Circuit Court for Prince George's County
Case No. CAL-14-20334

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1712

September Term, 2015

K. H., A MINOR BY AND THROUGH HIS GRANDMOTHER AND NEXT FRIEND STACIE ELLIOTT, *ET. AL.*

v.

BARDON, INC. D/B/A AGGREGATE INDUSTRIES

Woodward, C.J.
Graeff,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: February 12, 2018

The genesis of this appeal is the grant of summary judgment by the Circuit Court for Prince George's County in favor of appellee, Bardon, Inc. d/b/a Aggregate Industries (Bardon). Appellants are K.H., a minor, by his grandmother and next friend, Stacie Elliott, and Thomas R. Lewis, Jr., individually, and Stacie Elliott, individually and as personal representative of the estate of Alexis Kari Lewis (Lewis),[1] whose personal injury/wrongful death action resulted from the death of Lewis, the mother of K. H.

Appellants present a single question for our consideration – whether the circuit court erred in granting summary judgment.[2]

We shall affirm.

BACKGROUND

Alexi Kari Lewis died as a result of injuries suffered in a motor vehicle collision on February 14, 2013, at 7:44 a.m. on Waugh Chapel Road, in Anne Arundel County[3], between Crofton and Fort Meade. At the time of the collision, Waugh Chapel Road was a

[1] The lawsuit was originally brought by K.H.'s father and next friend, Dwayne Hall, who subsequently passed away while this appeal was pending, resulting in K.H.'s grandmother being substituted as his next friend maintaining the appeal on his behalf.

[2] In their opening brief, appellants ask:

> May a trial court find contributory negligence and grant summary judgment as a matter of law whenever a motor vehicle crosses a double yellow center line, notwithstanding evidence that, if believed by the jury, establishes the existence of a sudden emergency?

[3] The lawsuit was filed in Prince George's County, where Bardon maintained its principal offices in Maryland, at the time.

two-lane roadway in a residential area. On February 14, the weather was wet from rain and snow, and a temperature nearing 32 degrees.

We shall amplify the factual background as necessary to our discussion.

The Collision

Lewis was operating a S-10 Chevrolet Blazer eastbound and, in the course of giving way to an oncoming emergency vehicle, lost control and crossed the center line into the westbound lane. As she entered the westbound lane, her vehicle was struck by a fully-loaded cement mixer delivery truck, owned by appellee Bardon, Inc.[4] and operated by a Bardon employee, Gerald Carpenter. It is not disputed that, at the time, the mixer truck, fully loaded, weighed more than 60,000 pounds.

Carpenter began his trip from Crofton, bound for a construction site at Fort Meade, on a route prescribed by his company along MD. Rt. 3, to MD. Rt. 32. During the trip, however, Carpenter received a dispatch redirecting him onto Waugh Chapel Road to avoid traffic on Rt. 32. At that time, Waugh Chapel Road restricted through traffic of vehicles exceeding 10,000 pounds, a restriction that was noted by signs on MD. Rt. 3. It is also not disputed that, while traversing westbound on Waugh Chapel Road, Carpenter exceeded the posted speed limit of 35 mph and, at the time leading up to the collision, was traveling at 40 to 41 mph.

As Lewis, driving eastbound, neared the collision point, she was confronted with an emergency vehicle approaching from the opposite direction, which had just passed the

[4] Bardon, Inc., at the time, was doing business as Aggregate Industries.

cement truck. While moving to the right and giving way to that vehicle, her vehicle, for reasons in dispute, spun to her left and entered the westbound lane where it was struck by the mixer truck.

The Litigation

Appellants' complaint for wrongful death and survival claims was timely answered by Bardon who raised the defenses, *inter alia*, of contributory negligence and assumption of the risk. After extensive discovery, Bardon moved for summary judgment which, after appellants' response and Bardon's reply, was heard by the circuit court on September 4, 2015. The court, ruling from the bench, stated only:

> Well, certainly motions for summary judgment are not exactly what we call favored all the time, and if there is any rational – I'm trying to remember the exact language, reasonable inferences to be drawn, I'm still not sure she gets her day in court. I am going to deny the motions for summary judgment now.

Thereafter, on September 21, 2015, the parties again appeared before the court for a re-argument of the summary judgment motion.[5] The court's reasons articulated for ordering a second hearing on the motion were as follows:

> All right. Earlier I had heard the motion for summary judgment and had denied it. Some of the papers were late in getting to me, particularly those in regard to the liability of the cement truck being there and whatever negligence you could attribute to that and I wanted to hear the argument on that again.
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> * * *
>
> The issue is whether in fact as a matter of law the cement truck being there in violation of the over five ton prohibition, and I think it was speeding a mile or two over the speed limit as what nearly anybody can tell, and that's what I really wanted to talk about this morning.

[5] The rehearing appears to have been at the court's *sua sponte* order.

The court, after hearing essentially the same arguments that were presented at the September 4th hearing, granted Bardon's motion for summary judgment, again ruling from the bench:

> All right. I had earlier heard the motion for summary judgment and . . . listened to the argument from [appellants] that . . . perhaps her right rear tire touched ice, which caused her to go across the center line, then striking the cement truck owned by [Bardon]. And then the issue arises over the sign saying no trucks over five tons on that particular road and whether this was the protection of a particular class of persons and whether . . . through truck weight restrictions were placed due to concerns relating to avoiding accidents or just traveling in opposite directions or for whatever the reason is not entirely clear but in any event when you go past that to what caused the action and – the but for test I think factors in to this at some place.
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> But for the fact that [Lewis'] car crossed the double yellow line striking [Bardon's] truck there would be no accident. Whether the negligence of [Bardon] is merely passive or potential is one consideration, and in this case would the accident [sic] been any different if it had been a Jeep instead of a cement truck. And all of those things I think are somewhat speculative.
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> And I've tortured myself. I've considered the Judge Jim Salmon rule about you never get reversed if you don't grant summary judgment. But it's really unfair to the parties to force a case to trial . . . I think, under these circumstances. Accordingly, I'm going to grant summary judgment to [Bardon].

DISCUSSION

Summary Judgment

The grant of summary judgment is reviewed *de novo*. *Petty v. Mayor & City Council of Baltimore City*, 232 Md. App. 116, 121 (2017). When reviewing an order granting summary judgment, "we first determine whether a dispute of material fact exists, and if not, only then will we proceed to determine whether the movant is entitled to

judgment as a matter of law." *Id*. (citing *O'Connor v. Baltimore County*, 382 Md. 102, 110 (2004)). The essential facts are not in dispute. Rather, appellants challenge the circuit court's ability to grant summary judgment, as a matter of law, in a negligence cause of action when the issue of contributory negligence is presented. As a purely legal question, we review "whether the circuit court's conclusions were legally correct." *Trim v. YMCA of Cent. Maryland, Inc.*, 233 Md. App. 326, 332 (2017).

Neither Bardon nor appellants supported their respective motions for summary judgment or opposition thereto with an affidavit pursuant to Rule 2-501. Appellants did attach 25 documents as exhibits to support their opposition to the motion for summary judgment, including relevant answers to interrogatories and deposition testimony transcripts, referenced by both parties in their supporting memoranda. Of the 25 exhibits provided, however, only the sworn statements and testimony would be appropriate for the court to consider at the summary judgment stage. All other documents[6] would need to be authenticated and supported by affidavit or sworn statement in order for the court to properly consider them. *See* Rule 2-501(c) (the affidavit requirement is to "set forth such facts as would be admissible in evidence, and . . . show affirmatively that the affiant is competent to testify to the matters stated in the affidavit").

[6] The 25 exhibits included, *inter alia*, excerpts from interrogatories and deposition testimony transcripts, the police reports for the accident investigation, several police reports from the various other accidents that occurred throughout Anne Arundel County that same morning, photographs, a map of the area, apparent training materials used by Bardon/Aggregate for its drivers, and weather condition documentation.

The purpose of the affidavit requirement provision of the summary judgment Rule, has been best described by the Court of Appeals, explaining that:

> An affidavit suffices in the summary judgment context to place before the court a fact that, *if* testified to by the affiant at trial, would be admissible, even though the affidavit itself generally is not admissible at trial. The court can reasonably assume that, if called as a witness at trial, the affiant would testify to the same facts as those set forth in the affidavit. Thus, the trial judge may consider the affidavit in the summary judgment context even though, at trial, the affidavit itself generally would be inadmissible and the affiant would have to testify.
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> A transcript of former testimony possesses the same indicia of reliability as an affidavit in the summary judgment context. The transcript indicates the matters to which the witness, *if* called in the present case, would testify, because, like an affiant, the witness gave the former testimony under oath.

Imbraguglio v. Great Atl. & Pac. Tea Co., 358 Md. 194, 207 (2000).

We have confidence in our presumption that the court considered only those documents that were relevant to the issues, and that would have been admissible at trial.

The Parties' Arguments

Appellants' only challenge to the circuit court's grant of summary judgment is their assertion that the court granted summary judgment solely on the ground that it found Lewis contributorily negligent as a matter of law. In fact, the court made no finding (indeed, no mention) of negligence on the part of Lewis. Rather, the court acknowledged, without analyzing, the issues relating to the possible reasons why Lewis' vehicle crossed the double yellow line, as well as the effect of the weight restriction sign for through trucks and its purpose. The court focused its analysis and decision on the issue of causation, stating:

> [W]hen you go past that to what caused the action and – the but for test I think factors in to this at some place.
>
> But for the fact that [Lewis'] car crossed the double yellow line striking [Bardon's] truck there would be no accident.

It is clear that the court granted summary judgment on the basis that Lewis' vehicle crossing into the westbound travel lane was the proximate cause of the accident. Impliedly, it found that Bardon's actions did not cause the accident. The court made no finding as to whether Lewis' crossing the center-line was negligent on her part. Similarly, the issue of whether the sudden emergency doctrine was implicated in the circumstances presented, in order to controvert Bardon's allegations of contributory negligence by Lewis, was not determined, nor was it necessary to do so. Additionally, the court did not state any conclusive determination as to the purpose of the weight restriction sign or the effect of, *vis-à-vis*, Bardon's vehicle being operated on the weight-restricted road.

Appellants discuss Bardon's alleged statutory violation, appearing to assert a strict liability standard for negligence involving traffic control devices violations. They argue that because of the clearly advised weight restriction, Bardon's re-routing of its driver despite that fact, demonstrated that "such a violation of [Maryland Transportation Article § 21-201] is evidence of [Bardon's] negligence." Appellants assert that "in the context of motor vehicle tort litigation, the violation of ***any*** traffic control device is *always* evidence of negligence and, when such a violation causes or contributes to the injuries of the plaintiff, 'it constitutes negligence[,]'" (first alteration in original, second emphasis added) (quoting *Fisher v. O'Connor's, Inc*., 53 Md. App. 338, 342 (1982)), and that "***all*** traffic

control devices have as their purpose the safety of motorists on the roadways." (Emphasis in original). For support, appellants rely on *Fisher* and the Maryland Manual on Uniform Traffic Control Devices. Their reliance is misplaced, as neither supports such a proposition.

First, from *Fisher:*

> Maryland has consistently held that a violation of a statutory regulation is *evidence* of negligence, and if the "violation causes or contributes to the injuries complained of, it constitutes negligence." [*Ford v. Bradford*, 213 Md. 534, 541 (1957)]. . . . Each of the cited cases in which that principle of law is iterated involved a motor vehicle tort. ***Patently, violation of a statute concerning the "rules of the road" may be evidence of negligence***, and if the violation caused or contributed to the injuries, it constitutes negligence.

(Emphasis in original) (quoting *Fisher*, 53 Md. App. at 341–42). But, the court continued, "[t]he precept of law that 'violation of a statute is evidence of negligence' is a rule of evidence not the creation of a substantive cause of action." 53 Md. App. at 342.

Appellants quote from the Maryland Manual on Uniform Traffic Control Devices: "***The purpose of traffic control devices***, as well as the principles for their use, ***is to promote highway safety*** and efficiency by providing orderly movement of all road users . . . throughout the Nation." Maryland Manual on Uniform Traffic Control Devices, § 1A.01–Purpose of Traffic Control Devices, 01 (2011 Ed.) (emphasis in original). Section 1A.01(01) demonstrates that the promotion of "*safety and efficiency*" is the overarching purpose of traffic control devices in general. (Emphasis added). The goal inferred from this subsection is that it aims to "provid[e] orderly movement of all road users." *Id.* This is also evident from the Maryland Transportation Article (Tr.) definition of a "traffic

control device" as "any sign, signal, marking, or device that . . . [i]s not inconsistent with the Maryland Vehicle Law; and . . . [i]s placed by authority of an authorized public body or official to *regulate, warn, or guide traffic*." Tr. § 11-167 (emphasis added). Although safety is one consideration for the overall traffic control device system, it is clear that safety is not necessarily the purpose for all traffic control devices. *See McQuay v. Schertle*, 126 Md. App. 556, 577 (1999) ("while some 'Rules of the Road' statutes are designed to protect people from harm, others may not have such a purpose" (citing *Atl. Mut. Ins. Co. v. Kenney*, 323 Md. 116, 124 (1991))).

"Rules of the Road" statutes are not always for the exclusive purpose of safety, even when such violations coincide with personal injury incidents. *See McQuay*, 126 Md. App. at 578 ("the purpose of the fire hydrant parking regulation at issue here is to provide access to water in the case of fire and is not to protect people"); *Whoolery v. Hagan*, 247 Md. 699, 706 (1967) (the statute prohibiting stopping, standing, or parking on any bridge was intended by the Legislature "only [for] the facilitation and expedition of traffic and not [for] the protection of users of the bridge"); *Liberto v. Holfeldt*, 221 Md. 62, 66 (1959) (regarding the statute requiring removal of keys from the ignition when unattended, "[t]he duty to the public created by the statute was primarily to protect against a theft of or tampering with a motor vehicle and to prevent them from moving under their own momentum should the brakes fail"); *Maggitti v. Cloverland Farms Dairy*, 201 Md. 528, 532 (1953) (regarding a parking violation, "[t]he legislative purpose was obviously to expedite traffic, . . . for it is notorious that such parking impedes the flow of traffic even

more than parking at the curb"); *Christman v. Weil*, 196 Md. 207, 212 (1950) (a statute requiring 150 feet between commercial trucks "was not to protect the trucks from a collision with each other, but to provide sufficient space between them to permit lighter vehicles to pass").

We concur with established case law that "'the mere violation of a statute will not support an action in damages, even though it may be evidence of negligence, unless there is legally sufficient evidence to show the violation was a proximate cause of the injury.'" *McQuay*, 126 Md. App. at 579 (quoting *Peterson v. Underwood*, 258 Md. 9, 15 (1970)). When a "violation of a 'Rules of the Road' statute is merely coincidental, having only the effect of placing him 'at the wrong place at the wrong time,' it is 'non-contributory' as a matter of law." *Id.* (quoting *Rosenthal v. Mueller*, 124 Md. App. 170, 181 (1998)). *See also Schwarz v. Hathaway*, 82 Md. App. 87, 94 (1990) (finding that "although injury might not have occurred 'but for' an antecedent act of the defendant, liability may not be imposed if for example the negligence of one person is merely passive and potential, while the negligence of another is the moving and effective cause of the injury" (citing *Bloom v. Good Humor Ice Cream Co. of Baltimore*, 179 Md. 384, 387 (1941))).

Assuming, without deciding, that Bardon's actions were evidence of negligence, "[i]t is a basic principle that '[n]egligence is not actionable unless it is a proximate cause of the harm alleged.'" *Troxel v. Iguana Cantina, LLC*, 201 Md. App. 476, 504 (2011) (quoting *Pittway Corp. v. Collins*, 409 Md. 218, 243 (2009)). As such, in order "[t]o be a

proximate cause for an injury, 'the negligence must be 1) a cause in fact, and 2) a legally cognizable cause.'" *Id*. (quoting *Pittway Corp.*, 409 Md. at 243).

This Court has recently explained

> that "causation in fact raises the threshold question of 'whether the defendant's conduct *actually* produced an injury.'" [*Wankel v. A & B Contractors, Inc.*, 127 Md. App. 128, 158 (1999)] (quoting *Peterson v. Underwood*, 258 Md. 9, 17, 264 A.2d 851 (1970)). Two tests are used to determine whether cause in fact exists, "the 'but for' test and the 'substantial factor test.' " *Id*. (quoting *Yonce v. SmithKline Beecham Clinical Lab. Inc*., 111 Md. App. 124, 138, 680 A.2d 569 (1996)). The "'but for' test applies when the injury would not have occurred in the absence of the defendant's negligent act." *Yonce*, 111 Md. App. at 138, 680 A.2d 569. The "substantial factor" test appears when "two independent causes concur to bring about an injury, and either cause, standing alone, would have wrought the identical harm." *Id*.

Asphalt & Concrete Services, Inc. v. Perry, 221 Md. App. 235, 261 (2015), *aff'd sub nom*. *Perry v. Asphalt & Concrete Services*, 447 Md. 31 (2016).

In the court's discussion of the conflicting interpretations of the purpose and scope of the weight restriction as the basis of primary negligence, it found that it was "not entirely clear[.]" The court went on to state that: "Whether the negligence of [Bardon] is merely passive or potential is one consideration, and in this case would the accident [sic] been any different if it had been a Jeep instead of a cement truck. And all those things I think are somewhat speculative." The court's brief discussion of primary negligence coupled with its decision on causation, creates the inference that the court did not find sufficient evidence that Bardon's conduct was evidence of negligence, primary or otherwise. We agree.

We concur with the motions court that the essence of the summary judgment discussion was causation, not contributory negligence. Therefore, we shall affirm the grant of summary judgment.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED;
COSTS ASSESSED TO APPELLANT.