Circuit Court for Howard County
Case No. 13-C-17-110508

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 550

September Term, 2018

JONATHAN POSTMA

v.

MARTHA ISABEL LOPEZ, ET AL.

Kehoe,
Berger,
Beachley,

JJ.

Opinion by Berger, J.

Filed: July 16, 2019

This case arises out of an automobile accident that occurred on February 14, 2014. As Martha Isabel Lopez, appellee, turned a corner, Lopez struck Jonathan Postma, appellant, while Postma was clearing snow in his neighbor's driveway. Postma suffered injuries as a result. On February 13, 2017, Postma filed the complaint against Lopez in the Circuit Court for Howard County alleging that Lopez's negligence caused his injuries.[1] Following a two-day trial in the circuit court, a jury found in favor of Lopez.

On appeal, Postma poses six questions, which we set forth *verbatim*.

> 1. Did the trial court abuse its discretion in denying Appellant's requested jury instruction concerning Maryland Transportation Code Annotated, Section 21-504?
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> 2. Did the trial court abuse its discretion in denying Appellant's requested jury instruction concerning Maryland Transportation Code Annotated, Section 21-801?
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> 3. Did the trial court abuse its discretion in denying Appellant's requested jury instruction, Modern Pattern Jury Instruction, 19:7 - Violation of Statute?
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> 4. Did the trial court abuse its discretion in excluding Appellant's expert witness testimony as it related to Dr. Bennett's opinion concerning the need for future care and the costs of same?
>
> 5. Did the trial court abuse its discretion in denying the Appellant's objection regarding the burden of persuasion and re-instructing the jury, *sua sponte*, as to Appellant's burden of proof during closing arguments?

[1] Postma further named Armando Lopez in the complaint under an agency theory because he owned the vehicle. Mr. Lopez, however, was voluntarily dismissed before trial and his dismissal is not at issue in this appeal.

6. Did the trial court abuse its discretion by failing to grant the Appellant's Motion for New Trial that the jury's verdict was against the weight of the evidence?

For the reasons explained herein, we hold that the circuit court erred by refusing to instruct the jury to consider Md. Code (1977, 2012 Repl. Vol.), § 21-504 of the Transportation Article ("TR"). We, therefore, reverse and remand the case to the circuit court for a new trial. In light of our determination that the circuit court erred in declining to propound Postma's requested jury instruction, we shall not address the remaining issues on appeal.[2]

FACTS AND PROCEEDINGS

On February 14, 2014, Lopez was driving on Old Columbia Pike in Howard County, Maryland on her way home from a doctor's appointment. At the same time, Postma was removing snow from his neighbor's driveway. As Lopez approached a sharp, downhill turn on that snowy day, she lost control of the vehicle, left the roadway,

[2] We recognize that some of these issues may recur if this case is retried, while other issues may not, and those that recur may involve a different set of facts than those present in the record in this case. For example, a certain jury instruction may be generated by the facts on retrial even if it was not generated by the facts of the case on appeal (or vice versa). Furthermore, the issue relating to the testimony of Postma's expert witness may not arise in the same manner on remand given that the basis for Lopez's objection was that she was unfairly surprised about the content of the expert's testimony. Accordingly, the testimony of Postma's expert witness can easily be addressed before the retrial of this case, depending on the status of the discovery at the time of the retrial.

and struck Postma. Postma was injured as a result of the collision, suffering injuries including a torn meniscus, which required surgery.[3]

At trial, Postma's wife, Jennifer Porter, testified that she and Postma were helping their neighbor plow and shovel snow while their son watched. Ms. Porter testified that Postma was using a snow blower "about 4 or 5 feet into the [neighbor's] driveway." Ms. Porter further testified that while Postma was using the snow blower, a "car came around the corner" and "onto the driveway area and hit [Postma] behind his knees and he flipped back onto the car and projected forward." Ms. Porter characterized the accident as having occurred "fast, but also kind of [in] slow motion."

Thereafter, Lopez recounted her memory of the events. Lopez testified that she drove slower than usual and "well under" the speed limit because it snowed the day before and she "was anticipating snowy roads." When asked at trial about the speed limit, Lopez testified that the speed limit on the "straight road" was forty miles per hour, but that it dropped to twenty-five as she approached the scene of the accident. Although Lopez testified that the accident occurred quickly, Lopez admitted that the accident could have been avoided if she honked her horn to alert Postma.

[3] Richard Bennett, M.D. testified in a *de bene esse* deposition three days before trial that Postma would likely need a knee replacement in the future. Lopez filed a motion *in limine* to exclude that portion of Dr. Bennett's testimony, asserting that Dr. Bennett did not express an opinion about future treatment during discovery. Ultimately, the circuit court excluded Dr. Bennett's expert testimony, ruling that it constituted "trial by surprise."

At the close of evidence, Postma proposed various jury instructions. Three of Postma's proposed instructions form the basis of issues raised in this appeal. Postma asked the circuit court to instruct the jury to consider TR § 21-504. That statute provides, in pertinent part:

> (a) Notwithstanding any other provision of this title, the driver of a vehicle shall exercise due care to avoid colliding with any pedestrian.
>
> (b) Notwithstanding any other provision of this title, the driver of a vehicle shall, if necessary, warn any pedestrian by sounding the horn of the vehicle.

Postma further requested that the circuit court instruct the jury by reading TR § 21-801.[4] Finally, Postma requested that the circuit court provide the jury with Instruction 19:7 of

[4] Under TR § 21-801:

> (a) A person may not drive a vehicle on a highway at a speed that, with regard to the actual and potential dangers existing, is more than that which is reasonable and prudent under the conditions.
>
> (b) 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.
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> (c) Consistent with the requirements of this section, the driver of a vehicle shall drive at an appropriate, reduced speed when approaching and crossing an intersection at which cross traffic is not required to stop by a traffic control device.

(Continued)

the Maryland Civil Pattern Jury Instructions ("MPJI-Cv"), which provides that "[t]he violation of a statute, which is a cause of plaintiff's injuries or damages, is evidence of negligence."

The circuit court denied Postma's requests. The circuit court questioned whether Postma met the definition of "pedestrian" given his location at the time of the accident and expressed reservations about whether TR § 21-504 was applicable in these circumstances. The court further concluded that both TR § 21-504 and TR § 21-801 were "fairly covered" by the other instructions the trial court had already given.

> (d) Consistent with the requirements of this section, the driver of a vehicle shall drive at an appropriate, reduced speed when approaching and crossing a railroad grade crossing.
>
> (e) Consistent with the requirements of this section, the driver of a vehicle shall drive at an appropriate, reduced speed when approaching and going around a curve.
>
> (f) Consistent with the requirements of this section, the driver of a vehicle shall drive at an appropriate, reduced speed when approaching the crest of a grade.
>
> (g) Consistent with the requirements of this section, the driver of a vehicle shall drive at an appropriate, reduced speed when traveling on any narrow or winding roadway.
>
> (h) Consistent with the requirements of this section, the driver of a vehicle shall drive at an appropriate, reduced speed when any special danger exists as to pedestrians or other traffic or because of weather or highway conditions.

Following deliberations, the jury returned a verdict in favor of Lopez, finding that Lopez was not negligent. On February 23, 2018, the circuit court entered judgment accordingly. Postma subsequently filed a motion for a new trial. After the circuit court denied Postma's motion, Postma noted this timely appeal.

STANDARD OF REVIEW

Postma contends that the circuit court abused its discretion by declining to propound his proposed jury instructions.[5] "When we review a trial court's grant or denial of a requested jury instruction, we apply the highly deferential abuse of discretion standard." *Woolridge v. Abrishami*, 233 Md. App. 278, 305 (2017) (citations and quotations omitted). In determining whether the trial court abused its discretion, we consider "(1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given." *Id.* (quoting *Keller v. Serio*, 437 Md. 277, 283 (2014)). "[T]he trial judge is required to give a requested instruction that correctly states the applicable law and that has not been fairly covered in other instructions." *Fleming v. State*, 373 Md. 426, 432 (2003).

"In a civil case, a legal error in a jury instruction does not necessarily mandate reversal. To overturn a jury verdict, a jury instruction must not only be incorrect legally,

[5] Although Postma raises additional arguments in this appeal that may be subject to different standards of review, we decline to address the merits of these arguments because we hold that the circuit court abused its discretion by refusing to instruct the jury to consider TR § 21-504. Consequently, we need not address the additional standards of review.

but also prejudicial." *Armacost v. Davis*, 462 Md. 504, 524 (2019). The complaining party must demonstrate "that prejudice was not just possible, but probable, in the context of the particular case." *Id.*

DISCUSSION

Postma contends that the circuit court erred, *inter alia*, by declining to instruct the jury to consider whether Lopez was obligated to sound her horn. Lopez responds that the circuit court acted within its broad discretion to decline to propound Postma's proposed instruction. In doing so, Lopez maintains that TR § 21-504(b) -- i.e. the "horn instruction" -- was fairly covered by MPJI-Cv § 18:1, MPJI-Cv § 18:4, and MPJI-Cv § 19:1. For the reasons that follow, we conclude that the circuit court abused its discretion when it declined to instruct the jury that "the driver of a vehicle shall, if necessary, warn any pedestrian by sounding the horn of the vehicle" as set forth in TR § 21-504(b).[6]

[6] Postma additionally asserts that the circuit court erred by declining to instruct the jury as to TR § 21-504(a), which provides:

> Notwithstanding any other provision of this title, the driver of a vehicle shall exercise due care to avoid colliding with any pedestrian.

In light of our determination that the circuit court abused its discretion by failing to instruct the jury as to TR § 21-504(b), we need not address this argument. We observe, however, that the question of whether TR § 21-504(a) was fairly covered by the other instructions propounded by the circuit court is a closer call.

In Maryland, it "is well settled that a party is entitled to have his or her theory of the case presented to the jury, provided that the theory is legally and factually supported." *Brown v. Contemporary OB/GYN Assocs.*, 143 Md. App. 199, 260 (2002) (citations, quotations, and emphasis omitted). Accordingly, "a trial court must properly instruct the jury on a point of law that is supported by *some evidence* in the record." *Id.* (quoting *Green v. State*, 119 Md. App. 547, 562 (1998)) (emphasis added). The "some evidence" standard is "a fairly low hurdle" to reach. *Arthur v. State*, 420 Md. 512, 526 (2011). Indeed, some evidence "calls for no more than what it says -- 'some,' as that word is understood in common, everyday usage." *Id.* *See also Jarrett v. State*, 220 Md. App. 571, 586 (2014) ("A particular instruction is generated when a defendant can point to some evidence [that] supports the requested instruction. Some evidence is not strictured by the test of a specific standard. It calls for no more than what it says -- 'some,' as that word is understood in common, everyday usage.") (internal quotation and citation omitted) (ellipses omitted).

In this case, Postma requested that the circuit court instruct the jury to consider whether a reasonable driver under the circumstances would have sounded her horn to alert any nearby pedestrians.[7] Postma argued that this "particular instruction" was "more specific as to this issue than the more general ones that had already been given." The court explained its ruling as follows:

[7] The discussion between counsel and the court regarding jury instructions occurred in chambers. Thereafter, counsel for Postma placed his objection to the court's decision not to propound the "horn instruction" on the record.

> [M]y response to that initial objection when it was raised earlier was that, first of all as it relates to the one Transportation, the first Transportation that talked about pedestrians, the [c]ourt does, in fact, question whether or not in this situation the Plaintiff was a pedestrian because the testimony as he was in the driveway and [Lopez left] the roadway and struck him I think in the driveway. And looking at the definition of a pedestrian in the Transportation Article the [c]ourt first of all questioned whether or not he would be considered a pedestrian.
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> But, then also in addition to both instructions the [c]ourt believes that they were reasonably and fairly covered by the two other instructions that the [c]ourt has already given and it would just be repetitive.
>
> So, that's what the [c]ourt's rationale for declining to give those two additional requested instructions.

The questions before us on appeal are whether the circuit court erred in determining that the requested "horn instruction" was not generated by the evidence presented at trial and whether the circuit court abused its discretion when determining that the requested instruction was covered by the other instructions given. First, with respect to whether the requested instruction was generated by the facts of the case, we observe that evidence was presented demonstrating that the car operated by Lopez left the roadway and struck Postma. Lopez did not sound her horn as she traveled toward Postma. Notably, Lopez testified that the incident could have possibly been avoided if she had sounded her horn.

Furthermore, the circuit court questioned whether Postma was, in fact, a pedestrian due to his location in a driveway. In our view, Postma satisfies the legal definition of "pedestrian" despite his location in a driveway at the time he was struck. Section 11-145

of the Transportation Article defines pedestrian as "an individual afoot" without any reference to the individual's location. Furthermore, we have explained that "[i]n the context of the motor vehicle laws, a pedestrian is a person on foot, as distinguished from one in or on a vehicle, on or near a public highway or other place where the motor vehicle laws apply." *Braswell v. Burrus*, 13 Md. App. 513, 517 (1971). The undisputed facts of this case establish that Postma was a person on foot located near a public roadway, and, therefore, he was a pedestrian. To the extent the circuit court reached a contrary conclusion as to Postma's status as a pedestrian, we disagree with the circuit court.

The requested instruction, TR § 21-504, was indisputably a correct statement of the law. As we have explained, the instruction was generated by the facts of this case given Postma's status as a pedestrian and Lopez's testimony that the accident could have possibly been avoided had she sounded her horn. We turn, therefore, to the determination of whether Postma's requested instruction was fairly covered by the instructions actually given by the circuit court.

Lopez asserts that the substance of the "horn instruction" was covered by the circuit court's instructions on the standard of care, reasonable speed, and negligence, which were *verbatim* readings of the Maryland Civil Pattern Jury Instructions 18:1, 18.4, and 19.1. The relevant instructions given by the circuit court were propounded as follows:

> The driver of a motor vehicle must use reasonable care. Reasonable care is that degree of caution and attention that a person of ordinary skill and judgment would use under

> similar circumstances. What constitutes reasonable care depends upon the circumstances of a particular case.
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> A driver may not operate a vehicle at a speed that is greater than is reasonable and prudent under the conditions then existing.
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> Negligence is doing something that a person using reasonable care would not do or not doing something that a person using reasonable care would do. Reasonable care means that caution, attention or skill a reasonable person would use under similar circumstances.

We agree with Postma that the specific "horn instruction" he requested was not fairly covered by the other instructions propounded by the circuit court. Postma asked the court to instruct the jury that "the driver of a vehicle shall, if necessary, warn any pedestrian by sounding the horn of the vehicle" as set forth in TR § 21-504(b). No other instruction given by the circuit court advised the jury of a driver's specific duty to warn pedestrians by sounding a horn. The general negligence instruction advised the jury that a driver must use reasonable care. In short, we are not persuaded that a juror would necessarily infer that the duty to use reasonable care includes a duty to sound one's horn to warn pedestrians. Because the "horn instruction" correctly stated the applicable law, was generated by the evidence presented, and was not fairly covered in the circuit court's other instructions, the circuit court was required to give it. *Fleming*, *supra*, 373 Md. at 432 ("[T]he trial judge is required to give a requested instruction that correctly states the applicable law and that has not been fairly covered in other instructions.") We, therefore, hold that the circuit court abused its discretion by declining to instruct the jury that "the

driver of a vehicle shall, if necessary, warn any pedestrian by sounding the horn of the vehicle" as set forth in TR § 21-504(b).

We further hold that Postma has established that he was prejudiced by the circuit court's decision not to propound the "horn instruction." Postma bears the burden of demonstrating that "prejudice was not just possible, but probable" due to the legal error in jury instruction. *Armacost*, *supra*, 462 Md. at 524. Postma asserts that had the circuit court instructed the jury as to Lopez's duty to warn by sounding her horn, he could have "strenuously argued to the jury that, even if it believed that [Lopez] was traveling at an appropriate, decreased speed for the alleged conditions . . . she was separately negligent in failing to sound her horn to warn [Postma] of the danger posed by her vehicle as it traveled uncontrolled towards him."

Lopez asserts on appeal that "[n]othing short of pure speculation" would cause a jury to conclude that the sounding of a horn would have altered the outcome of this case, but Lopez specifically testified at trial that the accident "could have possibly been avoided" if she had sounded her horn. We agree with Postma that, had the jury been made aware of the driver's separate duty to warn pedestrians via the horn, Postma could have argued to the jury that Lopez was negligent by failing to warn even if she otherwise operated her vehicle in a reasonable manner. For these reasons, taking into consideration the evidence presented at trial, we are persuaded that prejudice was not just possible, but probable. Accordingly, we hold that Postma has established that he was prejudiced by the circuit court's decision not to propound the requested horn instruction.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY VACATED. CASE REMANDED FOR A NEW TRIAL. COSTS TO BE PAID BY APPELLEE.