

Circuit Court for Baltimore County
Case No. 03-C-13-002705

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 41

September Term, 2020

LEGEND SALES AND MARKETING, LLC.,
et al.

v.

ARENA VENTURES, LLC.

Reed,
Shaw Geter,
Moylan, Charles E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: April 5, 2021

*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.

In 2013, appellee, Arena Ventures, LLC, filed a complaint against appellants, Legend Sales and Marketing, LLC, *et al.*,¹ to settle a dispute involving the use and ownership of nine billboards erected on the exterior of the Royal Farms Arena in Baltimore, Maryland. In 2016, the Circuit Court for Baltimore County found in favor of appellees and awarded it \$3,360,000.00 based on disgorgement of profits. On appeal, we held that “[a]ny award of disgorged profits . . . would be grossly disproportionate to the actual harm suffered by Arena Ventures . . . [and] the appropriate measure of damages is the fair market value of the billboards as of December 31, 2012.” *SMG Holdings I, LLC v. Arena Ventures, LLC*, 1778, SEPT.TERM, 2016, 2018 WL 1391613, at *9 (Md. Ct. Spec. App. Mar. 20, 2018). We vacated the damages award and remanded the case for a trial on the issue of damages. *Id.* On remand, the Circuit Court for Baltimore County awarded damages to appellee in the amount of \$1,457,264.25. Appellants timely appealed and present the following questions for our review:

1. Did the circuit court err in awarding more than nominal damages when Arena Ventures did not provide sufficient evidence to prove the fair market value of its nine-year-old billboard structures in 2012?
 - A. Did the circuit court err by basing its valuation on an estimate that significantly overstated the size of the billboard structures, and hence the amount of steel necessary to build them?
 - B. Did the circuit court err by basing its valuation on an estimate for new steel structures, without any consideration of depreciation, even though the outdoor structures in question were almost a decade old?

¹ The additional appellants are SMG Holdings I, LLC, and SMG Holdings II, LLC.

C. Did the circuit court err by basing its valuation on evidence that it falsely asserted was proffered without objection when, in reality, an objection to the evidence was both raised and sustained?

For reasons discussed below, we shall affirm the judgment of the circuit court.

BACKGROUND

The details of the parties' dispute over the use and ownership of the nine billboards are set forth in this Court's previous opinion and are largely immaterial to this appeal. *See SMG Holdings I, LLC v. Arena Ventures, LLC*, 1778, SEPT.TERM, 2016, 2018 WL 1391613 (Md. Ct. Spec. App. Mar. 20, 2018). On April 15, 2019, a trial on the issue of damages was held in the Circuit Court for Baltimore County. Appellee presented testimony from four witnesses, Edwin Hale, Ernest, J. Narcise, Christopher Hudgins, and Patrick Fitzgerald. Three of whom offered revenue-based valuations of the billboards. Only Fitzgerald provided testimony as to the cost to build new billboards. The court accepted Fitzgerald "as an expert in general construction, and construction and valuation of billboards and wallsapes." Fitzgerald testified, in relevant part, as follows:

[APPELLEE'S COUNSEL]: You talked about demolition and then your next item, line item is structural steel.

[FITZGERALD]: Structural steel. The structural steel is an estimate I got from my steel erector who went out to the site, took a look at it, [and] came up with an estimate of what he thought it would cost to re-create it.

[APPELLEE'S COUNSEL]: And what's that value?

[FITZGERALD]: National Steel Construction.

[APPELLEE'S COUNSEL]: No, what's the amount for the steel.

[FITZGERALD]: The amount is \$1,295,346.

* * *

[APPELLEE’S COUNSEL]: *Now, the dollars that you’ve put down here, by dollars I mean the cost, that’s as of June 6th, 2018?*

[FITZGERALD]: *Correct.*

[APPELLEE’S COUNSEL]: *Now, we’re here to give a cost for—if the signs were replaced after December 31st, 2012.*

[FITZGERALD]: *‘12.*

[APPELLEE’S COUNSEL]: *How does your number, this number, compare to the cost it would have been in 2013?*

[FITZGERALD]: *It probably would have been a little bit more at the time.*

[APPELLEE’S COUNSEL]: *Why do you say that?*

[APPELLANTS’ COUNSEL]: *I’m going to object, Your Honor. This was not disclosed in the prior designations.*

THE COURT: Counsel?

[APPELLEE’S COUNSEL]: It was disclosed, Your Honor. I have the—let me get the designations. He was going to testify to the cost of replacing the sign, and now he’s just putting it into the dollars for 2012. I have the designations here. I’m not sure where that’s coming from, because it was clearly identified for all of this in the designation of experts.

[APPELLANTS’ COUNSEL]: Your Honor, if I may, because I was the one who deposed Mr. Fitzgerald. May

I—

THE COURT:

Yes. . . .

[APPELLANTS' COUNSEL]:

. . . *I was able to depose Mr. Fitzgerald on November 30th, which was a couple of days before — this trial was initially supposed to start in December. And I asked Mr. Fitzgerald this question: “So when you are called to testify at the trial, the opinion you will be offering as an expert in construction is limited to how much you believe it would cost to essentially install eight of the billboards in 2018?” That answer was: “Correct.”* So the information that was provided to us, I — that’s it. The testimony that you will be providing, the opinion testimony, is limited to the installation value in 2018 dollars, June 7, 2018. And in between November 30th and here we are today, April 15th, none of that information was amended or changed or supplemented by [appellee’s counsel]. And, in fact, I even gave him an out back in March, I sent a letter just reminding him, hey, please, amend your supplement, your Answers to Interrogatories if there’s going to be additional or new information that’s going to be presented at the trial. And I did not receive anything.

[APPELLEE’S COUNSEL]:

That’s true, Your Honor, but we’re not asking for a number. I’ll ask, my question is the cost in 2013 would be more. This is the lower of the number, that’s why I didn’t — this is lower than what it would have been 2013.

THE COURT:

So how’s it relevant if you’re not offering a number, what difference does it make in the overall analysis?

[APPELLEE’S COUNSEL]: We’re not offering the number for 2013, we’re offering this number, because it’s lower than—

THE COURT: So all he’s going to say is that—he started to say it would have been a little more back in 2013.

[APPELLEE’S COUNSEL]: Exactly.

THE COURT: But what relevance is that if he’s not going to attach a number to it? It doesn’t tell me anything.

[APPELLEE’S COUNSEL]: Well, the next question is the reason why it’s more and that’s the cost of the steel that was higher then. That’s the only difference.

THE COURT: *Well, your objection is sustained.* Next question.

(emphasis added).

* * *

[APPELLANTS’ COUNSEL]: . . . \$1,295,346 is the amount of steel that you estimate would be required; is that correct?

[FITZGERALD]: That is correct.

[APPELLANTS’ COUNSEL]: And the amount of steel that you estimate is correct is based on what’s identified as Subsection A and B on the quote; is that correct?

[FITZGERALD]: Correct.

[APPELLANTS’ COUNSEL]: Okay. So if the sizes that were identified in A and B were incorrect, the amount of steel would change; is that right?

THE COURT: The cost of the amount of steel.

[FITZGERALD]: The cost of the steel? It might change a little bit, yes.

THE COURT: I didn't mean to interrupt. So are you saying the amount of steel or the cost for the steel?

[APPELLEE'S COUNSEL]: Your Honor, the amount of steel.

THE COURT: Okay. That's—he's asking you—do you understand his question?

[FITZGERALD]: Yes. The amount—if the steel was a little less based on what we state then it would probably be a little less steel. Yes, that's correct.

[APPELLANTS' COUNSEL]: Well, whether it's a little less or—so how did you determine—you determined that all of the billboards are the same size; is that correct?

[FITZGERALD]: Correct. Approximately. We used—we went out and measured a couple of those that were in place, and that's what we based our estimate on.

[APPELLANTS' COUNSEL]: You measured a couple of the billboards?

[FITZGERALD]: Correct.

[APPELLANTS' COUNSEL]: And which couple did you measure?

[FITZGERALD]: The ones that are on, I guess it would be the east side.

[APPELLANTS' COUNSEL]: So the Hopkins Place?

[FITZGERALD]: Correct.

[APPELLANTS' COUNSEL]: So you didn't measure the five billboards

on the Baltimore Street side?

[FITZGERALD]: I could not get to those billboards to really physically measure those properly.

[APPELLANTS' COUNSEL]: So you didn't—so you don't know how large the billboards—there's five billboards on the Baltimore Street side?

[FITZGERALD]: I believe that's correct.

[APPELLANTS' COUNSEL]: And you don't know how large they are?

[FITZGERALD]: From what we saw on the site, they were approximately the same size as the ones on the Hopkins Place.

[APPELLANTS' COUNSEL]: You believe they are the same size?

[FITZGERALD]: We estimated them to be approximately the same size. That is correct.

[APPELLANTS' COUNSEL]: And hence you assumed they were all the same size?

[FITZGERALD]: Correct.

[APPELLANTS' COUNSEL]: So your replacement cost figure is the—what it would be—does that reflect in any way the age of the billboards?

[FITZGERALD]: No.

[APPELLANTS' COUNSEL]: And we are correct that your opinion is limited to what you believe it would cost to replace the billboards as of June 6th, 2018?

[FITZGERALD]: Correct.

* * *

Hudgins did not testify at trial, his testimony was presented by video in a *de bene esse* deposition. The testimony of the three other witnesses, in pertinent part, was as follows:

Edwin Hale’s Testimony

[APPELLEE’S COUNSEL]: Can you tell the Court what you factored in in coming to your ultimate conclusion for what you would have sold the [billboards] for?

[HALE]: At the time I took the—all the professional fees that I had spent, all the money that I had given to the Arena, just the—all the general costs. I did factor in the \$632,000 I spent to defend myself But the main thing was was [sic] the actual revenue. And the revenue was the underpinning for the amount that I thought was fair, which I thought was 5 and a half million dollars at the time.

* * *

Ernest J. Narcise’s Testimony

[NARCISE]: . . . those [billboards] are worth what somebody will pay for them at the time

* * *

[APPELLANT’S COUNSEL]: What would it be? It would be an average value?

[NARCISE]: I think that’s what the average sale price would be. That’s what I would say.

[APPELLANTS’ COUNSEL]: I just wanted to make sure, for clarity’s sake for the purposes of the sale of an ad on the billboard.

[NARCISE]: Got it. Yes.

* * *

Christopher Hudgins' Testimony

[APPELLANTS' COUNSEL]: And just for clarity [sic] sake, you are not offering any opinion as to the fair market value of the actual billboard structures?

[HUDGINS]: Correct. I have no relative knowledge of what that costs to be able to physically put up those signs.

* * *

At the close of appellee's evidence, appellants chose not to put on evidence.

The court, in its memorandum opinion, concluded:

[A] reasonable approach to determining the fair market value of the nine (9) billboards . . . is to is to [sic] ascertain the cost of building new billboards comparable . . . on December 31, 2012.

Factors, such as the depreciation of the existing structures, and intangible factors such as the convenience of having existing structures in place, the inconvenience associated with pre-construction authorization and approval as described by Mr. Fitzgerald and the inability to advertise for the period that it would have taken to build new structures may also be considered in determining the fair market value. In sum, however, the cost of installing new billboards would be the primary consideration for determining the fair market value of the billboards as of December 31, 2012.

(emphasis added).

* * *

Fitzgerald explained that he was asked to value what it would cost to erect

eight (8) billboards.[² Fitzgerald testified that he physically looked at the wallscapes and structural components, took some pictures, met with his steel contractors at the site, and communicated with other subcontractors. Fitzgerald testified that he measured the billboards on the Hopkins Place side of the building but did not explain how he did so. However, he also testified that he was unable to measure the billboards on the Baltimore Street side of the building. Fitzgerald estimated all billboards to be approximately the same size and based his evaluation for the cost of the steel structure base[d] on that approximation. This assumption resulted in a calculation being performed by Mr. Fitzgerald, which reflects the cost of steel used to construct eight (8) billboards, the size of the Hopkins Place billboards, which were slightly larger than the billboards on the Baltimore Street side of the Arena. It is undisputed that:

On the Hopkins Place side of the Arena, there are four (4) billboards whose dimensions are: 54' W x 40'3" H . . . Each Hopkins Place facing billboard has an area of approximately 2,160 sq. ft. . . . On the Baltimore Street Side of the Arena, there are five (5) billboards whose dimensions are 45' W x 30'3" H . . . Each Baltimore Street facing billboard has an area of approximately 1,361 sq. ft. . . . The billboards on the Arena facing Baltimore Street are 799 sq. ft. smaller than those facing Hopkins Place.

* * *

On cross examination, Fitzgerald explained that the cost of the structural steel for the eight (8) billboards of approximately the same size as of June 6, 2018, would be \$1,295,346.00. While Fitzgerald did not give a figure of the cost of the structural steel as of December 31, 2012, [appellee] proffered, without objection, that Fitzgerald would testify that the cost of the steel was greater in December 2012 than as of the date of his estimate. The [c]ourt accepts the proffer. Thus, the cost of the steel alone to erect eight (8) billboards on December 31, 2012 would have been greater than Fitzgerald's

² In a footnote, the court noted:

Fitzgerald was asked to only value eight (8) [billboards]. Presumably because one (1) billboard was designated for the City's use for public announcement and therefore not income producing. . . . Since the expert testimony does allow for a calculation for the cost to erect eight (8) billboards of approximately the same size, this [c]ourt can value all nine (9) billboards.

estimate in 2018. Stated differently, the cost to erect eight (8) billboards as of December 31, 2012 would have been greater than \$1,295,346.00. Consequently, it is not unreasonable for the [c]ourt to consider at least that figure in establishing the fair market value of the nine (9) billboards. If the cost of steel for eight (8) billboards is \$1, 295,346.00, then the approximate cost of each billboard is \$161,918.25. Thus, as of December 31, 2012, the cost of all nine (9) of [appellee’s] billboards would have been, \$1,457,264.25.

Fitzgerald also explained the need for and cost of other requirements and tasks associated with erecting the billboards as of June 2018. Plaintiff’s Exhibit 2, which was admitted without objection . . . shows the general summary of costs associated with building the eight (8) billboards as of June 6, 2018.

* * *

Mr. Fitzgerald elaborated on some of the associated costs to construct eight (8) billboards as of June 2018. For example, Fitzgerald testified that he included some allowance for engineering costs because: “A lot of times now the engineer is requiring us to get our structural drawings stamped and sealed by another engineer.” [emphasis added]. There is no indication that engineering costs as described by Fitzgerald would have been required as of December 31, 2012. Additionally, demolition, the cost of removing the existing billboards, would have been [appellee’s] obligation and not a cost to the City and would not be an associated cost with the construction of new billboards.

Moreover, the other associated costs for new billboard construction as set forth in Plaintiffs Ex. 2 were calculated as of June 2018 and not December 31, 2012. Ultimately, because the associated costs of constructing steel billboards in June of 2018 were not translated to December 31, 2012 dollars, the [c]ourt is unable to consider the associated costs.

Citing [*Stickell*] v. *City of Baltimore*, 252 Md. 464, 473 (1969), [appellants] argue[] that Fitzgerald did not offer any evidence of depreciation. *Stickell* dealt with a condemnation proceeding related to real property in Baltimore City, not personal property. *Id.*

Depreciation is a factor to be considered. However, [appellants] did not suggest a depreciation amount. Even if depreciation were a consideration, other intangible factors could be weighed against it. For example, the inconvenience of the City having to erect nine (9) new

billboards is a factor to consider. In addition to the cost of the steel, there would have been other costs associated with construction as outlined by Fitzgerald. Additionally, there would be lost revenue due to the inability to advertise during the construction of the new billboards. Ultimately, however, this [c]ourt finds that any depreciation of the existing structures would have been far outweighed by the costs associated with erecting nine (9) new billboards. This [c]ourt has not considered depreciation.

* * *

STANDARD OF REVIEW

“When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.” Rule 8-131(c). “If there is any competent evidence to support the factual findings below, those findings cannot be held to be clearly erroneous.” *Anderson v. Great Bay Solar I, LLC*, 243 Md. App. 557, 606 (2019), *cert. denied sub nom. Bd. of Comm’rs of Somerset Cnty. v. Anderson*, 468 Md. 224 (2020) (citation omitted). “Valuation is a question of fact subject to the clearly erroneous standard of review.” *Abdullahi v. Zanini*, 241 Md. App. 372, 413 (2019). “Under the clearly erroneous standard, this Court does not sit as a second trial court, reviewing all the facts to determine whether an appellant has proven his case.” *L.W. Wolfe Enterprises, Inc. v. Maryland Nat’l Golf, L.P.*, 165 Md. App. 339, 343 (2005) (quoting *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996)). “The appellate court must consider evidence produced at the trial in a light most favorable to the prevailing party and if substantial evidence was presented to support the trial court’s determination, it is not clearly erroneous and cannot be disturbed.” *GMC v. Schmitz*, 362 Md. 229, 234 (2001) (quoting *Ryan v. Thurston*, 276

Md. 390, 392 (1975)).

“[A] trial court is vested with substantial discretion in the reception or rejection of evidence.” *Hall v. Lovell Regency Homes Ltd. P’ship*, 121 Md. App. 1, 19 (1998) (citing *State v. Conn*, 286 Md. 406, 425 (1979); *Impala Platinum v. Impala Sales*, 283 Md. 296, 332 (1978)). “[T]rial courts have wide latitude in deciding whether to . . . admit or exclude particular expert testimony, and we review the trial court’s decision for an abuse of discretion.” *Basso v. Campos*, 233 Md. App. 461, 477 (2017) (citations and internal quotation marks omitted).

DISCUSSION

Fair market value is that which “a willing purchaser would pay to a willing seller in the open market.” *Weil v. Supervisor of Assessments of Washington County*, 266 Md. 238, 246 (1972). “It is well established in Maryland that damages based on speculation or conjecture are not recoverable as compensatory damages.” *Kleban v. Eghrari-Sabet*, 174 Md. App. 60, 95 (2007) (citing *Wlodarek v. Thrift*, 178 Md. 453, 461 (1940)). “To recover compensatory damages, the amount must be proved with reasonable certainty and may not be based upon speculation or conjecture.” *Brock Bridge Ltd. P’ship v. Dev. Facilitators, Inc.*, 114 Md. App. 144, 157 (1997) (citations omitted). “The amount, however, *need not be proven to a mathematical certainty*; the plaintiff bears the burden of adducing *sufficient evidence* from which the amount of damages can be determined on ‘some rational basis and other than by pure speculation or conjecture.’” *Id.* (quoting *Ass’n of Maryland Pilots v. Baltimore & Ohio Railroad Co.*, 304 F. Supp. 548, 557 (D.Md.1969) (emphasis added)).

Regarding the degree of certainty required, the Court of Appeals, in *M & R Contractors & Builders, Inc. v. Michael*, 215 Md. 340, 348–49 (1958), explained:

Courts have modified the ‘certainty’ rule into a more flexible one of ‘reasonable certainty.’ In such instances, recovery may often be based on opinion evidence, in the legal sense of that term, from which liberal inferences may be drawn. Generally, proof of actual or even estimated costs is all that is required with certainty.

“Nominal compensatory damages are damages awarded when an injury has been proven, but it is *impossible* to calculate the damages therefrom.” *Kleban v. Eghrari-Sabet*, 174 Md. App. 60, 95 (2007) (citation omitted) (emphasis added). “[N]either the Courts nor the juries are justified in inferring from mere possibilities the existence of facts, and they cannot make mere conjecture or speculation the foundation of their verdicts.” *Basso v. Campos*, 233 Md. App. 461, 477 (2017) (citing *Porter Hayden Co. v. Wyche*, 128 Md. App. 382, 391 (1999) (citations omitted)).

Appellants argue that appellee should have been awarded only nominal damages because they failed to present sufficient evidence to prove the fair market value of its billboards. They argue appellees were required to provide evidence that would “‘lay some foundation enabling the fact finder to make a fair and reasonable estimate of the amount of the damage.’” *Thomas v. Capital Med. Mgmt. Associates, LLC*, 189 Md. App. 439, 465 (2009) (quoting *Della Ratta, Inc. v. Am. Better Cmty. Developers, Inc.*, 38 Md. App. 119, 143 (1977)). They assert the evidence appellee put forth did not include a valuation of the billboards based on the correct size, age, or price of structural steel as of 2012. They contend that in order to calculate damages that constituted the fair market value of the

billboards as of December 31, 2012, the circuit court was “forced to speculate, to ignore the gaps in evidence, and to affirmatively misrepresent the record of the trial.”

A. Size

Appellants argue the circuit court did not factor in the size discrepancy when determining the cost of the steel and thus, its decision was error. They assert that Fitzgerald based his valuation of the billboards on inaccurate measurements which prevented a reasonably certain calculation of the fair market value of the billboards. They contend the court erred in basing its damages award on an estimate that significantly overstated the size of the billboards and, therefore, the amount of steel needed to construct them. They argue the court ignored the errors in the size estimates and made no attempt to adjust the damages award to the actual measurements of the billboards. According to appellants,

Nine billboards that were 66 feet wide would require 594 feet of the steel pipe and light mount assemblies listed as necessary to replace the billboards in Fitzgerald’s estimate, but four signs that were only 54 feet wide and five signs that were only 45 feet wide would require only 450 feet of the same. This 144 foot difference ($594 - 450 = 144$) means that Fitzgerald overestimated the amount of steel needed for this part of the signs by 32 percent ($144/450 = 0.32$), or almost a full third.

We note, preliminarily, based on the testimony, that the four billboards that were 54 feet wide would require 216 feet ($54 \times 4 = 216$) of steel pipe and light mount assemblies. The five billboards that were 45 feet wide would require 225 feet ($45 \times 5 = 225$) of those materials. Thus, the total needed for all nine billboards would be 441 feet, ($216 + 225 = 441$) which is a 153-foot ($594 - 441 = 153$) difference from nine billboards measuring 66 ($66 \times 9 = 594$) feet wide. This difference amounts to 26 percent ($153/594 = .26$), rather than the 32 percent asserted by appellants.

Appellants cite *Bd. of Trustees, Cmty. Coll. of Baltimore County v. Patient First Corp.*, where the Court of Appeals explained: “[t]he defendant can choose not to put on any evidence, in which case the court must determine whether the plaintiff submitted sufficient evidence to present a triable question of fact, and the trier of fact will be required to accept or reject the plaintiff’s evidence.” 444 Md. 452, 470 n. 10 (2015) (citing *Commodities Reserve Corp. v. Belt’s Wharf Warehouses, Inc.*, 310 Md. 365, 371 (1987)). Appellee argues the court credited Fitzgerald’s testimony regarding the size of the billboards even though he admitted that if his sizes were incorrect, the price of steel “might change a little bit.” Appellee contends that if appellants wanted to provide the court with guidance as to how to calculate a change in the steel estimate based on accurate billboard measurements, they could have offered such evidence.

Fitzgerald estimated \$1,295,346.00 as the cost for the amount of steel needed to build the billboards. He admitted that if the sizes identified in his quote were incorrect, the cost of the steel “might change a little bit.” When asked by the court to clarify “the amount of steel or the cost for the steel[,]” he responded “the amount of steel.” When asked if he understood the question, he replied: “Yes. The amount—if the steel was a little less based on what we state then it would probably be a little less steel. Yes, that’s correct.” Also, when asked how his estimate compared to the cost of steel in 2013, Fitzgerald testified that the cost “probably would have been a little bit more at the time.”

In its opinion, the court noted that Fitzgerald “testified that he was unable to measure [five of the nine] billboards,” but “estimated all billboards to be approximately the same size and based his evaluation for the cost of the steel structure base[d] on that

approximation.” The court concluded it was undisputed that there are “four (4) billboards whose dimensions are: 54’ W x 40’3” H . . . [and] five (5) billboards whose dimensions are 45’ W x 30’3” H” Fitzgerald’s estimate of \$1,295,346.00 for structural steel, was based on billboards measuring 66 feet wide.³ The court explained its calculation for the billboards: “If the cost of steel for eight (8) billboards is \$1,295,346.00, then the approximate cost of each billboard is \$161,918.25. Thus, as of December 31, 2012, the cost of all nine (9) of [appellee’s] billboards would have been, \$1,457,264.25.”

In our view, the circuit court’s final calculation accounted for the size difference. The court noted that the size of the billboards was “undisputed,” then provided the cost based on Fitzgerald’s testimony, which included his statement that if his size estimates were incorrect, the price of steel “might change a little bit.” The court stated: “it is not unreasonable for the [c]ourt to consider at least [the \$1,295,346.00] figure in establishing the fair market value of the nine (9) billboards” because “[appellee] proffered, without objection, that Fitzgerald would testify that the cost of steel was greater in December 2012 than as of the date of his estimate.” The court then concluded: “the cost of the steel alone to erect eight (8) billboards on December 31, 2012 would have been greater than Fitzgerald’s estimate in 2018. Stated differently, the cost to erect eight (8) billboards as of

³ Fitzgerald’s estimate stated:

(FURNISHAND INSTALL)

- a) (8) PIPEANDTUBE LIGHTMOUNTASSEMBLIESAPPROX. 66 L[INEAR] F[OOT] EACHWITH (6) OUTRIGGERS EACH
- b) (48) W8X10VERICALBEAMS@ EACH OUTRIGGER TO SUPPORT SIGNS

December 31, 2012 would have been greater than \$1,295,346.00.” Again, mathematical certainty is not required to prove damages. *Brock Bridge Ltd. P’ship v. Dev. Facilitators, Inc.*, 114 Md. App. 144, 157 (1997) (citations omitted). Given the evidence, which was largely undisputed, and the deference we afford to a trial court’s ability to judge the credibility of witnesses and assess the evidence, *see* Md. Rule 8-131(c), we cannot say that the trial court’s calculation was based on conjecture or mere speculation. Rather, the evidence proved with reasonable certainty the amount determined by the court.

B. Depreciation

Appellants argue the circuit court erred in failing to consider depreciation when determining the fair market value of the billboards. They cite *Stickell v. City of Baltimore*, stating “replacement costs are not admissible unless evidence of depreciation is submitted at the same time.” 252 Md. 464, 473 (1969) (citing *Mayor and City Council of Baltimore v. Schreiber*, 243 Md. 546, 554 (1966)). They contend that in order to fairly value any property under the replacement costs method, there must be consideration of depreciation because depreciation “represents deterioration, which is caused by its age and condition, as well as its ‘obsolescence,’ which includes consideration of its functional adequacy and the market demand” *Cordish Power Plant Ltd. P’ship v. Supervisor of Assessments for Baltimore City*, 427 Md. 1, 5 (2012) (citation omitted). Appellee asserts the court considered depreciation, but rejected the claim raised by appellants.

In its memorandum opinion, the court stated:

Depreciation is a factor to be considered. However, the [appellants] did not suggest a depreciation amount. Even if depreciation were a consideration, other intangible factors could be weighed against it. For

example, the inconvenience of the City having to erect nine (9) new billboards is a factor to consider. In addition to the cost of the steel, there would have been other costs associated with construction as outlined by Fitzgerald. Additionally, there would be lost revenue due to the inability to advertise during the construction of the new billboards. Ultimately, however, this [c]ourt finds that any depreciation of the existing structures would have been far outweighed by the costs associated with erecting nine (9) new billboards. This [c]ourt has not considered depreciation

As we see it, the court clearly acknowledged depreciation as a factor in determining the fair market value. The court, however, outlined that “the costs of installing new billboards would be its primary consideration.” The court then considered the various ways in which depreciation might have been outweighed by costs associated with constructing the billboards—which were not awarded to appellee. Its final statement, thus, reflects that it did not consider a dollar amount for depreciation. We conclude this assessment by the trial court was not clearly erroneous.

C. Steel Price Evidence

Maryland Rule 2-517, in relevant part, provides:

. . . An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. . . .

“[A]n objection must be made when the question is asked or, if the answer is objectionable, then at that time, by motion to strike.” *Ware v. State*, 170 Md. App. 1, 19 (2006).

Appellants contend that the court should not have considered evidence comparing 2018 steel prices with 2012 prices. They contend that the court misstated the record regarding whether objections were raised and sustained against appellee’s attempt to compare 2018 steel prices with 2012 steel prices. Appellants also assert that it was

logically necessary for the court to use excluded testimony as to 2013 steel prices to translate 2018 steel prices into 2012 prices. Appellee seems to contend that appellants objected to testimony of steel prices as of 2013 rather than 2012. Appellee, in its brief, asserted that: “[t]he [c]ircuit [c]ourt relied on the only expert offered to give a specific calculation of the cost of erecting the billboards. Such reliance is not a clear factual error that warrants reversal.”

The testimony at issue, as to the evidence of steel prices, was as follows:

[APPELLEE’S COUNSEL]: Now, we’re here to give a cost for—if the signs were replaced after December 31st, 2012.

[FITZGERALD]: ‘12.

[APPELLEE’S COUNSEL]: How does your number, this number, compare to the cost it would have been in 2013?

[FITZGERALD]: It probably would have been a little bit more at the time.

[APPELLEE’S COUNSEL]: Why do you say that?

[APPELLANTS’ COUNSEL]: I’m going to object, Your Honor. This was not disclosed in the prior designations.

Our review of the record reflects that appellants objected to testimony as to the question “Why do you say that?” Though appellants may have intended to object to testimony on the question: “How does your number, this number, compare to the cost it would have been in 2013?[,]” they failed to do so. In its opinion, the court stated:

While Fitzgerald did not give a figure of the cost of the structural steel as of December 31, 2012, [appellee] proffered, without objection, that Fitzgerald

would testify that the cost of the steel was greater in December 2012 than as of the date of his estimate. The [c]ourt accepts the proffer.

We agree, and conclude that because the objection was not timely, the court was not precluded from considering such evidence. Additionally, appellants never asked the court to strike Fitzgerald’s answer.

Our holding in *SMG Holdings I, LLC v. Arena Ventures, LLC*, dictates that, in the case at bar, “the appropriate measure of damages is the fair market value of the billboards as of December 31, 2012.” 1778, SEPT.TERM, 2016, 2018 WL 1391613, at *9 (Md. Ct. Spec. App. Mar. 20, 2018). In order to calculate the fair market value of the billboards as of 2012, the court needed to convert 2018 steel prices into 2012 steel prices. To be sure, without Fitzgerald’s proffered testimony comparing the price of steel in 2013, the fact finder would have to speculate as to how 2012 steel prices might differ from 2018 prices. Also, as appellants noted, the court was cognizant that evidence presented of costs associated with constructing the billboards that were not translated into 2012 prices was excluded from its consideration. When discussing other costs associated with constructing the billboards, the court stated: “[u]ltimately, because the associated costs of constructing steel billboards in June of 2018 were not translated to December 31, 2012 dollars, the [c]ourt is unable to consider the associated costs.”

As previously stated, compensatory damages need not be proven with mathematical certainty and, in the case at bar, appellee adduced sufficient evidence to determine the fair market value of the steel as of 2018 with reasonable certainty. *See Brock Bridge Ltd.*

P'ship, 114 Md. App. 144, 157 (1997) (quoting *Ass'n of Maryland Pilots*, 304 F. Supp. 548, 557 (D.Md.1969)).

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE COUNTY AFFIRMED;
COSTS TO BE PAID BY APPELLEE.**