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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CATHERINE KEREGE, surviving daughter of HARRIET CATHERINE VOLNER, deceased; and Personal Representative of the Estate of HARRIET CATHERINE VOLNER, on her own behalf and on behalf of all statutory beneficiaries, Plaintiffs/Appellees, v. VISCOUNT HOTEL GROUP, L.L.C., dba THE VISCOUNT HOTEL, Defendant/Appellant.	2 CA-CV 2010-0208 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20081176

Honorable Kenneth Lee, Judge

AFFIRMED

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B R A M M E R, Judge.

¶1 Viscount Hotel Group, L.L.C. (Viscount) appeals the judgment entered against it in favor of appellees Catherine Kerege and her siblings on their wrongful death claim, in which they asserted Viscount was liable for the death of their mother, Kitty Volner, following her falling down a stairway at the Viscount Hotel. Viscount argues the trial court erred by: allowing Kerege to present evidence of falls that occurred after Volner fell; preventing Viscount from arguing the absence of prior falls indicated the stairs were not unreasonably dangerous; admitting photographs of Volner in the hospital; and refusing to give Viscount's requested jury instructions. Viscount also argues a new trial is warranted by Kerege's counsel's misconduct during closing argument and the cumulative effect of the alleged errors. We affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the verdict." *Pima Cnty. v. Gonzalez*, 193 Ariz. 18, ¶ 2, 969 P.2d 183, 184 (App. 1998). Volner died as a result of injuries sustained when she fell down a stairway at the Viscount Hotel where she had come to have breakfast. Kerege brought a wrongful death action against Viscount on behalf of herself and her siblings. She alleged Viscount had failed to protect Volner as an invitee from hidden dangers or unreasonably dangerous conditions. She

further alleged Viscount had known of the unreasonably dangerous condition of the stairway where her mother had fallen. Viscount denied the allegations and countered that Volner was at fault for the accident.

¶3 Kerege's expert testified the construction plans approved for the hotel and the hotel floor plan depicted a center handrail at the stairway where Volner fell. A former Viscount employee testified there had been a center handrail at the stairway but that it had been removed and the carpeting had been changed. The expert testified that based on the intended use and width of the stairway the applicable building code required the installation and maintenance of a center handrail, and that removing it made the stairs dangerous. He further testified the carpet, which made the stairs appear "camouflaged," exacerbated the dangerous condition created by the handrail's absence. Viscount's expert agreed the building code required a center handrail and that it was a violation of the building code to have removed it. Kerege also presented testimony that others had fallen down the stairs, both before and after Volner's fall.

¶4 After a four-day trial, the jury returned a verdict in favor of Kerege and her three siblings for $750,000 each, apportioning liability 80 percent against Viscount and 20 percent against Volner. The trial court denied Viscount's motion for a new trial. This appeal followed.

Discussion

Subsequent Accident Evidence

¶5 Viscount argues the trial court abused its discretion by allowing Kerege "to present evidence of subsequent accidents." We review the court's admission of evidence for an abuse of discretion. *John C. Lincoln Hosp. & Health Corp. v. Maricopa Cnty.*, 208 Ariz. 532, ¶ 33, 96 P.3d 530, 541 (App. 2004). In its motion in limine to exclude the evidence, Viscount contended the testimony of witnesses who subsequently had fallen or witnessed falls on the same stairway was inadmissible because it was "irrelevant" and, even if it was relevant, any probative value the evidence had was outweighed by the risk of undue prejudice.

¶6 Relevant evidence is that which has any tendency to make the existence of any material fact "more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. "[E]vidence of similar accidents at or near the same place at a time not too remote from the accident in question is admissible" where the conditions were substantially similar to those resulting in the accident at issue, because the evidence "tends to prove the existence of a dangerous condition."[1] *Burgbacher v. Mellor*, 112 Ariz. 481, 483, 543 P.2d 1110, 1112 (1975). In her response to Viscount's motion, Kerege stated the evidence tended to prove the design, installation, or modifications made the stairway dangerous. Viscount does not suggest the conditions under which the

[1]Of course, as Viscount notes, subsequent accidents would not tend to prove it had notice of the condition prior to the incident, but the record supports that Kerege sought to admit the testimony to show the existence of the dangerous condition rather than notice, and Kerege's theory of recovery—that Viscount had created the condition—did not require her to provide evidence of notice. *See Contreras v. Walgreens Drug Store No. 3837*, 214 Ariz. 137, ¶ 7, 149 P.3d 761, 762 (App. 2006) (plaintiff must prove defendant caused or had notice of the condition).

subsequent falls occurred were different than those at the time Volner fell, and on appeal concedes the evidence "might have been relevant." We agree the evidence was relevant as tending to show a dangerous condition, and the trial court did not err in refusing to exclude it on this basis. *See id.*

¶7 Viscount asserts, however, the trial court should have precluded the evidence as "highly prejudicial." Even relevant 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."[2] Ariz. R. Evid. 403. "The prejudice that Rule 403 speaks to is that which suggests a 'decision on an improper basis, such as emotion, sympathy, or horror.'" *Shotwell v. Donahoe*, 207 Ariz. 287, ¶ 34, 85 P.3d 1045, 1054 (2004), *quoting State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997). In its motion in limine, Viscount did not allege the evidence suggested the jury's decision was based on such an improper basis; it merely argued "[t]he jury would assume that [Viscount] was negligent at the time of the Subject Accident because other accidents have happened at [the] hotel after the Subject Accident." However, the jury is allowed to make reasonable inferences based on the evidence. *See Robertson v. Sixpence Inns of Am.*, 163 Ariz. 539, 543, 789 P.2d 1040, 1044 (1990) ("[I]t is the jury's function to select which of the conflicting inferences or conclusions is the most reasonable."). And, as we already have noted, the jury may draw a proper inference that a dangerous condition

[2]Although Viscount fails to cite Rule 403, Ariz. R. Evid., to support this argument, it cited to the rule in its motion below, and we assume it offers the same argument on appeal.

existed based, at least in part, on similar incidents. *Burgbacher*, 112 Ariz. at 483, 543 P.2d at 1112. Viscount did not identify in its motion any additional danger the evidence would lead the jury to make its determination on a basis such as "emotion, sympathy, or horror." *See Mott*, 187 Ariz. at 545, 931 P.2d at 1055. Therefore, the court did not abuse its discretion in denying Viscount's motion to preclude the evidence under Rule 403.

¶8 Viscount also argues Kerege's counsel made improper closing arguments based on some of this evidence, which created confusion by asking the jury to "punish" Viscount. However, Viscount did not argue in its motion below that the evidence should be excluded due to the danger it would cause confusion of the issues. Nor did it argue the evidence was unduly prejudicial because asking the jury to "punish" Viscount would urge a decision on an improper basis. It therefore has waived these arguments and we do not address them further. *See Englert v. Carondelet Health Network*, 199 Ariz. 21, ¶ 13, 13 P.3d 763, 768 (App. 2000). To the extent Viscount asserts counsel's argument otherwise constituted reversible error, we address the issue below.

Absence of Prior Accidents

¶9 Viscount also contends the trial court abused its discretion by precluding "evidence of the absence of prior accidents." However, Viscount does not cite to any evidence the court precluded but instead refers to the court's preclusion of Viscount's argument at closing that evidence of "lack of pre-accident accidents" indicated the stairs were not unreasonably dangerous. Viscount sought to make this argument based on the

testimony of a staff member who stated that Viscount prepared incident reports when an accident was reported to or witnessed by hotel staff.

¶10 "Courts give counsel 'wide latitude in closing arguments to comment on the evidence and argue all reasonable inferences from it.'" *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 54, 211 P.3d 1272, 1287 (App. 2009), *quoting State v. Moody*, 208 Ariz. 424, ¶ 180, 94 P.3d 1119, 1159 (2004). But counsel is not permitted to make arguments based on facts not in evidence. *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 451, 652 P.2d 507, 524 (1982). Viscount does not cite to any evidence in the record showing the absence of previous accidents. Although Viscount identifies testimony regarding the existence of an incident reporting system, it does not cite any testimony indicating a review of that system was undertaken and resulted in information about accidents prior to Volner's. Viscount notes a former hotel manager testified regarding his awareness of prior accidents but concedes this was not evidence "regarding the number of accident reports" during the time period in which the manager worked there. Because there was no testimony regarding the lack of incident reports before Volner's accident, and because there was evidence previous accidents had occurred, the jury could draw no reasonable inference about the lack of prior accidents from the staff member's testimony about the existence of the incident reporting system. Therefore, the trial court did not abuse its discretion in precluding Viscount's proposed argument at closing.[3] *See Moody*, 208 Ariz.

[3]We note the court based its ruling on a determination that Viscount's reporting system did not meet the standard set forth in *Jones v. Pak-Mor Manufacturing Co.*, 145 Ariz. 121, 700 P.2d 819 (1985), but we will affirm the court's ruling if it is correct for

424, ¶ 180, 94 P.3d at 1159. Viscount also argues the preclusion of its argument was "compounded" by Kerege's counsel's alleged misconduct during closing argument, and we address that argument below.

Photographs of the Deceased

¶11 Viscount alleges the trial court abused its discretion in admitting photographs of Volner after the accident showing her "bruised and swollen eye, shaved and partially bandaged head, and shoulder in a sling." It argues, as it did below, that the prejudicial effect of the photographs outweighed their probative value. The court admitted the photographs, reasoning they were relevant to the survivors' claim for mental anguish and were not precluded under the balancing test of Rule 403, Ariz. R. Evid. "We review evidentiary rulings for an abuse of discretion and generally affirm a trial court's admission or exclusion of evidence absent a clear abuse or legal error and resulting prejudice." *John C. Lincoln Hosp. & Health Corp.*, 208 Ariz. 532, ¶ 33, 96 P.3d at 541.

¶12 Evidence about the manner of the decedent's death is "highly relevant" to the plaintiffs' claim for damages to the extent the manner of death contributed to the plaintiffs' mental anguish, but not to the extent the plaintiffs' mental anguish was caused by knowledge of the decedent's suffering. *Girouard v. Skyline Steel, Inc.*, 215 Ariz. 126, ¶ 17, 158 P.3d 255, 259-60 (App. 2007); *see also* Ariz. R. Evid. 401 (evidence relevant if it has "any tendency to make the existence of any fact that is of consequence to the

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any reason. *See Odom v. Farmers Ins. Co. of Ariz.*, 216 Ariz. 530, ¶ 6, 169 P.3d 120, 122 (App. 2007).

determination of the action more . . . or less probable"). Although Viscount notes the photographs were "horrific" and "gruesome," it does not argue the nature of the photographs created a danger of unfair prejudice under Rule 403. It argues instead that the photographs "invited the jury to compensate Plaintiffs for the decedent's pain and suffering." *See* Ariz. R. Evid. 403 (Relevant 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."). This is a "confusion of the issues" argument under Rule 403. The trial court instructed the jury on the elements of damages, including damages for "pain, grief, sorrow, anguish, stress, shock, and mental suffering" experienced by Kerege and her siblings. None of the instructions given suggested the jury could award damages for Volner's pain and suffering, and we presume the jury followed the instructions it was given. *See Hudgins v. Sw. Airlines, Co.*, 221 Ariz. 472, ¶ 16, 212 P.3d 810, 820 (App. 2009). Therefore, the court did not abuse its discretion by admitting the photographs.

Counsel's Asserted Misconduct

¶13 Viscount contends it should be granted a new trial because it was prejudiced by Kerege's counsel's misconduct during closing argument. Viscount alleges Kerege's counsel made "punitive damage arguments" attacking Viscount's character despite the absence of a punitive damages claim. Viscount did not object to any of counsel's statements during Kerege's closing argument, instead moving for a mistrial on

the basis that Kerege argued punitive damages. The court denied the motion. Viscount raised the issue again in its motion for a new trial, which the court also denied. We review the denial of a motion for a new trial on grounds of misconduct for an abuse of discretion. *Brethauer v. Gen. Motors Corp.*, 221 Ariz. 192, ¶ 3, 211 P.3d 1176, 1178 (App. 2009).

¶14 A trial court should grant a motion for a new trial on the basis of attorney misconduct only in "the most serious cases in order to prevent a miscarriage of justice." *Ritchie*, 221 Ariz. 288, ¶ 52, 211 P.3d at 1287. "The trial judge is in the best position to 'decide whether the misconduct materially affected the rights of the aggrieved party.'" *Id.*, *quoting Leavy v. Parsell*, 188 Ariz. 69, 72, 932 P.2d 1340, 1343 (1997). Misconduct alone does not warrant a new trial, but the trial court should find prejudice when:

> (1) the misconduct is significant, especially if the record establishes knowing, deliberate violations of rules or court orders that a litigant may confidently expect to be observed by his or her adversary; (2) the misconduct is prejudicial in nature because it involves essential and important issues, but the extent is impossible to determine in a close case; and (3) the misconduct is apparently successful in achieving its goals.

Leavy, 188 Ariz. at 73, 932 P.2d at 1344. Where all factors are present, prejudice should be inferred. *Id.*

¶15 Viscount argues the first part of this test was met because the misconduct was "significant, intentional, and went to the essential issue of damages." It points to various statements made by Kerege's counsel that it alleges were punitive damages arguments rather than compensatory damages arguments because they encouraged the

jury to award damages "to punish or deter the hotel." The trial court interpreted the statements differently as relating to liability. The court determined the statements were appropriate "[g]iven the context of the case and positions taken by [Viscount] in terms of maintaining that [the stairway was] still a safe condition."

¶16 In *Cota v. Harley Davidson*, 141 Ariz. 7, 15, 684 P.2d 888, 896 (App. 1984), plaintiffs' counsel argued the jury should "send a message" to defendant such that the injury suffered by the plaintiff would not happen to anyone else. The court determined that in the context of the case, where defendants denied their product was defectively designed, the argument was "entirely proper" and not a punitive damages argument. *Id.* Viscount contends Kerege's counsel's arguments fell outside the scope of *Cota* because they did not merely encourage the jury to send a message but linked the amount of damages to that message. However, the portion of the record cited by Viscount to support this assertion fails to do so, as Kerege's counsel only asked the jury to award "the full measure of damage," and not an additional amount solely to punish or send a message to Viscount. Therefore, the trial court did not abuse its discretion in determining there was no significant misconduct related to the statements Viscount asserts were punitive damages arguments warranting a new trial.

¶17 Viscount also alleges Kerege's counsel violated the "golden rule" by requesting the jurors to award damages as if the jurors were the injured party, and improperly vouched for evidence in violation of ER 3.4(e), Ariz. R. Prof'l Conduct, Ariz.

R. Sup. Ct. 42. Viscount did not object at trial on these grounds, but raised the arguments for the first time in its motion for a new trial.

¶18 Generally, failure to object to improper arguments at closing waives the issue on appeal. *See Monaco v. HealthPartners of S. Ariz.*, 196 Ariz. 299, ¶ 16, 955 P.2d 735, 741 (App. 1999); *see also Ritchie*, 221 Ariz. 288, ¶ 51, 211 P.3d at 1287 (noting counsel did not object at any point during closing argument). "Prompt objection allows the trial court to 'impose restraints upon counsel once it appears that argument is proceeding past legitimate boundaries.'" *Monaco*, 196 Ariz. 299, ¶ 16, 955 P.2d at 741, *quoting Grant*, 133 Ariz. at 453, 652 P.2d at 526. "Waiver does not apply when it appears 'that the improper conduct of counsel actually influenced the verdict.'" *Ritchie*, 221 Ariz. 288, ¶ 51, 211 P.3d at 1287, *quoting Anderson Aviation Sales Co. v. Perez*, 19 Ariz. App. 422, 429, 508 P.2d 87, 94 (1973). The trial court is in the best position to determine whether any misconduct influenced the verdict and we will not disturb the court's ruling unless it has abused its discretion. *Id.*

¶19 Viscount argues the alleged misconduct actually influenced the verdict and thus waiver does not apply. Viscount contends "there can be no doubt" the misconduct affected the verdict because the jury awarded three times the damages suggested by Kerege. It notes the decedent was elderly, had health problems, was not a wage earner, did not support her children financially, and argues that nothing "explains the excessive jury award." Assuming without deciding that Kerege's counsel's statements, allegedly in violation of the golden rule and the prohibition on vouching for evidence, constituted

misconduct, we address whether such misconduct actually influenced the verdict. Although the trial court denied Viscount's motion for a new trial without explanation, that denial "necessarily implies that the court did not find the misconduct of such magnitude that it actually influenced the verdict," and we will not reverse that discretionary finding unless it is clear the court was incorrect. *Monaco*, 196 Ariz. 299, ¶ 18, 955 P.2d at 741.

¶20 We cannot say the trial court abused its discretion in determining any misconduct of counsel did not affect the verdict merely because the jury awarded damages in excess of that recommended by Kerege's counsel. *See Ritchie*, 221 Ariz. 288, ¶¶ 36-38, 211 P.3d at 1284-85 (court will defer to jury's determination on damages even where jury awarded more than suggested by counsel). The jury was not bound by the amount suggested by counsel as the question of damages uniquely is within the jury's province, and that role is of "particular importance where the jury must determine appropriate damages for emotional loss." *White v. Greater Ariz. Bicycling Ass'n*, 216 Ariz. 133, ¶ 15, 163 P.3d 1083, 1088 (App. 2007). And Viscount's counsel emphasized at closing that the question of damages was for the jury to decide. The jury's exercise of its discretion in awarding damages differing from that suggested is not a clear indication that "'the improper conduct of counsel actually influenced the verdict.'" *Ritchie*, 221 Ariz. 288, ¶ 51, 211 P.3d at 1287, *quoting Perez*, 19 Ariz. App. at 429, 508 P.2d at 94. Moreover, there is no basis for us to conclude that the damages awarded were so excessive, unreasonable, or outrageous as to "'shock the conscience'" and warrant

reversal. *See Acuna v. Kroack*, 212 Ariz. 104, ¶ 36, 128 P.3d 221, 231 (App. 2006), *quoting Hutcherson v. City of Phoenix*, 192 Ariz. 51, ¶ 36, 961 P.2d 449, 455 (1998).

Jury Instructions

¶21 Viscount also contends the trial court erred in refusing to give three jury instructions it requested. "A trial court must instruct the jury on all legal theories supported by the evidence," *Golonka v. Gen. Motors Corp.*, 204 Ariz. 575, ¶ 64, 65 P.3d 956, 974 (App. 2003), but "has substantial discretion in determining how to instruct the jury," *Smyser v. City of Peoria*, 215 Ariz. 428, ¶ 33, 160 P.3d 1186, 1197 (App. 2007). We review a court's refusal to give a requested jury instruction for an abuse of discretion and resulting prejudice. *Brethauer*, 221 Ariz. 192, ¶ 24, 211 P.3d at 1182. "'Whether [any] error is prejudicial depends on a review of the instructions as a whole . . . . The test is whether the jury would be misled as to the proper rule of law.'" *Taylor v. DiRico*, 124 Ariz. 513, 517, 606 P.2d 3, 7 (1980), *quoting Coyner Crop Dusters v. Marsh*, 91 Ariz. 371, 376, 372 P.2d 708, 711 (1962); *see also Dawson v. Withycombe*, 216 Ariz. 84, ¶ 63, 163 P.3d 1034, 1055 (App. 2007) (reviewing court will not overturn verdict unless substantial doubt exists whether jury properly guided). Prejudice will not be presumed "'but must affirmatively appear from the record.'" *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 504, 917 P.2d 222, 233 (1996), *quoting Walters v. First Fed. Sav. & Loan Ass'n*, 131 Ariz. 321, 326, 641 P.2d 235, 240 (1982).

¶22 Viscount asked the trial court to instruct the jury that "upon the death of the person injured, damages for pain and suffering of such injured person shall not be

allowed." The court rejected the instruction, reasoning it was not necessary because the concept was covered by the instruction expressly listing the elements of damages the jury could award. Although conceding Kerege never "expressly argue[d] that the survivors were entitled to recover for [Volner]'s pain and suffering," Viscount argues the instruction was necessary to avoid confusion. We disagree. The court is not required to instruct on every refinement suggested by the parties. *State Farm Fire & Cas. Ins. Co. v. Grabowski*, 214 Ariz. 188, ¶ 23, 150 P.3d 275, 282 (App. 2007). In reviewing the instructions as a whole as we must, *see Taylor*, 124 Ariz. at 517, 606 P.2d at 7, failure to instruct the jury on an element for which it could not award damages does not raise substantial doubt as to whether the jury was guided properly when the court explicitly instructed the jury on those elements for which it could award damages, *see Dawson*, 216 Ariz. 84, ¶ 63, 163 P.3d at 1055. Therefore, the court did not abuse its discretion in refusing to give this requested instruction.

¶23 Viscount also asked the trial court to instruct the jury that there is "no liability for injuries from . . . dangers that are obvious." The court instructed the jury that "[i]f a property owner knows of a concealed danger upon the property, the property owner is negligent if a guest is not adequately warned about it." The court refused to give Viscount's requested instruction, reasoning other instructions addressed the concept and further refinements would constitute an inappropriate comment or emphasis from the court. Again, in reviewing the instructions as a whole, *see Taylor*, 124 Ariz. at 517, 606 P.2d at 7, instructing the jury that a property owner can be liable for concealed conditions

sufficiently implies that a property owner cannot be liable for obvious conditions. This especially is true where the jury is instructed, as described in the following paragraph, that the decedent needed to act as a reasonably careful person under the circumstances. Thus because there is no substantial doubt as to whether the jury was guided properly, *see Dawson*, 216 Ariz. 84, ¶ 63, 163 P.3d at 1055, the court did not abuse its discretion in not giving this requested instruction.

¶24 Viscount further asked the trial court to instruct the jury that the duty to exercise ordinary care includes a duty to observe and appreciate dangers and to make reasonable use of one's sight and intelligence to discover dangers. The court again refused, stating this concept was covered by other instructions. The court instructed the jury to consider Viscount's claim that Volner was at fault and defined negligence as "the failure to act as a reasonably careful person would act under the circumstances." The court instructed the jury on the correct standard to apply regarding Volner's potential fault and was not required to give the specific refinements Viscount requested. *See Grabowski*, 214 Ariz. 188, ¶ 23, 150 P.3d at 282. Moreover, the requested instruction was similar to the type of "common experience" instruction rejected in *Porterie v. Peters*, 111 Ariz. 452, 457-58, 532 P.2d 514, 519-20 (1975),[4] because that subject matter is more

[4]That instruction read:

> General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it. When there is evidence to the effect that one did look, but did not see that which was in plain sight, it follows that either there is an irreconcilable conflict in such evidence or the person was negligently inattentive.

appropriate for closing argument than jury instructions. Viscount did in fact emphasize in argument that people are expected to be cautious, anticipate danger, and be attentive to surroundings. And, the jury did find Volner partially at fault for her fall, so there can be no doubt the jury appreciated the very concepts Viscount wanted emphasized by the offered instruction. Therefore, there is no substantial doubt as to whether the jury was guided properly, *see Dawson*, 216 Ariz. 84, ¶ 63, 163 P.3d at 1055, and the court did not abuse its discretion in refusing to give this requested instruction.

Disposition

¶25 For the foregoing reasons, we affirm.[5]

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

[5]Viscount argues the cumulative effect of the alleged errors was to deprive it of a fair trial. Because we find no errors, we need not address this argument.