

Circuit Court for Prince George's County  
Case No. CAL16-12055

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 01620

September Term, 2017

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SAGRES CONSTRUCTION  
CORPORATION,

v.

VERIZON MARYLAND, LLC

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Meredith,  
Reed,  
Zarnoch, Robert A.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Reed, J.

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Filed: April 23, 2019

\*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.

Verizon Maryland, LLC (hereinafter “Appellee”) brought a lawsuit against Sagres Construction Corporation (hereinafter “Appellant”), in the Circuit Court for Prince Georges’ County, alleging that Appellant negligently damaged Appellee’s underground duct bank and copper communications cables. Prior to trial, the parties entered into a High/Low Agreement, which provided that should liability be found against Appellant, it would pay a certain sum, and if Appellant was not found liable it would pay a lesser sum. After a two day bench trial, the Honorable Ingrid M. Turner found Appellant liable for the damages made to Appellee’s duct bank and copper communications cables. Subsequently, Appellant filed a Motion for Judgment, which was denied by the circuit court.

It is from this denial that Appellant files this timely appeal. In doing so, Appellant brings the following questions for our review, which we have rephrased for clarity:<sup>1</sup>

- I. Did the circuit court err in denying Appellant’s Motion for Judgement?
- II. Is a new trial warranted by the circuit court’s failure to place a statement on the record pursuant to Md. Rule 2-522(a)?

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<sup>1</sup> Appellant presents the following questions:

1. Did the trial court improperly deny Sagres’s Motion for Judgment at the close of Verizon’s evidence when the proffered expert testimony was insufficient to support an opinion on causation?
2. Is a new trial necessary because the trial court failed to place in the record a statement of the reasons for the decision as required by Md. Rule 2-522(a)?
3. Is a new trial necessary the Verizon breached the confidentiality provision of the damages agreement by revealing its existence to the trial court?

III. Is a new trial warranted because Appellee breached the confidentiality provision of the High/Low Agreement?

For the foregoing reasons, we hold that this case be remanded to the circuit court where it can consider the evidence before it, make findings of fact, and provide a detailed written order for the reasoning of its decision.

**FACTUAL AND PROCEDURAL BACKGROUND**

On October 8, 2014, Appellee received multiple complaints from its customers about an interruption in their telecommunication services. On October 9, 2014, Appellee dispatched its technicians to determine what was causing the outages. The technicians found that the area of the outages were located between Piney Branch Road, New Hampshire Avenue and University Parkway. Subsequently, the technicians opened a manhole between Piney Branch Road and New Hampshire Avenue and began to test copper pairs to determine the rough location of the cable fault. However, the technicians were unable to determine the exact location.

On October 10, 2014, the Appellee's technicians returned to Piney Branch Road and New Hampshire Avenue and began testing the cables to get an idea of where the fault was located. The technicians received a fault reading of 30'-35' from one of Appellee's manholes on Piney Branch Road and noticed a fresh asphalt spot near the manholes. The technicians began to excavate around the fresh asphalt spot to access the duct bank and cables. The technicians found the damage through further investigation by Appellee's damage investigator, Michael Hightower, and UtiliQuest, the locator who marked Appellee's cable. It was later determined that on October 8, 2014, Appellant was

excavating portions of a road nearby Piney Branch Road. Appellant was installing new water lines for the Washington Suburban Sanitary Commission (“WSSC”). Mr. Hightower determined that, as a result of that work, Appellant was involved in causing the damage to Appellee’s duct bank and cables. Mr. Hightower came to this conclusion because Appellant was the only entity digging in the vicinity of the damage and there was a fresh asphalt patch indicating very recent digging. Mr. Hightower also notified Appellant about the damage its digging caused to Appellee’s duct bank and cables.

Subsequently, Appellee brought a lawsuit against Appellant alleging that Appellant negligently damaged Appellee’s underground duct bank and copper communications cables. Prior to trial, the parties entered into a High/Low Agreement, which provided that should liability be found against Appellant, it would pay a certain sum and if Appellant was not found liable it would pay a lesser sum. At trial, Mr. Hightower was accepted as Appellee’s hybrid expert witness in “Maryland [sic] safe dig practices to be able to answer hypothetical questions about what a contractor ought to do when digging around [sic] buried plant.” Appellee also had two other expert witnesses who testified that the damage to Appellee’s duct bank and cables were located in an area where Appellant was excavating. Appellee’s expert witnesses testified that Appellant used a mechanical hammer to excavate around and under Appellee’s duct bank. Appellee’s expert witnesses also testified that the mechanical hammer was “very powerful” with an impact force of “4 to 5,000 pounds.”

Appellee brought a lawsuit against Appellant in the Circuit Court for Prince Georges’ County, alleging that Appellant negligently damaged Appellee’s underground

duct bank and copper communications cables. At trial, Appellant called Michael Howard, Appellant's employee, as a witness. Mr. Howard testified that Appellant was aware that it violated Public Utilities §12-127 (c)(3) when it used mechanized equipment within 18 inches of a marked facility. Elber Vargas, Appellant's witness, also testified that he knew that digging 18 inches away from a marked facility was a violation of the statute, "but they did it anyway." At the conclusion of the two day bench trial, the Honorable Ingrid M. Turner found Appellant liable for the damages made to Appellee's duct bank and copper communications cables. Subsequently, Appellant filed a Motion for Judgment, which was denied by the circuit court.

#### **STANDARD OF REVIEW**

The appellate court "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial judge to judge the credibility of the witnesses." Maryland Rule 8-131 (c). "A finding of a trial court is not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion." *Id.* Moreover, "[u]nder the clearly erroneous standard, this Court does not sit as a second trial court, reviewing all the facts to determine whether an appellant has proven his case." *Goss v. C.A.N. Wildlife Trust, Inc.*, 157 Md. App. 447, 455-56 (2004). This Court is "limited to deciding whether the circuit court's factual findings were supported by 'substantial evidence' in the record." *Id.*

#### **DISCUSSION**

##### **A. Parties' Contentions**

Appellant argues that the trial court improperly denied Appellant's Motion for

Judgment because Mr. Hightower’s testimony was not sufficient to support an opinion on causation. Specifically, Appellant contends that Mr. Hightower’s testimony “was not supported by anything more [sic] than speculation and was not stated to any degree of possibility.” Appellant also argues that Mr. Hightower admitted that “[Appellee] has no evidence or photos showing a crushed duct bank or wet conditions or saturated cables” and that “there was no evidence entered at trial that [Appellant] made any physical contact with the duct bank on October 8, 2014, prior to 2:04 p.m., when the first outage reports was [sic] made.” Appellant maintains Mr. Hightower concluded that Appellant was “somewhat involved” in the damage made to Appellee’s duct bank and that this conclusion “was no more than what [this Court] has said an expert cannot be permitted to do.”

Appellant contends that “a new trial is required because the trial court failed to place in the record [sic] a statement of the reasons for [its] decision, as required by Md. Rule 2-522(a).” Specifically, Appellant asserts that at the conclusion of trial the circuit court made a “one sentence pronouncement” of its judgment. Appellant maintains that the circuit court did not meet the requirements pursuant to Md. Rule 2-522 (a) because the circuit court failed to provide a brief statement of the reasons for its decision. Appellant argues that without some statement for the basis of the circuit court’s decision Appellant cannot address “each of the trial court’s findings of fact that it believes were erroneous.” Appellant argues that the “obligation of Rule 2-522(a) is mandatory and the failure to meet it requires a remand for a new trial.”

Lastly, Appellant asserts “a new trial is necessary because [Appellee] breached the confidentiality provision of the [High/Low Agreement] by revealing its existence to the

trial court.” Appellant maintains that the High/Low Agreement entailed that if liability was found in Appellant’s favor, Appellant was required to pay Appellee “a low amount” and if Appellant was found liable Appellant had to pay Appellee a “high amount.” Appellant argues that the agreement also contained a provision that stated that the agreement “shall be confidential and any party may seek damages for violation of this provision.” Appellant maintains that Appellee breached this provision by revealing the existence of the agreement in a motion to the circuit court regarding an expert witness dispute.

Appellee responds that the trial court properly denied Appellant’s Motion for Judgment. Appellee argues that Appellant only relies on Mr. Hightower’s testimony to assert that his conclusion provided no adequate basis to conclude that Appellant damaged Appellee’s duct bank. Appellee contends that there were two other witnesses who both testified that the damage to its duct bank occurred where the “cold patch was when [Appellee] dug towards it, i.e. towards the street.” Appellee argues that a new trial is not warranted because the circuit court failed to put a statement of its findings on the record. Specifically, Appellee contends that the circuit court did not need to make specific findings because “neither party asked it to, since under the [High/Low Agreement Appellant] was liable to pay upon finding [sic] of liability.” In the alternative, Appellee asserts that this case “if anything” should be remanded back to the circuit court with a mandate.

We hold that this case be remanded to the circuit court where it can consider the evidence before it, make findings of fact, and provide a detailed written order for the reasoning of its decision.

## **B. Analysis**

**i. Expert Witness Testimony**

Appellant argues that the trial court improperly denied Appellant’s Motion for Judgment because Mr. Hightower’s testimony was not sufficient to support an opinion on causation. Specifically, Appellant contends that Mr. Hightower’s testimony “was not supported by anything more [sic] than speculation and was not stated to any degree of possibility.” Appellant relies on Maryland Rule 5-702.

Maryland Rule 5-702 prescribes as relevant:

Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

Maryland Rule 5-702.

At trial, Mr. Hightower testified to the following:

[Q]: Now in your capacity as damage investigator for [Appellee], what steps do you take, so now you get to Piney Branch, what do you do as part of your damage investigation?

[A]: I, first of all I arrive on the scene, I take account of anybody that may be working in the area, I also take account of markings that are down to make sure, you know, to see if they’re correct. I also cross-reference anything with the Miss Utility database to see who has tickets to be performing excavations in that area.

....

[Q]: I’m just going to show you [Appellee’s] Number 11, it says Miss Utility at the top, just tell us what that is, if you know?

[A]: Yes, this is a Miss Utility ticket that was requested by [Appellant] to have excavations going on Piney Branch Road.

...



[Q]: Now for the area, were there any other dig tickets – or I’m sorry, were there any other contractors who had dig tickets for the general area where this damage occurred?

[A]: Yes, I believe it was Jones Commu – Jones Construction.

[Q]: Okay. When you arrived on the scene at Piney Branch, did you, was [Appellant] on the scene?

[A]: I – no, [Appellant] was not on the scene when I arrived.

[Q]: Was Jones on the scene?

[A]: Yes.

[Q]: Did you have any conversations with anyone from Jones?

[A]: Yes, I did.

[Q]: Okay. And what was the nature of those conversations, what did you ask?

[A]: I asked them had they been digging in that area and if so, had they come in contact with any of our facilities.

[Q]: And what did they say?

[A]: They said, no, they had not. And matter of fact, they were quite paranoid and the gentleman from Jones stayed there, you know, the night until we were able to determine that it was not them.

[Q]: Okay. And how did you determine it was not Jones?

[A]: Because of the area where we uncovered our damage, they were not in that particular area, they were on the other side of the sidewalk there.

...

[Q]: Based on your training, knowledge and experience, how did you come to the determination that [Appellant] damaged [Appellee’s] plant?

[A]: Because of the location of the [sic], where we found our damage at and where the cold patch, the new cold patch was placed, we pretty much made a determination that they were somewhat involved.

Here, Appellant’s Motion for Judgment is based on the premise that Mr. Hightower did not have an adequate basis to conclude that Appellant was responsible for the damages made to Appellee’s duct bank. However, the record shows that Appellant was the only entity that was digging near Appellee’s duct bank on October 8, 2014. The record also shows that Mr. Hightower’s notes that were taken when the incident occurred noted that Appellant was the only entity digging in the damage area. Moreover, Appellee called two additional witnesses who testified that Appellant was responsible for the damage made to Appellee’s duct bank. The record shows that there were pictures that showed mechanized equipment within 18 inches of Appellee’s facility, which is a violation Public Utilities §12-127 (c). Public Utilities §12-127 prescribes as relevant:

**Care to avoid interference or damage to underground facility**

(c)(1) A person performing an excavation or demolition shall exercise due care to avoid interference with or damage to an underground facility that an owner-member has marked in accordance with § 12-126 of this subtitle.

(2) Before using mechanized equipment for excavation or demolition within 18 inches of an underground facility marking, a person shall expose the underground facility to its outermost surfaces by hand or other nondestructive techniques.

(3) A person *may not use mechanized equipment to excavate within 18 inches of the outermost surface of an exposed underground facility.*

Public Utilities §12-127 (c) (emphasis added).

Moreover, at trial Michael Howard and Elber Vargas both testified that Appellant was aware that it violated Public Utilities §12-127 (c) when it used mechanized equipment within 18 inches of a marked facility. In *Andrade v. Houssein*, this Court stated:

Thus, the trial court’s grant of judgment for appellee based upon the court’s conclusion that no negligence was shown was clearly erroneous, because it may be inferred from the mere happening of an accident, when considered in connection with the circumstances surrounding it, that it was due to a breach

of some duty on the part of the person controlling it. *See Pindell v. Rubenstein*, 139 Md. 567, 578, (1921); *see also Sun Cab v. Cusick*, 209 Md. 354, 360, (1956) (stating that if a violation of a motor vehicle statute is determined to be the proximate cause of an accident, a *prima facie* case is created placing the burden on the defendant to explain what only he may know).

*Andrade v. Houssein*, 147 Md. App 617, 622 (2002).

Here, it could be inferred that the mere fact that Appellant was the only entity digging near the damage area Appellant was responsible for the damage made to Appellee’s duct bank. Moreover, Appellant knew it was not allowed to use mechanized equipment within 18 inches of a facility because damage to that facility may occur.

Accordingly, the circuit court did not err when it denied Appellant’s Motion for Judgment. The record shows that it could be inferred that Appellant was responsible for the damage made to Appellee’s duct bank.

**ii. New Trial**

Appellant argues that the circuit court did not meet the requirements set forth in Maryland Rule 2-522 (a) because the circuit court failed to provide a detailed order of the reasoning for its decision. Appellant maintains that without some statement of reasoning for the circuit court’s decision Appellant cannot address “each of the trial court’s findings of fact that it believes were erroneous.” Appellant asserts that the “obligation of Rule 2-522(a) is mandatory and the failure to meet it requires a remand for a new trial.”

Maryland Rule 2-522 provides as relevant:

**(a) Court Decision.** In a contested court trial, the judge, before or at the time judgment is entered, shall prepare and file or dictate into the record a brief statement of the reasons for the decision and the basis of determining any damages.

Appellant’s argument has merit because the record does not contain any reasoning for the circuit court’s decision. However, a new trial is not warranted. In *Shum v. Gaudreau*, 322 Md. 242 (1991), the appellee sued the appellant for damages from breaching a lease. The district court entered judgment in favor of the appellee. The appellant appealed to the circuit court and the circuit court held that “because the District Court had failed to set forth any of its findings, the circuit court was unable to consider the balance of the appeal.”

*Id.* at 243. The Court of Appeals held:

We agreed with the circuit court that it was impossible to determine the remaining issues because of the failure of the District Court to make findings. We pointed out, however, that the respondent had had a full opportunity to present his case, and that the circuit court should not have remanded the matter for a new trial. We ordered the circuit court to remand the case to the District Court so it might “consider the evidence already before it, make findings of fact as to the evidence supporting each claim, determine whether those facts are sufficient to support each claim, and if so, in what amount, and then enter judgment for Landlord for any sum so supported.”

*Shum v. Gaudreau*, 322 Md. 242, 244 (1991).

Similar to *Shum*, Appellant had a full opportunity to present its case before the circuit court.

Maryland Rule 8-604(d) prescribes as relevant:

**(d) Remand.**

(1) *Generally.* If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.

Maryland Rule 8-604(d).

Pursuant to Maryland Rule 8-604(d) we hold that this case be remanded to the circuit court. This would give the circuit court the opportunity to consider the evidence before it, make findings of fact, and provide a detailed order of the reasoning of its decision.

Appellant also argues “a new trial is necessary because [Appellee] breached the confidentiality provision of the [High/Low Agreement] by revealing its existence to the trial court.” Appellant maintains that the agreement contained a provision that stated that the agreement “shall be confidential and any party may seek damages for violation of this provision.” Appellant contends that Appellee breached this provision by revealing the existence of the agreement in a motion to the circuit court regarding an expert witness dispute.

Appellant wants this Court to decide on an agreement that is not a part of the record. This Court cannot decide if Appellee breached a clause in an agreement because the agreement is not before the Court and the agreement was not presented before the circuit court. The circuit court’s simple knowledge of an agreement that was entered into by the parties before trial does not warrant a new trial.

Accordingly, we hold that this case be remanded to the circuit court where it can consider the evidence before it, make findings of fact, and provide a detailed written order for the reasoning of its decision.

**JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY IS REMANDED WHERE THE COURT CAN CONSIDER THE EVIDENCE BEFORE IT, MAKE FINDINGS OF FACT, AND PROVIDE A DETAILED WRITTEN ORDER FOR THE REASONING OF ITS DECISION. COSTS TO BE PAID BY APPELLANT.**