Circuit Court for Montgomery County
Case No. C-15-CV-22-000906

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1750

September Term, 2023

JAMES BURTON ROSENFIELD

v.

SHEILA HARNIK

Wells, C.J.,
Arthur,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),
JJ.

Opinion by Sharer, J.

Filed: February 12, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

As we consider the issues raised in this appeal, we engage in a discussion of a basic component of motor tort law – the Boulevard Rule.

James Burton Rosenfield sued Sheila Harnik in the Circuit Court for Montgomery County for injuries he sustained when the bicycle he was riding collided with a car driven by Mrs. Harnik in a residential area of Silver Spring, Montgomery County. A jury found Mrs. Harnik negligent and Mr. Rosenfield contributorily negligent, thus precluding an award of damages against Mrs. Harnik.

In his appeal, Mr. Rosenfield argues that because the Boulevard Rule applies, the circuit court erred in denying his motion for judgment and in instructing the jury on contributory negligence.[1]

For the following reasons, we shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

Just before the collision, the parties were returning to their respective homes in the "over 55" gated community of Leisure World. Mr. Rosenfield was about 200 yards from his home as he biked to meet his wife before she left their house to join friends; Mrs. Harnik was returning home with her husband, who was seated in the front passenger seat, from his medical appointment.

[1] Mr. Rosenfield frames his issues on appeal as follows:

1. Whether the Circuit Court erred in denying the Plaintiff's Motion for Directed Verdict as to Liability.

2. Whether the Circuit Court erred in giving a jury instruction on contributory negligence.

The collision occurred on a clear day around 3:30 p.m. on April 7, 2021. Mr. Rosenfield was riding his bike and attempting to turn left from North Leisure World Boulevard (which runs east-west) onto Norbeck Boulevard (which runs north-south) when Mrs. Harnik was driving her vehicle and attempting to turn left from Norbeck Boulevard onto North Leisure World Boulevard. Both streets are boulevards, meaning they contain two separate streets for traffic running in opposite directions with a median between the streets. As a result of the collision, Mr. Rosenfield suffered several fractures and was in rehabilitation for over five months.

At trial, Mr. Rosenfield testified that as he approached the intersection of North Leisure World Boulevard and Norbeck Boulevard, he saw a car stopped at a stop sign. He testified:

> I saw [Mrs. Harnik] was stopped, and I started to make a left-hand turn onto Norbeck Boulevard. As I entered the intersection, she proceeded to go forward and was making a left-hand turn so that she was basically tracking me as I was going forward. I couldn't go forward and outdo her because she was pulling to the left. So she was making a beeline directly at me, and she was accelerating. And so I knew this wasn't going to end well. I could tell she was going to hit me.
>
> And so I tried to figure out what to do, and decided on best course of action was not to be hit head on by her front of her car. So without falling, I turned my bike as hard as I could while I was pedaling. I couldn't stop to the left so that I would hit the side of her car and not have her front of her car hit me. And so I actually made contact with – just before I made contact with her, I was by the front passenger door, and I saw her husband in the front, and it didn't make much sense, but I did it by instinct. I didn't have a horn to sound, so I just yelled, hey, hoping she'd hear me and somehow slow down and put my hand out and banged on her car. And then I just closed my eyes . . . and maybe half a second later made impact with her car.

His bike collided with the right front passenger side of Mrs. Harnik's car, and he was thrown to the ground. He estimated that he was traveling between eleven and twelve miles per hour.

On cross-examination, Mr. Rosenfield testified he did not slow down when he saw Mrs. Harnik stopped at the stop sign; he "put [his] arm out briefly" to signal that he was turning left; as he "was entering the intersection, [Mrs. Harnik] began pulling out"; and he "believed that [he] didn't have time to stop" so he turned his bike to the left. He added that "[j]ust before impact, I was trying to get her attention. . . . She obviously had no idea I was there, so I was trying to alert her, but at that point it wouldn't have done any good because we were going to collide." When asked if he applied his brakes, he testified:

> I did a little bit, but it was – there was not time to stop. I would've stopped. I didn't want to get hit, so obviously I would've done that. I did apply the brakes. Again, I didn't want to be hit full on, so I believe I applied brakes and turned left. Otherwise, she would've hit me with the front of her car.

He admitted, however, in his answers to interrogatories, as to how the accident occurred, he never stated that he had ever applied his brakes.

Mrs. Harnik testified that while driving on Norbeck Boulevard, she passed through the security gates into the community. She testified:

> I went several blocks down to the intersection of Leisure World Boulevard and Norbeck Boulevard. I signaled to make a left turn. I pulled into the left turn lane. I made a complete full stop. Then all the roads were empty. There were – I did not see anybody, no cars and no people.

She continued: "I proceeded into the intersection to make the left turn. I was halfway through in the intersection of the turn and I felt a bump[.]" After the collision, she called

911 and walked over to Mr. Rosenfield. "He said to me he was trying to make a left turn, he saw me coming, and he couldn't stop." She testified there were no obstacles at the intersection, such as trees or hills, that made it difficult to see the entire intersection.

At the close of the evidence, Mr. Rosenfield's attorney moved for judgment pursuant to Md. Rule 2-519, on the issue of Mrs. Harnik's negligence.[2] The court denied the motion, stating: "He saw her. And coupled with the fact that he didn't apply his brakes, he turned his bike into the side of her car because he thought that was the safest thing to do, the jury could find he in some way contributed to this." The jury subsequently found Mrs. Harnik negligent and Mr. Rosenfield contributorily negligent.

DISCUSSION

Motion for Judgment

Mr. Rosenfield argues on appeal that, under the Boulevard Rule, Mrs. Harnik was negligent, and because she failed to elicit sufficient evidence of his negligence to submit the issue to the jury, the circuit court erred in denying his motion for judgment as to liability and in instructing the jury on contributory negligence. Mrs. Harnik does not dispute the jury's finding of her negligence but argues that there was sufficient evidence of Mr. Rosenfield's contributory negligence to submit the issue to the jury and for the circuit court to instruct the jury on contributory negligence.

[2] Mr. Rosenfield's attorney in fact moved for a directed verdict. What used to be called a "directed verdict" is now known as a "motion for judgment" under Md. Rule 2-519. *See Brendel v. Ellis*, 129 Md. App. 309, 314 n.2 (1999).

Standard of Review

We review de novo "the denial of a motion for judgment in a civil case, applying the same standard as the circuit court." *Ayala v. Lee*, 215 Md. App. 457, 467 (2013). "[W]e examine the facts presented at trial, together with all inferences that can reasonably be inferred from those facts, in the light most favorable to . . . the non-moving party." *Grady v. Brown*, 408 Md. 182, 196 (2009) (citing Md. Rule 2-519). "Consequently, if there is any evidence, no matter how slight, that is legally sufficient to generate a jury question, the case must be submitted to the jury for its consideration." *Mayor & City Council of Balt. v. Stokes*, 217 Md. App. 471, 491 (2014) (quotation marks and citation omitted). But where the evidence permits but only one conclusion, the question is one of law and the motion for judgment must be granted. *Ayala*, 215 Md. App. at 467.

The Boulevard Rule

The Boulevard Rule is codified at Md. Code Ann., Transp. Art. §§ 21-403, 21-404, 21-705(c). *See Dean v. Redmiles*, 280 Md. 137 (1977) (tracing the history of the rule). The Boulevard Rule requires:

> A driver upon approaching a "through highway" from an unfavored road must stop and yield the right of way to all traffic already in or which may enter the intersection during the entire time the unfavored driver encroaches upon the right of way; and this duty continues as long as he is in the intersection and until he becomes a part of the flow of favored travelers or successfully traverses the boulevard.

Grady, 408 Md. at 194 (cleaned up) (quoting *Creaser v. Owens*, 267 Md. 238, 239-40 (1972)). The purpose of the Rule is to optimize the efficient and safe flow of traffic. *Barrett v. Nwaba*, 165 Md. App. 281, 291 (2005). *See also Grady*, 408 Md. at 194 ("The purpose

of the rule is to accelerate the flow of traffic over through highways by permitting travelers thereon to proceed within lawful speed limits without interruption." (quotation marks and citation omitted)).

The Rule designates highways as favored or unfavored at intersections by the presence of a traffic control device on the unfavored highway and not on the favored highway.[3] *Dennard v. Green*, 95 Md. App. 652, 660 (1993). Therefore, the driver with the duty to stop and yield the right of way is the "unfavored driver" and the driver with the right of way is the "favored driver." *Washington Metro. Area Transit Auth. v. Seymour*, 387 Md. 217, 227-28 (2005).

The liability of the unfavored driver, however, is not absolute:

> In a case where the favored driver is suing the unfavored driver, once the plaintiff establishes that he was driving lawfully on the favored highway, the burden shifts to the defendant to produce evidence legally sufficient to create a factual dispute regarding the lawfulness of the plaintiff's actions or, in the absence of a statutory violation, the plaintiff's contributory negligence.

Barrett, 165 Md. App. at 293. The Maryland Supreme Court has explained:

> Of course, although the favored driver has the right to assume that the unfavored driver will yield the right of way to him, that does not mean that the traveler on the favored highway has an absolute, unqualified, and complete right of way at all times and under all circumstances. This right of way is to be enjoyed with due regard to the circumstances then and there existing. . . . [T]he relative rights of the parties at an intersection of a boulevard and an unfavored highway are not to be held to depend on nice calculations of speed, time or distance lest the purpose of the boulevard rule, to accelerate the flow of traffic over the through highway at the permitted speed, be thwarted.

[3] The Boulevard Rule applies to drivers of motor vehicles, as well as bicyclists. *Richards v. Goff*, 26 Md. App. 344, 353-54 (1975).

Dean, 280 Md. at 149-50 (cleaned up).

Thus, "if it can be shown that the favored driver could have avoided the accident if he had been operating lawfully and with due care, then the negligence of the favored driver should be an issue for the jury." *Dennard v. Green*, 335 Md. 305, 314 (1994) (quotation marks and citation omitted). *See also Stokes*, 217 Md. App. at 497 ("It is well established in Maryland law that along with obeying statutory provisions, all drivers must exercise due care and diligence when driving."); *State ex rel. Hopkins v. Marvil Package Co.*, 202 Md. 592, 599-600 (1953) (noting that, while there is a presumption that an unfavored driver will stop and yield, this does not relieve the favored driver of the duty to exercise care).

A "meager" amount of evidence of negligence is sufficient to submit the case to the jury. *Beahm v. Shortall*, 279 Md. 321, 342 (1977) (quotation marks and citation omitted). Nonetheless, the burden of proving that a party is guilty of negligence cannot be sustained "by offering a mere scintilla of evidence, amounting to no more than surmise, possibility, or conjecture . . . but such evidence must be of legal probative force and evidential value." *Myers v. Bright*, 327 Md. 395, 399 (1992) (quotation marks and citation omitted). The following observation regarding factual conflicts is pertinent:

> When the interplay of circumstances is susceptible of different interpretations by rational minds, the problem is essentially one for the jury; the trial judge is not permitted to transform it into a question of law for his own determination. The choice between conflicting facts and the weighing and assessing of competing inferences radiating therefrom is the jury's province.

Rea Constr. Co. v. Robey, 204 Md. 94, 100 (1954).

"In Maryland, contributory negligence on the part of a plaintiff completely bars recovery against a negligent defendant." *Wooldridge v. Price*, 184 Md. App. 451, 461 (2009). Contributory negligence is defined as a breach of the duty to observe ordinary care for one's own safety, which proximately causes an accident. *Thomas v. Panco Mgmt. of Md., LLC*, 423 Md. 387, 417 (2011). The defendant bears the burden of establishing the plaintiff's contributory negligence, and this is ordinarily a question of fact for the fact-finder. *McQuay v. Schertle*, 126 Md. App. 556, 568-69 (1999). Accordingly, if the defendant introduces "more than a mere scintilla of evidence, more than surmise, possibility, or conjecture" that the plaintiff was negligent, then we will affirm the trial court's submission of the case to the jury. *Id.* at 569 (cleaned up). *See also Schwier v. Gray*, 277 Md. 631, 635 (1976) (The test is whether reasonable minds could differ as to whether the favored driver's conduct, "during the sequence of events which ultimately culminated in the collision, was commensurate with the conduct of a reasonably prudent person acting under like or similar circumstances.").

Mrs. Harnik argues that, based on the evidence elicited at trial, the jury could have found Mr. Rosenfield was "fully aware" that she was entering the intersection; Mr. Rosenfield knew that she had "no idea" that he was in the intersection; and Mr. Rosenfield "decided not to apply his brakes," but instead decided to turn his bike to the left to bang on her vehicle to express his frustration. She argues that these facts could show that he was contributorily negligent and was the proximate cause of the accident. We agree.

The instant case presents "one of those rare instances in which the conduct of the favored driver was properly subject to a jury's determination of its reasonableness and

prudence under the circumstances." *Grady*, 408 Md. at 198 (quotation marks and citation omitted). Here, the evidence elicited permitted the jury to infer that Mr. Rosenfield was aware of Mrs. Harnik's presence, and while in motion he could have braked to avoid the accident but chose not to. This finding does not "depend on nice calculations of speed, time or distance[.]" *Dean*, 280 Md. at 150. Mr. Rosenfield's purported contributory negligence was in failing to exercise proper care and attention once he was aware of her car and was aware that she did not see him. As the Supreme Court said in *Rea Construction*, "[w]hen the interplay of circumstances is susceptible of different interpretations by rational minds, the problem is . . . one for the jury[.]" 204 Md. at 100. The factual dispute presented to the court in the instant case was for the jury to decide, not the trial court on a motion for judgment. *See Tate v. Bd. of Educ., Prince George's Cnty.*, 155 Md. App. 536, 545 (2004) ("[I]f there is any evidence, no matter how slight, that is legally sufficient to generate a jury question, the case must be submitted to the jury for its consideration." (quotation marks and citations omitted)).

Mr. Rosenfield relies on *Barrett v. Nwaba*, 165 Md. App. 281 (2005), to argue to the contrary. In that case, the unfavored driver was exiting a gas station and entering the highway when he hit the favored driver's back passenger door. *Id.* at 285-86. Before the accident, the favored driver had passed a large tractor trailer on the left and was back in the right lane when the accident occurred. *Id.* The favored driver sued the unfavored driver for liability and damages. At trial, the favored driver moved for judgment on the issue of the unfavored driver's negligence, arguing that, under the Boulevard Rule, the unfavored driver was negligent as a matter of law. *Id.* at 288. The court denied the motion, ruling that

the jury could possibly conclude based on the evidence presented that the unfavored driver was not negligent in attempting to enter the highway. *Id.* at 289. The jury ultimately found the unfavored driver had not been negligent, and therefore, did not consider whether the favored driver was negligent. *Id.*

The favored driver appealed, arguing that even when the evidence was viewed in the light most favorable to the unfavored driver, the circuit court erred as a matter of law in denying his motion for judgment as to the unfavored driver's negligence. *Id.* at 290. We agreed, stating:

> where the favored driver is suing the unfavored driver, once the plaintiff establishes that he was driving lawfully on the favored highway, the burden shifts to the defendant to produce evidence legally sufficient to create a factual dispute regarding the lawfulness of the plaintiff's actions or, in the absence of a statutory violation, the plaintiff's contributory negligence. When the defendant fails to meet that burden, no issue for the jury is created, and if the plaintiff moves for judgment, the trial court must find the defendant negligent as a matter of law.

Id. at 293. Under the facts presented, we found that the favored driver had met "his obligation to establish that he was operating his vehicle lawfully[.]" *Id.*

We then turned to whether the unfavored driver produced evidence legally sufficient to create a factual dispute to defeat the favored driver's motion for judgment and create an issue for the jury. *Id.* at 296. We determined that the unfavored driver "produced no evidence to rebut [the favored driver's] testimony that he was operating lawfully[,]" and therefore, there was no evidence of the plaintiff's contributory negligence. *Id.* We explained that there was no evidence that the plaintiff, who was proceeding straight down the favored highway, "was speeding, failing to use his headlights or indicator lights,

changing lanes when it was not safe to do so, swerving across both lanes of the highway, or otherwise operating in an unreasonable manner." *Id.* at 296-97. Because there was evidence that the favored driver did not see the unfavored driver, "there simply was no evidence of anything that would cause [the favored driver] to anticipate or to realize that [the unfavored driver] would, or had, entered the roadway." *Id.* at 298. Because the unfavored driver failed to create an issue for the jury, and thus was negligent as a matter of law, we reversed the judgment of the circuit court.

Barrett is distinguishable from the instant case because there was evidence that Mr. Rosenfield observed the unfavored driver, Mrs. Harnik, entering the intersection and, in response, decided not to apply his brakes. While there was some evidence that the collision happened quickly, there was also evidence that Mr. Rosenfield had sufficient time to decide not to apply his bicycle brakes, to swerve to the left toward the passenger side of Mrs. Harnik's car, to reach out and bang on her car, and to yell out to get her attention. This evidence was sufficient to place the question of Mr. Rosenfield's contributorily negligence and the proximate cause of the accident before the jury.

Contributory Negligence Instruction

We briefly address Mr. Rosenfield's final argument, that the trial court erred by instructing the jury on contributory negligence because there was insufficient evidence of his negligence to warrant the instruction.

We review a trial court's ruling on a jury instruction for an abuse of discretion. *Wright v. State*, 474 Md. 467, 482 (2021). When deciding whether to give a requested jury instruction, the trial court should consider three factors: "whether the requested instruction

was a correct exposition of the law, whether that law was applicable in light of the evidence before the jury, and finally whether the substance of the requested instruction was fairly covered by the instruction actually given." *Giant of Md. LLC v. Webb*, 249 Md. App. 545, 568-69 (2021) (quotation marks and citation omitted). Mr. Rosenfield takes issue with the second factor.

Having agreed with the trial court that sufficient evidence was elicited to submit the question of Mr. Rosenfield's contributory negligence to the jury, it follows that we find no abuse of discretion by the court in instructing the jury on contributory negligence.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.