Circuit Court for Prince George's County
Case No. CAL 18-26682

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2054

September Term, 2019

SIX FLAGS AMERICA, L.P.,

v.

NICHOLAUS MIMS, ET UX,

Berger,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Shaw Geter, J.

Filed: April 27, 2021

This is an appeal from a final judgment entered in the Circuit Court for Prince George's County in favor of appellees, Nicholaus Mims, et ux., against appellant, Six Flags America, L.P. A jury found Six Flags liable for injuries sustained by Mims during a security incident at the amusement park. Six Flags timely filed a motion for a new trial/remittitur, which was denied by the court.

Six Flags noted this appeal and presents two questions, which we have slightly rephrased:[1]

1. Did the trial court err in admitting the response to a request for admission into evidence?

2. Did the trial court abuse its discretion in allowing appellees' counsel to argue in rebuttal that Six Flags made surveillance footage disappear?

For the following reasons, we hold the trial court's admittance of the response to the request for admission was harmless error, but the trial court abused its discretion in allowing appellees' rebuttal arguments regarding the disappearance of surveillance footage.

FACTUAL BACKGROUND

On June 17, 2018, appellees, Nicholaus Mims ("Mims") and Antionette Love ("Love"), along with Mims' two sons, visited Six Flags amusement park located in Upper Marlboro, Maryland. Appellees were in the water park area, known as Hurricane Harbor,

[1] Appellant's original issue presented is as follows:

> Whether the trial court's error in allowing the response to request for admission into evidence, coupled with the error allowing Plaintiffs' counsel to argue in rebuttal that Six Flags spoliated evidence, was an abuse of discretion warranting a new trial?

when Mims removed his shirt and gave it to Love. At some point, Mims noticed his 12-year-old son was missing and thought that he might be lost. While shirtless, Mims went to look for his son.

After leaving the water park area, Mims was met on two occasions by Six Flags security concerning his state of undress. Six Flags enforces a written and posted policy that prohibits invitees from being shirtless in the park unless invitees are in the designated water park area. On both occasions, he was advised of the shirt policy and on the second occasion, Mims responded loudly. He was then ordered to leave the park and security reinforcement arrived to escort him to the exit. During this time frame, several verbal exchanges occurred between security and Mims. A struggle and altercation occurred at the park exit where Mims' head hit the ground. Love, who witnessed the incident, used her cell phone to video record the incident. Mims was detained by security and later, a security officer advised both Mims and Six Flags personnel of their right to file a complaint. Mims elected not to file a complaint. On July 26, 2018, Mims filed a civil complaint in the Circuit Court for Prince George's County.

During the discovery process, appellees requested Six Flags "[a]dmit that video footage was recorded by loss prevention at the entrance to the park on June 17, 2018, during the time of the incident involving Nicholas Mims." Six Flags' response stated: "[a]dmitted that the entrance of the park was under video by loss prevention."

At trial, appellees presented several eyewitnesses including Mims' son, Dominic Mims and Antionette Love. Love testified that she recorded the altercation on her cell phone but mistakenly recorded only a short portion of the incident. The cell phone video

taken by Love, which consisted of one second of footage, was admitted. Kevin Clark, a former Chief of the Baltimore City Police Department, was admitted as an expert in policing and security[2] and opined that Mims was subjected to a "strangulation hold," or a "throating[.]"[3]

On the third day of trial, prior to resting their case, appellees' counsel began to read into the record, the request for admission and response. Counsel for Six Flags objected, arguing that the response was outside of the scope of relevant evidence. The trial court overruled the objection and the admission was read.

During Six Flags' case in chief, Christopher Wheeler, an expert in the field of digital analysis of iPhones, opined that Love's cell phone video footage had been altered and turned into a one-second live photo or there was a third video file with unknown contents. He based his opinion on his analysis of the metadata. Six Flags used this evidence as the foundation for their spoliation claim.

Following the close of all evidence, the court, at Six Flags' request, instructed the jury on spoliation:

> The destruction of or the failure to preserve evidence by [appellees] may give rise to an inference unfavorable to [appellees]. If you find that the intent was to conceal the evidence, the destruction or failure to preserve must be inferred to indicate that [appellees] believe that their case is weak and that they would not prevail if the evidence was preserved. If you find that the destruction or

[2] Kevin Clark was admitted as an expert with respect to policing and security as it pertains to the continuum of force.

[3] Kevin Clark, regarding a photograph of the struggle between Mims and Six Flags security, testified "[a]nd in that picture, there is a hand that was later identified to be that of Sergeant Javon Taylor[] that is compressing the neck area of Mr. Mims. It's more or less what I—in my research, would be considered a strangulation hold, a throating."

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 [appellees].

Counsel then made their closing arguments to the jury. Pertinent to this appeal, the following transpired during appellees' rebuttal closing argument:

[APPELLEES' COUNSEL:] Members of the jury, he spent all that time talking about Ms. Mims whose husband is getting beat down, not being able to record it. What did we read you in request for admissions? Admit that video footage was recorded by loss prevention at the entrance to the park on June 27, 2018 during the time of the incident involving . . . Nicholaus Mims, admit that the entrance of the park was under video by loss prevention.

[APPELLANT'S COUNSEL:] Objection, Your Honor. May we approach?

THE COURT: Certainly.

Counsel approached the bench, and the following colloquy occurred:

[APPELLANT'S COUNSEL:] So, Your Honor, my objection is, it was read into evidence, but the problem is, and counsel knows this because he took the deposition of a loss control officer, when they filed the complaint and when they filed their letter, the video had already been recorded over in the ordinary course, et cetera. He seems to be trying to get an inference of spoliation.

THE COURT: Well, he probably is, but I mean, he brought that up during

[APPELLANT'S COUNSEL:] Again

THE COURT:	This was brought up during testimony and you didn't counter it or say anything.
[APPELLANT'S COUNSEL:]	Well, because you overruled my objection. But I'll say this, Your Honor, I don't want him to go any further with it. I didn't object until he got that out, and he certainly but he can't argue it because there is no inference of spoliation against us. We don't have duty to preserve stuff until they put us on notice that there's going to be litigation.
THE COURT:	But he's doing it all on facts that are in evidence.
[APPELLANT'S COUNSEL:]	I understand that. I don't want him to go any further. So that's what, you know, this is, because I don't think he can argue that there was spoliation because there you need to show
THE COURT:	I mean, he I think he can give he can refer to it. I mean, it was referred to during trial.
[APPELLANT'S COUNSEL:]	But there has to be under the case law there has to be finding that we destroyed video or didn't produce video at a time when we should have preserved it or destroyed it. We don't have that.
THE COURT:	But I could say that about plenty of things. You all raise things, let's see, in particular, there was something where you kind of oh, there's something that you raised and I thought you were going to come back and have some proof about it, but you didn't. And you just kind of put it out there to kind of put it in the jury's mind. I can't remember exactly what it is now, but it happened twice.

[APPELLANT'S COUNSEL:] At least twice, I'm sure. I do that all the time, but

THE COURT: Right. And so that's [sic] that's what

[APPELLANT'S COUNSEL:] But my point is he can't argue the spoliation instruction because it's directed to [appellees], because that's the only spoliation

THE COURT: I don't think he's arguing any instruction, he's just arguing that that's an admission that was admitted during trial

[APPELLANT'S COUNSEL:] Right.

THE COURT: —— and so where's video.

[APPELLANT'S COUNSEL:] And I would also say that it's beyond the scope of my argument, because I never talked about the video we took in any way, shape, or form, because it's not relevant. It was ——

THE COURT: Go ahead.

[APPELLEES' COUNSEL:] Judge, he spent almost third of his argument talking about video, talking about Ms. Mims is not preserving video. This was read to the jury during the course of the trial, I'm simply reading it again, it was read during the trial, it's been admitted. It's an admitted fact.

THE COURT: It has been admitted and it is an admitted fact.

[APPELLANT'S COUNSEL:] Right.

THE COURT: It absolutely has been.

[APPELLANT'S COUNSEL:] But the problem is, for there to be an inference of less there's been no evidence

	that the video would have shown anything, one thing or the other. And it has to be . . . negative inference from us, you have to have a finding that we were negligent in not preserving it after we had duty to do so or that we intentionally destroyed it. We didn't intentionally destroy anything
THE COURT:	I don't think he's saying that you destroyed anything, he's just saying that nothing was ever admitted.
[APPELLANT'S COUNSEL:]	Right. And he didn't request it. We also read the request for production of documents I made my record, Your Honor.
THE COURT:	Yeah.
[APPELLANT'S COUNSEL:]	I don't think it's going to matter.
THE COURT:	I mean and counsel, I mean, are you making an argument that it was . . . or are you just referencing to them that apparently there was some video that it was admitted to you and we didn't see it?
[APPELLEES' COUNSEL:]	That's all I'm saying, Judge.
THE COURT:	Okay. Overruled. All right. Go ahead.

Counsel returned to the trial tables, and the following occurred in open court:

[APPELLEES' COUNSEL:]	If it pleases this honorable jury, I'm going to take 10 minutes, because my dog is biting me when I get home because I've been away from him all week, so I'm going to take 10 minutes and talk to you. If you give me 10 minutes, I'll sit down. Now they [sic] chomping on Ms. Mims because she don't [sic] have video of her husband getting beat down, they got video

> at the front of the park, where is it? Do you think a little cell phone is better than Six Flags' park video up there at the front where all the cashiers and all the cash registers? I bet you get . . . rob that place, they'd have 15 videos of it. Members of the jury, I thought I was at a magic show during the Six Flags defense of this case. I think they're trying to make it disappear. All kind of magical stuff that they pull out of their head. Shadows on chests, shirt that disappears without explanation, a bump on Mr. Mims' head that nobody knows where it came from, a hand around his neck that's just sitting on his chest, reports that don't contain facts that they should contain, and a guard sitting there watching Ms. Mims record and they brought somebody all the way in from Colorado said [sic] she got it off the internet.

STANDARD OF REVIEW

The standard of review, regarding the admissibility of evidence, depends on whether the "ruling under review was based on a discretionary weighing of relevance in relation to other factors or on a pure conclusion of law." *Perry v. Asphalt & Concrete Servs., Inc.*, 447 Md. 31, 48-49 (2016) (quoting *Parker v. State,* 408 Md. 428, 437 (2009)). "[W]hen the trial judge's ruling involves a legal question," the *de novo* standard of review will apply. *See id*. (quoting *Parker*, 408 Md. at 437). Trial judges have wide discretion "in weighing relevancy in light of unfairness or efficiency considerations," however, "trial judges do not have discretion to admit irrelevant evidence." *Id*. at 48.

Under Maryland Rule 5-103(a), "Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling[.]" Md. Rules 5-

103(a). "It is not the possibility, but the probability, of prejudice which is the object of the appellate inquiry." *MEMC Elec. Materials, Inc. v. BP Solar Int'l, Inc.*, 196 Md. App. 318, 342 (2010) (citing *Crane v. Dunn*, 382 Md. 83, 91 (2004)). "Further, [we] will only reverse upon finding that the trial judge's determination was both manifestly wrong and substantially injurious." *Id*. (citing *Lomax v. Comptroller of Treasury*, 88 Md. App. 50, 54 (1991). "The party maintaining that error occurred has the burden of showing that the error complained of likely affected the verdict below." *Id*. (citing *Brown v. Daniel Realty Co.*, 409 Md. 565, 584 (2009).

"[Relying] on established principles for reviewing closing arguments[,]" "we will review counsel's statements . . . to determine whether [the statements] were unduly prejudicial or improper . . . [.]" *Mason v. Lynch*, 151 Md. App. 17, 25–26 (2003), *aff'd*, 388 Md. 37 (2005).

DISCUSSION

1. The court erred in admitting the request for admission response.

Appellant argues the trial court erred in admitting the response to appellees' request for admissions into evidence because it was not relevant or material to any issue pled. Appellant contends appellees were attempting to "back door" a spoliation argument, but "never presented any evidence that the loss prevention cameras located in the area where the occurrence took place actually captured any part of the alleged occurrence nor any evidence regarding any potential duty on the part of Six Flags to preserve video." Appellees argue the response was admissible and that appellant failed to specify its objection, thus, any objection was waived. Appellees contend testimony by their expert

witness, Kevin Clark, "describe[d] the relevance and materiality of the entrance of the park being the site of the attack on Mr. Mims[.]" Appellees argue this testimony was "key in the decision to allow the jury to consider punitive damages[.]" Finally, appellees contend that appellant's spoliation claim that appellees improperly manipulated video evidence made the response for admissions relevant.

Preliminarily, we address whether appellant waived any objection to the admission of the response at trial because they did not object during the discovery process. Appellees argue that under Md. Rule 2-424(d), "any matter admitted is conclusively established . . . [.]" We agree but note that appellant was not required to foresee during discovery how its response would be used at trial and whether a nexus would be established regarding its relevancy. An admission does not exist in a vacuum and must be connected to the issues presented in the case.

Maryland Rule 5-401 defines relevant evidence "as evidence having 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. Rules 5-401. "[T]he question of whether a given fact is 'material' and thus relevant, depends on the underlying facts of the case." *Bryant v. State*, 163 Md. App. 451, 490 (2005), *aff'd*, 393 Md. 196 (2006). "Evidence is material if it tends to establish a proposition that has legal significance to the litigation." *Id*. (citing *Johnson v. State*, 332 Md. 456, 472 n. 7 (1993) (noting material evidence has tendency to prove a proposition at issue in the case)).

Here, the request for admission asked appellant to "[a]dmit that video footage was recorded by loss prevention at the entrance to the park on June 17, 2018, during the time

of the incident involving Nicholas Mims." Appellant's answer, however, merely "[a]dmitted that the entrance of the park was under video by loss prevention." Appellant did not admit that surveillance footage of the park entrance was recorded by loss prevention on June 17, 2018, and more specifically, did not admit that there was video footage recorded during the incident in question. As we see it, appellant's response was ambiguous and to some extent, non-responsive and appellees requested no clarification of the response.

During appellees' case, no evidence was presented that connected the admission materially to any issue in the case related to appellant's conduct, and, specifically no evidence was presented of spoliation by Six Flags. While Chief Clark described the general area where the incident occurred, based on his review of depositions and reports, he did not testify that cameras would have provided a video recording of the incident. Mr. Taylor, a Six Flags employee, testified that there were cameras at the front of the park but could not attest to their operability on the day of the incident. In fact, no witness testified about the operability of cameras at the entrance, whether video was captured, and if so, whether it had been destroyed or was missing.

Appellees argue that appellant "raised the spectre" that video evidence obtained by the appellees had been improperly manipulated and thus, they should have been allowed to argue spoliation as well. However, appellant presented expert testimony regarding its claim, whereas, appellees presented no testimony about the existence or destruction of a video. As a result, the response lacked legal significance because it did not have any

tendency to prove any of the issues pled. We hold, while this was error, in isolation, it was not prejudicial.

2. The court abused its discretion in allowing the rebuttal argument that Six Flags made surveillance footage disappear.

Attorneys are "afforded great leeway in presenting closing arguments to the jury." *Degren v. State*, 352 Md. 400, 429 (1999).

> While arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel, generally speaking, liberal freedom of speech should be allowed. There are no hard-and-fast limitations within which the argument of earnest counsel must be confined—no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.

Id. at 430. "[W]hat exceeds the limits of permissible comment depends on the facts in each case." *Id*. at 430–31 (quoting *Wilhelm v. State*, 272 Md. 404, 415 (1974)).

Spoliation is "[t]he intentional destruction, mutilation, alteration, or concealment of evidence, usu[ally] a document." *Giant of Maryland LLC v. Webb*, No. 413, SEPT. TERM, 2019, 2021 WL 733828, at *11 (Md. Ct. Spec. App. Feb. 25, 2021) (citing *Keyes v. Lerman*, 191 Md. App. 533, 537 (2010) (quoting Black's Law Dict., 8th Ed. (2004) at 1437)).

> When determining whether spoliation has occurred, a court considers whether there has been an act of destruction, whether the destroyed evidence was discoverable, whether there was an intent to destroy the evidence, and whether the destruction occurred at a time after suit has been filed, or, if before, at a time when the filing was fairly perceived as imminent.

Adventist Healthcare, Inc. v. Mattingly, 244 Md. App. 259, 274 (2020).

Recently, this Court addressed spoliation in *Giant of Maryland LLC v. Webb*, No. 413, SEPT. TERM, 2019, 2021 WL 733828, at *10 (Md. Ct. Spec. App. Feb. 25, 2021). After suffering injuries from a pallet cart collision, Ms. Webb filed a civil action and alleged that surveillance footage of the incident existed and was destroyed by the defendant, Giant. *Id*. During a deposition, Giant's corporate representative, Mr. Coradini testified that he did not know whether a video existed. *Id*. At trial he stated that, following his deposition, he contacted management to determine whether there was any footage of the incident and was notified that no video of the incident was captured. *Id*. Ms. Webb requested a spoliation instruction be given to the jury and the court granted her request. *Id*. at *11. The jury returned a verdict in her favor. *Id*. at *1.

On appeal, this Court noted that Ms. Webb had the burden to establish that a video "actually existed." *Giant of Maryland LLC v. Webb*, No. 413, SEPT. TERM, 2019, 2021 WL 733828, at *11 (Md. Ct. Spec. App. Feb. 25, 2021) (citing *Silesky v. Tracey*, 198 Md. App. 292, 309 (2011). Although we reversed the trial judgment on the issue of vicarious liability, we observed that "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." *Id*. at *12. We stated, "[h]ad we not already reversed . . . we would also reverse the judgment based on the spoliation instruction . . . " *Id*.

In *Keyes*, the patient-plaintiff requested a spoliation instruction, asserting that the defendant-doctor's failure to dictate operative notes hindered the plaintiff's expert witnesses from rendering expert opinions on the doctor's compliance with the standard of care. *See Keyes v. Lerman*, 191 Md. App. 533, 540-41 (2010). The trial court found that

the evidence did not support a spoliation instruction, however, the court allowed plaintiff's counsel, during closing argument, to comment on the missing operative notes. *Id*. at 536. The court noted that there was no evidence of destruction or a failure to preserve. *Id*. at 530. Rather, the testimony indicated that the report might have been lost or misplaced. *Id*. at 541. We held the trial court did not abuse its discretion in failing to give the instruction and in allowing counsel to comment on the missing operative report in closing argument. *Id*. at 547.

While the present case does not concern a spoliation instruction, both *Giant* and *Keyes* make clear that evidence as to the existence of a document or video is crucial in this area. In the present case, appellants argue there was no evidence that a video captured the entrance to the park during the altercation, no evidence that such a video was not preserved, nor was there evidence that a video had been destroyed or was missing. Appellants assert that, through argument only, appellees injected a spoliation theory into the case which was unfairly prejudicial and affected the jury's verdict. Appellees argue that their rebuttal argument was not improper and that appellants, at trial, introduced the theory of video evidence being improperly manipulated or destroyed when appellants made their own spoliation argument. Appellees further argue that their rebuttal was a response to appellant's closing argument that appellees did not rely on evidence, but rather on passion and prejudice. In appellees' view, the trial court did not err.

Appellees' counsel argued, in pertinent part:

> [APPELLEES' COUNSEL:] Members of the jury, he spent all that time talking about Ms. Mims whose husband is getting beat down, not being able to

record it. What did we read you in request for admissions? Admit that video footage was recorded by loss prevention at the entrance to the park on June 27, 2018 during the time of the incident involving . . . Nicholaus Mims, admit that the entrance of the park was under video by loss prevention.

[APPELLANT'S COUNSEL]: Objection, Your Honor. May we approach?

* * *

THE COURT: Okay. Overruled. All right. Go ahead. (Counsel returned to the trial tables, and the following occurred in open court.)

[APPELLEES' COUNSEL]: …Now they chomping on Ms. Mims because she don't have video of her husband getting beat down, they got video at the front of the park, where is it? Do you think little cell phone is better than Six Flags' park video up there at the front where all the cashiers and all the cash registers? I bet you get . . . rob that place, they'd have 15 videos of it. Members of the jury, I thought I was at a magic show during the Six Flags defense of this case. I think they're trying to make it disappear. All kind of magical stuff that they pull out of their head. Shadows on chests, shirt that disappears without explanation, a bump on Mr. Mims' head that nobody knows where it came from, a hand around his neck that's just sitting on his chest, reports that don't contain facts that they should contain, and a guard sitting there watching Ms. Mims record and they brought somebody all the way in from Colorado said she got it off the internet.

In allowing the rebuttal argument, the trial court reasoned that the arguments regarding the disappearance of the video were based on the response to request for admissions and that counsel was just arguing, "so where's a video." However, the response did not address whether a recording of the incident ever existed, and appellees offered no evidence on this point. Assuming *arguendo*, that the response was properly admitted, the answer did not establish that a probative video was destroyed. The court's reasoning referenced missing evidence, but, appellees' argument went much further. In fact, the court stated, "I don't think he's saying that you destroyed anything, he's just saying that nothing was ever admitted." Unlike in *Keyes*, where counsel was permitted to argue "missing evidence" where there was testimony in that regard, here, appellees' argument centered on evidence destruction and an intent to do so. Moreover, there was no argument or reference in appellees' initial closing or that of appellant's, that a video existed and was missing or destroyed.

As previously stated, spoliation is "[t]he intentional destruction, mutilation, alteration, or concealment of evidence, usu[ally] a document." *Giant of Maryland LLC v. Webb*, No. 413, SEPT. TERM, 2019, 2021 WL 733828, at *11 (Md. Ct. Spec. App. Feb. 25, 2021) (citing *Keyes*, 191 Md. App. at 537 (quoting Black's Law Dict., 8th Ed. (2004) at 1437)). Appellees presented no evidence of this nature and thus, the rebuttal arguments were not reflective of the evidence in the case. Appellees argue that under *Silvestri v. General Motors Corp*., 271 F.3d 583 (4th Cir. 2001), the injection of spoliation at trial was proper. We disagree. *Silvestri* does not hold that spoliation may be introduced at trial without laying the necessary evidentiary foundation. *Silvestri* holds a spoliation claim

requires notice, an opportunity to inspect the evidence and a duty to preserve it. *See Silvestri*, 271 F.3d at 592 ("In sum, we agree with the district court that Silvestri failed to preserve material evidence in anticipation of litigation or to notify General Motors of the availability of this evidence, thus breaching his duty not to spoliate evidence.").

While attorneys have broad leeway, it is fundamental, that attorneys "may not comment upon facts not in evidence or state what he or she would have proven." *Mitchell v. State*, 408 Md. 368, 381 (2009) (citing *Smith and Mack v. State*, 388 Md. 468, 488 (2005)) (internal quotation omitted). We hold the court abused its discretion by allowing counsel to inject a spoliation theory into the case during rebuttal closing argument with no evidence to support such a theory. *See Lee v. State*, 405 Md. 148, 165-66 (2008) (holding the State's argument to jury during rebuttal argument were an improper allusion to facts not in evidence).

We note the questions asked by the jury during deliberations further validate appellant's contention that appellees' rebuttal arguments caused the jury to speculate about facts not in evidence. After a short time, the jury asked: How much exculpatory information was captured by Six Flags' cameras? Why was the film not included in the case? Whose decision was it to omit the film? In response, the judge instructed the jury not to speculate. Under these circumstances, the court abused its discretion by allowing counsel to argue facts that were not in evidence through a rebuttal argument that was clearly prejudicial.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED AND REMANDED FOR NEW TRIAL; COSTS TO BE PAID BY APPELLEE.