

Circuit Court for St. Mary's County
Case No. 18-C-16-001123

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1485

September Term, 2017

MICHAEL SCOTT

v.

GLEN IVES

Berger,
Friedman,
Harrell, Jr., Glenn T.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: October 9, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant (Plaintiff below), Michael Scott, challenges essentially the testimony of Appellee (Defendant below), Glenn Ives, who testified during the defense case-in-chief regarding his on-the-eve of trial discovery of an obstruction to a poly-vinyl chloride (PVC) drain pipe on Ives's property that figured to some degree in the underlying suit about storm water run-off from his property onto Scott's property. Scott's suit against Ives alleged nuisance and negligence caused by storm water runoff from Ives's property. Ives, during direct examination in his defense case, claimed that someone trespassed onto his property at some unspecified time, dug up and cut an underground PVC drainage pipe, and then plugged the remaining pipe before reburying it. Although Ives was not permitted to speculate who the malefactor may have been, it is worth noting that Scott had conceded earlier in his case-in-chief, during cross-examination, that he had entered onto Ives's property on a prior occasion and applied caps to the exposed ends of four drain pipes on Ives's property, including the same pipe involved in the later discovered incident. Scott, sensitive to the obvious implication that he may have been the actor in both incidents involving the pipes, challenged Ives's testimony as irrelevant. If the testimony was deemed relevant, however, Scott claimed that the testimony was inadmissible as unduly prejudicial evidence of a bad act. Scott demands, if we were to agree with him, a new trial.

Ives responds that the testimony regarding the latter obstructed PVC pipe was relevant to whether any flow of storm water onto Scott's property was of a degree to cause erosion. If the fact finder found decreased storm water run-off, a finding of nuisance and consequential damages became less likely. Ives contends also that his testimony regarding the obstructed PVC pipe was not evidence of a bad act specifically on the part of Scott, nor

did it have prejudicial effect on his ability to have a fair consideration of his claims as plaintiff.

Scott presents in his brief one umbrella question for our consideration, which we rephrase slightly:

Did the trial court commit reversible error by admitting Ives's irrelevant testimony regarding the plugged PVC pipe on his property?

We hold that the trial court did not err. Thus, we affirm the judgment of the circuit court.

Factual Background

Scott and Ives own side-by-side properties in St. Mary's County, fronting on Little Kingston Creek. Ives's property is at a higher elevation than Scott's lot. On Scott's side of the common boundary there is a steep downward slope.¹ Storm water from Ives's property has flowed historically down the slope on Scott's lot. In July 2009, Ives installed a paved, circular driveway in front of his home. In the course of that work, four PVC pipes (tied to the roof drainage system of his home) were installed on Ives's property. The flow of storm water was redirected thereby from Ives's roof area onto Scott's property.² At

¹ The slope is subject to regulation under the Chesapeake Bay critical area laws. *See* MD. CODE ANN., NAT. RES. §§ 8-1801 to -1817. Those laws are designed to protect water quality in the Bay by forestalling an increase of storm water runoff into the Bay and its tributaries. To that end, Bay critical area laws restrict reduction in the number of trees or vegetative cover on regulated land, including the land in this case because it borders a tributary creek to the Bay.

² Although Scott denied removing any trees or vegetation from the slope on his property, aerial photos taken from Google Earth (admitted in evidence) showed that the slope was denuded significantly, without the required county permit for land protected by the critical

Scott's request, an inspector from the St. Mary's County Department of Land Use and Growth Management inspected the slope on his property in November 2010 for "washout from [Ives's] driveway." The inspector detected no erosion on the slope.

In order to mitigate alleged erosion from the alleged runoff, Scott constructed a French drain on his property. The French drain was rendered ineffective, however, when Ives relocated a basketball hoop on his property. This may have been the penultimate straw. Scott brought suit against Ives, alleging claims of nuisance and negligence.³ He sought a jury trial on his claims for damages and bench consideration of his injunctive relief prayer.⁴

Two days before trial, as Ives testified in his defense case-in-chief, he discovered that someone had plugged anew one of the four PVC drain pipes on his property. Ives stated that an unknown person came onto his land, dug up the pipe, cut off a section of it, inserted a plug in the remaining pipe to block the flow of water, and reburied the pipe. Thus, the plug had the effect of leaving only three of the four pipes draining the storm water from the roof of Ives's home. The trial judge refused to allow Ives to speculate who the intruder might have been.

What made Scott sensitive especially to this testimony by Ives was the fact that Scott had been questioned earlier, in cross-examination by defense counsel during the

area laws. Such denuding was argued to contribute to an increase in velocity of storm water running down the slope from Ives's property.

³ The parties agreed ultimately that only the nuisance claim would be submitted to the jury.

⁴ The injunctive relief was held for resolution by the court pending the jury verdict. Because the jury rendered a defense verdict, the court had no reason to consider this relief.

plaintiff's case-in-chief, and admitted that he had entered onto Ives's property on an earlier occasion and placed end caps on the four PVC drain pipes:

[Ives]: Sir, when you went on to the Ives' property, what materials did you have with you to achieve your goal of tampering with their pipes?

Scott: I had those caps.

[Ives]: Anything else?

Scott: No.

...

[Ives]: Okay. So you didn't bring a shovel, correct?

Scott: Yeah; no shovel.

[Ives]: Did you bring a saw?

Scott: No saw.

[Ives]: Did you bring some kind of plastic pipe plug to insert into one of the pipes to stop the flow?

Scott: No, just the end caps.

...

[Ives]: Did you dig out one of the shallow pipes and cut the pipe and insert a manmade plug and reattach it to stop the water flow out of that pipe?

[Scott's Counsel]: Objection, your honor.

Scott: No.

The court: Overruled.

Returning to the eve-of-trial discovered incident, Ives attempted to introduce into evidence (through Scott) a section of PVC pipe.⁵ Scott objected and a bench conference ensued.

During the bench conference, counsel for Scott objected to the admission of the PVC pipe section as an effort to tarnish Scott's reputation. Ives's counsel asserted that, regarding the second incident, Scott trespassed on Ives's property yet again, cut, and

⁵ It is unclear why Ives thought he could lay a foundation for admission of the PVC pipe through cross-examination of Scott. Unless Scott were to have another "come to Jesus" moment where he would confess to being also the perpetrator with regard to the second incident (for which, at that point in the trial, Ives had not testified yet regarding his eve-of-trial discovery), Ives had not linked the pipe in the courtroom to either incident.

plugged the pipe. The judge asked him pointedly whether there was a counter-complaint for trespassing. The only reply that could be given (and was) - there was not. Ultimately, the court sustained Scott's objection. The section of PVC pipe was not allowed into evidence. No subsequent effort to move admission of the pipe into evidence, e.g., during the defense case-in-chief, appears to have occurred.

Following the bench conference, counsel for Ives asked Scott: "So you admit to trespassing on my client's property, capping the PVC pipes, but you deny cutting any pipe or inserting any plug into one of the pipes?"⁶ Scott answered: "That's correct."

Both parties called expert witnesses to testify. Scott called Joseph Kadjeski, an expert in drainage and erosion control.⁷ Kadjeski testified that water runoff appears to be coming from two points on Ives's property: the southwest corner of the driveway and from four PVC pipes connected to the roof-drainage system. When asked whether he was "confident to a reasonable degree of engineering certainty" that the runoff was coming from man-made structures, Kadjeski replied that "it is a natural drainage path, but man-made surfaces, impervious surfaces has [sic] increased that runoff from the natural state."

Ives called William DeMario as his expert witness. DeMario opined that without hydrologic testing or modeling, no storm water expert can determine, to a reasonable degree of engineering certainty, whether any man-made changes caused any substantial changes to the natural flow of water. He observed no erosion upon physical inspection of

⁶ This question attracted an objection, which the court overruled.

⁷ Kadjeski did not make any calculations regarding rainfall, gallons per acre, or gallons per hour. His opinions were based on interpretation of builder site plans for Ives's property and what he could see from standing on Scott's property.

the subject slope.

As noted earlier, the case was tried on claims of negligence and nuisance, but ultimately only the nuisance claim was submitted to the jury. The parties agreed on the following jury instructions:

A nuisance is any unreasonable use of land that causes real, substantial, and unreasonable damage to or interference with another person's ordinary use and enjoyment of his or her property.

An interference is substantial if it would materially lessen the value of or cause damage to the property.

You should consider the right of both parties to make reasonable use and enjoyment of their property. The Plaintiff's right to be free from interference with his or her use and enjoyment should be balanced against the Defendant's right to use his or her property and the Plaintiff must expect to endure some inconvenience or discomfort that results from the Defendant's reasonable use of his or her property.

In determining what reasonable amount of interference ... the Plaintiff should be expected to tolerate, you should consider the right of the Defendant to use his or her property or to conduct his or her affairs in a reasonable manner. The extent of interference that would result from the Defendant's reasonable use of his or her property or conduct of his or her affairs, the circumstances under which the interference occurred, the nature of the area in which the real property is located and the uses being made of other property in the area.

The parties also agreed to the following instruction with regard to storm water run-off disputes generally:

The owner of higher land is entitled to have surface water flow naturally onto the lower land of an adjoining landowner who cannot obstruct it. This longstanding rule is subject only to the "reasonableness of use test" which prevents the higher landowner from making man-made or artificial changes that materially increase the amount or volume of water discharged onto the lower property or discharging water in a different manner than the natural course of drainage, putting the lower land water that would not have flowed there naturally.

The jury found in favor of Ives. Scott moved for a new trial, which was denied by the court. This timely appeal followed.

Standard of Review

This Court analyzes questions of evidentiary relevance generally without deference to the trial court's ruling. This standard of review applies to the trial judge's conclusion of law whether the evidence is (or is not) "of consequence to the determination of the action." *Parker v. State*, 408 Md. 428, 437, 970 A.2d 320, 325 (2009) (citations omitted) (quoting *J.L. Matthews, Inc. v. Md.-Nat'l Capital Park & Planning Comm'n*, 368 Md. 71, 92, 792 A.2d 288, 300 (2002)).

On appellate review, a trial judge's weighing of probative value against prejudicial effect under Maryland Rule 5-403 is reviewed under an abuse of discretion standard. *Perry v. Asphalt & Concrete Servs., Inc.*, 447 Md. 31, 49, 133 A 3.d 1143, 1154 (2016). An error is reversible on appeal if it has "not the possibility, but the probability, of prejudice." *Id.*

Discussion

Scott argues first that the trial court committed reversible error by admitting irrelevant evidence of his supposed second bad act. Specifically, Scott claims that Ives's testimony regarding the "trespass" and pipe obstruction discovered on the eve of trial was not relevant to any contested legitimate issue at trial. Nuisance and negligence were the claims tried. As this argument goes, only evidence regarding man-made or artificial

changes to the natural flow of water that concentrated the discharge of water onto Scott's property was relevant. Therefore, the testimony regarding the supposed eve-of-trial discovered "trespass" (by a person or persons unknown) onto Ives's property and the vandalized pipe was not relevant.⁸

Ives counters by claiming that testimony regarding the second episode (the plugged pipe) was relevant and of consequence to the determination of the nuisance action. As this argument goes, the plug blocked completely the water flow from that pipe. As such, it stood to reason that there existed a decrease, for some period of time, in the overall storm water flow from Ives's property. This renders the obstruction relevant to whether there was sufficient water flow (for whatever period the pipe was blocked) to cause erosion, a decrease in property value, or substantial interference with the use and enjoyment of Scott's property.⁹

⁸ Scott also argued, in his brief and in oral argument before this Court, that counsel for Ives attempted to poison the jury against Scott by exposing to the jury the piece of PVC pipe, supposedly relating to the eve-of-trial discovered incident. He contends that the section of pipe was a surprise revelation and that it contributed to Scott's inability to defend himself or fairly present his case to the jury. Although the pipe was not admitted into evidence, Scott complains that Ives's counsel infected the jury with his mere exposure of it.

There are conflicting accounts advanced on appeal by counsel whether the pipe was "waved" in front of the jury or held inconspicuously as counsel for Ives attempted to introduce it into evidence. The record does not confirm either party's account how the pipe was displayed or presented. This contretemps evades appellate review; the trial judge was in the best position to determine whether any impropriety occurred. We shall not consider this argument.

⁹ In order to demonstrate a prima facie nuisance claim, Scott was required to show that a material increase or change in storm water flow was causing a real, serious, and substantial interference with [Scott's] ordinary, lawful, use and enjoyment of his property and a material diminishment of the property's value. *Fantasy Valley Resort, Inc. v. Gaylord Fuel Corp.*, 92 Md. App. 267, 272, 607 A.2d 584, 587 (1992).

The obstructed pipe may have been relevant also to the issues of causation and damages in the negligence claim, which remained alive at the time the pertinent testimony was given. Similar to the nuisance claim, obstruction of the pipe could be relevant to the jury's consideration of the nature and extent of the water flow. The extent of the flow was relevant to determine if it was sufficient to cause the alleged erosion, decreased property value, and interference with the use and enjoyment of the property.

Relevant evidence is admissible generally. Md. Rule 5-402. Relevant means that the evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Md. Rule 5-403.

We cannot overrule the trial court on this record. The testimony regarding the obstructed pipe may have been relevant, albeit to what degree cannot be ascertained with precision on the record before us. Scott claimed storm water discharge from all four pipes caused erosion on his property, a material decrease in the value of his property, and substantial interference with the lawful use and enjoyment of his property. The fact that one of the pipes was obstructed for some period of time could have been relevant to whether the flow of water from the other three pipes was substantial enough to support Scott's allegations. This was presented to the jury. It found for Ives.

Scott's final contention is that, if the testimony was relevant, it is nevertheless inadmissible because the probative value is outweighed substantially by the danger of unfair prejudice. If the probative value is outweighed substantially by the danger of unfair

prejudice, the evidence should be excluded. Md. Rule 5-403. Although Ives testified that he found a plug in one of his pipes, Scott was not accused of trespass as to that incident in front of the jury. On cross-examination, Scott was questioned about trespassing onto Ives's property as to both incidents. He admitted that he entered onto Ives's property and placed end caps on all four PVC pipes on an earlier occasion. Regarding the later incident of the plugging of the single pipe, Scott responded that he did not place the plug in the pipe. Neither Ives's testimony nor the question presented to Scott, on review of the record of this trial from our high perch, tipped the scale to the point where the danger of unfair prejudice outweighed substantially the probative value of Ives's testimony. It follows that the court did not abuse its discretion in allowing Ives's testimony.

**JUDGMENT OF THE CIRCUIT COURT
FOR ST. MARY'S COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**