IN THE COURT OF APPEALS OF MARYLAND

PETITION DOCKET NUMBER **38-2021 T.**

KAREN WEBB,

Petitioner,
v.

GIANT OF MARYLAND LLC,

Respondent

Petition for Writ of Certiorari to the Court of Appeals
(Sept. Term, 2019, No. 413)

Michael D. Reiter (CPF # 1012160059)
CHASENBOSCOLO INJURY LAWYERS
7852 Walker Drive, Suite 300
Greenbelt, Maryland 20770
(301) 220.0050
(301) 474.1230 (fax)
Counsel for Petitioner

MS. WEBB'S PETITION FOR WRIT OF CERTIORARI

Karen Webb ("Ms. Webb") through counsel Michael D. Reiter, Benjamin T. Boscolo and **CHASEN**BOSCOLO, hereby requests that this Court grant certiorari and review the reported decision below, which overturned a $400,000 verdict. Review by this Court is necessary and in the public interest for three reasons. First, it will provide clarity for litigants as to whether the Court of Special Appeals (COSA) departed from its own precedent without explanation in reviewing the denial of a motion for summary judgment under an abuse of discretion standard of review but not a denial of a motion for judgment under that same abuse of discretion standard. Second, it will provide essential guidance where, as the Court of Special Appeals found, the evidence did not change between summary judgment and through trial, as to whether it is inconsistent to affirm a trial court's denial of a motion for summary judgment but then reverse the trial court's denial of a motion for judgment on the same facts. As this court recently stated, great deference should be afforded to finders of fact, stating, "an appellate court has 'no power to review the finding of the jury upon matters of fact.'" *Est. of Blair by Blair v. Austin*, 469 Md. 1, 18, 228 A.3d 1094, 1103 (2020)(citation omitted). Third, review will result in an explanation of whether there is an abuse of discretion in giving a standard spoliation instruction where the Court of Special Appeals indicated that there was sufficient evidence to argue that jurors could draw negative inferences from the absence of video footage of the incident as

well as provide an explanation of what constitutes “probable prejudice” adequate to vacate a jury verdict.

A. QUESTIONS FOR REVIEW

1. In reviewing the denial of a motion for summary judgment but not the denial of a motion for judgment under the abuse of discretion standard, did COSA depart without explanation from its own precedent in holding that a trial court's denial of both motions for summary judgment and/or for judgment are reviewed under an abuse of discretion standard?
2. Where, as the appellate court found, the evidence did not change between summary judgment and through trial, did COSA, which upheld the trial court’s denial of a motion for summary judgment on an issue of material fact, then err in reversing the trial court’s ruling denying the motion for judgment addressing the same issue of material fact?
3. Where COSA indicated that there was sufficient evidence to argue that jurors could draw negative inferences from the absence of video footage of the incident given the presence and operation of cameras aimed in the direction of the incident, did COSA err both in holding that the trial court’s decision to provide a standard spoliation instruction was an abuse of discretion and in holding that giving the instruction also resulted in probable prejudice?

B. STATEMENT OF THE CASE

This case arises from a lawsuit filed in the Circuit Court for Anne Arundel County on October 13, 2017 Docket # C-02-CV-17-003054. Following a four day trial on April 26, 2019, the jury found Respondent Giant of Maryland, LLC, negligent and vicariously liable for the actions of its agent, Mr. Kedyonn Winzer, who failed to safely operate a pallet jack, striking Ms. Webb and seriously injuring her. Before trial, Respondent moved for summary judgment alleging that Ms. Webb failed to offer evidence that Giant sufficiently controlled the details of

Winzer's (who worked for Pepsico) work to present a material issue of fact for the jury to decide. That motion was denied.

During trial at the close of Petitioner's and its own case, Respondent moved for judgment on the same grounds. The trial judge denied both motions, holding that the critical questions were "whether Mr. Winzer…did something that was negligent that resulted in the injury that was caused to Ms. Webb [and]….is there evidence to keep this case alive against Giant with regards to Mr. Winzer's actions that day." The trial court reasoned that "there was evidence to – that Giant controlled access to the store. The evidence was that [Mr. Winzer] checked in when he got there, he checked out when he left; that at points Giant…would supervise what he had done. I – he used equipment [owned] by Giant. Giant had regulations on types of equipment that he could use during certain hours. So I think that there is some evidence that the Plaintiff can argue that there is enough of a relationship between Giant and Mr. Winzer that it becomes a question of fact for the jury to decide."

At trial, the court gave a pattern spoliation instruction. Petitioner pointed out that there were cameras throughout the store, that they were pointing where the incident occurred, and that they were operable at the time of the incident and yet Respondent produced no video footage of the incident. Respondent objected to the instruction, arguing it would be unfairly prejudicial since there was no evidence that video footage of the incident had existed. The court found the

evidence sufficient to support giving the spoliation jury instruction. The jury returned a $400,000 verdict.

Respondent appealed to COSA, arguing that the facts regarding the degree of control exerted by it over the pallet jack operator were insufficient to create an issue of material fact and that the court's decision to give a spoliation instruction was an abuse of discretion. COSA determined that the fact pattern did not change between summary judgment and through trial and affirmed the trial court's denial of Giant's summary judgment motion, yet reversed the court's denial of the motion for judgment. It asserted that the critical question was not one of an agency relationship but solely independent contractor liability. Separate verdict sheet questions, however, were submitted regarding whether Mr. Winzer was an agent or independent contractor and the jury determined that an agency relationship existed. COSA also found that Petitioner could properly argue that jurors could draw negative inferences based on the absence of video footage given the presence and operation of cameras aimed in the direction of the incident, but then ruled that the trial court abused its discretion by giving a spoliation instruction and that it could not rule out prejudice because there was no actual evidence that the video existed.

C. STATEMENT OF THE FACTS

On December 4, 2014, Ms. Webb was a customer of Giant. She went to Giant and, while in the frozen food aisle, was struck with a pallet jack being pushed by a Pepsico employee, Mr. Winzer, who was using the jack owned by

Giant. Mr. Winzer testified that Giant's jacks were available for his and other third-party vendors' use with Giant's express permission and consent. When he arrived at Giant, he would meet with a Giant shipper, receiver and manager on duty, and had an understanding of Giant's expectations of him within their store to use its equipment safely. Mr. Winzer was moving product that would be sold at Giant's store for Giant's benefit and moving through its aisles where Giant knew customers would be during normal business hours.

Mr. Coradini, Giant's corporate representative, acknowledged several controls Giant exercises over vendors, such as directing vendors on where to place items and displays, "correct[ing]" them where a safety issue was observed and retaining authority to "kick [vendors] out of the store if they're abusing or not doing something properly." Giant, Mr. Coradini added, has "probably upwards of 30-some cameras" positioned "throughout the entire store" and that "there's cameras around [the] frozen food [section]. If [the incident was] in frozen food, they point every direction." Evidence at trial indicated that, on the day of the incident the cameras were in operation and that Giant had notice to preserve footage of the incident when an incident report was created. Giant also confirmed that it had received preservation of evidence letters within two weeks after the incident. Despite this, Respondent failed to produce video footage.

ARGUMENT

A. The Court Of Special Appeals Departed From Its Own Precedent Without Explanation In Reviewing The Denial Of A Motion For Summary Judgment Under An Abuse Of Discretion Standard Of Review But Not A Denial Of A Motion For Judgment Under That Same Abuse Of Discretion Standard.

In Maryland, denial of a motion for summary judgment is reviewed for abuse of discretion. *See Dashiell v. Meeks*, 396 Md. 149, 165(2006). The appellate court presumes, even in the absence of a stated ground for the denial, that the trial court implicitly rejected appellant's assertion that summary judgment was required in light of his asserted defenses. *Fischbach v. Fischbach*, 187 Md. App. 61,)) (2009)975 A. 2d 333, 342 (Md. App. 2009). As COSA recently held in *Six Flags Am., L.P. v. Gonzalez-Perdomo*:

> [O]n appeal, the standard of review for a denial of a motion for summary judgment is whether the trial judge abused his discretion and in the absence of such a showing, the decision of the trial judge will not be disturbed. The same standard of review applies for a motion for judgment notwithstanding the verdict and a motion for judgment at the close of the evidence….[i.e.] whether on the evidence presented a reasonable fact-finder could find the elements of the cause of action by a preponderance of the evidence…Consequently, if there is *any evidence, no matter how slight*, that is legally sufficient to generate a jury question, the case must be submitted to the jury for its consideration.

Six Flags Am., L.P. v. Gonzalez-Perdomo, 248 Md. App. 569, 581, 242 A.3d 1143, 1150 (2020), *cert. denied* March 26, 2021(*citations omitted)(emphasis added); Id. at 586* (holding that "the circuit court did not abuse its discretion by denying Six Flags' motion for summary judgment and motion for judgment at trial").

Here, COSA should have, but did not apply an abuse of discretion standard in determining whether the trial court's denial of the motion for judgment was proper. The trial court properly denied Defendant's motion for summary

judgment and motion for judgment based on the same evidence. COSA indicated the facts did not change between Respondent's Motion for Summary Judgment and Motion for Judgment. Slip.Op., p. 10 n.6. COSA held that the facts were sufficient to affirm the trial court's denial of the Motion for Summary Judgment and that it was not abuse of discretion to do so. But it then illogically held, contrary to its recent holding in *Six Flags, supra*, that those same facts were somehow insufficient to affirm the trial court's denial of the motion for judgment. A review of COSA's decision will provide clarity where, as here, the trial court's denial of a motion for summary judgment was reviewed under an abuse of discretion standard, that its denial of a motion for judgment on the same factual question should likewise not be disturbed except for abuse of discretion.

B. COSA Correctly Affirmed the Trial Court's Order Denying Giant's Summary Judgment Motion, but Illogically and Inconsistently Reversed the Trial Court's Denial of Giant's Motion for Judgment Based On The Same Evidence.

COSA held that the facts here were sufficient to affirm the trial court's denial of the Motion for Summary Judgment but were somehow insufficient to affirm the trial court's denial of the motion for judgment, on the same facts. That conclusion is inconsistent and illogical. As COSA determined, the evidence on which the trial court based its denials of the motions for summary judgment and judgment was the same. The latter ruling was in fact made after the close of Ms. Webb's case, after the trial judge was able to "appreciate` nuances, inflections and impressions never to be gained from a cold record,' *Buck v. Cam's*

Broadloom Rugs, Inc., 328 Md. 51, 59, 612 A.2d 1294, 1298 (1992). The trial court, having heard testimony and observing witnesses, properly determined that the evidence of Giant's control over Mr. Winzer's actions created a genuine issue of material fact for the jury. That ruling should not have been disturbed.

There is no dispute that a claim of vicarious liability exists against a Defendant where injury arises out of the conduct of a contractor and the "operative details and methods" of the contractor's work are under defendant's control and "are the very thing from which the injury arose." *Appiah v. Hall*, 416 Md. 533 (2010). COSA assumed that the operation of the jack was "the very thing from which the injury arose." But in reversing the court's denial of Defendant's motion for judgment, COSA disregarded its own precedent to treat all reasonable inferences from the evidence in the light most favorable to the non-moving party, usurping the trial court's discretion and fact-finding province of the jury.

COSA correctly held that a trial court's denial of a motion for summary judgment is reviewed for abuse of discretion and that the trial court's denial of Giant's motion fell within its discretion. *See Dashiell v. Meeks*, 396 Md. 149, 164–65 (2006). But it is also well-settled that in seeking reversal of a trial court's denial of a motion for judgment, the moving party faces a similarly "high standard,"i.e, the reviewing court must consider, not only all evidence, but all "*inferences* in the light most favorable to the party against whom the motion is

made." *Owens-Corning Fiberglas Corp. v. Garrett*, 682 A. 2d 1143, 1156 (Md: Court of Appeals 1996)(emphasis added).” [I]f there is *any* evidence, no matter how slight, that is legally sufficient to generate a jury question, the case must be submitted to the jury for its consideration." *Tate v. Bd. of Educ. of Prince George's County*, 155 Md.App. 536, 545, 843 A.2d 890 (2004).(emphasis added). A trial court must determine whether there is a material issue of fact to be resolved in both motions for summary judgment and for judgment. *Mills v. Galyn Manor Homeowners Ass'n*, 198 A. 3d 879, 883-84 (MD. Ct. of Sp. App. 2018).

COSA disregarded reasonable inferences to be drawn. Relying on *Appiah v. Hall*, 416 Md. 533 (2010), it instead found the evidence showed only that Giant had “general control” over Mr. Winzer’s actions and that “[t]o the extent that Ms. Webb’s injury “arose” out of Mr. Winzer’s use of an unpowered pallet jack in his work, Giant’s control extended only to a prohibition against the use of powered jacks by any vendor.” But the evidence showed that Giant exercised substantial control over Mr. Winzer, including owning the jack and extensively controlling Mr. Winzer’s access to and use of it in their store as described in detail above. While the caselaw requires that defendant control the “details” of the contractor’s work, there are not that many details, and what few details are involved, were largely under Respondent’s control: The movement of products to be placed on Giant’s shelves required use of Giant’s jack, products were moved from the pallet to

places chosen by Giant, Giant determined when, how, and by whom its jacks could be used and could remove persons unsafely operating its equipment. The jury's factual finding was that Mr. Winzer acted negligently as Respondent's agent, not an independent contractor. The existence of an agency relationship is a question of fact and will not be disturbed on appeal unless it is clearly erroneous. *See Rankin v. Brinton Woods of Frankford, LLC*, 241 Md. App. 604, 611 (2019).

COSA, however, substituted its factual finding for the jury's, claiming "In sum, correcting a vendor *observed* using a pallet jack improperly, requiring a vendor to check in and out, to stock in a particular location of the store, permitting only non-powered jacks, and 'sometimes' checking the vendor's work—do not indicate sufficient control over the 'methods' and 'operative detail' of Mr. Winzer's work to extend liability on Giant for his actions." (emphasis in original). But, as noted earlier, given the limited details of the job and the power to kick the vendor out of the store, that is substantial control. *Appiah* holds that "There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way." *Appiah*, supra at 554. Contrary to COSA's assertion, there was more than sufficient evidence from which a jury could (and did) infer that Giant exercised the requisite control over Mr. Winzer's actions and that he was "not entirely free to do the work his own way." *Id.* The crabbed reading of *Appiah* ignores the trial court's inferences drawn from factual

evidence. Review of COSA's decision will provide clarity on whether it is inconsistent to affirm a trial court's denial of a motion for summary judgment but then reverse the trial court's denial of a motion for judgment on the same facts.

C. The Trial Court's Decision To Give A Standard Spoliation Instruction After Acknowledging The Existence of Sufficient Evidence To Permit A Jury To Draw A Negative Inference From Absence Of A Video Of The Subject Incident, Was Not An Abuse of Discretion and Did Not Constitute Probable Prejudice.

COSA entirely ignored its prior holding that when it "review[s] a trial court's grant or denial of a requested jury instruction, [it] appl[ies] the highly deferential abuse of discretion standard." *Woolridge v. Abrishami*, 233 Md. App. 278, 305 (2017). *See also Collins v. Nat'l R.R. Passenger Corp*., 417 Md. 217, 228–29 (2010). Giant argued that the "trial court abused its discretion in giving the jury a spoliation instruction." Despite this, after mentioning Giant's argument, COSA never mentions the abuse of discretion standard again. Under that standard, which the court never applied, the discretion must be " manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons," *Gunning v. State*, 347 Md. 332, 351–52 (1997).

To constitute an abuse of discretion the trial court's ruling must be "beyond the fringe of what the court deems minimally acceptable," e.g., "violative of fact and logic." *Dehn v. Edgecombe,* 384 Md. 606, __ (2005). COSA itself has noted that, "[a] spoliation instruction is given in a civil case when "a party has destroyed or failed to produce evidence." *Cost v. State*, 417 Md. 360, 370 (2010). The court

gave a *standard* spoliation instruction, one COSA *agreed* reflected inferences that counsel could properly argue. This wasn't "violative of fact and logic."

Mr. Coradini testified that Giant has "probably upwards of 30-some cameras" positioned "throughout the entire store." These cameras were in place at the time of the incident, including the site of Ms. Webb's injury in the frozen food section, where "they point every direction." Not only were these cameras operating at the time of the incident, but Giant received notice to preserve footage when an incident report was created that same day and Giant also confirmed that it received preservation of evidence letters within two weeks of the incident. Mr. Coradini, moreover, did not initially dispute the existence of the footage, stating he did not know if it existed and only later testifying that none of the footage "had been captured."

COSA correctly stated that these facts would support the argument Petitioner made, that these facts demonstrate the reasonable inference that footage of the incident existed and was destroyed and/or that Giant had negligently failed to preserve and produce it. "The failure of the multiple cameras to capture the incident," it observed, "could be grist for credibility and argument mills." COSA's statement that although such argument was proper, the same evidence "would not justify a spoliation instruction," makes no sense and does not support a conclusion that the court abused its discretion. Before an error can be prejudicial there must be actual error. In a challenge to an instruction, the

instruction must be "incorrect legally." *Armacost v. Davis*, 462 Md. 504, 524 (2019). The decision to give a standard spoliation instruction under the facts presented was not "incorrect legally."

COSA attempts to rationalize its conclusion, arguing that Ms. Webb had not produced evidence of the "actual existence" of the footage, only the "possibility" of its existence. Yet there was evidence that cameras were running and facing the incident area indicating that existence of the footage was not just "possible," but likely. Spoliation instructions are warranted where there exists *sufficient evidence to show* that a party has destroyed or failed to produce evidence. *See Cost v. State*, 417 Md. 360 (2010). In determining appropriateness, the court determines whether the giving of the instruction and the law it contains is "applicable in light of the evidence before the jury." *Anderson v. Litzenberg*, 115 Md. App. 549, 559 (1997). This Court has held that spoliation instructions may be given without demonstrable bad faith on the part of the spoliator. *See Cumberland Ins. Grp. v. Delmarva Power*, 226 Md. App. 691, 700, 130 A.3d 1183, 1188 (2016). A court's grant or denial of a requested jury instruction is reviewed for abuse of discretion. *Steamfitters Loc. Union No. 602 v. Erie Ins. Exch.*, 469 Md. 704, 739, 233 A.3d 59, 79–80 (2020). In *Steamfitters,* the "instruction pertained to a video recording from a surveillance camera on Steamfitters' building that was pointed close to the area where the fire was alleged to have originated." *Id.* Even though there was argument that the video

would not have shown the incident, even if it was preserved, a spoliation instruction was deemed proper because "[t]here was evidence in the record that the camera was pointed in a direction that would have captured persons present on Steamfitters' property prior to and at the time of the fire, as well as a portion of the property close to the origin of the fire." *Id.* Here, there was similar evidence regarding where the cameras pointed to create a reasonable inference that video of the incident was not preserved. COSA's arbitrary reasoning here converts the preponderance of the evidence test into a *de facto* clear and convincing standard. Worse, such a ruling would allow defendants to avoid production of relevant and damaging evidence, and negative inference, by simply denying its existence. Review is necessary to prevent such a dangerous imbalance.

Finally, COSA's opinion departs from the principle that, "the party asserting error in a civil case bears the burden of proving that an erroneously given instruction was prejudicial." *Barksdale v. Wilkowsky*, 419 Md. 649, 661 (2011). To justify reversal, Respondent is "required to persuade [the Court] [that prejudice was *probable*, not merely possible." *Id.* at 662 (emphasis added).

Even assuming *arguendo* that the spoliation instruction was improper, the trial court's decision did not constitute probable prejudice. COSA's determination of possible prejudice seems tied, not to the instruction itself, but to the fact that Ms. Webb's counsel discussed the instruction in closing. Slip. op. at 24-25. But given COSA's own observation that, "[t]he failure of the multiple cameras to

capture the incident could be grist for credibility and argument mills," it is illogical to conclude that a standard jury instruction to the same effect could amount to probable prejudice. As indicated above, to warrant reversal, prejudice must be more than merely possible, it must be probable. Clarity is needed as to what constitutes probable prejudice to prevent jury verdicts being casually overturned.

CONCLUSION

WHEREFORE, for the foregoing reasons, Ms. Karen Webb respectfully requests that this Honorable Court GRANT her Petition for Writ of Certiorari to the Court of Appeals of Maryland.

Respectfully submitted,

CHASENBOSCOLO INJURY LAWYERS

By: 

Michael D. Reiter (CPF # 1012160059)
MReiter@chasenboscolo.com
7852 Walker Drive, Suite 300
Greenbelt, Maryland 20770
(240)624-2379
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of March, 2021, two copies of the foregoing Respondent's Petition for Writ of Certiorari were mailed to:

Stephen J. Marshall, CPF #0512140230
Jessica J. Ayd, CPF # 1112130051
Franklin & Prokopik
Two North Charles Street, Suite 600
Baltimore, Maryland 21201
Attorneys for Respondent Giant of Maryland, LLC

Michael D. Reiter

CERTIFICATE OF REDACTION

Pursuant to Rule 20-201 (f)(1)(a) of the Maryland Rules of Civil Procedure, I hereby certify that the enclosed filings contain no restricted information.

Michael D. Reiter

CERTIFICATE OF WORD COUNT

I, Michael D. Reiter, do hereby certify that this Brief was typed in Arial, Size 13. There are 3,871 words in this Petition, excluding the Signature Block and Certificates of Service and Word Count.

CaseSearch Circuit Court of Maryland

Case Information

Court System: **Circuit Court For Anne Arundel County - Civil**
Location: **Anne Arundel Circuit Court**
Case Number: **C-02-CV-17-003054**
Title: **Karen Webb vs. Giant of Maryland LLC**
Case Type: **Tort - Premises Liability**
Filing Date: **10/13/2017**
Case Status: **Appealed**

Other Reference Numbers

Case Appealed: **CSA-REG-0413-2019**

Involved Parties Information

Mediator

Name: **Borchini, Ezio**
Address: **4815 Saint Elmo Avenue**
City: **Bethesda** State: **MD** Zip Code: **20814**

Defendant

Name: **PepsiCo Inc**
Removal Date: **06/13/2018**
Address: **S/O: The Corporation Trust, Incorporated**
2405 York Road
City: **LUTHERVILLE TIMONIUM** State: **MD** Zip Code: **21093**

Attorney(s) for the Defendant

Name: **RUSSELL, ANGELA W**
Appearance Date: **02/21/2018**
Removal Date: **06/13/2018**
Address Line 1: **WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP**
Address Line 2: **500 EAST PRATT STREET**
Address Line 3: **SUITE 600**
City: **BALTIMORE** State: **MD** Zip Code: **21202**

Name: **GIPE, ALICIA J**
Appearance Date: **02/21/2018**
Removal Date: **06/13/2018**
Address Line 1: **WILSON, ELSER, MOSKOWITZ EDELMAN & DICKER, LLP**
Address Line 2: **500 E PRATT STREET**
Address Line 3: **SUITE 600**
City: **BALTIMORE** State: **MD** Zip Code: **21202**

Defendant

Name: **Giant of Maryland LLC**
Address: **Serve On: CSC - Lawyers Incorporating Service Company**
7 St Paul Street
City: **Edgewater** State: **MD** Zip Code: **21037**

Aliases

Business: **Super Giant Landover 308**

Attorney(s) for the Defendant

Name: **MARSHALL, STEPHEN J**
Appearance Date: **02/19/2018**
Address Line 1: **FRANKLIN & PROKOPIK, P.C.**
Address Line 2: **2 N CHARLES ST, STE 600**
City: **BALTIMORE** State: **MD** Zip Code: **21201**

Name: **TEPE, JUSTIN E**
Appearance Date: **02/19/2018**
Removal Date: **04/22/2019**
Address Line 1: **Goodell, DeVries, Leech & Dann, LLP**
Address Line 2: **One South Street**
Address Line 3: **20th Floor**
City: **BALTIMORE** State: **MD** Zip Code: **21202**

Name: **AYD, JESSICA J**

Appearance Date: **04/22/2019**
Address Line 1: **Goodell, DeVries, Leech & Dann, LLP**
Address Line 2: **One South Street**
Address Line 3: **20th Floor**
City: **BALTIMORE** State: **MD** Zip Code: **21202**

Plaintiff

Name: **Webb, Karen**
Address: **1601 Ruxton Road**
City: **Edgewater** State: **MD** Zip Code: **21037**

Attorney(s) for the Plaintiff

Name: **REITER, MICHAEL**
Appearance Date: **10/13/2017**
Address Line 1: **7852 WALKER DR**
Address Line 2: **STE 300**
City: **GREENBELT** State: **MD** Zip Code: **20770**

Court Scheduling Information

Event Type	Event Date	Event Time	Court Location	Court Room	Result
Hearing - Complex Motions	05/14/2018	09:00:00	Civil Calendar	Courtroom 3B	Reset
Hearing - Complex Motions	06/04/2018	09:00:00	Civil Calendar	Courtroom 3D	Concluded / Held
Conference - Pre-Trial	08/29/2018	10:00:00	Civil Calendar	Suite 402	Reset
Conference - Pre-Trial	10/03/2018	09:30:00	Civil Calendar	Suite 402	
Trial - Jury	04/23/2019	09:00:00	Civil Calendar	Courtroom 2D	Continued
Trial - Jury	04/24/2019	09:00:00	Civil Calendar	Courtroom 2D	Continued
Trial - Jury	04/25/2019	09:00:00	Civil Calendar	Courtroom 2D	Continued
Trial - Jury	04/26/2019	08:30:00	Same Day Calendar	Conference Room 2B	
Trial - Jury	04/26/2019	09:00:00	Civil Calendar	Courtroom 2D	Concluded / Held

---

Judgment Information

Monetary
Original Judgment

Judgment Event Type: **Final Judgment / Decree / Order**
Judgment Against: **Giant of Maryland LLC**
Judgment in Favor of: **Webb, Karen**
Judgment Ordered Date: **05/01/2019**
Judgment Entry Date: **05/01/2019**
PostJudgment Interest:
Principal Amount: **$188,986.00** PreJudgment Interest:
Other Fee: **$211,014.00** Service Fee:
Appearance Fee: Witness Fee:
Filing Fee: Attorney Fee:
Amount of Judgment: **$400,000.00** Total Indexed Judgment: **$400,000.00**
Comment: **For Non-Economic Damages and Cost of Suit.**

Judgment Status	Status Date
Entered	05/01/2019

Document Information

File Date: **10/13/2017**
Filed By:
Document Name: **Deficient Filing**
Comment: **Complaint - Envelope 01147673**

File Date: **10/13/2017**
Filed By:
Document Name: **Complaint / Petition**
Comment: **Complaint for Tort-Premises Liability**

File Date: **10/13/2017**
Filed By:
Document Name: **Case Information Report Filed**
Comment:

File Date: **10/13/2017**
Filed By:
Document Name: **Request to Issue**
Comment: **Line to Issue Summons**

File Date: **10/25/2017**
Filed By:
Document Name: **Notice of Deficiency - Rule 20-203(d)**
Comment: ****CORRECTED**(Copy to atty Reiter)**

File Date: **10/25/2017**
Filed By:
Document Name: **Additional Notes Exist**
Comment: **** $10.00 ATTORNEY FEES NEEDS TO BE COLLECTED WHEN REFILED****

File Date: **11/02/2017**
Filed By:
Document Name: **Attorney Appearance - $10 Fee**
Comment:

File Date: **11/02/2017**
Filed By:
Document Name: **Summons Issued (Service Event)**
Comment:

File Date: **12/08/2017**
Filed By:
Document Name: **Return of Service - Served**
Comment: **Served 11/30/17**

File Date: **12/18/2017**
Filed By:
Document Name: **Line**
Comment: **Line of Interlineation**

File Date: **12/18/2017**
Filed By:
Document Name: **Request to Re-Issue**
Comment: **Line to Re-Issue of Summons**

File Date: **12/20/2017**
Filed By:
Document Name: **Summons Issued (Service Event)**
Comment:

File Date: **12/22/2017**
Filed By:
Document Name: **Supporting Document**
Comment: **Amended Complaint Showing Edits - Webb**

File Date: **12/22/2017**
Filed By:
Document Name: **Complaint - Amended**
Comment: **Amended Complaint RE: Tort-Premises Liability ***STRIKE PEPSICOLA INC per Order 6/13/18*****

File Date: **12/22/2017**
Filed By:
Document Name: **Supporting Exhibit**
Comment: **Exhibit 1**

File Date: **12/22/2017**
Filed By:
Document Name: **Request to Re-Issue**
Comment: **Line to Issue Summons**

File Date: **12/29/2017**
Filed By:
Document Name: **Summons Issued (Service Event)**
Comment:

File Date: **01/22/2018**
Filed By:
Document Name: **Return of Service - Served**
Comment: **Certified Mail 01/16/18**

File Date: **01/29/2018**
Filed By:
Document Name: **Return of Service - Served**
Comment: **Certified Mail 01/19/18**

File Date: **02/05/2018**
Filed By:
Document Name: **Scheduling Order**
Comment: **(Copies mailed to Atty Reiter, Pepsico Inc, Giant of Maryland LLC, and Ezio Borchini (MED)...No email on record fro Atty Reiter)**

File Date: **02/05/2018**
Filed By:
Document Name: **Order - Mediation**
Comment: **(Copies mailed to Atty Reiter, Pepsico Inc, Giant of Maryland LLC, and Ezio Borchini (MED)...No email on record fro Atty Reiter)**

File Date: **02/19/2018**
Filed By:
Document Name: **Answer**
Comment: **to Amended Complaint**

File Date: **02/21/2018**
Filed By:
Document Name: **Motion / Request - To Dismiss**
Comment: **PepsiCo, Inc.'s Motion to Dismiss ***GRANTED 6/13/18*****

File Date: **02/21/2018**
Filed By:
Document Name: **Attorney Appearance - No Fee**
Comment: **Paid through File &Serve**

File Date: **02/26/2018**
Filed By:
Document Name: **Returned Mail**
Comment: **From Giant of Maryland LLC**

File Date: **03/08/2018**
Filed By:
Document Name: **Opposition**
Comment: **to Defendant Pepsico Moiton to Dismiss**

File Date: **03/08/2018**
Filed By:
Document Name: **Miscellaneous Document**
Comment: **Request for hearing**

File Date: **03/15/2018**
Filed By:
Document Name: **Reply to Opposition**
Comment: **Reply to Opposition to Motion to Dismiss**

File Date: **03/15/2018**
Filed By:
Document Name: **Supporting Exhibit**
Comment: **Exhibit 1 - Reply to Opposition to Motion to Dismiss**

File Date: **03/23/2018**
Filed By:
Document Name: **Order**
Comment: **Order to Set Civil Motion Hearing- Assignment Office schedule hearing on Defendant Pepsico Inc's Motion to Dismiss and Opposition, before any judge. (Copies to Atty Reitter, Atty Tepe, Atty Marshall, Atty Russell and Atty Gipe)(Notification emailed to Atty Atty Tepe, Atty Marshall, Atty Russell, and Atty Gipe. No email on record for Atty Reitter)**

File Date: **04/16/2018**
Filed By:
Document Name: **Expert Witness List**
Comment: **Plaintiff's Designation of Experts**

File Date: **04/19/2018**
Filed By:
Document Name: **Notice of Discovery**
Comment: **(Interrogatories and Request for Production of Documents)**

File Date: **05/03/2018**
Filed By:
Document Name: **Certificate Regarding Discovery**
Comment:

File Date: **05/16/2018**
Filed By:
Document Name: **Motion - Modify Scheduling Order**
Comment: **Joint Motion to Modify the Court's Scheduling Order and Extend Deadlines for Designation of Expert Witnesses**

File Date: **05/21/2018**
Filed By:
Document Name: **Deficient Filing**
Comment: **Certificate Regarding Discovery - Envelope #01842866**

File Date: **05/29/2018**
Filed By:
Document Name: **Notice of Deficiency - Rule 20-203(d)**
Comment: **(Copies mailed to All Parties)**

File Date: **05/29/2018**
Filed By:
Document Name: **Certificate Regarding Discovery**
Comment: **Plaintiff's Certificate Regarding Discovery for Plaintiff's Responses to Request for Admissions**

File Date: **05/31/2018**
Filed By:
Document Name: **Order**
Comment: **Ordered that the Joint Motion to Modify Scheduling Order is granted. (Copies to attys Marshall, Russell, Reiter, Tepe, Gipe.. Notification email to attys Russell, Gipa and Marshall)**

File Date: **06/04/2018**
Filed By:
Document Name: **Hearing Sheet**
Comment:

File Date: **06/13/2018**
Filed By:
Document Name: **Order**
Comment: **Defendant's Motion to Dismiss is GRANTED; Plaintiff's Amended Complaint be stricken fron the record as it pertains to adding PepsiCola Inc as a new party; all claims against PepsiCola Inc be dismissed with prejudice. (Copies to Atty Reiter, Atty Tepe, Atty Marshall, Atty Russell, Atty Gipe. Notification emailed to Atty Tepe, Atty Marshall, Atty Russell, Atty Gipe. No email on record for Atty Reiter)**

File Date: **06/18/2018**
Filed By:
Document Name: **Expert Witness List**
Comment: **Defendant's Preliminary Expert Witness Designation**

File Date: **06/18/2018**
Filed By:
Document Name: **Supporting Exhibit**
Comment: **Exhibit A to Defendant's Preliminary Expert Designation**

File Date: **07/18/2018**
Filed By:
Document Name: **Notice of Discovery**

Comment: **Notice of Service Discovery and Defendants Notice to Take Deposition of Plaintiff**

File Date: **07/18/2018**
Filed By:
Document Name: **Motion - Modify Scheduling Order**
Comment: **Joint Motion to Modify Scheduling Order and extend deadlines**

File Date: **07/19/2018**
Filed By:
Document Name: **Certificate Regarding Discovery**
Comment: **Plaintiff's Certificate Regarding Discovery for Plaintiff's Answers to Interrogatories**

File Date: **07/19/2018**
Filed By:
Document Name: **Certificate Regarding Discovery**
Comment: **Plaintiff's Certificate Regarding Discovery for Plaintiff's Responses to Requests for Production of Documents**

File Date: **07/26/2018**
Filed By:
Document Name: **Order**
Comment: **SHOW CAUSE ORDER FOR FAILURE TO COMPLY WITH SERVICES. (copies mailed to Atty Reiter-No Email, Atty Marshall and Atty Tepe-Notification by Email)**

File Date: **07/26/2018**
Filed By:
Document Name: **Certificate Regarding Discovery**
Comment: **Plaintiff's Certificate Regarding Discovery for Rule 2-412(d) Deposition Notice**

File Date: **08/08/2018**
Filed By:
Document Name: **Order**
Comment: **Joint Motion to Modify Scheduling Order and Extend Deadlines is ORDERED that the Motion is GRANTED to Court Approved Dates/Deadlines not those suggested by Counsel. (Copies mailed to Attys Reiter, Marshall and Ezio Borchini (MED)...Notification emailed to Atty Marshall; No email on record for Atty Reiter).**

File Date: **08/17/2018**
Filed By:
Document Name: **Notice of Service**
Comment: **otice to Take Deposition of Kedyonn Winzer,**

File Date: **08/24/2018**
Filed By:
Document Name: **Notice of Discovery**
Comment: **Defendant Giant of Maryland, LLC's Notice and Certificate of Service Regarding Discovery**

File Date: **08/29/2018**
Filed By:
Document Name: **Notice of Service**
Comment: **Served 05/20/18 - Kedyonn Winzer - Subpoena**

File Date: **09/14/2018**
Filed By:
Document Name: **Motion for Summary Judgment**
Comment: **Defendant Giant of Maryland, LLC's Motion for Summary Judgment**

File Date: **09/14/2018**
Filed By:
Document Name: **Memorandum**
Comment: **Defendant Giant of Maryland, LLC's Memorandum of Law and Points of Authorities in Support of its Motion for Summary Judgment**

File Date: **09/14/2018**
Filed By:
Document Name: **Supporting Exhibit**
Comment: **Defendant Giant of Maryland, LLC's Exhibit A**

File Date: **09/14/2018**
Filed By:
Document Name: **Supporting Exhibit**
Comment: **Defendant Giant of Maryland, LLC's Exhibit B**

File Date: **09/28/2018**
Filed By:
Document Name: **Pre-Trial/Hearing Statement**
Comment: **Plaintiff's Pre-Trial Statement**

File Date: **09/28/2018**
Filed By:
Document Name: **Pre-Trial/Hearing Statement**
Comment: **Defendant's Pretrial Conference Statement**

File Date: **09/28/2018**
Filed By:
Document Name: **Opposition**
Comment: **Plaintiff's Opposition to Defendant's Motion for Summary Judgment**

File Date: **09/28/2018**
Filed By:
Document Name: **Request for Hearing/Trial**
Comment: **Plaintiff Line to Request Hearing**

File Date: **10/01/2018**
Filed By:
Document Name: **Line**
Comment: **Joint Line regarding Show Cause Order**

File Date: **10/17/2018**
Filed By:
Document Name: **Order**
Comment: **Ordered that Defendant Giant of Maryland LLC's Motion for Summary Judgment is DENIED. (Copies mailed to Attys Reiter, Tepe, Marshall, Notification emailed to Attys Marshall, Tepe, No email on record for Atty Reiter)**

File Date: **11/02/2018**
Filed By:
Document Name: **Pre-Trial Order**
Comment: **Case Ready for Trial. (Copies attys Reiter, Marshall, Tepe, Ezio Borchini (MED)...Notification email Marshall, Tepe...No email atty Reiter)**

File Date: **01/16/2019**
Filed By:
Document Name: **Certificate Regarding Discovery**
Comment: **Plaintiff's Notice of De Bene Esse Deposition**

File Date: **02/15/2019**
Filed By:
Document Name: **Certificate Regarding Discovery**
Comment: **Notice of De Bene Esse Deposition**

File Date: **03/19/2019**
Filed By:
Document Name: **Return/Affidavit of Served Subpoena**
Comment: **Kedyonn Winzer**

File Date: **03/27/2019**
Filed By:
Document Name: **Certificate Regarding Discovery**
Comment: **Notice of De Bene Esse Deposition**

File Date: **03/29/2019**
Filed By:
Document Name: **Pre-Trial/Hearing Statement**
Comment: **Defs Supplemental Pre-Trial Statement**

File Date: **04/01/2019**
Filed By:
Document Name: **Notice Filed**
Comment: **Notice RE: Video Deposition**

File Date: **04/02/2019**
Filed By:
Document Name: **Request - Jury Instructions**
Comment: **Plaintiff's Requested Jury Instructions**

File Date: **04/02/2019**
Filed By:
Document Name: **Requested Voir Dire**
Comment: **Plaintiff's Requested Voir Dire**

File Date: **04/02/2019**
Filed By:
Document Name: **Miscellaneous Document**
Comment: **Proposed Verdict Sheet**

File Date: **04/03/2019**
Filed By:
Document Name: **Motion - Limine**
Comment: **Omnibus Motion in Limine to Preclude Argument That Giant Breached a "Non-Delegable Duty"**

File Date: **04/03/2019**
Filed By:
Document Name: **Supporting Exhibit**
Comment: **Exhibit 1 - Memorandum in Support of Omnibus Motion in Limine**

File Date: **04/03/2019**
Filed By:
Document Name: **Supporting Exhibit**
Comment: **Exhibit 2 - Memorandum in Support of Omnibus Motion in Limine**

File Date: **04/03/2019**
Filed By:
Document Name: **Supporting Exhibit**
Comment: **Exhibit 3 - Memorandum in Support of Omnibus Motion in Limine**

File Date: **04/03/2019**
Filed By:
Document Name: **Memorandum**
Comment: **Memorandum in Support of Omnibus Motion in Limine**

File Date: **04/03/2019**
Filed By:
Document Name: **Request - Jury Instructions**
Comment: **Proposed Jury Instructions**

File Date: **04/03/2019**
Filed By:
Document Name: **Request - Jury Instructions**
Comment: **Proposed Jury Instructions**

File Date: **04/03/2019**
Filed By:
Document Name: **Verdict Sheet**

Comment: **Proposed Verdict Sheet**

File Date: **04/04/2019**
Filed By:
Document Name: **Certificate Regarding Discovery**
Comment: **Amended Notice of De Bene Esse Deposition**

File Date: **04/16/2019**
Filed By:
Document Name: **Notice of Objection**
Comment: **Notice of Objections to Portions of the Deposition of Kevin Coradini**

File Date: **04/16/2019**
Filed By:
Document Name: **Supporting Exhibit**
Comment: **Exhibit 1 - Notice of Objections to Portions of the Deposition of Kevin Coradini**

File Date: **04/16/2019**
Filed By:
Document Name: **Notice Filed**
Comment: **Notice of Deposition Designations Regarding the Testimony of Kedyon Winzer**

File Date: **04/16/2019**
Filed By:
Document Name: **Supporting Exhibit**
Comment: **Exhibit 1 - Notice of Deposition Designations Regarding the Testimony of Kedyon Winzer**

File Date: **04/18/2019**
Filed By:
Document Name: **Opposition**
Comment: **Opposition to Motion in Limine**

File Date: **04/18/2019**
Filed By:
Document Name: **Supporting Exhibit**
Comment: **Exhibit A - Opposition to Motion in Limine**

File Date: **04/18/2019**
Filed By:
Document Name: **Supporting Exhibit**
Comment: **Exhibit B - Opposition to Motion in Limine**

File Date: **04/18/2019**
Filed By:
Document Name: **Supporting Exhibit**
Comment: **Exhibit C - Opposition to Motion in Limine**

File Date: **04/18/2019**
Filed By:
Document Name: **Supporting Exhibit**
Comment: **Exhibit D - Opposition to Motion in Limine**

File Date: **04/19/2019**
Filed By:
Document Name: **Pre-Trial/Hearing Statement**
Comment: **Defendant, Giant's Second Supplemental Pre-Trial Statement**

File Date: **04/22/2019**
Filed By:
Document Name: **Order**
Comment: **Defendant's Motion in Limine docketed April 3, 2019 and Plaintiff's Opposition to Defendant's Motion in Limine, docketed April 18, 2019, are to be addressed by the trial judge on April 23, 2019. (Copies and email notification sent to Attys Marshall and Tepe) **No email provided for Atty Reiter****

File Date: **04/22/2019**
Filed By:
Document Name: **Line**
Comment: **Defendant Giant of Maryland's Line Substituting Appearance of Counsel**

File Date: **04/22/2019**
Filed By:
Document Name: **Reply to Opposition**
Comment: **Defendant Giant of Maryland's Reply to Plaintiff's Opposition to Omnibus Motion in Limine**

File Date: **04/23/2019**
Filed By:
Document Name: **Hearing Sheet**
Comment:

File Date: **04/23/2019**
Filed By:
Document Name: **Miscellaneous Document**
Comment: **Plaintiff and Defendant's Strikes**

File Date: **04/23/2019**
Filed By:
Document Name: **Voir Dire**
Comment:

File Date: **04/24/2019**
Filed By:
Document Name: **Hearing Sheet**
Comment:

File Date: **04/25/2019**

Filed By:
Document Name: **Hearing Sheet**
Comment:

File Date: **04/25/2019**
Filed By:
Document Name: **Jury Instructions**
Comment:

File Date: **04/26/2019**
Filed By:
Document Name: **Verdict Sheet**
Comment:

File Date: **04/26/2019**
Filed By:
Document Name: **Hearing Sheet**
Comment: **Hearing Sheet signed as an Order of Court**

File Date: **04/26/2019**
Filed By:
Document Name: **Jury Notes**
Comment:

File Date: **05/01/2019**
Filed By:
Document Name: **Order**
Comment: **Ordered that the Hearing sheet signed as Order of Court. (Copies mailed to Attys Marshall, Ayd, Reiter, Notification emaield to Atty Marshall, No email on record for Attys Ayd, Reiter)**

File Date: **05/01/2019**
Filed By:
Document Name: **Notice of Recorded Judgment**
Comment: **(Copies mailed to Attys Reiter, Marshall, Ayd, Notification emailed to Atty Marshall, No email on record for Attys Ayd, Reiter)**

File Date: **05/10/2019**
Filed By:
Document Name: **Notice of Appeal to COSA**
Comment: **Notice of Appeal**

File Date: **05/10/2019**
Filed By:
Document Name: **Additional Notes Exist**
Comment: ****** Notice of Appeal sent to Judge Alban and Court Reporters task queue; and COSA workflow queue ******

File Date: **05/10/2019**
Filed By:
Document Name: **Additional Notes Exist**
Comment: ****** PHC Form mailed to Attorney Marshall ******

File Date: **05/10/2019**
Filed By:
Document Name: **Motion**
Comment: **Motion to Stay Enforcement of Judgment**

File Date: **05/15/2019**
Filed By:
Document Name: **Opposition**
Comment: **Plaintiff's Opposition to Defendant's Motion to Stay Enforcement of Judgment**

File Date: **05/15/2019**
Filed By:
Document Name: **Bond Filed and Approved**
Comment: **Appeal Bond**

File Date: **05/16/2019**
Filed By:
Document Name: **Reply to Opposition**
Comment: **Reply to Plainitffs' Opposition to Motion to Stay Enforcement of Judgment**

File Date: **05/16/2019**
Filed By:
Document Name: **Supporting Exhibit**
Comment: **Exhibit A**

File Date: **05/29/2019**
Filed By:
Document Name: **Order**
Comment: **Ordered that the Defendant's Motion to Stay Enforcement of Judgment be and is hereby DENIED. (Copies mailed to Attys Reiter, Marshall, Ayd, Notification emailed to Atty Marshall, No email address on record for Attys Reiter, Ayd)**

File Date: **06/28/2019**
Filed By:
Document Name: **Order to Proceed**
Comment: **ORDERED, to proceed without a Prehearing Conference or Alternative Dispute Resolution.**

File Date: **07/02/2019**
Filed By:
Document Name: **Additional Notes Exist**
Comment: ****** Order to Proceed sent to Judge Alban and Court Reporters task queues ******

File Date: **07/08/2019**
Filed By:

Document Name: **Transcript**
Comment: **Invoice and 4 volumes of transcript dated 4/23/19 (Civil Jury Trial), 4/24/19 (Civil Hearing), 4/25/19 (Jury Trial), and 4/26/19 (Civil Jury Trial).; Cost $2,767.50.**

File Date: **07/12/2019**
Filed By:
Document Name: **Bond Filed and Approved**
Comment: **Appeal Bond**

File Date: **08/22/2019**
Filed By:
Document Name: **Motion / Request - To Stay**
Comment: **Motion to Stay Enforcement Upon Posting of New Bond**

File Date: **08/22/2019**
Filed By:
Document Name: **Supporting Exhibit**
Comment: **Exhibit A**

File Date: **08/22/2019**
Filed By:
Document Name: **Supporting Exhibit**
Comment: **Exhibit B**

File Date: **08/27/2019**
Filed By:
Document Name: **Additional Notes Exist**
Comment: **Unable to transmit electronically, contacted COSA via telephone and informed them Case is Prepared, Transcript Costs - $2,767.50**

File Date: **08/27/2019**
Filed By:
Document Name: **Additional Notes Exist**
Comment: ****** Case Summary and Appeal Index mailed to Attys Marshall, Ayd and Reiter ******

File Date: **08/28/2019**
Filed By:
Document Name: **Original Record Sent**
Comment: ****Sent to COSA Workflow Queue; Transcript Cost $2,767.50. Due to Odyssey Navigator Issues not sent until 8/28/2019.*****

File Date: **08/28/2019**
Filed By:
Document Name: **Revenue Allocation Adjustment**
Comment:

File Date: **08/29/2019**
Filed By:
Document Name: **Opposition**
Comment: **Opposition to Motion to Stay Enforcement of Judgment Based Upon Posting of Additional/New Bond**

File Date: **08/29/2019**
Filed By:
Document Name: **Supporting Exhibit**
Comment: **Exhibits - Opposition to Motion to Stay Enforcement of Judgment Based Upon Posting of Additional/New Bond**

File Date: **09/09/2019**
Filed By:
Document Name: **Reply to Opposition**
Comment: **Defendant/Appellant's Reply to Plaintiff/Appellee's Opposition to Motion to Stay Enforcement of Judgment Based Upon Posting of Additional /New Bond**

File Date: **09/16/2019**
Filed By:
Document Name: **Revenue Allocation Adjustment**
Comment: **Sent to CSA through workflow queue**

File Date: **09/26/2019**
Filed By:
Document Name: **Order**
Comment: **ORDERED: That the Motion to Stay Enforcement is DENIED. E-Service to Attys Marshall Ayd & Reiter**

File Date: **11/20/2019**
Filed By:
Document Name: **Order Received from Court of Special Appeals**
Comment: **ORDERED that the Renewed Motion to Stay Enforcement of Judgment Based Upon Posting of Additional/New Bond is granted, and it is further ORDERED that enforcement of the judgment entered in favor of the appellee on May 1, 2019 is stayed pending resolution of this appeal.**

File Date: **02/25/2021**
Filed By:
Document Name: **Reported Opinion from COSA**
Comment:

Service Information

Service Type	Issued Date	Service Status
Summons Issued	11/02/2017	
Summons Issued	12/20/2017	
Summons Issued	12/29/2017	

Giant of Maryland LLC v. Karen Webb, No. 413, September Term, 2019. Opinion by Kenney, J.

NEGLIGENCE – PREMISES LIABILITY – STANDARD OF CARE – STATUS OF ENTRANT – INVITEES – CARE REQUIRED IN GENERAL

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he: (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger. But the owner or possessor of land is not an insurer of the safety of his customers while they are on the premises and no presumption of negligence on the part of the owner arises merely from a showing that an injury was sustained in his store.

LABOR AND EMPLOYMENT – RIGHTS AND LIABILITIES AS TO THIRD PARTIES – WORK OF INDEPENDENT CONTRACTOR – EXTENT OF CONTROL – IN GENERAL

"General control over an independent contractor's work" would not be sufficient to extend liability to Giant for Mr. Winzer's actions. *See Appiah v. Hall*, 416 Md. 533, 563. To do that, it would be necessary to demonstrate that Giant had "retained control over the operative detail and methods" of Mr. Winzer's work, including "*the very thing from which the injury arose*." *Id.* at 555 (citing *Gallagher's Estate v. Battle*, 209 Md. 592, 602 (1956)).

EVIDENCE – ADMISSIBILITY IN GENERAL – MATERIALITY – TENDENCY TO MISLEAD OR CONFUSE

The Reptile Theory approach is similar to a Golden Rule argument. It encourages jurors to favor personal safety and the protection of family and community; Golden Rule arguments "appeal[] to the jury's own interests" and ask jurors "to place themselves in the shoes of the victim." *Lee v. State*, 405 Md. 148, 171 (2008) (internal citations omitted). When such arguments "invite[] the jurors to disregard their oaths and to become non-objective viewers of the evidence which has been presented to them, or to go outside that evidence to bring to bear on the issue of damages purely subjective considerations" they are improper. *Leach v. Metzger*, 241 Md. 533, 536-37 (1966).

EVIDENCE – PRESUMPTIONS – EVIDENCE WITHHELD OR FALSIFIED – SUPPRESSION OR SPOLIATION OF EVIDENCE

Spoliation is "[t]he intentional destruction, mutilation, alteration, or concealment of evidence, usu[ally] a document." *Keyes v. Lerman*, 191 Md. App. 533, 537 (2010). A spoliation instruction is given in a civil case when "a party has destroyed or failed to produce evidence." *Cost v. State*, 417 Md. 360, 370 (2010).

The instruction addresses:

> the destruction or failure to preserve evidence, rendering it unavailable, and not merely the failure to produce evidence that *is* available, or, indeed, the failure to create evidence, but, for purposes of the permissible inference, it does distinguish between destruction or failure to preserve with an intent to conceal the evidence and destruction or failure to preserve that is the product of negligence.

Keyes, 191 Md. App. at 540.

Before the instruction may be given, the requestor, "[b]y necessity," has the burden to establish and the court would have to find that the video "actually existed." *Solesky v. Tracey*, 198 Md. App. 292, 309 (2011). There can be no act of destruction or failure to preserve evidence not proven to exist, and therefore no act or omission from which inferences can arise.

APPEAL AND ERROR – HARMLESS AND REVERSIBLE ERROR – PARTICULAR ERRORS – INSTRUCTIONS – IN GENERAL

Instructions "as to facts and inferences" are not normally required. And when missing evidence permits multiple inferences to be drawn, a trial judge's "emphasis of one possible inference out of all the rest . . . can be devastatingly influential upon a jury although unintentionally so." *Keyes*, 191 Md. App. at 542 (quoting *Yuen v. State*, 43 Md. App. 109, 114 (1979)).

APPEAL AND ERROR – HARMLESS AND REVERSIBLE ERROR – IN GENERAL – PREJUDICE; PREJUDICIAL ERROR– IN GENERAL

An instruction that "is misleading or distracting for the jury, and permits the jury members to speculate about inapplicable legal principles," is potentially prejudicial. *Barksdale v. Wilkowsky*, 419 Md. 649, 669 (2011).

Circuit Court for Anne Arundel County
Case No. C-02-CV-17-003054

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 413

September Term, 2019

GIANT OF MARYLAND LLC

v.

KAREN WEBB

Leahy,
Wells,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: February 25, 2021

Appellee, Karen Webb, was injured on December 4, 2014 while shopping at a supermarket owned and operated by appellant, Giant of Maryland, LLC ("Giant"). On October 25, 2017, she sued Giant in the Circuit Court for Anne Arundel County, advancing two causes of action: (1) negligence and (2) negligent hiring, training, and supervision.[1] A jury returned a verdict in her favor.

In its timely appeal, Giant presents four questions, which we have reordered, slightly rephrased, and consolidated into three for our review:[2]

[1] According to her Complaint, an "employee of [Giant] was pushing a shopping cart in one of the shopping aisles as part of his job duties at the premises and within the scope of his employment," and he "failed to safely operate the shopping cart, failed to pay proper time and attention to pushing the shopping cart." Upon learning that the person operating the cart was Keydonne Winzer, an employee of PepsiCo, Ms. Webb amended her complaint on December 22, 2017 to add PepsiCo as a defendant. Mr. Winzer was not sued individually. PepsiCo moved to dismiss based on limitations, and the trial court granted PepsiCo's motion and struck the amended complaint. Mr. Winzer was employed by FedEx at the time of trial.

[2] Giant asked:

> I. Whether the circuit court erred in denying Giant's motion for judgment whereby permitting [Ms.] Webb to argue a new, alternative theory of liability at the close of trial?
>
> II. Whether the circuit court erred in denying Giant's motion for summary judgment?
>
> III. Whether the circuit court erred in denying Giant's motion in limine to exclude argument that Giant owed [Ms.] Webb a non-delegable duty of "safety" when such argument misstated the law, was irrelevant, and was wholly prejudicial?
>
> IV. Whether the circuit court erred in charging the jury with a spoliation instruction when there was no evidence or findings that video footage of the incident existed or was destroyed?

I. Did the circuit court err in denying Giant's motion for summary judgment prior to trial and its subsequent motion for judgment?

II. Did the circuit court err in denying Giant's motion in limine to exclude argument that Giant owed Ms. Webb a non-delegable duty of "safety"?

III. Did the circuit court err or abuse its discretion in giving a spoliation instruction?

For the reasons set forth herein, we shall reverse.

FACTUAL AND PROCEDURAL BACKGROUND

The Incident

Ms. Webb's injury occurred in the frozen-foods aisle at Giant. She testified:

> I turned around and to put the stuff in my – in the basket and I stepped back and I was struck in the back. And I fell backwards, struck my back and my buttocks which we have pictures to show the bruising that I did hit something and I fell to the ground. And I assume it was a Pepsi person that was pushing the cart.[3]

Ms. Webb's prior medical history indicated prior incidents of dizziness and falling. Giant's incident report and some medical records suggest that she had reported being dizzy and falling when the incident occurred.

Keydonne Winzer, the person "pushing the cart," denied striking Ms. Webb. He testified:

> Okay. . . . We have those wooden pallets that we have our crates and things on and I was pulling it to the back of the store. As I'm going down the aisle, I recognize that there's a lady who is knelt down in front of one of the

[3] The terms "pallet cart" and "pallet jack," were used interchangeably in this case. They are also known as pallet trucks, pallet pumps, pump trucks, scooters, dogs, or jiggers and used to lift and move pallets. In her Complaint, Ms. Webb alleged that she was struck by a "store pallet cart."

freezer doors. So generally I told her – well, normally when I do the pallets, I'll let the customers know, hey, I'm behind you or I'm on the aisle.

So I said, "Hey I'm behind you." I don't think she really heard me because she stood up, it seems that she lost her balance and when she stumbled backwards, she hit the edge of the pallet and then hit the floor.

As to his employer, he testified:

[Giant's Counsel]: Okay. You received all your training from Pepsi?

[Mr. Winzer]: Yes.

[Giant's Counsel]: Did you ever receive training from Giant?

[Mr. Winzer]: No.

[Giant's Counsel]: Did you ever receive any type of payment directly from Giant?

[Mr. Winzer]: No.

[Giant's Counsel]: Were you ever an employee of Giant?

[Mr. Winzer]: No.

[Giant's Counsel]: You were always an employee of Pepsi?

[Mr. Winzer]: Yes.

* * *

[Giant's Counsel]: Now, your purpose while you were at the Giant that day was to make sure Pepsi product was stocked, correct?

[Mr. Winzer]: Yes.

[Giant's Counsel]: Okay. Did anybody from Giant ever tell you how to stock Pepsi products?

[Mr. Winzer]: No.

* * *

[Giant's Counsel]: In your experience as a merchandiser, were you ever followed by any store employee to watch – so they'd watch you do your job?

[Mr. Winzer]: No.

[Giant's Counsel]: Because they're doing their job, right?

[Mr. Winzer]: Right. Sometimes afterwards, that's – that would be to check to see if I did the job the correctly.

[Giant's Counsel]: If it's stocked properly?

[Mr. Winzer]: Right.

* * *

[Giant's Counsel]: [Giant] did not hire or fire you?

[Mr. Winzer]: No.

[Giant's Counsel]: It did not control your conduct while you were in the store, is that correct?

[Mr. Winzer]: No.

Motion for Summary Judgment

On September 14, 2018, Giant moved for summary judgment:

> For the purpose of this motion, and for the resolution of the claims against Giant, while there are disputed facts regarding the manner in which the occurrence happened, *it is undisputed that the alleged tortfeasor was not an employee of Giant.* Because the person that may have struck the Plaintiff was not an employee or agent of Giant, Giant cannot be vicariously responsible for that person's alleged negligence. Additionally, there cannot be a cause of action for negligent hiring, supervision, or retention. Plaintiff's claims all fail as a matter of law, and Giant is entitled to judgment in its favor.

Ms. Webb, in opposition to the motion, stated:

> The man was not wearing any type of uniform and did not identify himself to Ms. Webb and as a result [she] was not aware whether he was an employee of Giant. *Exhibit A* at 31-3 through 17. However, [she] assumed that the man that struck her was an employee of Giant.
>
> * * *
>
> Mr. Winzer has testified that Defendant Giant's pallet jacks were known and understood to be available for his use and that of other such third-party vendors with the express permission and consent of Defendant Giant. . . . Mr. Coradini [Giant's corporate representative] also explained that Defendant Giant would direct vendors on such matters as where to place items and displays and "correct" them where a safety issue was observed.
>
> * * *
>
> The Motion for Summary Judgment must be denied because Giant is vicariously liable for the subject incident which caused Ms. Webb's injuries and also because there remain genuine disputes of material fact as to the identity of the individual who struck Ms. Webb with the pallet jack.

(Emphasis added).

The circuit court denied the motion without a hearing.

Motion in Limine

On April 3, 2019, Giant filed an Omnibus Motion in Limine to preclude Ms. Webb from arguing that Giant had "breached a 'safety' duty as a property owner" under a "Reptile Theory"[4] approach by "appeal[ing] to the jury's own interests and/or passions

[4] Giant argues that the "Reptile Theory" is a "recent phenomenon, which traces its origins to a monograph authored by Don C. Kennan and David Ball, *Reptile: The 2009 Manual of the Plaintiff's Revolution.*" According to Giant:

> The Reptile theory asserts that you can prevail at trial by speaking to, and scaring, the primitive part of jurors' brains, the part of the brain they share with reptiles. The Reptile strategy purports to provide a blueprint to succeeding at trial by applying advanced neuroscientific techniques to

and ask[ing] them to place themselves in the proverbial shoes of the plaintiff when deciding what the defendant should have done." In addition, the motion in limine sought to preclude any evidence or testimony that Mr. Winzer "was an employee, agent, or servant of Giant," because it was now undisputed "that the person pushing the cart was an employee of PepsiCo."

Ms. Webb responded that "[t]here is a genuine dispute of material fact as to the identity of the employee who caused [her] injuries," and that "she does not know whether the man who struck her was employed by Defendant Giant." In addition, she argued that "Giant, as the property owner of a business open to the public, owe[d] a duty to 'use reasonable care to see that those portions of the property that the invitee may be expected to use are safe.'" Characterizing Giant's duty as "non-delegable under Maryland law," she argued that "the duty of care owned to Ms. Webb" was breached when it "permitted Mr. Winzer . . . to utilize a pallet jack it owned with its permission and consent, in its store aisles, at the same time they were to be open to customers (invitees), without proper oversight or supervision."

> pretrial discovery and trial. The fundamental concept is that the reptile brain is conditioned to favor safety and survival. Therefore, if plaintiffs' counsel can reach the reptilian portion of the jurors' brains, they can influence their decisions; the jurors will instinctively choose to protect their families and community from danger through their verdict.

Appellant's Brief at 2-3 (citing *Plaintiff's bar embraces Reptile strategy and defense bar responds*, LEXOLOGY (Oct. 4, 2013), https://www.lexology.com/library/detail.aspx?g=ad754e6a-c50c-4570-8990-71900cdf6795.

When the parties appeared for the first day of trial, the court, after argument, denied the motion:

> [W]ith regards to Mr. Win[ze]r as [to] whether he's an employee, agent, servant of Giant, again, these are, I think, you are asking me again to kind of make a ruling without having the evidence. I think this is the facts that are going to be at issue, and I will address this at the conclusion of the case, so I decline to rule on a Motion in Limine at this point. – *whether Giant breached a safety duty as the property owner, again, I'm going to instruct the jurors on the law. If they start to argue a higher duty and it's not supported by my instructions, that's going to be an area that they're going to have a problem with in closing arguments.* They're going to get the instructions from me, you know. That will be fair fodder for your closing, you know.
>
> So at this point I'm going to deny your motions with regards to that.

(Emphasis added).

Motion for Judgment

At the close of Ms. Webb's case-in-chief, Giant moved for judgment on two grounds: (1) that there was no evidence of an unreasonably dangerous condition on the premises to support a claim that Giant breached a non-delegable duty to keep its premises safe; and (2) that there was no evidence that Mr. Winzer was an agent, servant, or employee of Giant sufficient to support a claim for vicarious liability or negligent hiring, supervision, training, or retention.

Ms. Webb's counsel responded:

> The property owner here, which is undisputed, Giant, has a non-delegable duty . . . which he is not free to delegate to the contractor. Such a non-delegable duty requires the person upon who it is imposed to answer for that care as exercised by anyone even though he be an independent contractor to whom the performance of the duty is entrusted. . . .

> [E]mployers are liable under this exception[5] irrespective of whether they themselves have been at fault. Whether vicarious liability should be imposed upon an employer by application of this exception is a matter of policy.
>
> * * *
>
> That's exactly what we have here and with respect to these questions regarding notice, whether knows or should have known, there was testimony from both the Giant rep and from Mr. Winzer that they know – first of all, it's a store owned by Giant and it's a pallet jack owned by Giant with their permission and consent stocking shelves for their benefit. And the duty is to use reasonable care to see that those portions of the property that the invitee may be expected to use are safe.

The trial court granted judgment in favor of Giant on premises liability, but permitted the case to go forward based on vicarious liability:

> I evaluated the evidence of this case and . . . looked at the case law that was cited and *what I believe we have before us is not a premise liability case. I do not believe that there is any allegation that what occurred is a result of a flaw or evidence in the record to say that there was something about those premises that created a danger that would have resulted in the injury*. . . . So I do not believe that the – there is evidence to go forward on premise liability to the jury.
>
> However, what, I think this case is and what the evidence is, I mean, it's a – is whether Mr. Winzer was – did something that was negligent that resulted in the injury that was caused to Ms. Webb. So I think the issue becomes, is there evidence to keep this case alive against Giant with regards to Mr. Winzer's actions that day. *I think that there is arguments that could be made on what was offered, that there is some – enough involvement with Giant with regards to Mr. Winzer to warrant it turning into a fact question for the jury to decide*. I think there was enough evidence for the jury to figure out a, you know, a – whether – you know, *I'm going to leave it up to Counsel to make their arguments that there isn't*

[5] Counsel referred to the exception to the general rule that an "employer of an independent contractor is not liable for the negligence of the contractor or his employees." *Appiah v. Hall*, 416 Md. 533, 558 (2010) (quoting *Rowley v. Balt.*, 305 Md. 456, 461 (1986)).

> *enough, but I think there was evidence to – that Giant controlled access to the store*.

(Emphasis added).

At the close of its case, Giant renewed the motion for judgment, which the trial court again denied. The jury awarded Ms. Webb $188,986 in past medical bills and $211,014 in non-economic damages.

Other facts will be presented in our discussion of the questions.

DISCUSSION

I

The Denial of Giant's Motion for Summary Judgment and Motions for Judgment

The motions for summary judgment and for judgment present similar questions at different stages of the proceedings. We will first address the Motion for Summary Judgment.

Summary Judgment

Standard of Review

A trial court has "discretionary authority to *deny* a motion for summary judgment in favor of a full hearing on the merits, even when the moving party 'has met the technical requirements of summary judgment.'" *Fischbach v. Fischbach*, 187 Md. App. 61, 75 (2009) (quoting *Dashiell v. Meeks*, 396 Md. 149, 164–65 (2006)). Accordingly, we review a denial of a motion for summary judgment for an abuse of discretion. *Id.*

Contentions

Giant contends that Ms. Webb had "failed to offer any disputes of fact or evidence that Mr. Winzer was an agent, servant, or employee of Giant," and to "present any evidence that an unreasonably dangerous condition existed on the premises to sustain a cause of action predicated on premises liability."[6]

Ms. Webb contends that the denial of summary judgment was proper. She argues there was a genuine dispute of material fact regarding Mr. Winzer's relationship with Giant,[7] and sufficient facts to demonstrate Giant's control over Mr. Winzer when he was on the premises.

Analysis

A trial court can "enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law," but it may also exercise its discretion not to do so. *Fischbach*, 187 Md. App. at 75

[6] The trial court later granted Giant's motion for judgment on the issue of premises liability. Giant argues that by the end of discovery, Ms. Webb lacked any evidence that the person pushing the pallet cart was an agent, servant, or employee of Giant or that Mr. Winzer's use of Giant's pallet cart "equated to an entrustment of a non-delegable duty or was itself "unreasonably dangerous." We understand Giant's argument to be that the evidence did not change between summary judgment and trial and that it was entitled to judgment prior to trial.

[7] In her opposition to Giant's motion for summary judgment, Ms. Webb also contended that there was a genuine dispute of material fact as to the identity of the employee who caused her injuries. Mr. Winzer's identity and his relationship with PepsiCo was not disputed at trial. As we noted above, Ms. Webb sought to join PepsiCo as a defendant on December 22, 2017. PepsiCo moved to dismiss based on limitations, and the trial court granted PepsiCo's motion and struck the amended complaint.

(quoting Md. Rule 2-501(f)); *see Dashiell v. Meeks*, 396 Md. 149 (2006). The denial of a technically sufficient motion for summary judgment "in favor of a full hearing on the merits" does not necessarily constitute an abuse of discretion, and we are not persuaded that it did in this case. *See Fischbach*, 187 Md. App. at 75.

Motion for Judgment.

Standard of Review

When we review a trial court's ruling on a motion for judgment, we ask:

> whether on the evidence adduced, viewed in the light most favorable to the non-moving party, any reasonable trier of fact could find the elements of the tort by a preponderance of the evidence. . . . If there is even a slight amount of evidence that would support a finding by the trier of fact in favor of the plaintiff, the motion for judgment should be denied.

Washington Metro. Area Transit Auth. v. Djan, 187 Md. App. 487, 491-92 (2009).

Contentions

Giant contends that Ms. Webb's "own admission and representations" indicate that "her sole theory of liability in this case was based on premises liability, *i.e.* that Giant breached a duty to one of its customers related to an unreasonably dangerous condition on its premises." And, more particularly, that "[her] theory of liability was that the operation of a pallet cart by Mr. Winzer during store hours created an unreasonably dangerous condition" for which Giant was vicariously liable based on the breach of a non-delegable duty. According to Giant, Ms. Webb did not plead or advance a theory of negligence "based on vicarious liability, until the [c]ourt granted the motion for judgment on the premises liability claims." But even assuming that vicarious liability "was one of [Ms. Webb's] theories of negligence," there was "insufficient evidence to support the

existence of an employment relationship between Giant and Mr. Winzer and therefore no grounds for Giant to be vicariously liable for Mr. Winzer's actions."

Ms. Webb contends that by pleading negligence, she had "pursued a vicarious liability theory from the time of the filing of her Complaint," and that Giant's liability was always based "on the theory that [Giant was] vicariously liable for Mr. Winzer's actions due to the control and authority exerted over Mr. Winzer while he was working on [Giant's] premises."[8] Pointing to the testimony of Mr. Coradini, Giant's corporate designee,[9] she asserts that Giant "controlled not only Mr. Winzer's access to [its] store, but also [his] behavior while within the store."

Analysis

The duty of care owed by an owner or occupier of land to someone entering on the property depends on whether the person "is an invitee, a licensee, or trespasser." *Rowley v. Balt*, 305 Md. 456, 464 (1986). An "invitee" is "a person invited or permitted to enter or remain on another's property for purposes connected with or related to the owner's business." *Id.* at 465. Without question, Ms. Webb was an invitee to whom Giant owed a duty of "reasonable and ordinary care to keep [the] premises safe for [her] and to protect [her] from injury caused by an unreasonable risk which [she], by exercising ordinary care for [her] own safety will not discover." *Id*. (citations omitted).

[8] The Complaint indicates that Giant's liability for Mr. Winzer's actions was based originally on his status as a Giant employee.

[9] Mr. Coradini, testified: "if they're using a power jack, they . . . try to use a power jack, and they're told not to. We can kick them out of the store if they're abusing or not doing something properly."

As the Court of Appeals further explained in *Deering Woods Condo. Ass'n v. Spoon*, 377 Md. 250, 263 (2003), citing Restatement (Second) of Torts § 343:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, *but only if, he*
>
> (a) *knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and*
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.[10]

(Emphasis added).

But the owner or possessor of land is not "an insurer of the safety of his customers while they are on the premises and no presumption of negligence on the part of the owner arises merely from a showing that an injury was sustained in his store." *Myers v. TGI Friday's, Inc.*, No. CIV. JFM 07-333, 2007 WL 4097498, at *4 (D. Md. Nov. 9, 2007) (quoting *Moulden v. Greenbelt Consumer Servs., Inc.*, 239 Md. 229, 230 (1965)).

Mr. Winzer was employed by PepsiCo to deliver and stock PepsiCo products at the Giant store, which he was doing when Ms. Webb was injured. As a general rule,

[10] For example, "an employee of a business has a legal duty to take affirmative action" to protect a business invitee who is in danger, "*provided that the employee has knowledge of the injured invitee and the employee is not in the path of danger*." *Southland Corp. v. Griffith*, 332 Md. 704, 719 (1993) (emphasis added). And there is a duty to protect an invitee from harm caused by the intentional acts of a third party when it is known or should be known that the acts are occurring or about to occur. *Corinaldi v. Columbia Courtyard, Inc.*, 162 Md. App. 207, *cert. granted*, 388 Md. 404, *appeal dismissed*, 389 Md. 124 (2005).

Giant would not be liable for the negligence of a PepsiCo employee. As the Court of Appeals has explained:

> This common law principle is embodied in § 409 of the Restatement, which provides that, with some exceptions, "the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants." Although the exceptions to this rule are numerous, Comment b to § 409 of the Restatement explains that they generally "fall into three very broad categories: 1. Negligence of the employer in selecting, instructing, or supervising the contractor[;] 2. Non-delegable[11] duties of the employer, arising out of some relation toward the public or the particular plaintiff[; and] 3. Work which is specially, peculiarly, or 'inherently' dangerous." Under these exceptions, liability is imposed on the employer of an independent contractor under one of two theories: vicarious liability or "actual fault on the part of an employer." *Rowley*, 305 Md. at 462, 505 A.2d at 497; Restatement §§ 410–415 introductory n. (discussing liability for harm caused by employers of independent contractors).
>
> * * *
>
> [A]n employer is not liable for harm caused by the work of an employee so long as "the employee is 'a contractor, pursuing an independent employment, and, by the terms of the contract, is free to exercise his own judgment and discretion as to the means and assistants that he may think proper to employ about the work, exclusive of the control and direction, in this respect, of the party for whom the work is being done.'" *Gallagher's Estate v. Battle*, 209 Md. 592, 601 (1956) (quoting *Deford v. State ex rel. Keyser*, 30 Md. 179, 203 (1869)). When an employer has retained control of the details of the work, however, liability is permitted under a theory of actual fault. *See Gallagher's Estate*, 209 Md. at 601 (explaining that an employer's liability under *respondeat superior* is predicated on the rationale that the employer's control over the employee's work renders the employer constructively present during the work, "so that the negligence of the servant is the negligence of the master"); Restatement §§ 410–429

[11] The *Rowley* Court stated that referring to the duty owed to an invitee as "non-delegable" was "something of a misnomer" in that the duty of performance can be delegated but not "the risk of non-performance of the duty." 305 Md. at 466. There is no evidence of delegation in this case.

> introductory n. (referring to actual fault as the basis for imposing liability on employers under the retention of control doctrine set forth in § 414)[12] . . . . As this passage from the Restatement implies, and we have repeated throughout, the retention of control is an absolute prerequisite to an employer's liability for harm caused by the work of an independent contractor.

Appiah v. Hall, 416 Md. 533, 551, 562-63 (2010).

In denying the premises liability claim, the trial court did not find "enough evidence in the record to say that there was something about those premises that created a danger that would have resulted in the injury," which would include the use of pallet jacks during store hours.[13] The court also granted Giant judgment on the count related to negligent hiring, training, and "supervision of its employees/agents." But, referencing Giant's control over Mr. Winzer's access to the store, the court found that there was sufficient evidence to "keep the case alive" against Giant.

[12] Comment c. to § 414 of Restatement (Second) of Torts provides:

> It is not enough that [the employee] has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

[13] As a result, the jury was not "to decide a premises liability case." The instructions and the verdict sheet question affirmatively answered by the jury regarding negligence related to Mr. Winzer's negligence and whether he was an "agent, servant or employee" of Giant based on its control of his work. The jury did not answer whether Mr. Winzer "was an independent contractor and that his acts were authorized or intended by Giant."

Arguing in support of that finding, Ms. Webb advances the following as evidence of the requisite control over Mr. Winzer's work:

> (1) Mr. Winzer checked in with a Giant employee when he arrived at the store, and checked out when he left;
>
> (2) Mr. Winzer used equipment owned by Giant, which had regulations on the type of equipment he could use when fulfilling his tasks in the store;[14]
>
> (3) Citing Giant's corporate designee's testimony, Ms. Webb states that Giant controlled "Mr. Winzer's behavior while within the store": "[W]e can kick them out of the store if they were abusing or not doing something properly."

But "*[g]eneral control over an independent contractor's work*" would not be sufficient to extend liability to Giant for Mr. Winzer's actions. *See Appiah*, 416 Md. at 563 (emphasis added). To do that, it would be necessary to demonstrate that Giant had "retained control over the operative detail and methods" of Mr. Winzer's work, including "*the very thing from which the injury arose.*" *Id.* at 555 (citing *Gallagher's Estate*, 209 Md. at 602). To the extent that Ms. Webb's injury "arose" out of Mr. Winzer's use of an unpowered pallet jack in his work, Giant's control extended only to a prohibition against the use of powered jacks by any vendor.

[14] Ms. Webb argues that some stores do not allow pallet jacks during regular business hours but what Mr. Winzer testified to was that some stores do not permit *powered* pallet jacks on the floor during certain hours. Giant is one of those stores. The record does not indicate any prior issues having arisen from the use of non-powered pallet jacks by Mr. Winzer or the employees of any other vendors who did not have their own. Because powered jacks were not permitted, Giant provided non-powered jacks for the vendors to use.

In sum, correcting a vendor *observed* using a pallet jack improperly, requiring a vendor to check in and out, to stock in a particular location of the store, permitting only non-powered jacks, and "sometimes" checking the vendor's work—do not indicate sufficient control over the "methods" and "operative detail" of Mr. Winzer's work to extend liability on Giant for his actions. *See Appiah*, 416 Md. at 565. Rather than a right to supervise Mr. Winzer's work, these are general rights that a possessor of the premises on which the work is being done would ordinarily retain for itself. For this reason, we hold, as a matter of law, that the evidence was insufficient to submit the vicarious liability claim to the jury, and that Giant's motion for judgment should have been granted.

II.

The Denial of Giant's Motion in Limine

Standard of Review

Evidentiary rulings are "left to the sound discretion of the trial judge and will only be reversed upon a clear showing of abuse of discretion." *Ayala v. Lee*, 215 Md. App. 457, 474–75 (2013) (quoting *Malik v. State*, 152 Md. App. 305, 324 (2003)). An abuse of discretion is when "no reasonable person would take the view adopted by the [trial] court," or when "the court acts without reference to any guiding rules or principles." *Powell v. Breslin*, 430 Md. 52, 62 (2013) (internal quotation marks and citation omitted).

Contentions

Giant contends that, by denying the motion in limine, the court "improperly allowed [Ms.] Webb's counsel to interject 'Reptile Arguments' into trial." More

specifically, it argues that her argument that Giant had a duty to keep her safe was "not an accurate summation of the law in any way." In its view, this error was especially prejudicial in light of the trial court's determination that "there was insufficient evidence of a dangerous condition to support a theory of negligence predicated on premises liability," which meant that there was no breach of a "non-delegable duty." Giant asserts that, by denying the motion, the court "openly invited" the jury "to look beyond the law, put themselves in the place of [Ms.] Webb, and punish a corporate defendant regardless of fault."

Ms. Webb contends that Giant's arguments were not preserved for our review because Giant never objected to any arguments that she made. In addition, she contends that they are "entirely without merit," because "at no point" did she ask the jury to "put themselves in her shoes."

Analysis

A Reptile Theory approach is similar to a Golden Rule argument. It encourages jurors to favor personal safety and the protection of family and community; Golden Rule arguments "appeal[] to the jury's own interests" and ask jurors "to place themselves in the shoes of the victim." *Lee v. State*, 405 Md. 148, 171 (2008) (internal citations omitted). When such arguments "invite[] the jurors to disregard their oaths and to become non-objective viewers of the evidence which has been presented to them, or to go

outside that evidence to bring to bear on the issue of damages purely subjective considerations" they are improper.[15] *Leach v. Metzger*, 241 Md. 533, 536-37 (1966).

Here, some comments by Ms. Webb's counsel in both opening and closing statements might be understood as encouraging the jurors to make Giant an insurer of its customers' safety while on its premises.[16] But they were not objected to. Instead, Giant responded in its closing:

> I feel that there is complete disregard for the actual facts and evidence that you've heard . . . when I listened to [what Ms. Webb's counsel] said, your job is to assess community safety standards. For about 20 minutes, [the trial court] delivered the law. She delivered the instructions that you are to consider. And nowhere in those instructions are we charging you to be the guardians of the public safety. Nowhere.

An objection to an improper argument must be "interposed either (1) immediately after the allegedly improper comments are made, or (2) immediately after the argument is completed." *Grier v. State*, 116 Md. App. 534, 545 (1997). And, in its ruling on the motion in limine, the trial court essentially invited an objection if Ms. Webb argued for "a higher duty . . . not supported by the instructions."

In short, the issue was not adequately preserved for our review.

[15] Prior to submitting the case to the jury, the trial court instructed the jurors to base their findings only upon the testimony, exhibits, and stipulations of the parties, "including any conclusions which may be fairly drawn from that evidence." And that "[o]pening statements and arguments of the lawyers are not evidence in this case."

[16] As noted above, the case went to the jury based on Mr. Winzer's negligence. Because neither Mr. Winzer nor PepsiCo could be held liable for his negligence, recovery was dependent on the extension of liability to Giant beyond its duty to Ms. Webb as an invitee.

III.

Spoliation

Standard of Review

In deciding whether to grant a requested jury instruction, a trial court must consider "whether the requested instruction was a correct exposition of the law, whether that law was applicable in light of the evidence before the jury, and finally whether the substance of the requested instruction was fairly covered by the instruction actually given." *Malik v. Tommy's Auto Serv., Inc.*, 199 Md. App. 610, 616 (2011) (citation omitted). We review the grant or denial of an instruction for an abuse of discretion. *Steamfitters Local Union No. 602 v. Erie Ins. Exchange*, 231 Md. App. 94, 124 (2019) (citing *S & S Oil, Inc. v. Jackson*, 428 Md. 621, 640 (2012)).

Contentions

Giant contends that the trial court abused its discretion in giving the jury a spoliation instruction that was "based on pure speculation that: 1) video footage of the incident existed; and 2) the alleged footage was destroyed."

Ms. Webb contends that Giant's "actions clearly demonstrate the propriety of the spoliation instruction given to the jury." She points to Mr. Coradini's statement that Giant has "probably upwards of 30-some cameras" positioned "throughout the entire store" that were "in place at the time of the incident in question," and argues that Mr. Coradini's testimony "both in his deposition and at trial, provided far more evidence regarding the existence of camera footage of the subject area at the time of the incident at issue than [Giant] references either in [its] motion or [its] brief."

Analysis

Mr. Coradini was asked in a discovery deposition if there was video footage of the incident, to which he responded: "I don't know." Giant's counsel, referring to Giant's earlier response to a document request, then stated on the deposition record that there was no video footage of the incident.

At trial, Mr. Coradini testified that, after his deposition, he personally contacted MAC Risk Management to determine whether there was any video footage of the incident, and was notified, consistent with Giant's response to the earlier document request and his deposition response that "[n]o video of that incident was captured."[17]

When she first submitted proposed jury instructions, Ms. Webb requested an instruction on spoliation. In response, Giant asked that the trial court deny the instruction request and preclude her from inferring or arguing that video surveillance of the incident had been destroyed. The court deferred ruling on the spoliation instruction at that time.

Later, when Ms. Webb's counsel again requested a spoliation instruction, Giant's counsel stated:

> [T]his whole notion of spo[li]ation is based on nothing but rank speculation and there's no foundation that there was any video to be preserv[ed] or that there was any destruction of evidence. To allow [Ms. Webb's counsel] to ask questions to engage in speculation – just engages in

[17] On cross-examination, the following exchange ensued:

> [Ms. Webb's counsel]: Why did you say at the deposition that you didn't know whether video existed or not?
>
> [Mr. Coradini]: Because I, like I said, the research was done. . . . you didn't ask if I physically did the research.

> speculation, there's just no evidence for it to be – and all it would do is serve to prejudice my client to ask questions about something without any foundation that would require the jury at the end of the case to engage in nothing but speculation.

The court granted Ms. Webb's request and, using Maryland Civil Pattern Jury Instruction (MPJI-Cv) 1:16, instructed the jury:

> The destruction of or the failure to preserve evidence by a party may give rise to an inference unfavorable to that party. If you find that the intent was to conceal the evidence, the destruction or failure to preserve must be inferred to indicate that the party believes that his or her case is weak and that he or she would not prevail if the evidence was preserved. If you find that the destruction or failure to preserve the evidence was negligent, you may, but are not required to, infer that the evidence, if preserved, would have been unfavorable to that party.

Spoliation is "[t]he 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 Dict., 8th Ed. (2004) at 1437). A spoliation instruction is given in a civil case when "a party has destroyed or failed to produce evidence." *Cost v. State*, 417 Md. 360, 370 (2010). The instruction addresses:

> the destruction or failure to preserve evidence, rendering it unavailable, and not merely the failure to produce evidence that *is* available, or, indeed, the failure to create evidence, but, for purposes of the permissible inference, it does distinguish between destruction or failure to preserve with an intent to conceal the evidence and destruction or failure to preserve that is the product of negligence.

Keyes, 191 Md. App. at 540.

But before the instruction was given, Ms. Webb, "[b]y necessity," had the burden to establish and the court would have to find that the video "actually existed." *Solesky v. Tracey*, 198 Md. App. 292, 309 (2011). There can be no act of destruction or failure to

preserve evidence not proven to exist, and therefore no act or omission from which inferences can arise.

According to the document request response and Mr. Coradini's deposition and trial testimony, "no video of the area where the fall occurred was found." In other words, there is no direct evidence that a video of the incident actually existed or that it was destroyed or otherwise not preserved.

Ms. Webb offers the following circumstantial evidence to establish its existence: (1) the number of cameras positioned throughout the store pointing in "every direction" including "around the frozen food section";[18] (2) the store report created on the day of the incident; and (3) her demand to MAC Risk Management on December 16, 2014 to preserve and not destroy the video of the incident.

On this record, the number of cameras in the store, including cameras or a camera "around" the frozen food aisle, do not support a factual finding that a video of the incident "actually existed." Nor do the store report and the demand to MAC Risk Management support the likelihood of its existence. To borrow from MPJI-Cv 1.8, which was given in this case, the cameras are, at most, deer tracks in the snow, but they are not necessarily tracks of a particular deer—in this case, a video of the incident. Depending on operability and direction, they may support the video's *possible* existence, but not its actual existence.

[18] When Mr. Coradini testified, he said that there were "roughly, give or take" 30 cameras in the store, which was an estimation of the screens seen in the "loss prevention room," but that he did not have access to the "actual angles they're facing."

The failure of the multiple cameras to capture the incident could be grist for credibility and argument mills, but it would not justify a spoliation instruction. Instructions "as to facts and inferences" are not normally required. And when missing evidence permits multiple inferences to be drawn, a trial judge's "emphasis of one possible inference out of all the rest . . . can be devastatingly influential upon a jury although unintentionally so." *Keyes*, 191 Md. App. at 542 (quoting *Yuen v. State*, 43 Md. App. 109, 114 (1979)). That said, we do not reverse a trial court's decision on a jury instruction in the absence of prejudicial harm. *Barksdale v. Wilkowsky*, 419 Md. 649, 669 (2011) (holding that "a party challenging an erroneous jury instruction in a civil case must demonstrate to the court why the error was prejudicial").

Giant argues that it was prejudiced because the instruction "permitted [Ms.] Webb's counsel to lead the jury away from the actual evidence presented in this case," and that "[t]he only purpose for [Ms.] Webb to even reference spoliation was to unfairly prejudice the jury." Ms. Webb responds that Giant suffered "no harm" from the instruction because its language gave "the jury the opportunity to weigh the evidence and reach their own conclusions."[19]

Here, the only witnesses to the incident were Ms. Webb and Mr. Winzer, which made their respective credibility an issue. In closing, Ms. Webb's counsel directed the jury's attention to the instruction: "I really want you to pay close attention to [the

[19] The language of the instruction presumes the existence of the evidence and its destruction or the failure to preserve it. The permitted conclusions relate to the intent to conceal and the required or permitted inferences.

spoliation instruction] that the judge gives you" and then read the instruction to the jury. He then asked the jury if they "really believe that there's no video footage of the incident" and asserted "[t]here's almost always video footage" and if there was, it "would probably corroborate and be consistent with Ms. Webb's description" of what happened.

An instruction that "is misleading or distracting for the jury, and permits the jury members to speculate about inapplicable legal principles," is potentially prejudicial. *Barksdale*, 419 Md. at 669. Here, the jury was invited and permitted by the instruction, to engage in speculation regarding concealment, destruction, and failure to preserve evidence that was not shown to actually exist. According to the Court of Appeals, "the mere inability of a reviewing court to rule out prejudice, given the facts of the case, may be enough to declare an error reversible." *Barksdale*, 419 Md. at 669. Prejudice cannot be ruled out in this case. Had we not already reversed the judgment based on vicarious liability, we would also reverse the judgment based on the spoliation instruction and remand to the circuit court for a new trial.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED; CASE REMANDED TO THE CIRCUIT COURT TO ENTER JUDGMENT IN FAVOR OF GIANT; COSTS TO BE PAID BY APPELLEE.