Circuit Court for Anne Arundel County
Case No. C-02-CV-17-000142

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1823

September Term, 2017

MICHELE COOPER

v.

DAVID GOOD, ET AL.

Fader, C.J.,
Kehoe,
Reed,
JJ.

Opinion by Fader, C.J.

Filed: January 8, 2019

Michele Cooper, the appellant, was riding a bicycle on Coastal Highway in Ocean City, Maryland when she tried to overtake the car that was traveling in front of her in the far right lane. Ms. Cooper attempted to pass on the right, utilizing the narrow gap between the curb and the car, which was being driven by the appellee, David Good. At the same time, Mr. Good began to make a right turn into a restaurant parking lot. Mr. Good's car made contact with Ms. Cooper, who fell and sustained injuries.

Ms. Cooper contends that the Circuit Court for Anne Arundel County erred in granting summary judgment to Mr. Good in her lawsuit against him for damages. Because we agree with the circuit court that Ms. Cooper was contributorily negligent as a matter of law based on the undisputed material facts, we affirm.

BACKGROUND

In May 2014, Mr. Good was driving his car southbound on Coastal Highway when he moved into the far right lane so that he could make a right turn into the Phillips Seafood House that was located at the intersection of Coastal Highway and 141st Street.[1] The far right lane was reserved for buses, bicycles, and cars turning right, as stated in a sign hanging over 142nd Street, one block north of the site of the collision. Mr. Good "believe[d] [he] was going 10, 15 mile[s] an hour" once he changed lanes, that he slowed down even further before starting his turn into the parking lot, and that he checked his rearview mirror and engaged his turn signal before making his turn.

[1] The Phillips location at 141st Street has since closed. Following a short stint as a Mexican cantina, the building is now unoccupied.

Just prior to Mr. Good starting to make his turn, Ms. Cooper was riding her bicycle in the same lane traveling in the same direction. Ms. Cooper saw Mr. Good's car ahead of her from "at least" a block away and noticed that it was moving "really, really slow[ly]"; less than five miles per hour. Because Mr. Good's car "was barely moving," Ms. Cooper decided to pass it. She tried to do so by maneuvering into the gap between the right side of the car and the curb. Ms. Cooper acknowledged in deposition testimony that at the time she attempted her pass she was aware that cars can and do make right turns from the far right lane and that she was aware that Mr. Good's vehicle could make a right turn. She also testified that Mr. Good did not put his turn signal on before she attempted to pass his car but that his brake lights were on.

When Mr. Good attempted to execute his turn at the same time as Ms. Cooper attempted to execute her pass, the two collided, Ms. Cooper lost her balance, and she fell off her bicycle "alongside the car" and sustained injuries.

Ms. Cooper brought a negligence action in the circuit court against Mr. Good.[2] Following discovery, Mr. Good moved for summary judgment on grounds of both his lack of negligence and Ms. Cooper's contributory negligence. Ms. Cooper responded that summary judgment was precluded by factual disputes, including as to Mr. Good's speed and whether he used a turn signal. She further asserted that she was not contributorily negligent because it "appeared safe to pass on the right side" before Mr. Good "suddenly

[2] Ms. Cooper's lawsuit also named Mr. Good's employer, Brookfield North Plumbing, as a defendant. The court granted summary judgment to the company and Ms. Cooper has not appealed that ruling.

and unexpectedly decided to make a right turn when [she] was directly alongside" the vehicle.

After a hearing, the circuit court entered judgment in favor of Mr. Good. Observing that bicycles are "held to the same rules" as other vehicles, the court held that Ms. Cooper was contributorily negligent as a matter of law when she attempted to pass Mr. Good's car on the right under the circumstances. Ms. Cooper appealed.

DISCUSSION

We review an appeal from a grant of summary judgment de novo. *Bank of New York Mellon v. Georg*, 456 Md. 616, 651 (2017). "[W]e independently review the record to determine whether the parties properly generated a dispute of material fact, and, if not, whether the moving party is entitled to judgment as a matter of law. We review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party." *Id*. (quoting *Chateau Foghorn LP v. Hosford*, 455 Md. 462, 482 (2017)).

THE TRIAL COURT CORRECTLY AWARDED SUMMARY JUDGMENT IN FAVOR OF MR. GOOD.

A. Ms. Cooper Was Contributorily Negligent as a Matter of Law.

Ms. Cooper argues that in granting summary judgment on the ground of contributory negligence, the circuit court "improperly assumed the function of the jury." Because we agree with Mr. Good and the circuit court that the only rational conclusion that a jury could have reached is that Ms. Cooper was contributorily negligent, we affirm.

Under the doctrine of contributory negligence, and subject to certain exceptions not at issue here, a plaintiff in a negligence action is barred from "recovery against a defendant who causes an injury where such injury is also a result of the plaintiff's own failure to exercise due care." *Kiriakos v. Phillips*, 448 Md. 440, 487 n.38 (2016); *see also Batten v. Michel*, 15 Md. App. 646, 652 (1972) ("Contributory negligence, if present, defeats recovery because it is the proximate cause of the accident[.]").

A plaintiff is contributorily negligent if he or she "fail[s] to observe ordinary care for [his or her] own safety" or does "something that a person of ordinary prudence would not do[.]" *Menish v. Polinger Co.*, 277 Md. 553, 559 (1976) (internal quotation marks omitted). Contributory negligence is not an issue for the jury if the evidence establishes that the plaintiff made "some prominent and decisive act which directly contributed to the accident," *id.* at 563, such that "the only rational conclusion reasonable minds could reach on the evidence presented is that the [plaintiff] . . . was negligent as a matter of law . . .," *Smith v. Warbasse*, 71 Md. App. 625, 631 (1987) (quoting *United States Fidelity & Guaranty Co. v. Royer*, 230 Md. 50, 55 (1962)). To take a question of negligence away from a jury, such a "prominent and decisive act" must allow only "one interpretation . . . to which there is no room for reasonable minds to differ." *Ayala v. Lee*, 215 Md. App. 457, 468 (2013) (quoting *Weshaar v. Canestrale*, 241 Md. 676, 681 (1996)); *see generally Fowler v. Smith*, 240 Md. 240, 247 (1965) (stating that the "question of negligence . . . becomes a question of law" when the "undisputed facts" and inferences that can be drawn from those facts "lead to conclusions from which reasonable minds could not differ").

Here, undisputed evidence in the summary judgment record demonstrates that Ms. Cooper's "failure to exercise ordinary care [was] a proximate cause of [her] injuries," thus barring her recovery. *Seaborne-Worsley v. Mintiens*, 458 Md. 555, 563 n.5 (2018). The evidence, viewed in the light most favorable to Ms. Cooper, includes: (1) Mr. Good's car was established in the far right lane ahead of Ms. Cooper for at least a block before the collision; (2) Ms. Cooper was aware of Mr. Good's position in the lane; (3) Mr. Good's vehicle was moving very slowly, less than five miles per hour;[3] (4) the far right lane in which both vehicles were traveling is marked as a bicycle, bus, and a right-turn only lane; (5) Ms. Cooper was aware that vehicles were permitted to turn right from that lane at the time she decided to pass on the right; (6) Mr. Good did not use a turn signal or look behind him before starting his turn; and (7) the space in which Ms. Cooper attempted to pass was the gap between Mr. Good's car and the curb.

On these facts, it is undisputed that Mr. Good "had the right of way" and "was the favored traveler" in the lane. *Rodriguez v. Lynch*, 246 Md. 623, 627 (1967); *see* Md. Code Ann., Transp. § 21-101(t) (Repl. 2012, Supp. 2018) (defining "Right-of-way" as "the right of one vehicle . . . to proceed in a lawful manner on a highway in preference to another vehicle . . . ."). It is also not subject to genuine dispute that in attempting to overtake Mr. Good's car, Ms. Cooper violated State traffic laws that generally prohibit vehicles,

[3] Ms. Cooper argues on appeal that Mr. Good's vehicle might have been stopped. However, the record contains no support for that assertion as both she and Mr. Good testified that his car was moving slowly.

including bicycles,[4] from passing other vehicles on the right. Under § 21-304(a) of the Transportation Article, the driver of a vehicle may "overtake and pass" another vehicle on the right "only" in three specified circumstances: (1) "If the overtaken vehicle is making or about to make a left turn"; (2) "On a highway with unobstructed pavement not occupied by parked vehicles and wide enough for two or more lines of vehicles moving lawfully in the same direction as the overtaking vehicle"; or (3) "On any one-way roadway, if the roadway is free from obstruction and wide enough for two or more lines of moving vehicles." Because none of those circumstances apply, Ms. Cooper's attempt to pass Mr. Good on the right violated § 21-304(a).

Ms. Cooper disagrees, arguing that she was permitted to pass on the right pursuant to § 21-304(b), which she interprets to authorize passing on the right whenever doing so would be safe. That section provides: "The driver of a vehicle may overtake and pass another vehicle to the right only if it is safe to do so." Construing the plain language of the statute in context, as we are required to do, *see SVF Riva Annapolis LLC v. Gilroy*, 459 Md. 632, 640 (2018) (stating that statutory interpretation begins with the plain language of the statute and, if unambiguous, ends there as well) (citing *Douglas v. State*, 423 Md. 156, 178 (2011)), we reject Ms. Cooper's interpretation.

[4] Individuals operating bicycles in Maryland are "subject to all the duties required of the driver of a vehicle . . . ." Transp. § 21-1202. Section 21-1205(c) of the Transportation Article also expressly requires bicyclists on the roadway to "exercise due care when passing a vehicle."

Our analysis begins with § 21-304(a), which starts with the caveat that it is "[s]ubject to the requirements of subsection (b) of this section," thus making the three specific circumstances in which it allows passing on the right expressly subject to the language of subsection (b). Subsection (a) then states expressly that passing on the right is permitted "only" in those three circumstances.

Subsection (b), in turn, also uses the restrictive term "only" to identify its additional limitation on passing on the right. Had the General Assembly intended subsection (b) to be permissive—creating a new category of permissible passing on the right—a plethora of permissive terms were available to it: "whenever," "any time," "at any point when," etc. It is not for us to change the restrictive term chosen by the General Assembly into a permissive one. *See Bellard v. State*, 452 Md. 467, 481 (2017) (stating that under our statutory interpretation principles, "we will give effect to the statute as it is written" and will not give it "a meaning not reflected by the words that the General Assembly used . . . ."). Moreover, if subsection (b) really did authorize passing on the right *whenever* doing so is safe, it would render subsection (a) superfluous.[5] Interpreting the statute that way would run counter to our charge of "reading the statute as a whole to ensure that no

[5] We acknowledge that there is one circumstance in which Ms. Cooper's interpretation of subsection (b) would not render subsection (a) superfluous. This is if subsection (a) were interpreted to allow passing in the three identified circumstances even when doing so is *not* safe. However, we reject that interpretation as "absurd, illogical, [and] incompatible with common sense." *C & B Construction, Inc. v. Dashiell*, 460 Md. 272, 280 (2018) (quoting *Washington Suburban Sanitary Comm'n v. Phillips*, 413 Md. 606, 620 (2010)).

word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory." *SVF Riva Annapolis*, 459 Md. at 640 (quoting *Douglas*, 423 Md. at 178).

We therefore interpret subsection (b) not as a new category of circumstances in which passing on the right is permitted, but as a further limitation on passing on the right even in the circumstances identified in subsection (a). In other words, § 21-304(b) establishes that even in the three circumstances identified in § 21-304(a), passing on the right is permitted only when it is also safe. This confirms that Ms. Cooper's passing on the right violated State law.

As Ms. Cooper points out, however, that does not end the inquiry because in Maryland "a statutory violation is evidence of negligence," but "[i]t does not constitute negligence *per se* . . . ." *Blackburn Ltd. P'ship v. Paul*, 438 Md. 100, 126 (2014) (quoting *Absolon v. Dollahite*, 376 Md. 547, 557 (2003)). But although the statutory violation would not itself establish Ms. Cooper's contributory negligence, when that is combined with all of the other undisputed material evidence, we conclude that the only rational conclusion a jury could reach is that Ms. Cooper was contributorily negligent. We base that on the undisputed evidence that: (1) she attempted to overtake on the right a car that was traveling slowly in a lane in which it was only permitted to travel for the purpose of making a right turn; (2) she was aware that vehicles traveling in that lane, including Mr. Good's, could turn right; (3) there were numerous businesses with entrances directly along the roadway, including at the very point where she attempted to pass; and (4) although there were traffic

lanes on the left[6] and a sidewalk on the right, she attempted to pass by riding her bicycle through a gap between the right side of Mr. Good's car and the curb. Based on these undisputed facts, Ms. Cooper failed to take "appropriate precautions to protect [her] own interests," which contributed directly to her injuries. *Kassama v. Magat*, 368 Md. 113, 127 (2002) (quoting *Wegad v. Howard Street Jewelers*, 326 Md. 409, 417 (1992)).

B. Ms. Cooper Fails to Identify Genuine Disputes of Fact that Are Material to the Issue of Her Contributory Negligence.

Ms. Cooper argues that contributory negligence should still have been a question for the jury because there were genuine disputes as to material facts, of which she identifies four: (1) the speed of Mr. Good's vehicle; (2) whether Mr. Good used a turn signal; (3) whether Ms. Cooper exercised due care while passing to the right, and (4) whether Mr. Good looked out for her before turning. We find that to the extent there is a genuine dispute as to these issues, none of them are material to Ms. Cooper's contributory negligence on this record.

"A material fact is a fact the resolution of which will somehow affect the outcome of a case." *Barber v. E. Karting Co.*, 108 Md. App. 659, 671 (1996). In reviewing alleged material facts, we "do not endeavor to resolve factual disputes, but merely determine

[6] Under § 21-1205(a) of the Transportation Article, bicycles are generally required to operate "as near to the right side of the roadway as practicable and safe" except when, among other exceptions, "[p]assing a stopped or slower moving vehicle" or "[t]he right lane is a right turn only lane." Under either of these exceptions, Ms. Cooper would have been permitted to pass Mr. Good's car on the left. Although Ms. Cooper claims that the speed and volume of traffic in the lane to her left would have made passing on the left unsafe, her counsel admitted at oral argument that nothing would have prevented her from stopping behind Mr. Good's car until it was safe to pass on the left.

whether they exist and 'are sufficiently material to be tried.'" *Newell v. Runnels*, 407 Md. 578, 607 (2009) (quoting *Sadler v. Dimensions Healthcare Corp.*, 378 Md. 509, 534 (2003)).

The first dispute Ms. Cooper identifies is as to the speed of Mr. Good's vehicle. In her deposition, Ms. Cooper testified that Mr. Good's car was moving "real slow," less than five miles per hour, and "barely moving." Mr. Good testified that he had been traveling at approximately 10-15 miles per hour but had slowed down before the turn to just "a few miles an hour." It is not clear to us that there is really a factual dispute as to the speed of Mr. Good's vehicle at all. Even if there is, the difference between moving "real slow" and traveling "just a few miles an hour" is not material. For purposes of this appeal, we accept Ms. Cooper's testimony about the speed of Mr. Good's vehicle and reject that of Mr. Good. We still conclude that Ms. Cooper's conduct was contributorily negligent.

Ms. Cooper next contends that there is a genuine dispute regarding whether Mr. Good used his turn signal before initiating his turn, in violation of § 21-604(c) of the Transportation Article.[7] *See Blackburn Ltd. P'ship*, 438 Md. at 126-27. Whether Mr. Good properly signaled his turn would certainly have been material to the issue of his own negligence and in other circumstances could be material to whether a plaintiff was contributorily negligent. On these facts, however, that dispute is not material to Ms. Cooper's contributory negligence. That is because the undisputed evidence demonstrates

[7] Section 21-604(c) of the Transportation Article provides in relevant part: "A person may not, if any other vehicle might be affected by the movement, turn a vehicle until he gives an appropriate signal in the manner required . . . ."

that Ms. Cooper's affirmative act in attempting to pass Mr. Good's vehicle on the right in circumstances in which it was manifestly unsafe to do so led directly to the accident. In other words, even if Mr. Good did not use his turn signal—and we assume for purposes of our analysis that he did not—the collision was "at least partly attributable" to Ms. Cooper's actions and so "she can be blamed for contributing to the event." *Myers v. Bright*, 327 Md. 395, 405, 407 (1992); *see also Harrison v. Montgomery County Bd. of Educ.*, 295 Md. 442, 451 (1983) ("[A] plaintiff who fails to observe ordinary care for his [or her] own safety is contributorily negligent and is barred from all recovery, regardless of the quantum of a defendant's primary negligence.").

Third, Ms. Cooper asserts that there is a genuine dispute as to whether "she exercised due care when she attempted to pass" to the right. For the reasons set forth above, we disagree.

Fourth, Ms. Cooper asserts that Mr. Good "failed to maintain a proper lookout prior to turning" and that if he had, he would have seen her bicycle behind him. Although this issue as well might have been material to whether Mr. Good was negligent, we fail to see any relevance to the question of Ms. Cooper's contributory negligence.

Finally, we observe that Ms. Cooper's reliance on *Knecht v. Mooney*, 118 Md. 583 (1912), in arguing that contributory negligence was a question for the jury, is misplaced. In *Knecht*, there was a collision when the plaintiff attempted to pass between a cart and a wagon. The Court of Appeals concluded that the question of contributory negligence was for the jury because, depending on which version of the disputed facts was accepted, there

was a genuine dispute as to whether the accident was caused by the negligence of the defendants' agent in suddenly turning his cart or whether it resulted from "the plaintiff's own carelessness." *Id.* at 586-87. Notably, the Court expressly found that the undisputed evidence showed "no [] decisive act of negligence" that would establish contributory negligence as a matter of law. *Id.* at 587. Indeed, the Court expressly distinguished the circumstances before it from other cases in which "the uncontradicted evidence . . . establish[es] some distinct, prominent and decisive fact, about which ordinary minds would not differ[.]" *Id.* Such evidence, the Court opined, "justif[ies] the Court in pronouncing the plaintiff's conduct such contributing negligence in law as prevents a recovery." *Id.*

Here, in contrast to *Knecht*, the undisputed evidence was that Ms. Cooper's decisive act in attempting to overtake Mr. Good's vehicle on the right directly contributed to her injury. In sum, we agree with circuit court that Ms. Cooper was negligent as a matter of law. As a result, we need not reach the issue of Mr. Good's primary negligence.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.