UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2083

September Term, 2014

ROBERT W. MALLETTE, III

v.

CARLOS MOORER

Eyler, Deborah S.,
Arthur,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: April 13, 2016

Robert W. Mallette III sued a Baltimore City police officer for malicious prosecution. The jury awarded him $170,000 in damages – $70,000 more than he had requested in his complaint and asked the jury to award. The circuit court denied Mallette's post-judgment motion to amend the *ad damnum* clause to conform to the verdict and ordered a new trial on damages unless Mallette agreed to remittitur in the amount of $30,000. Mallette refused, and a second jury awarded him nothing. He appealed.

QUESTIONS PRESENTED

Mallette presents four questions, which we have rephrased for clarity and concision:

1. Did the circuit court abuse its discretion in granting the remittitur?

2. Did the circuit court abuse its discretion when it denied his post-judgment motion to amend the *ad damnum* clause of his complaint?

3. Did the circuit court err or abuse its discretion when, in the second trial, it allowed the defense to impeach Mallette with the results of a blood-alcohol test that would have been inadmissible as substantive evidence under Md. Code (1974, 2013 Repl. Vol.), § 10-303(a)(2) of the Courts and Judicial Proceedings Article ("CJP"), because it was taken more than two hours after his arrest?

4. Did the circuit court abuse its discretion in declining to instruct the jury, in the second trial, about the statutory presumptions regarding intoxication under CJP § 10-307?[1]

[1] Mallette phrased the questions as follows:

1. Did the Trial Court abuse its discretion when it granted Appellee's Motion for Remittitur, having determined that the highest figure a reasonable jury would award based on the evidence for noneconomic damages is $30,000.00, having applied MPJI-Cv. 10:2 (Compensatory Damages for Bodily Injury) (continued…)

For the reasons that follow, we hold that the circuit court did not abuse its discretion in ordering the remittitur or in ordering the new trial on damages when Mallette refused to accept the remittitur. Because we hold that the court did not abuse its discretion in ordering a new trial, we need not consider whether the court abused its discretion in declining to permit Mallette to amend his complaint to bring his *ad damnum* clause into conformance with the first jury verdict. Finally, we hold that in the second trial the court did not abuse its discretion in allowing the defense to impeach Mallette with the blood-alcohol test results or in declining to instruct the jury about the statutory presumptions pertaining to blood-alcohol tests.

to its consideration of damages?

2. Did the Trial Court abuse its discretion when it denied Appellant's Motion for Leave of Court to Amend Complaint as to *Ad Damnum* Clause Only to Comport with Jury Verdict when [the] jury returned a verdict in excess of the *Ad Damnum* Clause by $71,559.00?

3. Did the Trial Court err as a matter of law when it admitted evidence related to the result of a test for alcohol concentration for impeachment purposes despite the fact [*sic*] that the test was not completed within two hours of apprehension of the Appellant by Appellee?

4. Did the Trial Court abuse its discretion when it failed to instruct the jury as to the inapplicability of the presumptions set forth in [CJP] §10-307 associated with the results of a chemical test for alcohol, where the Trial Court has already deemed the results of the test admissible for impeachment purposes?

FACTUAL AND PROCEDURAL BACKGROUND

A. Mallette's Arrest

On July 4, 2011, Mallette was driving home when he saw a group of Baltimore City police officers beating an unarmed citizen. Mallette decided to pull over and record the incident with his iPhone. While Mallette was still in his car, two officers who were not directly involved in the beating blocked his view. One of those officers was Officer Carlos Moorer, the sole defendant and appellee. The other officer was not named at trial.

Mallette claimed that when he inquired about what was happening to the man who was being beaten, the second officer pulled him from his car. Mallette then claimed that he was handcuffed and that Officer Moorer "thrust a pen at [his] eyes."

Mallette agreed that he had alcohol in his car, but insisted that the containers were unopened. Mallette denied and continues to deny consuming any alcohol that day.

Officer Moorer claimed that he was alerted to Mallette's presence because cars were honking their horns. He said that Mallette smelled of alcohol, had an open container of 99 Bananas[2] in his cupholder, had slurred speech, admitted to having had "a few drinks," and was blocking traffic. The officer testified that he had Mallette finish parking and then requested that he leave the vehicle. Before handcuffing Mallette, Officer Moorer said that he performed the horizontal gaze nystagmus test, in which a pen is placed before a person's eyes and moved from side to side to detect signs of

[2] "99 Bananas" is a 99 proof (49.5% alcohol by volume) alcoholic beverage, which is a variety of banana schnapps.

inebriation. *See generally State v. Blackwell*, 408 Md. 677, 686-88 (2009). The officer said that he did not perform other roadside sobriety tests, such as the "one leg stand" and the "walk and turn" tests, because he was afraid that Mallette might injure himself during them.

The officers searched Mallette's vehicle. Mallette claimed that the officers took $100.00 in cash and his driver's license.

While the officers conducted the search, Mallette was handcuffed and made to sit on a curb, where he was surrounded by armed policemen. He claimed that he was in fear of his life, having watched the officers beat the other man.

After about 45 minutes, a van arrived to transport Mallette to the police station. More than an hour later, while he was at the station, Mallette took a blood-alcohol concentration test. Although the test was taken more than two hours after the officers initially detained him, it measured .16 grams of alcohol per 210 liters of breath, the equivalent of a .16 blood-alcohol concentration. Mallette consented to and participated in the test, and nothing indicates that he caused any of the delay in administering the test. Officer Moorer was not involved in the test.

The police charged Mallette with several offenses, including driving under the influence of alcohol, and released him soon after the test.

B. Mallette's Acquittal

At his criminal trial, about six months after his arrest, Mallette successfully moved to exclude the test, because it was not taken within two hours after he was apprehended.

See CJP § 10-303(a) (requiring a specimen of blood for the purpose of a test for determining alcohol concentration to be "taken within 2 hours after the person accused is apprehended"); *id.* § 10-303(a) (conditioning use of statutory inferences of intoxication on analysis being performed "as provided in this subtitle"). The exclusion of the test resulted in a judgment of acquittal.

C. The First Malicious Prosecution Trial

After his acquittal, Mallette sued Officer Moorer for malicious prosecution. Mallette claimed a small amount of economic damages for the items that were allegedly taken from his car and the costs associated with the criminal proceedings. Mallette also claimed $100,000.00 in noneconomic and $500,000.00 in punitive damages against Officer Moorer. During his testimony, he broke down in tears on several occasions.

In cross-examination, Officer Moorer's attorney used the blood-alcohol test results to refresh Mallette's recollection about the test and the results. Although the court initially prohibited the introduction of a document reflecting the test results, it later admitted the document during the testimony of the technician who administered the test. Nonetheless, at the end of the trial, the court instructed the jury that because the police had not administered the test within two hours after Mallette was apprehended, it did not comply with Maryland law, it had been excluded from the criminal trial, and it could not in itself serve as a basis to conclude that Mallette was driving while under the influence of alcohol at the time when he was arrested.

The court dismissed Mallette's claim for punitive damages, but allowed the jury to determine the other claims. The jury found that Officer Moorer was liable for about $1,000.00 in economic damages and $170,000.00 in noneconomic damages.

Officer Moorer moved for judgment notwithstanding the verdict, for a new trial, and for remittitur. The court granted the remittitur, ordering a new trial on damages unless Mallette accepted $30,000.00 in noneconomic damages. Mallette rejected the offer and elected to go to trial purely on the noneconomic damages claim.

D. The Second Malicious Prosecution Trial

At his second trial, on the issue of damages alone, the court allowed Officer Moorer's attorney to use the results of the blood-alcohol test to refresh Mallette's recollection that he had taken the test and to establish that the test result was "over zero." Although Mallette insisted that he had "had nothing to drink" on the day of the arrest, the court did not permit Officer Moorer to introduce the document reflecting the test result or to establish that the test reported a blood-alcohol level of .16. Not having admitted the actual test result, the court declined to instruct the jury that the test result could not serve as a basis to conclude that Mallette was driving while under the influence of alcohol at the time when he was arrested.

Mallette did not break down on the stand during the second trial, but he did interrupt, answer questions that he wasn't asked, and get into verbal sparring matches with the court, opposing counsel, and even his own counsel. The jury returned a verdict for zero dollars in noneconomic damages.

Mallette filed this timely appeal, challenging elements of both trials. The first jury's determination that Officer Mallette was liable for malicious prosecution is unchallenged in this appeal.

DISCUSSION

A. Remittitur

Mallette contends that by failing to account for his emotional injuries, the circuit court abused its discretion in granting the remittitur, setting the remittitur amount, and ordering a new trial if he refused to accept it. Officer Moorer responds that the first jury's award of noneconomic damages, at almost 170 times the economic damages awarded, was clearly excessive. We conclude that the trial court did not abuse its "broad discretion" (*Hebron Vol. Fire Dep't, Inc. v. Whitelock*, 166 Md. App. 619, 628 (2006)) either in setting the remittitur or ordering a new trial.

"'The trial practice of granting a new trial sought by the defendant, unless the plaintiff remit a portion of the verdict which the trial court deems excessive, is well established in Maryland.'" *Hebron*, 166 Md. App. at 628 (quoting *Turner v. Washington Sub. San. Comm'n*, 221 Md. 494, 501-02 (1960)). "The standard to be applied by a trial judge in determining whether a new trial should be granted on the ground of excessiveness of the verdict has been variously stated as whether the verdict is 'grossly excessive,' or 'shocks the conscience of the court,' or is 'inordinate' or 'outrageously excessive,' or even simply 'excessive.'" *Id.* (quoting *Banegura v. Taylor*, 312 Md. 609, 624 (1988)). "We will not disturb a trial judge's remittitur decision except in cases of an

abuse of discretion.'" *Id.* (quoting *Owens-Illinois, Inc. v. Hunter*, 162 Md. App. 385, 415 (2005)). An abuse of discretion occurs when the court's decision is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Id.* at 644 (internal quotation marks omitted).

In determining the appropriate amount of a jury verdict, the circuit court does not employ any "precise formula, nor a detailed checklist of considerations." *Id.* at 642. "Rather, the trial court, in making its determination, must make a fair and reasonable assessment of the evidence it has seen and heard during the trial and determine the highest amount that a reasonable jury would award to fairly compensate a plaintiff for his or her loss based on that evidence." *Id.* at 642-43. The court "necessarily brings to its analysis . . . 'its own common knowledge, as well as its experience with other injury verdicts.'" *Id.* at 643 (quoting *Fertile v. St. Michael's Med. Ctr.*, 169 N.J. 481, 501 (2001)). Nonetheless, for purposes of appellate review for abuse of discretion, "'[i]t is not necessary that the trial court's view of the verdict be the *only* rational view.'" *Id.* at 643-44 (quoting *Baltimore Harbor Charters, Ltd. v. Ayd*, 134 Md. App. 188, 201 (2000), *aff'd in part, vacated in part*, 365 Md. 366 (2001)) (emphasis in both *Ayd* and *Hebron*).

Mallette complains that, in calculating the amount of an appropriate verdict, the experienced trial judge referred to Maryland Civil Pattern Jury Instruction ("MPJI-Cv") 10:2, which concerns "Compensatory Damages for Bodily Injury," rather than MPJI-Cv 10:7, which concerns "Compensatory Damages for Tort Without Bodily Harm." He argues that MPJI-Cv 10:7 applied to his claim for noneconomic damages for malicious

prosecution. On that basis, he concludes that in relying on MPJI-Cv 10:2 the court failed to consider the appropriate factors. We disagree.

"'[T]rial judges are presumed to know the law and to apply it properly.'" *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 426 (2007) (quoting *State v. Chaney,* 375 Md. 168, 179 (2003)). Nothing in the court's order or other conduct suggests that it failed to consider the relevant factors when determining whether the jury's verdict was excessive. To the contrary, in addition to MPJI-Cv 10:2, the trial court explicitly wrote that it had "focused on . . . the mental anguish Plaintiff testified to enduring on July 4th and while awaiting trial." The court's reference to "mental anguish" encompasses the dignitary injustices contemplated by MPJI-Cv 10:7: "mental pain and suffering, fright, nervousness, indignity, humiliation, embarrassment, and insult to which plaintiff was subjected."

The court's brief reference to MPJI-Cv 10:2 instead of MPJI-Cv 10:7 does not evidence any failure to consider the relevant measure of damage. Had the court considered only the damages springing from bodily injuries, it would have found that *no* noneconomic damage award was justified, as all parties agree that Mallette suffered no bodily injury. In short, despite its reference to the instruction for bodily injuries, the court clearly considered Mallette's "expenses, mental pain and suffering, fright, nervousness, indignity, humiliation, embarrassment, and insult." We find no error here.

Mallette next contends that the trial court improperly weighed or failed to consider his testimony when determining that the verdict was excessive. He argues that because

the judge was unable to look him in the face, she could not properly consider his emotional state and could not put the correct dollar value on his dignitary injuries. Mallette states that dignity is "a sense of self and self-worth," and injuries to it are "not visible in X-rays or scans, but . . . gleaned from looking a person in the eye[] and experiencing that person's broken spirit."

We find no support for Mallette's assertion that a judge must look a witness in the eye or else be incompetent to evaluate a verdict for emotional damages. Mallette effectively contends that we must tell the trial court how to weigh his emotional state during trial, and we disagree. "Because the exercise of discretion under these circumstances depends so heavily upon the unique opportunity the trial judge has to closely observe the entire trial, complete with nuances, inflections, and impressions never to be gained from a cold record, it is a discretion that will rarely, if ever, be disturbed on appeal." *Buck v. Cam's Broadloom Rugs, Inc.*, 328 Md. 51, 59 (1992). The trial court observed Mallette's testimony. We did not. We are in no position to second-guess the circuit court or to re-try the case on appeal.

Finally, in upholding the trial court's determination that $170,000.00 was an excessive amount, it is noteworthy that even Mallette admits to being "shocked" by the verdict. The jury's verdict was much greater than any amount Mallette contemplated, requested, or argued for. It has long been "in entire conformity with the law, practice and decisions of the State" that a court may require a plaintiff "remit so much of the verdict as was in excess of the damages laid in the declaration." *Whitelock*, 166 Md. App. at 639

(quoting *Attrill v. Patterson,* 58 Md. 226, 260 (1882)). The same reasoning applies when a jury awards substantially more in damages than a party specifically demanded.

Mallette's closing argument set forth an optimistic formula by which the jury could award $100,000.00 in noneconomic damages. Even Mallette did not anticipate that a jury's verdict would breach six figures and keep going. From the way in which the jury defied Mallette's own expectations, the trial court could reasonably infer that the verdict was excessive. The trial judge did not abuse her discretion offering the plaintiff a remittitur.

B. Denial of Motion to Amend

Under Md. Rule 2-305, "a demand for a money judgment that exceeds $75,000 *shall not specify the amount sought*, but shall include a general statement that the amount sought exceeds $75,000." (Emphasis added.) Notwithstanding the rule, however, Mallette demanded $100,000.00 in his complaint. Consequently, when the jury awarded him significantly more than he had specifically demanded, he attempted to amend his complaint to bring the demand into conformity with the verdict.

Mallette contends that the court abused its discretion in prohibiting him from amending his claim for damages. We disagree, because the immediate need for an amendment became moot when the trial court ordered a new trial on damages unless Mallette accepted a remittitur in the amount of $30,000.00. Once Mallette rejected the remittitur, he was free to amend his complaint, without leave of court, as long as he acted more than 30 days before the new trial date. Md. Rule 2-341(a).

C. Use of Blood-Alcohol Test for Impeachment

CJP § 10-307 sets out a list of inferences that a factfinder may draw from the results of tests of "the amount of alcohol in the person's breath or blood." *Id.* § 10-307(a)(1). Most notably for purposes of this case, section 10-307(e) stipulates that if a person's blood-alcohol concentration is .08 grams of alcohol per 210 liters of breath, the person is considered to be under the influence of alcohol per se. Mallette's blood-alcohol level was .16, or twice the level at which he would be considered under the influence of alcohol per se.

Under section 10-303(a)(2), however, "the specimen of breath or blood shall be taken within 2 hours after the person accused is apprehended," *i.e.*, within two hours after "a police officer has reasonable grounds to believe that the person is or has been driving a motor vehicle while intoxicated or while under the influence of alcohol and the police officer reasonably acts upon that information by stopping or detaining the person." *Willis v. State*, 302 Md. 363, 376 (1985). The Baltimore City police did not sample Mallette's blood-alcohol concentration until more than two hours after Officer Moorer apprehended him.

"Section 10-303, enacted to facilitate the successful prosecution of drunken drivers, . . . imposes the two-hour time limit to prevent the defense from securing an exculpatory bonus from a favorable test result to which it would not be logically and scientifically entitled." *Brice v. State*, 71 Md. App. 563, 581-82 (1987) (citation omitted). "[T]he percentage of alcohol in the blood begins to diminish shortly after

drinking stops, as the body functions to eliminate it from the system." *Schmerber v. California*, 384 U.S. 757, 770 (1966); *see also Missouri v. McNeely*, 133 S. Ct. 1552, 1560 (2013) ("as a result of the human body's natural metabolic processes, the alcohol level in a person's blood begins to dissipate once the alcohol is fully absorbed and continues to decline until the alcohol is eliminated") (citations omitted). Consequently, the "delay in the administration of [the] blood test work[ed] only to [Mallette's] advantage," *Brice*, 71 Md. App. at 581, and Mallette "has in no way been prejudiced by the fact that the sample here was withdrawn more than two hours after the incident in question." *State v. Moon*, 291 Md. 463, 474 (1981). Had the police administered the test within two hours of when Office Moorer apprehended Mallette, his blood-alcohol concentration presumably would have been even higher than the quite high .16 that he registered more than two hours after his apprehension. *See Moon*, 291 Md. at 475 ("a report as to the alcohol content of Moon's blood at a time more than two hours after the incident would not be less favorable to Moon than a report as to the alcohol content at a time within the two hour period").

Nonetheless, "the statutory inferences of intoxication . . . are not available" if the police fail to administer the test within two hours of the suspect's apprehension or fail to comply with other statutory requisites. *See Briscoe v. State*, 60 Md. App. 42, 45 & n.1 (1984) (internal citation omitted); *see also Langway v. State*, 94 Md. App. 407, 411 (1993). Thus, although the court could admit the test itself as a business record (*Langway*, 94 Md. App. at 412) and could have permitted an expert to explain the results

to the jury (*see Moon*, 291 Md. at 420), in neither trial was Officer Moorer able to rely on the statutory inferences in section 10-307 to prove that Mallette was intoxicated when the officer apprehended him.[3]

Mallette complains that at the second trial, which is the only trial of any consequence for this part of the appeal, the court permitted Officer Moorer to use the test result to impeach him. We review the decision to allow impeachment for abuse of discretion. *See Titan Custom Cabinet, Inc. v. Advance Contracting Inc*., 178 Md. App. 209, 218 (2008).

We detect no abuse of discretion. The court did not admit the test results as substantive evidence that Mallette was intoxicated at the time of his arrest. The court neither accepted the results into evidence nor permitted Officer Moorer to disclose Mallette's actual blood-alcohol concentration. Rather, after Mallette testified that he had "had nothing to drink" on the day of his arrest, the court permitted Officer Moorer to draw Mallette's veracity into question by establishing that he had taken a blood-alcohol test that day and that the test result was "over zero." Mallette cites no authority for the proposition that a court abuses its discretion by permitting a party to impeach an

[3] Citing *Fouche v. Masters*, 47 Md. App. 11, 21 (1980), Mallette argues that the statutory inferences apply only in criminal cases. To the contrary, since 2001, the inferences have applied "[i]n any criminal, juvenile, or civil proceeding in which a person is alleged to have committed an act that would constitute a violation of" any one of a variety of statutes concerning the operation of a motor vehicle or a boat while under the influence of alcohol. *See* CJP § 10-307(a)(1); 2001 Md. Laws ch. 4.

adversary's claim of abstinence by establishing that his or her blood-alcohol level was "over zero."

Even if the court abused its discretion, the error, if any, was harmless. We are not at all convinced that the jury was unfairly prejudiced by the testimony that Mallette's blood-alcohol test resulted in a "number over zero." The question about the test result pertained only to Mallette's veracity and had no direct bearing on his noneconomic damages, the only issue in the second trial. The jury was properly instructed that the officer's liability was already a given. Officer Moorer did not even discuss the results in his closing arguments. In short, because the fleeting reference to a breathalyzer test did not prejudice Mallette under these circumstances, we would not reverse the judgment even if we found error (which we do not). *Crane v. Dunn*, 382 Md. 83, 91 (2004) ("[i]t is the policy of this Court not to reverse for harmless error and the burden is on the appellant in all cases to show prejudice as well as error"); *Barksdale v. Wilkowsky*, 419 Md. 649, 660 (2011) (in civil cases, the appellant has the burden "to show that an error caused prejudice").

D. Jury Instruction

At the end of the second trial, Mallette asked the court to instruct the jury that the blood-alcohol test had been "entered into evidence," that the test "did not comply with Maryland [l]aw," and that, "based on the result of the test alone," the jurors could not infer that Mallette was driving while impaired by alcohol, that he was "driving with alcohol in his blood," or that he was "driving under the influence of alcohol per se." In

other words, Mallette asked the court to instruct the jury that the statutory inferences of section 10-307 did not apply.

The court had given a similar instruction at the first trial, where Mallette's intoxication was a potential defense to liability, and where the court had actually admitted the test result into evidence. At the second trial, however, the court declined to give the requested instruction. Mallette contends that the circuit court erred.

"We review the denial of a proposed jury instruction under the highly deferential abuse of discretion standard." *White v. Kennedy Krieger Inst., Inc*., 221 Md. App. 601, 622-23, *cert. denied*, 443 Md. 237 (2015). In determining whether a court abused its discretion in declining to give an instruction, we look to "(1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given." *Stabb v. State*, 423 Md. 454, 465 (2011); *accord Keller v. Serio*, 437 Md. 277, 283 (2014); *White*, 221 Md. App. at 601.

The court did not abuse its discretion, because the instruction was inapplicable under the facts of the case in the second trial. Contrary to the assertion in the first sentence of the proposed instruction, the court had not "entered" the blood-alcohol test "into evidence." Instead, to impeach Mallette's testimony that he had had no alcohol to drink on the day of his arrest, the court simply permitted Officer Moorer to extract a concession that Mallette had taken a blood-alcohol test and that the test result was "over zero." On these facts, the premises for the requested instruction – that the court had

admitted the actual results as substantive evidence and that the officer was invoking the statutory presumptions to prove that he had probable cause to arrest Mallette for driving while drunk – were completely unfounded.

In any event, in the second trial, the jury had no idea that it could use the statutory inference. No jury needs be told not to draw an inference that it doesn't know that it is able to draw. Mallette was not entitled to a jury instruction on an irrelevant issue, not generated by the evidence, which would have only informed the jury that it could not do something that it had no idea it could do in the first place.

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