Circuit Court for Prince George's County
Case No. 17-03847

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 557

September Term, 2018

KATHLEEN FULLER

v.

HABITAT AMERICA, et al.

Arthur,
Shaw Geter,
Wilner, Alan M. (Senior Judge, Specially Assigned)

JJ.

Opinion by Wilner, J.

Filed: October 24, 2019

*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.

This is a slip-and-fall action by appellant against the manager of her apartment complex and a contractor employed by the manager to resurface the parking lot adjacent to the building in which her apartment was located. At the end of appellant's case, the court granted appellees' motions for judgment on the grounds of insufficient evidence of negligence on appellees' part and assumption of the risk by appellant. In this appeal, appellant complains about that ruling as well as the court's earlier denial of her motion for mistrial. We shall affirm the court's judgments.

BACKGROUND

Appellant was a tenant of an apartment in the Sierra Woods apartment complex, which is located in Columbia, Maryland and was managed by appellee Habitat America LLC (Habitat). Her building was on Flowerstock Row. On October 6, 2015, appellant, along with the other tenants in her building, received a Notice from Habitat that, on October 7, appellee GMC Contractors would be "working on the parking lot," which would require that residents move their vehicles from Flowerstock Row.[1] All vehicles, the Notice continued, must be moved by 8:00 a.m. "and can return at 4 p.m." The Notice did not indicate precisely what work was to be done, but the evidence indicated that

[1] The Notice was dated October 5, but appellant said she did not receive it until the 6th. No complaint was made that the Notice was untimely.

GMC was employed to fill in cracks in the asphalt, spray a black coating or sealant on the lot, and repaint the striping.

On the morning of the 7th, appellant dutifully moved her car to the nearby Long Reach Shopping Center and walked back to her apartment, using a bike path for part of the way. She said that, in order to get back to her apartment using the bike path, she needed to walk up a "small incline" adjacent to her apartment but that she never had any trouble walking up that incline. She added that she often used the bike path during the day, when it was light out, because it was the closest route to and from her apartment, but that she did not use it after dark because she felt it was dangerous due to criminal activity.

Appellant remained at home throughout the day until about 4:00 to 4:30 p.m., when, using the same bike path, she walked to the shopping center to retrieve her car. During the day, she saw trucks "spraying something" on the parking lot, although she did not notice any workmen or vehicles still working on Flowerstock Row when she left to get her car. When driving back, however, she found that the entrance to Flowerstock Row was blocked off with two orange cones and yellow caution tape. Not wishing to return to the shopping center, she parked on a nearby road and waited in her car, expecting that someone would eventually come by and remove the cones and tape.

When appellant left to get her car, she said it was "getting to be dusk." She got back to the apartment development around 5:00. Without objection, counsel for Habitat

informed the jury in her opening statement that sunset that day was approximately 6:41 p.m., although, because judgment was entered at the end of the plaintiff's case, no evidence of that was offered. Nonetheless, we may take judicial notice that, according to the Astronomical Applications Department of the U.S. Naval Observatory, which officially records sunrise and sunset, as well as dawn and twilight, sunset that day in Columbia was, in fact, 6:41 p.m. daylight savings time and actual twilight was not until 7:09 p.m.[2]

Eventually, a neighbor came by, and, according to appellant, they conversed for about two hours, at which point it was "darker by then."[3] She and the neighbor decided to return home, but, instead of taking the bike path back, they took a sidewalk along Flowerstock Row, passing by the two cones and tape. They continued on the sidewalk

[2] The Naval Observatory recorded sunset for that day in Columbia at 17:41 (5:41 p.m.) Eastern Standard Time, but we may take Judicial notice that Daylight Savings Time did not end until November 1, 2015, so the actual time was 6:41 p.m. We also may take judicial notice that it does not actually get dark at sunset. The Naval Observatory also records three categories of twilight times – civil, nautical, and astronomical. Civil twilight is when the sun is six degrees below the horizon. It is the brightest form of twilight, when there is enough natural sunlight that artificial light may not be required to carry out outdoor activities. Nautical twilight is less bright, when the sun is twelve degrees below the horizon and artificial light may be required. Astronomical twilight is when the sun is 18 degrees below the horizon and the sky is no longer illuminated. The Observatory recorded civil twilight for Columbia beginning at 7:09 p.m. daylight savings time (6:09 p.m. eastern standard time).

[3] The neighbor contradicted part of appellant's testimony. He said that, from the time he met up with appellant until the time of her fall, only 10 to 15 minutes elapsed, not two hours.

until it made a turn to go around some townhomes. Instead of continuing on that route, which would have required her, at some point to travel on a dirt path, appellant stepped off the sidewalk and, with one foot, stepped on to the parking lot to test its condition. The lot was firm at that point, so she continued crossing the lot. After traveling 30 to 40 feet, she slipped on a soft spot, fell on her right arm, landed on her back, and injured her head. She was not able to get up because her foot kept sliding. She and her clothes were covered in tar. Someone called 911, and appellant eventually was rescued and taken to a hospital.

Appellant said that the only other ways of getting back to her apartment were to use the bike path, which, because it was getting dark, she declined to do, or continue on the sidewalk, which ended at some point and would require her to climb a large hill that, due to her age, would be too much of a chore.

On cross-examination, appellant acknowledged that she had been employed as assistant manager of another apartment complex for over 30 years, that she had experience with the sealing of asphalt, and that, when she got the Notice on October 6, she had a general idea of what work was to be done. She said that she knew from that experience that people had to stay off the area that was being coated for some period of time and vehicles had to stay off for a longer time. In the end, she contended that the only way she could have returned to her apartment without walking on some part of the

parking lot was to have continued along the sidewalk or take the bike path, which she was unwilling to do.

At the conclusion of appellant's case, Habitat and GMC both moved for judgment under Rule 2-519.[4] Habitat argued that there was no evidence of what the standard of care was for the resurfacing of a parking lot by an apartment manager or how Habitat breached that standard and, alternatively, that, by failing to take available alternative routes to her apartment, appellant assumed the risk of her injuries. GMC argued that no evidence had been presented that it breached any duty to appellant – it blocked the street leading to the lot to preclude vehicular traffic and no evidence of a standard of care with respect to pedestrians had been presented. Counsel noted that appellant recognized the danger by testing the lot before actually walking on it, found it firm, and walked up to 50 feet without incident until coming to a soft, slippery part.

The court's response to the arguments was brief. Taking the evidence in a light most favorable to appellant, it concluded that there was no evidence of negligence on the part of either appellee. Even if appellant had presented a *prima facie* case, it continued, appellant assumed the risk when "she knew that the material, wet, slippery, sticky, tarry, had been roped off and she walked on it and she slipped."

DISCUSSION

[4] In their briefs, the parties refer to their motions as motions for directed verdict.

Entry of Judgment for Appellees

The allegations of negligence in appellant's complaint were general ones. Making no distinction between Habitat and GMC, she alleged that they each had a duty to use reasonable care in managing, inspecting, designing, configuring, leasing, cleaning, and maintaining the premises, to use ordinary care to have the premises in reasonably safe condition, and to use ordinary care to correct or warn of any unsafe condition that they knew or should have known about. She contended that both appellees were aware and had notice of the dangerous, unsafe, and unusual condition, and that her fall was directly caused by carelessness, recklessness, and negligence in managing, inspecting, designing, and maintaining the premises, failure to use ordinary care to have the premises in a reasonably safe condition, and failure to warn appellant of the dangerous, unsafe, and unusual condition. There was no allegation of what more or different either appellee could and should have done.

Eight witnesses were called by appellant – herself, the neighbor, two responders to the 911 call, a representative from appellant's employer who testified regarding appellant's employment, a physician called to testify regarding appellant's injuries, appellant's husband, and appellant's grandson. None of them testified, or appeared to be qualified to testify, regarding any particular standard of care applicable to the resurfacing of asphalt parking lots in apartment complexes or what either appellee could and should have done differently.

The neighbor said that, as he and appellant walked back to their apartments around 7:15 p.m., he stayed on the sidewalk because there were both wet and dry spots on the parking lot and that it was not until the next day that it was completely dry. Where the sidewalk ended, he took the bike path**.** His testimony in that regard was:

> "Yeah, I took the bike path because it go back behind my, my building, I took the step to the bike path and I was riding [his bike] and that's when I caught up with Fuller or while, you know, we drove down and we walked and I ain't got, I ain't get on it, on the blacktop until it was dry."

The two 911 responders both recalled that, when they arrived, the parking lot was slippery. One said that the asphalt "was a bit slick and we had to shuffle our feet to cross the street on Flowerstock Row." The other added that, to get access to appellant, "we had to navigate part of the parking lot and I do remember it being slippery." The grandson, who lived with appellant and her husband, said that he returned home from work around midnight and that the cones and tape were still there. He confirmed appellant's testimony that, other than the bike path, which was dangerous to use at night, the only way to get back to appellant's apartment from Flowerstock Row without crossing at least part of the parking lot involved walking up a steep incline. Appellant's husband testified that he heard appellant screaming and went looking for her in his wheelchair. He apparently started to traverse the parking lot but could not proceed because his wheelchair got stuck in the tar. He observed the 911 responders sliding and slipping in their attempt to reach appellant.

To succeed in a claim of negligence, the plaintiff must show (1) a duty owed to the plaintiff or a class to which the plaintiff belongs, (2) a breach of that duty, (3) a legally cognizable relationship between the breach and the harm suffered, and (4) damages. *Kennedy Krieger v. Partlow*, 460 Md. 607, 633 (2018). In cases involving personal injury, the "principal determinant of duty becomes foreseeability." *Id.* at 634.
In a jury case, when determining, as a matter of law under Rule 2-519 whether those criteria have been satisfied, the court must consider all evidence and inferences in a light most favorable to the party against whom the motion is made.

Although lumped together in appellant's complaint, the nature of any duty owed to appellant by appellees differs. The case against Habitat was one of premises liability. Appellant clearly was an invitee of Habitat. Maryland follows the rule set forth in *Restatement (Second) of Torts*, § 343, that a possessor of land is subject to liability for physical harm to invitees by a condition on the land, but only if the possessor (1) knows or should realize that the condition involves an unreasonable risk of harm to the invitee, (2) should expect that the invitee will not discover or realize the danger or will fail to protect him/herself against it, and (3) fails to exercise reasonable care to protect the invitee against the danger. *Deering Woods v. Spoon*, 377 Md. 250, 263 (2003).

Clearly, resurfacing an asphalt parking lot with a slick, slippery, or sticky substance creates a temporary dangerous condition on the lot – a condition that will remain dangerous until the substance fully dries and becomes hardened. No evidence

was presented by appellant that the lawful objective of resurfacing the lot could have been accomplished by Habitat in any less dangerous manner or that it was unnecessary for Habitat to have the lot resurfaced in the manner that it was.

The only requirement, then, was for Habitat to give adequate warning to its invitees to avoid contact with the lot for the duration of the danger. In her brief, appellant complains that no specific warning was given as to when the lot would be safe for foot travel or of which sections of the lot were safe to cross. At oral argument, counsel indicated that, especially in light of the Notice suggesting that cars could return to the lot after 4:00, Habitat and GMC had a duty to block off or place warning devices around the entire perimeter of the lot when it became clear that the substance had not yet dried sufficiently.

We shall assume, without in any way deciding, that, given the fact that the lot was still in a dangerous condition at 4:00, one or both of appellees had a duty to warn residents or other invitees of that continuing danger and that something more than simply blocking the vehicular entrance to the lot was necessary. There may have been sufficient evidence of negligence to overcome the motion for judgment. We shall affirm the judgment on the ground that, when appellant arrived at the scene at 5:00, when it was still light out, she was or should have been aware of the danger, that she knew there was an alternative way for her to return safely to her apartment, that she knowingly chose not to

take that route, and, by entering on to the lot as a shortcut, she assumed the risk of the injury she suffered.

Assumption of risk "rests upon an intentional and voluntary exposure to a known danger and, therefore, consent on the part of the plaintiff to relieve the defendant of an obligation of conduct toward him [or her] and to take his [or her] chances from harm from a particular risk." *Poole v. Coakley*, 423 Md. 91, 110 (2011), quoting from *Crews v. Hollenbach*, 358 Md. 627, 640-41 (2000). To establish the defense of assumption of risk, the defendant must show "that the plaintiff (1) had knowledge of the risk of the danger, (2) appreciated that risk, and (3) voluntarily confronted the risk of danger." *Poole*, at 110-11. That is an objective test. As held in *ADM v. Martin*, 348 Md. 84, 91-92 (1997), quoting from *Schroyer v. McNeal*, 323 Md. 275, 283-84 (1991), "when it is clear that a person of normal intelligence in the position plaintiff must have understood the danger, the issue is for the court."

Notwithstanding the Notice indicating that cars could be returned at 4:00, appellant knew at 5:00 that the lot was not ready. The entrance was blocked with cones and warning tape. She knew that she could not rely on the Notice. It was clear to the neighbor and to everyone else who encountered the lot, even later than 5:00, that there were wet spots on the lot; the neighbor informed her of that and decided to use the sidewalk. She knew from her employment experience that people need to stay off of resealed asphalt until it dried. It is true that a plaintiff's acceptance of a risk is not

voluntary under Maryland law "if the defendant's tortious conduct has left him [or her] no reasonable alternative course of conduct in order to avert harm to himself or another or exercise or protect a right or privilege of which the defendant has no right to deprive him [or her]" *ADM, supra*, at 93, quoting from *Restatement of Torts*, § 496E and Comment b.

Thus, if appellant truly had no safe alternative means of returning to her apartment and thus would have been forced to cut across the parking lot, assumption of risk would not apply. That was not the case, however. Although it may have been getting to dusk when appellant returned at 5:00, it was still light; the sun would not set for another hour, and civil twilight was still two hours away. She could have taken the bike path that she regularly and safely used during daylight. Instead, she waited another two hours before proceeding home. In doing so, knowing that the alternative of using the sidewalk and having to climb a hill was unacceptable, she left herself the only option of assuming the risk of traversing the parking lot. That option was not forced upon her.

Motion for Mistrial

Appellant was asked on cross-examination whether, from her experience as an assistant manager of another apartment complex, she understood that, when seal coating was done, people and vehicles had to be kept off the area that was being coated, and she responded that she did. The follow-up question was, "So you knew what the situation was here, correct," to which she replied "I know of the situation, yes. We did things

differently." On redirect examination, appellant's attorney asked several times what it was her employer did differently, and on each occasion a general objection to the question was sustained. Upon the conclusion of re-cross-examination, appellant's attorney sought permission to ask another question, which the court disallowed, essentially indicating that enough was enough.

The next day, appellant called Dr. John Ingari, appellant's treating physician to testify. When he was asked about the need for future surgery, defense counsel objected, and a bench conference ensued. During that bench conference, the judge complained that he was suffering from back pain and needed a 10-minute break, but before taking the break, he sustained the objection. When court resumed, objections were made to other questions relating to possible future surgeries, and they also were sustained. After cross-examination ended, appellant's attorney moved for a mistrial, which was immediately denied. The attorney responded "I think that there's something going on with the Court. I don't know if Your Honor's uncomfortable. The rulings are against the law and at this point I don't think that my client's getting a fair trial." The judge denied the motion, replying that there was an adequate basis for his rulings.

The decision whether to grant a mistrial is discretionary with the trial court. We may not have made the same rulings, but we do not find that the decision to deny the motion for mistrial amounted to an abuse of discretion. To the extent that appellant's complaint involved rulings related to questions posed to Dr. Ingari, they are moot at this

point given our view that appellant failed to establish a cause of action against either appellee. To the extent the motion encompassed the sustaining of objections to appellant testifying what her employer did differently, no proffer was made of what her answer would have been, but also in light of our conclusion that appellant voluntarily assumed the risk of the injury she actually faced, what her employer did differently was irrelevant.

JUDGMENTS AFFIRMED; APPELLANT TO PAY THE COSTS.