Circuit Court for Anne Arundel County
Case No.: C-02-CV-21-001493

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1676

September Term, 2023

VIRGIL EDWARDS

v.

JASON LABBE, II

Shaw,
Tang,
Woodward, Patrick L.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: December 13, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

In the Circuit Court for Anne Arundel County, Virgil Edwards ("Edwards"), appellant, filed suit against Jason Labbe, II ("Labbe"), appellee, asserting claims for negligence arising from a motor vehicle accident.[1] Labbe conceded liability, and the case was scheduled for a jury trial on damages. During jury selection, Labbe raised an issue with the *de bene esse* depositions of designated medical experts that Edwards intended to introduce at trial. Labbe challenged the admissibility of the videotaped depositions and made an oral motion for judgment. The court excluded the videotaped depositions and granted Labbe's motion for judgment.

Edwards appealed, presenting a single question:[2] Did the trial court err in granting judgment in Labbe's favor? We answer in the affirmative. Accordingly, we vacate the judgment and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

On November 19, 2018, Edwards was driving a vehicle when another car, driven by Labbe, hit him from behind. In his complaint, Edwards alleged that as a direct and proximate result of Labbe's negligence, he "suffered serious, painful, and permanent bodily injuries, great physical pain and mental anguish, severe and substantial emotional

[1] Edwards also named James River Insurance Company as a defendant. He later dismissed his claim against it.

[2] Rephrased from:

> Did the trial court err by granting a motion for judgment prior to jury selection being completed, prior to [Edwards] presenting any testimony, and prior to the close of [his] case in chief?

distress [and] loss of capacity for the enjoyment of life." Labbe conceded liability but contested Edwards's damages claim.

Edwards designated two of his treating physicians as expert witnesses: Dr. Susan Liu, an orthopedic surgeon, and Dr. Varada Nargund, an anesthesiologist and pain specialist. According to Edwards's expert designation, Dr. Liu was expected to testify that she examined him due to his neck and back complaints. She ordered and reviewed an MRI of his neck, which showed multilevel degenerative changes. Dr. Liu was also expected to testify that the treatment rendered was causally related to the accident and was medically necessary.

Dr. Nargund was expected to testify that he examined Edwards for chronic cervical pain. During the examination, Edwards reported experiencing aching and stabbing, as well as sharp and shooting pain in his cervical area. Dr. Nargund recommended physical therapy, medication therapy, and a series of injections. He was also expected to testify that the treatment rendered was causally related to the accident and was medically necessary.

In preparation for the jury trial scheduled for October 12, 2023, Edwards noted and took the videotaped *de bene esse* depositions of these physicians in accordance with Maryland Rule 2-419(a)(4).[3] Dr. Nargund's deposition occurred on October 3, and Dr. Liu was deposed on October 6.

[3] Maryland Rule 2-419(a)(4) provides that "[a]n electronic audio-video deposition of a treating or consulting physician or of any expert witness may be used for any purpose even though the witness is available to testify if the notice of that deposition specified that it was to be taken for use at trial." This type of deposition is known as a "de bene esse" deposition. *See Shannon v. Fusco*, 438 Md. 24, 34 n.14 (2014) (explaining that "*de bene* (continued)

During the jury trial on October 12, the parties began by addressing two preliminary issues before starting jury selection.[4] After the court posed the *voir dire* questions to the venire, but before individual questioning of the venirepersons, the court took a lunch recess.

When the court reconvened, it inquired whether the parties were prepared to continue with jury selection. Edwards's attorney ("plaintiff's counsel") informed the court of yet "another issue" that had "come up." Plaintiff's counsel had learned Labbe's attorney ("defense counsel") took issue with the videotaped *de bene esse* depositions but did not understand the issue being raised by defense counsel: "I've been advised that there's an objection to the videotapes of the experts because they weren't offered as experts. I don't know what that means, but that's what [defense counsel] is reporting to me."

Defense counsel clarified that the objection was based on the fact that plaintiff's counsel did not offer the physicians as experts during the depositions: "[N]ot a single time were [the physicians] ever offered as an expert in any field of any kind during the [deposition] transcript." Although plaintiff's counsel had conducted *voir dire* of the physicians during the depositions, defense counsel pointed out that he did not have the

esse" is defined: "[a]s conditionally allowed for the present; in anticipation of a future need" (quoting Black's Law Dictionary 430 (8th ed. 2009))).

[4] One issue concerned the admission of Edwards's medical records, which was eventually resolved. The other issue related to the fact that Edwards had been treated at the hospital the night before for ongoing neck pain and been directed to wear a cervical collar. His attorney moved for a postponement to allow counsel to obtain those treatment records from the recent hospital visit and to prevent the jury from seeing Edwards with a neck brace without hearing evidence about why he was wearing it. Defense counsel objected, and the request was denied. Neither issue is before us in this appeal.

same opportunity because the physicians were never offered as experts during the depositions.

The court stated, "[T]here are some procedural things we have to do when we offer an expert['s] testimony, right? We have to say, I'm offering this witness as an expert in the field of blank." The court indicated that if a treating physician were to testify in court and be offered as an expert, a judge would ask opposing counsel if they had any objections to the physician being admitted as an expert or if they wished to conduct *voir dire* of the physician before the court decided to accept the physician as an expert. The court explained, "[I]f those procedural steps are not taken, that leaves us, for the lack of a better term, in short pants."

Plaintiff's counsel acknowledged that the proper procedures were not followed during the depositions, stating, "We can't try the case . . . ." Consequently, the court inquired whether Edwards intended to dismiss his complaint. Plaintiff's counsel replied that he had to consult with his co-counsel, who was not present in court but could be reached by phone.

Defense counsel moved to dismiss the case, arguing that without an expert, "[Edwards] can't possibly meet all the criteria to bring the case to a jury, and I think we'd just be wasting everyone's time." Plaintiff's counsel opposed this motion, explaining that the witnesses who had been deposed were treating physicians and could testify as such. Defense counsel countered that these witnesses would not be able to provide any medical opinions and could only serve as fact witnesses:

> They cannot offer opinion, medical opinions. They're -- at that point, they're fact witnesses. Fact witnesses cannot offer a medical opinion as to whether the treatment is related to the accident. The fact witnesses cannot offer any testimony regarding any other treatment that they weren't privy to, which they both did, so they can't possibly, they can't possibly now be seen as a fact witness. Even so, you still need an expert to relate the treatment to the occurrence. And without the -- without an injury related to the accident there is no claim.

The court expressed similar concerns, noting that "[t]he problem would be that it's a fact witness that's masquerading as an expert or an expert masquerading as a fact witness."

After allowing plaintiff's counsel to consult with his co-counsel, counsel advised that Edwards was not withdrawing his complaint. The court then inquired whether defense counsel wished to make "a motion for judgment at this time," to which he responded affirmatively. The court then granted the "[m]otion for judgment."

On October 16, 2023, the court entered an order, stating, in relevant part: "Defendant moved to exclude video depositions because the witnesses were not designated as experts-GRANTED. Defendant moved for [j]udgment-GRANTED. Case is Dismissed."

This timely appeal followed.

DISCUSSION

The parties agree that the circuit court made two rulings in this case, as set forth in its order. First, the court granted a motion to exclude the videotaped *de bene esse* depositions of Edwards's treating physicians. Second, the court granted judgment in Labbe's favor.

Edwards does not challenge the first ruling. He concedes in his brief that during the depositions, he failed to tender the physicians as experts, and thus, the defense did not conduct a *voir dire* examination of them.

We address the second ruling, which is the focus of this appeal.

A.

Parties' Contentions

The parties disagree on which rule the circuit court relied upon when it granted the motion for judgment. Edwards claims that the court relied on Rule 2-519(a), which states, in relevant part, that "[a] party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence." Edwards contends that the court improperly granted the motion for judgment before the close of the evidence, contrary to the Rule's requirements. He further asserts that he could have rectified the problem with the *de bene esse* depositions by calling either physician or both as live witnesses at trial, allowing for *voir dire* examination by defense counsel and qualifying them as experts in their respective fields.

In contrast, Labbe contends that the court relied on Rule 2-501, which governs motions for summary judgment. Subsection (a) states:

> Any party may file a *written* motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law. The motion shall be supported by affidavit if it is (1) filed before the day on which the adverse party's initial pleading or motion is filed or (2) based on facts not contained in the record. A motion for summary judgment may not be filed: (A) after any evidence is received at trial on the merits or (B) unless permission of the court is granted, after the deadline for dispositive motions specified in the scheduling order entered pursuant to Rule 2-504(b)(1)(F).

Md. Rule 2-501(a) (emphasis added). The Committee Note following this subsection states:

> *This Rule does not prevent the trial court from exercising its discretion during trial to entertain any motions* in limine *or other preclusive motions that may have the same effect as summary judgment and lead to a motion for judgment under Md. Rule 2-519*. See, e.g., Univ. of Md. Medical System Corporation, et al. v. Rebecca Marie Waldt, et al., 411 Md. 207 (2009).[5] Such a procedure avoids confusion and potential due process deprivations associated with summary judgment motions raised orally or at trial. See Beyer v. Morgan State Univ., 369 Md. 335, 359, fn. 16 (2002); see also Hanson v. Polk County Land, Inc., 608 F.2d 129, 131 (5th Cir. 1979) (allowing oral motions for summary judgment leads to confusion with each side having a different recollection of what was contended.) Requiring a written motion also insures adequate notice to all sides.

(emphasis added).

According to Labbe, plaintiff's counsel conceded below that Edwards could not proceed with his damages claim without expert testimony. Labbe disputes the assertion that Edwards could have fixed the problem with the depositions by calling the physicians to testify in person at trial; Edwards made no such claim below, nor does the record indicate that these witnesses would have been available to appear in person to testify.

Labbe acknowledges that Rule 2-501(a) specifies that a motion for summary judgment must be filed in writing. However, he interprets the Committee Note and related

[5] In *Waldt*, the plaintiffs' expert witness was excluded from testifying about the standard of care and informed consent due to not meeting the relevant statutory criteria and lacking sufficient experience with the specific procedure. 411 Md. at 213. After the plaintiffs' case-in-chief, the defense moved for summary judgment on two counts. *Id.* The plaintiffs conceded that no evidence of negligence was presented, leading the court to grant judgment in favor of the defendants. *Id.* After hearing arguments concerning the informed consent claim, the court ruled that, without expert testimony on the informed consent claim, there was no question for the jury and thus granted judgment for the defendants. *Id.*

case law to mean that trial judges have the discretion to excuse the writing requirement where, as here, a court's ruling effectively renders a plaintiff's claim futile and strict adherence to the writing requirement is neither feasible nor warranted. He adds that even if the court erred by granting an oral motion for summary judgment, the error was harmless.[6]

Edwards disputes Labbe's assertion that the court granted summary judgment under Rule 2-501, as it did not expressly indicate this in its order. Even if the court treated the motion as one for summary judgment, he points out that Rule 2-501 does not allow the motion to be made orally. Furthermore, he argues that Labbe's interpretation of the Committee Note is inapplicable because Labbe could have filed a written motion for summary judgment after the depositions and before the scheduled trial date in compliance with the Rule.

[6] Alternatively, Labbe moves to dismiss the appeal for Edwards's violations of the rules of appellate procedure. He argues that Edwards's record extract, which comprises only the transcript of the first day of trial, is deficient because it fails to include the circuit court docket entries and the judgment appealed from. *See* Md. Rule 8-501(c) (stating that a record extract "shall include the circuit court docket entries[and] the judgment appealed from"). He also highlights that Edwards's brief is largely bereft of any citation to the record. *See* Md. Rule 8-504(a)(4) ("Reference [in the statement of facts in the brief] shall be made to the pages of the record extract or appendix supporting the assertions.").

We exercise our discretion and deny the motion to dismiss the appeal. Labbe included the missing documents in an appendix to his brief. *See* Md. Rule 8-501(m) ("[o]rdinarily, an appeal will not be dismissed" based upon a deficient record extract). Though Edwards should have included citations to the record for the background facts supplied on the second page of his brief, none of those facts are in dispute on appeal. See Md. Rule 8-504(c) (providing that the appellate court "may" dismiss the appeal for non-compliance with Rule 8-504).

B.

Analysis

The circuit court did not expressly state whether it was treating Labbe's motion for judgment as a motion for directed verdict under Rule 2-519 or as a motion for summary judgment under Rule 2-501. However, we need not determine which rule the court relied on for its decision, as it erred in applying either rule.

If the court granted a motion for judgment under Rule 2-519, it erred because it was not made "at the close of all the evidence." Md. Rule 2-519(a); *see Goff v. Richards*, 19 Md. App. 250, 251 (1973) (construing the predecessor to Rule 2-519(a) and concluding that the trial court lacked authority to direct a verdict in favor of the defendant following opening statements); *Terumo Med. Corp. v. Greenway*, 171 Md. App. 617, 623 (2006) ("A motion for judgment pursuant to Rule 2-519 . . . is concerned only with whether the plaintiff has met the burden of *prima facie* production, as a matter of law . . . .).

If the court treated Labbe's motion for judgment as one for summary judgment under Rule 2-501, it erred in granting the motion. This is because the motion was not filed in writing, as the Rule requires. *See, e.g.*, *Hanson v. Polk Cnty. Land, Inc.*, 608 F.2d 129, 131 (5th Cir. 1979) (holding reversible error to grant oral motion for summary judgment).

Prior to 2015, Rule 2-501 did not specify that a motion for summary judgment had to be in writing. In *Beyer v. Morgan State University*, the Supreme Court of Maryland affirmed the trial court's grant of an oral motion for summary judgment made at trial. 369 Md. 335, 359 (2002). It reasoned that there was no prohibition against making an oral motion for summary judgment under Rule 2-501. *Id.* Indeed, Rule 2-311(a), which governs

motions, expressly exempts motions "made during a hearing or trial" from having to be made in writing. *See id.* The Court noted, however, that an oral motion for summary judgment "may raise potential due process considerations. The context and chronology of the particular circumstances of such a motion may implicate issues of fair notice and opportunity to defend for the nonmoving party." *Id.* at n.16.

Effective July 1, 2015, the Rule was amended to require that motions for summary judgment be made in writing. The Supreme Court of Maryland's Standing Committee on Rules of Practice and Procedure ("Rules Committee") explained that mandating written motions for summary judgment was consistent with practice in federal courts and represented sound judicial policy. RULES COMM., ONE HUNDRED EIGHTY-SIXTH REPORT: NOTICE OF PROPOSED RULE CHANGES 12 (2014), https://www.mdcourts.gov/sites/default/files/rules/reports/186th.pdf [https://perma.cc/G87N-6TDC] [hereinafter 186TH REPORT]. Permitting an oral motion for summary judgment at trial could catch a litigant "off-guard," particularly if it was made after evidence had already been admitted. *Id.* Additionally, oral motions raise due process concerns, as identified in *Beyer,* because the nonmoving party lacks notice and an opportunity to defend the motion. 186TH REPORT at 12. The Rules Committee reasoned that the "opportunity for a considered response may be severely limited when [an oral motion for summary judgment] is made after trial has commenced." *Id.* at 12–13.

The Maryland Supreme Court summarized the justifications for amending Rule 2-501:

> First, the Rules Committee stated that motions for summary judgment are historically filed prior to trial to prevent "the necessity and expense of preparing for trial on the merits when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law." Second, the Rules Committee stated that the due process rights of the party against whom the motion is filed will be protected by the proposed changes since the party will have fair notice and the opportunity to defend. Third, other motions are available to the parties if during the course of trial a party becomes entitled to judgment (e.g. Md. Rule 2-519). Lastly, the Rules Committee stated that it may become unclear what evidence the court should consider in deciding a mid-trial motion for summary judgment.

Spaw, LLC v. City of Annapolis, 452 Md. 314, 364 (2017).

The Committee Note does not support Labbe's interpretation that the trial court can allow motions for summary judgment to be made orally during trial when the court's earlier ruling effectively renders a plaintiff's claim futile. The Rules Committee explained the meaning of the Note. *See* 186TH REPORT at 13, 80–81. It acknowledged that "there are occasions when, as a result of what occurs during the course of a trial, one party or another may become entitled to judgment (or partial judgment) as a matter of law." *Id*. at 13. However, it emphasized "other ways to deal with that situation." *Id.* Specifically, a party could move for judgment under Rule 2-519 "at the end of the plaintiff's case or at the end of the entire case." *Id.* It gave the following example:

> If the court were to exclude as inadmissible the testimony of a witness or a document that is legally essential to a party's case, or some discrete aspect of a party's case, the other party may move *in limine* to preclude further evidence, as being irrelevant. If such a motion is granted, a motion for judgment under Rule 2-519 would then lie.

Id. In summary, it explained that "motions for summary judgment should remain pretrial motions intended to avoid the need for a trial," and "motions for judgment made after trial

has commenced and evidence has been received should be dealt with under Rule 2-519." *Id.*

Labbe cites *Ross v. Housing Authority of Baltimore City*, 430 Md. 648, 652 (2013), for the proposition that the Maryland Supreme Court implicitly endorses the practice of granting an oral motion for summary judgment made during a hearing held before trial begins and after a pretrial motion has been granted to exclude critical expert testimony. We disagree with Labbe's interpretation. *Ross* did not address the issue of whether the court could grant summary judgment on an oral motion. Furthermore, that case was decided before Rule 2-501(a) was amended to require that motions for summary judgment be filed in writing. Indeed, as the Maryland Supreme Court has recently stated, "Gone are the days when a summary judgment motion could be made orally at trial, a practice that raised 'due process considerations' of 'fair notice and opportunity to defend for the nonmoving party.'" *Charles Riley, Jr. Revocable Tr. v. Venice Beach Citizens Ass'n*, 487 Md. 1, 18 (2024) (quoting *Beyer*, 369 Md. at 359 n.16)).

Our appellate courts will not reverse a lower court's judgment if the error is harmless. *Flores v. Bell*, 398 Md. 27, 33 (2007). "The party complaining that an error has occurred has the burden of showing prejudicial error." *Shealer v. Straka*, 459 Md. 68, 102 (2018). "Prejudice will be found if a showing is made that the error was likely to have affected the verdict below." *Crane v. Dunn*, 382 Md. 83, 91 (2004). "It is not the possibility, but the probability, of prejudice which is the object of the appellate inquiry." *Id.* (citation omitted). Ultimately, we determine prejudice "based on the facts of each individual case." *Barksdale v. Wilkowsky*, 419 Md. 649, 662 (2011).

Edwards argues that he was prejudiced by the court's error in granting Labbe's oral motion for summary judgment because there was no opportunity for Edwards to provide a considered response regarding whether there was a genuine dispute of material fact on his claim for damages in light of the excluded evidence. He contends that neither the parties nor the judge thoroughly analyzed all the evidence in the case. Instead, it seemed they all operated under the assumption that excluding the videotaped depositions of two of Edwards's treating physicians foreclosed his damages claim.

After reviewing the record, we conclude that the error is not harmless. The parties were in the middle of jury selection when defense counsel made an oral motion for judgment. There was no opportunity for counsel to fully address or for the court to thoroughly analyze whether there was a genuine dispute of material fact on Edwards's claim for damages in light of the excluded evidence.[7] The response from plaintiff's counsel indicates he was caught off guard by the issue with the *de bene esse* depositions and was not adequately prepared to provide a considered response to the oral motion.

The Rules Committee provided compelling reasons for amending Rule 2-501 to require that motions for summary judgment be filed in writing before trial. In the Committee Note, the Committee explained that this requirement "avoids confusion and potential due process deprivations associated with summary judgment motions raised

[7] We note that there are instances where expert testimony is not necessary to prove a causal connection between negligence and an injury or damages. *See Hunt v. Mercy Med. Ctr.*, 121 Md. App. 516, 538–42 (discussing when medical expert testimony is necessary to prove causation and collecting cases). We express no opinion as to whether Edwards's testimony or other evidence could have sufficed to prove any of his damages because the record is not developed in this regard.

orally or at trial" and "insures adequate notice to all sides." The circumstances in this case illustrate this rationale and the significance of providing "fair notice and opportunity to defend for the nonmoving party." *See Venice Beach Citizens Ass'n*, 487 Md. at 18 (quoting *Beyer*, 369 Md. at 359 n.16).

Considering the important justification underpinning the Rule change, we are persuaded that the court's error in granting the oral motion was not harmless. By effectively denying Edwards the opportunity to present a considered response to the oral motion, we conclude that the court's failure to comply with the requirements of Rule 2-501 probably would have affected the outcome of its decision. *See, e.g.*, *Shealer*, 459 Md. at 105–06 (error by orphans' court in refusing to transmit unresolved factual issues to a court of law was not harmless; obligation to transmit issues was significant obligation; and error denied caveator right to have issues tried by jury). For the reasons stated, we vacate the judgment and remand for further proceedings.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY VACATED. CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.