

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1681

DEBORAH KINGSTON

vs.

BURLINGTON VETERINARY CLINIC, INC., & others.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff was injured when she slipped and fell in a parking lot outside the defendant veterinary clinic. She now appeals from a judgment, after a jury trial, in favor of the defendants, the clinic and the trustees of the realty trust that owns the property. Although the jury found that the trust was negligent, they found that such negligence was not a substantial contributing factor to the plaintiff's injury. As to the veterinary clinic, the jury found that it was not negligent. On appeal, the plaintiff argues that the trial judge abused his discretion in denying her motion to continue the trial and in excluding evidence from her proposed expert, which she argues would have shown spoliation of evidence. We affirm.

¹ Ralph W. Levine and Sandra I. Levine, as trustees of the Levine Family Realty Trust.

Background. At about 2 P.M. on January 20, 2014, while attempting to regain control of her dog (who had leaped out of her parked car), the plaintiff slipped and fell on black ice in the parking lot outside a veterinary clinic. During the course of discovery, the plaintiff deposed the veterinarian, who produced three photographs that appeared to show that the area where plaintiff fell was free of ice at 5:06 P.M. that day. Almost a year later, in April 2019, the plaintiff's weather expert raised a question with plaintiff's counsel as to why the photographs appeared to be taken in daylight despite the fact that sunset that day was at 4:42 P.M. Plaintiff's counsel thereafter located and retained an expert in photographic analysis and provided him with the photographs on June 24, 2019. Trial was scheduled to begin three weeks later, on July 10, 2019.

At the final pretrial conference the following day (June 25, 2019), the plaintiff did not disclose that she had retained a new expert, or that there was any question about the photographs. Instead, three days later, on June 28, 2019, the plaintiff filed an emergency motion to continue the trial because the new so-called rebuttal expert was not available on the scheduled trial date. Attached to this motion was a "report" from the previously-undisclosed expert stating that although he was "not challenging the photo image itself (that is

what the picture is displaying and p[ur]ports to be), [he was] questioning the unexplained discrepancies in the metadata fields, especially the dates/times in question."

On July 2, 2019, the judge conducted a hearing on the motion. The defendants opposed the motion for continuance on the ground that there was no good cause for the late disclosure of the expert, and orally moved to exclude the evidence. At the end of the hearing, the judge allowed the oral motion to exclude because of the late disclosure. The judge did not rule explicitly on the motion to continue, but the plaintiff no longer objected to the trial date given the ruling on the motion to exclude.

Discussion. The plaintiff argues that the trial judge abused his discretion in excluding her proposed expert's testimony, which she calls "spoliation" testimony. She further argues that the expert's views were "strong evidence that [the veterinarian] was perpetuating fraud on the court and would be committing perjury if she testified to the pictures being taken on January 20, 2014 at 5:06 P.M." However, the plaintiff's motion to continue did not claim spoliation, fraud on the court, or perjury. Nor did her proposed expert's report do so. Instead, as we noted above, the expert raised a question about unexplained differences between the timestamps on the photographs and the metadata; consistent with this, the

plaintiff argued below that the proffered evidence bore on the reliability of the metadata associated with the photographs.²

In addition to not raising spoliation, perjury, or fraud on the court in her motion to continue, the plaintiff did not object at trial to the admission of the photographs, nor did her pretrial motion seek to exclude them. Indeed, the plaintiff and the defendants had stipulated to the admissibility of the photographs, and the plaintiff made no attempt to withdraw that stipulation at any time. While the plaintiff now argues that it would have been "futile" to object to the admission of the photographs or move to withdraw her stipulation given the judge's ruling on the motion to continue, that motion did not seek to exclude the photographs. Thus, the question of admissibility was never put to the judge. Because the plaintiff never asked the judge to exclude the photographs, the record does not support her contention that an objection to their admission would have been futile. In addition, the plaintiff was the first party to make affirmative use of the photographs, which she did during her direct examination of the veterinarian. See, e.g., Ohler v. United States, 529 U.S. 753, 755 (2000) ("Generally, a party introducing evidence cannot complain on

² It is true that the plaintiff once used the word spoliation, without elaboration, during the hearing on the motion to continue.

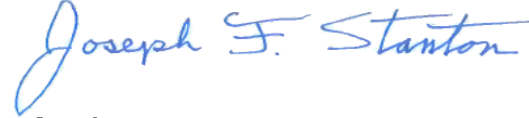
appeal that the evidence was erroneously admitted"). Although the plaintiff remained free to attack the photographs' reliability via examination of the veterinarian, and she asked the veterinarian about the timestamps, she did not ask whether the veterinarian had altered them in any way. Even after both defendants questioned the veterinarian about the timestamps and lighting of the photographs on cross-examination, the plaintiff on redirect failed to highlight the issue for the jury or to pursue it further. Moreover, it appears that the plaintiff neither requested a jury instruction on spoliation nor objected to the lack of such an instruction. See Mass. R. Civ. P. 51 (b), 365 Mass. 816 (1974).

In these circumstances, the plaintiff has waived the arguments she now presses on appeal. "Objections, issues, or claims -- however meritorious -- that have not been raised at the trial level are deemed generally to have been waived on appeal." Scheffler v. Board of Appeal on Motor Vehicle Liab. Policies & Bonds, 84 Mass. App. Ct. 904, 905 (2013), quoting

Palmer v. Murphy, 42 Mass. App. Ct. 334, 338 (1997). On this basis, we affirm the judgment below.³

So ordered.

By the Court (Wolohojian,
Henry & Singh, JJ.⁴),



Clerk

Entered: March 25, 2021.

³ Although a motion to continue is conferred to the judge's discretion, see, e.g., Commonwealth v. Burston, 77 Mass. App. Ct. 411, 417 (2010), that discretion must be soundly exercised. See Commonwealth v. Cavanaugh, 371 Mass. 46, 50-51 (1976). Where, as here, a judge is presented with a colorable claim that important evidence may be unreliable (whether because of spoliation or otherwise), the better course would have been to first take reasonable steps to ensure that the evidence was reliable before denying the continuance. Unreliable evidence threatens the integrity of the judicial process and should not be admitted. Here, the judge focused exclusively on the timing of the plaintiff's motion, and did not explore the reliability of the photographs before denying the motion to continue.

⁴ The panelists are listed in order of seniority.