UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0618

September Term, 2015

ERNEST WEISKERGER, JR.

v.

PAIK'S DECORATORS INC., ET AL.

Berger,
Arthur,
Friedman,

JJ.

Opinion by Berger, J.

Filed: April 29, 2016

The case giving rise to the present appeal arose out of a motor vehicle accident near the intersection of Crain Highway and Chevy Drive in Upper Marlboro, Prince George's County, Maryland. Ernest Weiskerger ("Weiskerger"), appellant, suffered injuries after the motorcycle he was operating collided with a van driven by Mario Cruz ("Cruz"), an employee of Paik's Decorators, Inc. (collectively, "the appellees"). Weiskerger suffered multiple injuries which required over fifteen surgeries and a prolonged period of hospitalization. As a result of the accident, Weiskerger suffered permanent impairment.

Weiskerger ultimately filed a complaint against the appellees, seeking economic and noneconomic damages. The case proceeded to trial in Circuit Court for Prince George's County. A jury found in favor of the appellees. Weiskerger noted an appeal.

On appeal, Weiskerger presents two issues for our consideration, which we have rephrased slightly as follows:

1. Whether the circuit court erred by failing to determine as a matter of law that the right lane on Crain Highway was not a right-turn only lane and by failing to instruct the jury accordingly.

2. Whether the circuit court erred by failing to grant Weiskerger's motion to compel Cruz's recorded statement.

For the foregoing reasons, we shall affirm.

FACTS AND PROCEEDINGS

On the afternoon November 17, 2012, a motor vehicle accident occurred when a motorcycle operated by Weiskerger collided with a van driven by Cruz. As a result,

Weiskerger suffered significant injuries. At trial, Weiskerger and Cruz reported differing accounts of the circumstances surrounding the accident.

Motion to Compel

Prior to trial, an issue arose during discovery with respect to a recorded statement given by Cruz to a State Farm claims adjuster shortly after the accident. The appellees had refused to provide the statement, arguing that it was produced in anticipation of litigation and was protected under the attorney work product doctrine. Weiskerger filed a motion to compel the recorded statement. Attached to the appellees' response to the motion to compel was an affidavit from a State Farm Claims Team Manager stating that it was not part of State Farm's ordinary business practice to record statements and that this particular statement was taken in anticipation of litigation. Following a hearing on February 4, 2015, the circuit court denied Weiskerger's motion to compel, finding that the statement was protected from disclosure pursuant to the work product doctrine.

Merits Trial

As discussed *supra*, the factual circumstances surrounding the accident were strongly disputed at trial. Weiskerger contended that he and Cruz were both driving on Route 4 and that he was following behind Cruz's vehicle when both exited Route 4 to merge onto northbound Route 301/Crain Highway. Weiskerger maintained that Cruz's van moved into the middle lane as it exited from Route 4 onto Route 301/Crain Highway. Weiskerger explained that he remained in the right lane and drove toward the traffic light at Chevy

Drive, intending to merge left after going through the intersection of Crain Highway and Chevy Drive. According to Weiskerger, Cruz moved from the middle lane into the right lane, colliding with Weiskerger's motorcycle. Weiskerger maintained that he remained in the right lane and at no time moved to a different lane.

Weiskerger testified that he was very familiar with the traffic patterns on Crain Highway near the intersection with Chevy Drive. He explained that he drove this route nearly every day on his way to work. Weiskerger testified that he had two options after merging onto Crain Highway. He could remain in the right lane approaching Chevy Drive and proceed through the intersection. Alternatively, Weiskerger explained that he could have merged left into the center lane if traffic conditions permitted. Weiskerger testified that there were no signs or road markings indicating that the right lane was a right-turn only lane.

Cruz presented the facts somewhat differently. Consistently with Weiskerger's testimony, Cruz testified that he exited Route 4 to merge onto northbound Route 301/Crain Highway. Cruz, however, maintained that he remained in the right lane on Crain Highway between the time when he merged and when he reached Chevy Drive. Cruz explained that he intended to turn right on Chevy Drive.[1] Cruz testified that he did not change lanes at any point and that he was in the process of making the right turn onto Chevy Drive when Weiskerger's motorcycle impacted the right side passenger door of Cruz's van.

[1] Cruz was attempting to go a Home Depot which was located on the opposite side of Crain Highway across a concrete barrier. He planned to turn right on Chevy Drive, make a u-turn, and then proceed across the intersection into the Home Depot parking lot.

Dixie Flaim testified as an independent witness who observed the crash from her vehicle. Following the crash, she pulled her vehicle to the side of the road and telephoned 911. Ms. Flaim told the 911 operator that the van changed lanes and struck Weiskerger's motorcycle. At trial, Ms. Flaim testified that Cruz changed lanes from the middle to the right lane and collided with Weiskerger. Ms. Flaim further testified that she did not see Weiskerger operating his motorcycle in a reckless manner at any time. On cross-examination, however, Ms. Flaim testified inconsistently on various issues. For example, Ms. Flaim testified at trial that she had seen Cruz's van hit Weiskerger's motorcycle twice, but Ms. Flaim did not report the two separate collisions to the 911 operator or to Weiskerger's private investigator, who took a written statement from her. Furthermore, Ms. Flaim testified that she did not see which part of the van had collided with Weiskerger. On cross-examination, she was impeached with her prior testimony in which she stated that the first impact occurred with the middle of the van toward the rear and that a second impact occurred with the front of the van. Also on cross-examination, Ms. Flaim admitted that, in June of 2014, she had told an attorney for the appellees that both Weiskerger and Cruz were in the same right lane when the accident occurred.

One issue that arose at trial was the status of the right lane on Crain Highway. The appellees argued that the right lane was a right-turn only lane and that Weiskerger was not permitted to travel straight through the intersection with Chevy Drive in the right lane. Weiskerger argued that the right lane was not a right-turn only lane. At trial, Weiskerger

argued that the circuit court should determine the status of the right lane as a matter of law in order to prevent confusion on the part of the jury as well as to permit the jury to be instructed accordingly. Weiskerger raised this issue multiple times, through a motion in limine prior to the start of trial, as well as during the trial and at the close of the presentation of evidence. The trial court determined that the status of the right lane was a contested matter of fact and declined to rule on the issue as a matter of law. Various witnesses testified as to the status of the right lane of Crain Highway at the intersection with Chevy Drive.

Maryland State Trooper Kyle Gaines responded to the accident scene. At the time of his arrival, Weiskerger had already been moved into an ambulance. Trooper Gaines testified that there were no traffic control devices which would indicate that the right lane of Crain Highway was a right-turn only lane at the intersection with Chevy Drive. Nevertheless, there was a solid white line separating the right lane from the center lane prior to the intersection. Trooper Gaines testified that, in his view, traffic in the right lane of Crain Highway was required to merge before the solid white line in order to proceed straight through the intersection with Chevy Drive.

Each side presented testimony from an accident reconstruction expert. Glenn Reuschling, a former officer with the Maryland State Police, testified as an accident reconstruction expert on behalf of Weiskerger. Mr. Reuschling testified that there were no traffic control devices indicating that the right lane was a right-turn only lane. Mr.

Reuschling explained that, pursuant to the Maryland Manual on Uniform Traffic Control Devices, in order for a lane to be considered a "turn-only" lane, there must be painted markings on the pavement and a sign indicating the lane is a turn-only lane. Mr. Reuschling testified that because the right lane on Crain Highway had neither pavement markings nor a turn-only lane sign, traffic was permitted to travel straight through the intersection from the right lane.

David Plant, the accident reconstructionist who investigated the accident, testified on behalf of the appellees. Mr. Plant testified that he had concluded, based upon the evidence, that Cruz was in the right turn lane of Crain Highway and was in the process of turning onto Chevy Drive when Weiskerger's motorcycle struck Cruz's vehicle. Mr. Plant explained that Weiskerger had also been traveling in the right lane, slightly behind Cruz's van, at the time the accident occurred.

The jury ultimately returned a verdict in favor of the appellees, finding that Cruz was not negligent. Because the jury found no primary negligence, it did not reach the issue of whether Weiskerger was contributorily negligent. Weiskerger filed a motion for new trial, which was denied on May 7, 2015. This appeal followed.

STANDARD OF REVIEW

With respect to the appellate standard of review of a trial court's decision whether to propound a requested jury instruction, the Court of Appeals has explained:

> We consider the following factors when deciding whether a trial court abused its discretion in deciding whether to grant or deny

> a request for a particular jury instruction: (1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given.

Stabb v. State, 423 Md. 454, 465 (2011) (citing *Gunning v. State*, 347 Md. 332, 351 (1997)). "The burden is on the complaining party to show both prejudice and error." *Tharp v. State*, 129 Md. App. 319, 329 (1999), *aff'd*, 362 Md. 77 (2000). "Whether the evidence is sufficient to generate the desired instruction is a question of law for the judge." *Bazzle v. State*, 426 Md. 541, 550 (2012) (quoting *Dishman v. State*, 352 Md. 279, 292 (1998)). Furthermore, "an interpretation of a statute . . . is a function of the court, not the jury." *Peters v. Ramsay*, 273 Md. 21, 25 (1974).

Discovery orders are reviewed on appeal under an abuse of discretion standard. *Independent Newspapers, Inc. v. Brodie,* 407 Md. 415, 440 (2009). An abuse of discretion occurs where (1) no reasonable person would take the view adopted by the trial court; (2) the trial court acts without reference to any rules or principles; or (3) acts clearly against the logic and facts. *Falik v. Hornage,* 413 Md. 163, 182 (2010). We review a circuit court's factual findings applying the clearly erroneous standard of review. *L.W. Wolfe Enterprises, Inc. v. Maryland Nat'l Golf, L.P.*, 165 Md. App. 339, 343 (2005) ("If there is any competent and material evidence to support the factual findings of the trial court, those findings cannot be held to be clearly erroneous.") (internal quotation omitted).

DISCUSSION

I.

Weiskerger's first contention is that the circuit court erred by failing to determine as a matter of law that the right lane on Crain Highway was not a right-turn only lane and instruct the jury accordingly. As we shall explain, whether the circuit court erred by failing to instruct the jury on the status of the right lane was irrelevant to jury's ultimate determination, given that the jury found no primary negligence on the part of Cruz and did not reach the issue of whether Weiskerger was contributorily negligent. Furthermore, assuming *arguendo* that the status of the right lane was relevant to the jury's determination with respect to primary negligence, as we shall explain, the court properly left the determination of the status of the right lane to the jury.

The jury was tasked with determining various facts in this case. The verdict sheet reflects that the jury was asked to determine whether "the Defendant Mario Cruz was negligent and that his negligence was a proximate cause for the accident on November 17, 2012." The verdict sheet instructed that if the answer to this question was "no," the jury should cease deliberations. Only if the jury found negligence on the part of Cruz were they to consider the next question, which addressed the alleged contributory negligence by Weiskerger.[2] The jury answered Question 1 in the negative, finding no negligence by Cruz.

[2] Question 2 on the verdict sheet read: "Do you find that the Plaintiff Ernest Weiskerger was negligent and that his negligence was a proximate cause for the accident on November 17, 2012?" Question 3 asked the jurors to determine the amount of damages, if (continued...)

As we set forth *supra*, the jury was presented with very two different versions of the circumstances giving rise to the accident. Weiskerger asserted that Cruz changed from the center to the right lane, causing the accident. Cruz asserted that he was driving in the right lane when Weiskerger struck his vehicle. Whether the right lane was a right-turn only lane or not was relevant only if the jury reached the issue of Weiskerger's contributory negligence. Because the jury determined that Cruz was *not negligent,* the status of the right lane, and whether Weiskerger was permitted to travel straight through the intersection with Chevy Drive from the right lane of Crain Highway, were irrelevant.

In his brief, Weiskerger acknowledged that the appellees were likely to argue to this Court that any alleged error with respect to the right turn lane issue was harmless because the jury did not reach the issue of Weiskerger's contributory negligence. Weiskerger asserts that the right turn lane issue could have influenced the jury's decision as to primary negligence as well. Other than arguing generally that this Court is unable to rule out prejudice, Weiskerger offers no actual support for his assertion that the right turn lane issue could have affected the jury's determination that Cruz did not act negligently. Our review of the record indicates that the issue associated with the right turn lane was relevant only to the determination of any contributory negligence on the part of Weiskerger and was irrelevant to the determination of primary negligence on the part of Cruz.

[2] (...continued)
any, to award.

Moreover, even if we were to assume, *arguendo*, that the right turn lane issue could have conceivably affected the jury's verdict in some way, we agree with the appellees that the circuit court did not err in submitting the issue to the jury rather than by issuing a legal ruling on the status of the right lane. Weiskerger maintains that whether the right lane was a right-turn only lane was a question of law for the court and not a question of fact for the jury. In support of this assertion, Weiskerger cites *Peters v. Ramsay*, 273 Md. 21, 25 (1974) for the proposition that the construction and interpretation of statutes is a function of the court and not for the jury to decide. In our view, *Peters* is distinguishable from the present case.

In *Peters*, which was also a case involving a motor vehicle accident, the critical issue was whether an appellant was on the "main traveled portion of the roadway" within the meaning of a then-existing statute.[3] On appeal, this Court explained that the determination of whether the portion of the road on which the appellant was driving, which had been characterized both as "an improved shoulder" and as a "right-hand turn lane," was a question for the court and not the jury. *Ramsay v. Peters*, 20 Md. App. 61 (1974). This Court held that the relevant portion of the road was not a main traveled portion of the roadway." *Id.* at 68-69. The Court of Appeals agreed with this Court that the determination of the issue "called for an interpretation of a statute, which is a function of the court, not the jury."

[3] The relevant statute related to when a driver may overtake and pass on the right of another vehicle and provided that "[i]n no event shall this movement be made by driving off the pavement or main traveled portion of the roadway." Md. Code (1957, 1970 Repl. Vol.), Art. 66 ½, § 11-304(b).

Peters, *supra*, 273 Md. at 25. The Court of Appeals, however, disagreed with our ultimate conclusion, holding that the relevant portion of the road was a main traveled portion of the roadway under the statute. *Id.* at 29.

Peters involved the construction of specific statutory language. In that case, the appellate courts were tasked with determining the precise meaning of "main traveled portion of the roadway." This was a clear matter of statutory interpretation, and accordingly, a determination for the court as a matter of law. The relevant statute at issue is this case contains far less specific language. There is no statute that defines what constitutes a right-turn only lane or that sets forth the types of marking required for such a designation to apply. Rather, the relevant statute requires drivers to adhere to traffic control devices, including signs and pavement markings. Md. Code (1977, 2012 Repl. Vol.), § 21-201(a)(1) of the Transportation Article ("Tr.") ("[T]he driver of any vehicle, unless otherwise directed by a police officer, shall obey the instructions of any traffic control device applicable to the vehicle and placed in accordance with the Maryland Vehicle Law."). We have held that "pavement markings designating lanes of travel constitute 'traffic control devices.'" *Stephens v. State*, 198 Md. App. 551, 568 (2011).

Weiskerger asserts that the standards and requirements of the Maryland Manual on Uniform Traffic Control Devices ("MdMUTCD") are incorporated into the Maryland Traffic Code. In support of this assertion, he cites Tr. § 25-104, which provides:

> The State Highway Administration shall adopt a manual and specifications for a uniform system of traffic control devices, consistent with the provisions of the Maryland Vehicle Law, for

> use on highways in this State. This uniform system shall correlate with and, as far as possible, conform to the system set forth in the most recent edition of the Manual on Uniform Traffic Control Devices for Streets and Highways.

The MdMUTCD "contains the basic principles that govern the design and use of traffic control devices for all streets, highways, bikeways, and private roads open to public travel . . . regardless of type or class or the public agency, official, or owner having jurisdiction." MdMUTCD § 1A.03. Weiskerger points to no authority, however, which would indicate that drivers are bound by the various diagrams, explanations, and guidance set forth in the MdMUTCD.[4]

As discussed *supra*, the jurors were presented with evidence from various sources regarding the traffic control devices (and lack thereof) at the intersection of Crain Highway and Chevy Drive. The jurors were informed that there were no arrows painted on the roadway and no signs designating the right lane as "right-turn only." The jurors were also presented with evidence demonstrating a solid white line between the right lane and the center lane before the intersection with Chevy Drive. The jury further heard testimony from Weiskerger's accident reconstruction expert, who testified that the right lane of Crain Highway did not meet the requirements set forth in the MdMUTCD for the designation of

[4] The MdMUTCD is an over 900-page document which sets forth, *inter alia*, explanations relating to where signs should be placed, how exit and entrance ramps should be configured, and how lanes should be designated. The State Highway Administration describes the MdMUTCD as "the combined document of the national set of traffic control device standards and guidance promulgated by Federal Highway Administration (FHWA) rulemaking on December 16, 2009 and Maryland Supplement to the MUTCD." The MdMUTCD is available at http://www.roads.maryland.gov/index.aspx?PageId=835.

a right-turn only lane. In our view, it was appropriate for the court to permit the jury to consider the evidence presented by various witnesses and determine whether, based upon the evidence, Weiskerger was inappropriately traveling straight through the intersection from the right lane -- if such a determination was relevant to the jury's finding with respect to Cruz's primary negligence.[5] Accordingly, we hold that the circuit court did not err by declining to rule on the status of the right lane.

II.

Weiskerger's second contention is that the circuit court erred by failing to grant his motion to compel the recorded statement provided by Cruz to a State Farm adjuster shortly after the accident. Weiskerger asserts that the statement was not prepared in anticipation of litigation and, as such, should have been produced in discovery.

"[T]he work product doctrine 'protects from discovery the work of an attorney done in anticipation of litigation or in readiness for trial.'" *100 Harborview Drive Condo. Council of Unit Owners v. Clark*, 224 Md. App. 13, 56 (2015) (quoting *Catler v. Arent Fox, LLP*, 212 Md. App. 685, 702 (2011) (*quoting E.I. du Pont de Nemours & Co. v. Forma–Pack, Inc.*, 351 Md. 396, 407 (1998))). The party claiming work product protection "bears the burden to substantiate its non-discovery assertion by a preponderance of the evidence." *Id.* at 56 (internal quotation and citation omitted). The determination of "whether a document or other tangible thing was prepared in anticipation of litigation or for

[5] As discussed *supra*, based upon our review of the record, the entire right lane issue was irrelevant to the jury's actual verdict.

trial . . . is essentially a question of fact, which, if in dispute, is to be determined by the trial judge following an evidentiary hearing." *Id.* at 56-57 (omission in original) (internal quotation and citation omitted). The protection of the work product doctrine is not absolute. *Id.* at 57. Rather, "even if the party asserting protection under the work product doctrine is successful in meeting its burden, the party seeking discovery can gain access to the material by demonstrating 'substantial need' and 'undue hardship.'" *Id.* (citing Md. Rule 2-402(d)).

The work product doctrine is codified in Md. Rule 2-402(c), which provides:

> Subject to the provisions of sections (f) and (g) of this Rule, a party may obtain discovery of documents, electronically stored information, and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, **insurer**, or agent) only upon a showing that the materials are discoverable under section (a) of this Rule and that the party seeking discovery has substantial need for the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of these materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

(Emphasis supplied.) The Court of Appeals has commented, quoting this Court, that "the critical point is that the purpose of making the report, the purpose of giving this data, the purpose of collecting the data, is to supply it to the liability carrier whose only possible interest in obtaining such information is in anticipation of litigation. [Rule 2-402] very clearly says that such information, such documents prepared by a party, his attorney, his assured, his agent and so forth and so on is not discoverable unless you meet the several

criteria establishing a substantial need." *Kelch v. Mass Transit Admin.*, 287 Md. 223, 227 (1980) (quoting *Kelch v. Mass Transit Admin.*, 42 Md. App. 291, 303 (1979)).

The statement at issue in the instant case was taken three days after the accident and was provided by Cruz to a State Farm claims adjuster. The appellees produced an affidavit from the State Farms claims adjuster attesting to the fact that it was not part of State Farm's ordinary business practice to record statements and that Cruz's statement was taken in anticipation of litigation. Following a hearing, the circuit court found that Cruz's "statement was made in anticipation of litigation" and denied Weiskerger's motion to compel.

On appeal, Weiskerger emphasizes that Cruz's statement was not created at the direction of any attorney and that, at the time of the statement, there was no reasonable indication that litigation was imminent or likely. The circuit court reached a contrary factual conclusion with respect to whether the statement was created in preparation for litigation. In our view, the circuit court reasonably concluded that the statement was taken in anticipation of litigation. The State Farm adjuster's affidavit clearly provided that "[r]ecorded statements are not taken on all claims opened and/or reported to" the insurer, but rather, "due to the nature of this accident and the investigation, all recorded statements of all witnesses and Mr. Cruz were taken in anticipation of litigation." Given the seriousness of the motorcycle accident, it was reasonable for State Farm to foresee that litigation would likely occur and take steps accordingly, including recording Cruz's statement. Although Weiskerger characterizes the State Farm affidavit as "self-serving," he does not actually present any factual evidence which contradicts the contents of the affidavit. We, therefore,

will not disrupt the circuit court's factual finding that Cruz's recorded statement was prepared in anticipation of litigation.[6]

Weiskerger further asserts the trial court erred by denying his motion to compel because Weiskerger was not "given the opportunity to demonstrate 'undue hardship' and 'substantial need' under Rule 2-402(d)." Critically, Weiskerger failed to raise this issue before the trial court. We have reviewed Weiskerger's motion to compel, Weiskerger's reply to the appellees' response in opposition to the motion to compel, and the transcript of the hearing before the trial court on the motion to compel. Although Weiskerger repeatedly argued that Cruz's statement was not entitled to work product protection because it was not prepared in anticipation of litigation, Weiskerger never argued that there was a substantial

[6] We are unpersuaded by the various cases cited by Weiskerger in support of his assertion that a statement made to an insurance company is not protected by the work product doctrine. For example, Weiskerger points to *Conn. Indem. Co. v. Carrier Haulers, Inc.*, 197 F.R.D. 564, 571 (W.D.N.C. 2000) for the principle that "adjusting a claim is indisputably the very nature of an insurer's business and is not normally performed in anticipation of litigation." Weiskerger further cites to *Pete Rinaldi's Fast Foods, Inc. v. Great Am. Ins. Cos.*, 123 F.R.D. 198, 202 (M.D.N.C. 1988) for the principle that "[a]n insurance company cannot reasonably argue that the entirety of its claims files are accumulated in anticipation of litigation when it has a duty to investigate, evaluate and make a decision with respect to claims made on its insured." First, we note that some other courts have reached contrary conclusions, holding that certain portions of an insurer's claim file is entitled to work product protection. *See*, *e.g.*, *Bartlett v. State Farm Mut. Auto. Ins.*, 206 F.R.D. 623, 629 (S.D. Ind. 2002). We agree with Weiskerger that not all materials relating to an insurer's investigation would necessarily be protected under the work product doctrine under Maryland law. In this case, however, the appellees presented evidence that *this particular statement* was made in anticipation of litigation and that it was not the ordinary practice of State Farm to record all statements.

need for Cruz's statement sufficient to overcome the work product doctrine.[7] Maryland Rule 8-131(a) provides that an appellate court normally will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court." *Univ. Sys. of Maryland v. Mooney*, 407 Md. 390, 400 (2009). Accordingly, this issue is not properly before this Court on appeal.[8]

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

[7] The transcript of the February 4, 2015 hearing on the motion to compel makes reference to a prior conversation that had occurred in the trial judge's chambers relating to the motion to compel. We have no way of knowing what may have been discussed in chambers given that the conversation in chambers is not part of the record before this Court.

[8] We note, however, that Weiskerger received in discovery a copy of a written statement given by Cruz on the day of the accident, written in Cruz's own handwriting. Had Weiskerger raised the issues of undue hardship or substantial need, the court may have found it relevant that Weiskerger already possessed a contemporaneous statement given by Cruz, and may have found that the other statement served to diminish Weiskerger's substantial need for the statement provided by Cruz to State Farm.