Warinner, shared. Whitekus's opinion did not, therefore, rely upon correlation to "establish causation."

[¶18] Because Whitekus's opinions were relevant and reliable and did not substitute a mere correlation for proof of causation, we affirm the trial court's exercise of discretion in denying the plaintiff's motion in limine seeking to exclude his testimony.

B. Alexander Cross-Examination

[¶19] The plaintiff claimed that the automobile accident caused an exacerbation of her preexisting migraines. The testimony of her expert neurologist, Dr. Warriner, supported this theory. He testified that the automobile accident caused a traumatic brain injury that worsened the plaintiff's preexisting migraines. The defendant's expert neurologist, Dr. Alexander, testified that the plaintiff had not suffered a brain injury. He was not asked on direct for his opinion as to whether the accident had any effect on the plaintiff's migraines, but he implied on direct that the plaintiff's treating physician saw no relationship between the migraines and the accident.

[¶20] He then testified without objection on cross-examination that the symptoms the plaintiff experienced after the accident were attributable to something other than a brain injury. When the plaintiff sought to elicit whether the migraines were caused by her whiplash injury, however, the defendant objected on the ground that the question was beyond the scope of direct. The defendant asserted that because the trial court had limited the defendant's cross-examination of the plaintiff's expert, Dr. Myers, to matters he had testified to on direct, it should do the same with respect to the cross-examination of Alexander. The trial court sustained the objection, stating, in part, "[t]hat's the law of the case."¹

[¶21] In his deposition testimony, Alexander had acknowledged that the plaintiff's migraines had been worsened by the whiplash injury she sustained in the automobile accident. Because the plaintiff was prevented from

¹ It is unclear from the record whether the trial court used the phrase "law of the case" formally or colloquially.

questioning Alexander on this point, however, the jury heard only Alexander's implication that the plaintiff's treating physician saw no relationship between the migraines and the accident and that the migraines were caused by something other than a brain injury. The plaintiff argues that because the jury could have understood from this testimony that Alexander disputed Warriner's opinion that the accident exacerbated the migraines when in fact the opposite was true, the trial court erred when it limited the scope of her cross-examination of Alexander.

[¶22] As a preliminary matter, to the extent that the trial court ruled that it was bound by "the law of the case" to limit cross-examination of Alexander to matters that he had testified to on direct, it erred as a matter of law. The law of the case doctrine provides that "[q]uestions once decided on appeal . . . are not ordinarily reexamined in the same case upon a subsequent appeal." Saunders v. Town of Kingston, 160 N.H. 560, 566 (2010) (quotation omitted) (emphasis added). There having been no appeal at the time of the trial court's ruling, the doctrine did not apply.

[¶23] A trial court has broad discretion to determine the scope of cross-examination and the admissibility of evidence, and we will affirm its ruling absent an unsustainable exercise of discretion. State v. Kornbrekke, 156 N.H. 821, 823-24 (2008). To prevail under this standard, the party challenging the trial court ruling must demonstrate that it was clearly untenable or unreasonable to the prejudice of his or her case. Id. at 824. New Hampshire Rule of Evidence 611(b) provides, regarding the scope of cross-examination, that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination." N.H. R. Ev. 611(b).

[¶24] Were we to hold that when a trial court limits the scope of cross-examination of one witness to the subject matter of the direct examination it must similarly limit the scope of cross-examination of another witness, that holding would undermine the purpose of Rule 611(b). Unlike its federal counterpart, which generally limits the scope of cross-examination to the subject matter of the direct examination and matters affecting the witness's credibility, see Fed. R. Evid. 611(b), New Hampshire Rule of Evidence 611(b) continues the common law practice of allowing open-ended cross-examination, that is, "on any matter relevant to any issue in the case," unless "[i]n the interests of justice," the judge "limit[s] cross-examination with respect to matters not testified to on direct examination." N.H. R. Ev. 611(b); see Noel v. Lapointe, 86 N.H. 162, 167 (1933) ("[t]he latitude permissible in cross-examination extends ordinarily to any matter which tends to discredit the opposing party's claim"). Accordingly, pursuant to Rule 611(b), a trial court must make an individualized determination regarding whether it serves "the interests of justice" to limit the scope of cross-examination of a particular

witness to the scope of the witness's direct examination based on the factual circumstances surrounding that witness's testimony. N.H. R. Ev. 611(b). Thus, to the extent that it limited the plaintiff's cross-examination of Alexander solely based upon its prior ruling limiting the defendant's cross-examination of Myers, the trial court erred.

[¶25] We are unpersuaded by the defendant's argument that because the trial court had restricted cross-examination of Myers, "it would have been patently unfair to apply different rules to Plaintiff's counsel and allow him to cross-examine Dr. Alexander to matters outside the scope of direct." The record does not support the defendant's characterization of the trial court's rulings on the scope of the cross-examination of Myers. During cross-examination, defense counsel asked Myers questions about his expert report that went beyond the scope of his direct testimony. The plaintiff objected on the ground that cross-examination exceeded the scope of direct. Defense counsel argued that she was "allowed to get outside the scope of direct testimony in cross-examination," and the trial court overruled the objection. Defense counsel then questioned Myers in some detail about portions of his report that he had not been asked about on direct, including the plaintiff's migraines. At the conclusion of this line of questioning, defense counsel inquired about Myers's projection of the costs for treatment of the migraines, and the plaintiff objected. The trial court sustained the objection, but not on the grounds that the cross-examination exceeded the scope of direct. Rather, the transcript reflects that the trial court was concerned that testimony regarding the cost of treatment would confuse the jury because Myers's report was not in evidence, and the future cost of treatment of the migraines was not "in the case" because the plaintiff was not making that claim.

[¶26] Based upon our review of the record, we agree with the plaintiff that the trial court's ruling limiting cross-examination of Alexander was clearly unreasonable and that it prejudiced the plaintiff. Alexander's testimony created the impression that both he and the plaintiff's treating physician did not believe that there was any relationship between the plaintiff's migraines and the automobile accident. Preventing the plaintiff from correcting that misimpression was an unsustainable exercise of discretion. The prejudice to the plaintiff's case is self-evident, given that it undermined the plaintiff's credibility and led the jury to believe that there was a dispute over whether the migraines were made worse by the accident when that was not the case. Defense counsel argued in closing, moreover, that "the claim here isn't that her migraines got worse just because of the auto accident. The claim here is very dependent on you finding that [the plaintiff] had a traumatic brain injury from the auto accident. Basically, everything flows from that fact." Restricting the plaintiff's cross-examination of Alexander enabled defense counsel to argue that the jury could not find that the plaintiff's migraines were exacerbated by the accident without a finding that the plaintiff had a traumatic brain injury,

despite the fact that the defendant's own expert had opined that the whiplash aggravated the migraines.

[¶27] We do not find persuasive the defendant's argument that even if the plaintiff had been permitted to cross-examine Alexander, it would not have affected the outcome of the case because, as the defendant puts it, the deposition testimony makes clear that "Dr. Alexander would only have agreed that, according to [the plaintiff's] self-reporting, her migraines had worsened since the accident, not that he concurred with Dr. Warinner's conclusions." In fact, Alexander testified in his deposition that it was "probably correct" that the plaintiff's neck injury aggravated the migraines. In light of the misimpression created by Alexander's trial testimony before the trial court sustained the defendant's objection and the trial court's misapplication of New Hampshire Rule of Evidence 611(b), we hold that the trial court's decision is unsustainable.

C. Defense Counsel's Reference to Missing Witnesses

[¶28] Throughout her closing argument, defense counsel referred to witnesses who might have testified but did not. Counsel noted the absence of the plaintiff's treating neurologist, the emergency room doctor, the plaintiff's primary care doctor, and her mental health counselors and stated that the plaintiff "didn't call any of the people who could establish to you, to meet that burden of proof, that she had a traumatic brain injury from this accident," and that "the only one who makes that link" was the plaintiff's expert witness, Warinner. Counsel later noted that the plaintiff had not called any of the doctors she had seen during the period of time leading up to the fall down the stairs and stated, "we don't know what they're going to say. Presumably, if they were going to help, they'd be here." Defense counsel also noted the absence of the plaintiff's family members and friends who were at the party the night the plaintiff fell, noting, "None of them came. None of them came and told you what happened. She wants you to believe her testimony. We don't have any witnesses who testified about it."

[¶29] The plaintiff objected and requested that the court instruct the jury to disregard the comments. Following argument, the trial court overruled the objection and denied the plaintiff's request. To the extent that the defendant argues on appeal that the plaintiff did not preserve her objection because she did not object during closing, we disagree because the record reflects that the plaintiff objected immediately after defense counsel finished her closing. See Broderick v. Watts, 136 N.H. 153, 167 (1992) (holding that any objections to statements made in closing in civil cases must be made "during or immediately after such opening or closing" (emphasis added)). We therefore consider the merits of the plaintiff's argument. We review the trial court's decision declining to give a curative instruction for an unsustainable exercise of discretion. See Murray v. Developmental Servs. of Sullivan County, 149 N.H. 264, 270 (2003).

Accordingly, we must determine whether the trial court's decision not to give a curative instruction was "clearly untenable or unreasonable to the prejudice of [her] case." Id.

[¶30] This court has recognized what is often referred to as the "uncalled-witness rule" or the "missing-witness rule," which stands for the proposition that if a party has the ability to produce, but does not produce, a witness who could have given relevant testimony, a presumption is created that the testimony would have been unfavorable to that party. See Kerr v. Allard, 130 N.H. 247, 248-49 (1987); see also Graves v. United States, 150 U.S. 118, 121 (1893); Robert H. Steir Jr., Revisiting the Missing Witness Inference — Quietening the Loud Voice from the Empty Chair, 44 Md. L. Rev. 137, 149 n.53 (1985) (citing cases). Despite the rule's inherent risk that it invites jury speculation with no evidentiary basis, we have sustained rulings permitting a party in a case to comment on the opponent's failure to call a witness when the record indicates that the witness could have given relevant testimony and was apparently in the jurisdiction and available to appear. See, e.g., Abel v. Yoken, 104 N.H. 119, 122-24 (1962); Beardsell v. School, 89 N.H. 459, 462-63 (1938); Brito v. Company, 79 N.H. 163, 164 (1919).

[¶31] To limit that risk, however, we have also cautioned that courts should be vigilant against attempts by counsel to abuse the rule and that "argument of this character is not to be commended because of its tendency to divert the attention of the jury from the issues presented . . . to collateral questions of the credibility and good faith of a party." Abel, 104 N.H. at 124 (quotations omitted). We have also stated that parties ought not be given the "right to comment unfettered by the court's discretion to forbid it," and that "when a trial judge can conveniently test the soundness of" the inference that the proponent of the missing-witness argument seeks to establish, "it is entirely proper that [the court] do so before allowing the argument." Kerr, 130 N.H. at 249.

[¶32] Defense counsel did not apprise the court or the plaintiff in advance of her intention to comment as she did on the missing witnesses. This deprived the plaintiff's counsel of the opportunity to demonstrate that the plaintiff's failure to call the witnesses was for reasons other than fear that the witnesses would have testified unfavorably to her. It also deprived the trial court of the opportunity to exercise its discretion meaningfully. Thus, we hold today that a party who intends to argue in closing that the opposing party's failure to call a certain witness was because the witness's testimony would be adverse, the party must notify the court and the opposing party in advance. This advance notice must be sufficient to ensure that an opposing party is provided with the opportunity to challenge the propriety of the missing-witness argument in light of the specific circumstances of the case.

[¶33] The lack of a curative instruction resulted in prejudice to the plaintiff. The trial court’s ruling deprived the plaintiff of the protection against misuse of the missing-witness rule that our decisional law requires. As a result, the jury was left to speculate about what these witnesses might have said had they appeared at trial. Further, as the defendant acknowledges, much of the plaintiff’s case depended on her credibility. The plaintiff’s ability to persuade the jury that injuries from the automobile accident exacerbated her migraines and that a syncope episode caused her to fall depended, in substantial part, on the jury’s finding her testimony credible. Defense counsel’s closing argument explicitly tied the “missing” witnesses to the plaintiff’s credibility:

[H]as the Plaintiff earned your trust? Because she wants you to trust her. Remember, she didn’t bring the family members to talk about what happened. She didn’t bring her neurologist.

The trial court’s failure to instruct the jury to disregard defense counsel’s statements about witnesses who were not called at trial was therefore clearly unreasonable to the prejudice of the plaintiff’s case.

III. Conclusion

[¶34] For the foregoing reasons, we affirm the trial court’s ruling admitting Whitekus’s expert testimony. We reverse the trial court’s ruling limiting the plaintiff’s cross-examination of Alexander and its ruling declining to strike or give a curative instruction regarding defense counsel’s reference in her closing argument to several witnesses or possible witnesses who might have testified but did not. In light of our rulings on these issues, we do not reach the plaintiff’s argument that the trial court erred when it denied the plaintiff’s motion to set aside the verdict. We also decline to address the plaintiff’s argument that she should have been permitted to introduce a follow-up question and answer from her deposition because the issue is unlikely to arise on remand. See Motorsports Holdings v. Town of Tamworth, 160 N.H. 95, 111 (2010). We remand to the trial court for a retrial on damages arising from the automobile accident and on both liability and damages for the October 9, 2021 fall.

Affirmed in part; reversed
in part; and remanded.

MACDONALD, C.J., and DONOVAN and COUNTWAY, JJ., concurred.