UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0389

September Term, 2015

RONALD ALLEN DAILEY, JR.

v.

BONNIE GAIL MACKEY

Krauser, C.J.,
Arthur,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: May 3, 2016

This appeal involves competing claims of negligence in connection with an automobile accident. A jury found that both drivers were negligent, barring all recovery. One driver appealed, contending that the trial court should not have submitted the issue of his contributory negligence to the jury. Finding sufficient evidence to warrant the submission of the issue to the jury, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Ronald Allen Dailey and Bonnie Gail Mackey were involved in a collision when Ms. Mackey rear-ended Mr. Dailey's disabled vehicle. The details of the incident were vigorously disputed, but some facts are clear.

The parties agreed that the accident took place at night, on an uphill section of Interstate 95 North, in Harford County, just past the White Marsh exit. The parties agreed that there were no streetlights on this stretch of the interstate. The parties agreed, or at least did not dispute, that Mr. Dailey's vehicle shut down or lost power, at which point Mr. Dailey moved to the right. The parties agreed that the accident occurred in one of the two right lanes and that the interstate had four lanes at that point, with a shoulder on either side. The parties agreed that Mr. Dailey did not reach the right shoulder and that Ms. Mackey's vehicle struck his vehicle from behind. Although Ms. Mackey's trial counsel insinuated that Mr. Dailey's car may have lost power because of negligent maintenance or because he negligently ran out of gas, she now agrees that she had no evidence to support either assertion.

The parties disputed whether Mr. Dailey was in the far-left lane or the second lane to the left when he lost power. The parties disputed whether the left shoulder was

sufficiently wide to constitute a "place of safety" to which Mr. Dailey could have moved in an emergency. The parties disputed whether Mr. Dailey's hazard lights were on after he lost power. The parties disputed how much time elapsed between the time when Mr. Dailey lost power and when the collision occurred. The parties disputed whether the collision occurred in the far-right lane or the second lane from the right. The parties disputed whether Ms. Mackey's car struck Mr. Dailey's squarely from behind or from an angle.

Mr. Dailey testified that he was in the lane next to the far-left lane, going uphill, when his car suddenly shut down or stalled.[1] Although he acknowledged that there were no cars to his left to impede his ability to move across the far-left lane to the left shoulder, Mr. Dailey said that began to move across the two lanes to the right and put on his hazard lights. Mr. Dailey testified that his car came to a stop, or at least very close to one, in the far-right lane. He realized that he did not have enough momentum to reach the shoulder. He did not try to restart his car. He looked in the rear-view mirror and saw headlights approaching. At some point thereafter, it is not clear how long, Ms. Mackey's car collided with his. Mr. Dailey could not recall whether his headlights were working after the engine lost power, but he testified at trial that his hazard lights were still flashing after the collision. At his deposition, however, he had testified that he was "not sure" whether the hazard lights were still operating when the police arrived.

[1] There is some indication that, at some point on his trip, Mr. Dailey was or may have been in the far-left lane, but it is reasonably clear that he was in the lane next to the far-left lane when his car lost power.

Ms. Mackey testified that she was driving at about 60 miles per hour in the far-right lane, getting ready to leave the interstate, when she saw a sign stating that the lane was closed at some point before the upcoming exit. She testified that she put on her left-turn signal, looked in her rear view mirror, looked to her left, looked forward again, and moved completely into the next lane to the left, which is where, she said, she struck Mr. Dailey.[2] She likened the impact to hitting a brick wall. Ms. Mackey testified that she did not know what she had hit: she did not brake before the collision, and she claimed that she did not see Mr. Mackey's car or any flashing lights or tail lights.

Mr. Dailey sued Ms. Mackey, and she counterclaimed. Both parties contended that the other was negligent. Mr. Dailey contended that if he was negligent, Ms. Mackey was contributorily negligent. Ms. Mackey similarly contended that if she was negligent, Mr. Dailey was contributorily negligent.

After a brief trial on liability, the jury determined that both parties were negligent. The court denied Mr. Dailey's motion for judgment notwithstanding the verdict, and he filed this timely appeal. Ms. Mackey has not appealed.

QUESTION PRESENTED

Mr. Dailey presents one question, which we have rephrased to eliminate any argumentative qualities: Did Ms. Mackey present sufficient evidence of Mr. Dailey's

[2] On cross-examination, Ms. Mackey said that she moved to the left before turning her attention forward again.

negligence to permit the trial court to submit the question of his contributory negligence to the jury?[3]

We answer the question in the negative. Although the evidence may not have been overwhelming, Ms. Mackey presented enough evidence for a jury to conclude that Mr. Dailey was contributorily negligent, and thus not entitled to recover. We affirm.

DISCUSSION

The question of whether Mr. Dailey was contributorily negligent was a question of law for the court only if reasonable minds could not differ in the conclusions to be drawn from the evidence, after it has been viewed in the light most favorable to Ms. Mackey. *See, e.g., Exxon Mobil Corp. v. Albright*, 433 Md. 303, 369 (2013) (quoting *Houston v. Safeway Stores, Inc.*, 346 Md. 503, 521 (1997)). So long as there is any evidence, no matter how slight, legally sufficient to generate a jury question, the court must submit the question to the jury. *Barrett v. Nwaba*, 165 Md. App. 281, 289-90 (2005).

Negligence requires proof of four elements: (1) the defendant owed a duty to the plaintiff to exercise reasonable care, (2) the defendant breached that duty, and (3) the defendant's breach is the actual and proximate cause of (4) damages suffered by the plaintiff. *See, e.g., Hamilton v. Kirson*, 439 Md. 501, 523-24 (2014). Negligence has long been recognized as either acting or failing to act as an ordinarily prudent person would under the circumstances. *Vickers v. Starcher*, 175 Md. 522, 531 (1938); *see also*

[3] Mr. Dailey phrased his question as follows: "Did the trial court err in presenting the question of appellant's negligence to the jury when appellee presented no legally sufficient evidence of the appellant's negligence?" As phrased, that question answers itself.

Brooks v. Lewin Realty III, Inc., 378 Md. 70, 85 n.5 (2003) ("negligence is a failure to do what the reasonable [person] would do under the same or similar circumstances") (citation and quotation marks omitted).

Subject to exceptions that are not relevant here, a plaintiff cannot recover even from a negligent defendant where the plaintiff was also negligent. This principle, still followed in only a handful of states, is known as "contributory negligence." *See Coleman v. Soccer Ass'n of Columbia*, 432 Md. 679, 690-91 (2013).

In the case of a sudden emergency, such as the one that befell Mr. Dailey when his car lost power, the driver must still exercise ordinary care. *Warnke v. Essex*, 217 Md. 183, 187 (1958) (stating that "[t]he mere fact that a person finds himself in a predicament or emergency does not automatically relieve him of the obligation to use ordinary care"); *accord Lehmann v. Johnson*, 218 Md. 343, 346 (1958) (same). The emergency, however, is considered and weighed as one of the relevant circumstances. *Warnke*, 217 Md. at 187. "Whether the operator of an automobile was confronted with an emergency, and whether he [or she] acted negligently under the circumstances, are generally questions for the jury." *Id.*

The jury found that Ms. Mackey was negligent, and Ms. Mackey does not challenge that finding. As a result, the only question we must answer is whether there was enough evidence for a reasonable jury to conclude that Mr. Dailey was negligent.

Ms. Mackey claims that Mr. Dailey was negligent in cutting across several lanes of traffic to reach the right shoulder, when the left shoulder was closer to where he lost power. Mr. Dailey contends that the law required him to move to the right and, at any

rate, that he reasonably tried to reach the right shoulder, rather than the left shoulder, as the left shoulder was narrower and more dangerous than the right. We disagree with Mr. Dailey's assessment, and we agree that there was enough evidence to submit the question of contributory negligence to the jury.

Even "meager evidence of negligence is sufficient to carry the case to the jury." *Cavacos v. Sarwar*, 313 Md. 248, 258 (1988) (quoting *Fowler v. Smith*, 240 Md. 240, 246 (1965)). "[A]ny evidence, however slight, legally sufficient as tending to prove negligence" requires submission to the jury, which determines "the weight and value of such evidence." *Id.* Here we have testimony that Mr. Dailey's car was closer to the left shoulder than the right when he lost power, on an uphill grade, at night, on an unlit or poorly lit section of a four-lane highway. We also have testimony, admittedly in serious dispute, that his lights were not working. On the basis of this testimony, a reasonable jury could conclude that Mr. Dailey knew or should have known that it would be difficult for other motorists to see him and that it was imprudent for him to attempt to cross any more lanes of traffic than strictly necessary.

"In Maryland, [c]ontributory negligence connotes a failure to observe ordinary care for one's own safety. It is the doing of something that a person of ordinary prudence would not do, or the failure to do something that a person of ordinary prudence would do, under the circumstances." *Faith v. Keefer*, 127 Md. App. 706, 745 (1999) (quoting *Smith v. Warbasse*, 71 Md. App. 625, 627 (1987), *which quoted Menish v. Polinger Co.*, 277 Md. 553, 559 (1976)) (quotation marks omitted). In this case, the jury determined that Mr. Dailey negligently failed to take the shortest possible route to safety even though he

knew or should have known that his powerless car had become a dangerous obstruction because its lights were inoperable. While one might reasonably disagree with that conclusion, the jury is the ultimate judge of what is and is not reasonable conduct. We have no basis to overturn the jury's verdict.

Citing Md. Code (1977, 2012 Repl. Vol.), § 21-301(b) of the Transportation Article, Mr. Dailey responds that he was legally required to move to the right rather than the left. Section 21-301(b), which concerns "[s]low-moving traffic," dictates that, in general, "any vehicle going 10 miles an hour or more below the applicable maximum speed limit or, if any existing conditions reasonably require a speed below that of the applicable maximum, at less than the normal speed of traffic under these conditions, shall be driven in the right-hand lane then available for traffic or as close as practicable to the right-hand curb or edge of the roadway." We disagree that § 21-301(b) required Mr. Dailey to try to move his stalled vehicle across two lanes to the right shoulder rather than across only one lane to the left.

Section 21-301(b) expresses the general rule that slow-moving traffic should stay to the right. If Mr. Dailey's car were operable, but unable to travel within 10 miles per hour of the applicable speed limit, § 21-301(b) would have required him to move to the right lane and remain there. Section 21-301(b) does not, however, address the situation in this case, where a vehicle loses power altogether. In those circumstances, it is not unreasonable to expect a driver to move to the closest place of safety, even if that requires the driver to move left rather than right. Were we to accept Mr. Dailey's

interpretation, any driver bringing a disabled vehicle to rest in the left shoulder would be in violation of the law.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED. APPELLANT TO PAY COSTS.