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IN THE COURT OF APPEALS OF INDIANA

Aberdeen Apartments II LLC,
Appellant-Defendant,

v.

Jessica Miller,
Appellee-Plaintiff.

November 15, 2021

Court of Appeals Case No. 21A-CT-1263

Appeal from the Hendricks Superior Court

The Honorable Robert W. Freese, Judge

Trial Court Cause No. 32D01-1809-CT-143

Najam, Judge.

Statement of the Case

[1] Aberdeen Apartments II LLC ("Aberdeen") appeals the trial court's judgment following a jury trial in favor of Jessica Miller on her complaint alleging negligence. Aberdeen presents three issues for our review:

1. Whether the trial court erred when it denied Aberdeen's summary judgment motion.

2. Whether the trial court abused its discretion when it denied Aberdeen's motion for relief from judgment.

3. Whether the trial court abused its discretion when it denied Aberdeen's motion to correct error alleging excessive damages.

[2] We affirm.

Facts and Procedural History

[3] In January 2018, Miller's boyfriend, John Lambert, lived in an apartment complex in Mooresville that was owned and managed by Aberdeen. At approximately 7:00 a.m. on January 24, 2018, Miller was walking from Lambert's apartment to her car when she slipped and fell on ice on a sidewalk. As a result of the fall, Miller sustained a non-displaced fracture of her right arm, which is her dominant arm. Miller wore her arm in a sling for several weeks, and she underwent physical therapy. Because of her injury, Miller was unable to work until the end of March.

[4] On April 4, Miller filed a complaint against Aberdeen alleging that Aberdeen was negligent and caused her injuries. Aberdeen moved for summary judgment, and the trial court denied that motion. At the conclusion of the ensuing jury trial, during Miller's closing argument, Aberdeen objected to remarks by Miller's counsel. In a side bar conference, the trial court stated that Aberdeen could argue the objection after Miller had concluded her argument. As soon as the court excused the jury to deliberate, Aberdeen moved the court

for a mistrial, citing misconduct by Miller's counsel. The court denied that motion.

[5] The jury found that Aberdeen was 80% at fault for Miller's injuries and that Miller was 20% at fault. The jury awarded total damages of $100,000, reduced by $20,000, for a total award to Miller of $80,000. Aberdeen then filed a motion to correct error and a motion for relief from judgment. The trial court denied both of those motions. This appeal ensued.

Discussion and Decision

Issue One: Summary Judgment

[6] Aberdeen first contends that the trial court erred when it denied its summary judgment motion. As our Supreme Court has stated:

> We review summary judgment de novo, applying the same standard as the trial court: "Drawing all reasonable inferences in favor of . . . the non-moving parties, summary judgment is appropriate 'if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (quoting T.R. 56(C)). "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Id.* (internal citations omitted).
>
> The initial burden is on the summary-judgment movant to "demonstrate [ ] the absence of any genuine issue of fact as to a determinative issue," at which point the burden shifts to the non-movant to "come forward with contrary evidence" showing an

> issue for the trier of fact. *Id.* at 761-62 (internal quotation marks and substitution omitted).

Hughley v. State, 15 N.E.3d 1000, 1003 (Ind. 2014) (alterations original to *Hughley*). "[S]ummary judgment is generally inappropriate in negligence cases because issues of contributory negligence, causation, and reasonable care are more appropriately left for the trier of fact." *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522, 526 (Ind. Ct. App. 2004) (citations omitted), *trans. denied*. Nonetheless, summary judgment is appropriate when the undisputed material evidence negates one element of a negligence claim. *Rhodes v. Wright*, 805 N.E.2d 382, 385 (Ind. 2004).

[7] To prevail on a negligence claim, the plaintiff must demonstrate "(1) duty owed to plaintiff by defendant; (2) breach of duty by allowing conduct to fall below the applicable standard of care; and (3) compensable injury proximately caused by defendant's breach of duty." *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016). The parties here agree that Aberdeen owed a duty of care to Miller, and the sole issue for summary judgment was whether Aberdeen breached that duty. The parties also agree that the scope of the duty Aberdeen owed to Miller is governed by the duty of care that a landowner owes to invitees upon the property. That duty is defined as follows:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Burrell v. Meads, 569 N.E.2d 637, 639-40 (Ind. 1991) (quoting Restatement (Second) of Torts § 343 (1965)). In the context of premises liability, this court has held that constructive knowledge depends on a "condition [which] has existed for such a length of time and under such circumstances that it would have been discovered in time to have prevented injury if the [owner], his agents[,] or employees had used ordinary care." *See Schulz v. Kroger Co.*, 963 N.E.2d 1141, 1144 (Ind. Ct. App. 2012) (citation omitted, alteration original).

[8] On appeal, Aberdeen maintains that it designated evidence on summary judgment to negate the element of breach and that Miller did not designate evidence to establish a genuine issue of material fact whether Aberdeen breached its duty of care. In particular, Aberdeen contends that it did not know, and could not in the exercise of reasonable care have discovered, the icy sidewalk in the apartment complex before Miller fell. Aberdeen designated evidence showing that: a local forecast posted at 6:57 p.m. on January 23 did not predict inclement weather for the overnight; an updated forecast posted at 11:11 p.m. on January 23 warned of "patchy freezing drizzle" and "slick roads" overnight; and neither Aberdeen's property manager, Deanna Settles, nor its

maintenance supervisor, Tom Eply, knew about the updated forecast or the icy conditions until after Miller had fallen. Appellant's App. Vol. 2 at 56. Thus, Aberdeen asserts that it did not know and could not reasonably have known that there was ice on the sidewalk when Miller fell.

[9] In support of its contention, Aberdeen cites *Orth v. Smedley*, 177 Ind. App. 90, 378 N.E.2d 20 (1978). In *Orth*, the plaintiff lived in one of two apartments on the second floor of a two-story building owned by the Smedleys. Orth woke up early one January morning, left her apartment, and was walking towards a friend's car when she noticed that she was slipping on ice that had formed overnight. Orth continued walking towards her friend's car because she "thought [she] could make it." *Id.* at 22. Orth then slipped and fell and broke her arm, and she sued the Smedleys. The trial court entered summary judgment in favor of the Smedleys. On appeal, we held that the Smedleys had neither actual nor constructive notice of the dangerous condition on their premises because the "icy condition developed after midnight; it was not detectable by sight"; and, in any event, the property manager was asleep between midnight and the time that Orth fell. *Id.* at 24. Thus, we affirmed the entry of summary judgment for the Smedleys.

[10] Here, in contrast, there is no evidence that Aberdeen's employees Settles and Eply were asleep either when the 11:11 p.m. updated forecast was issued or when the ice began to form. And, notably, in January 2018, there were phone applications and other means of getting alerts twenty-four hours a day regarding dangerous weather conditions. We cannot say, as a matter of law, that a

landlord of a multi-unit complex has exercised reasonable care for the safety of its tenants and guests if it has not utilized that technology during the winter months. Indeed, Aberdeen did not designate evidence to show what type of monitoring of weather conditions is reasonable under industry standards and whether its reliance on the 6:57 p.m. forecast the night before Miller's fall was sufficient to show reasonable care. *See Henderson v. Reid Hosp. and Healthcare Servs.*, 17 N.E.3d 311, 319 (Ind. Ct. App. 2014), *trans. denied*. This is not a case where the weather changed suddenly and without any warning.

[11] We hold that Aberdeen did not designate evidence to show, as a matter of law, that it did not have constructive notice of the icy conditions that led to Miller's fall and that it could not have prevented her fall with reasonable care. Thus, Aberdeen did not negate the breach element of Miller's negligence claim, and the trial court did not err when it denied Aberdeen's summary judgment motion.

Issue Two: Motion for Relief from Judgment

[12] Aberdeen next contends that the trial court abused its discretion when it denied its motion for relief from judgment under Trial Rule 60(B)(3), which provides that a court may set aside a judgment based on fraud, misrepresentation, or misconduct. A grant of equitable relief under Trial Rule 60 is within the discretion of the trial court. *Outback Steakhouse of Florida, Inc. v. Markley*, 856 N.E.2d 65, 72 (Ind. 2006). Accordingly, we review a trial court's ruling on a Rule 60 motion for an abuse of discretion. *Id.*

[13] "A plaintiff seeking relief for misconduct under Rule 60(B)(3) must (1) show that the defendant engaged in misconduct, (2) show that the misconduct prevented the plaintiff from fully and fairly presenting her case at trial, and (3) make a prima facie showing that she has a meritorious claim." *University of Notre Dame v. Bahney*, 158 N.E.3d 809, 813 (Ind. Ct. App. 2020), *trans. denied*. "Rule 60(B)(3) 'creates a limited exception to the general rule of finality of judgments.'" *Id.* (quoting *Outback Steakhouse*, 856 N.E.2d at 73). "If a party cannot show that the misconduct 'substantially prejudiced the party's presentation of the party's case, a court should not set aside an otherwise final judgment.'" *Id.* (emphasis omitted).

[14] During rebuttal closing argument, Miller's counsel stated as follows:

> [Plaintiff's Counsel]: I am asking you to make it right. It has been one thousand one hundred and sixty-eight days since this fall. Jessica has waited one thousand one hundred and sixty-eight days for Aberdeen to accept any responsibility whatsoever for her pain and suffering for her injuries, for her financial burden. They never have and they never will. Only you the jury have the ability to hold Aberdeen Apartments II, LLC responsible for the damage that was caused to Jessica and make this right. So I am asking you to make it right by awarding Jessica from one hundred and sixteen thousand and eight hundred to two hundred and thirty-three thousand and six hundred dollars and opposing counsel made it very clear that in 28 years he has never heard anyone ask for that kind of money for this kind of injury. One that is not true and two I have only been doing this for 6 years. For 6 years I have been trying cases in front of juries for injured people. Never once have I had a defense attorney admit that their client did anything wrong whatsoever, regardless of the circumstance. I have people that

rear end my clients at a red light who have been stopped there for 2 minutes and refuse to accept responsibility. So am I surprised by their position today? Absolutely not. They want you to protect that land owner. That is why we have these laws to protect these land owners who can't even be bothered to show up for trial. And another thing because John hasn't filed a complaint with Aberdeen Apartments, that means that they are great property managers? We have jobs, we go to work you could have a hundred different things you could hate about your job but if you don't complain about any of those to your boss, does that mean that you think your company is a great employer? No. So the circumstantial jump there that John has never made any complaints somehow makes them fantastic is absurd. Who would have the best opportunity to avoid the fall? That is where he is going. Jessica had the best opportunity to avoid the fall. Who had the best opportunity to prevent the fall? Aberdeen Apartments. Jessica got to work, those sidewalks were salted. She didn't fall. I am not sure what is different about that premises versus Aberdeen. I am asking to make it right by awarding Jessica between one hundred and sixteen thousand and eight hundred and two hundred and thirty-three thousand and six hundred dollars, it is one hundred to two hundred dollars per day for every day that this company has denied responsibility and denied justice to Jessica.

[Defense Counsel]: I am sorry Judge can we approach please.

COURT: Yes

BENCH SIDE BAR: inaudible

COURT: [Plaintiff's counsel], you may continue.

BACK IN FRONT OF THE JURY

[Plaintiff's Counsel]: Thank you. And you as the jury can calculate damages however you want. This is a metaphor to

> understand where I come up with my numbers. I can't force you to calculate it this way, but it is what I believe is fair. You could award three hundred, you could award fifty dollars a day. It is totally up to you. I gave you my fairest most reasonable number because it was I believe in my heart.

Tr. at 87-89.

[15] Because its objection was not recorded in the transcript, Aberdeen submitted a verified statement of the evidence under Indiana Appellate Rule 31, which the trial court certified. The statement of the evidence shows in relevant part as follows:

> 3. After approaching the bench, the Defendant asserted an objection and requested an admonishment regarding Plaintiff's request for compensation of $100 or $200 dollars a day for the time period between the date of the incident and the date of the trial, "[F]or every day that this company has denied responsibility and denied justice to Jessica."
>
> 4. The Court advised that Defendant could make its record after the conclusion of the argument and outside the presence of the jury.
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> 5. The Trial Court overruled Defendant's objection and permitted Plaintiff's counsel to continue the rebuttal argument without an admonishment or curative instruction.
>
> 6. Pursuant to the Trial Court's instruction, the Defendant articulated the objection and requested a mistrial after the jury was released for deliberations.

Appellant's App. Vol. 2 at 147-48 (citations omitted). The trial court denied Aberdeen's motion for mistrial.

[16] In its subsequent motion for relief from judgment, Aberdeen asserted that Miller's counsel's remarks during closing argument constituted misconduct under Indiana Rule of Professional Conduct 3.4(e), which provides in relevant part that a lawyer may not "allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence . . . or state a personal opinion as to the justness of a cause" or "the culpability of a civil litigant[.]" And Aberdeen contends on appeal that it was prejudiced by the remarks and that the prejudice prevented Aberdeen from fairly presenting its case because it was denied an opportunity to "counter[]" the "highly prejudicial effect" of the remarks. Appellant's Br. at 16. Aberdeen asserts that, "[w]hen counsel is guilty of clear misconduct it is presumed prejudicial to the adverse party," citing *Troxel v. Otto*, 153 Ind. App. 437, 287 N.E.2d 791 (1972). *Id.* And Aberdeen maintains that the prejudice denied him a fair trial, citing *Outback Steakhouse*, 856 N.E.2d at 80. We cannot agree.

[17] First, in denying Aberdeen's motion for mistrial on this same issue, the trial court stated as follows:

> Ok, I think, one, he could have asked for a nickel a day for the rest of her life so, you know, it is an argument of counsel, it is . . . jurors can take it as they see, they have been instructed on what the law is, the motion for mistrial is denied.

Tr. at 92. Thus, the trial court found that Miller's counsel had not committed misconduct. This court has held that a trial judge has broad discretion in determining what is improper argument. *Chaiken v. Eldon Emmor & Co.*, 597 N.E.2d 337, 345 (Ind. Ct. App. 1992), *trans. denied*. A reviewing court will reverse a judgment due to improper remarks by counsel during argument only when it appears from the entire record that the remarks, in all probability, formed the basis for securing an incorrect verdict. *Id.* Aberdeen has not shown that the trial court abused its discretion when it found that Miller's counsel had not committed misconduct.

[18] Second, and moreover, Aberdeen has not shown that the alleged misconduct prevented it from fully and fairly presenting its case at trial. In *University of Notre Dame*, the plaintiff, a spectator at a basketball game, was injured when she tripped over a riser and fell. 158 N.E.2d at 810. She sued, and a jury entered a verdict in favor of Notre Dame. The plaintiff then "moved for a new trial under Indiana Trial Rule 60(B)(3) based primarily on Notre Dame's failure to notify her before trial that a Notre Dame employee had testified incorrectly at a deposition." *Id.* In particular, the employee had testified in her deposition that there were tables and chairs on the riser when the plaintiff fell, which would have provided a "visual cue" to a spectator, but at trial the employee testified that there were no tables and chairs on the riser when the plaintiff fell. *Id.* at 812. The trial court granted the plaintiff's motion and ordered a new trial.

[19] On appeal, we held that Notre Dame's failure to correct the deposition testimony prior to trial constituted misconduct, but that the plaintiff had "failed

to show that this misconduct prevented her from fully and fairly presenting her case at trial." *Id.* at 813. We rejected the plaintiff's claim that, had she known about the changed testimony, she would have pursued a different strategy at trial focused on "'other issues such as the markings on the risers or other warnings.'" *Id.* at 814 (quoting plaintiff's brief on appeal). We noted that plaintiff had ample opportunity during trial to address the alleged lack of safety warnings on the risers, and she did not spend an inordinate amount of time during trial trying to prove that there were no tables on the risers at the time of her fall. *Id.*

[20] Likewise, here, Aberdeen had ample opportunity during its closing argument to argue damages. Aberdeen asked the jury to limit damages to "around" $15,000 or $20,000 given the amount of Miller's lost wages and the limited amount of recovery time she needed to regain function of her arm. Tr. at 84. While Aberdeen did not get to "counter" the specific request for damages Miller made during her rebuttal closing argument, the appropriate avenue of relief in that instance was a request for an admonishment and motion for mistrial, which Aberdeen pursued and the trial court denied. But Aberdeen does not appeal the denial of those motions.

[21] In sum, the trial court did not abuse its discretion when it found that Miller's counsel did not commit misconduct. And, in any event, Aberdeen has not shown that the alleged misconduct prevented it from fully and fairly presenting its case at trial. Accordingly, the trial court did not abuse its discretion when it denied Aberdeen's Trial Rule 60(B)(3) motion to set aside the judgment.

Issue Three: Excessive Damages

[22] Finally, Aberdeen contends that the trial court abused its discretion when it denied its motion to correct error alleging that the jury's damages award was excessive. As this Court has explained,

> "[a] jury determination of damages is entitled to great deference when challenged on appeal. *Sears Roebuck and Co. v. Manuilov*, 742 N.E.2d 453, 462 (Ind. 2001). The applicable standard of review has been summarized as follows:
>
> > Damages are particularly a jury determination. Appellate courts will not substitute their idea of a proper damage award for that of the jury. Instead, the court will look only to the evidence and inferences therefrom which support the jury's verdict. We will not deem a verdict to be the result of improper considerations unless it cannot be explained on any other reasonable ground. Thus, if there is any evidence in the record which supports the amount of the award, even if it is variable or conflicting, the award will not be disturbed.
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> *Id.* (quoting *Prange v. Martin*, 629 N.E.2d 915, 922 (Ind. Ct. App. 1994) (internal citations omitted)[, *trans. denied*]). In addition, [our] Supreme Court has noted the following:
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> > Our inability to actually look into the minds of the jurors is, to a large extent, the reason behind the rule that we will not reverse if the award falls within the bounds of the evidence. We cannot invade the province of the jury to decide the facts and cannot reverse unless the verdict is clearly erroneous.
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> *Id.* (quoting *Annee v. State*, 256 Ind. 686, 690, 271 N.E.2d 711, 713 (1971))."

Spaulding v. Cook, 89 N.E.3d 413, 420-21 (Ind. Ct. App. 2017) (quoting *Flores v. Gutierrez*, 951 N.E.2d 632, 636 (Ind. Ct. App. 2011) (emphasis added), *trans. denied*), *trans. denied*.

[23] Aberdeen points out that Miller's economic damages consisted of $2,699 in medical expenses and $7,616 in lost wages. And Aberdeen maintains that, "[w]hen subtracting Miller's economic damages proven at trial, the jury essentially awarded Miller more than $45,000 a month for pain and suffering for a two month period of time." Appellant's Br. at 19. Thus, Aberdeen asserts that "[i]t is apparent that the jury responded to the aforementioned misconduct [during Miller's rebuttal closing argument], and effectively punished Aberdeen for exercising its right to a jury trial." *Id.*

[24] However, Miller observes, correctly, that juries have broad discretion in calculating damages for pain and suffering. As this Court has stated,

> [a]wards for pain, suffering, and mental anguish are particularly within the province of the jury because they involve the weighing of evidence and the credibility of the witnesses. Physical and mental pain are, by their very nature, not readily susceptible to qualification and, thus, the jury is given wide latitude in determining these kinds of damages. Where the damages cannot be calculated with mathematical certainty, the jury has liberal discretion in assessing damages.

Weinberger v. Boyer, 956 N.E.2d 1095, 1113 (Ind. Ct. App. 2011) (citations omitted), *trans. denied*. Further, we will not disturb a jury's award unless it "appear[s] to be so outrageous that it impresses us at first blush with its

enormity." *See Foddrill v. Crane*, 894 N.E.2d 1070, 1080 (Ind. Ct. App. 2008), *trans. denied*.

[25] Miller presented evidence that she lost the use of her dominant arm for several weeks and depended on her boyfriend to help her with her daily activities. She experienced such pain during her physical therapy sessions that she cried. She missed several weeks of work and had to use her sick leave, and she missed out on overtime pay. During her recovery, Miller had to use up her savings to pay her bills, and when her savings ran out, she used credit cards and "racked up a lot of debt." Tr. at 27. In light of the evidence, and given the jury's broad discretion, we cannot say that the damages award of $80,000 is "so outrageous that it impresses us at first blush with its enormity." *See Foddrill*, 894 N.E.2d at 1080. The trial court did not abuse its discretion when it denied Aberdeen's motion to correct error.

[26] Affirmed.

Riley, J., and Brown, J., concur.