Circuit Court for Calvert County
Case No. C-04-CV-17-000076

UNREPORTED*

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 554

September Term, 2018

GREGG BAILEY, et al.,

v.

MICHAEL MUSUMECI, et al.

Berger,
Friedman,
Gould,

JJ.

Opinion by Gould, J.

Filed: July 9, 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.

Eliza Bailey, driving on her provisional license, lost her life when the car she was driving was hit by a truck driven by Michael Musumeci. The circumstances surrounding this heartbreaking tragedy implicate the Boulevard Rule, the application of which resulted in summary judgment in favor of Mr. Musumeci. Under this rule, a driver who enters an intersection from a road controlled by a stop sign, as Eliza did, is negligent as a matter of law if she fails to yield the right-of-way to oncoming traffic and that failure causes an accident. This negligence cannot be excused even when the car that hits her is traveling at an unlawful speed *if* the accident could not have been avoided had the car been going slower.

The central issues in this appeal are whether the Boulevard Rule was correctly applied by the circuit court in its finding that Eliza was contributorily negligent as a matter of law and whether the summary judgment record contained any evidence that Mr. Musumeci's alleged speeding was a proximate cause of the crash. Constrained as we are by the undisputed facts of record and the governing principles of law, we must affirm.

BACKGROUND

Eliza was driving westward on Mt. Harmony Road when she reached a stop sign at the intersection with Route 4. At the same time, Mr. Musumeci was driving his employer's truck in the leftmost northbound lane of Route 4, a four-lane highway. As Mr. Musumeci approached the intersection, a black SUV traveling southbound on Route 4 turned left directly in front of Mr. Musumeci's vehicle. Almost simultaneously, Eliza's vehicle emerged from Mt. Harmony Road. Mr. Musumeci's vehicle collided with Eliza's vehicle

where Mt. Harmony Road meets the leftmost northbound lane of Route 4. The crash claimed Eliza's life.

Eliza's parents, Gregg and Shauna Bailey (the "**Baileys**"), filed suit against Mr. Musumeci and his employer in the Circuit Court for Calvert County on claims grounded in negligence.[1] The circuit court granted summary judgment in favor of Mr. Musumeci, holding that, because Eliza was required to yield the right-of-way to cars traveling on Route 4, she was contributorily negligent as a matter of law when she entered the intersection. The court further held that Eliza's negligence was not excused by the doctrine of last clear chance, which applies if a defendant has an opportunity to avoid an accident after the plaintiff's original negligent act. It reasoned that: 1) there was no evidence suggesting that Mr. Musumeci was negligent in not avoiding the accident; and 2) Eliza's negligence continued up until the time of the accident.

The Baileys noted a timely appeal.

DISCUSSION

The Baileys contend that the circuit court erred when it found, as a matter of law, both that Eliza was contributorily negligent and that Mr. Musumeci was not negligent. The Baileys argue that the circuit court: 1) failed to apply Maryland's presumption of due care to Eliza's conduct; 2) ignored evidence sufficient to create an issue of fact as to whether

[1] For ease of reference, we will refer to Eliza's parents, Gregg and Shauna Bailey, as the "**Baileys**," and Eliza Bailey as "**Eliza**." We will refer to both defendants collectively as "**Mr. Musumeci**."

Mr. Musumeci was negligent; and 3) erred in its refusal to apply the doctrine of last clear chance to overcome the dispositive effect of contributory negligence.[2]

We review an order granting summary judgment de novo. Wooldridge v. Price, 184 Md. App. 451, 457 (2009) (quotation omitted). In doing so, we must first determine whether there was a genuine dispute of material fact—a fact that would affect the outcome of the case—on the summary judgment record. Id. at 457-58. If there is no genuine dispute of material fact, we must determine whether the circuit court reached the correct legal result. See Windesheim v. Larocca, 443 Md. 312, 326 (2015).

I. WAS ELIZA CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW?

We must first determine whether the trial court was correct in finding that Eliza was contributorily negligent as a matter of law. We conclude that because Eliza violated the Boulevard Rule by failing to yield to oncoming traffic on Route 4, and because this violation is not excused by any conduct on the part of Mr. Musumeci, the trial court was correct. Further, the presumption of due care is inapplicable where, as here, the record evidence of the decedent's conduct is undisputed.

a. FAILURE TO YIELD THE RIGHT-OF-WAY

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[2] The Baileys raise three questions for our review:

1. Did the trial court err in ruling that Appellant was contributorily negligent as a matter of law without considering Maryland's presumption of due care?

2. Did the trial court err in ruling that Appellee was not negligent as a matter of law where there was evidence from which a lack of reasonable care could be inferred?

3. Did the trial court err in determining that the doctrine of last clear chance was inapplicable?

The material facts in this case are undisputed. Both the police officer who investigated the accident and the parties' experts concluded that Eliza failed to yield the right-of-way to the vehicles traveling on Route 4, and the Baileys' expert even admitted that the duty to yield continued until the collision. Similarly, each of the experts, as well as the investigating police officer, confirmed that this failure to yield the right-of-way caused the accident. As such, it is undisputed that Eliza's failure to yield the right-of-way was the cause of the accident.

b. APPLICATION OF THE BOULEVARD RULE

The circuit court found that by failing to yield the right-of-way, Eliza violated the Boulevard Rule. We agree.

The Boulevard Rule was developed in the early 1930s. Dean v. Redmiles, 280 Md. 137, 144 (1977). It was designed "to give preference to drivers on highways when they encounter other drivers attempting to enter or cross through highways," and makes it possible for individuals traveling on main roads to avoid slowing down at every intersection to check for oncoming traffic. See Myers v. Bright, 327 Md. 395, 398 n.1 (1992); Creaser v. Owens, 267 Md. 238, 246 (1972) (quotation omitted).

The rule has since been codified at Md. Code Ann., Transp. ("**TR**") § 21-403 (2012). This statute requires the driver of a car approaching an intersection from a road controlled by a stop or yield sign (the "**unfavored**" road) to stop at the entrance of the intersection and yield the right-of-way to cars traveling on the main road (the "**favored**" road).[3] This

[3] TR § 21-403(c) states:

duty continues uninterrupted until the unfavored vehicle is no longer in the intersection. See, e.g., Creaser, 267 Md. at 244-45.

The Boulevard Rule has evolved over time such that a failure of the unfavored driver to yield the right-of-way will not provide an absolute defense to the favored driver if the favored driver was driving unlawfully and such unlawfulness was the proximate cause of the accident.[4] Mallard v. Earl, 106 Md. App. 449, 457 (1995) (citation omitted) ("The rule still holds the unfavored driver liable for a collision if the favored driver's unlawful conduct was not a proximate cause of the collision."); see also Barrett v. Nwaba, 165 Md. App. 281, 292 (2005) (emphasis added) (change in the Boulevard Rule "eased the sometimes harsh effects of an absolute application of the boulevard rule by relieving an unfavored driver of liability *where the evidence established that the favored driver's unlawful conduct was a proximate cause of the collision*").

> (c) If a stop sign is placed at the entrance to an intersecting highway, even if the intersecting highway is not part of a through highway, the driver of a vehicle approaching the intersecting highway shall:
>
> > (1) Stop in obedience to the stop sign; and
> >
> > (2) Yield the right-of-way to any other vehicle approaching on the intersecting highway.

[4] In 1971, the General Assembly amended its definition of "right-of-way" to "the right of one vehicle or pedestrian to proceed *in a lawful manner* on a highway in preference to another vehicle or pedestrian," restricting the application of the Rule to favored individuals driving lawfully. Mallard, 106 Md. App. at 457 n.3 (emphasis in original). "Consequently, the rule no longer affords *absolute protection* to the favored driver who is driving in an unlawful manner." Id. at 457 (emphasis added) (citations omitted).

The application of the Boulevard Rule to the undisputed facts of this case is straightforward: Eliza did not yield the right-of-way to the northbound traffic on Route 4 and hence violated the Boulevard Rule, and her violation of the Boulevard Rule proximately caused the crash. As a matter of law, therefore, Eliza was contributorily negligent.

The Baileys rely on Grady v. Brown, 408 Md. 182 (2009) in contending that an unfavored driver who enters a favored road without yielding completely may be found not negligent if her view of oncoming traffic was obstructed. However, Grady neither stands for that proposition nor presents similar facts to the present case.

In Grady, an accident occurred when the plaintiff, traveling on the favored road, collided with the defendant, who was pulling out of an alley. Id. at 185. The Court of Appeals held that the defendant was not negligent in "inching up and stopping his vehicle parallel to the parked cars, before he entered the traveled portion of the roadway, in order to get a view of the traffic on the highway." Id. at 197. The Court pointed out that the Boulevard Rule was not violated where the defendant did not encroach on the traveled portion of the road, and thus did not fail to yield the right-of-way to oncoming traffic. See id. at 197 n.4. The Court did not hold, as the Baileys suggest, that an unfavored driver may permissibly fail to yield the right-of-way when her view is obstructed. Nor is this a situation where Eliza "inched up" to Route 4 to get a better view of oncoming traffic. On the contrary, Eliza had already passed through the shoulder and the right northbound lane when she was hit by Mr. Musumeci's vehicle. Grady is of no help to the Baileys.

The circuit court correctly found that Eliza was contributorily negligent as a matter of law. Thus, unless the summary judgment record included admissible evidence that Mr. Musumeci was driving unlawfully, and that such unlawfulness was also a cause of the fatal crash, Eliza's contributory negligence bars the Baileys' claims. See Creaser, 267 Md. at 245. We turn to that issue next.

c. *MR. MUSUMECI'S ALLEGEDLY UNLAWFUL CONDUCT*

The Baileys argue that Mr. Musumeci failed to exercise due care when approaching the intersection by traveling at 11 miles over the speed limit and failing to apply his brakes.[5] Assuming solely for the sake of argument that such conduct is "unlawful" for purposes of the Boulevard Rule, the dispositive question is whether a reasonable jury could find on the summary judgment record that such actions were the proximate cause of the accident. We hold that it could not.

Only the rarest of Boulevard Rule cases create an issue of fact about whether the speed of a favored driver proximately caused the accident. Redmiles, 280 Md. at 150. In all other cases, the court may properly conclude, as a matter of law, that the favored driver's speed was not a proximate cause. Myers, 327 Md. at 403. Conjecture and speculation that

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[5] At oral argument, the Baileys also asserted that Mr. Musumeci's familiarity with Route 4—in other words, that he knew that the road presented many hills and obstructed views—could have provided another basis for a finding that his excessive speed constituted negligence. However, as described below, Mr. Musumeci's speed could not have been a proximate cause of the accident, and thus this conduct, whether negligent or not, does not overcome Eliza's contributory negligence.

"the accident might have been caused by the alleged speeding is insufficient to send the case to the jury." Id.

Our opinion in Mallard is instructive and supports the conclusion that, as a matter of law, Mr. Musumeci's speed and alleged failure to apply his brakes could not have been a proximate cause of the accident. In Mallard, as in this case, the plaintiff claimed that the favored driver (Mallard) had been speeding and failed to apply the brakes, even though he had seen the unfavored driver (Hall) from as much as 200 feet away. 106 Md. App. at 465. We reversed the jury's finding of negligence. Id. at 467. First, noting Mallard's speed and location at the time he first saw Hall, we reasoned that he would have had only four seconds to react; thus, "from the moment Hall created the hazard, Mallard had precious little time in which to avoid a collision." Id. at 465. Our explanation in Mallard of why such evidence was insufficient to find negligence on the part of a favored driver is particularly apt here:

> Moreover, in order to reach appellees' conclusion, the jury would have had to engage in precisely the sort of "nice calculations of speed, time or distance" that the Boulevard Rule was designed to avoid. As the Court said in Redmiles, "it is only in a rare instance in our cases involving the boulevard law where it may fairly be said that the speed of the favored driver was a proximate cause of the accident in such manner that the question should be considered by the jury." Clearly, Mallard had no duty to anticipate that Hall would not remain in the westbound lanes, until Mallard passed, or that Hall would utterly fail to yield the right of way. As there was no expert testimony concerning the amount of time or the number of feet it would have taken Mallard to decelerate safely, the jury would have had to engage in rank speculation to determine whether Mallard's failure to brake was the proximate cause of the collision.

Id. at 465–66 (internal citations omitted). Other cases have reached the same conclusion. See Myers, 327 Md. at 406 (where the "accident happened very quickly" and there was no

evidence that the favored driver's speed "deprived her of an opportunity to take some action to avoid the collision," the favored driver was not negligent as a matter of law); Creaser, 267 Md. at 244 ("However, until [the unfavored driver enters the flow of favored traffic], neither excessive speed by the favored driver nor the obstructed vision of the unfavored driver will be heard as an excuse for his failure to yield the right of way").

The evidence in this case is, if anything, less compelling from the plaintiffs' perspective than the evidence found wanting in Mallard. According to his expert, who was unrebutted on this point, Mr. Musumeci only had approximately two seconds to react. Even the Baileys' expert conceded that the accident happened "very quickly" and that he had no reason to doubt that Eliza "came out of nowhere":

> Q: You don't [doubt Mr. Musumeci's version of events]?
>
> A: No, I don't have any question whether he's accurate or not. He's driving up the road, she came out of nowhere. Why would I dispute that[?] It looks like that's exactly what happened.

In addition, the Baileys' expert did not opine as to how Mr. Musumeci's speed could have caused the accident, or more precisely, how the accident would have been avoided had he kept to the speed limit. The Baileys came forward with no evidence that had Mr. Musumeci been going slower or applied his brake, he would have avoided the collision. Thus, there is no evidence from which a jury could reasonably conclude that Mr. Musumeci's allegedly unlawful conduct deprived him of the chance to avoid the collision. As such, the circuit court did not err in finding that Mr. Musumeci's conduct did not cause the accident.

The Baileys point to Malik v. Tommy's Auto Serv., Inc., 199 Md. App. 610 (2011), and Mayor & City Council of Baltimore v. Stokes, 217 Md. App. 471 (2014), to support the notion that the trial court should have allowed a jury to consider whether Mr. Musumeci was negligent. But neither of those cases suggest that speed or a failure to apply brakes could be the proximate cause of an accident like the one we have here. Instead, these cases merely stand for the unremarkable proposition that, where there is some evidence of negligence on the part of a driver that could have caused an accident, it is sufficient to create a jury question. See Stokes, 217 Md. App. at 499 (finding that there was evidence of negligence on the part of the defendant); Malik, 199 Md. App. at 621-23 (finding that the evidence could have showed that the plaintiff had seen the defendant in the roadway but nevertheless tried to "dart" in front of him). Here, as explained above, Mr. Musumeci's alleged negligence could not have been the proximate cause of the collision.

Nor are the Baileys' references to Gresham v. Comm'r of Motor Vehicles, 256 Md. 500 (1970) (or more precisely, to an opinion cited within Gresham itself) any more convincing. In Gresham, two unidentified vehicles killed a pedestrian as he was walking in a crosswalk. Id. at 501-02. The Court of Appeals, which did not analyze the case within the framework of the Boulevard Rule, found that the evidence that the cars had accelerated rapidly to the intersection and collided with the pedestrian to throw him up in the air was sufficient to create a jury question as to whether the drivers entered the intersection with due care. Id. at 511. Whether such negligence was the proximate cause of the collision was not an issue. In contrast to those facts, there is no evidence here that, even if Mr.

Musumeci had been traveling at the speed limit and had applied his brake when he first saw Eliza's vehicle, he would have been able to avoid the collision.

As such, the Boulevard Rule applies, and the circuit court correctly found Eliza contributorily negligent as a matter of law.

d. THE PRESUMPTION OF DUE CARE

Notwithstanding the evidence of Eliza's contributory negligence, the Baileys argue that the "presumption of due care" should operate to create a jury question as to her negligence. This presumption assumes that a party will act with due care as to her own safety. See McQuay v. Schertle, 126 Md. App. 556, 596-97 (1999) (citations omitted). "When the decedent's conduct at the time of the accident is in dispute and his actions cannot be established by evidence other than his own obviously unavailable testimony, the presumption of due care fills the evidentiary void created by his absence." Id. at 604. On the other hand, when "the conduct of the decedent prior to the accident has not been in dispute," the presumption does not apply. See id. at 605 (collecting cases).

The Baileys have waived this argument by failing to present it to the circuit court. See Md. Rule 8-131(a). Even if the argument had not been waived, the presumption is not applicable because the relevant "conduct of the decedent" is not in dispute: Eliza failed to yield the right-of-way to the vehicles traveling on Route 4, as was required by law. Nobody

disputes that; not even the Baileys' expert. Accordingly, the presumption of due care does not apply here.[6] See McQuay, 126 Md. App. at 605.

II. DOES THE DOCTRINE OF LAST CLEAR CHANCE APPLY?

The Baileys contend that the circuit court should have applied the doctrine of last clear chance to avoid the fate made mandatory by the finding of contributory negligence. The last clear chance doctrine applies if: 1) the defendant was negligent; 2) the plaintiff was contributorily negligent; and 3) then a new occurrence "affords the defendant a fresh opportunity (of which he fails to avail himself) to avert the consequences of his original negligence." Burdette v. Rockville Crane Rental, Inc., 130 Md. App. 193, 216 (2000) (quotation omitted); see also Creaser, 267 Md. at 245 ("if the unfavored driver is a plaintiff, his suit is defeated unless the doctrine of last clear chance rescues his claim"). "For the doctrine to apply, the acts of the respective parties must be sequential and not concurrent." Burdette, 130 Md. App. at 216 (citations omitted).

The Court of Appeals' decision in Meldrum v. Kellam Distrib. Co., 211 Md. 504, 512 (1957) is applicable here. In Meldrum, the unfavored driver was hit by oncoming traffic while trying to make a left turn. 211 Md. at 507. At trial, the favored driver admitted

[6] It is not clear what fact could have been established had the presumption of due care been applied. Is it that Eliza did not enter the intersection while there were cars travelling on Route 4? That can't be; the very location of the accident itself—which is undisputed—shows that she *did* enter the intersection while cars were approaching. In contrast, in Gresham, the Court of Appeals allowed the presumption of due care to create a jury issue, in the absence of countervailing evidence, on whether the decedent had been walking across the intersection with a favorable light and within the cross walk. Gresham, 256 Md. at 504-05. There, the occurrence of the accident in and of itself did not establish either of these two facts, thus allowing the presumption to fill the evidentiary gap.

that he was traveling above the speed limit at the time of the collision. Id. at 509. In overturning the trial court's decision to permit the jury to consider the last clear chance doctrine, the Court determined that the doctrine was inapplicable because there was no evidence that he had "a clear chance to avoid injury to the plaintiff's truck by the exercise of ordinary care" after the unfavored driver's negligent act. Id. at 513. Moreover, the Court found that, even assuming the favored driver had been negligent, the negligence of the unfavored driver was "concurrent" in that it "continued until the happening of the collision." Id.

As in Meldrum, Eliza's failure to yield the right-of-way to traffic was concurrent with any (assumed) negligence on the part of Mr. Musumeci, as it continued up to and through the collision. See, e.g., Creaser, 267 Md. at 240 (citation omitted) (duty to yield the right-of-way continues until the unfavored driver "becomes a part of the flow of favored travellers or successfully traverses the boulevard"). Similarly, because it was undisputed that Mr. Musumeci had little, if any, time to react to Eliza's car when she emerged from Mt. Harmony Road, Mr. Musumeci did not have a "fresh opportunity" to avoid the collision. Accordingly, the circuit court correctly determined that the last clear chance doctrine did not apply.

CONCLUSION

Eliza's failure to yield the right-of-way to traffic on Route 4 constituted contributory negligence as a matter of law. This negligence was not excused by Mr. Musumeci's conduct, which was not the proximate cause of the accident. Nor do the facts of this case

permit the application of the last clear chance doctrine. As such, we find no error in the circuit court's decision to grant summary judgment to Mr. Musumeci.

JUDGMENT OF THE CIRCUIT COURT FOR CALVERT COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANTS.