Circuit Court for Prince George's County
Case No. CAL19-34071

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 666

September Term, 2021

CARL LITTLE, JR.

v.

KEVIN POHANKA

Wells, C.J.,
Zic,
Ripken,

JJ.

Opinion by Zic, J.

Filed: December 5, 2022

This appeal arises from a motor vehicle accident between Carl Little, Jr. and Kevin Pohanka. Approximately two years after the accident, Mr. Little filed this negligence action. The Circuit Court for Prince George's County found Mr. Pohanka negligent and Mr. Little contributorily negligent. Mr. Little appealed, presenting the following questions for our review:

1. Did the [t]rial [c]ourt err by failing to give [Mr.] Little's requested standard jury instruction (MPJI-Cv 1:16) regarding spoliation of evidence?

2. Did the [t]rial [c]ourt's refusal to instruct the jury as requested cause prejudice to [Mr. Little] such that it constituted reversible error?

For the following reasons, we answer both questions in the negative and affirm the judgment of the circuit court.

BACKGROUND

On December 28, 2017, Mr. Little and Mr. Pohanka collided in a motor vehicle accident in a car dealership parking lot in Prince George's County, Maryland. The dealership's video surveillance camera recorded the accident. Within a week after the collision, Mr. Pohanka's insurance company, Geico, requested the video footage. The footage was sent to Mr. Pohanka's email, which he then submitted to Geico.

Almost two years later, on October 18, 2019, Mr. Little filed a complaint against Mr. Pohanka, alleging that Mr. Pohanka was negligent in operating his vehicle, and as a direct and proximate result of that negligence, Mr. Little sustained injuries and damages. During a deposition, Mr. Pohanka testified that once he learned of Mr. Little's complaint,

he attempted to obtain the video footage from the dealership but was unable to because they no longer had it.

At trial, Mr. Pohanka presented an oral motion *in limine* to exclude a jury instruction on spoliation of evidence and preclude Mr. Little from discussing the video footage of the accident. In response, Mr. Little argued that the jury instruction on spoliation of evidence was necessary because the video footage was material evidence that was potentially lost or destroyed. The circuit court denied Mr. Pohanka's motion *in limine* due to untimeliness and decided to treat the video as an evidentiary issue to be handled during trial.

On direct examination, Mr. Pohanka testified that he submitted the video footage to his insurer, Geico, two years before the lawsuit was filed. Mr. Pohanka stated that he no longer had the video footage because he received it through email and his email storage auto-deletes. At the conclusion of the evidence, the court ruled that the jury instruction on spoliation of evidence would not be given. Because Mr. Pohanka was not on notice to preserve the video footage, the court stated that he did not demonstrate an intent to lose it. The jury found Mr. Pohanka negligent and Mr. Little contributorily negligent, barring Mr. Little's recovery of damages. Mr. Little then filed this appeal on July 2, 2021.

STANDARD OF REVIEW

This court reviews a trial court's denial of a jury instruction under the abuse of discretion standard, which involves a three-part test: "(1) whether the requested

instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given." *Adventist Healthcare, Inc. v. Mattingly*, 244 Md. App. 259, 282 (2020) (quoting *Stabb v. State*, 423 Md. 454, 465 (2011)). "If any one part of the test is not met," the court's denial of the jury instruction will be affirmed. *Butler-Tulio v. Scroggins*, 139 Md. App. 122, 154 (2001) (quoting *Hill v. Wilson*, 134 Md. App. 472, 496 (2000)).

The standard for reversible error regarding a jury instruction requires a demonstration of prejudicial harm. *Giant of Md. LLC v. Webb*, 249 Md. App. 545, 572, (2021) (citing *Barksdale v. Wilkowsky*, 419 Md. 649, 669 (2011)), *aff'd*, 477 Md. 121 (2021). The appellant must demonstrate both error and injury, and "unless it is perceived that the error cause[d] the injury there can be no reversal merely because there is error." *Brown v. Contemporary OB/GYN Assocs.*, 143 Md. App. 199, 253 (2002) (quoting *Harris v. Harris*, 310 Md. 310, 319 (1987)).

DISCUSSION

Spoliation is the "intentional destruction, mutilation, alteration, or concealment of evidence, usu[ally] a document." *Keyes v. Lerman*, 191 Md. App. 533, 537 (2010) (quoting *Black's Law Dictionary*, 1437 (8th ed. 2004)). The spoliation doctrine ensures that a party does not "support its claims or defenses with physical evidence that it has destroyed to the detriment of its opponent." *Cumberland Ins. Grp. v. Delmarva Power*, 226 Md. App. 691, 697 (2016).

I. THE CIRCUIT COURT DID NOT ERR BY DENYING MR. LITTLE'S REQUESTED JURY INSTRUCTION REGARDING SPOLIATION OF EVIDENCE.

When a party intentionally destroys discoverable evidence, courts provide a spoliation jury instruction. *Cost v. State*, 417 Md. 360, 370 (2010). In Maryland, the spoliation jury instruction states that if a jury finds that a party intended to conceal evidence by failing to preserve it, then jurors are required to infer "that the party believes that his or her case is weak." MPJI-Cv 1:16. If jurors find that a party's failure to preserve evidence was negligent, then jurors "may, but are not required to, infer that the evidence, if preserved, would have been unfavorable to that party." *Id.* To determine whether spoliation occurred, a court considers four factors: "(1) [a]n act of destruction; (2) [d]iscoverability of the evidence; (3) [a]n intent to destroy the evidence; [and] (4) [o]ccurrence of the act at a time after suit has been filed, or, if before, at a time when the filing is fairly perceived as imminent." *Cumberland*, 226 Md. App. at 701-02 (quoting *Klupt v. Krongard*, 126 Md. App. 179, 199 (1999)); *Adventist Healthcare*, 244 Md. App. at 274.

The first element regarding destruction of the evidence may take place through physical destruction or "alteration or removal of evidence beyond the reach of the court." *White v. Off. of the Pub. Def. for the State of Md.*, 170 F.R.D. 138, 148 (D. Md. 1997) (outlining test for destruction of evidence, which was adopted by *Cumberland* to determine whether spoliation occurred). There is no factual evidence that Mr. Pohanka destroyed, altered, or removed the video footage. As the circuit court stated, Mr. Pohanka did not own the video footage; instead, he was in possession of an emailed copy

of the video footage. *Compare Steamfitters Loc. Union No. 602 v. Erie Ins. Exch.*, 469 Md. 704, 738-39 (2020) (affirming trial court's grant of spoliation jury instruction because party owned video footage and destroyed it by taping over it after notice of litigation), *with Zorzit v. Comptroller*, 225 Md. App. 158, 180 (2015) (finding that a party did not engage in spoliation of evidence because he did not possess or have access to the relevant evidence, but only had a report of the evidence). Mr. Pohanka's loss of an email containing the video footage cannot be conflated with destruction of the video. *Patterson v. State*, 356 Md. 677, 696 (1999) ("Nonproduction of evidence does not automatically equate with destruction of evidence."). Moreover, whether the dealership that owned the video footage destroyed the evidence is irrelevant because they are not a party to this case. Thus, because Mr. Pohanka did not own or possess the original video footage, he cannot be held responsible for its destruction.

The second element of discoverability is met, as conceded by Mr. Pohanka.[1] Regarding the third element, intent is defined as "knowledge, actual or constructive, that discoverable evidence is relevant to pending litigation." *Klupt*, 126 Md. App. at 200 (affirming trial court's finding of party's intent because he had "actual knowledge of the relevance" of the evidence to the litigation and thus intentionally destroyed it). Additionally, intent has been held to include "knowledge of imminent or reasonably foreseeable litigation." *White*, 170 F.R.D. at 148. Mr. Pohanka had no actual or

[1] Mr. Little also stated during trial that the video footage was requested from Geico during discovery but not provided.

constructive knowledge of the relevance of the video footage to this suit. Mr. Pohanka was not put on notice, he was not instructed by anyone to preserve the video footage, and he did not have a reason to anticipate litigation when he obtained the video footage. Instead, the video footage was obtained due to the request of Mr. Pohanka's insurer, and Mr. Little did not file suit until almost two years later. Mr. Little's decision to file suit two years after the accident demonstrates that litigation was not imminent. Further, because litigation could not be anticipated, Mr. Pohanka did not have a duty to preserve the footage. *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) (noting that the duty to preserve material evidence "extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation"). As the circuit court stated, Mr. Pohanka did not demonstrate "intentionality" because he had no actual or constructive knowledge of the video footage's relevance, nor did he have an obligation to preserve it.

Finally, the fourth element necessitates that the alleged intentional destruction of discoverable evidence occurred after suit was filed or when litigation was perceived as imminent. *Cumberland*, 226 Md. App. at 702 (citing *Klupt*, 126 Md. App. at 199). As previously stated, potential litigation cannot be "fairly perceived as imminent" two years prior. *Id.* Mr. Little heavily relies on *Steamfitters*, 469 Md. at 738, where a party in ownership of relevant video footage confirmed receipt of a litigation hold letter and then proceeded to destroy the video. In contrast, Mr. Pohanka received no notice of potential litigation until almost two years after the accident, at which point he attempted to retrieve

the video, but it had already been lost. Ultimately, spoliation did not occur because Mr. Pohanka did not own the video and thus could not destroy it, he did not have actual or constructive knowledge of its relevance, and litigation was not fairly imminent.

Mr. Little argues that because the jury instruction on spoliation states that a party may be found to negligently destroy or fail to preserve the evidence, a trial court does not have to determine that a party intentionally destroyed the evidence to provide a spoliation jury instruction. MPJI-Cv 1:16. Mr. Little's argument incorrectly construes the intentionality requirement. A trial court must determine not whether a party intentionally or negligently destroyed discoverable evidence, but whether a party had actual or constructive knowledge of the discoverable evidence's relevance when destroying it. *Klupt*, 126 Md. App. at 200. In the scenario where a court finds that a party destroyed discoverable evidence with the required knowledge that it was relevant to warrant a spoliation jury instruction, the jury may then determine whether the destruction was intentional or negligent. But a court must first find that a party fulfills the minimum threshold of knowing that the evidence was relevant, in other words demonstrating intentionality, before granting the spoliation jury instruction.

Because Mr. Pohanka did not commit spoliation of evidence regarding the video footage, the circuit court did not abuse its discretion by failing to provide the jury instruction of spoliation of evidence. Per the second prong of the abuse of discretion test, the requested spoliation jury instruction is not applicable under the facts of this case. Accordingly, we affirm the circuit court's denial of Mr. Little's request for jury

instructions of spoliation of evidence. *See Adventist Healthcare*, 244 Md. App. at 282 (finding that because spoliation did not occur under the four-factor test, the circuit court did not abuse its discretion when denying a requested spoliation jury instruction because it was not applicable under the facts of the case).

II. THE CIRCUIT COURT'S DENIAL OF A SPOLIATION JURY INSTRUCTION DID NOT CAUSE PREJUDICE TO MR. LITTLE TO CONSTITUTE REVERSIBLE ERROR.

Mr. Little argues that the circuit court's denial of a spoliation jury instruction caused prejudicial harm, constituting reversible error. To demonstrate a reversible error, the appellant must show both error and injury, and "unless it is perceived that the error cause[d] the injury there can be no reversal merely because there is error." *Brown*, 143 Md. App. at 253 (quoting *Harris*, 310 Md. at 319). The alleged prejudicial harm must be probable, not merely possible. *CSX Transp., Inc. v. Pitts*, 203 Md. App. 343, 391 (2012) (citing *Barksdale*, 419 Md. at 662), *aff'd*, 430 Md. 431 (2013). The appellant must show that the alleged error "was likely to have affected the verdict below," *Crane v. Dunn*, 382 Md. 83, 91 (2004), and that it was "both manifestly wrong and substantially injurious." *Id.* at 92 (quoting *Rotwein v. Bogart*, 227 Md. 434, 437 (1962)). Even if an appellate court finds that a trial court's denial of a jury instruction was erroneous, the court may still affirm if prejudice due to the denial is not demonstrated. *Livingstone v. Greater Wash. Anesthesiology & Pain Consultants, P.C.*, 187 Md. App. 346, 364 (2009) (citing *Landon v. Zorn*, 389 Md. 206, 227 (2005), *abrogated on other grounds by McQuitty v. Spangler*, 410 Md. 1 (2009)).

Not only was there no error by the circuit court in denying the request for a jury instruction on spoliation, but there was no injury to Mr. Little. Although Mr. Pohanka was found negligent, Mr. Little argues that the denial of the jury instruction was prejudicial because he was found contributorily negligent. This argument extends beyond the reach of the jury instruction. Mr. Little's argument is predicated on the premise that if the spoliation instruction was provided, he would not have been found contributorily negligent. However, as the jury instruction states, at best, a jury may find that a party "believes that his or her case is weak and that he or she would not prevail if the evidence was preserved." MPJI-Cv 1:16. Thus, the jury instruction is limited to the jury's view of Mr. Pohanka; even if the instruction led the jury to find Mr. Pohanka negligent, it would not preclude the jury from finding Mr. Little contributorily negligent. The instruction cannot absolve Mr. Little because it only allows for a negative inference of Mr. Pohanka at best. Because Mr. Pohanka was already found negligent, granting the jury instruction would not have changed the outcome of this case. Accordingly, Mr. Little did not suffer injury or prejudicial harm to constitute reversible error.

Mr. Little also argues that the circuit court erred in sustaining an objection to his question regarding Mr. Pohanka's insurance company. Mr. Little asserts that the circuit court's ruling prejudiced him because he could not "explore [Mr. Pohanka's] explanation for losing the video." However, the question at issue related to whether Mr. Pohanka was

in court with the assistance of his insurance company.[2] Assistance provided to Mr. Pohanka does not relate to whether spoliation occurred. Because Mr. Little's question exceeded the scope of the cross-examination, the circuit court did not err, and Mr. Little was not prejudiced. Md. Rule 5-611(b) ("[C]ross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness."); *Baires v. State*, 249 Md. App. 62, 99 (2021) (finding that a trial judge may exclude questions "made for the purposes of exceeding direct examination or [that] would . . . result[] in responses that would have exceeded the scope of direct examination."). Thus, not only did the circuit court not err, but Mr. Little fails to demonstrate injury or prejudicial harm to constitute reversible error.

For the above reasons, we hold that the Circuit Court for Prince George's County properly denied Mr. Little's request for a jury instruction regarding spoliation of the evidence.

JUDGMENT OF THE CIRCUIT COURT OF PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[2] The question was asked as follows: "Okay. You've been -- you're here today with the assistance from Geico, correct?"