Circuit Court for St. Mary's County
Case No. 18-C-16-001362

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 01907

September Term, 2017

DAVID WILSON

v.

JOSEPH BLAIN

Graeff,
Shaw Geter,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: January 3, 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.

Appellant here and plaintiff below, David Wilson ("Wilson"), complains that the Circuit Court for St. Mary's County instructed in error a jury regarding assumption of the risk as regards his automobile negligence claim. Wilson objected duly to the giving of the jury instruction. Over his objection, assumption of the risk was submitted to the jury. The jury found: (1) Appellee here and defendant below, Joseph Blain ("Blain"), was negligent in striking Wilson, a pedestrian, with his automobile; (2) Wilson was not contributorily negligent; but (3) Wilson assumed the risk of a collision, thus barring recovery. Wilson moved for judgment notwithstanding the verdict or a new trial, both of which were denied by the trial court. This timely appeal followed. We shall affirm, for the reasons that follow.

FACTUAL BACKGROUND

All operative events took place on the Patuxent Naval Air Station in St. Mary's County. On 15 October 2013 at approximately 7:30 a.m., Wilson, a U.S. Department of Defense employee, was walking with a co-worker, Eugene Pharr ("Pharr"), to a work meeting at a building some distance from where his car was parked at the Air Station. Wilson and Pharr had walked essentially the same route (along Ranch Road) to past meetings. Ranch Road had no shoulder or sidewalk on either side of its pavement. Wilson and Pharr walked ordinarily on the grass adjacent to the north side of the road. On the fateful day of October 15, however, construction of a new warehouse at a point on the north side of the road blocked their usual path. Thus, although their journey that day started out on the north side of Ranch Road, Wilson and Pharr crossed the street prior to the construction site and continued their trek along the south side of Ranch Road. This change

in route meant that oncoming vehicular traffic from the east on the road would be approaching them from behind.

Wilson and Pharr testified that they were walking side-by-side. Pharr stated that he walked on Wilson's right, farthest away from the flow of vehicular traffic. They both claimed that they were on the grass and not the pavement (except when they crossed the road from the north side to its south side), especially when the collision occurred.

Joseph Blain ("Blain"), employed as a helicopter mechanic at the Air Station and having completed his overnight shift at 7:30 a.m. on October 15, was driving home going east on Ranch Road.[1] Blain, who normally wore sunglasses but forgot and left them at home on this day, described the weather on the morning of October 15: "the sun was just, it was crazy beaming that day . . . I couldn't see anything at all."[2] While driving at a claimed "5, 10 miles [per hour] at the max," Blain heard a thumping sound, but was unaware immediately of what, if anything, it meant. He continued east on Ranch Road briefly, but, thinking he might have struck something or somebody, made a U-turn. Blain insisted at trial that, at no point prior to hearing the thumping sound, did his car leave the paved roadway because he knew from experience what it feels like if his car left the paved road and traveled over grass or gravel.

[1] Blain testified that he drove on Ranch Road daily for eleven years. He indicated also that he was cognizant of the fact that the morning sun could impair vision eastbound for travelers on or adjacent to the road at its slight incline in the vicinity of where the accident occurred ultimately. Additionally, he stated that Ranch Road was the only vehicular travel route that people could take leaving their shift at the Air Station.

[2] He amplified that he was unable to see east on Ranch Road for a distance of fifty yards because of the sun; however, he had never seen anyone walk along this side of Ranch Road in his eleven years of driving on Ranch Road.

As it turns out, the thumping sound resulted from Blain striking Wilson. Police Officer Steven Skyler, among other law enforcement and emergency personnel, responded to the scene of the accident.[3] Officer Skyler conducted an investigation and offered several observations regarding the area where the accident occurred. According to his testimony, as a witness called by Blain to corroborate his position that his car never left the pavement of Ranch Road, he observed "heavy" morning dew on the grass and that there were "no tire tracks off road, in the grass, next to where [Wilson] was lying and in the area of impact."

Over Wilson's objection, the trial judge allowed the question of whether he assumed the risk of being hit by a car to be presented to the jury. On that topic, the jury was instructed as follows:

> The Plaintiff cannot recover damages if the Plaintiff has assumed the risk of an injury. A person assumes a risk of an injury if that person knows and understands or must have known and understood the risk of an existing danger and voluntarily chooses to encounter that danger.

As noted earlier in this opinion, the jury found Blain negligent and Wilson not contributorily negligent; however, Wilson was precluded from recovery for his injuries because the jury found that he assumed the risk of being hit by a car.

[3] Officer Skyler was not the first police officer to arrive at the scene of the accident. According to his testimony, two officers from his "unit" arrived at the scene before he did. Additionally, both fire and emergency medical service personnel arrived before Officer Skyler, with "two emergency rescue type vehicles."

QUESTIONS PRESENTED

Wilson presents the following questions for our review, which we have rephrased slightly to combine related queries:[4]

1. Does assumption of the risk apply to this case?
2. Did the court err in instructing the jury on assumption of the risk?
3. Did the court err in denying Wilson's motions for judgment notwithstanding the verdict or new trial?

Because the questions presented are analyzed under varying appellate standards of review, we shall discuss them separately.

DISCUSSION

Assumption of the risk is "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 and to take his chances from harm from a particular risk." *Balt. Gas & Elec. Co. v. Flippo*, 348 Md. 680, 705, 705 A.2d 1144, 1156 (1998). In Maryland, for a defendant to establish a prima facie case of assumption of the risk on the plaintiff's part, it is required to be shown by some competent evidence that the plaintiff: (1) had

[4] Wilson's questions were framed as follows:

I. Was assumption of risk applicable in this case?
   A. Did the court err in denying the Appellant [sic] Motion for Judgment on the issue of assumption of risk?
   B. Did the court err by instructing the jury on assumption of risk?
   C. Did the jury err in finding that Appellant was guilty of assumption of risk?
   D. Did the trial court err in denying Appellant's Motion for Judgment Notwithstanding the Verdict or New Trial?

Wilson does not claim that the instruction as given was not a correct statement of the elements of the affirmative defense of assumption of the risk.

knowledge of the risk and danger; (2) appreciated that risk; and, (3) voluntarily confronted the risk of danger. *ADM P'ship v. Martin*, 348 Md. 84, 91, 702 A.2d 730, 734 (1997). In considering these elements, "an objective standard must be applied and a plaintiff will not be heard to say that he did not comprehend a risk which must have been obvious to him." *Id.* If established, assumption of the risk is a complete bar to recovery because "it is a previous abandonment of the right to complain if an accident occurs." *Id.*

The particular plaintiff must have actual knowledge of the risk before he/she can be found to have assumed it. *Poole v. Coakley & Williams Constr., Inc.*, 423 Md. 91, 114, 31 A.3d 212, 226 (2011). Furthermore, assumption of the risk does not apply "unless the disputed evidence and all permissible inferences therefrom *clearly* establish that the risk of danger was *fully* known to and *understood* by the plaintiff." *Schroyer v. McNeal*, 323 Md. 275, 283, 592 A.2d 1119, 1123 (1991) (emphasis in original).

Assumption of the risk and contributory negligence are related, often overlapping, but yet separate doctrines. The Court of Appeals, in explaining the difference between the two, stated:

> Contributory negligence, of course, means negligence which contributes to cause a particular accident which occurs, while assumption of risk of accident means voluntary incurring that of an accident which may not occur, and which the person assuming the risk may be careful to avoid after starting. Contributory negligence defeats recovery because it is a proximate cause of the accident which happens, but assumption of the risk defeats recovery because it is a previous abandonment of the right to complain if an accident occurs.

Schroyer, 323 Md. 275, 281, 592 A.2d 1119, 1122. The Court continued, "[a]ssumption of the risk does not require proof of negligence by the plaintiff, but only that the plaintiff

be aware of the risk, which he or she then voluntarily undertakes." *Id.* (internal citations omitted). It follows then that the two doctrines are not mutually exclusive, as it is possible for a plaintiff not to be contributorily negligent and contribute to cause an accident but to assume the risk of some kind of harm. *See S & S Oil, Inc. v. Jackson,* 428 Md. 621, 631, 53 A.3d 1125, 1131 (2012) (allowing the jury to consider both, stating that "[a] trial judge can combine the two defenses into one question about contributory negligence when all reasonable jurors would conclude that the risk assumed is unreasonable and, therefore, the act of assuming the risk is necessarily negligent.").

A. Did assumption of the risk apply in this case?

Wilson urges first that assumption of the risk did not apply because, in his view, assumption of the risk was subsumed on this record by the jury's consideration and resolution of the issue of contributory negligence. He cites *Belleson v. Klohr*, 257 Md. 642, 264 A.2d 274 (1970), in support of this contention. In *Belleson*, the plaintiff, standing at night on the shoulder near his broken-down vehicle, was struck by the defendant's vehicle. *Id.* at 643, A.2d 275. The main issue in that case was contributory negligence. The appellant argued that the appellee, if not guilty of contributory negligence, assumed the risk of injury by standing on the side of the road at night. *Id.* at 651, A.2d 279. The Court rejected application of assumption of the risk, stating only: "[w]e believe that consideration of the defense of assumption of risk in this case does not add any dimension not already considered under the heading of contributory negligence." *Id.* *Belleson,* to us, seems too thin a gruel to nourish Wilson's argument, as we shall explain in a moment.

Wilson relies also on an only somewhat more healthy porridge, *Whitt v. Dynan*, 20 Md. App. 148, 315 A.2d 122 (1974), citing its comprehensive discussion of the reciprocal right doctrine.[5] In *Whitt*, the Court of Special Appeals addressed Md. Transportation Article 11-506(b), the predecessor of Transportation Art. 21-506(b),[6] and contributory negligence. Wilson claims that this case stands for the proposition that assumption of the risk is not applicable in a case where a pedestrian walking on the side of the road is struck by traffic approaching him or her from behind.

Wilson concedes apparently that there is no Maryland case that addresses directly whether assumption of the risk applies in a pedestrian versus motor vehicle case with facts similar to those in this matter. He points to several foreign cases, however, where it was found that assumption of the risk did not apply to similar cases in those jurisdictions. Those cases come from Nebraska, Minnesota, and the District of Columbia. Before we might

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[5] This common-law doctrine states that when no sidewalk exists, both pedestrians and motorists have an equal right to use the road and must anticipate the other's possible presence. *Whitt*, 20 Md. App at 156, 315 A.2d at 128. Because both parties have an equal right to use the road, the degree of care required to prevent potential injury by the motorist and the pedestrian is identical. *Id.*

[6] MD. TRANSP. CODE, § 21-506 provides as follows:

Where sidewalks provided

(a) Where a sidewalk is provided, a pedestrian may not walk along and on an adjacent roadway.

Where sidewalks not provided

(b) Where a sidewalk is not provided, a pedestrian who walks along and on a highway may walk only on the left shoulder, if practicable, or on the left side of the roadway, as near as practicable to the edge of the roadway, facing any traffic that might approach from the opposite direction.

Wilson concedes that he violated this statute, but still maintains that assumption of the risk was not applicable because violation of this statute constitutes only evidence of negligence. In *Whitt*, the plaintiff violated the predecessor to the aforementioned statute, and the court applied the doctrine of reciprocal rights, but did not address assumption of the risk.

consider them for possible guidance, however, we shall examine some additional (and possibly more persuasive) Maryland precedent.

Blain relies on two cases that apply assumption of the risk and speak to an injured plaintiff's knowledge of possible injury when assuming a risk. In *Saponari v. CSX Transp.*, 126 Md. App. 25, 727 A.2d 396 (1999), the wife of the appellant was struck and killed by a train operated by CSX. The court instructed the jury on the issues of negligence, contributory negligence, and, despite objection by appellant's counsel, assumption of the risk. *Id*. at 28, A.2d 397. Identical to the current case, the jury found that the appellee (CSX) was negligent, the decedent was not contributorily negligent, but the decedent assumed the risk of her death by walking on the train tracks. *Id*. We held that assumption of the risk applied, despite the appellant's contention that the defendant was required to prove that the plaintiff was aware of the *particular* train that struck her. *Id*. at 45, A.2d 406 (emphasis added). In holding that the plaintiff need only be aware of the possibility of being struck by a train, rather than the specific train that struck her, the court stated: "a jury reasonably could have found that the decedent . . . had knowledge of the danger of being struck by a train crossing at that location." *Id*. at 34, A.2d 400.

Blain relies additionally on *American Powerlifting Ass'n v. Cotillo*, 401 Md. 658, 934 A.2d 27 (2007). In that case, the plaintiff (Cotillo) was participating in a weight-lifting competition and was injured after spotters failed to prevent a weighted bar from falling on his face. *Id*. at 662, A.2d 30. The Court of Appeals held that Cotillo assumed the risk of being injured by participating in the powerlifting competition. *Id*. at 671, A.2d 35. The Court reasoned that Cotillo, an experienced power lifter, knew the type of injury he

suffered was foreseeable, appreciated that risk, and accepted that risk by his participation in the competition. *Id.*

We conclude that the close question of assumption of the risk was considered properly by the jury in this case. *Belleson* and *Whitt*, relied on by Wilson, appear to us to be distinguishable from the present factual scenario. The Court of Appeals, in *Belleson*, rejected application of assumption of the risk in a case that bears some factual similarity to the present case, but did not elaborate its reasoning why the doctrine should not apply there. Instead, the Court disposed of the issue quite summarily, in a four-sentence paragraph. The primary issues in *Belleson* were the trial court's application of contributory negligence as a matter of law (i.e., the trial judge refused to grant the plaintiff's motion for a directed verdict), and the reciprocal rights doctrine, whereas the virtually sole issue on appeal here is assumption of the risk being submitted to a jury. The Court did not give any direction or guidance as to why assumption of the risk does or did not apply (or what facts or factors might cause a different outcome), in conjunction with contributory negligence, in a pedestrian versus car case or otherwise.

Whitt can be distinguished more easily. As Blain points out, *Whitt* does not hold nor support the notion that assumption of risk is not applicable in the present case because *Whitt* discusses contributory negligence as a matter of law, as opposed to assumption of the risk. Wilson attempts to extend *Whitt*'s logic by arguing that, although it does not address assumption of the risk, the case endorses the assertion that assumption of the risk is not applicable to a pedestrian walking on the shoulder or right side of the road with traffic approaching from the rear. Unfortunately, assumption of the risk is not mentioned at any

point in the opinion. As we discussed *supra* at page 5, contributory negligence is an inherent concept applicable in a negligence context. Assumption of the risk is not a negligence concept and may be applied independently in a given case.

On the other hand, the authorities offered-up by Blain strike us as more persuasive here. For example, *Saponari* is nearly indistinguishable factually, except that the pedestrian was struck by a train, as opposed to a car. The jury's findings with regard to negligence, contributory negligence, and assumption of the risk were identical to the outcome of the present jury trial. Contributory negligence and assumption of the risk were considered properly by the jury.

B. Was the trial court justified in instructing the jury on assumption of the risk?

Wilson does not challenge the legal content of the jury instructions on assumption of the risk, only that it was given at all. "We review a trial judge's decision whether to give a jury instruction under the abuse of discretion standard." *CSX Transp., Inc. v. Pitts*, 430 Md. 431, 458, 61 A.3d 767, 783 (2013). A jury instruction will be overturned only if it rises to the level of prejudicial error. *Id.*

The trial court did not err in instructing the jury on assumption of the risk. Applying the elements requisite to establish the affirmative defense of assumption of the risk,[7] giving the instruction to the jury was not an abuse of discretion. Because there was sufficient evidence before the trial judge to generate giving the jury instruction, there was sufficient

[7] *See supra* Page 4.

evidence for the fact-finder jury to find that Wilson assumed the risk on the morning of October 15 of being struck by a car.

Applying an objective standard, Wilson had knowledge of the danger of being struck by a car. First, it seems obvious that walking on a road or its shoulder, where no sidewalks exist, creates some danger of being struck by an oncoming car. Second, Wilson's position that morning vis a vis cars driving east on Ranch Road, i.e. with cars approaching from his rear where he could not see them ordinarily, increased the danger of being struck by a car.

Additionally, Wilson appreciated the risk objectively. As pointed out in *Saponari*, Wilson did not need to be aware of the specific car that struck him ultimately. Rather, Wilson needed only be aware that a car may hit him from behind. Aggravating the risk of danger was the position of the sun in relation to the direction of the parties' travel on the road that day. Wilson walked Ranch Road regularly. He was aware, according to his testimony, that it was a bright, sunny day on October 15, volunteering that he was eager to walk on such a beautiful day. The sun was rising in Wilson's field of vision, and likely in the eyes as well of any motorist traveling in the same direction as Wilson. Any adult would appreciate objectively the risk of oncoming cars traveling east on Ranch road at the scene of the accident.

Lastly, it is conceivable at least that Wilson confronted the danger. Although he may have crossed Ranch Road out of perceived necessity to skirt the construction site, the record is silent as to how many feet the construction site took-up on the north side of the road, nor does it explain why Wilson could not have crossed back over Ranch Road (after

he avoided the construction site) so as to confront vehicular traffic coming head-on. Adding to this, the parties' evidentiary conflict over whether Wilson was walking on the grassy side of the road or on its pavement when Blain's vehicle struck him was for the factfinder to sort-out.

C. Did the trial court err in denying Wilson's motions for judgment, judgment notwithstanding the verdict, or new trial?

We review a denial of a motion for judgment without deference to the trial court's decision, considering the evidence and reasonable inferences drawn from the evidence in the light most favorable to the non-moving party. *Torbit v. Balt. City Police Dep't*, 231 Md. App. 573, 587, 153 A.3d 847, 855 (2017). Denial of a motion for judgment notwithstanding the verdict is reviewed under the same standard as denial of a motion for judgment. *Prince George's Cty. v. Morales*, 230 Md. App. 699, 712, 149 A.3d 741, 748 (2016). We "may reverse the denial of . . . a JNOV only if the evidence . . . does not rise above speculation, hypothesis, and conjecture." *Morales*, 230 Md. App. at 712, 149 A.3d at 748 (internal quotations omitted).

The standard of review of the denial of a motion for new trial is abuse of discretion. *B-Line Med., LLC v. Interactive Dig. Sols.*, Inc., 209 Md. App. 22, 45, 57 A.3d 1041, 1054 (2012). Abuse of discretion has been described as:

> [W]here no reasonable person would take the view adopted by the trial court, when the court acts without reference to any guiding rules or principles or rules on untenable grounds, and where the ruling does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective.

Id.

We find no error in the denial of Wilson's motions for judgment and judgment notwithstanding the verdict. There was a dispute of fact regarding whether Wilson was walking in the road or on the grass when he was struck by Blain's car, precluding a motion for judgment. The jury was presented with properly-admitted testimony and demonstrative evidence from both sides regarding this dispute and other issues in the case. Because there were reasonable inferences that could have been drawn from the evidence, and the evidence and inferences rose above mere speculation, hypothesis, and conjecture, there was no error in denying Wilson's motions for judgment and judgment notwithstanding the verdict.

The trial judge did not abuse his discretion in denying Wilson's motion for new trial. As discussed previously, there was sufficient evidence to support the verdict reached by the jury, and so we shall not disturb it.

JUDGMENT OF THE CIRCUIT COURT FOR ST. MARY'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.