Circuit Court for Prince George's County
Case No. CAL18-23031

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2175

September Term, 2019

E&R SERVICES, INC., ET AL.

v.

DELANEY THOMPSON

Gould,*
Zic,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: September 30, 2021

*Judge Steven B. Gould, now serving on the Court of Appeals, participated in the hearing and conference of this case while an active member of the Court; he participated in the adoption of this opinion as a specially assigned member of this Court.

E&R Services, Inc. ("E&R") and the City of Laurel ("City") appeal from a jury verdict in the Circuit Court for Prince George's County awarding noneconomic damages to Delaney Thompson, appellee, in a negligence action. Ms. Thompson brought claims for negligence against E&R and the City for allegedly leaving concrete debris on a sidewalk in the Cherrywood condominium development ("Cherrywood") that she claims caused her to fall and sustain injuries. During trial, the circuit court excluded the digital file information[1] for the photograph of the rock that was the alleged cause of Ms. Thompson's fall. For the reasons set out below, we shall vacate the judgment of the circuit court and remand the case for a new trial.

QUESTION PRESENTED

The appellants present ten questions for our review.[2] We resolve this appeal based on one of those questions, which we have rephrased as follows:

[1] Throughout this opinion, we use "digital file information" and "metadata" interchangeably.

[2] The appellants raised the following questions in their brief:

I. Did the trial court err by denying E&R's motions for judgment?

A. Did [a]ppellee prove a prima facie case of negligence, when [a]ppellee impermissibly relied on conjecture and speculation to prove causation?

B. If the rock was a customary, permissible condition on the sidewalk, not a dangerous trap, was the rock dangerous under Maryland law?

1. Did the circuit court err by not admitting the digital file information for the photograph of the rock that allegedly caused Ms. Thompson's fall, specifically the date that photograph was taken, and, if so, was the exclusion of this evidence prejudicial?

C. Was the rock on the sidewalk open and obvious negating [a]ppellants' duty, under Maryland law, to warn or protect [a]ppellee from the rock?

D. Was [a]ppellee contributorily negligent as a matter of law, when the rock was visible and there to be seen?

II. Did the trial court commit multiple errors during the trial that were likely to have impacted the outcome of the jury's verdict and award of damages?

A. Did the trial court err by permitting [a]ppellee to present irrelevant testimony from the video deposition of E&R's Corporate Designee that he thought [a]ppellee's claim was "bogus" and that she wanted "easy money?"

B. Did the trial court err by precluding evidence of the digital file properties of the photograph of the rock that allegedly caused [a]ppellee's fall?

C. Did the trial court err by precluding E&R from introducing [a]ppellee's statements regarding her prior symptoms to her primary care physician, and prior medical records into evidence?

D. Did the trial court err by permitting [a]ppellee to read into evidence the deposition transcript of an employee of [the City] at trial?

For the reasons set forth below, we hold that the metadata associated with the digital photograph of the rock was erroneously excluded and that this exclusion was prejudicial. As such, we do not address the additional questions raised by the appellants.

BACKGROUND

Ms. Thompson's Fall

On November 10, 2015, Ms. Thompson fell on a sidewalk in Cherrywood. Ms. Thompson was walking her two small dogs when she "stepped on something" and fell, resulting in a broken right foot, two sprained wrists, and a fractured left knee cap. She alleges that she stepped on a piece of concrete debris left on the sidewalk by E&R. Ms. Thompson testified that she did not immediately know what she fell on until she was on the ground and saw a rock and concrete debris littered on the sidewalk. After Ms. Thompson fell, her friend, Denise Redmond, arrived at Cherrywood and found Ms. Thompson injured in her home. Contrary to Ms. Thompson's testimony, Ms. Redmond testified that when she found Ms. Thompson after the fall, Ms. Thompson did not know what she fell on.

Photographs of the Rock

After caring for Ms. Thompson, Ms. Redmond testified that she went outside to observe the scene of the fall and took photographs with her iPhone of concrete debris, which were admitted into evidence as Plaintiff's Exhibits 15 and 16.[3] Ms. Redmond

[3] Plaintiff's Exhibits 15 and 16 each show a single rock, which appears to be a piece of concrete debris.

testified that she took the photographs within an hour of arriving at Cherrywood on November 10, 2015. Ms. Thompson, however, testified during trial that Ms. Redmond did not take the photographs of the rock on November 10, 2015. Additionally, when asked whether Ms. Redmond left the house before they both went to Urgent Care, Ms. Thompson stated "I know she didn't go back to where I fell."

Ms. Thompson testified that the rock she believes she fell on was close to the curb. The two photographs taken by Ms. Redmond depict the rock on the opposite side of the sidewalk near the grass. Ms. Redmond and Ms. Thompson both agreed that the rock was moved at some point after the incident. According to Ms. Thompson, it was moved prior to when the photographs were taken. Ms. Redmond admitted that she moved the rock.

Work Done by E&R on November 10, 2015

The City owns the sidewalk where Ms. Thompson allegedly fell. The City hired E&R to repair multiple sections of the sidewalk and curb in Cherrywood. Ms. Thompson testified that on the morning of November 10, 2015, E&R was performing construction work on the sidewalk. Ms. Thompson claimed that she heard jackhammering and other construction sounds that morning. And she testified that once it began to rain, she saw the construction workers pack up. E&R's records, however, show that the crew assigned to the Cherrywood project did not work on November 10, 2015 due to rain. The concrete truck was also cancelled by E&R for that day. Emilio Rodriguez, the owner of and corporate designee for E&R, testified that it is the company's policy to not work when

there is at least a 50% chance of rain in the forecast because they are unable to pour concrete in the rain.

Procedural History

Ms. Thompson asserted, among other claims, negligence against E&R and the City for their alleged roles in her fall.[4] The circuit court held a jury trial to adjudicate Ms. Thompson's claims. During the trial, E&R attempted to admit Defendant's Exhibit 9: a computer screenshot of the digital file information for one of the photographs of the rock that Ms. Redmond allegedly took on November 10, 2015.[5] The court determined that Ms. Redmond was not qualified to explain the date of the photograph as listed in the photograph's digital file information ("date taken"), which was November 24, 2015, or any of the other embedded digital information and that E&R needed an expert witness to admit this into evidence. Prior to this ruling, the court admitted screenshots of the digital file information for two photographs of Ms. Thompson's injured knee without an expert witness to explain this information.[6]

The jury rendered a verdict in Ms. Thompson's favor, finding that E&R and the City were negligent and awarding Ms. Thompson $300,000 in noneconomic damages. There was no claim for medical expenses. The jury also found that E&R's and the City's

[4] Ms. Thompson raised claims against two other defendants: American Community Management, Inc. and Cherrywood Condominium Association, Inc. The jury found in their favor and they are not involved in this appeal.

[5] The digital file information pertained to the photograph marked as Plaintiff's Exhibit 15.

[6] These were admitted as Defendant's Exhibits 7 and 8.

negligence was the proximate cause of Ms. Thompson's injuries and that E&R was required to indemnify the City for any damages resulting from this lawsuit. Thereafter, E&R moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. The circuit court denied E&R's motion on December 4, 2019. On January 2, 2020, E&R filed a timely notice of appeal. The City also noted an appeal on January 9, 2020.

DISCUSSION

The appellants contend that the circuit court erred in ruling that expert testimony was required to admit the date taken listed in the metadata associated with the digital photograph of the rock. They argue the photograph's date taken was properly presented during trial through a lay witness, Ms. Redmond, who took the particular photograph. Conversely, Ms. Thompson argues that Ms. Redmond, as a lay witness, was not qualified to discuss this information because she was not "an expert in digital file metadata."

The applicable "standard of review on the admissibility of evidence depends on whether the [circuit court] 'based [its decision] on a discretionary weighing of relevance in relation to other factors or on a pure conclusion of law.'" *Perry v. Asphalt & Concrete Servs., Inc.*, 447 Md. 31, 48 (2016) (quoting *Parker v. State*, 408 Md. 428, 437 (2009)). Generally, an abuse of discretion standard is used to review the admission or exclusion of evidence, but a de novo standard applies when the court's ruling was based on a legal question. *Perry*, 447 Md. at 48.

"Expert testimony is required 'only when the subject of the inference . . . is so particularly related to some science or profession that is beyond the ken of the average

layman.'" *Johnson v. State*, 457 Md. 513, 530 (2018) (quoting *Bean v. Dep't of Health & Mental Hygiene*, 406 Md. 419, 432 (2008)). Such testimony "is not required on matters of which the jurors would be aware by virtue of common knowledge.'" *Johnson*, 457 Md. at 530 (quoting *Bean*, 406 Md. at 432). Based on our review of the caselaw, Maryland courts have not explicitly ruled on whether the date taken provided in the metadata[7] for a digital photograph needs to be admitted through expert testimony. However, in *State v. Payne*, 440 Md. 680 (2014), the Court of Appeals did state that "[w]hen metadata is presented in the course of litigation, it is accomplished through expert testimony." *Id.* at 691-92 n.14. Ms. Thompson references this quotation as supporting authority for her contention that expert testimony was necessary to admit the metadata for the photograph of the rock. We believe that *Payne* is distinguishable from the evidence at issue here.

In *Payne*, a police officer testified as a lay witness about cell phone call records that the officer obtained from the cell phone company and subsequently analyzed in order to locate the suspects. *See id.* at 685-89. The Court held that the officer "needed to be qualified as an expert under Maryland Rule 5-702 before being allowed to testify as to his process for determining the communication path of [the defendants'] cell phones." *Id.* at

[7] Metadata is defined as "'data about data' which can provide 'information about the authorship' of a document or the 'make of the cell phone' that created a picture." *State v. Payne*, 440 Md. 680, 691 n.14 (2014) (quoting Larry E. Daniel & Lars E. Daniel, *Digital Forensics for Legal Professionals: Understanding Digital Evidence from the Warrant to the Courtroom* §§ 27, 27.2.3, 27.2.4 (2012)). "[T]his information can be used to identify when a piece of data, say a picture, was created, or when a website was accessed through a smartphone." *Payne*, 440 Md. at 691 n.14.

684. The Court explained that the process the officer used to determine the location data "was beyond the ken of an average person." *Id.* at 700.

In *Gross v. State*, 229 Md. App. 24 (2016), this Court differentiated between data that requires interpretation by a witness—as exhibited in *Payne*—and data that is merely read by the witness. *See id.* at 33-34. We then held that "expert testimony is not necessary for the admission of records of GPS data, where the witness merely reads the GPS data as it appears in the records." *Id.* at 36. In explaining this holding, this Court stated that "the average juror could understand the GPS records without expert help" as they "indicate simply and clearly the date and time of the reading and the address at which the [object] was then located." *Id.* at 34. Later, in *Johnson v. State*, 457 Md. 513 (2018), the Court confirmed the ruling in *Gross*, concluding that GPS evidence does not need to be introduced through expert testimony because, even though an individual may not understand how a GPS device works, "[t]he general public has a common sense understanding of what information the device conveys." *Id.* at 518, 531. Relevantly, the Court also stated:

> In many instances, such records indicate, like the GPS report here, a person's (or device's) location at a given time, are produced or processed by computers, and are admitted without expert testimony—e.g., computer generated reports from electronic ankle monitoring devices, electronic records of employee card access, computer reports generated from electronic hotel key cards, and computer reports from electronic toll transponders. Expert testimony about how a clock works is not necessary every time an employee's timesheet is offered into evidence. The same is true for GPS entries.

Id. at 532 (footnotes omitted).

To guide our analysis, we also look to *People v. Froehler*, 373 P.3d 672 (Colo. App. 2015). There, the Colorado Court of Appeals concluded that the detective's testimony about the "date created" and "date modified" associated with certain photographic images on a flash drive was "properly admitted as lay witness testimony." *Id.* at 676-77. The court explained that such data was "within the realm of knowledge of ordinary people who use computers in everyday life." *Id.* at 677. It further stated that the method that the detective used to determine the date on which the photographs were taken—"simply . . . plugging the flash drive into her computer and right-clicking on the image files"—"did not require any specialized knowledge or familiarity with computers beyond that of the average lay person." *Id.*

We believe that the admission of the metadata for the digital photograph of the rock, specifically the date taken, did not require expert testimony. Similar to the circumstances of *Gross* and *Froehler*, Ms. Redmond was not asked to analyze or interpret the date of the photograph of the rock provided in the picture's digital file information. After confirming that she took the photograph using her iPhone 6, which was subsequently transferred to E&R's counsel by email, Ms. Redmond was only asked to read the date as it appeared on the computer screenshot of the photograph's metadata. The circuit court, however, determined that expert testimony was necessary to the admission of the digital photograph's file information, stating:

> [THE COURT]: But counsel is correct that [Ms. Redmond] cannot testify as to the imbedded information, and that

> information either will have to come in by way of stipulation or through another witness who is qualified to do that.
>
> * * *
>
> [THE COURT]: . . . She can say that I have an iPhone. She can say when she took the photo. She can't testify to all of this information unless she has some type of specialized computer knowledge.

We disagree that "some type of specialized computer knowledge" was required. In reading the date taken, Ms. Redmond did not "engage[] in a process to derive [her] conclusion . . . that was beyond the ken of an average person." *Payne*, 440 Md. at 700. And she was not required to apply any specialized knowledge in doing so. It is our belief that "the average juror could understand the [date taken provided in the photograph's metadata] without expert help." *Gross*, 229 Md. App. at 34. As such, we hold that Defendant's Exhibit 9 was improperly excluded during trial.

The final step in our analysis is determining the effect of the erroneous ruling. Maryland Rule 5-103(a) provides that for an appellate court to conclude that the exclusion of evidence was in error, the exclusion must have been prejudicial and the substance of the evidence must have been made known to the circuit court. Ms. Thompson claims that there was no prejudice to the appellants because during both cross-examination of Ms. Redmond and E&R's closing argument, the date taken (November 24, 2015) was stated in front of the jury.

It is well established that, "[e]ven where there is error, this Court will not reverse a lower court's judgment for harmless error." *Perry*, 447 Md. at 49. Instead, the objecting

party must establish that the error was prejudicial. *Id.* "Prejudice will be found if a showing is made that the error was likely to have affected the verdict below. 'It is not the possibility, but the probability, of prejudice which is the object of the appellate inquiry.'" *Crane v. Dunn*, 382 Md. 83, 91 (2004) (quoting *State of Md. Deposit Ins. Fund Corp. v. Billman*, 321 Md. 3, 17 (1990)). "Courts are reluctant to set aside verdicts for errors in the admission or exclusion of evidence unless they cause substantial injustice." *Perry*, 447 Md. at 49 (quoting *Brown v. Daniel Realty Co.*, 409 Md. 565, 584 (2009)). The Court has found the exclusion of a single piece of evidence to cause such injustice, thus warranting reversal of a jury verdict, even though the excluded evidence was not conclusive on the issue presented. *See Crane*, 382 Md. at 101-02 (holding that the erroneous exclusion of the driver's guilty plea to negligent driving from a prior civil proceeding was prejudicial, especially given that the driver and the passenger were the only witnesses to the accident).

The photographs of the rock depicted in Plaintiff's Exhibits 15 and 16 are the only photographs in the record showing there was indeed debris on the sidewalk where Ms. Thompson allegedly fell.[8] Multiple inconsistencies in the trial testimony of Ms. Thompson and Ms. Redmond call into question when these photographs were actually taken. Ms. Thompson testified that she noticed the rock and concrete debris on the sidewalk after falling while she was still on the ground:

[8] Plaintiff's Exhibits 2 through 7 purport to show the curb and gutter but do not show any debris in the area.

> [MS. THOMPSON]: I was trying to collect myself. I was in some severe pain at that point. And I did notice, after a while I did notice when I was trying to get up that there was a lot of debris there in that area. I noticed the (Inaudible) stepped on. . . .
>
> [COUNSEL FOR MS. THOMPSON]: Well, as far as what you observed when you were on the ground collecting yourself I want to show you [Plaintiff's Exhibits] 15 and 16 which I think are already in evidence. What do [these exhibits] show?
>
> [MS. THOMPSON]: It shows the piece of concrete that I stepped on.

But Ms. Redmond testified that when she arrived and found Ms. Thompson injured in her home, Ms. Thompson did not know what made her trip.

According to Ms. Redmond, upon learning that Ms. Thompson fell but not knowing what she stepped on, Ms. Redmond went outside to assess the condition of the sidewalk where Ms. Thompson claimed she fell. At that point, Ms. Redmond claims she took the two photographs of the rock, which were admitted as Plaintiff's Exhibits 15 and 16:

> [COUNSEL FOR MS. THOMPSON]: And is this a fair and accurate -- do you know who took this picture?
>
> [MS. REDMOND]: I believe I did.
>
> [COUNSEL FOR MS. THOMPSON]: . . . When did you take this photo?
>
> [MS. REDMOND]: So it would have been after I talked to [Ms. Thompson]. . . .
>
> * * *

> [COUNSEL FOR MS. THOMPSON]: About how long after you got there did you take that photo?
>
> [MS. REDMOND]: Within the hour.

In further contradiction of Ms. Thompson's testimony that she noticed the rock and other debris directly after the fall, Ms. Redmond explained that she took the pictures "[b]ecause I wanted to be able to show [Ms. Thompson] what I saw on the sidewalk and what she possibly would have tripped on or fell on."

Despite Ms. Redmond's above statements, Ms. Thompson testified that "these pictures were taken a day or two after the fall." She further contradicted Ms. Redmond's testimony by stating that Ms. Redmond, after arriving, did not leave the house until they both went to Urgent Care:

> [COUNSEL FOR E&R]: All right. And neither you or -- so, [Ms. Redmond] came.
>
> [MS. THOMPSON]: Yes.
>
> [COUNSEL FOR E&R]: And she came into the house?
>
> [MS. THOMPSON]: Yes.
>
> [COUNSEL FOR E&R]: And then neither of you left the house after that time, correct?
>
> [MS. THOMPSON]: Not immediately. We did leave to go to Urgent Care.
>
> [COUNSEL FOR E&R]: Okay. But between the time that she came in and discovered you were injured and the time that you went to Urgent Care neither of you left the house, correct?
>
> [MS. THOMPSON]: I know I didn't.

> [COUNSEL FOR E&R]: Okay. Well -- I asked you about that. Page 74, line 1. Question. Okay. Did you or [Ms. Redmond] go out, back out to the location where you fell? Answer. No. Does that refresh your recollection?
>
> [MS. THOMPSON]: I know she didn't go back to where I fell.

The erroneously excluded metadata lists the photograph's date taken as November 24, 2015, raising further doubt about the condition of the sidewalk on the day of Ms. Thompson's fall.

There is also conflicting evidence concerning the location of the rock on the sidewalk at the time of Ms. Thompson's fall. According to Ms. Thompson, the rock was close to the curb. Plaintiff's Exhibits 15 and 16, however, show the rock on the other side of the sidewalk, close to the grass. Ms. Redmond did admit to moving the rock:

> [COUNSEL FOR E&R]: And did you move the rock before you took pictures of it?
>
> [MS. REDMOND]: So I don't -- I did move the rock.
>
> [COUNSEL FOR E&R]: Did not?
>
> [MS. REDMOND]: I did move the rock because then I didn't want anybody else to -- for it to be in the walkway. So I did move it. So the question is did I move it before or after I took the picture, and that I could not answer to you.
>
> [COUNSEL FOR E&R]: So then --
>
> [MS. REDMOND]: Because my immediate reaction walking up, if I see something that I feel is, you know, a compromise, I'm going to -- I'm going to move it. And then I realized that, well, you shouldn't have; then you should have just go on and

> taken the picture. So I put it back where it was, took the picture and then moved it.

Because there is no other evidence besides Ms. Thompson's and Ms. Redmond's conflicting testimony establishing that the rock depicted in Plaintiff's Exhibits 15 and 16, which is the alleged cause of Ms. Thompson's fall and the basis of her negligence claim, was on the sidewalk on November 10, 2015, we believe that the date of the photograph as listed in the photograph's metadata was material to the outcome of this case. Accordingly, we conclude that the exclusion of the date taken provided in the photograph's digital file information caused substantial prejudice to E&R.

Ms. Thompson asserts that E&R was not prejudiced because its counsel mentioned the date taken (November 24, 2015) during closing argument and thus the jury heard this evidence. But in Ms. Thompson's closing argument, her attorney stated to the jury that the defense was being untruthful in claiming that November 24, 2015 was the date taken.[9] Specifically, Ms. Thompson's counsel said: "[B]ut they just flat out lied to you. They said November 24, 2015 is going to have a time stamp on it. There is no November 24, 2015 time stamp. I just needed to make that clear."

Moreover, in our opinion, hearing evidence during trial and seeing that evidence properly admitted do not have the same effect on the jury. The jury is left wondering why the November 24, 2015 date taken was not allowed into evidence by the court. The

[9] At no point during trial, nor anywhere in her brief, does Ms. Thompson contend that the date taken associated with the photograph of the rock was manipulated. As noted above, that photograph was taken by Ms. Thompson's witness, namely Ms. Redmond, and was produced by Ms. Thompson's counsel.

court inexplicably allowed in the date taken for the two photographs of Ms. Thompson's injured knee, further calling into question for the jury the validity of the excluded November 24 date, especially in light of the comment by Ms. Thompson's counsel that "[t]here is no November 24, 2015 time stamp."

In conclusion, we hold that the exclusion of Defendant's Exhibit 9, specifically the date taken provided in the metadata for the digital photograph of the rock, was both erroneous and prejudicial.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY VACATED; CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR A NEW TRIAL CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.