UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1320

September Term, 2014

DAVID JORDAN

v.

ROBERT TORAIN, ET AL.

Meredith,
Berger,
Nazarian,

JJ.

Opinion by Berger, J.
Dissenting Opinion by Meredith, J.

Filed: July 23, 2015

This appeal arises out of a judgment entered by the Circuit Court for Baltimore City on August 21, 2014 finding that Robert Torain ("Torain") and David Jordan ("Jordan") were not negligent in connection with a motor vehicle collision in which they were involved on July 28, 2011. The circuit court's judgment further provided that the Mayor and City Council of Baltimore City (collectively, "the City") were not negligent with respect to the July 28, 2011 motor vehicle collision between Torain and Jordan, despite the fact that Torain was acting as an employee of the City at the time of the collision.

On appeal, Jordan presents four issues[1] for our review, which we have rephrased as follows:

[1] The issues, as presented by Jordan, are:

1. Did the trial court err when it joined the employee, Robert Torain and, the employer, Mayor and City of Baltimore, together on Question 1 of the verdict sheet, which required the jury to find both parties actively negligent in the motor vehicle accident of July 28, 2011?

2. Did the trial court err when it refused to give Appellant's requested jury instruction regarding stipulated underlying facts, that Robert Torain was acting within the scope of his employment or agency with the Mayor and City Council of Baltimore, and instead allowed issue [sic] to go to the jury to determine?

3. Did the trial court err when it gave Appellees requested jury instructions regarding: (1) the prohibition on following too closely; and, (2) passing and overtaking on the right, without sufficient evidence to justify either instruction?

4. Did the trial court err when it refused to give Appellant's proposed jury instruction on the issue of the degree of care required by the driver of a large vehicle?

1. Whether the circuit court erred by drafting the first question on the jury's verdict sheet such that the jury was required to answer whether they found by a preponderance of the evidence that Torain and the City were negligent in the motor vehicle accident on July 28, 2011.

2. Whether the trial court erred by declining to instruct the jury that the parties had stipulated that Torain was acting within the scope of his employment with the City during the July 28, 2011 motor vehicle collision.

3. Whether the circuit court erred by giving jury instructions that were not generated by the evidence.

4. Whether the circuit court erred by declining to give Jordan's requested jury instruction concerning a heightened standard of care applicable to drivers of large vehicles.

For the reasons that follow, we affirm the judgment of the Circuit Court for Baltimore City.

FACTUAL AND PROCEDURAL BACKGROUND

On July 28, 2011, Jordan was driving eastbound on West Northern Parkway approaching the intersection of West Northern Parkway and Park Heights Avenue in Baltimore, Maryland. At the same time, Torain, employed as a sanitation engineer by the City, was driving a Baltimore City trash truck eastbound on West Northern Parkway ahead of Jordan. Torain was in the process of completing his daily trash collection route. Thomas Baxter ("Baxter"), another sanitation engineer employed by the City, was riding on the rear of the trash truck operated by Torain.

Torain attempted to turn right from West Northern Parkway onto Magnolia Avenue, an alley off of West Northern Parkway right before its intersection with Park Heights Avenue. Simultaneously, Jordan attempted to turn right onto Park Heights Avenue when he collided with the rear of the Baltimore City trash truck operated by Torain. Torain, Baxter, and Jordan all claimed to have sustained injuries as a result of the collision.

Jordan subsequently filed a three-count complaint in the Circuit Court for Baltimore City against Torain and the City. The first count of Jordan's complaint alleged that he was injured by Torain's negligent operation of the Baltimore City trash truck. The second count of Jordan's complaint alleged that the City was vicariously liable for Jordan's injuries because Torain was, at all relevant times, operating his trash truck within the scope of his employment by the City. The third count of Jordan's complaint alleged that the City caused Jordan's injuries by negligently entrusting Torain with the responsibility for driving a Baltimore City trash truck.

Torain and Baxter also filed suit against Jordan, alleging that he was liable for the injuries they sustained in the collision. The cases were consolidated and tried from August 18, 2014 through August 21, 2014. Conflicting accounts of the July 28, 2011 vehicle collision were presented at trial. Torain and Baxter testified that they were attempting to turn right onto Magnolia Avenue from the right lane of West Northern Parkway when they were struck from behind by Jordan. Baxter further testified that Jordan was speeding just prior to his impact with the trash truck. Jordan, conversely, testified that he was not speeding at the

time of the collision and that Torain and Baxter attempted to turn right onto Magnolia Avenue from the middle lane of West Northern Parkway.

At the close of evidence, the City moved to dismiss the third count of Jordan's complaint, alleging negligent entrustment, based on the fact that Jordan failed to produce any evidence of negligent entrustment at trial. Jordan conceded this point and the circuit court dismissed Jordan's claim that the City had negligently entrusted Torain with the responsibility of operating a trash truck. Jordan subsequently requested that the court provide the jury with the pattern jury instruction[2] regarding the stipulation of facts or testimony to establish that Torain was acting within the scope of his employment by the City at the time of the collision.[3] The circuit court denied Jordan's request. Jordan further objected to the

[2] We note that in the instant case, due to a technical complication, the jurors were given all relevant jury instructions in written form to take with them as they deliberated. All of our references to jury instructions in the instant case quote the written form of the instructions as provided to the jurors.

[3] Maryland Civil Pattern Jury Instruction 1:9 reads as follows:

> The parties have agreed that (agreed facts). These facts are now not in dispute and should be considered proven.

Maryland Civil Pattern Jury Instructions ("MPJI-Cv") § 1:9 (4th ed. 2009).

circuit court's decision to instruct the jury on "following too closely"[4] and "passing and overtaking on the right."[5]

At trial, Jordan objected to the formulation of Question 1 on the verdict sheet given to the jury, which read as follows:

> Do you find, by a preponderance of the evidence that the **DEFENDANT, ROBERT TORAIN** and the **DEFENDANT, MAYOR AND CITY COUNCIL**, were negligent in the motor vehicle accident on July 28, 2011?

Jordan claimed that Question 1, as phrased, would confuse the jury by leading them to conclude that they were required "to find *both* Robert Torain *and* [the City] were negligent in causing" the July 28, 2011 vehicle collision. (emphasis in original). Jordan argued that the jury would read Question 1 on the verdict sheet and conclude that if "Torain's negligence was the sole proximate cause of the crash, they would have to answer Question 1 'no.'"

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[4] The circuit court's instruction on "following too closely" read as follows:

> At all times, the driver of a vehicle shall control the speed of the vehicle as necessary to avoid colliding with any person or any vehicle or other conveyance that, in compliance with the legal requirements and the duty of all persons to use due care, is on or entering the highway.

[5] The circuit court's instruction on "passing and overtaking on the right" read as follows:

> The driver of a vehicle may pass to the right of another vehicle on the roadway with unobstructed pavement not occupied by parked vehicle and wide enough for two or more lines of vehicles moving lawfully in the same direction as the overtaking vehicle.

(emphasis in original). Nevertheless, the circuit court did not alter the phrasing of Question 1 on the verdict sheet.

The jury returned its verdict on August 21, 2014, finding that Torain and the City were not negligent in the motor vehicle collision of July 28, 2011. The jury further found that Jordan was not negligent in the July 28, 2011 motor vehicle collision. This timely appeal followed.

DISCUSSION

I. Phrasing of the First Question on the Jury Verdict Sheet

A. Standard of Review

Maryland Rule 2-522(b)(2)(A) provides that:

> The court may require a jury to return a verdict in the form of written findings upon specific issues. For that purpose, the court may use any method of submitting the issues and requiring written findings as it deems appropriate, including the submission of written questions susceptible of brief answers or of written forms of the several special findings that might properly be made under the pleadings and evidence. The court shall instruct the jury as may be necessary to enable it to make its findings upon each issue.

Md. Rule 2-522(b)(2)(A).

"[T]he decision to use a particular verdict sheet 'will not be reversed absent abuse of discretion.'" *Consol. Waste Indus., Inc. v. Standard Equip. Co.*, 421 Md. 210, 220 (2011) (quoting *Applied Indus. Technologies v. Ludemann*, 148 Md. App. 272, 287 (2002)). Moreover, "Maryland appellate courts generally will not reverse even an unreasonable

decision without evidence of prejudice/harm." *Id*. "Prejudice exists when the particular error is determined likely to have affected the verdict—'it is not the possibility but the probability of prejudice which is the object of the appellate inquiry.'" *Id*. at 219-20 (quoting *Crane v. Dunn*, 382 Md. 83, 91 (2004)).

B. Analysis

On appeal, Jordan advances the argument he made before the circuit court concerning an alleged defect in Question 1 of the verdict sheet used by the jurors in the instant case. Jordan contends that Question 1 on the jury's verdict sheet was phrased such that the jurors could only find that Torain acted negligently if they also found that the City was negligent, independent of any of Torain's acts. Jordan reasoned that the jury should have first determined whether Torain, independently, was negligent before it could consider whether Torain was acting within the scope of his employment by the City.[6]

If Torain was found to be negligent in his operation of the trash truck, and such negligent operation occurred within the scope of Torain's employment with the City, then the City would have been vicariously liable for Torain's negligence. *See Rivera v. Prince George's Cnty. Health Dep't*, 102 Md. App. 456, 475 (1994) ("Vicarious liability is . . . the attribution of a wrongdoer's actions to an innocent third party by virtue of the relationship

[6] We note that this argument runs counter to Jordan's argument, discussed *infra*, that the circuit court should have instructed the jury that the parties had stipulated that Torain was acting within the scope of his employment with the City during the July 28, 2011 motor vehicle collision.

between the wrongdoer and the third party."). On appeal, Jordan argues that "the verdict sheet should have attempted to distinguish the concepts of active negligence from vicarious liability as they apply to the multiple parties in this case." At trial, counsel for Jordan voiced his objection to the proposed wording of Question 1 on the verdict sheet as follows:

> [COUNSEL FOR JORDAN]: I just want to get this one point in. You're telling the jury they have to find both Torain negligent and the City negligent or they can't move on and that's, that's going to, I mean, if you want to separate them and have them both incorporated I agree we can do that.

Jordan points to the jury's verdict as evidence of the fact that the jury was confused by the wording of Question 1 on the verdict sheet. Jordan argues that "[t]he jury's verdict, that no party was negligent, was erroneous and reflected the jury's confusion and the illogical consequences of the poorly drafted verdict sheet." Contrary to Jordan's assertion, however, the jury's verdict in the instant case was neither erroneous nor illogical. Although it may seem unusual, intuitively, to have a motor vehicle collision in which no party is found to have acted negligently, such a result is permitted by law.

The Maryland Civil Pattern Jury Instruction concerning the preponderance of the evidence standard provides, in pertinent part:

> The party who asserts a claim or affirmative defense has the burden of proving it by what we call the preponderance of the evidence.
>
> In order to prove something by a preponderance of the evidence a party *must prove that it is more likely so than not so*. In other words, a preponderance of the evidence means such evidence which, when considered and compared with the evidence

> opposed to it, has more convincing force and produces in your minds a belief that it is more likely true than not true.

Maryland Civil Pattern Jury Instructions ("MPJI-Cv") § 1:12 (4th ed. 2009) (emphasis added). Accordingly, if a jury makes a finding that a party was negligent under the preponderance of the evidence standard, then the jury must have concluded that there was a greater than fifty percent (50%) chance that the party acted negligently. In the instant case, the jury concluded that Jordan did not satisfy his burden of proving, by a preponderance of evidence, that the accident was caused by Torain and the City's negligence. Furthermore, the jury concluded that Torain and the City did not satisfy their burden of proving, by a preponderance of evidence, that the accident was caused by Jordan's negligence.

We note that the phrasing of Question 1 on the verdict sheet was at the very least confusing, even if it did not rise to the level of an abuse of discretion. Counsel for Jordan clearly and timely raised his objection to the formulation of Question 1 before the circuit court, but the circuit court declined to revise the question accordingly. We concede that Question 1 on the verdict sheet in this case was poorly phrased and arguably unreasonable because it could be interpreted as requiring the jury to find that the City was a proximate cause of Jordan's injuries as a co-requisite for finding that Torain proximately caused Jordan's injuries.

Nevertheless, before the circuit court, the parties agreed that the only theory under which the City could be found liable in the instant case was a theory of vicarious liability or

respondeat superior.[7] Indeed, in closing arguments before the circuit court, counsel for Jordan explicitly stated that "[t]here's some instructions with the employer/employee . . . [t]hat's not even really an issue in this case because everyone agrees he was driving the trash truck for the City." Counsel for Jordan proceeded to take great pains to explain just what Question 1 on the verdict sheet was asking of the jury. Counsel for Jordan described Question 1 on the verdict sheet as follows:

> [Counsel for Jordan]: "[I]n the verdict sheet the first question is do you find by a preponderance of the evidence that Defendant Robert Torain, and Defendant . . . City . . . were negligent for this accident. *And I wanted to point out that Mr. Torain, who was the driver of the truck, was working for the City at the time, so nobody's suggesting that the Mayor or City Council were in any way driving the truck, but they are responsible for City employees.* So I just wanted to point that out because I think that that could cause some confusion as to whether or not, you know, are we actually supposed to be saying this is the Mayor and City Council? No, it's agency, and Mr. Torain was acting as the agent for the Mayor and City Council of Baltimore.

(emphasis added). As counsel for Jordan made clear in his closing arguments, Question 1 on the verdict sheet in the instant case did not require the jury to find that the City proximately caused Jordan's injuries. Rather, Question 1 asked the jury to determine whether Torain's negligence, in operating his City trash truck, proximately caused Jordan's

[7] Black's Law Dictionary defines *respondeat superior* as "[t]he doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." RESPONDEAT SUPERIOR, Black's Law Dictionary (10th ed. 2014).

injuries, and, additionally, whether the City was responsible for Torain's negligence, given that Torain was acting within the scope of his employment as the City's employee/agent.

In addition to the statements made by counsel for Jordan during closing arguments, any confusion that the wording of Question 1 on the verdict sheet may have produced was at least, in part, ameliorated by the circuit court's jury instructions. As we have previously held, a "verdict sheet need not repeat the oral instructions given to the jury." *Fraidin v. Weitzman*, 93 Md. App. 168, 208 (1992). The written jury instructions used by the jurors in the instant case provided, in pertinent part, as follows:[8]

> **Employee and Employer**
>
> An employer or a principal is responsible for injuries or damages caused to others by acts of employees or agents if the acts causing the injuries or damages were within the scope of employment.
>
> *The defendant, Mayor and City Council are sued as employer and, Mr. Torain as employee. If the employee is responsible for the acts about which complaint is made by plaintiff[s], the employer is also responsible.*
>
> *Mr. Torain was acting as the employee of the defendant, Mayor and City Council at the time of the acts about which complaint is made by plaintiff[s].* The employer, Mayor and

[8] We note that the "Employee and Employer" jury instruction, reproduced below, may not have been orally read to the jury in the form presented here and is not present in the joint record extract provided by the parties in this case. Nevertheless, the "Employee and Employer" jury instruction, as reproduced here, was in fact used by the jury as it was obtained from a printed sheet of jury instructions that jurors actually took with them into their deliberations. A technical problem with the courtroom recording system required the jurors in this case to rely on a printed sheet of jury instructions, as the recording of the circuit court judge reading instructions to the jury was unavailable.

> City Council is responsible if the employee did the acts about which complaint is made by plaintiff[s].

(emphasis added). The jury instructions given by the circuit court clearly provide that at all relevant times, Torain was acting within the scope of his employment with the City. The instructions further explain that the City is responsible for any of Torain's acts of negligence that were performed within the scope of Torain's employment. It follows, therefore, that the City *must* be negligent if Torain is found to be negligent. Moreover, the circuit court instructed the jury that "Torain was acting as the employee of the . . . City . . . at the time of the acts about which complaint is made" by Jordan. The City was, therefore, vicariously liable for any of Torain's negligent acts that contributed to the July 28, 2011 motor vehicle collision.

Despite the admitted problems with the phrasing of Question 1 on the verdict sheet in the instant case, we hold that the circuit court's use of Question 1 did not rise to an abuse of discretion under the facts of this case. Jordan has failed to sufficiently prove that he was prejudiced by the use of Question 1 as it was phrased in this case. A finding of prejudice is required for an appellate court to reverse a trial court's decision to use a particular verdict sheet. *Consol. Waste Indus., Inc.*, *supra*, 421 Md. at 220. Further, "prejudice exists when the particular error is determined likely to have affected the verdict – it is not the possibility but the probability of prejudice which is the object of the appellate inquiry." *Id*. at 219-20 (quoting *Crane v. Dunn*, *supra*, 382 Md. at 91). On this record, we are unable to conclude that there is a probability of prejudice by the trial judge's use of the verdict sheet in this case.

Indeed, the only evidence of prejudice to which Jordan can point is the fact that the jury found that no party in the instant case was negligent. The jury's finding that no party was negligent was not illogical given the conflicting testimony about the collision and the applicable burden of proof in the instant case. Further, the jury received appropriate written instructions from the trial judge that the City was sued as the employer and that it was responsible "if the employee did the acts about which complaint is made by the plaintiff[s]." In addition, defense counsel appropriately argued to the jury that "nobody's suggesting that the . . . City . . . [was] in any way driving the truck, but they are responsible for City employees." Moreover, there is no evidence in this case that the City could be held liable under any theory but one of *respondeat superior*.

According to the instructions on the verdict sheet, the jury answered Question 1 and Question 2 on the verdict sheet and returned their verdict to the circuit court, as required by the clear instructions of the verdict sheet. As "[i]t is not unreasonable to expect a jury to follow instructions presented clearly to them[,]" Jordan has failed to allege that the circuit court's use of Question 1 on the verdict sheet prejudiced the jury against Jordan. *Id*. at 226. We, therefore, hold that the verdict sheet used by the circuit court in the instant case did not constitute an abuse of discretion.

II. Jury Instruction Issues

A. Standard of Review

In reviewing a trial court's decision to give certain jury instructions, we must first determine if the proposed instruction was generated by the evidence. Only after making this threshold determination do we proceed to evaluate whether the instruction, as given, constituted an abuse of discretion. As the Court of Appeals has held:

> We review a trial judge's decision whether to give a jury instruction under the abuse of discretion standard. *Conyers v. State*, 354 Md. 132, 177, 729 A.2d 910, 934 (1999). Moreover, we will overturn a jury verdict and grant a new trial based on such an error only if it rises to the level of prejudicial error.
>
> In determining whether there was error, "[i]t is well settled that when [an] objection is raised to a court's instruction, attention should not be focused on a particular portion lifted out of context, but rather its adequacy is determined by viewing it as a whole." *Collins v. State*, 318 Md. 269, 283, 568 A.2d 1, 8 (1990) (citation and quotation marks omitted). Error will be found if the given instruction is not supported by evidence in the case. *Rustin v. Smith*, 104 Md.App. 676, 680, 657 A.2d 412, 414 (1995). The proven error must then be prejudicial, not harmless.

CSX Transp., Inc. v. Pitts, 430 Md. 431, 458 (2013).

B. Analysis

1. Lack of An Instruction Regarding Stipulation of Fact

At trial, Jordan requested that the circuit court instruct the jury that the parties had stipulated that "Torain was acting in the scope of his employment [.]" The circuit court denied Jordan's request, stating:

> THE COURT: No. If you're going to have a stipulation then you're going to write it out and all parties are going to sign it. I think the testimony is clear. It isn't a stipulation; it's evidence. Mr. Torain testified that at the time of the accident he was working within the scope of his employment as the driver of a big green garbage truck.
>
> * * *
>
> THE COURT: . . . . And so you only get a stipulation where no one testifies to a fact. No one testifies live in person to a fact. And that fact is then written out like we stipulate that it was 95 degrees that day. No one testifies but you all agree.

Accordingly, the circuit court denied Jordan's request for a jury instruction regarding the stipulation of fact because Jordan could not produce a written stipulation that was signed by all of the parties.

The Court of Appeals has held that "[b]y definition, a stipulation is an agreement between counsel akin to a contract[,] . . . based on mutual assent and interpreted to effectuate the intent of the parties." *State v. Broberg*, 342 Md. 544, 558 (1996). Although contracts may ordinarily be oral or written, the Court of Appeals has recommended that "the proponent of a stipulation would be well advised to ensure that the terms of any stipulation are recorded, and that mutual assent is demonstrated." *Id*. at 563. At trial, counsel for Jordan requested a jury instruction concerning the stipulation of fact as follows:

> [COUNSEL FOR JORDAN]: Your Honor, I would like the jury to hear that the City stipulates that Mr. Torain was acting in the scope of his employment and they don't contest that fact.
>
> THE COURT: You wrote out a stipulation?

> [COUNSEL FOR JORDAN]: I didn't write one out but what you said earlier to [counsel for the City] would do just fine.

Jordan, therefore, lacked a written, signed stipulation *and* could not even demonstrate mutual assent to the proposed stipulation. When asked for the terms of the stipulation that "Torain was acting in the scope of his employment," Torain asks the circuit court to use an earlier colloquy between the court and counsel for the City. A colloquy between the court and the counsel for the City, however, does not establish a contract-like agreement between counsel for the City and counsel for Jordan.

Furthermore, Jordan's argument that the circuit court erred by failing to instruct the jury on the alleged stipulation of fact is moot. As explained previously, the jury instructions provided to the jury by the circuit court assume that Torain was acting within the scope of his employment with the City at all relevant times during the July 28, 2011 motor vehicle accident. Indeed, the circuit court clearly instructed the jury that "Torain was acting as the employee of the defendant, . . . [the] City . . . at the time of the acts about which complaint is made by plaintiff[s]" and, therefore, "[t]he employer, . . . [the] City . . . is responsible if the employee did the acts about which complaint is made by plaintiff[s]." This instruction served the same function as Jordan's requested instruction concerning the proposed stipulation of fact.

2. The Instructions to the Jury Were Generated by the Evidence

Jordan further contends on appeal that the circuit court erred by instructing the jury on "following too closely" and "passing and overtaking on the right." Jordan argues that

these instructions were not generated by the evidence introduced at trial. The circuit court, however, in issuing these jury instructions over Jordan's objections, specified that it had concluded that the testimony of Baxter and Jordan at trial was legally sufficient to generate the "following too closely" and "passing and overtaking on the right" jury instructions.

Following the close of evidence, the circuit court reviewed the jury instructions that the parties had proposed. Torain and the City had requested that the circuit court give the jury an instruction on "following too closely" based on § 21-801(b) of the Transportation Article of the Maryland Code.[9] Torain and the City asserted that this instruction was generated by Baxter's testimony that, just prior to the collision, he looked up from the back of the trash truck and observed Jordan speeding toward him. Counsel for Jordan objected, arguing that Baxter "said the sole thing he was basing his opinion of speeding on was that they were going faster than the truck."

The circuit court, however, gave the "following too closely" instruction over Jordan's objection after finding that Baxter had testified on direct that "he'd been driving in a vehicle for many, many years with other people and that he had observed vehicles speeding and going faster or slower in his years on the back of the truck [and] . . . during that time could

[9] "At all times, the driver of a vehicle on a highway shall control the speed of the vehicle as necessary to avoid colliding with any person or any vehicle or other conveyance that, in compliance with legal requirements and the duty of all persons to use due care, is on or entering the highway."

Md. Code (1977, 2012 Repl.Vol.), § 21-801(b) of the Transportation Article.

tell when someone was speeding." The circuit court concluded that it was only during cross-examination that counsel for Jordan attempted to "pin [Baxter] down that it was only the movement of the truck that day that made him say that . . . Jordan was speeding."

Torain and the City further requested a jury instruction on "passing and overtaking on the right" based on § 21-304(a)(2) of the Transportation Article of the Maryland Code.[10] Torain and the City argued that the "passing and overtaking on the right" instruction was generated by Jordan's testimony that the trash truck driven by Torain was in the middle lane of West Northern Parkway when it attempted to turn right onto Magnolia Avenue. Jordan alleged that he was driving east on West Northern Parkway in the right hand lane, when the trash truck driven by Torain turned right onto Magnolia Avenue from the middle lane of West Northern Parkway. Torain and the City, therefore, proposed that "if [Jordan is] going to pass a trash truck which he claims is in the middle lane on the right he must have, must do so under the dictates" of § 21-304(a)(2) of the Transportation Article of the Maryland Code. Jordan objected, claiming that his testimony established that he "saw the trash truck come into his lane and tapped his brakes initially because he believed they were merging in front

[10] "[T]he driver of a vehicle may overtake and pass to the right of another vehicle only . . . [o]n a highway with unobstructed pavement not occupied by parked vehicles and wide enough for two or more lines of vehicles moving lawfully in the same direction as the overtaking vehicle[.]"

Md. Code (1977, 2012 Repl.Vol.), § 21-304(a)(2) of the Transportation Article.

of him." Jordan maintained that he "never testified that [he] was intending to pass this trash truck on the right[.]"

The circuit court ultimately concluded that Jordan "would have been lawfully passing [Torain's trash truck] if that garbage truck had negotiated his way into the middle lane," and Jordan, therefore, "would have been within his right to maintain a position in that right hand lane passing by the garbage truck and proceeding up to the corner of Park Heights and Northern Parkway to negotiate a right hand turn." Accordingly, the circuit court gave the requested "passing and overtaking on the right" instruction because "if [Torain] was in the middle lane and he was moving to the right to make that right hand turn, this rule would apply[,]" and "[i]f [Torain] were in the right hand lane and stayed in the right hand lane and was going to make the right hand turn, this rule would apply."

Regardless of whether the "following too closely" and "passing and overtaking on the right" jury instructions were supported by the evidence adduced at trial, the use of these jury instructions by the circuit court did not prejudice Jordan. "To establish that [an] erroneous jury instruction warrants reversal, appellant bears the burden of demonstrating prejudice." *CSX Transp., Inc. v. Pitts*, 203 Md. App. 343, 392 (2012) *aff'd*, 430 Md. 431 (2013). In the instant case, the "following too closely" and "passing and overtaking on the right" jury instructions did not prejudice Jordan because the jury ultimately found that Jordan was not negligent in the July 28, 2011 motor vehicle collision. As Jordan failed to identify any prejudicial effect caused by the circuit court's decision to instruct the jury on "following too

closely" and "passing and overtaking on the right," we will not reverse the circuit court's decision.

3. There is No Heightened Standard of Care for Drivers of Large Vehicles

Finally, Jordan argues that the circuit court erred by declining to instruct the jury that "[a] driver of a large heavy vehicle must use additional care in the operation of their vehicle." Jordan claims that this heightened standard of care applicable to the operators of large motor vehicles is derived from our decision in *Baublitz v. Henz*, 74 Md. App. 538 (1988). In that case, we held that "the size and weight of the truck . . . are important factors in determining questions of negligence, and drivers of large, heavy vehicles owe a duty to take those elements into consideration in the operation thereof." *Id*. at 547.

Our holding in *Baublitz,* however, does not suggest that drivers of large trucks "must use additional care in the operation of their vehicle." On the contrary, *Baublitz* merely holds drivers of large trucks to the same standard of negligence applied to all other drivers. The size and weight of a motor vehicle are important factors in determining the question of negligence, whether the motor vehicle is a small motorized scooter or a large commercial truck. Both scooter drivers and truck drivers must take the size and weight of their respective vehicles into account when operating them, to avoid being held liable for negligently operating a motor vehicle. Indeed, as the Court of Appeals held in *York Motor Exp. Co. v. State, for Use of Hawk*:

> In cases arising from collisions, the size and weight of such vehicles are important factors in determining questions of negligence. The drivers of these vehicles, having knowledge of their width and length, owe to other motorists on the highway the duty to take these elements into consideration in the operation of their vehicles. The fact that some vehicles are of a greater size or weight than the average car gives them no additional rights on the highways. *Every motorist is required to exercise ordinary care in the operation of his vehicle in view of all the circumstances.*

York Motor Exp. Co. v. State, for Use of Hawk, 195 Md. 525, 532-33 (1950) (emphasis added). Just as drivers of larger vehicles have "no additional rights on the highways," so too do they have no responsibility to "use additional care" in the operation of their vehicles.

Accordingly, truck drivers are to be held to the same standard of care as all other drivers. The circuit court, therefore, did not err in declining to give Jordan's requested jury instruction. Indeed, Jordan's requested jury instruction misstated the applicable law and was properly rejected by the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.

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Dissenting Opinion by Meredith, J.

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I agree with the majority opinion's disposition of issues 2, 3, and 4. But, with respect to the first issue, I would reverse and remand for a new trial because the verdict sheet which the trial judge prepared included no question that asked only if the jury found appellee Torain negligent. As a consequence, the trial court deprived the appellant of the right to have the jury make a finding on that specific question.

Over appellant's objection, the trial judge submitted to the jury a single question addressing the negligence *vel non* of both appellees, Mr. Torain *and* his employer (the Mayor and City Council). The specific question (to which the jury was asked to answer either "YES" or "NO") was:

> Do you find, by a preponderance of the evidence that the **DEFENDANT, ROBERT TORAIN** and the **DEFENDANT, MAYOR AND CITY COUNCIL** were negligent in the motor vehicle accident on July 28, 2011?

Given the fact that there was no evidence presented at trial to show that the Mayor and City Council had committed any act of negligence in the motor vehicle accident on July 28, 2011, the *only* possible answer to this compound question was "NO." It was a fatally flawed question that was the equivalent of directing a verdict in favor of the defendants. Because there was evidence in the record which, if believed, would have supported a jury finding that Mr. Torain alone was negligent, it was error for the trial court to refuse to submit that specific issue to the jury and thereby deprive the appellant of the right to a jury determination on an issue that was material to his claim for compensation.

Even though trial judges are vested with broad discretion with respect to fashioning jury instructions and verdict sheets, a "court's discretion is always tempered by the requirement that the court correctly apply the law applicable to the case." *Arrington v. State*, 411 Md. 524, 552 (2009).

Although the majority opinion concludes that there was no prejudice attributable to the misleading wording of the question on the verdict sheet because the jury was instructed (correctly) that the City could be held vicariously "responsible" if the acts causing the injuries were performed by Mr. Torain at a time when he was acting as an employee of the City, the trial court never instructed the jury that it could find that the City was also "negligent" on that basis. Indeed, an instruction to that effect would have been a misstatement of the law of negligence (even if it might have avoided the gap in the factual issues that were submitted to the jury).

One way to have addressed the confusion inherent in the issue drafted by the trial judge would have been to simply separate out the question about Mr. Torain's negligence. Indeed, that was what the appellant asked the trial judge to do. But the trial judge inexplicably rebuffed trial counsel's request for a clarifying revision to the verdict sheet. The refusal to correct a misleading question on the verdict sheet after the flaw was specifically pointed out by counsel was an abuse of discretion on the part of the trial judge.

Furthermore, this was not a "harmless" error on the part of the trial judge. By refusing appellant's request to revise the verdict sheet in a manner that would have posed a separate

question asking whether the jury found Mr. Torain negligent, the trial judge made it impossible for us to know what the jury's answer to that question would have been. That inability to know the jury's finding on that critical fact issue is not speculative; we do not know, and will never know how this jury would have answered a properly worded, non-compound question asking whether Mr. Torain was negligent. In my view, that is clear prejudice to the appellant, and we should address that deprivation of justice by ordering a new trial.