UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2599

September Term, 2014

RUBY LYLES

v.

JIMMY CHEUNG, ET AL.

Wright,
Kehoe,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: February 5, 2016

After every rainfall since March 2012, water leaked—or flooded—into Ruby Lyles's salon. She sued her landlord for breach of contract, her landlord counterclaimed for unpaid rent and joined the neighboring property owner, and Ms. Lyles filed a cross-claim in negligence against the neighbor. After a trial in the Circuit Court for Prince George's County, a jury found that the neighbors were negligent for not maintaining their roof, but that Ms. Lyles could not recover because she assumed the risk of her damages. The jury also found that the landlord did not breach the lease agreement by not repairing the wall Ms. Lyles's salon shared with the neighbor. Rather, the jury found Ms. Lyles in breach, and awarded the landlord $15,000 in unpaid rent. Ms. Lyles sought a new trial on both claims, and the circuit court denied the motion. She appeals and we affirm.

I. BACKGROUND

Ms. Lyles owned and operated the Color of Nails Salon and Barbershop from a space she rented (the "Property") in a Prince George's County strip mall. Ms. Lyles had rented the Property from Jimmy Cheung since 2003, and the parties memorialized their agreement in a lease agreement. The adjacent mall property is owned by F.G. Development Corp., Inc. ("F.G. Development") and occupied by appellee Community Outreach and Development CDC ("Community Outreach"), a non-profit support center that provides community assistance to low income individuals.

In March 2012, Ms. Lyles complained to Mr. Cheung that water was leaking into the Property. Mr. Cheung replaced the roof in May 2012 and made repairs. The parties then renewed their lease agreement for a three-year term effective July 1, 2012. The lease agreement provides that Mr. Cheung shall be responsible for the roof, exterior walls, and

structural foundations of the Property, but also that the landlord shall not be responsible for any damage to Ms. Lyles or the Property. In addition, it permits Ms. Lyles to vacate the premises in the event that Mr. Cheung cannot remedy a problem, but does not allow her to withhold rent as a solution. Other relevant provisions of the lease are discussed below.

In October 2012, rain from Hurricane Sandy leaked into the Property. At this time, Ms. Lyles ceased paying rent, and had yet to make a rent payment as of the date of trial, although she continued to operate her business. Ms. Lyles notified Community Outreach and F.G. Development that the Property was leaking, then contacted the Prince George's County Department of Permits, Inspection and Enforcement (the "Department"). A property standards inspector spoke to Ms. Lyles numerous times, visited the Property, and issued several citations to Community Outreach and F.G. Development directing them to repair their roof. By the end of that year, the repairs were made, but water nevertheless continued to leak in.

Ms. Lyles brought suit against Mr. Cheung in circuit court on October 7, 2013. She alleged breach of contract (the lease) and claimed $75,000 in economic damages; she also demanded a jury trial. Mr. Cheung counterclaimed for unpaid rent, including a stipulated late fee of 5%. Ms. Lyles's last rent payment was in September 2012, and the unpaid rent and fees totaled $36,855 at the time of trial. Mr. Cheung also filed a third-party complaint against Community Outreach and F.G. Development, alleging that their negligence in failing to maintain their roof caused Ms. Lyles's damages. Ms. Lyles completed the circle by bringing a cross-claim, also in negligence, against the third-party defendants. Among

their defenses to the third-party and cross-claims, Community Outreach and F.G. Development argued—without objection from Ms. Lyles, either to the defense or corresponding jury instructions—that Ms. Lyles had assumed the risk of harm by continuing to operate her business in the Property.

In December 2014, after a two-day trial, the jury found that Community Outreach and F.G. Development were negligent and that Ms. Lyles was not contributorily negligent, but that Ms. Lyles assumed the risk. The jury also found that Mr. Cheung had not breached the lease, but that Ms. Lyles *had* breached the lease by failing to pay rent, and awarded Mr. Cheung $15,000 in damages.

Ms. Lyles moved for a new trial, arguing that the jury misapplied the doctrine of assumption of risk and wrongfully found Mr. Cheung was not in breach of their contract. In a written order denying the motion, the trial court cited *Poole v. Coakley & Williams Construction, Inc.*, 423 Md. 91 (2011), for the proposition that the question of whether a plaintiff knew of and appreciated a danger, *i.e.*, assumed a risk, is a question for the jury, and only becomes a matter of law when the undisputed facts lead to but one reasonable conclusion. The court stated that "[t]his is a jury's call and not the court's to make. The court, having heard the evidence, finds that reasonable persons could have differed as to the jury's conclusion and will not invade the providence of the jury to be finders of fact." As to the breach of contract claim, the court ruled that the issue of "[w]hether [Mr. Cheung's] repairs were sufficient to merit a finding of breach of contract[] w[as] adequately presented and argued to the jury." Ms. Lyles filed a timely notice of appeal.

II. DISCUSSION

Ms. Lyles's appellate contentions[1] are not a model of clarity—her brief actively conflates questions about the sufficiency of the evidence, the correctness of the jury's verdict, and the circuit court's denial of the motion for new trial. Because, however, her motion for a new trial was filed within ten days of the initial entry of judgment, we will construe her notice of appeal as challenging both the original judgment and the denial of the motion for new trial, *see* Maryland Rule 8-202(c), and address her arguments as to both of the trial court's decisions.

A. The Jury's Verdict Was Supported By The Evidence.

First, Ms. Lyles complains that the jury misapplied the assumption of risk defense to her negligence claim, and that the jury could not have reasonably concluded that she breached the lease agreement while Mr. Cheung did not. Putting aside the very real question in our minds about whether the assumption of risk defense even applies to the sort

[1] Ms. Lyles phrased the issues as follows:

> 1. Did the jury misapply the doctrine of assumption of risk to the facts, documents and testimony of the case contrary to the instructions from the Court, to the weight of the evidence and against the evidence?
>
> 2. Was the jury's finding that Lyles breached the Contract, but Cheung did not breach the contract against the weight of evidence and the evidence that was admitted into the record?
>
> 3. Did the trial court err in not granting Plaintiff's Motion for New Trial?

of negligence alleged in this case,[2] we look at whether, "on the facts adduced at trial viewed most favorably to [the prevailing] party, any reasonable fact finder could find the existence of the elements of the cause of action by a preponderance of the evidence." *Univ. of Md. Med. Sys. Corp. v. Gholston*, 203 Md. App. 321, 329 (2012) (citing *Hoffman v. Stamper*, 385 Md. 1, 16 (2005)), and find no error.

1. The evidence supported the jury's finding that Ms. Lyles assumed the risk.

Although the jury found that Community Outreach and F.G. Development were negligent, it also found that Ms. Lyles assumed the risk of her damages, and that finding barred her from recovering. Ms. Lyles contends that there was insufficient evidence to support this finding, that the jury should have used this doctrine to reduced her recovery rather than bar it, that the jury should have indicated exactly when Ms. Lyles assumed the risk, and that this doctrine did not apply to the time of the first flooding in March 2012. We disagree.

[2] The assumption of risk defense is most often asserted in cases such as slip-and-falls, *see, e.g., Thomas v. Panco Mgmt. of Md., LLC*, 423 Md. 387, 395-99 (2011), or sports injuries, *see, e.g., Kelly v. McCarrick*, 15 Md. App. 82, 96-97 (2004), and our research has failed to uncover any reported case applying it in a situation like this. That said, Ms. Lyles never objected to the assertion of this defense in the trial court, nor to the court's instruction to the jury on that defense, and her brief in this Court expressly concedes the point. *See* Appellant's Br. at 10 ("It is not disputed by the Plaintiff that assumption of risk is a bar to recovery in Maryland" and "Plaintiff does not have any problem with the trial court giving an assumption of risk instruction, but only the application of this law to the facts and evidenc[e] admitted at trial . . . "). As such, any objection was waived, but our analysis of the issue should not be read as acknowledging, let alone holding, that the defense should have survived a timely challenge in the circuit court.

An assumption of risk defense requires the defendant to prove three elements: (1) that the plaintiff had knowledge of the risk of the danger; (2) that the plaintiff appreciated that risk; and (3) that the plaintiff voluntarily confronted the risk of danger. *Thomas v. Panco Mgmt. of Md., LLC*, 423 Md. 387, 395 (2011) (citing *ADM P'ship v. Martin*, 348 Md. 84, 90-91 (1997)). The record contains ample evidence to establish each of these elements. Ms. Lyles knew of the leak since March 2012 when the Property first flooded. She renewed her lease in May 2012 and continued to operate her business out of the Property. She did not notify Community Outreach and F.G. Development of the leak until October 2012, at which time they began repairs. She refused entry to repairmen, was combative with them, failed to keep any record of the alleged loss, declined her contractual right to vacate the property, and failed to procure insurance as required under her lease. The jury reasonably found that Ms. Lyles assumed the risk of water damage to her business and property.

Ms. Lyles concedes that "[i]t is not disputed by the Plaintiff that assumption of risk is a bar to recovery in Maryland," citing MPJI-Cv 19:13, which states that "[a] plaintiff cannot recover if the plaintiff has assumed the risk of the injury." Later in her argument, though, Ms. Lyles complains that the jury should have applied assumption of risk merely to reduce her recovery. But the jury was not asked to parse her damages in this manner, and appropriately so: if it applies, assumption of risk serves as a complete bar to a plaintiff's recovery. *See, e.g.*, *ADM P'ship v. Martin*, 348 Md. 84, 91 (1997); *Schroyer v. McNeal*, 323 Md. 275, 282 (1991); *Boddie v. Scott*, 124 Md. App. 375, 380 (1999); *Bliss v. Wiatrowski*, 125 Md. App. 258, 272 (1999); *Pfaff v. Yacht Basin Co., Inc.*, 58 Md. App.

348, 354 (1984). Similarly, the jury was never asked to make a finding about when she had knowledge of the risk—the verdict sheet asked only the thumbs-up-or-down question about whether she assumed the risk, and counsel neither objected to this formulation nor proposed a verdict form that contained more granular questions. Moreover, Ms. Lyles acknowledges that "there was a point between [] March 2012 and December 2014 whe[n] the Plaintiff should have taken appropriate actions to leave the Property . . . ," which by itself seems to concede the existence of evidence to support an assumption of risk at some point in that not-quite-three-year period.

2. The evidence supported the jury's findings that Mr. Cheung didn't breach the lease but that Ms. Lyles did.

Next, Ms. Lyles challenges the jury's findings on her breach of contract claim against Mr. Cheung. *Her* claim turned on the "Care and Maintenance of Premises" provision of the lease, which states that "Tenant shall be responsible for all repairs required, excepting the roof, exterior walls, [and] structural foundations which shall be maintained by Landlord." She argues that this care and maintenance provision, coupled with the testimony that the damaged wall was not fully restored, required *ipso facto* a finding that Mr. Cheung breached the contract. The question for us is not whether the jury was right or wrong, of course, but whether the evidence introduced at trial, viewed in the light most favorable to the winner, was sufficient. And again, it was.

The evidence presented at trial readily supported a finding that Mr. Cheung did not breach the lease agreement. Most obviously, the jury could have found that Mr. Cheung complied with any duty he had to repair the Property. He replaced the roof, including

installing brand new fittings, within 60 days of first learning of the leaks, at a cost of $19,000, and he continued to work with his tenant, his subcontractors, and his neighbors to remedy the problem. Indeed, Ronald Shane, a property standards inspector from the Department, testified that he had visited the Property and found problems with the adjoining property, not Mr. Cheung's:

> Well, . . . the roof over her store I inspected and that was a fairly new roof. It was dry. There wasn't any debris or anything up there, that was it. So the roof adjoining her property, . . . that one was in . . . disrepair, lack of repair and there was debris up there, there was vegetation growing through the actual tar, tar paper. I mean the roots had to be going down, so there was quite a bit of debris.

And Ms. Lyles herself testified that Mr. Cheung helped her clean her salon after the flooding. Both parties recounted times when Mr. Cheung (and agents of the adjoining property) sent repairmen to the Property to repair the damaged wall. Although Ms. Lyles insisted that she allowed the workers to enter each time, Mr. Cheung, a representative of F.G. Development, and hired repairmen testified that Ms. Lyles refused to let workers on the Property, or would become irate and force them to leave prior to finishing their job. The jury also heard testimony that under the lease's indemnification and insurance provisions, Mr. Cheung was not liable to her for any damage to the Property, and that she had agreed "to hold [Mr. Cheung] harmless from any claims for damages, no matter how caused." However the jury might have gotten there, the evidence readily supported its conclusion that Mr. Cheung had not breached the lease.

The evidence even more clearly supports the jury's finding that Ms. Lyles breached her lease obligations. First things first: there was no dispute that she stopped paying rent in September 2012 and that, at the time of trial, she owed more than $36,000. The lease provided as well that if Ms. Lyles complained of a problem and Mr. Cheung failed to fix the problem within 60 days, she could vacate the Property. But she never did. To the contrary, after the wall remained in disrepair, Ms. Lyles continued operating her business in the Property without paying rent, a self-help strategy the lease did not authorize. On top of that, the lease's insurance clause also required Ms. Lyles to obtain property damage insurance, and it is undisputed that she never did.

As Mr. Cheung aptly characterizes the argument, "Ms. Lyles further invites this court to infer that the jury's failure to award Mr. Cheung his full measure of damages means that [the] jury's findings were illogical and inconsistent and thus must be overruled." If anything, the jury's decision to cut her undisputed rent obligation by $19,000 (coincidentally, the amount Mr. Cheung paid to repair the roof) suggests, especially in light of its assumption of risk finding, that it wanted to cut Ms. Lyles some sort of break. But we need not, and will not, speculate about why the jury reached a particular result or how it weighed any particular theory or evidence. It is enough for present purposes that the evidence supported the jury's verdicts on both sets of claims.

B. The Circuit Court Did Not Abuse Its Discretion In Denying A New Trial.

Ms. Lyles also argues that the trial court err in not granting her Motion for New Trial. A trial court may grant a motion for a new trial "where the verdict is against the

evidence or the weight of the evidence." *Thodos v. Bland*, 75 Md. App. 700, 708, *cert. denied*, 313 Md. 689 (1988). "Motions for new trial on the ground of weight of the evidence are not favored and should be granted only in exceptional cases, when the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to let the verdict stand." *Yorke v. State*, 315 Md. 578, 583 (1989). The party requesting a new trial bears the burden of persuading the court that the alleged error had a "substantial likelihood of causing an unjust verdict." *Isley v. State*, 129 Md. App. 611, 619 (2000), *rejected on other grounds*, 367 Md. 17 (2001). And we review the decision to grant or deny a motion for a new trial for abuse of discretion. *Mason v. Lynch*, 151 Md. App. 17, 28 (2003), *aff'd*, 388 Md. 37 (2005).

Ms. Lyles offers no distinct argument on this point beyond the final sentence of the argument section of her brief, which states in bold font: "For all of the aforementioned reasons, the trial court erred in not granting Plaintiff's Motion for New Trial." And having found the jury's verdicts appropriately supported by the evidence, we could stop there.

Even so, we see no basis on which to find an abuse of discretion from the court's decision not to grant a new trial. This case narrowly escaped the defendants' motion for judgment, and the record reveals considerable uncertainty about Ms. Lyles's proof of causation and damages. Ms. Lyles offered no expert testimony on the issue, nor did any witness offer conclusive testimony as to which roof (if either) caused the water damage, or any sound opinion that the neighbors' repairs were faulty. The County Inspector, called to testify by Ms. Lyles, stated that Mr. Cheung had a new roof and that the adjoining property

had a defective roof, but he also indicated that there could be other reasons for water leaking. In response, counsel tried to change theories:

> [COUNSEL FOR PLAINTIFF]: I'm just going to throw res ipsa out there, Your Honor; there's—
>
> THE COURT: You didn't plead it.
>
> . . .
>
> THE COURT: Yea, I'm not going to go with the res ipsa because they didn't have exclusive control. Your folks did, she had, she was the tenant. She had control over it, they didn't. They were a landlord. Res ipsa is not applicable here, okay.
>
> . . .
>
> THE COURT: . . . I haven't heard that the repair that was . . . faultily done, I haven't heard that there was a structural—

The circuit court denied the defense's motion, but expressed concern about the proof of damages:

> THE COURT: Damages, she testified to a little bit of it, not a lot of it, so that, that, that one I'm not going with.
>
> . . .
>
> Okay. I'm going to have to ponder about it and think about it. Yeah, there probably is a scintilla here, ever so slight, so the motion will be denied.

Ms. Lyles provided no expert accounting testimony, no receipts, no client lists, no daily log of damages, no tax returns, no proof of income, no testimony from stylists who became unable to rent a booth due to the flooding, and no testimony from clients who were unable to patronize the salon due to flooding. Mark Robinson, a contractor hired by Community Outreach to make multiple repairs on the Property, testified that the work stations were "old" and that nothing was new, and disputed Ms. Lyles's characterization of the property she lost:

> [MR. ROBINSON]: [B]ut the things she wanted, she wanted an upgrade. She didn't want the same stations.
>
> [COUNSEL FOR DEFENDANT]: She wanted new stations?
>
> [MR. ROBINSON]: Not just new stations, an upgrade stations. New upgrade.
>
> [COUNSEL FOR DEFENDANT]: Things she didn't have before?
>
> [MR. ROBINSON]: Right.

Additionally, Eric Glasgow, one of Mr. Robinson's employees who repaired the Property, testified as to how Ms. Lyles acquired some of the beauty chairs for her salon damaged: he recalled cleaning out other properties in the same shopping center, and giving—for free—a few beauty chairs to Ms. Lyles, chairs which were among the damaged property for which she sought to recover. Ms. Lyles didn't provide proof, or even an estimate, of when she purchased the "brand new" chairs, couldn't remember how many of each item she bought, and had no receipts or bills for any purchases.

The evidence fairly got the case to the jury. But the court could well have decided to grant the motion for judgment, and all of the jury's decisions fell well within the range of reasonable outcomes on this record. We find no abuse of discretion in the court's decision to deny the motion for a new trial.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.