

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1697

September Term, 2013

JAMES SAMPSON

v.

VICTORIA M. BASSO

Leahy,
Reed,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: June 2, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, James Sampson, suffered injuries after being struck by a car driven by appellee, Victoria Basso, in downtown Baltimore City in 2010. Mr. Sampson filed suit in the Circuit Court for Baltimore City against Ms. Basso for injuries sustained in the incident. The lawsuit proceeded to a jury trial where the jury rendered a verdict finding Ms. Basso negligent, but ultimately denying Mr. Sampson any recovery on the grounds of contributory negligence. The trial court entered a judgment in favor of Ms. Basso.

We are asked to review the trial court’s decisions to deny two of Mr. Sampson’s requested jury instructions and his motion for a directed verdict. Appellant poses four questions for our consideration, which we have consolidated and rephrased in three questions below:¹

- I. Whether the trial court erred where it denied appellant’s motion for a directed verdict on the question of appellant’s alleged contributory negligence;
- II. Whether the trial court erred where it denied appellant’s request for a jury instruction on the presumption of due care;
- III. Whether the trial court erred where it denied appellant’s request for a jury instruction on comparative negligence.

¹ Appellant originally presented the following four questions in his brief:

- I. Whether a Plaintiff with no memory of an occurrence owning to an accident-related trauma is entitled to a jury instruction that he is presumed to have been exercising due care?
- II. Whether Appellee offered sufficient evidence of contributory negligence.
- III. Whether Appellee met her burden of proving causation, that the alleged contributory negligence “cooperated” with the defendant’s negligence to bring about the occurrence.
- IV. Whether the Court of Appeals, once this matter is concluded, should adopt comparative negligence.

Because we hold the trial court properly denied Mr. Sampson’s motion for directed verdict and his requested jury instructions, we affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. Sampson was a Baltimore City resident and business owner, who lived near Camden Yards and Federal Hill at the time of the accident. Before becoming a business owner, he worked for several decades as a teacher before an acute case of glaucoma robbed him of vision in his left eye, rendering him legally blind. Despite the loss of vision in his left eye, he retains vision in his right eye and is able to move freely without a cane.

Because of his impaired vision, Mr. Sampson left his job as a teacher. Despite leaving a job he greatly enjoyed, he was able to pursue new opportunities via a State program that assists blind individuals with establishing businesses in State and federal office buildings. While associated with this program, Mr. Sampson owned and operated a number of businesses over the years, including a convenience store and a soup and sandwich deli. At the time of the accident, however, Mr. Sampson was only operating a convenience store.

On the morning of April 9, 2010, Mr. Sampson left his home in south Baltimore and began walking to the convenience store, as he did every morning. At approximately 7:00 a.m. that morning, he arrived at the southeast corner of the intersection of South Sharp Street and West Pratt Street. West Pratt Street is a busy street in downtown Baltimore, but especially so during rush hour. The street is a four-lane thoroughfare of eleven-foot wide lanes, with all four lanes running east to west. Mr. Sampson testified at trial that prior to

crossing the intersection, he looked across the intersection’s crosswalk and saw that the “walk” signal was illuminated, then looked to his left to see that the Pratt Street traffic was stopped. Believing his path was clear, he began to cross the intersection and reached the second lane.

This is where Mr. Sampson’s recollection of events ended. He testified that he could not recall reaching the third lane and that his next memory was waking up in a hospital bed. He further stated that for three days after the accident, he remained confused and unclear as to what had occurred.

Mr. Sampson had been struck by the vehicle driven by appellee, Victoria Basso, who was driving on Pratt Street to her job. Ms. Basso testified that, at approximately 7:05 a.m. that morning, she had turned right onto West Pratt from Russell Street and established herself in the far left-hand lane. Ms. Basso testified to good weather and clear visibility, as well as typical rush-hour traffic on Pratt Street with cars both to the right and in front of her car. She did not describe anything unusual about the traffic on Pratt Street, explaining that all four lanes were moving without incident and that she was moving with the flow of traffic. She further explained that as she approached the intersection with Sharp Street, she was looking ahead and making sure that pedestrians were not walking across the street. She also noted that the traffic signal for motorists on Pratt Street was green.

Ms. Basso did not describe striking Mr. Sampson when he was in the crosswalk. Rather, her recollection was that she felt an impact approximately ten-to-fifteen feet past the crosswalk that Mr. Sampson stated he was using. She explained she did not see him as she drove and that she was looking straight ahead on the road. She only realized that she

had struck a pedestrian when she stopped and exited her car to see what had caused the impact.

Mr. Sampson filed his complaint on October 31, 2011, alleging Ms. Basso had injured him through her negligence. Ms. Basso filed her answer to Mr. Sampson's complaint on April 30, 2012, asserting a number of defenses, including that Mr. Sampson was contributorily negligent.

The matter proceeded to trial on October 9, 2013. At the close of the evidence, Mr. Sampson moved for a directed verdict on the issue of contributory negligence, but his motion was denied. He later requested jury instructions on comparative negligence and the presumption of due care. The trial court denied both of his requested instructions, opting instead to give Ms. Basso's contributory negligence instruction, as well as explaining that the relevant case law limited the presumption of due care to instances of accident-related death or mental illness.

The jury returned a verdict in which it determined that Ms. Basso had been negligent. The jury further found, however, that Mr. Sampson had been contributorily negligent. Accordingly, the trial court denied Mr. Sampson any recovery and entered judgment in favor of Ms. Basso on October 10, 2013. The judgment itself was docketed on October 25, 2013.

Mr. Sampson timely noted his appeal on October 22, 2013. While the appeal was pending with this Court, Mr. Sampson filed a petition for a writ of certiorari with the Court

of Appeals on the question of comparative negligence. The Court of Appeals denied the petition on September 3, 2014, over Judge Harrell’s dissent.²

DISCUSSION

A. Parties’ Contentions

Mr. Sampson attacks the trial court’s judgment in favor of Ms. Basso on three grounds. First, he argues he is entitled to a presumption of due care and the trial court erred where it did not give this instruction to the jury. He explains that his case is supported by our holdings on the presumption. *See Young v. Dietzel*, 13 Md. App. 159, 163–66 (1970) (limiting presumption of due care to plaintiffs who are deceased or incapacitated and unable to testify); *McQuay v. Schertle*, 126 Md. App. 556, 608 (1999) (refusing to apply presumption of due care for deceased plaintiff because there were other witnesses who could compensate for her absence). Mr. Sampson contends *Young* supports his case because he suffers from traumatic amnesia, rendering him unable to testify as to the accident, and that *McQuay* is distinguishable from his case because there are no witnesses who can fill in the evidentiary gaps. Mr. Sampson further explains that accident-related amnesia has been recognized in other jurisdictions as grounds for the presumption, and he advocates that we join these jurisdictions.

² In his dissent to the denial of Mr. Sampson’s writ of certiorari, Judge Harrell cited his dissenting opinion in *Coleman v. Soccer Ass’n of Columbia*, 432 Md. 679, 698–738 (2013) (Harrell, J. dissenting). He reiterated and summarized the points he made in *Coleman*, particularly that *stare decisis* should not act as a hurdle to the Court of Appeals’ abrogation of the doctrine of contributory negligence in favor of the doctrine of comparative negligence. *See Den. of Pet’r’s Pet. for Writ of Cert.*, No. 244, Sept. Term 2014, slip op. at 1–4 (Md. Sept. 3, 2014) (Harrell J. dissenting).

Second, Mr. Sampson argues that there was sufficient evidence to support a directed verdict in his favor on the question of contributory negligence. He contends that the burden lay with Ms. Basso to prove contributory negligence and she had not met her burden. Mr. Sampson explains that Ms. Basso relied on an inappropriate and unsupportable inference that Mr. Sampson had acted negligently. Mr. Sampson also argues that he did not “contribute” to the accident such that he was contributorily negligent. He explains that Ms. Basso offered no evidence that would tend to explain how he deprived her of the ability to see him in the street. Finally, Mr. Sampson presents without argument the question of whether Maryland should adopt comparative negligence. He does so with the understanding that we are bound to follow existing precedents of the Court of Appeals, but in the hopes that he may preserve the question for an eventual petition for a writ of certiorari to that Court.

Ms. Basso counters all of Mr. Sampson’s arguments. She explains that the presumption of due care applies only to those cases where the plaintiff is wholly unable to testify, and is particularly for the benefit of deceased plaintiffs. Ms. Basso argues that accident-related amnesia is an improper ground for application of the presumption, and to have instructed the jury on the presumption would have absolved Mr. Sampson of his burden of proving Ms. Basso was negligent. Second, she argues that there existed sufficient evidence on the question of Mr. Sampson’s contributory negligence, and it was a question of fact properly resolved by the jury. Last, Ms. Basso explains that Maryland does not recognize comparative negligence, and the Court of Appeals’ opinion in *Coleman v. Soccer*

Association of Columbia, 432 Md. 679 (2013) most recently affirmed that contributory negligence remains the law in Maryland.

B. Standards of Review

When we review the denial of a motion for judgment, we must “consider all the evidence, including the inferences reasonable and logically drawn therefrom, in a light most favorable to the non-moving party.” *Address v. Millstone*, 208 Md. App. 62, 80 (2012) (citations omitted) (internal quotation marks omitted); *see also* Md. Rule 2-519(b). If, on our review, we determine there was evidence—even a meager amount—that was legally sufficient to generate a question for the jury, we will affirm the trial court’s decision to deny the motion and submit the case to the jury. *See Address*, 208 Md. at 80. But where there is only one conclusion to be drawn from the evidence such that a question for the jury is inappropriate, “the question is one of law and the motion must be granted.” *Id.*

Jury instructions in civil cases are within the province of Maryland Rule 2-520, which provides in pertinent part: “The court may instruct the jury, orally or in writing or both, by granting requested instructions, by giving instructions of its own, or by combining any of these methods. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.” Md. Rule 2-520(c). The Court of Appeals has recognized that litigants are “entitled to have [an] instruction submitted to the jury if the instruction is a correct exposition of the law and there is testimony in the case which supports it.” *Goldberg v. Boone*, 396 Md. 94, 122 (2006) (citations omitted) (internal quotation marks omitted). Our review requires that we examine “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.” *Zografos v. Mayor & City Council of Balt.*, 165 Md. App. 80, 109 (2005) (citation omitted). If the jury instruction sets forth clearly the applicable law, there will be no reversible error. *Goldberg*, 396 Md. at 122.

C. Analysis

i. Motion for Directed Verdict on Question of Contributory Negligence

The trial court properly denied Mr. Sampson’s motion for a directed verdict because the evidence presented at trial created a question of fact for the jury. Cases from the Court of Appeals and this Court support a finding of contributory negligence against pedestrians who are insufficiently cautious when crossing the street. The evidence presented was able to raise, at the very least, factual questions about how cautious Mr. Sampson was when crossing Pratt Street that morning.

Central to this dispute is whether the evidence presented could lead to only one conclusion—that Ms. Basso was wholly negligent when she struck Mr. Sampson. According to Mr. Sampson, the evidence presented renders him blameless and Ms. Basso should have seen him or should have been more attentive to whether she had a clear path ahead with a green light. We do not agree.

In Maryland, a pedestrian who crosses a street between crossings will be contributorily negligent if that person failed to look for traffic, or having looked, failed to see an approaching vehicle. *See Smith v. Warbasse*, 71 Md. App. 625, 630 (1987) (quoting *United States Fid. & Guar. Co. v. Royer*, 230 Md. 50, 54 (1962)); *see also Dix v. Spampinato*, 278 Md. 34, 37–38 (1976) (affirming trial court’s grant of directed verdict for

defendant on contributory negligence grounds because plaintiff failed to look for or see defendant's car). In *Smith*, this Court affirmed the trial court's grant of summary judgment to the defendant on the issue of plaintiff's contributory negligence. *Smith*, 71 Md. App. at 631. We determined the evidence demonstrated that plaintiff crossed the street at night between crossings and failed to see the defendant's car, supporting a finding of contributory negligence. *Id.* at 628–29, 631. A plaintiff, however, is not *per se* negligent if he crosses the street between crossings, but he must still exercise great care to protect himself. See *Pratt v. Coleman*, 14 Md. App. 76, 80 (1972) (citing *Royer*, 230 Md. at 54); see also *Richardson v. Rice*, 256 Md. 19, 26 (1969).

The evidence presented by both parties could in fact raise a jury question as to Mr. Sampson's contributory negligence. Mr. Sampson testified that he carefully entered the crosswalk and kept his head turned to the left to face traffic. Turning his head allowed him to use his "good eye," *i.e.*, his right eye, to see traffic. His testimony further indicated that he kept his eye trained on the Pratt Street traffic to his left. As he crossed the two lanes closest to the south side of Pratt Street, Mr. Sampson stated he saw cars stopped. A fact-finder could reasonably conclude from this evidence that Mr. Sampson was acting with due care.

Yet, Ms. Basso's testimony offered a different viewpoint. She explained in her testimony that as she approached the intersection of Pratt and Sharp, the light was green and she was keeping pace with the flow of traffic, which was proceeding at approximately 25 to 28 miles per hour. Critically, Ms. Basso explained that she had already passed through the intersection when, suddenly, Mr. Sampson struck the side of her car.

These are different accounts of the same incident that a jury is entitled to resolve by assessing the credibility of the testimony and determining how much weight is to be given to each piece of evidence. *See Abrishamian v. Barbely*, 188 Md. App. 334, 347–48 (2009) (stating “[T]he trier of fact may accredit or disregard any evidence introduced, and a reviewing court may not decide how much weight should have been given to each item of evidence” and citing *Edsall v. Huffaker*, 159 Md. App. 337, 3432 (2004)); *see also Bereano v. State Ethics Comm’n*, 403 Md. 716, 747 (2008) (“The finder of fact properly may assign no weight and no credibility to a particular witness’s testimony.”). Mr. Sampson presents an account of the accident where he was properly in the crosswalk and was struck by an inattentive Ms. Basso. On the other hand, Ms. Basso’s account presents a version of the accident where she was operating her vehicle mindfully and carefully, and it was Mr. Sampson who crossed the street between crosswalks and actively struck her vehicle. Certainly, reasonable minds could disagree as to whose account of the accident was most accurate and most credible—which is what the trial court correctly determined. The evidence presents the possibility that Ms. Basso was primarily negligent, but it also presents the possibility that Mr. Sampson was contributorily negligent. As stated *supra*, if we determine there was legally sufficient evidence to generate a jury question, then we shall affirm the trial court’s grant of a directed verdict. *Address*, 208 Md. App. at 80. We are able to make this determination here and hold the trial court properly denied a directed verdict on the question of Mr. Sampson’s contributory negligence.

ii. Jury Instruction on Presumption of Due Care

Mr. Sampson also contends that the trial court failed to give adequate consideration to his presumption of due care when reviewing the proposed jury instructions. We do not agree with Mr. Sampson because the case law in this State does not support application of the presumption in Mr. Sampson’s case.

The presumption of due care serves as an evidentiary “bridge.” Where a decedent’s conduct at the time of the accident is called into question, the presumption serves to bridge the gap between decedent’s unavailable testimony and a lack of evidence that would serve to explain his actions. *See Faith v. Keefer*, 127 Md. App. 706, 754–55 (1999) (quoting *McQuay*, 126 Md. App. at 604–05). The presumption operates as a matter of fairness, preventing an uncontroverted determination of the decedent’s contributory negligence. *See Faith*, 127 Md. App. at 754–55. To that end, a decedent accused of contributory negligence is granted a presumption “that he exercised ordinary care for his own safety in accordance with the natural instinct of human beings to guard against danger.” *Id.* at 754 (quoting *Balt. Transit Co. v. State ex rel. Castrand*, 194 Md. 421, 434 (1950)). Application of the presumption is limited to cases “where the victim is *dead* or *mentally incompetent* to testify.” *Young*, 13 Md. App. at 164 (emphasis added). In addition to the victim’s unavailability, there must be no other evidence that could establish his actions. *See McQuay*, 126 Md. App. at 604 (“When the decedent’s conduct at the time of the accident is in dispute and *his actions cannot be established by evidence other than his own obviously unavailable testimony*, the presumption of due care fills the evidentiary void created by his absence.” (emphasis added)).

Prior to 1969, the presumption only applied to deceased individuals. *See Young*, 13 Md. App. at 163–64 (explaining Maryland’s long-standing application of the presumption to the deceased, but that *Nizer v. Phelps*, 252 Md. 185, 205 (1969), extended the doctrine to mentally incompetent individuals). In *Nizer*, the Court of Appeals expanded the doctrine such that the presumption was applied in favor of the victim, an 82-year-old woman rendered totally disabled and mentally incompetent by the accident. *Id.* at 205. Accordingly, the presumption of due care is not exclusive to the deceased, but to victims of an accident where they are robbed of their testimonial faculties.

Not only is Mr. Sampson neither deceased nor mentally incompetent, but he was fully available to testify—which he did. The presumption operates as a matter of fairness because it allows the unavailable victim to have an evidentiary counterpoint to the defendant’s evidence of the victim’s contributory negligence. It would be equally unfair, however, to allow application of the presumption where the victim is available *and* competent to testify. Were we to permit Mr. Sampson’s desired result, we would rob the jury of its ability to assess the evidence Ms. Basso presented. Mr. Sampson would be permitted to cherry-pick whatever favorable evidence he had regarding Ms. Basso’s negligence, and she would be relegated to silence. *See State, for Use of Chenoweth v. Balt. Contracting Co.*, 177 Md. 1, 21 (1939) (“To instruct the jury that they may, in considering the whole case, infer the absence of fault on the part of the plaintiff, from the known disposition of persons to avoid injuries to themselves, in the presence of testimony that tends strongly to show the existence of fault, is tantamount to instructing them that they

may conclude as they please; *that they may find upon presumption and put the evidence aside.*” (emphasis added) (internal quotation marks omitted)).

We cannot permit Mr. Sampson to employ the presumption contrary to established law and to the detriment of fairness. We hold that the trial court properly denied Mr. Sampson’s requested jury instruction on the presumption of due care.

iii. Jury Instruction on Comparative Negligence

We now turn to the question of whether it was error for the trial court to decline Mr. Sampson’s proposed jury instruction on comparative negligence in lieu of an instruction of contributory negligence. We hold that it was not, but with a caveat.

We will not go into an extended historical discussion of the doctrine of contributory negligence in Maryland; such an undertaking is well within the bailiwick of the Court of Appeals. Nevertheless, it is worth noting that contributory negligence has existed in the common law since the early 19th century, when it was developed and explained by Lord Chief Justice Ellenborough in the King’s Bench case of *Butterfield v. Forrester*. *Coleman*, 432 Md. at 686 (citing *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809)). Contributory negligence has been the law of this State since 1847, when the Court of Appeals adopted the doctrine in *Irwin v. Sprigg*, 6 Gill. 200, 205 (1847). *See Coleman*, 432 Md. at 687.

What the *Coleman* opinion affirmed is that contributory negligence is—and remains—the law of this State. *See id.* at 695. Compelled by the forces of *stare decisis* and legislative inertia, the Court of Appeals was bound to reach this conclusion. *Id.* The Court explained that it is hesitant to revise the common law where indications exist that doing so

would be contrary to State public policy, particularly where the declaration of public policy is a traditional function of the General Assembly. *See id.* at 689–90. The General Assembly considered and rejected several bills that would have adopted comparative negligence, and the Court accorded great weight to this action and abided by the principles of *stare decisis*. *Id.* at 693–95.

The continued dominance of contributory negligence in Maryland, however, does not absolve it of criticism. We have previously taken issue with the doctrine’s unyielding results. *See Carter v. Senate Masonry, Inc.*, 156 Md. App. 162, 175 (2004) (“[A] doctrine that most other states have found too harsh and pitiless to apply.”); *Stewart v. Hechinger Stores Co.*, 118 Md. App. 354, 359 (1997) (“[W]e are aware of the often harsh consequences of Maryland’s common law doctrine of contributory negligence, and that it has been abandoned by a vast majority of states in favor of some form of comparative negligence[.]”); *see also Coleman*, 432 Md. at 712 (Harrell, J. dissenting) (citing *Carter* and *Stewart*). The harsh results of the doctrine are apparent here, where the jury found Ms. Basso to be negligent, yet denied Mr. Sampson any recovery because of their determination that he was also, in some part, negligent.

As we stated in *Stewart*, we are in no position to summarily abandon contributory negligence; that is for the Court of Appeals or the General Assembly to do. *See Stewart*, 118 Md. App. at 359; *see also Coleman*, 432 Md. at 691–93 (majority opinion) (explaining the Court of Appeals’ authority to modify the common law). But we must ask—how many more citizens must be struck in the State and left without recovery before this antiquated doctrine is discharged? Until then, contributory negligence remains the law of this State

and the trial court committed no error in declining Mr. Sampson's requested jury instruction on comparative negligence.

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