96 Mass.App.Ct. 410
Appeals Court of Massachusetts,
Suffolk..

Meaghan FITZPATRICK
v.
WENDY'S OLD FASHIONED HAMBURGERS
OF NEW YORK, INC., & Others. [1]

No. 18-P-1125
|
Argued March 13, 2019.
|
Decided November 7, 2019.

**Synopsis**

**Background:** Customer brought breach of warranty action against fast food restaurant and meat supplier, alleging she sustained a tooth injury from bone fragment in hamburger. Restaurant and meat supplier filed motion for mistrial. The Superior Court Department, Suffolk County, Heidi E. Brieger, J., granted motion, and the case was retried. Customer appealed.

**Holdings:** The Appeals Court, Wolohojian, J., held that:

[1] trial judge violated her duty to consider alternate, less drastic measures to remediate counsel's allegedly improper closing argument;

[2] trial judge was required to review motion for mistrial under standard for reviewing motion for new trial; and

[3] closing argument of counsel for customer was improper.

Vacated and remanded.

**Procedural Posture(s):** On Appeal; Motion for Mistrial.

West Headnotes (20)

[1] **New Trial** Failure of justice in general

A new trial motion is not a mechanism for addressing individual errors at trial; it is an opportunity to allow the judge to take a survey of the whole case to ensure that a miscarriage of justice has not occurred.

1 Cases that cite this headnote

[2] **Trial** Mistrial

A judge may, for reasons of efficiency, decide to defer ruling on a motion for a mistrial until after receiving the jury's verdict.

[3] **Double Jeopardy** Acquittal

**Res Judicata** Criminal Offenses, Proceedings, and Liability in General

The preclusive effect of an acquittal is grounded in the double jeopardy clause, which protects against a second prosecution for the same offense after acquittal. U.S. Const. Amends. 5.

[4] **Res Judicata** Criminal Offenses, Proceedings, and Liability in General

A verdict of acquittal is final, the last word on a criminal charge, and therefore operates as a bar to a subsequent prosecution for the same offense.

[5] **Appeal and Error** Nature and grounds of right

**Judgment** Nature and scope of remedy

**Trial** Construction and operation

In civil cases, there is no equivalent finality from a verdict, like that in criminal cases, since either party, or both, depending on the outcome, can appeal or otherwise seek relief from the judgment or seek a retrial.

  

[6] **Trial** Sufficiency of action in general

Trial judge, in deferring her ruling on fast food restaurant and meat supplier's motion for mistrial due to counsel's allegedly improper closing argument, in action brought by customer alleging tooth injury caused by bone fragment in hamburger, violated her duty to consider alternate, less drastic measures to remediate counsel's allegedly improper closing argument; although counsel for restaurant and meat supplier failed to object to any specific statements, move to strike, or propose curative instructions, and neither party objected to her proposal to defer ruling, judge had independent duty to prevent and remedy error in closing arguments, judge had stated she was unsure whether mistrial was required, and deferral of decision resulted in loss in availability of remedial measures. Mass. Guide to Evid. § 1113(d).

[7] **Trial** Role and Obligations of Judge

Trial court judge has an independent responsibility to take rigorous and emphatic action to counteract prejudicial statements made in front of the jury.

[8] **Trial** Discretion

The trial court judge has discretionary latitude to determine what measures should be taken to counteract prejudicial statements made in front of jury.

[9] **Appeal and Error** Arguments and conduct of counsel

**Appeal and Error** Necessity of objection in general

**Appeal and Error** Correcting erroneous instructions

The absence of objection, motions to strike, and requests for curative instructions means that any supposed errors, whether in the closing or the instructions, are unpreserved for appellate review. Mass. R. Civ. P. 51(b).

[10] **Trial** Conduct of party or persons associated with party causing sympathy or prejudice

Trial judge was required to review fast food restaurant and meat supplier's motion for mistrial due to customer's counsel's alleged improper closing arguments, in action brought by customer for tooth injury from hamburger, under standard for reviewing motion for new trial, where trial judge had deferred ruling on motion for mistrial until after she received jury's verdict.

[11] **Trial** Discretion of court

A judge is deprived of authority to declare a mistrial once the jury verdict has been received, recorded and proclaimed and the jury has been discharged, because there is no longer any trial to interrupt.

[12] **Appeal and Error** Arguments and Conduct of Counsel

**Appeal and Error** Relation between error and final outcome or result

Four-factor framework for considering claim of prejudicial attorney misconduct, including whether the defendant seasonally objected, whether the error was limited to collateral issues, what specific or general instructions given to jury may have mitigated the mistake, and whether the error made a difference in the jury's conclusion, is for a determination of whether a preserved claim of error arising out of attorney misconduct is prejudicial under the appellate prejudicial error standard of review.

[13] **New Trial** Weight of Evidence

The standard that a trial judge is to apply on a motion for a new trial in a civil case is whether the verdict is so markedly against the weight of the evidence as to suggest that the jurors allowed themselves to be misled, were swept away by bias or prejudice, or for a combination of reasons,

  

including misunderstanding of applicable law, failed to come to a reasonable conclusion.

1 Cases that cite this headnote

**[14]** **New Trial** Failure of justice in general

In assessing a motion for new trial, the judge should not take it upon himself to nullify a jury's verdict by granting a new trial unless it appears on a survey of the whole case that otherwise a miscarriage of justice would result.

**[15]** **New Trial** Harmless error

The new trial motion inquiry focuses on the harmful impact of the errors; it is not the egregiousness of, or the disrespect to the court shown by, attorney misconduct that the new trial motion addresses.

**[16]** **Sales** Food and beverages

The test for breach of the warranty of merchantability claim by reason of substance in food is whether the consumer reasonably should have expected to find the injury-causing substance in the food. Mass. Gen. Laws Ann. ch. 106, § 2-314.

**[17]** **Appeal and Error** Instructions understood or followed

The presumption that jurors follow the instructions they are given may be displaced on appeal if there is some evidence that the instructions were disregarded.

**[18]** **New Trial** Weighing evidence as court function

Trial judge is not to act merely as a 13th juror to set a verdict aside simply because he would have reached a different result had he been the trier of facts.

1 Cases that cite this headnote

**[19]** **Trial** Discretion of court

A mistrial is not to be allowed as a form of sanction for attorney misconduct in closing argument.

**[20]** **Trial** Appeals to prejudice against corporations

Closing argument of counsel for customer, in customer's action against fast food restaurant and meat supplier, alleging tooth injury from hamburger, was improper, where counsel impermissibly integrated jurors with customer and himself as within community of average customers, classified restaurant and meat supplier as part of community of big companies that try to shrink responsibility, and counsel suggested jury could protect community from future possibilities of harm and invited jury to imagine hypothetical future moment where they could think about their jury service and remember they held big companies responsible and accountable. Mass. Guide to Evid. § 1113(b)(2).

****358** Practice, Civil, Argument by counsel, Mistrial, New trial.

CIVIL ACTION commenced in the Superior Court Department on August 9, 2013.

The case was tried before Heidi E. Brieger, J., and a motion for a mistrial was heard by her.

**Attorneys and Law Firms**

Matthew J. Fogelman for the plaintiff.

Christopher A. Duggan, Boston (Pauline A. Jauquet, Lincoln, also present) for Wendy's Old Fashioned Hamburgers of New York, Inc., & another.

Present: Wolohojian, Blake, & Shin, JJ.

  

**Opinion**

WOLOHOJIAN, J.

***410** **[1]** In this appeal we conclude that it was an abuse of discretion to allow a new trial based on statements in plaintiff's counsel's closing argument that crossed the bounds of permissible advocacy. We reach this conclusion because, among other things, the judge did not apply the correct legal standard and, as ***411** a result, failed to conduct a survey of the whole case, as she was required to, to determine whether a miscarriage of justice would result absent a new trial. Instead, it appears the judge nullified the jury's verdict and allowed a new trial as a form of sanction for counsel's closing. This she could not do. A "new trial motion is not a mechanism for addressing individual errors at trial. It is an opportunity to allow the judge to take 'a survey of the whole case' to ensure that a 'miscarriage of justice' has not occurred." Wahlstrom v. JPA IV Mgt. Co., 95 Mass. App. Ct. 445, 447, 127 N.E.3d 274 (2019), quoting Evans v. Multicon Constr. Corp., 6 Mass. App. Ct. 291, 295, 375 N.E.2d 338 (1978). For this reason, we vacate the order allowing the defendants' motion for mistrial, and remand for further proceedings.

Background. On January 23, 2011, the plaintiff, a thirty-four year old woman with good teeth, paid $5.64 for a small plain hamburger with no toppings and French fries from a Wendy's restaurant in Medford and took them home to eat for dinner. On the third or fourth bite, she heard a loud crack and crunching, and felt a pain shoot up into her upper left gum. She spit out the half-eaten food and discovered that her mouth was bleeding and one of her upper left molars (tooth 14)[2] was split in two. The injury was caused by a piece of bone in the hamburger.[3]

The bone had split tooth 14 well below the gum line, and the dental nerve was sheared, bleeding, and exposed.[4] The bone also caused minor damage to the opposing lower molar (tooth 19), which was easily repaired with a filling. But repairing tooth 14 was not a simple matter and required at least twenty-three trips to various dentists over the next two years. To begin with, the disengaged part of tooth 14 (which was moving loosely) had to be removed. In addition, the plaintiff had to undergo an immediate root canal by an endodontist, ****359** who subsequently had to perform a second root canal. The initial goal was to try to save the remaining portion of tooth 14 and to restore it with a cap. To accomplish this, the dentist, over several appointments, performed a gingivectomy ***412**[5] (necessary because of the depth of the break), implanted a titanium post in the tooth's canal, fitted a temporary crown, and then cemented in a permanent crown.

But the plaintiff's anatomy was not "ideal" for the crown and, as a result, the tooth required ongoing special cleaning. Within about a month, the plaintiff's gum was sore and throbbing and X-rays revealed bone loss caused by an inflammatory process most likely due to the fact that tooth 14 could not be cleaned efficiently. At this point, the plaintiff was prescribed a prescription-strength mouthwash and referred to a periodontist to see if tooth 14 could be saved.

The periodontist identified two possible treatment options. The first (which the periodontist did not favor) was to surgically "re-contour the gum and the bone around the crown to see if the final result would make [tooth 14] cleansable and sustainable." The second option was to extract tooth 14, and replace it with a dental implant. This was the periodontist's favored solution based on how deep the original fracture had extended under the gum. Unfortunately, however, the plaintiff did not have sufficient "sinus elevation" or quality of bone in which to anchor an implant. Thus, this option required sinus elevation surgery to push up the floor of the sinus, along with bone grafts to increase the span of bone to hold the implant. The bone grafts could be done using the patient's own bone (in which case additional surgery would be required to harvest bone from elsewhere in the patient's body), freeze-dried animal bone, or bone taken from a human cadaver. Once the graft surgeries healed and the grafts grew, the periodontist would insert a metal implant to which the dentist would then attach a new permanent crown.

The plaintiff opted for the recommended option using a cadaver bone to avoid the additional surgery that would be necessary to harvest her own bone for the graft. All told, the various surgeries, grafts, and other procedures were not completed until February 7, 2013, two years after the original injury. Along the way, the plaintiff suffered pain requiring strong medication (oxycodone), bruising and black eyes as a result of the procedures, and mental distress. She was required to take antibiotics and steroids. As an ongoing matter into the indefinite future, because the implant is prone ***413** to infection, it requires special, continuing cleaning by the plaintiff.

The plaintiff sued Wendy's Old Fashioned Hamburgers of New York, Inc. (Wendy's), which operated the restaurant from which the plaintiff bought the hamburger, JBS Souderton, Inc.

  

(JBS), which produced and supplied the hamburger according to Wendy's specifications, and Willow Run Foods, Inc., which distributed the hamburger to Wendy's. By the time of trial, only Wendy's and JBS remained in the case, and the only claims against them were for breach of the implied warranty of merchantability, G. L. c. 106, § 2-314, and violation of G. L. c. 93A. [6]

****360** The breach of warranty claim went to trial in 2016, with the judge reserving the c. 93A claim for herself. We recite the trial proceedings in detail given that they must be considered in their entirety. During his opening statement, plaintiff's counsel began by stating that the case was about "safety rules that protect all of us" from dangerous food products "only if jurors like yourselves enforce those rules in Court. You decide what is safe in our community." He then identified the two defendants, noting that JBS is one of the leading meat processors in the world. Counsel proceeded to outline the multistep production process for hamburger meat, noting that bone can get through if it is smaller than the size of the final grind plate. He then stressed that, although JBS had X-ray technology available to it to examine the final grind for bone, it did not use that technology. Counsel outlined the facts we set out above concerning the plaintiff's injury and treatment, which he then followed by remarking on the fact that the plaintiff received no response from Wendy's when she called to report what had happened. He next described the defendants' policies of providing safe food to their customers, and stated that these "safety rules" are to apply to all consumers. He then focused on the question of a consumer's reasonable expectations, noting that consumers do not expect to find bone in their hamburger (unlike when one eats, for example, a chicken wing), and that hamburgers will not be inspected by the consumer before being eaten. Counsel concluded by giving some biographical information about his client, noting that she had no prior history of serious dental problems, and outlining the course of the medical procedures she underwent. No objection was lodged as to any aspect of the opening.

***414** Wendy's and JBS were represented by the same counsel, which obviously constrained any defense premised on one blaming the other. Defense counsel's opening began with the importance of the right to trial by jury. He then described Wendy's as having been founded in 1969 by Dave Thomas. He described JBS as "one of the leading meat processors in the whole world." Counsel described in detail the hamburger production process and the many steps that are taken to ensure that the meat is safe, biologically, chemically, and physically. He noted that, by the end of the process, the meat is produced to Wendy's specifications in a seventy-five/twenty-five meat/fat ratio, and put through a final grind plate of three thirty-seconds of an inch (3/32"). Counsel noted that the Wendy's grind specification was much smaller than that specified by the United States Food and Drug Administration (FDA) (one centimeter) as safe for human consumption, and also much smaller than the industry standard (one-eighth of an inch). Counsel pointed out that meat could not be ground any finer and still be made into hamburger. He acknowledged that pieces of gristle and bone might get through the final grind if they were less than 3/32", but "that is way past what is safe under our FDA regulations." He then described the many quality assurance measures in place at JBS and at Wendy's. Finally, defense counsel did not dispute that the plaintiff broke her tooth after biting into a Wendy's hamburger and stated, "[T]here's no doubt that there was a small, small tiny fragment of a bone" in the hamburger. But he stressed that the plaintiff's tooth 14 was compromised before the injury and raised a question about the filling material her dentist used in 2006 (several years earlier) to treat it. Counsel ended on the theme that there was nothing more the defendants could do and still sell hamburgers in the United States, and that ****361** the defendants had met the reasonable expectations of their customers.

The trial was not long; testimony required only two one-half days of trial, and all the trial exhibits came in by agreement. The plaintiff first called Wendy's district manager, who testified that Wendy's strove to serve safe food and not to put its customers at risk. He confirmed that "food safety is the number one priority at Wendy's and to our customers," that this policy pertains to all customers, and that "Wendy's customers expect to be served safe food." The witness confirmed that Wendy's does not expect to serve hamburgers with bone in them and does not expect to receive hamburger meat containing bone from JBS. The witness acknowledged ***415** that Wendy's does not warn its customers that there might be bone in its products. Plaintiff's counsel then established through the witness that utensils are not usually provided with a hamburger, that it is served between two pieces of soft bread, and that it is intended to be picked up by the consumer's hands and eaten. Wendy's does not expect its customers to cut the hamburger into tiny pieces to inspect it before consumption.

On cross-examination, defense counsel asked the witness to describe Wendy's corporate history, eliciting that the company was started in 1969 and that it "kind of centers around just,

you know, do the right thing and just be nice." The company has roughly 6,500 restaurants internationally. Counsel then elicited a description of the training that Wendy's employees receive and the "extensive testing" of its products. The witness testified that JBS supplies the hamburger to Wendy's specification that it be ground to 3/32" and "that this was the -- smallest grind, I believe, that we could get and still meet customer's expectations of what a hamburger should taste like." Over objection, defense counsel was permitted to ask whether "any restaurant in the United States of America ... pledges absolute perfection in anything," and the witness replied that perfection is not possible because of the nature of the product. The witness continued, if "you're eating an animal, there's always the potential for bone, cartilage, a different a -- a tendon perhaps," noting that he himself had had that experience. Next, the witness testified that the Wendy's restaurant in Medford sells 160 pounds of beef daily, the equivalent of 800-900 hamburgers of the size the plaintiff ordered. The witness knew of not a single incident during his time with the company of a customer being injured by a piece of bone or cartilage getting through the final 3/32" grind of the hamburger.

The plaintiff next called her treating dentist, who testified to the medical course we set out *supra*. On cross-examination, defense counsel elicited testimony that the plaintiff had a history of grinding her teeth at night, of a crack in tooth 14 dating back to 2004, and of fillings to tooth 14 in 2006, which the dentist contemporaneously noted may require a future crown. Defense counsel attempted to establish that the composite resin filling material used by the dentist was inferior to the alternate available material, amalgam. Defense counsel also conducted a detailed examination into the plaintiff's fillings in other teeth. He concluded his examination by noting that the dentist's records did not reflect that the plaintiff ***416** had ongoing problems with her dental implant. After redirect, on further cross-examination, defense counsel elicited testimony that it was not uncommon for people to break teeth on "small, small pieces of -- of bone even in ... sausage and hamburger and the like."

The plaintiff next called the training and development manager of JBS, who had previously been the company's technical ****362** services manager.[7] Without objection, counsel elicited that JBS was one of the leading beef processors in the world, selling to customers around the world. This witness confirmed that JBS's mission was to provide safe food to all its customers, even those whose teeth may be compromised. The witness acknowledged two important points: first, that a piece of bone could have gotten into the hamburger if it was small enough to pass through the holes in the final grind plate; and second, that although the hamburger was put through the metal detection process after the final grind, the hamburger was not put through an X-ray to inspect for bone, even though it would have been practical to do so and a more effective measure of protection. Counsel also established that bits of bone could have been missed on an upstream X-ray earlier in the production process. On cross-examination, defense counsel elicited detailed testimony about the numerous safety measures taken by JBS at multiple steps in the production process and that Wendy's specifications for their hamburgers far exceeded government and industry standards. The witness testified that bone less than one centimeter in size was not a food safety hazard and, therefore, there was no need to X-ray the meat after it had passed through the final grind. Finally, the witness testified that JBS sold over fifteen million pounds of hamburger to Wendy's in the thirteen months preceding January 2011 and there was not a single complaint of anyone getting injured by a piece of bone during that period.

After the JBS witness's testimony, a sidebar took place to discuss plaintiff's counsel's desire to introduce Wendy's third-party complaint against JBS as a judicial admission that JBS was responsible for the piece of bone in the plaintiff's hamburger. The judge denied the request, noting:

> "Well, this particular fact is, as I understand it, been admitted and testified to by virtually every witness so far, which was that there was a foreign object, a bone, less than the size of ***417** three thirt -- two [sic] thirty seconds that was in that hamburger. It was actually marked into evidence. I think it's Exhibit 3. The Jury has seen it. So, there has already been an admission by defendants and their witnesses that it was a bone or bone like matter."

The plaintiff was the last witness to testify, and we will not repeat her testimony about her injury and subsequent treatment as we have set it out *supra*. In addition to that testimony, the plaintiff testified to her expectations and habits as a consumer and how they differed depending on the particular food involved. For example, she ate foods known to contain pits or bones differently from how she ate a hamburger, which she did not expect to contain bone. Wendy's provided no warning that there might be bone in her hamburger, and she did not inspect the hamburger before eating it. She testified to the period when she had to live without tooth 14 and described it as "difficult." She noted that she continued to be distrustful because she "trusted

that [she] was going to be served something that wouldn't physically harm me." She testified that she felt betrayed because "everyone else [at Wendy's and JBS] knew [that] there was the possibility of the bone being in the burger but me." She called this "inside information." Cross-examination of the plaintiff focused on the course of her dental treatment and established that she did not know for certain which of the two pieces of foreign matter that were in her hamburger (and marked ****363** as exhibits) was the one that caused the injury to her tooth.

The plaintiff then rested, and the defendants' motion for a directed verdict was denied. The defendants rested without calling any witnesses and renewed their directed verdict motion, which was again denied. The judge then conducted a charging conference, the details of which are not pertinent here.

We now turn to the closing arguments, which are the central focus of this appeal. The defendants' counsel began his closing in a manner similar to his opening, by focusing on historical context. This time, however, counsel homed in on the jury's role of "speak[ing] the truth." Counsel then drew the jury's attention to exhibits 3.1 and 3.2, one of which was gristle and the other bone, both about 2.2 millimeters (less than 3/32") in size. He noted that both were hard substances and that either might cause a tooth to fracture, as could many other hard foods such as popcorn. Counsel then went step-by-step through the production process of the ***418** hamburger, focusing at each point on the safety measures taken at JBS. He stressed that the final grind of the meat was done to a specification far finer than the industry standard and the standard identified by the Federal government as safe for human consumption. He argued that, as a result, the 3/32" grind was "safe." He then went through the huge amounts of beef processed by JBS for Wendy's the year before the incident at issue and noted that it was the equivalent of 61.2 million hamburgers. He stressed that there had not been a single "claim of a bone fragment or anything else in the hamburger." Counsel then turned to the legal standard and argued that it did not require perfection, only that the product be reasonably fit. He argued that "JBS made this hamburger as good as can be possible and still make hamburger, for all of us to eat, the reasonable consumer can expect no more." He then turned to questioning why the plaintiff was injured by the bone or gristle when no one else had been and suggested to the jury that the plaintiff's tooth 14 was compromised by a previous crack that had been inadequately filled. He suggested that, if the preexisting condition of the plaintiff's teeth was the reason why her tooth 14 broke on the piece of bone when no one else's had, then the defendants had met the reasonable expectations of their consumers. At this point, counsel returned to the production process and explained why X-ray examination after the final grind, although possible, was not necessary. He then turned to the verdict slip and used it to reinforce his points that the hamburger needed only to be reasonably fit, not perfect, that perfection could not be achieved in any event, and that the defendants met the expectations of the reasonable consumer. He then stated "that 61.2 [million] hamburgers doesn't lie" and concluded his argument with the statement "[t]hat both of these fine companies did precisely what we would want all of the companies in America to adhere to." Notably, defense counsel did not speak at all to the topic of damages, nor to the monetary value that might be placed on the plaintiff's pain and suffering.

Plaintiff's counsel began by asking the jurors to imagine the plaintiff's surprise when she bit into the hamburger thinking it was safe, only to discover bone in it. He then said:

> "See what [the plaintiff] did not know, and what JBS and Wendy's did know, is that bone can get into the final burger. They have insider knowledge. They're the ones who know what goes into the meat process. How big the holes are in the ***419** plate. Whether x-ray is used and when the x-ray is used. They know all ****364** that. But you know who doesn't know that? We don't know that. The average customer. The regular consumer. We don't have the knowledge that they do. You have it now because you've been sitting here for three days. So now when you go out you know more than you did on Wednesday morning. But you didn't know that before you came to Court on Wednesday. How could you."

Counsel then tied knowledge to expectation and stated, "It's very important, ladies and gentlemen, it's not what JBS reasonably expects. It's not what Wendy's reasonably expects. It's what we reasonably expect. Us, the average people, not them."

Plaintiff's counsel then placed the role of the jury into historical context and stressed the power and importance of the jury. He touched briefly on the reasonable consumer standard and the preponderance of the evidence standard, noting that the jury would receive the law from the judge.

Counsel then returned to the theme of "tools" that he had referred to in his opening, which he again equated to safety

  

rules. He referred the jury to the testimony of the JBS and Wendy's employees who testified that the defendants were required to serve safe food, that safe food was their mission, and that the mission applied to all customers -- even those with fillings in their teeth. He then stated:

> "I asked them about warnings. What did they say. JBS, they know that bone can get in the burger. I asked them, do you tell Wendy's? No. Wendy's knows that bone can get in the burger. I asked Wendy's, do you tell your customers? No. How are people supposed to know if they're not told? They don't have the insider knowledge."

Plaintiff's counsel then spoke at length about a reasonable consumer's expectations with respect to eating a hamburger, noting that consumers do not expect it to contain bone and accordingly eat it with their hands without inspecting it beforehand and bite down without restraint. He concluded this portion of his argument with, "Do we go to Wendy's and expect to get injured? No, we don't. If we expected to find something in there we wouldn't eat it the way that we do."

Counsel then proceeded to the topics of accountability and responsibility, and gave an example of how parents teach their children about responsibility. He then stated:

> ***420** "Did Wendy's and JBS make it right? Here's something to think about. [Wendy's regional manager], on Thursday, I wrote this down, you might have written it down too. He said we do the right thing. We do the right thing when it comes to our customers. The customer's always right. That's what he said. Really? What does do the right thing mean to these companies? One of the largest fast food companies and one of the largest beef manufacturers in the world. What does that mean, do the right thing? They have not accepted one shred of responsibility. Not one. They have not learned anything from this. Have they learned that they can't serve meat with bone in it that's going to hurt somebody? No. Instead what have we heard? ... What we've heard for three days is a long list of excuses. One after another. Attempt to confuse things. That's what they do, these big companies. That's what they do. They take something simple and they make it all confusing."

Counsel then segued to examining the so-called "excuses" given by the defendants. The first was that the plaintiff's teeth were compromised beforehand or had been improperly filled before. Counsel then identified the plaintiff's and her dentist's testimony to the contrary. The second so-called "excuse" defense that counsel identified ****365** was that nothing could get through the final 3/32" grind or that, if something did, it could not cause such extensive damage. Here, counsel pointed out that, not only did the defendants present no evidence to this effect, but the plaintiff's dentist had testified to the contrary. Another "excuse" was relying on the studies upon which the Federal government guidelines were based. Here, counsel noted that the studies were not in evidence. Next, counsel turned to the fact that JBS did not X-ray the meat after the final grind. Finally, counsel turned to the defendants' argument that, based on the massive number of hamburgers produced without complaint, "this is a fluke."

> "Well you know what, we all use thousands of things and we all eat thousands of food, and companies manufacture thousands of products. Things that only hurt people once in a while. Maybe something hasn't hurt somebody yet. But when a product hurts somebody, the company always says, oh, that never happened before. The safety rules says that the company must make safe food. And the law says that if they did not make safe food and you reasonably expect it, we reasonably expect it to be safe, they're responsible. Because if you add up all the people that are ***421** hurt by things that hardly ever hurt anyone, that adds up to a lot of dangerous things. And sooner or later a danger is going to claim a victim. That's why the law does not care how many times it happened before. The law asked was the bone there and should we have reasonably expected it to be there. That's the law. Not how many times it happened.
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> "Sixty million burgers, I don't know if that's true or not. But there's no -- I don't know if there's any evidence of that before you. [Defendants' counsel] said it. That's fine. But you know what, when Wendy's and JBS sells all those burgers, they are more than happy to take our money. We pay for the burger. It goes to them. But when a burger hurts somebody, no responsibility. No accountability. Shame on them, honestly -- shame on them.
>
> "Are these important rules in our community? Are we going to enforce them? Are you going to enforce them? If the rules that we talked about here, the safety rules, if those are important you need to speak to that and your verdict needs to speak to that. You[r] verdict will speak volumes echoing outside of this Courthouse. If the rules are not important, if it's okay for them to serve burger with bone and someone gets hurt once in a while, and if they get injured, too bad for them. Then you know what? Give these guys a pass. Give them a pass.

  

> "I don't think you can. I don't think you can give them a pass. I don't think you can say it's okay to have a burger with bone in it or hard gristle and sell burgers. If you say that their conduct is okay then you're essentially rewarding their conduct by giving them a pass."

Counsel then turned to the question of compensation, commenting on the extent, duration, and nature of the plaintiff's injuries. He suggested a range of $150,000 to $250,000 in compensatory damages, stressing several times that the range was only a suggestion and entirely up to the jury to decide based on their assessment of the evidence of the harm to the plaintiff, including her pain and anxiety. See Mass. G. Evid. § 1113(b) (2019) ("In civil actions in the Superior Court, parties, through their counsel, [in closing] may suggest a specific monetary amount for damages at trial"). It should be noted that, by stipulation of the parties, no evidence of the plaintiff's medical bills or expenses was introduced or referred to.

***422** ****366** Plaintiff's counsel closed his argument with the following:

> "And I think I speak for everyone here, what we want from your verdict is that when you leave this courthouse later today with your head held high, proud of what you did, you gave up time from work and from family, and I want you to know that it mattered. It was important. And you should be comfortable with -- with -- with what happened here. And this may be the kind of case that triggers something for you a month from now or a year from now. You might be eating a burger. Maybe you'll read an article that someone else got hurt by a food product. Or you'll be telling your wife or your husband about the case. That somebody ate a burger and they did not expect to get hurt. And that safety rules were violated and that you helped to make a wrong right. You made it right and you held them responsible and accountable.
>
> "And when you -- when that something triggers, when that happens to you, because it will happen, you'll think back to today when we left Suffolk Superior Courthouse and I want you to be proud and say we did the right thing. We did the right thing."

Immediately after the closing, the judge dismissed the jury for lunch.

Defendants' counsel did not lodge objections to any specific components of plaintiff's counsel's closing, nor did he move to strike any of the statements made. Instead, counsel orally moved for a mistrial based on plaintiff's counsel's argument. Specifically, defendants' counsel contended that plaintiff's counsel had improperly attempted to "integrate himself with the jury," and had impermissibly spoken about not rewarding the defendants' conduct, punishing big companies, and what might happen in the future. Defendants' counsel then referred to an entirely separate case previously tried before the same judge in which she had allowed a motion for a new trial based on improper closing argument, and stated, "this is the Demoulas case in spades." [8]

In response, plaintiff's counsel briefly stated that he had not crossed any lines of advocacy. But the judge terminated this discussion, ***423** stating that she had noted several objectionable statements in his argument. She then said, "I recently set aside a verdict based on Plaintiff's improper closing argument. I urge you to read that. I have not yet decided how close you were to that line but it was close. I'm going to let it go to the Jury and we'll see what happens after that. All right?" Neither counsel objected to this proposal.

Importantly, defendants' counsel did not ask for instructions designed to cure the supposedly improper aspects of the argument -- either immediately after the argument was made or during the judge's final instructions to the jury. Notwithstanding the absence of such a request, the judge included several instructions relevant here. For example, the judge instructed the jury:

> "You should determine the facts here solely on a fair consideration of the evidence. You are to be completely fair and impartial, and you are not to be swayed by any prejudice, person[al] likes or dislikes towards either side, or by any personal view you may have about the nature of the claims or the defenses in this case.
>
> ****367** "You are also not to consider the effect that your verdict may have on any party or on any person or any

  

reaction that any party or anyone might have to your verdict.

> "You may not decide the case based on sympathy for any party or for the witness or for anyone else. Sympathy is entirely proper and appropriate in some circumstances, but it is entirely irrelevant to your determination of the facts in this case."

The judge also gave instructions targeted to the closing argument in particular:

"As I mentioned before, the opening statements and the closing arguments of lawyers are not evidence. In fact, during closing arguments you may found -- you may have found that counsel argued matters that were not admitted into evidence. Your collective memory is what controls your deliberations in this case. You are not to consider matters or arguments that were not admitted into the trial as evidence.

"I want to stress to you that it is not your job as a juror to send a message to anyone inside or outside of this Courtroom. ***424** Your job is not to deter any conduct or to punish any party. Your job is not to make distinctions or hold any sympathies or prejudices based on whether a party is a big company or a small company or a buyer or a seller.

"In the end your job, as sworn Jurors, is to answer the question of whether [the plaintiff] has proved her case by a preponderance of the admitted evidence, and the closing arguments are only assisted -- intended to assist you in understanding the contentions of the parties and the inferences that the lawyers want you to draw from the properly admitted evidence."

As to damages, the judge instructed the jury that they "should bear in mind that damages are assessed for the purpose of compensating an injured party for losses sustained as a result of a wrong that was done by another. ... The object is not to punish anybody and it is not to reward anybody. The object is simply to put the injured person back in the position she would have been in had the wrong not occurred."

Defendants' counsel did not object to the instructions given, nor did he request (or object to the absence of) additional instructions designed to mitigate any potential impermissible effect of plaintiff's counsel's closing argument.

The case was given to the jury on a Friday afternoon. After some period of deliberation, the jury posed a question asking to see the JBS witness's deposition transcript, answers to interrogatories, and charts he had drawn of the floor of the plant where the hamburger was processed. The jury then continued to deliberate until the end of the day, when they were discharged for the weekend. On the following Monday morning, defendants' counsel requested that the judge supply additional instructions to the jury -- none bearing on plaintiff's counsel's closing. The jury resumed their deliberations for several more hours, and the total deliberations lasted almost as long as the trial testimony. At the end, the jury reached a plaintiff's verdict against both defendants, and awarded $150,005.64 in damages, the sum of the lowest figure suggested by plaintiff's counsel during his closing plus the amount the plaintiff spent on her Wendy's meal.

After the jury's verdict was received and recorded, and the jurors were discharged, the defendants orally renewed their motion for mistrial, which the judge deferred ruling on until she received briefing. In accordance with a schedule set by the judge, ***425** the defendants filed their written ****368** motion for a mistrial approximately two months later. They did not move for remittitur.

Ultimately, the judge allowed the mistrial motion in a written decision in which she concluded that plaintiff's counsel's closing argument (1) improperly created an "us versus them" dichotomy designed to distinguish " 'us,' the average people" from " 'them,' the big corporations"; (2) "improperly suggested that the jury decide the case as 'the voice of the community' to 'send a message' beyond the courtroom," and sought "to arouse in the jury a sense of duty to safeguard the community" from generalized safety concerns; (3) improperly invoked the "golden rule" by asking the jurors to place themselves in the plaintiff's shoes; (4) improperly interjected counsel's own personal opinions and beliefs; and (5) resorted to rhetorical principles "described in the book [D. Ball & D. Keenan,] Reptile: The 2009 Manual of the Plaintiff's Revolution" (book). [9] The judge acknowledged that she had given curative instructions but deemed them inadequate without explanation. Although she stated (and we accept) that she reviewed the entire trial transcript, she did not address the evidence (or its strength) in her decision and did not explain how or why the closing argument might have affected the jury's consideration of the evidence. She did not

  

address the several indications that the jury were not carried away by the argument. Specifically, she did not address the length of the jury's deliberation (which was almost as long as the testimony), the jury's focus on the evidence (as evidenced by their question), and the precision of the damages award. Nor did she address the amount of the award, or suggest or conclude that it was disproportionate to the evidence of harm. Finally, she made no mention of the fact that the defendants did not make specific objections to the closing, move to strike any portion of it, request curative instructions, request instructions beyond those the judge gave, or request additional instructions. Nonetheless, the judge concluded that "the prejudicial aspects of the closing argument likely influenced the jury's ***426** verdict, thereby depriving the Defendant[s] of a fair trial."

Thereafter, the case was retried to a different jury before the same judge, which again found in the plaintiff's favor and awarded $10,000. The judge, who had reserved the c. 93A claim to herself, ruled in favor of the defendants on that claim and allowed the defendants' motion to recover costs pursuant to Mass. R. Civ. P. 68, 365 Mass. 835 (1974), leaving the plaintiff with a net recovery of $5,964.52. This appeal followed, in which the sole issue is the allowance of the motion for a mistrial.

**[2] [3] [4] [5]** Discussion. We turn first to the judge's decision, relying on Commonwealth v. Brangan, 475 Mass. 143, 56 N.E.3d 153 (2016), S.C., 478 Mass. 361, 84 N.E.3d 1269 (2017),[10] to defer ruling on the defendants' ****369** motion for a mistrial until after she received the jury's verdict. A judge may, for reasons of efficiency, decide to defer ruling on a motion for a ***427** mistrial until after receiving the jury's verdict. Brangan, supra at 148, 56 N.E.3d 153. But independent of that decision, the judge has an obligation to consider whether alternate, lesser remedial measures would suffice to remediate counsel's improper argument.

**[6] [7] [8] [9]** Here, the judge did not consider such alternatives or ask the parties to propose any. True, the judge was not aided by the defendants' counsel's failure to object to any specific statements in the closing, move to strike them, or propose curative instructions -- whether to be delivered immediately or later as part of the final instructions.[11] Nor was she helped by the fact that neither party objected to her proposal to defer ruling on the motion. But the fact remains that the judge had an independent responsibility to "take 'rigorous and emphatic action' to counteract prejudicial statements made in front of the jury." Rolanti v. Boston Edison Corp., 33 Mass. App. Ct. 516, 529, 603 N.E.2d 211 (1992), citing Goldstein v. Gontarz, 364 Mass. 800, 811, 309 N.E.2d 196 (1974). Of course, the judge had discretionary latitude to determine what those measures should be in this particular case. See Santos v. Chrysler Corp., 430 Mass. 198, 214, 715 N.E.2d 47 (1999); Fialkow v. DeVoe Motors, Inc., 359 Mass. 569, 572, 270 N.E.2d 798 (1971). But she did not have the discretion to simply defer dealing with the issue until after trial when those remedial measures would no longer be available to her. See Mass. G. Evid. § 1113(d) (2019) ("A trial judge has a duty to take appropriate action to prevent and remedy error in ****370** opening statements and closing arguments"). This is especially so where, as here, the judge stated she was unsure whether a mistrial was required when the motion was made. See Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 120, 731 N.E.2d 1075 (2000) (trial judge is in best position to determine whether mistrial is needed); Sullivan v. Commonwealth, 383 Mass. 410, 414, 419 N.E.2d 846 (1981) (in civil case, judge must find that there is "high degree of necessity for a mistrial"). The judge shortchanged her obligation to allow the parties to be heard on the topic of whether less drastic measures would suffice as well as her own ability to consider and craft such measures when they still could have made a difference.

**[10] [11]** Because the judge decided to defer ruling on the motion until after receiving the jury's verdict, the motion was then to be treated ***428** as a motion for a new trial rather than one for a mistrial. A judge is deprived of authority to declare a mistrial once "the jury verdict ha[s] been received, recorded and proclaimed and the jury ha[s] been discharged." Holder v. Gilbane Bldg. Co., 19 Mass. App. Ct. 214, 218, 473 N.E.2d 1142 (1985). At that point, "[t]he time for declaring a mistrial ha[s] gone by" because there is no longer any trial to interrupt. Id. ("Mistrial connotes an interruption of the trial because justice may not be done if the trial continues"). Moreover, the judge was required to apply the new trial standard as of the moment she decided the motion rather than as of the moment the motion was made. Put another way, having decided to wait to see what the jury did before ruling on the motion, the judge could not then ignore the verdict in her analysis of the motion for a mistrial.[12] See Gath v. M/A-Com, Inc., 440 Mass. 482, 494, 802 N.E.2d 521 (2003) (in assessing posttrial motion for new trial "the judge considered,

  

as he must, the possible influence of counsel's conduct on the verdict" [emphasis added] ).

**[12]** **[13]** **[14]** **[15]** Instead of employing the new trial standard, the judge, at the defendants' urging, used the incorrect "four-factor framework for considering claims of prejudicial attorney misconduct that we articulated in Fyffe v. Massachusetts Bay Transp. Auth., 86 Mass. App. Ct. 457, 472, 17 N.E.3d 453 (2014)." Wahlstrom, 95 Mass. App. Ct. at 446, 127 N.E.3d 274. But "the Fyffe factors are simply a way of determining whether a preserved claim of error arising out of attorney misconduct is prejudicial under the appellate prejudicial error standard of review." Id. at 448, 127 N.E.3d 274. [13]

> "The standard that a trial judge is to apply on a motion for a new trial in a civil case is whether the verdict is so markedly against the weight of the evidence as to suggest that the jurors allowed themselves to be misled, were swept away by bias or prejudice, or for a combination of reasons, including misunderstanding of applicable law, failed to come to a reasonable conclusion."

W. Oliver Tripp Co. v. American Hoechst Corp., 34 Mass. App. Ct. 744, 748, 616 N.E.2d 118 (1993), and cases cited. In conducting the correct ***429** assessment, "the judge should not take it upon himself to nullify a jury's verdict by granting a new trial unless ****371** it appears on a survey of the whole case that otherwise a miscarriage of justice would result." Evans, 6 Mass. App. Ct. at 295, 375 N.E.2d 338. See Salter v. Leventhal, 337 Mass. 679, 698, 151 N.E.2d 275 (1958) ("The effect of the [improper] remark and the sufficiency of the steps taken to overcome it must, as in every case, be judged with reference to the entire case as it stood before the jury"). "[T]he new trial motion inquiry focuses on the harmful impact of the errors. It is not the egregiousness of, or the disrespect to the court shown by, attorney misconduct that the new trial motion addresses." Wahlstrom, supra at 449-450, 127 N.E.3d 274.

Had she taken a survey of the whole case, the judge would have had to consider many features of the trial proceedings that she did not take into account. For example, the evidence was largely uncontested. No one disputed that the plaintiff's tooth 14 was injured by a small piece of bone that was in a hamburger sold by Wendy's and produced by JBS. Nor was there any serious contest concerning the extent or nature of the dental treatments the plaintiff was required to undergo, their severity, or their duration. Although the beef was ground very fine, and the defendant JBS took many measures to ensure that the meat was safe, the defendants did not contend that a small piece of bone could not end up in a hamburger or that it did not land in the one at issue here.

**[16]** Moreover, because this was not a negligence case, the reasonableness of the defendants' actions was not at issue. Instead, as the jury were instructed, the test for the plaintiff's breach of the warranty of merchantability claim is "whether the consumer reasonably should have expected to find the injury-causing substance in the food." Phillips v. West Springfield, 405 Mass. 411, 412-413, 540 N.E.2d 1331 (1989) ("the reasonable expectations test is the appropriate one to apply in determining liability for breach of warranty of merchantability under G. L. c. 106, § 2–314 [2] [c], by reason of a bone or other substance in food that caused harm to a consumer"). As to this inquiry, there was also no serious dispute; the plaintiff did not expect an injury-producing bone in her Wendy's hamburger, and the defendants did not expect their customers to receive hamburgers with injury-producing bone in them.

**[17]** The judge was correct to factor her instructions into her analysis, but she considered them inadequate even though they were not objected to and she gave them sua sponte. To be sure, the presumption that jurors follow the instructions they are given may be displaced if there is some evidence that the instructions ***430** were disregarded. See Fyffe, 86 Mass. App. Ct. at 475, 17 N.E.3d 453 ("the rubric that jurors are presumed to follow the judge's instructions does not mean that a curative or cautionary instruction always suffices to remove the stain of what otherwise would be prejudicial error"). Here, however, the judge did not explain why the presumption should be displaced in this case. Nor does our own review of the record reveal any reason to think the jury failed to follow the judge's well-crafted instructions. To the contrary, the record contains numerous indications that the jury were not "misled, ... swept away by bias or prejudice," or otherwise "failed to come to a reasonable conclusion." W. Oliver Tripp Co., 34 Mass. App. Ct. at 748, 616 N.E.2d 118. The jury took their time deliberating over the case; their question to the judge revealed that they were focused on the evidence; and their damages award was neither disproportionate to, nor unsupported by, the evidence. Contrast Fyffe, supra at 473-474, 17 N.E.3d 453 (fact that $1.2 million award was "in the upper range of what may be ****372** borne by the evidence" supports conclusion

  

that jury's assessment of damages was affected by counsel's improprieties). In addition, the damages award was not of a size to suggest that it was intended to be punitive rather than compensatory. Importantly, we note that the judge did not find that the jury were in fact misled, swayed, or influenced by the improper aspects of the closing, or that the jury's verdict on liability was against the weight of the evidence, or that their damages award was disproportionate to the evidence.

**[18]** **[19]** Because the motion was decided under the incorrect legal standard, the judge's order allowing the motion must be vacated, the verdict from the second trial must be set aside, and a remand is necessary to permit the judge to consider the motion under the correct standard. On remand, for the reasons set out next, the judge need not reconsider whether aspects of plaintiff's counsel's closing were impermissible; we agree that they were. Instead, the question for the judge will be whether the impermissible advocacy resulted in a miscarriage of justice such that a mistrial is required. We note in this regard that a judge is not to "act merely as a '13th juror' [to] set [the] verdict[s] aside simply because he would have reached a different result had he been the trier of facts." Clapp v. Haynes, 11 Mass. App. Ct. 895, 896, 414 N.E.2d 359 (1980), quoting Borras v. Sea-Land Serv., Inc., 586 F.2d 881, 887 (1st Cir. 1978). Nor is a mistrial to be allowed as a form of sanction for attorney misconduct in closing argument. See Wahlstrom, 95 Mass. App. Ct. at 449-450, 127 N.E.3d 274. We note, in addition, that the outcome ***431** of the retrial would not support a conclusion that the first jury were misled or swept away if for no other reason than that both juries reached the same conclusion as to liability and, although the second jury made a smaller damages award, the dollar value of the plaintiff's harm was not contested by the defendants during the first trial.

We now turn to plaintiff's counsel's closing, keeping in mind that closing argument "may contain enthusiastic rhetoric, strong advocacy, and excusable hyperbole," Mass. G. Evid. § 1113(b)(2), but that certain types of argument are improper. Specifically,

> "[t]he following are not permissible in a closing argument:
>
> (A) to misstate the evidence, to refer to facts not in evidence (including excluded matters), to use evidence for a purpose other than the limited purpose for which it was admitted, or to suggest inferences not fairly based on the evidence;
>
> (B) to state a personal opinion about the credibility of a witness, the evidence, or the ultimate issue of guilt or liability;
>
> (C) to appeal to the jurors' emotions, passions, prejudices, or sympathies;
>
> (D) to ask the jurors to put themselves in the position of any person involved in the case;
>
> (E) to misstate principles of law, to make any statement that shifts the burden of proof, or to ask the finder of fact to infer guilt based on the defendant's exercise of a constitutional right; and
>
> (F) to ask the jury to disregard the court's instructions."

Id. at § 1113(b)(3). We agree with the judge that certain aspects of the closing fell within categories (C) and (D) of § 1113(b)(3).

**[20]** Specifically, counsel's repeated references to "we" and "us" impermissibly integrated the jurors with the plaintiff (and counsel) within a community of the "average customers." Certainly, counsel could permissibly argue that the jurors could use their common sense and life experience to determine the reasonable expectations ****373** of a consumer. He could also permissibly argue that the plaintiff was an average consumer. But what he could not do was to draw the jurors into the position of the plaintiff.

***432** The undisputed evidence was that both Wendy's and JBS were large multinational corporations, and plaintiff's counsel was entitled to characterize them as such in his closing. In addition, counsel was permitted a certain amount of latitude to counter the defendants' counsel's attempts to portray the defendants as "fine companies," doing the "right thing," doing the best they could in America. But that latitude did not extend to arguing that the defendants were part of a community of "big companies" who try to shirk responsibility, come up with "excuses," and "confuse things." Nor did it justify counsel's argument that "when Wendy's and JBS sells all those burgers, they are more than happy to take our money. We pay for the burger. It goes to them. But when a burger hurts somebody, no responsibility. No accountability. Shame on them, honestly -- shame on them."

Nor was counsel permitted to invoke future possibilities of harm, [14] or that the jury through their verdict could protect

the community from such dangers,[15] or that a defendants' verdict would give the defendants a "pass" or "reward" them.

Finally, we see no justification for the final portion of the plaintiff's counsel's argument, which attempted to draw the jury into imagining a hypothetical future moment when they might think about their jury service and remember that "safety rules were violated and that you helped to make a wrong right. You made it right and you held them responsible and accountable."

We therefore conclude, as did the judge, that portions of the plaintiff's counsel's closing were outside the bounds of permissible argument.

Conclusion. For these reasons, we vacate the order allowing the defendants' motion for a mistrial, and remand for reconsideration of that motion by the judge in the first instance, consistent with what we have laid out in this opinion.

So ordered.

**All Citations**

96 Mass.App.Ct. 410, 136 N.E.3d 355

## Footnotes

1 JBS Souderton, Inc., and Willow Run Foods, Inc.

2 Tooth 14 is the first upper left molar and an important grinding tooth.

3 The plaintiff saved the half-eaten food, and one of the objects in it was tested and determined to be bone. The defendants did not contest the fact that there was bone in the hamburger.

4 The plaintiff's dentist testified that the bone fragment's density and hardness, rather than its size, determined its ability to damage a tooth, and that bone is among the hardest of materials.

5 As the plaintiff's dentist explained at trial, the gingivectomy "removed about two millimeters of the gum tissue on the palatable side with something called electrocautery, basically, cut[ting] with radio waves but you can think of it as a burning, controlled burn."

6 The plaintiff's claims for negligence and negligent infliction of emotional distress had earlier been voluntarily dismissed, as were all claims against Willow Run Foods.

7 In the latter role, he was responsible for quality assurance.

8 See Stiles v. DeMoulas Super Mkts., 94 Mass. App. Ct. 1116, 2019 WL 124230 (2019). We note that closing argument in that case was markedly different from the one at hand; among other things, plaintiff's counsel repeatedly argued matters not in evidence, suggested that defense counsel had concealed evidence, and improperly argued damages.

9 As the judge explained, "the central ten[e]t underlying the so-called reptile approach is the 'Triune Brain' theory espoused by neuroscientist Paul MacLean in the 1960s, theorizing that there are three discrete parts to the brain reflecting the stages of evolution: a reptilian complex at the core of the brain (primitive and survival-based), a paleomammalian complex located in the mid-brain (focused on emotion, reproduction, and parenting), and a neomammalian complex at the top (capable of language, logic, and planning). Applying this theory to courtroom tactics requires a lawyer to trigger a juror's fear of danger to the community as a result of a defendant's conduct."

10 Brangan, 475 Mass. at 148, 56 N.E.3d 153, held that the Commonwealth is not entitled to an immediate appeal from a decision allowing a motion for a mistrial simply because the motion was decided after the verdict. In reaching this conclusion, the court explained that the nonappealable nature of the ruling on the motion did not change simply because of its timing. In this context, the court stated that the deferred ruling on the mistrial motion was based in practicality and efficiency: "[w]here a defendant's motion for a mistrial is brought during closing arguments and presents a close question, a judge's decision to defer ruling on

  

the motion until after the jury return their verdict enhances judicial efficiency and preserves valuable judicial resources by 'obviating the need for a retrial should the verdict result in an acquittal.' " Id. at 148, 56 N.E.3d 153. The court concluded that in such circumstances, the mistrial motion, even though decided posttrial, was not immediately appealable. Id.

Brangan is a criminal case, where the preclusive effect of an acquittal is grounded in the double jeopardy clause, which "protects against a second prosecution for the same offense after acquittal." North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). " '[A] verdict of acquittal [in our justice system] is final,' the last word on a criminal charge, and therefore operates as 'a bar to a subsequent prosecution for the same offense.' " Bravo-Fernandez v. United States, —— U.S. ——, 137 S. Ct. 352, 357–358, 196 L.Ed.2d 242 (2016), quoting Green v. United States, 355 U.S. 184, 188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). See Conkey v. Commonwealth, 452 Mass. 1022, 1023, 897 N.E.2d 28 (2008), quoting Commonwealth v. Lopez, 383 Mass. 497, 499, 420 N.E.2d 319 (1981) ("[A] defendant cannot be tried by the same sovereign for an offense the conviction of which would require the readjudication of a factual issue which previously has been determined in his or her favor").

This case, by contrast, is a civil action. In civil cases, there is no equivalent finality from a verdict since either party (or both, depending on the outcome) can appeal or otherwise seek relief from the judgment or seek a retrial. See Bravo-Fernandez, 137 S. Ct. at 358 ("In civil suits, inability to obtain review is exceptional; it occurs typically when the controversy has become moot. In criminal cases, however, only one side [the defendant] has recourse to an appeal from an adverse judgment on the merits").

11 The absence of objection, motions to strike, and requests for curative instructions means that any supposed errors (whether in the closing or the instructions) are unpreserved for appellate review. See Gath v. M/A-Com, Inc., 440 Mass. 482, 492, 802 N.E.2d 521 (2003). See also Mass. R. Civ. P. 51 (b), 365 Mass. 816 (1974).

12 Given that she assessed the adequacy of her instructions but did not consider the jury's verdict in her analysis, it appears that the judge chose to assess the motion from the vantage point of the moment the case was submitted to the jury. This was error.

13 Because no objections were lodged below to the closing or the instructions, see note 11, supra, any claim of error is waived, and we have no reason to apply the Fyffe appellate prejudicial error standard.

14 "[I]f you add up all the people that are hurt by things that hardly ever hurt anyone, that adds up to a lot of dangerous things. And sooner or later a danger is going to claim a victim."

15 "Are these important rules in our community? Are we going to enforce them? Are you going to enforce them? If the rules that we talked about here, the safety rules, if those are important you need to speak to that and your verdict needs to speak to that."