Circuit Court for Montgomery County
Case No. 447371-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 144

September Term, 2019

CDOHY, INC. D/B/A FITZGERALD HYUNDAI, ROCKVILLE

v.

ANNA R. BLASK

Berger,
Gould,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: July 31, 2020

Many have complained that the purchase of a new car is a painful experience. Appellee, Dr. Anna R. Blask, found the experience even more so when, while shopping for a new car, she was injured when she was struck by the closing of the liftgate of the sports utility vehicle that she was test-driving. Dr. Blask filed a personal injury suit in the Circuit Court for Montgomery County, naming appellant, CDOHY, Inc., doing business as Fitzgerald Hyundai, Rockville, as the only defendant.[1] Trial in the circuit court resulted in a jury verdict[2] in favor of Dr. Blask. Fitzgerald's post-trial motions were denied by the trial court, and this appeal followed.

FACTUAL BACKGROUND

There is little dispute as to the facts giving rise to this litigation. The parties, however, dispute the inferences that are to be drawn from those facts.

Shopping for a new car, Dr. Blask, on November 5, 2017, visited Fitzgerald's place of business in Rockville, seeking to test drive a Hyundai sports utility vehicle (SUV). There, she was greeted by Fitzgerald's salesman, Jayakumar Radhakrishnan, who she identified at trial as Mr. Rad.[3] Explaining her interests, Mr. Rad arranged a "test-drive." Ultimately, there were two test drives.

[1] We shall refer to appellant as "Fitzgerald" for clarity.

[2] The jury awarded Dr. Blask $68,799, representing past medical expenses, lost wages, and non-economic damages.

[3] At trial, he testified that he is called by some as "Jay Rad," we shall refer to Mr. Radhakrishnan likewise.

On each of the two test drives, Mr. Rad drove the vehicle away from the showroom lot, with Dr. Blask in the front passenger seat, so that she did not have to drive into heavy traffic. Mr. Rad drove to a less-busy side street, Huff Court, where he parked and switched places with Dr. Blask, who continued the test drive. The first test drive was without incident.

The second test drive, in a larger SUV, began as did the first — Mr. Rad drove from the lot to Huff Court and parked near the curb. He exited the SUV and walked to the rear where, without discussion, he opened the liftgate to reposition the "tag" (license plate) that had been improperly attached. Accomplishing that, he activated the automatic liftgate which began closing downward. By that time, Dr. Blask had gotten out of the passenger seat and was walking to the rear of the vehicle, intending to go around to the driver side. As she was rounding the rear passenger side corner of the SUV, she was struck by the descending liftgate, knocked to the ground, and injured.[4] She testified that she was unaware that the liftgate had been opened and heard no alarms or warning signal as it closed.

Mr. Rad confirmed the testimony of Dr. Blask in large part, differing to a degree in his description of the moments leading up to the incident. He recalled that he saw Dr. Blask approaching as the automatic liftgate was beginning to descend and said, "stop, don't, don't come this way, or to that effect. I put my hand out and said something to that

[4] The nature and extent of her injuries were not disputed at trial and have no bearing on the issues raised in this appeal.

effect." Dr. Blask, on the other hand, denied that Mr. Rad had given her any hand gesture or warning when she approached the rear of the vehicle.

Fitzgerald moved for judgment at the conclusion of Dr. Blask's case-in-chief and again at the close of all the evidence, pursuant to Maryland Rule 2-519(a).[5] Those motions were denied, as was its subsequent motion for judgment notwithstanding the verdict (NOV). In each instance, Fitzgerald argued that it breached no duty owed to Dr. Blask and, in any event, she was contributorily negligent in failing to observe, and avoid, the raised liftgate. Fitzgerald raises those same arguments in this appeal.

Fitzgerald presents two questions for our review, which we have recast for clarity:[6]

1. Did the trial court err in denying its Motion for Judgment and Motion for Judgment NOV?

[5] Rule 2-519(a) provides that:

> A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence. The moving party shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of an opposing party's case.

[6] In its opening brief, Fitzgerald asks:

1. Did the Circuit Court err in failing to grant Appellant's Motion for Judgment and/or its Motion for Judgment Notwithstanding the Verdict, where Appellee failed to present any evidence that Appellant breached any duty owed to her?

2. Did the Circuit Court err in failing to instruct the jury regarding Appellee's duty to observe what can be observed and exercise due care for her own safety, where the evidence showed that Appellee walked directly into the path of the obviously open liftgate that was at or near her eye level?

2. Did the trial court err in failing to give the requested non-pattern jury instruction, that related to its contributory negligence defense, regarding Dr. Blask's failure to be observant and to exercise due care?

We shall affirm the judgment of the circuit court.

DISCUSSION

The facts, as developed by the record create a quintessential Torts 101 question: Was the evidence sufficient to find the defendant to have been negligent and, if so, does the evidence establish contributory negligence on the part of the plaintiff?

Standard of Review

Motion for Judgment

We review the trial court's ruling on motions for judgment under a *de novo* standard. We have said:

> We review a trial court's decision to grant or deny a motion for judgment applying the *de novo* standard of review. "In the trial of a civil action, if, from the evidence adduced that is most favorable to the plaintiff, a reasonable finder of fact could find the essential elements of the cause of action by a preponderance standard, the issue is for the jury to decide, and a motion for judgment should not be granted."

Wallace & Gale Asbestos Settlement Trust (*Wallace & Gale*) *v. Busch*, 238 Md. App. 695, 705 (2018) (internal citations omitted), *aff'd*, 464 Md. 474 (2019).

In *Tate v. Bd. of Educ., Prince George's County*, 155 Md. App. 536 (2004), we explained our analysis for reviewing motions for judgment:

> "[W]hen ruling on a motion for judgment the trial judge must consider the evidence, including the inferences reasonably and logically drawn therefrom, *in the light most favorable to the party against whom the motion is made.* If there is any evidence, no matter how slight, legally sufficient to generate a jury question, the motion must be denied…. An appellate court reviewing

> the propriety of the grant or denial of a motion for judgment by a trial judge must conduct the same analysis."

155 Md. App. at 545 (emphasis in *Tate*) (citation omitted). The standard for our review of a court's ruling on a motion for judgment NOV is the same. *Edgewood Mgmt. Corp. v. Jackson*, 212 Md. App. 177, 201 (2013) (explaining that "'[w]e review the denial of a motion for judgment and a motion for judgment notwithstanding the verdict ("JNOV") under the same appellate lens'" (quoting *Giant Food, Inc. v. Booker*, 152 Md. App. 166, 176 (2003))). *See also Tate*, 155 Md. App. at 544 (quoting *Orwick v. Moldawer*, 150 Md. App. 528, 531–32 (2003)).

Requested Jury Instruction

We review "a trial court's decision whether to give a requested jury instruction … under an abuse of discretion standard." *Gasper v. Ruffin Hotel Corp. of Maryland, Inc.*, 183 Md. App. 211, 219 (2008) (citing *Thompson v. State*, 393 Md. 291, 311 (2006)). Recently, we explained that "[a] trial court is required to give a proposed jury instruction when: (1) the requested instruction is a correct statement of the law; (2) the evidence supports giving the instruction; and (3) the substance of the instruction is not otherwise fairly covered by instructions that are given." *Anne Arundel County v. Fratantuono*, 239 Md. App. 126, 142 (2018) (citing *Preston v. State*, 444 Md. 67, 81–82 (2015)).

Denial of appellant's motions

At the outset, we note that Fitzgerald concedes that Mr. Rad was its agent during his discussions and transactions with Dr. Blask. Likewise, through Mr. Rad's testimony, Fitzgerald concedes that it owed a duty of ordinary and reasonable care to keep its premises

— and by logical extension its vehicle in which Dr. Blask was a prospective customer — safe. While Fitzgerald concedes its duty, it contends that Dr. Blask failed to offer evidence sufficient to prove a breach of that duty; hence, it argues, the court erred in denying its motion for judgment. Although the court heard arguments from counsel on Fitzgerald's motion for judgment, it denied the motion without explanation. Again, in its denial of the renewed motion, the court did not expand on its ruling, stating merely that the "[m]otion for judgment is denied."

A distillation of the evidence reveals that the second test drive began as a virtual replay of the first, but it was terminated before Dr. Blask even got the opportunity to take the wheel of the second vehicle. Instead, the test drive transpired, in short: that, after arriving at Huff Court, Dr. Blask, as she had in the first drive, left the passenger seat to go around to the driver side; that, as she did so, unbeknownst to her, Mr. Rad activated the lowering mechanism of the automatic liftgate, which Dr. Blask had no reason to expect he would do; she was not aware that it had been opened, as he had not done so during the earlier test drive; she did not observe or hear a warning from either the vehicle or Mr. Rad, signaling movement of the liftgate; and that she was struck in the head by the "momentum" of the liftgate, falling as a result, and injured. Fitzgerald does not except to those facts; rather, it argues that Mr. Rad's act of raising and lowering the liftgate was not negligent; hence, there was no breach of its duty to Dr. Blask.

We agree with the trial court's conclusion that the question of Fitzgerald's asserted negligence was for the jury. Fitzgerald and its agents owed a duty of care to Dr. Blask; the instrumentality that caused her injuries was under the control of Fitzgerald's agent; and she

was, in fact, injured. Thus, we find no error in the court's denial of the motion for judgment on that ground.

We move, then, to discuss Fitzgerald's defense of contributory negligence.

Contributory Negligence

A plaintiff cannot recover if he or she has been negligent in the happening of the occurrence creating injury. *Woolridge v. Abrishami*, 233 Md. App. 278, 301–02 (2017) (quoting *Coleman v. Soccer Association of Columbia*, 432 Md. 679, 696 (2013)). Contributory negligence is said to have occurred when "the injured person acts or fails to act in a manner consistent with the knowledge or appreciation, actual or implied, of the danger or injury that his or her conduct involves." Richard J. Gilbert & Paul T. Gilbert, *Maryland Tort Law Handbook* (*Maryland Tort Law*) § 11.4, at 117 (3d ed. 2000) (footnote omitted). The burden of proving that a plaintiff's conduct contributed to the injury complained of lies with the defendant. *Woolridge*, 233 Md. App. at 302 (citing *Myers v. Bright*, 327 Md. 395, 403 (1992)); *Tate*, 155 Md. App. at 546.

"Ordinarily, the question of whether the plaintiff has been contributorily negligent is for the jury to decide and not the judge." *Maryland Tort Law* § 11.4.1, at 118 (footnote omitted). But, "there are cases wherein the plaintiff's contributory negligence is so obvious that the court is justified in ruling as a matter of law that the plaintiff may not recover." *Id.* at 118–19. Here, Fitzgerald argues that Dr. Blask was not only contributorily negligent, she was so as a matter of law.

In arguing its motion for judgment at the end of appellee's case, Fitzgerald made only passing reference to its claim that Dr. Blask was contributorily negligent as a matter of law, saying:

> I think also that based on the evidence presented with regard to what plaintiff has testified [to], that the lift gate is there, that it could be contributory negligence as a matter of law. She failed to, she said she was looking in front of her, she always looks in front of her if she's going towards the back of the vehicle where the lift gate is, and to the extent that she makes contact with it, she walked into something that was plain and obvious there to be seen[.]

Counsel, arguing the motion for judgment at the close of all of the evidence, made no further reference to contributory negligence as a matter of law.

We cannot, in the exercise of any degree of good judgment, equate Dr. Blask's conduct to contributory negligence as a matter of law. Contributory negligence as a matter of law is, in our view, reserved for conduct that is outrageous, if not downright stupid. For example, the driver who disregards the signals or warning signs of a visible, oncoming train at a railroad grade crossing and is injured by the train, *see, e.g., Lord v. Pennsylvania R. Co*., 251 Md. 113 (1968), or the plaintiff who, in attempting to traverse a busy four-lane highway, fails to use a designated crosswalk or check for oncoming traffic, and is injured when struck by an unsuspecting, passing car. *See, e.g., Dix v. Spampinato*, 278 Md. 34 (1976).

As to whether Dr. Blask's conduct rises to the level of contributory negligence generally, we are satisfied to apply the established law of Maryland that, "'where there is a conflict of evidence as to material facts relied upon to establish contributory negligence, … it is not for the court to determine its quality as a matter of law, but it is for the jury to

pass upon it.'" *Catler v. Arent Fox, LLP*, 212 Md. App. 685, 728 (2013) (quoting *Schwier v. Gray*, 277 Md. 631, 635 (1976)).

Post-trial, Fitzgerald filed a timely motion for judgment NOV, arguing again that it did not breach a duty owed to Dr. Blask and that, in any event, Dr. Blask was precluded from recovery because of her contributory negligence. The court denied the motion in a written order, without further comment.

As we did regarding the court's ruling on Fitzgerald's motions for judgment, we review the court's ruling on the motion for judgment NOV under the same standard as a motion for judgment — a *de novo* standard. *Tate*, 155 Md. App. at 545 (quoting *Orwick*, 150 Md. App. at 531–32); *Wallace & Gale*, 238 Md. App. at 705 (citing *DeMuth v. Strong*, 205 Md. App. 521, 547 (2012)). Applying the same standard as earlier discussed, we are reminded that where there was sufficient evidence from which the jury could have reasonably reached its decision, it would be error for the trial court to grant the motion. *Montgomery County v. Voorhees*, 86 Md. App. 294, 302 (1991) ("Where there is sufficient evidence in the record from which a jury could reasonably have reached its conclusion, we will not disturb the verdict." (citing *I.O.A. Leasing Corp. v. Merle Thomas Corp*., 260 Md. 243, 250 (1971))).

Considering the record before us, we find no error in the trial court's denial of the motion for judgment NOV.

Appellant's requested jury instruction

In support of its contributory negligence theory of defense, Fitzgerald requested the following instruction, citing as authority *Tennant v. Shoppers Food Warehouse Md. Corp.*, 115 Md. App. 381, 389–90 (1997):

> The Plaintiff has a duty to observe what is there to be seen and exercise due care for her own safety.

After discussion, the court declined to give that requested instruction and instead, relevant to contributory negligence, instructed the jury, following MPJI – Cv 19:12:

> A plaintiff cannot recover damages if the plaintiff's negligence is a cause of the injury. The defendant has the burden of proving by a preponderance of the evidence that the plaintiff's negligence was a cause of the plaintiff's injury.

Immediately before that instruction was given, the court instructed the jury: pursuant to MPJI – Cv 19:1, on the elements of negligence; pursuant to MPJI – Cv 19:3, on foreseeable circumstances; and pursuant to MPJI – Cv 19:10, on causation.

In defending its requested instruction, Fitzgerald argued to the court, in part:

> I think it's important that … the jury understand that Maryland case law says, when there's something there to be seen, included … in the duty of the plaintiff, when you're talking about contrib, is the duty to see something that is, that is obviously there, and I don't think there's any -- I mean, their position is that the liftgate made contact with her head. So they can't take the position that the liftgate wasn't there, and I think it's an important instruction to be given.

The court responded:

> Well, I think the jury is going to have to determine whether the liftgate was there and in a place to be seen by the plaintiff and she walked into it or whether it wasn't. I mean, I think that's a factual finding they're going to have to make. To me, this instruction is tantamount to telling them what to find. So I'm not going to give this one.

The court was correct.

Maryland Rule 2-520(a) provides, in relevant part, that "[t]he court shall give instructions to the jury at the conclusion of all the evidence …." The court may instruct the jury by either "granting requested instructions, [or] … giving instructions of its own," or by any combination thereof. Rule 2-250(c); *Potts v. Armour & Co*., 183 Md. 483, 491 (1944). When requested by a party, the court must instruct the jury of that party's theory of the case if the proposed instruction is supported by the evidence, is an accurate statement of the law, and is not otherwise adequately covered by the court's other instructions. *Fratantuono*, 239 Md. App. at 142 (citing *Preston*, 444 Md. at 81–82); *Mallard v. Earl*, 106 Md. App. 449, 469 (1995) (citations omitted).

Fitzgerald's requested instruction on contributory negligence was otherwise adequately covered by the court's instruction that followed the language of MPJI – Cv 19:12. *See* Rule 2-250(c) (explaining that "[t]he court need not grant a requested instruction if the matter is fairly covered by instructions actually given").

We find no error.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS ASSESSED TO APPELLANT.