

# Third District Court of Appeal

## State of Florida

Opinion filed October 16, 2019.  
Not final until disposition of timely filed motion for rehearing.

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No. 3D18-2369  
Lower Tribunal No. 14-19068

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**City of Miami,**  
Appellant,

vs.

**Juanita Kho,**  
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Spencer Eig, Judge.

Victoria Méndez, City Attorney, and Eric J. Eves, Assistant City Attorney and Joseph T. Murray III, Assistant City Attorney, for appellant.

Sarah Steinbaum, P.A., and Sarah Steinbaum, for appellee.

Holland & Knight, LLP, and Frances Guasch De La Guardia; Miriam Ramos, City Attorney, for City of Coral Gables, as amicus curiae.

Before FERNANDEZ, LINDSEY and GORDO, JJ.

GORDO, J.

The City of Miami appeals the entry of final judgment in favor of Juanita Kho in this negligence action. We conclude that the trial court's denial of the City's motion for directed verdict and entry of judgment for Kho were based on inadmissible evidence. We reverse and remand with instructions that judgment be entered in favor of the City.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Kho sued the City for negligence following a trip-and-fall accident in 2010 on a City sidewalk. The subject sidewalk had an asphalt patch, which was one-and-a-quarter inches lower than the adjoining concrete slab. Kho alleged that this difference in elevation was a "dangerous and defective condition," which caused her to fall. In order to prove her case, Kho was required to show that the City had either actual or constructive knowledge of the sidewalk's condition.

At trial, Kho was unable to prove that the City had actual knowledge of the condition of the sidewalk. Kho then sought to prove constructive knowledge using a Google Maps photograph of the sidewalk at issue, which was dated November of 2007. Kho wanted to use the photograph to show that the condition had existed since then and that the City should have known about it.

Prior to trial, the City filed a notice of objection to the admission in evidence of any internet photograph or map without the proper authentication. At the hearing on both parties' motions in limine, the City set forth its argument for exclusion of

the Google Maps photograph. The City argued that Kho would be unable to lay the proper foundation to authenticate the image, as no one with knowledge of the sidewalk's condition on the date of the photograph would be testifying. During that proceeding, the trial court made clear that the Google Maps photograph would need to be authenticated "like any other photograph."

Upon the City's objection at trial, the trial court acknowledged that the photograph was not self-authenticating under Florida Statutes section 90.902 and that testimony would be required to lay the proper foundation. Kho introduced the photograph through her expert who testified that there was no substantial difference between the Google Maps photograph and a photograph taken of the same location on the date of Kho's fall. The expert had not visited the subject location prior to 2010. No testimony was presented from anyone with personal knowledge of the sidewalk's condition in November of 2007. Kho also did not introduce testimony from a Google Maps representative or anyone with control over or personal knowledge of the Google Maps system. Based on the lack of foundation and authentication, the City objected to the admissibility of the evidence. The trial court summarily overruled that objection and admitted the photograph in evidence without any additional testimony.

At the close of Kho's case in chief, the City moved for directed verdict arguing that Kho had failed to prove either actual or constructive knowledge. The trial court

partially denied the City’s motion for directed verdict, finding that the Google Maps photograph evidenced constructive knowledge. The jury found the City liable and awarded Kho \$90,000. The City then moved to set aside the verdict and for a new trial. Both motions were denied, and final judgment was entered for Kho. This appeal followed.

### **STANDARD OF REVIEW**

“Evidentiary rulings are generally reviewed under an abuse of discretion standard.” Bank of N.Y. Mellon v. Garcia, 254 So. 3d 565, 567 (Fla. 3d DCA 2018) (citing Holt v. Calchas, LLC, 155 So. 3d 499, 503 (Fla. 4th DCA 2015)). “However, a [trial] court’s discretion is limited by the evidence code and applicable case law. A [trial] court’s erroneous interpretation of these authorities is subject to de novo review.” Bank of Am., N.A. v. Delgado, 166 So. 3d 857, 860 (Fla. 3d DCA 2015) (citations omitted).

### **LEGAL ANALYSIS**

Section 90.901 of the Florida Evidence Code provides that evidence must be authenticated before it is admitted. § 90.901, Fla. Stat. (2019). The burden of providing sufficient evidence to support a finding that the evidence is what it purports to be rests with the proponent. Id. A Google Maps image must be authenticated in the same manner as any other photographic evidence before it is admitted in evidence.

“There are two methods of authenticating photographic evidence.” Dolan v. State, 743 So. 2d 544, 545 (Fla. 4th DCA 1999). The first is the “pictorial testimony” method, which requires a witness with personal knowledge to testify that the image fairly and accurately depicts a scene. Id. The second is the “silent witness” method, under which the photograph “may be admitted upon proof of the reliability of the process which produced the tape or photo.” Id. at 545–46 (citing Hannewacker v. City of Jacksonville Beach, 419 So. 2d 308 (Fla. 1982)). A trial judge may admit a photograph under the silent witness method after considering the following factors:

- (1) evidence establishing the time and date of the photographic evidence;
- (2) any evidence of editing or tampering;
- (3) the operating condition and capability of the equipment producing the photographic evidence as it relates to the accuracy and reliability of the photographic product;
- (4) the procedure employed as it relates to the preparation, testing, operation, and security of the equipment used to produce the photographic product, including the security of the product itself; and
- (5) testimony identifying the relevant participants depicted in the photographic evidence.

Wagner v. State, 707 So. 2d 827, 831 (Fla. 1st DCA 1998). The Google Maps photograph in this case was not authenticated by either of these methods.

As for the pictorial testimony method, Kho did not present testimony from any witness with personal knowledge of the sidewalk's condition in November of 2007. The testimony of Kho's expert was insufficient to authenticate the photograph, as he testified that he had not visited the subject location prior to her fall in 2010. Indeed, Kho conceded that the photograph was not authenticated through the pictorial testimony method by failing to address it in her brief to this Court. See Agee v. Brown, 73 So. 3d 882, 886 (Fla. 4th DCA 2011).

On appeal, Kho argues that the photograph was authenticated under the silent witness method.<sup>1</sup> Here, Kho failed to offer evidence in support of any of the Wagner factors, and thus, failed to authenticate the photograph. The date stamp on the photograph was insufficient to establish the date on which it was taken, as the trial court correctly noted that the photograph was not self-authenticating. Kho did not present any evidence as to the operating capabilities or condition of the equipment used by Google Maps. There also was no testimony as to the procedures employed by Google Maps in taking the photograph. Given the lack of evidence as to any of

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<sup>1</sup> Kho also argues that the photograph was properly admitted because the trial court had authority to take judicial notice of it. Importantly, however, Kho concedes on appeal that the trial court never actually took judicial notice of the photograph or the reliability of the technology that produced it. Moreover, Kho never filed a motion requesting that the court take judicial notice and the court did not take notice on its own motion. Judicial notice requires that the parties be given an "opportunity to present information relevant to the propriety of taking judicial notice." Gidwani v. Roberts, 248 So. 3d 203, 207 n.1 (Fla. 3d DCA 2018); see also § 90.203, Fla. Stat. (2019).

the relevant factors, the trial court did not make any findings regarding admissibility under the silent witness method.

Since the photograph was not authenticated, it was not properly admitted in evidence.<sup>2</sup> See § 90.901, Fla. Stat. Without the Google Maps photograph, Kho failed to present legally sufficient evidence of constructive knowledge. See Miami-Dade Cty. v. Jones, 232 So. 3d 1127, 1130 (Fla. 3d DCA 2017). Despite Kho's contention that the admission of the photograph was harmless error, it is evident that it was not. The trial court admitted the unauthenticated photograph and then based its denial of directed verdict solely on that inadmissible evidence.

## CONCLUSION

For the foregoing reasons, we reverse and remand with instructions that judgment be entered for the City. See Jones, 232 So. 3d at 1131 (reversing and remanding for entry of judgment in favor of the County where the plaintiff failed to present evidence at trial of actual or constructive knowledge of the dangerous condition). Entry of judgment for the City rather than a new trial is proper because Kho is not entitled to a second bite at the apple. See, e.g., Correa v. U.S. Bank Nat'l Ass'n, 118 So. 3d 952, 956 (Fla. 2d DCA 2013) (“[A]ppellate courts do not generally provide parties with an opportunity to retry their case upon a failure of proof.”)

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<sup>2</sup> As we conclude that the Google Maps photograph was not properly authenticated and was thus inadmissible, we decline to consider the remaining arguments raised by Kho.

(quoting Morton's of Chi., Inc. v. Lira, 48 So. 3d 76, 80 (Fla. 1st DCA 2010)); cf. Levy v. Ben-Shmuel, 255 So. 3d 493, 496–97 (Fla. 3d DCA 2018) (finding that parties are not entitled to a new trial on damages where they fail to prove the correct measure of damages in the initial trial).

Kho was aware that the City would be contesting the photograph's admissibility and had ample time to prepare the extrinsic evidence necessary to properly authenticate it. Thus, the City is entitled to judgment in its favor.

Reversed and remanded.