

Circuit Court for Baltimore City
Case No.: 24C18006663

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2007

September Term, 2019

BRINKER OF BALTIMORE, A MARYLAND
CORPORATION

v.

CARESA SMITH

Fader, C.J.,
Arthur,
Gould,

JJ.

Opinion by Gould, J.

Filed: January 6, 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.

No matter the perceived strengths or weaknesses in one’s position, predicting the outcome of any trial—jury or non-jury—is more art than science, and uncertain art at that. This is no less true in personal injury cases, particularly cases in which the extent of the plaintiff’s pain and suffering rests on the credibility of the plaintiff. That’s why some plaintiffs with unrebutted testimony of significant pain and suffering may be awarded little to nothing in non-economic damages, while other plaintiffs may receive substantial non-economic damages awards for non-permanent injuries associated with minimal economic damages. That most cases settle before trial owes, in part, to the speculative nature of predicting the outcome in advance.

In this personal injury case, a \$350,000 jury verdict for non-economic damages was entered against a restaurant in favor of its customer who, when eating her appetizer of loaded nachos, bit into an industrial metal screw that had broken free from a kitchen machine. The restaurant filed a post-trial motion to reduce the judgment, claiming that the excessive award was not supported by the evidence. The restaurant also argued that improper arguments or tactics by plaintiff’s counsel and the court’s erroneous exclusion of the plaintiff’s medical bills contributed to the excessiveness of the verdict. The court denied the motion without a hearing. On appeal, the restaurant contends that this denial constituted an abuse of discretion. We disagree and affirm.

BACKGROUND

Caresa Smith, age 42, was dining with her significant other in May 2018 at a restaurant owned by an entity named “Brinker of Baltimore County, a Maryland Corporation” (“Brinker”). As she was enjoying her appetizer of nachos, she bit into an industrial metal screw that had separated from the machine in the kitchen that tosses tortilla chips. The pain was immediate and searing. She incurred injuries to the upper left quadrant of her mouth that required two root canals and three crowns.

Ms. Smith sued Brinker, seeking damages to compensate her for medical expenses, lost wages, and non-economic damages. Brinker admitted that it owed Ms. Smith a duty of care and that it breached this duty. Before trial, Ms. Smith withdrew her claims for past medical expenses and lost wages, leaving non-economic damages as the only component of her requested damages. The sole issues before the jury were whether the screw proximately caused Ms. Smith’s injuries, and if so, the amount, if any, of non-economic damages to award Ms. Smith.

After a three-day trial, the jury returned a verdict of \$350,000.

Brinker filed a post-judgment motion to reduce the damages award to \$30,000, or in the alternative, to obtain a new trial. Ms. Smith responded with a detailed memorandum in opposition.

The court denied Brinker’s motion without a hearing. The court’s order stated:

Upon consideration of the Defendant Brinker of Baltimore County, a Maryland Corporation’s Motion to Revise Judgment by Remittitur or, in the Alternative, Motion for a New Trial, and all responses thereto, it is this 31st day of October, 2019, by the Circuit Court for Baltimore City, Part 6, hereby

FINDS that no hearing is necessary on this matter, and the materials submitted by the parties are sufficient for a ruling; and it is further

ORDERED that the Motion to Revise Judgment by Remittitur be, and hereby is, **DENIED**; and it is further

ORDERED that the Motion for a New Trial be, and hereby is, **DENIED**.

On appeal, Brinker presents two questions that we have consolidated and rephrased as follows: Did the trial court abuse its discretion in denying Brinker’s post-trial motion for remittitur or, in the alternative, for a new trial?¹

DISCUSSION

We review a trial judge’s decision on a motion for remittitur or a new trial for abuse of discretion. *See Brooks v. Jenkins*, 220 Md. App. 444, 474 (2014); *Owens-Illinois, Inc. v. Hunter*, 162 Md. App. 385, 415 (2005). “Both the granting of a remittitur or the intertwined awarding of a new trial based on the alleged excessiveness of the verdict for economic loss are matters entrusted to the wide discretion of the trial judge.” *John Crane, Inc. v. Puller*, 169 Md. App. 1, 52 (2006). “[I]t is for the trial judge to determine whether a verdict ‘shocked his conscience,’ [or] was ‘grossly excessive[.]’” *Brooks*, 220 Md. App. at 474.

¹ Brinker framed its two questions as follows:

1. Did the trial court abuse its discretion in denying defendant’s post-judgment motion for a remittitur?
2. Did the trial court abuse its discretion in denying the defendant’s alternative post-judgment motion for a new trial?

Brinker advances three main arguments in its appeal. *First*, Brinker contends that the trial court abused its discretion in denying the post-judgment motion because it failed to consider Brinker’s claim of an excessive verdict on its merits. Brinker maintains that had the court entertained its excessive verdict argument on its merits, it would have considered that: (1) the award was 37.6 times the amount of Ms. Smith’s economic damages; (2) the award exceeded the amount that Ms. Smith’s counsel requested in closing argument; and (3) the award exceeded other jury verdicts for similar injuries. According to Brinker, the failure to consider the motion on its merits warrants a reversal.

Second, Brinker contends that Ms. Smith’s counsel made improper, inflammatory, and/or prejudicial comments which “contributed to the excessiveness of the jury’s verdict.” Brinker maintains that Ms. Smith’s counsel made a “send a message” appeal to the jury even though punitive damages had not been requested, and improperly invited the jury to make “moral or social judgments through its verdict rather than simply resolving the factual disputes in the narrow context of [this] case.” Brinker also argues that Ms. Smith’s counsel made an improper “golden rule” argument by asking the jurors to abandon their objectivity and place themselves in her position. In addition, Brinker argues that Ms. Smith’s counsel asked the jury to determine the value of the case based on what a reasonable person would pay to avoid the pain and suffering she experienced, thereby improperly inviting the jury to disregard the correct standard for a damages award—the amount that would adequately compensate Ms. Smith for the damages she suffered. And finally, Brinker contends that during the rebuttal portion of its closing argument, Ms. Smith’s counsel denigrated Brinker’s closing argument as “fake news,” which Brinker views as inflammatory.

Third, Brinker contends that the trial court erroneously excluded from evidence Ms. Smith’s medical bills and improperly admitted into evidence pictures of the rogue screw.

We will address each of these arguments in turn.

I.

**THE TRIAL COURT’S
CONSIDERATION OF THE POST-TRIAL MOTION**

Brinker’s assertion that the trial court failed to consider its motion on its merits is without merit. Trial courts are presumed to know the law, *Cobrand v. Adventist Healthcare, Inc.*, 149 Md. App. 431, 445 (2003) (quoting *Lapides v. Lapides*, 50 Md. App. 248, 252 (1981)), and are not required to state their reasons when ruling on a motion seeking to interfere with a jury verdict. *Abrishamian v. Barbely*, 188 Md. App. 334, 350-51 (2009) (quoting *Fraidin v. Weitzman*, 93 Md. App. 168, 210 (1992)). Here, the trial court specifically stated in its order that its ruling was based “[u]pon consideration of [Brinker’s post-trial motion], and all responses thereto[.]” The court also stated that no hearing was necessary because “the materials submitted by the parties are sufficient for a ruling[.]” Both statements indicate that the court reviewed Brinker’s motion on the merits, and Brinker provides no reason not to take the court at its word.

A trial court’s discretion is at its broadest when its decision rests on its “particular knowledge and expertise” from having observed the trial. *Yiallourous v. Tolson*, 203 Md. App. 562, 574 (2012) (citing *Buck v. Cam’s Broadloom Rugs*, 328 Md. 51, 58-59 (1992)). Moreover, trial courts are familiar with the range of values that juries assign to personal injury claims of all kinds, particularly those associated with minimal economic damages.

Trial courts have seen and/or are aware of verdicts that have been surprisingly low and surprisingly high. Trial courts are better situated than we are to distinguish awards that are outliers from those that shock the conscience.

Here, the trial court sat through a three-day trial in which it was able to observe the testimony and demeanor of the witnesses, the tactics and performances of the parties' trial counsel, and the impact the evidence had on the jury. The trial transcripts show that the trial court was engaged and attentive for the duration of the trial. Further, the post-trial motion was thoroughly briefed by both parties. Thus, we have no difficulty fully crediting the trial court's assertion that it considered Brinker's motion on its merits.

The Court of Appeals' decision in *Banegura v. Taylor*, 312 Md. 609 (1988), on which Brinker relies in support of its argument, does not require otherwise. Brinker is correct that in *Banegura*, the Court did state that a trial court is required to consider a claim of excessive damages "on its own merits" and that a court's failure to do so constitutes an abuse of discretion. 312 Md. at 624-25. But there, for reasons not relevant to this appeal, the trial court expressly declined to consider the motion. *Id.* at 623-24. Faced with the trial court's express acknowledgement that it had not considered the motion, the Court of Appeals was "unable to say from [the] record that the trial judge did exercise his discretion" and remanded the case "to permit consideration" of the defendant's claim of an excessive verdict. *Id.* at 625. In contrast, here, the trial court expressly stated that it had considered Brinker's motion. Thus, *Banegura* is distinguishable from this case on the facts.

Brinker also contends that the court's decision was in error because it did not consider the factors set forth in *Hebron Volunteer Fire Dep't, Inc. v. Whitelock*, 166 Md.

App. 619, 643 (2006), when it reviewed Brinker’s motion. Brinker’s reliance on *Hebron* is misplaced.

In *Hebron*, the jury awarded the plaintiff \$15,000 for medical expenses and \$525,000 in non-economic damages. *Id.* at 627. The trial court remitted the non-economic damages award to \$300,000.00. *Id.* On appeal, the defendant contended that the trial court’s reduction of the award was insufficient. *Id.* at 630. In the context of discussing how a trial court should determine the *amount* of the remittitur once it determined that the verdict was excessive, we listed the following factors for the trial court to consider: “(1) the extent and duration of the injuries sustained; (2) their effect on the overall physical and mental health and well-being of the plaintiff; and (3) the physical pain and mental anguish suffered in the past and which may reasonably be experienced in the future[,]” in its review of the motion. *Id.* at 643. We did not state or imply that a trial court should consider those factors in determining *whether* the verdict was excessive. *See id.* at 642-43. Here, because the trial court rejected Brinker’s request for a remittitur; the *Hebron* factors never came into play.

Because we have no reason to question the trial court’s assertion that it considered Brinker’s post-trial motion, we are satisfied that if Brinker argued a point, the trial court considered it. For example, Brinker argues that the trial court should have considered that the award was 37.6 times greater than the amount of Ms. Smith’s medical bills. But Brinker made this argument in its post-trial motion; that the court wasn’t persuaded doesn’t mean that it didn’t consider the point.

Conversely, we do not presume or expect that the trial court considered points that Brinker did *not* make in its motion. Under Rule 2-311(c), “[a] written motion and a response to a motion shall state with particularity the grounds and the authorities in support of each ground.” Further, under Rule 2-533(b), a party moving for a new trial is required to set forth “[a]ll grounds advanced in support of the motion” and “no other grounds shall thereafter be assigned without leave of court.” Two of Brinker’s appellate arguments fall in the category of arguments that were never made.

First, Brinker contends on appeal that the trial court should have considered that the non-economic damages award exceeded the amount requested by Ms. Smith’s counsel during closing argument. In addition to not advancing that point in its post-trial motion, it is simply incorrect. Ms. Smith’s counsel requested a total of \$550,000 in non-economic damages in closing argument. The jury awarded \$350,000—approximately 64% of the requested amount. Even if Brinker had made this argument in its post-trial motion, we can safely presume the trial court would not have been persuaded.

Second, Brinker argues for the first time on appeal that the trial court should have considered two jury verdicts from cases in other courts. One was a verdict rendered by a jury sitting in the Circuit Court for Montgomery County in an injury case *twenty* years ago. The other was a jury verdict from the Circuit Court for Fairfax County, Virginia, *seventeen* years ago. If Brinker thought that the trial court should have considered these two other jury verdicts, it should have brought them to the trial court’s attention. Nevertheless, these two cases are too remote in time and place to have provided much, if any, value to the trial court, and certainly do not provide enough value to displace the trial court’s own

knowledge of and experience with temporally and geographically relevant cases. *See Owens Corning v. Bauman*, 125 Md. App. 454, 524 (1999), *abrogated on other grounds by John Crane, Inc. v. Scribner*, 369 Md. 369 (2002) (“[W]hile comparison to other similar cases is helpful, a review of the specific evidence presented to the jury, rather than a mathematical analysis, more appropriately enables us to determine whether the award was shocking.”).

In sum, we are satisfied from our review of the record in this case that the trial court considered Brinker’s motion on its merits.

II.

IMPROPER/INFLAMMATORY TRIAL TACTICS

Brinker argues that Ms. Smith’s counsel “made several statements [in his opening statement and in closing argument] which were improper as a matter of law and which undoubtedly contributed to the excessiveness of the jury’s verdict.” According to Brinker, “[t]he inflammatory and prejudicial tenor of these arguments was raised in [its] post-judgment motion and should have been considered by the trial court in its ruling” on the motion. Brinker cites four examples: (1) remarks made in opening statement and closing argument imploring the jury to “send a message”; (2) remarks made in closing argument invoking the “golden rule”; (3) framing the damages issue during closing argument as “what a reasonable person would pay”; and (4) in the rebuttal part of closing argument, disparaging Brinker’s counsel’s closing argument as “fake news.” Brinker failed to preserve these issues for an appeal.

Objections to statements made during opening statements and closing arguments must be asserted when the offending statements are made. *See Warren v. State*, 205 Md. App. 93, 132-33 (2012) (citing Md. Rule 8-131(a)). Brinker’s failure to promptly object to these allegedly improper statements by Ms. Smith’s counsel did not preclude the trial court from considering these points when deciding Brinker’s post-trial motion, although the trial court was free to take that into account in deciding the motion. *See Buck*, 328 Md. at 61-62. However, because the trial court denied Brinker’s post-trial motion, Brinker’s failure to lodge timely objections at trial precludes our consideration of such issues on appeal.² *Id.* at 61.

III.

EVIDENTIARY RULINGS

Brinker contends that the trial court made two evidentiary rulings that contributed to the excessiveness of the verdict: (1) the exclusion of Ms. Smith’s medical bills; and (2) the admission of two pictures of the screw found in Ms. Smith’s food. We address both rulings in turn.

Ms. Smith moved in limine to exclude from evidence her medical bills, contending that they were rendered irrelevant when she withdrew her claim for economic damages. Brinker did not oppose the motion and instead responded in a written filing that included the following statements:

² In any event, only one of the four offending remarks was addressed in Brinker’s post-trial motion: the “send a message” argument. As to the other three, Brinker failed to lodge an objection at trial *and* neglected to raise the issue in its post-trial motion.

3. Defendant does not oppose the motion per se, unless Plaintiff opens the door for such evidence at trial.

4. However, it is believed that Plaintiff is trying this case at trial on non-economic damages only as an apparent attempt to appeal to jurors' fears and prejudices (by letting a jury imagine a larger medical bill, and larger dental injury, which does not exist), so that their decisions will be driven by their instincts and emotions.

5. With that being said, the defense has concerns that Plaintiff, or her counsel, may use improper prejudicial tactics at trial that could mislead a jury to believe Plaintiff's dental injuries are far greater than what they truly are. As such, Defendant asks for the Court to issue a warning to Plaintiff and her counsel to refrain from such tactics at trial.

Before the start of the jury selection process, the court granted the motion but noted that Brinker would be permitted to introduce the medical bills if Ms. Smith opened the door to the issue of medical expenses. After the jury was selected but before opening statements, Ms. Smith's counsel advised the court that he intended to elicit testimony from Ms. Smith that she could not afford a particular medical procedure, and wanted to make sure that, in doing so, he would not be opening the door to the admission of the medical bills. The trial court responded that such testimony would likely open the door but added that "I will make that decision when we get to it."

As anticipated, Ms. Smith testified during her direct examination (without objection) that she had to delay a dental treatment because she couldn't afford it at the time. Under cross-examination, Brinker explored the issue by eliciting, over Ms. Smith's counsel's objection, testimony that the treatment that she couldn't afford would have cost approximately \$3,500. At no time did Brinker contend that Ms. Smith opened the door or seek the admission of the medical bills. As noted above, Brinker's failure to timely object

at trial did not preclude the trial court from considering this issue when Brinker raised it in its post-trial motion, but because the trial court denied the post-trial motion, it does preclude Brinker from raising this issue on appeal. *See Buck*, 328 Md. at 61.

Similarly, Brinker is precluded from arguing that the admission of pictures of the metal screw was an error that contributed to the excessiveness of the verdict. Brinker objected to their admission at trial, contending that the pictures were irrelevant and inflammatory. The trial court overruled the objection, finding instead that the pictures were relevant and not inflammatory. Brinker failed to raise any issue related to the pictures in its post-trial motion. Again, we will not find an abuse of discretion for failing to consider arguments that Brinker did not see fit to make.

Nevertheless, even if Brinker had argued in its post-trial motion that the admission of the pictures of the screws was both irrelevant and inflammatory, the court would not have abused its discretion by rejecting that argument. We do not second guess a trial court's admission of evidence when an objection under Rule 5-403 is made unless there is a clear showing of abuse of discretion. *See Malik v. State*, 152 Md. App. 305, 324 (2003).

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Md. Rule 5-401. The central issues at trial were the nature and extent of Ms. Smith's injuries and the pain and suffering she incurred. Screws come in a variety of sizes and types. Assessing Ms. Smith's claim of pain and suffering would likely have been facilitated by a visual depiction of the screw at issue. Thus, the

picture of the screw was plainly relevant under Rule 5-401, and the trial court did not abuse its discretion in so finding.

Brinker’s assertion that the pictures were inflammatory is no more persuasive. Under Rule 5-403, the “evidence may be excluded if its probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” (Emphasis added). As noted above, the trial court found that the pictures were not inflammatory, and having reviewed the pictures, we cannot say that this finding constituted an abuse of its discretion. The trial court’s permissible findings that the pictures were both relevant and not inflammatory took Rule 5-403 off the table as a basis to exclude the pictures.

CONCLUSION

As an error correcting court, we always welcome a trial court’s reasoning for granting or denying a motion for remittitur or for a new trial. And we may yet see a case in which a trial court’s statement that it had considered the motion, standing alone, would not indicate a proper exercise of its discretion. This is no such case. Our review of the entire record, Brinker’s post-trial motion and Ms. Smith’s opposition convinces us that the trial court’s denial of Brinker’s motion was well within its considerable discretion.

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