Circuit Court for Baltimore City
Case No. 24-C-16-000610

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 754

September Term, 2017

MEI CHIU, et al.

v.

HARBOR EAST PARCEL C-COMMERCIAL LLC, et al.

Meredith,
Graeff,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: July 11, 2019

Appellants Mei Chiu and Tom Chiu filed a lawsuit in the Circuit Court for Baltimore City against Harbor East Parcel C-Commercial, LLC ("Harbor East"), Hitt Contracting, Inc. ("Hitt"), and Solo Furniture Installer & Liquidators, Inc. ("Solo"), appellees, for injuries she received after a fall that occurred on February 8, 2013.[1] On May 17, 2017, the circuit court issued an Order granting the motions for summary judgment filed by appellees on the ground that Mrs. Chiu assumed the risk.

On appeal, appellants present the following question for this Court's review, which we have rephrased slightly, as follows:

> Did the circuit court err in granting appellees' motions for summary judgment on the ground on assumption of risk?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Mr. and Mrs. Chiu own Chiu's Sushi, a restaurant located within a Marriott Courtyard in Baltimore City. The restaurant has a front entrance and a back entrance. To reach the back entrance, a person has to go to the loading dock at the back of the building,

[1] Harbor East was an owner and management entity of the building where the fall occurred. Hitt was the general contractor that was performing renovations on the building at the time the fall occurred. Solo was a subcontractor that was hired by Hitt to remove furniture from hotel rooms that were being renovated in the building where the fall occurred.

[2] The factual background was gleaned from the complaint, discovery materials, Mrs. Chiu's deposition testimony, and exhibits that the parties attached to their memoranda in support of and in opposition to their motions for summary judgment.

which leads to a common hallway that is "shared by all [of the] businesses" and is connected to the Marriott.

On February 8, 2013, at approximately 10:15 a.m., Mr. Chiu dropped Mrs. Chiu off at the loading dock and went to park the car, as was their normal routine. Mrs. Chiu was wearing a jacket, holding a twelve-pack of soda in each hand, and had her handbag on her shoulder as she entered the common hallway.

Mrs. Chiu entered the hallway, where the "lighting was good," and she noticed a "whole row" of mattresses leaning against the wall on the right-hand side, "lin[ed] up" one after the other.

Underneath the mattresses,[3] Mrs. Chiu noticed a white sheet. This sheet, which she described in her deposition testimony as "lumpy" and "irregular," did not stretch across the entire width of the hallway; some of the hallway's concrete floor remained exposed. Prior to that day, Mrs. Chiu had not seen any mattresses or sheet in the hallway.

During her deposition testimony, Mrs. Chiu explained that she normally would walk on the right side of the hallway because there "were poles on the left," although these poles were only present in certain "section[s]" of the hallway. Mrs. Chiu said she did not notice if there were poles on the left side of the wall in the location where she eventually fell.

[3] Mrs. Chiu explained in her deposition testimony that she could not recall if there was a white sheet under each of the mattresses, or if there were only white sheets under the mattresses located near where she fell.

At her deposition, Mrs. Chiu agreed that there was "concrete floor showing between the left wall and the sheet when [she] fell." Although she initially stated that she did not want to answer whether the distance of the concrete floor was "wide enough for a single person to take steps left, right, left, right," she ultimately stated that it was possible.[4]

When Mrs. Chiu observed the mattresses and the sheet, she also noticed that there was a delivery man in the hallway who was proceeding in the same direction that she was headed, pushing a cart with two wheels. The delivery man was "turning down the hallway to the left" when Mrs. Chiu noticed him.

Mrs. Chiu then proceeded down the hallway. When she reached the area where the mattresses and sheet were located, Mrs. Chiu took a step with her right foot onto the sheet. After "one or two steps," Mrs. Chiu felt like something was "tangling" her and "hooked on" her. Because she was unable "to lift" her "right foot" due to being "tangled," she fell forward onto her left knee, dropping the soda cans in the process. She then gradually turned

[4] At her deposition, Mrs. Chiu was asked to look at a photograph of the common hallway (labeled Exhibit 2), which was taken a few days after her fall. Mrs. Chiu stated that the picture did not portray exactly how the sheet looked at the time of the incident because, in the picture, the sheet had been pushed closer to the mattress, which likely was due to many people stepping on the area when paramedics were bringing her from the hallway to the ambulance. Counsel for the defendants said that they used the photograph to exhibit that, where Mrs. Chiu fell, there were no pillars on the left side of the hallway (or "poles" as Mrs. Chiu called them), noting that, during her deposition, Mrs. Chiu pointed to the spot on the photograph indicating the area where she fell.

around and sat down. Upon doing so she noticed that "on the white sheet there was a hook, like the hook [that would be used] for the curtains."[5]

Mrs. Chiu called out for help, and several employees and other people in the building came to her aid. The manager of the Marriott called paramedics, who took her to the emergency room. Mrs. Chiu had fractured her knee, and she subsequently underwent three surgeries.

On February 5, 2016, Mrs. Chiu and her husband filed a Complaint against appellees asserting negligence and loss of consortium.[6] The Chius filed an amended complaint on October 6, 2016. On March 27, 2017, Hitt and Solo filed a Motion for Summary Judgment, alleging contributory negligence and assumption of risk. On April 10, 2017, Harbor East filed a Motion for Summary Judgment incorporating the arguments made by Hitt and Solo.

On May 17, 2017, the circuit court held a hearing on appellees' motions for summary judgment. Counsel for Hitt and Solo stated that the material facts of the case were not in dispute, and Mrs. Chiu voluntarily confronted a risk of danger because she had the option to use the alternative route of the front entrance or "walk on the left half of the hallway on the concrete floor not covered by the sheet or obstructed by any other condition." Instead of taking an alternative route, Mrs. Chiu "chose to step on a surface

[5] When asked to describe what the hook looked like, Mrs. Chiu was unable to recall, but thinks the hook was "whitish" in color.

[6] The complaint listed another defendant, HFP Hotel Owner, III, LLC, but this defendant was eventually dismissed.

that she could not determine was making the sheet lumpy and/or irregular." Counsel for Hitt and Solo continued:

> There's an argument by [Mrs.] Chiu that, well, the evidence is [Mrs.] Chiu, the Plaintiff, did not know there were these hooks within the sheet or curtain, and that it was the hook that caused her to fall somehow, not the sheet itself.
>
> As if to argue she couldn't appreciate or know the danger, because the danger was the hook, not the sheet. And she couldn't see the hook. And if she couldn't see the hook, she couldn't be guilty of assumption of the risk as a matter of law, because she didn't appreciate the risk.
>
> But the reality here is it's not the hook itself, assuming for purposes of the motion that the hook was there and caused her to fall as opposed to anything else. It's not the hook itself that was the hazard she needed to appreciate in order to have assumption of the risk bar her claim.
>
> Rather, it is the decision and the risk of stepping on the sheet and curtain itself that was presented to her as being lumpy and irregular. She voluntarily chose to step on a surface for which she could not determine what was causing it to be lumpy or irregular, what was under there. Any sorts of things could have been under there, whether it be a hook, a brick, a rock, a pebble – whatever it might be.
>
> And therefore, the risk that she accepted and knew and understood wasn't that there would be a hook there that might snag her, but that she chose to step on the surface itself, the sheet itself, which was a hazard. Because she couldn't determine what was underneath it. And it was clearly a hazard, as compared to the hallway that was to her left where the concrete floor was exposed.

Counsel for Harbor East adopted the contentions raised by counsel for Hitt and Solo. Counsel also reiterated that there were two alternate paths available to Mrs. Chiu, but she did not choose to take either alternate path.

Counsel for the Chius argued that Mrs. Chiu said the white sheet appeared to be passable, meaning "[t]here was nothing for her to think, 'This is dangerous.'" She noted that Mrs. Chiu saw a delivery man in the hallway, leading to her belief that it was safe to

pass through, even though, "[b]y her own testimony, he would have had to walk over portions of the sheet as it came across the hallway."

The following colloquy then ensued regarding the potential disputes of material fact:

THE COURT: So in your mind, what are the disputes as to material fact?

[Counsel for the Chius]: I think the disputes as to material fact is whether or not there was danger that was open and obvious. I mean, the fact that we can all agree it was the white sheets or the white curtains itself on the floor. But does that in itself raise it as to being a dangerous condition?

You know, it was the hooks, in fact, that got caught on her shoe that caused her to fall, that she said she did not see until after she was on the floor and saw the white-ish hook.

You know, the fact that, you know, she describes it as a sheet, not as a drape – that was not, you know, only confirmed by Defendant Solo's answers to interrogatories. So if it's a sheet, you don't expect there to be hooks.

THE COURT: But she did – based on what I'm hearing, she did say in her deposition that she saw that it was lumpy, that it wasn't a flat sheet.

[Counsel for the Chius]: It wasn't a flat sheet, lumpy and irregular, and in part she was describing that not only as to how it appeared but as it was – because she was asked during her deposition, "How far was the sheet out?" And she was estimating it covered about half the hallway, but that it was out farther in certain sections than others.

There was a limited portion of the hallway, the floor, that was exposed on the left side. But, you know, what she says is overall the hallway appeared to be passable. The fact that the delivery person was able to walk down the hallway while pushing a cart with boxed goods for delivery did not have any problem. It appeared to be safe.

THE COURT: Are you saying that she tried to walk on the left side?

[Counsel for the Chius]: Right. That's what she testified to. Because, in fact, she said that her left foot was on the hallway. She was aware of the barriers ahead of her, so that she couldn't, you know, for lack of a better term, walk, you know, directly on the left side.

Also, the fact that she was carrying two 12-packs of Coke. So you're going to have that, you know, space carrying it next to you. So under the

> circumstances, she acted reasonable [sic]. There was nothing that was perceived to be an open and obvious danger to her.
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> Counsel for Hitt and Solo responded as follows:
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> [T]here's no question, based on [Mrs. Chiu's] own testimony, that there was sufficient distance, whenever that might have been, for her to have walked left, right, left, right down the left side of the hallway on the concrete without having to go onto the white sheet. That is undisputed.
>
> And here's the crux of it. There's no question that the mattresses and this sheet, lumpy and irregular, was open and obvious to everyone. Because she saw it. She made a risk assessment.
>
> Argument has been made, and understandably so from [Mrs. Chiu's] perspective, that somehow she thought it was reasonable. Well, let's step back from whether it's reasonable or not and whether other people had done that. Because assumption of the risk doesn't mean anything about reasonable care.

Counsel also noted that, at her deposition, Mrs. Chiu pointed to a spot on the photograph showing where she fell, and that the area where Mrs. Chiu pointed had no pillars on the left side, and she said that she was able to walk "left, right, left, right," down the hallway.

After hearing the parties' arguments, the court issued its ruling from the bench. It stated, in pertinent part, as follows:

> [Mrs. Chiu] in her own deposition made it very clear that there was still plenty of room for someone, for one person, to, as she said it, "right, left, right, left" walk straight, not in the path of this white, lumpy sheets [sic] that were to her [right], and that she did have the ability to walk that hallway without having to touch the white sheet that she was not sure what it was and why it was there, and there was a risk of slipping when you're walking on a white sheet.
>
> The risk—the specific risk of the hook doesn't—I don't see that as being the real question here. I don't think she had to assume the risk that a hook specifically was going to come out and grab her shoe. But she does say in her deposition that right when she got to the entrance of this room, of this hallway, she saw this white, lumpy sheet.
>
> And there's, you know, a knowledge that there was a danger of walking on a sheet. It might not be the danger of getting yourself hooked,

> but it's definitely a danger of possibly slipping on the sheet. And she has also testified in her deposition, and there's no contrary evidence to suggest that she was not correct in her deposition, that there was a walkway for her.
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> There was still enough room in that hallway for her to take, choose, the path that would not cause her possible damage. And that would have been the part of the hallway where the concrete was exposed, where she said there was room for her to walk.
>
> So I think that takes us back to a *Rountree* [*v. Lerner Development Co.*, 52 Md. App. 281 (1982)] analysis, that if there had been evidence—which here there is, based on her deposition—that there was a reasonable and safe alternative route of egress open to [Mrs. Chiu], which based on her deposition there was, and she deliberately chose the shorter but more dangerous route.
>
> So here, I don't know if it was that it was shorter, but it was the route that she was just used to taking. But it was the more dangerous route. That as a matter of law, this Court can find that she was guilty of having assumed the risk. And based on this, this Court is going to grant the motion for summary judgment as a matter of law.

On May 19, 2017, the circuit court entered an order granting the motions for summary judgment based on appellees' defense of assumption of risk. This timely appeal followed.

STANDARD OF REVIEW

The Court of Appeals has explained the relevant standard an appellate court should apply in reviewing the grant of a motion for summary judgment:

> We review a grant of summary judgment as a matter of law. *Eng'g Mgmt Servs. v. Md. State Highway Admin.*, 375 Md. 211, 229, 825 A.2d 966, 976 (2003). "The standard for appellate review of a trial court's grant or denial of a summary judgment motion is whether the trial court was legally correct." *Sheets v. Brethren Mut. Ins. Co.*, 342 Md. 634, 638, 679 A.2d 540, 542 (1996) (citation omitted). Thus, we conduct an independent review of the record to determine whether a genuine dispute of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Walk v. Hartford Cas. Ins. Co.*, 382 Md. 1, 14, 852 A.2d 98, 105–06 (2004). "We review the record in the light most favorable to the non-moving party and

> construe any reasonable inferences which may be drawn from the facts against the movant." *Id.* at 14, 852 A.2d at 106 (citation omitted).

Md. Cas. Co. v. Blackstone Intern. Ltd., 442 Md. 685, 694 (2015). "On appeal from an order entering summary judgment, we review 'only the grounds upon which the trial court relied in granting summary judgment.'" *Long Green Valley Ass'n v. Bellevale Farms, Inc.*, 205 Md. App. 636, 651 (2012) (quoting *Rodriguez v. Clarke*, 400 Md. 39, 70 (2007)), *aff'd*, 432 Md. 292 (2013).

DISCUSSION

Appellants contend that the circuit court erred in granting the motions for summary judgment on the ground that Mrs. Chiu assumed the risk of walking on the lumpy sheet. They assert that Mrs. Chiu "had no knowledge that the sheet, although lumpy and irregular, was dangerous or hazardous."

Harbor East, Hitt, and Solo contend that the circuit court properly found that Mrs. Chiu assumed the risk as a matter of law. They assert that Mrs. Chiu's testimony that the sheet was "lumpy" and "irregular" demonstrates that she knew of and appreciated the risk she was taking. They argue that Mrs. Chiu voluntarily confronted the danger because she chose to walk on the sheet rather than choosing to walk on the concrete floor or use the front entrance to the restaurant. For the reasons explained below, we agree with appellees that Mrs. Chiu assumed the risk as a matter of law.

Assumption of risk "'rests upon 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.'" *Poole v. Coakley & Williams Const., Inc.*, 423 Md. 91, 110 (2011) (quoting *Crews v. Hollenbach*, 358 Md. 627, 640–41 (2000)). To establish the defense of assumption of risk, "'the defendant must show that the plaintiff: (1) had knowledge of the risk of the danger; (2) appreciated that risk; and (3) voluntarily confronted the risk of danger.'" *Id.* at 110–111 (quoting *ADM P'ship v. Martin*, 348 Md. 84, 90–91 (1997)). "An assumption of risk defense . . . may be grounds for entering summary judgment for a defendant, . . . but this is only true when 'the undisputed facts permit but one reasonable determination,' namely, that the plaintiff has assumed the risk as a matter of law." *Id.* at 109 (quoting *Hooper v. Mougin*, 263 Md. 630, 635 (1971)).

Courts in Maryland have sometimes stated that an objective standard must be applied when determining whether a person knew of and appreciated a risk. *See, e.g.*, *Gibson v. Beaver*, 245 Md. 418, 421 (1967). More recently, however, the Court of Appeals has explained that the standard is technically a subjective one, though not in the purest sense of the word. *Poole*, 423 Md. at 112. Because the standard applied is not fully objective, this renders assumption of risk distinct from contributory negligence, for which a reasonable person standard applies. *Id.* at 111, 114 n.10.

For the defense of assumption of the risk to apply, "the *particular* plaintiff must have *actual* knowledge of the risk before she [or he] can be found to have assumed it." *Id.* at 114 (emphasis in original). This is the subjective aspect of the standard. "Because the focus is on what the plaintiff actually knew, understood[,] and appreciated[,] the issue is ordinarily left to the jury to resolve." *Id.* at 115. However, "'there are certain risks which

any one of adult age must be taken to appreciate,'" *Id.* at 116 (quoting *Gibson*, 245 Md. at 421), and therefore, "'when it is clear that a person of normal intelligence in the position of the plaintiff *must* have understood the danger, the issue is for the court.'" *Id.* at 116 (quoting *Schroyer v. McNeal*, 323 Md. 275, 283-84 (1991)). This is the objective aspect of the standard. Risks which "'anyone of adult age must be taken to appreciate' include . . . 'the danger of slipping on ice, of falling through unguarded openings[,] of lifting heavy objects . . . and doubtless many others.'" *Id.* at 116 (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 68 at 488 (5th ed. 1984)). *Accord Thomas v. Panco Mgmt of Md., LLC*, 423 Md. 387, 399 (2011) (noting that courts may impute knowledge to a plaintiff, "as a matter of law, when there is undisputed evidence of awareness," such as "physical interaction with or sensory perception of the dangerous condition" or "the risk is a usual and foreseeable consequence of the plaintiff's conduct").

In determining "whether a person has voluntarily exposed him or herself to the risk of a known danger, 'there must be some manifestation of consent to relieve the defendant of the obligation of reasonable conduct.'" *Morgan State Univ. v. Walker*, 397 Md. 509, 515 (2007) (quoting *ADM P'ship*, 348 Md. at 90–92). Thus, for a plaintiff voluntarily to assume the risk, the plaintiff must be willing "'to take an informed chance,'" such that "there can be no restriction on the plaintiff's freedom of choice either by the existing circumstances or by coercion emanating from the defendant." *ADM P'ship*, 348 Md. at 92 (quoting *Schroyer*, 323 Md. at 283).

Viewing the evidence in the light most favorable to the appellants, as we must, we conclude that there was no genuine dispute of material fact that Mrs. Chiu assumed the risk here. In her deposition testimony, Mrs. Chiu stated that, upon entering the hallway, she noticed both the mattresses and the sheet prior to proceeding down the hallway. By walking on this clearly observable sheet, which Mrs. Chiu described as "lumpy" and "irregular," when she had the option to walk on the concrete next to the sheet, Mrs. Chiu assumed the risk. *See Crews*, 358 Md. at 646 ("'In determining whether a plaintiff had . . . appreciation of the risk, [the] plaintiff will not be heard to say that he did not comprehend a risk which must have been obvious to him.'" (quoting *ADM P'ship*, 348 Md. at 91)); *Thomas*, 423 Md. at 406 (quoting *Rountree*, 52 Md. App. at 286) (If evidence exists indicating that a person had the option to take a "'reasonable and safe alternative route of egress,'" but he or she "'deliberately chose the shorter but more dangerous route,'" this may establish, as a matter of law, that the person assumed the risk.).[7]

In sum, we agree with the circuit court that there is no genuine dispute of material fact that Mrs. Chiu assumed the risk by walking on the clearly observable, lumpy, unusual, and unknown surface. Accordingly, the court properly granted appellees' motions for summary judgment.

[7] We also note that Mrs. Chiu had a key to the front entrance of her restaurant the day that she fell, and upon noticing the mattresses and the sheet, she could have turned around and accessed the building using the front door. Mrs. Chiu stated at her deposition that it was not raining and there was no snow on the ground the morning of her fall.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.