Circuit Court for Montgomery County
Case No. 420656V

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1669

September Term, 2021

CHRISTOPHER MCCAULEY BOWERS

v.

TKA INC., ET AL.

Kehoe,
Zic,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: March 6, 2023

* At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

On 30 March 2017, Christopher McCauley Bowers, Appellant, filed a third amended complaint in the Circuit Court for Montgomery County against TKA Inc., its president, Dale R. Tompkins, Jr., and its vice-president, Kim Bernhardt-Moake, Appellees. In that complaint, Appellant sought a declaratory judgment and damages, alleging, among other things, tortious interference with a contract (Count III) and tortious interference with a business relationship (Count V). Specifically, Appellant claimed that Appellees, by whom he was employed formerly as a martial arts instructor, misrepresented to the Montgomery County Department of Recreation ("the Department") that a restrictive covenant in his TKA Employment Agreement prohibited him from competing with TKA, resulting in the Department's "ceasing to do business with" him.

Following a three-day jury trial, Appellees renewed their motion for judgment on all counts made previously at the close of Appellant's case-in-chief. The court denied their motion as to Count III (alleging tortious interference with a contract), but granted it with respect to Count V (alleging tortious interference with a business relationship). The court then entered a declaratory judgment in favor of Appellant, ruling: "If Defendant, TKA, Inc., had an enforceable non-compete agreement with the Plaintiff, Christopher Bowers, the non-compete clause of that agreement expired three (3) years from October 18th, 2007." The court submitted Count III to the jury, which found in favor of Appellant, awarding him economic damages in the amount of $89,500.[1]

[1] Although the jury awarded Appellant economic damages, it rejected his request for non-economic relief.

Appellees noted an appeal from the judgment on Count III. Appellant, in turn, cross-appealed, challenging the court's decision to grant Appellees' motion for judgment on Count V. We reversed both judgments in an unreported opinion filed on 11 February 2019. As to Count III, we held that the trial court erred in denying Appellees' motion for judgment, reasoning that Appellant presented neither evidence of a binding contract nor proved damages. *TKA Inc., et al. v. Bowers*, No. 1185, Sept. Term 2017, slip op. at 13, 16 (filed 11 February 2019). With respect to Count V, we concluded that Appellant had "presented sufficient evidence for the jury to infer that the representations were made with reckless disregard as to whether they were truthful or not." *Id.*, slip op. at 27. Accordingly, we "remanded [the case] . . . for a new trial as to Count V[.]" *Id.*, slip op. at 28 (capitalization omitted).

On remand, Appellees moved *in limine* to exclude, among other things, testimony pertaining to "damages alleged and previously tried under Count III[.]" The circuit court granted that motion. A second three-day trial ensued, at the conclusion of which a jury found Appellees not liable on Count V.

Appellant noted another appeal and presents five issues for our review, which we have rephrased as follows:[2]

[2] In his brief, Appellant articulates the issues as follows:

> I. Did the Circuit Court make a legal error by dismissing the EBB portion of the economic relationship for consideration of damages, in dismissing the possibility of emotional damages, and in preventing mention of the EBB
>
> (continued…)

1. Did the trial court commit reversible error by granting Appellees' motion *in limine*?

2. Did the trial court err in denying Appellant's motion for judgment made at the close of his case-in-chief?

3. Did the trial court abuse its discretion in limiting Appellant's theory of liability?

4. Did the trial court exhibit bias, to the prejudice of Appellant?

5. Did the trial court abuse its discretion in denying Appellant's motion for summary judgment?

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

BACKGROUND

The resolution of this appeal does not turn upon the evidence adduced on remand. Accordingly, we reproduce the facts presented in our prior opinion to provide context for the issues presented on appeal.

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programs at trial which would have demonstrated both Tortious Interference and fraud as a cause of wrongfulness?

II. Did the Circuit Court erroneously deny the Plaintiff's motion for a Judgment as to liability at the close of evidence, and was the Plaintiff entitled to judgment in his favor as a matter of law?

III. Did the Circuit Court make a legal error by ruling that only Fraud could be used as a cause of wrongfulness for element 3?

IV. Did the Circuit court abuse its discretion by engaging in actions that constituted legal error, were unfair, and exposed the plaintiff to ridicule, were intentionally deceptive, and unfairly prejudicial to the Jury?

V. Did the Circuit court commit a legal error in denying the Plaintiff's Motion for Summary Judgment?

On April 27, 2001, Bowers signed an Employment Agreement ("Agreement") with TKA. The Agreement contained a restrictive covenant stating that for a period of three years after the termination of the employment relationship, Bowers was prohibited from competing with TKA's business at any location whose "ten (10) mile radius [would] invade or overlap any area within a ten (10) mile radius of any business location" of TKA. On October 17, 2007, Bowers resigned from TKA and ceased performing any work for them.

Almost four years later, on September 16, 2011, Bowers again began teaching martial arts for TKA. When Bowers rejoined TKA, he did not sign a new Agreement with them.

On September 8, 2014, Bowers once again resigned from TKA. He began teaching karate under the name "Zen Budo Karate." Shortly thereafter, Kim Moake (TKA's Vice President) phoned an agent of the Montgomery County Department of Recreation, an organization with which TKA regularly did business, and advised that Bowers had left the employ of TKA, and that he was currently subject to a non-compete agreement.

* * *

On June 30, 2015, counsel for TKA wrote the Montgomery County Department of Recreation a letter that said, in material part, the following:

> It has come to our attention that . . . Bowers has applied to teach martial arts through the Montgomery County Department of Recreation. Mr. Bowers is a former employee of [TKA] who is subject to a non-competition agreement. Mr. Bowers' agreement precludes him from offering martial arts instruction in Montgomery County in competition with [TKA].
>
> I will appreciate your office notifying us if Mr. Bowers has applied or does apply to instruct students in any martial arts program for or through the Montgomery County Department of Recreation.

On September 8, 2015, Bowers entered into a contract negotiated by Sara Swarr, a representative of Montgomery County, whom Bowers dealt with in regard to a program called "Excel Beyond the Bell" ("EBB"). In regard to the EBB program, Bowers' company was hired to teach martial arts

> for three (3) months at Montgomery Village Middle School, Argyle Middle School, and Roberto Clemente Middle School. The EBB program was open to students at the aforementioned middle schools. The EBB contract was documented by a direct purchase order and a letter of intent showing that the services were to be provided between September 28, 2015 and January 22, 2016. For those services, Bowers was to be paid $9,945.
>
> On December 26, 2015, Bowers, and Sara Swarr, began to negotiate, by email, a contract for Bowers to provide karate instructors for the EBB program starting in January of 2016.
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> * * *
>
> In addition to the EBB program, Bowers was interested in contracting with the Montgomery County Recreational Department to have his organization provide karate instructors for high school students. The anticipated karate program would be fee based, meaning that a fee would be paid for each student in attendance and the fee would be divided, in some fashion, between Montgomery County and Bowers' company. In regard to the possible fee based contract, Bowers dealt with Patricia Walsh, who was employed by the division in the Recreation Department that oversaw class programs offered in the Department's guide book. . . . As part of her job she discusses with contractors, like Bowers, the prices they would charge for their work, but, as part of her job, she did not negotiate the contract prices. In a fee based program, such as the one Bowers proposed, the county keeps a portion of the fee and the contractor keeps the rest. She had discussions with Bowers about a fee based program and discussed locations where classes might be held. But during their negotiation, nothing was decided as to where the classes were to take place, how many students were to attend, what fees would be charged or how the fees would be split.
>
> Sometime, at the beginning of 2016, Ms. Walsh was told to break off negotiations with Bowers because TKA had informed the county that Bowers was bound by a non-compete agreement.

Id., slip op. at 4-8.

We shall include additional facts as relevant to our discussion of the questions presented.

DISCUSSION

I.

Appellant contends that the court committed reversible error in granting Appellees' motion *in limine* to exclude evidence of damages resulting from their alleged tortious interference with the EBB contract. In support of that motion, Appellees argued that "[a]ny claims related to EBB transactions are barred under *res judicata* (claim preclusion), and collateral estoppel (issue preclusion), as the EBB claims were litigated in full during the earlier trial and a valid final judgment has been entered on that claim." Appellant challenges that position, arguing that *res judicata* and collateral estoppel only apply "to separate actions, that is, separate lawsuits[,]" rather than to "different counts within the same lawsuit."[3] (Internal quotation marks omitted.) Appellant asserts further that the court's purported error was compounded by "prevent[ing] any mention of the EBB classes" and precluding him from recovering emotional damages. (Emphasis omitted.)

[3] Appellant is incorrect with respect to the applicability of *res judicata*. The Supreme Court of Maryland has held repeatedly that the doctrine applies to final judgments on the merits entered previously in the same case. *See, e.g.*, *Anne Arundel Cnty. Bd. of Educ. v. Norville*, 390 Md. 93, 110 (2005) ("Res judicata pertains to the legal consequences of a judgment entered previously in the same case."); *Colandrea v. Wilde Lake Cmty. Ass'n, Inc.*, 361 Md. 371, 392 (2000) ("[*R*]*es judicata* looks to the final judgment on the merits earlier entered in the same case[.]"). *See also Facey v. Facey*, 249 Md. App. 584, 610, *cert. denied*, 475 Md. 680 (2021); *Heit v. Stansbury*, 215 Md. App. 550, 566 (2013); *Douglas v. First Sec. Fed. Sav. Bank, Inc.*, 101 Md. App. 170, 189, *cert. denied*, 336 Md. 558 (1994); *Burkett v. State*, 98 Md. App. 459, 464 (1993), *cert. denied*, 334 Md. 210 (1994).

Appellees maintain that Appellant was estopped collaterally from introducing evidence of damages, arguing that "[t]here are no underlying facts asserted under the business interference claim that were not asserted and tried earlier in support of the EEB claim." Alternatively, they argue that "[e]ven if the [c]ourt had erred, it would have been harmless error, because the jury found that TKA was not liable for any damage."

In reversing the jury's verdict in favor of Appellant on his tortious interference with a contract claim, we held that "the trial judge erred in denying [Appellees'] motion for judgment as to that count." *TKA Inc.*, slip op. at 13. "Taking the evidence in the light most favorable to [Appellant]," we reasoned that Appellant did not present evidence that the Board agreed to be bound by the second EBB contract. *Id.*, slip op. at 12-13. Without a binding contract, we concluded that Appellant had not satisfied an essential element of the claim.[4] *Id.*, slip op. 13. We further found that Appellant "failed to prove, with reasonable certainty, what pecuniary damages he suffered as a result of the (assumed) breach of contract." *Id.*, slip op. at 16.

[4] To prevail on a claim of tortious interference with a contract, a plaintiff must prove by a preponderance of the evidence:

> (1) The existence of a contract or a legally protected interest between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional inducement of the third party to breach or otherwise render impossible the performance of the contract; (4) without justification on the part of the defendant; (5) the subsequent breach by the third party; and (6) damages to the plaintiff resulting therefrom.

Brass Metal Prods., Inc. v. E-J Enters., Inc., 189 Md. App. 310, 348 (2009) (quotation marks and citations omitted).

On remand, Appellees moved *in limine* to exclude, *inter alia*, any testimony pertaining to damages arising from their alleged tortious interference with the would-be EBB contract as well as any evidence of non-economic damages. In an accompanying memorandum, Appellees argued, in pertinent part:

> Plaintiff had a full opportunity to argue damages attributable to Defendants' alleged interference with his EBB contract relations with Montgomery County. Plaintiff did offer damage evidence on the EBB claim at the earlier trial. All damage claims attributable to the County's EBB contract have been determined by a valid judgment and the Plaintiff is barred and collaterally estopped from having this claim and damage issue redetermined under Count V.
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> * * *
>
> Plaintiff's emotional distress and other non-economic damage claim was also raised, adjudicated, and decided at the earlier [c]ircuit [c]ourt trial. Following a full opportunity to present evidence on this issue, a jury returned a judgment of zero dollars ($0.00) for non-economic damages. A final judgment on Plaintiff's non-economic damage claim was entered by this [c]ourt on June 1, 2017. The Count III judgment was ultimately vacated by the [Appellate Court of Maryland]. Nevertheless, the facts supporting non-economic damages under Counts III and V are identical. Because the non-economic damage issue was actually litigated and determined, and a valid final judgment has been entered. Therefore, the disposition of this issue is conclusive and cannot be relitigated in a subsequent action between the parties. . . . Plaintiff is barred by issue preclusion from re-litigating non-economic damages under Count V.

After hearing oral argument on Appellees' motion and Appellant's opposition thereto, the court announced its ruling from the bench:

> Under the [Appellate Court of Maryland's] holding, [Appellant] cannot seek to retry or reprove Count 3. So . . . the existence of a specific contract that was pled, off the table. The existence of damages that were flowing from that contract, off the table. They remanded for Count 5 to see if he can prove this gestalt theory, and maybe he can, maybe he can't.

* * *

Okay. So, the motion is granted in part and denied in part[.]

At Appellant's request, the court clarified the scope of its ruling, explaining:

> The only limitation I'm placing on you is you cannot seek to prove to this jury that you had the January 2016 contract that was already the subject of Count 3, and as to which the [Appellate Court of Maryland] held . . . one, you failed to prove there was a contract with Montgomery County, and two, even if there had been a contract, . . . [y]ou failed to prove damages.
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> * * *
>
> As to the interference with business relationships, except for those two items, which are off the table, you can prove what you can prove.

"We review without deference . . . questions of law, such as a determination as to the applicability of the doctrines of res judicata and collateral estoppel." *Bank of New York Mellon v. Georg*, 456 Md. 616, 666 (2017). Accordingly, we will exercise *de novo* review of such rulings "and shall not set aside the [trial] court's findings of fact unless they are clearly erroneous." *Bender v. Schwartz*, 172 Md. App. 648, 664 (2007) (quotation marks and citation omitted).

Collateral estoppel, or issue preclusion, "bars a party from re-litigating any issue of fact or law conclusively determined against that party in previous litigation." *Brown & Sturm v. Frederick Rd. Ltd. P'ship*, 137 Md. App. 150, 192 (2001). To invoke successfully collateral estoppel, a party must satisfy the following four-part test: (1) the issue decided in the prior adjudication was identical to the one presented in the later action; (2) there was a final judgment on the merits in that former suit; (3) the party against whom the plea is

asserted was a party or in privity to a party to the prior adjudication; and (4) the party against whom the plea is asserted was given a fair opportunity to be heard on the issue in question during the prior proceeding. *Garrity v. Maryland State Bd. of Plumbing*, 447 Md. 359, 369 (2016). "The purpose of the doctrine . . . is to avoid the expense and vexation of multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibilities of inconsistent decisions." *Shader v. Hampton Improvement Ass'n, Inc.*, 443 Md. 148, 161 (2015) (quotation marks and citation omitted).

We address first Appellant's argument that collateral estoppel only applies to "separate lawsuits" and not to "different counts within the same lawsuit." (Emphasis omitted.) Appellant's argument, although correct technically, is unavailing ultimately. Granted, the term "'[c]ollateral,' for collateral estoppel purposes, denotes that the estopping influence came into the case in issue from some other outside case[.]" *Colandrea*, 361 Md. at 391 (quoting *Burkett*, 98 Md. App. at 466). As a matter of semantic precision, therefore, "in the context of a single case, the issue-preclusive operation should actually be called 'direct estoppel.'" *Id.* (quoting *Burkett*, 98 Md. App. at 466). This, however, is a mere nominal distinction without substantive difference. The four-prong test to determine the applicability of issue preclusion remains the same no matter whether an issue was initially litigated in the same or a different case. *See United States v. Shenberg*, 89 F.3d 1461, 1478 (11th Cir. 1996) ("Our analysis . . . remains the same, whether we refer to the application of estoppel principles as 'direct' or 'collateral.'"); *Davenport v. North Carolina Dep't of Transp.*, 3 F.3d 89, 94 (4th Cir. 1993) ("[T]here was no need for the

Court to identify the particular brand of issue preclusion thought to be before it; it wouldn't have affected issue preclusion analysis.").

The first element of issue preclusion—that the issue decided in the prior adjudication is the same as that raised in a later proceeding—is met here. At the initial trial, the jury found Appellees liable on Count III and determined that Appellant suffered economic damages in the amount of $89,500. On appeal from that verdict and award, we reversed, holding that Appellant failed, as a matter of law, to present sufficient evidence either (1) that the Department had agreed to be bound by a second EBB contact or (2) of any damages he incurred as the result of Appellees' purportedly tortious interference with the EBB program. These were the same issues with respect to which the court granted Appellees' motion *in limine*. Appellant maintains that "[t]here is no case law which explains that a thrown out count at trial prevents recovery of damages under a different count upon retrial[.]" An issue is not, however, transformed substantively merely by virtue of its being raised under a different count or pursuant to a different legal theory. *See John Crane, Inc. v. Puller*, 169 Md. App. 1, 33 ("Collateral estoppel or issue preclusion may cross the line from one claim to another claim sharing a common factual issue[.]"), *cert. denied*, 394 Md. 479 (2006).

The finality of judgment element is satisfied similarly. For purposes of issue preclusion, "final judgment includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." *Bryan v. State Farm Mut. Auto. Ins. Co.*, 205 Md. App. 587, 595 (2012) (quotation marks and citation

omitted). *See also Morgan v. Morgan*, 68 Md. App. 85, 94 (1986) ("Finality in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." (quotation marks, citation, and emphasis omitted)). Although we remanded the case for a retrial on the tortious interference with business relationship claim, we held nevertheless that Appellant "failed to prove, with reasonable certainty, what pecuniary damages he suffered as a result of the (assumed) breach of [the EBB] contract." *TKA Inc.*, slip op. at 16. That holding was "sufficiently firm to be accorded conclusive effect[,]" and therefore constituted a final judgment for purposes of issue preclusion. *Bryan*, 205 Md. App. at 595 (quotation marks and citation omitted).

Finally, the third and fourth prongs are satisfied. As to the third element, the parties on remand and retrial were identical to those in the initial trial and appeal. With respect to the fourth, Appellant was afforded an unfettered opportunity to be heard on the issues of whether the Department agreed to be bound by the EBB contract and the damages that he believed he suffered as a result of Appellees' alleged tortious interference therewith.

We turn next to Appellant's sub-contentions, beginning with his claim that "[a]s the trial progressed, the [court] prevented any mention of the EBB classes." (Emphasis omitted.) We need not reach the merits of this complaint, as Appellant failed to preserve this issue for our review.

Maryland Rule 5-103 provides, in pertinent part:

> (a) **Effect of Erroneous Ruling.** Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling, and
>
> * * *
>
> (2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered.

See also Merzbacher v. State, 346 Md. 391, 416 (1997) ("Ordinarily, a formal proffer of the contents and relevancy of the excluded evidence must be made in order to preserve for review the propriety of the trial court's decision to exclude the subject evidence."); *Muhammad v. State*, 177 Md. App. 188, 281 (2007) ("A claim that the exclusion of evidence constitutes reversible error is generally not preserved for appellate review absent a formal proffer of the contents and materiality of the excluded testimony."), *cert. denied*, 403 Md. 614 (2008). The foregoing rule "is necessary to [e]nsure that on appeal, a trial judge's exercise of discretion can be fairly and accurately assessed." *Waldron v. State*, 62 Md. App. 686, 698, *cert. denied*, 304 Md. 97 (1985).

Turning to the record, Appellant cites two occasions on which he claims that the court prohibited categorically him from eliciting testimony pertaining to the EBB program. The first was during Appellant's direct examination of a TKA employee. After testifying that she had worked at Argyle Middle School "from 2012, 2013, probably through until 2016[,]" the following exchange occurred:

> Q Were you aware that I was teaching karate programs for Montgomery County?

A Yes.

Q How were you aware of that?

A Because I worked in the same building that you were doing the programs in.

Q And what was that program called?

A EBB, Excel Beyond the Bell.

[DEFENSE COUNSEL]: Objection. Move to strike.

THE COURT: Yes. Sustained. Sir, you knew that's off limits for the reasons we've discussed, so move on, please.

The second occasion on which Appellant asserts that the court excluded erroneously testimony regarding EBB was during his direct examination of Ms. Bernhardt-Moake:

Q You said you had two conversations with Sarah Swarr in previous testimony?

A That's correct.

Q Would you describe the first conversation?

[DEFENSE COUNSEL]: Objection.

THE COURT: Basis?

[DEFENSE COUNSEL]: EBB.

THE COURT: Sustained.

On neither of those two occasions did Appellant make a cognizable proffer of the contents or relevance of the excluded testimony. In fact, our review of the trial transcripts reveals

only one occasion on which Appellant proffered the relevance of an objected-to question pertaining to EBB.[5]

This does not end our inquiry. As is clear from the plain language of Rule 5-103(a), a proffer is not an absolute requirement for the preservation of excluded testimony. Absent a formal proffer, the exclusion of trial testimony is preserved for appellate review when "what the examiner was trying to accomplish was obvious." *Jorgensen v. State*, 80 Md. App. 595, 601 (1989). A proffer is also unnecessary ordinarily when a trial court,

> in response to a motion *in limine*, makes a ruling to exclude evidence that is clearly intended to be the final word on the matter, and that will not be affected by the manner in which the evidence unfolds at trial, and the proponent of the evidence makes a contemporaneous objection[.]

Prout v. State, 311 Md. 348, 357 (1988), *superseded by rule on other grounds, Beales v. State*, 329 Md. 263 (1993).

As discussed earlier, the court's order *in limine* excluded only evidence of the existence of the EBB contract and damages arising from Appellees' interference with it. The court then permitted Appellant, over objection, to testify at length regarding EBB. The court's order *in limine* was not, therefore, "clearly intended to be the final word" on the admissibility of evidence otherwise related to EBB. Moreover, it was not obvious what relevant testimony Appellant's excluded EBB-related questions were attempting to elicit.

[5] During his direct examination of Ms. Bernhardt-Moake on the third day of trial, Appellant asked: "Were you aware that I was teaching EBB program and that I had plans to in 2014?" When the court sustained defense counsel's ensuing objection, Appellant simply responded: "I'm trying to establish malice, Your Honor."

Thus, to the extent that the court excluded testimony regarding EBB that exceeded the scope of its order *in limine*, the issue is not preserved for our review.

Appellant's second sub-contention (that the court erred by excluding evidence and argument as to non-economic damages) fairs no better than his first. The jury found Appellees not liable, thus never reaching the issue of EBB-related damages. Assuming that the court erred by excluding evidence of non-economic damages, any such error would be harmless. *Cf. Schear v. Motel Mgmt. Corp. of Am.*, 61 Md. App. 670, 691 (1985) ("In light of the fact that the jury found no liability on the part of the [defendant], any error in the [jury] instructions with respect to the amount of damages that could be awarded was clearly harmless error." (emphasis omitted)).

II.

Appellant asserts that the court erred by denying summarily his motion for judgment as to liability.

Maryland Rule 2-519(a) governs motions for judgments and provides, in pertinent part:

> A party may move for judgment on any or all of the issues in any action at the close of the evidence offered *by an opposing party*, and in a jury trial at the close of all the evidence. The moving party shall state with particularity all reasons why the motion should be granted.

(Emphasis added.) Rule 1-201(a) instructs further that the Maryland Rules all "be construed to secure simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay." These and the other Maryland rules "are 'precise

rubrics,' which are to be strictly followed." *Gen. Motors Corp. v. Seay*, 388 Md. 341, 356 (2005) (citation omitted).

As is clear from its plain language, Rule 2-519(a) only permits the defendant, as the plaintiff's party-opponent, to move for judgment at the close of the plaintiff's case-in-chief. *See Ramlall v. MobilePro Corp*., 202 Md. App. 20, 33-24 (2011) ("A party may move for judgment at the close of the evidence offered *by an opposing party*. . . . When a *defendant* does so at the close of the evidence offered by *the plaintiff* in a bench trial, 'the court may proceed . . . to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence.'" (emphasis added) (quoting Md. Rule 2-519)). To permit a trial court to grant a plaintiff's motion for judgment at the close of his or her case-in-chief, but before the close of the evidence offered by his or her opponent, would deny defendants a meaningful opportunity to be heard. As the appropriate time for Appellant to make a motion for judgment was at the close of all the evidence and he made such a motion only at the close of his own case-in-chief, the court did not err in denying Appellant's premature motion.[6]

[6] Even if it were permissible for a plaintiff to move for judgment prior to the close of a defendant's case, this issue would not be preserved for appellate review because Appellant failed to renew his motion at the close of all the evidence. *See Baltimore Harbor Charters, Ltd. v. Ayd*, 134 Md. App. 188, 197 (2000) ("A plain reading of [Rule 2-519] shows that these motions must be made at the close of *all* evidence." (emphasis retained)), *aff'd in part, vacated in part on other grounds, and remanded*, 365 Md. 366 (2001); *Waters v. Whiting*, 113 Md. App. 464, 475 (holding that the appellant failed to preserve a challenge to the jury's verdict because "she did not move for judgment under Rule 2-519 at the close of all the evidence and prior to submission of the case to the jury"), *cert. denied*, 345 Md. (continued…)

III.

Next, Appellant claims that the court committed "a legal error by ruling that only Fraud could be used" to satisfy the malice element of tortious interference with a business relationship.[7] Appellees counter: "The trial court never ruled that fraud alone could be considered to support [Appellant's] claim of wrongful interference." Rather, Appellees assert that Appellant "alone chose to argue fraud as the cornerstone of his case against [them]." In his reply brief, Appellant refines his contention, arguing that the verdict sheet "preclude[d] all other forms of conduct and wrongfulness other than 'misrepresenting', or 'without belief in its truth' which is fraud." (Emphasis omitted.) The court should have permitted him to pursue alternate theories of "wrongfulness," including "baseless threats of suit, unlawful restraint of trade, concealment of the non-compete contract, [and] intentional infliction of emotional distress[.]"

237 (1997); *Fearnow v. Chesapeake & Potomac Tel. Co. of Md.*, 104 Md. App. 1, 27 (1995) (holding that to preserve a motion for judgment "for appellate review, a party must: (i) specifically make the motion at the close of the evidence; and (ii) state with particularity the grounds for the motion"), *aff'd in part, rev'd in part on other grounds*, 342 Md. 363 (1996).

[7] The elements of tortious interference with a business relationship are:

> "(1) intentional and willful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting."

Spengler v. Sears, Roebuck & Co., 163 Md. App. 220, 242 (quoting *Bagwell v. Peninsula Reg'l Med. Ctr.*, 106 Md. App. 470, 504 (1995)), *cert. denied*, 389 Md. 126 (2005)

Maryland Rule 2-522 governs the submission of issues to the jury, providing, in part: "If the court fails to submit any issue raised by the pleadings or by the evidence, all parties waive their right to a trial by jury of the issues omitted unless before the jury retires a party demands its submission to the jury." Md. Rule 2-522(b)(2)(B). The Rule states similarly that "[n]o party may assign as error . . . the refusal of the court to submit a requested issue unless the party objects on the record before the jury retires to consider its verdict, *stating distinctly the matter to which the party objects and the grounds of the objection*." Md. Rule 2-522(b)(5) (emphasis added). *See also Blaw-Knox Const. Equip. Co. v. Morris*, 88 Md. App. 655, 668 (1991).

"[T]he decision to use a particular verdict sheet will not be reversed absent abuse of discretion." *Consol. Waste Indus., Inc. v. Standard Equip. Co.*, 421 Md. 210, 220 (2011) (quotation marks and citation omitted). Even if a trial court abused its discretion, we "generally will not reverse even an unreasonable decision without evidence of prejudice/harm." *Id.* "Prejudice exists when the particular error is determined likely to have affected the verdict—it is not the possibility but the probability of prejudice which is the object of the appellate inquiry." *Id.* at 219-20 (quotation marks and citation omitted).

The verdict sheet in this case consisted of five questions with respect to the issue of liability:

> **QUESTION 1:** Did TKA, Inc., with malicious or wrongful intent, knowingly misrepresent that Mr. Bowers was bound by a non-compete agreement, without belief in the truth of the statement or recklessly, without care as to whether the statement was true or false?

* * *

QUESTION 2: Did Dale Tompkins with malicious or wrongful intent, knowingly misrepresent that Mr. Bowers was bound by a non-compete agreement, without belief in the truth of the statement or recklessly, without care as to whether the statement was true or false?

* * *

QUESTION 3: Did Kim Moake with malicious or wrongful intent, knowingly misrepresent that Mr. Bowers was bound by a non-compete agreement, without belief in the truth of the statement or recklessly, without care as to whether the statement was true or false?

* * *

QUESTION 4: Did Mr. Bowers prove actual lost profits or other consequential damage as result of malicious or wrongful interference with his economic relationship with Montgomery County?

* * *

QUESTION 5: Did the Defendants act with actual malice, ill will, hatred, or spite toward Mr. Bowers when they communicated with Montgomery County concerning his employment agreement with TKA?

Challenging Question No. 5, Appellant seems to assert that the actual malice requirement for the recovery of punitive damages could be satisfied by conduct other than that which formed the basis for liability, stating: "I was under the impression it was malice towards lots of different things in the case, not just that specific item, any malice." The court overruled Appellant's objection, explaining: "[T]he only count that the [Appellate Court of Maryland] remanded for trial was Count 5. Count 5 dealt specifically with [Appellees'] communication with Montgomery County regarding your employment status."

Appellant also objected to Question No. 1, arguing:

> My exegesis of the law based upon my own research only as a pro se client is that wrongful intent, and they are completely correct that wrongful intent is required. It requires a tortious intent and a wrongful action, but it does not require maliciousness. Maliciousness is required for punitive damages, not for compensatory damages.[8]

Again, the court clarified Appellant's misunderstanding, advising him:

> Two things. Number one, the statement on a verdict sheet is in the disjunctive. It says 'or.' It's a correct statement of the law.
>
> * * *
>
> [I]t's a correct statement of what is the law of the case in this case which is what the [Appellate Court of Maryland] in [its], I understand it's unpublished; nonetheless, it's binding upon me in this case. It is consistent with what they construed the elements of the tort to be regarding this case.

(Some punctuation added.) Appellant relented, replying: "You're totally correct, Your Honor. I did not understand the or part and I apologize."

Appellant neither demanded that the court submit alternate theories of liability to the jury, nor identified distinctly the court's failure to do so as a ground for his objection. He failed to preserve this issue for appellate review. In any event, we do not perceive that,

[8] For purposes of tortious interference with a business relationship, "malice" denotes "an act that is wrongful and without legal justification." *State v. Roshchin*, 446 Md. 128, 139 (2016). To recover punitive damages in such an action, a plaintiff bears the additional burden of proving by clear and convincing evidence that a defendant acted with "actual malice," *i.e.*, "conduct of the defendant characterized by evil motive, intent to injure, ill will, or fraud[.]" *Owens-Illinois v. Zenobia*, 325 Md. 420, 460 (1992). In objecting to Question No. 1, Appellant seems to have conflated these two principles.

by overruling his objections, the court prohibited Appellant from advancing alternate theories of liability at closing argument.

IV.

Penultimately, Appellant complains that the trial court "engaged [i]n a campaign of manipulation to muzzle [him] and prevent him from making his case." In support of this argument, Appellant directs us to instances in the record when the court purportedly:

1) Refused to permit him to recall witnesses;

2) Declined to admit an entire deposition transcript into evidence;

3) Required Appellant to introduce interrogatory answers individually;

4) Advised Appellant that to lay a foundation for testifying regarding damages, "[y]ou can't just say I want a lot of money. You have to say I want a lot of money, and here's why you should give it to me";

5) Ruled than an exhibit was hearsay not subject to the business records exception;

6) Asked Appellant to rephrase a question in a less pejorative way;

7) Accused Appellant of making negative insinuations against a witness;

8) Requested that he remove his hands from his pockets, stating "it's what people do when they're pointing a firearm at somebody";

9) Declined six of Appellant's requests for a "sidebar"; and

10) Admonished Appellant against debating the law and "making speeches" in front of the jury.

Appellees rejoin that the "trial court did not engage in unfair, deceptive, or prejudicial conduct, and did not ridicule the appellant[.]" Relying on the record, they then attempt to refute each of Appellant's allegations of judicial misconduct and consequent bias.

Appellant objected only to one instance of the alleged judicial misconduct about which he now complains and did not do so on the ground of judicial bias. Our review of the record does not reveal that Appellant otherwise made any such exception—either by objection, a motion for a mistrial, or a motion to recuse. To the contrary, after the pattern of alleged partiality to which Appellant refers, he expressed a contrary impression, opining: "I understand you're being fair. You're a very fair judge." By failing to object to the alleged instances of improper conduct, Appellant failed to preserve this issue for our review. *See Joseph v. State*, 190 Md. App. 275, 289 (2010) ("[U]nder Maryland Rule 8-131(a), a party has to object to preserve allegations of judicial bias for review." (footnote omitted)); *Acquah v. State*, 113 Md. App. 29, 61 (1996) ("In order to preserve this issue for appeal, [defendant] must first have objected to the individual instances of improper conduct."); *McMillian v. State*, 65 Md. App. 21, 26 (1985).

Even if Appellant had objected to each instance of allegedly improper conduct, we would hold that this issue is not properly before us. Where, as here, an appellant seeks review of an alleged pattern of misconduct which, considered in aggregate, evidences judicial bias, it is that pattern to which that appellant must object—and not merely each individual incident. *See Acquah*, 113 Md. App. at 61 ("Although [appellant] objected to each incident, she failed to object to the 'pattern of improper conduct.' It is the 'pattern' of

the judge's conduct that she asks us to review, not the propriety of the individual instances. It is, therefore, to this 'pattern' that she was required to object at trial."). For the foregoing reasons, this issue is not preserved for our review, and we decline to address the merits thereof. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any [non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

V.

Finally, Appellant contends that the court erred in denying his motion for summary judgment. Rather than support that claim with independent argument, Appellant adopts by reference the argument made in support of his claim that the court denied erroneously his premature motion for judgment. He asserts baldly that "at the motion for summary judgments there was no dispute of facts which were crucial to establishing the essential elements of liability[.]"

Maryland Rule 2-501 governs motions for summary judgment and provides, in pertinent part: "The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). While we review the grant of a motion for summary judgment *de novo*, "a trial court may exercise its discretionary power to deny a motion for summary judgment even if the moving party has met the technical requirements for summary judgment—*i.e.*, even if the moving party has shown that there is no genuine dispute of

material fact and that it is entitled to judgment as a matter of law." *Estate of Castruccio v. Castruccio*, 247 Md. App. 1, 60 (2020). "'Thus, on appeal, the standard of review for a denial of a motion for summary judgment is whether the trial [court] abused [its] discretion and in the absence of such a showing, the decision . . . will not be disturbed.'" *Fischbach v. Fischbach*, 187 Md. App. 61, 75 (2009) (quoting *Dashiell v. Meeks*, 396 Md. 149, 165 (2006)). Indeed, "the trial court's discretion to deny or defer ruling *ordinarily prevents* an appellate court from directing that summary judgment be granted." *Three Garden Vill. Ltd. P'ship v. United States Fid. & Guar. Co.*, 318 Md. 98, 108 (1989) (emphasis added).

Even if we were to accept his bald assertion that "there was no dispute of facts which were crucial to establishing the essential elements of liability[,]" which we do not, Appellant would not prevail. Appellant does not argue remotely, nor does the record reflect, that the court abused its discretion by denying his motion. For that reason alone, Appellant's final contention fails.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.