UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1546

September Term, 2014

MICHAEL RUBENSTEIN

v.

STATE OF MARYLAND, et al.

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*Zarnoch,
Leahy,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: March 24, 2016

*Zarnoch, Robert A., J., participated in the conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

This case concerns a tragic motorcycle accident that left the plaintiff, Michael Rubenstein, severely injured. A Frederick County jury found the State of Maryland and Frederick County negligent for failing to properly maintain the road signage. The jury also found Rubenstein contributorily negligent. Because Rubenstein's contributory negligence is a bar to recovery, he was awarded nothing. He has appealed.

FACTS

Route 77 is the main east-west road through northern Frederick County. It is a two-lane highway maintained by the State Highway Administration. It intersects with Stottlemeyer Road, a north-south, two-lane road that is maintained by Frederick County. At the intersection, traffic on Route 77 has the right-of-way and there is neither a stoplight nor stop sign controlling traffic on Route 77. Traffic on Stottlemeyer Road is controlled by a stop sign in both the northbound and southbound directions. Despite being located on the County road, the stop signs are maintained by the State Highway Administration. On May 25, 2012, the day of the accident, however, the stop sign on northbound Stottlemeyer Road was bent over and obscured from the view of motorists.

On that clear and sunny spring day, Rubenstein was riding his motorcycle northbound on Stottlemeyer Road. About 500 feet before the intersection with Route 77,

Rubenstein passed a warning sign[1] alerting him to the "Stop Ahead." As he continued along, he didn't see the downed stop sign and entered the intersection with Route 77 at approximately 45 miles per hour without slowing or stopping. He collided with a sport-utility vehicle ("SUV") traveling westbound on Route 77.

Rubenstein filed suit against the State of Maryland and the Board of County Commissioners of Frederick County for negligence from which he suffered injuries.

The parties proposed various jury instructions. Two of those proposed instructions are at issue in this appeal: *First*, over Rubenstein's objection, the trial court gave an edited version of § 21-801 of the Transportation ("TR") Article of the Maryland Code as a non-pattern instruction:

> A person driving a motor vehicle shall control their speed to avoid colliding with other vehicles, taking into account the actual and potential dangers that exist. This includes reducing their speed when approaching and crossing an intersection at which cross traffic is not required to stop.

Second, the trial court considered Rubenstein's request to give the pattern violation of statute instruction, but decided that it did not apply. The pattern violation of statute instruction, states that "[t]he violation of a statute, which is a cause of [Rubenstein's]

[1] Section 2C.36 of Maryland Manual on Uniform Traffic Control Devices explains that Advance Traffic Control symbol signs, including the "Stop Ahead (W3-1)," "shall be installed on an approach to a primary traffic control device that is not visible for a sufficient distance to permit the road user to respond to the device." *See* Md. Manual on Unif. Traffic Control Devices for Sts. and Hwys, Md. Hwy. Admin., § 2C.36 at 165, 167-68 (Dec. 2011), https://perma.cc/U3F4-LJCZ.

injuries or damages, is evidence of negligence." MPJI-CV 18:4.[2] The trial court asked aloud "[d]oes that even apply" given that "[the jury are] not gonna be instructed that [TR § 21-801 is] a statute[?]" As a result, Frederick County withdrew the requested instruction. Rubenstein did not request that the violation of statute instruction be given, nor did he object to the trial court's decision not to give it.

Tasked solely with deciding the issue of liability, the jury found the State and County negligent and Rubenstein contributorily negligent, thus precluding recovery. After the trial court denied Rubenstein's Motion for Judgment Notwithstanding the Verdict and in the Alternative for New Trial, Rubenstein noted this appeal.

DISCUSSION

Rubenstein complains that the trial court erred by improperly: (1) instructing the jury (a) by giving the non-pattern instruction based on TR §21-801; and (b) by not giving the pattern violation of statute instruction; (2) allowing the jury to consider the question of

[2] Below and in this Court, the parties discuss both Maryland Civil Pattern Jury Instructions ("MPJI-Cv") 18:4 and 19:7. These two instructions are identical and both provide that "[t]he violation of a statute, … [is merely] evidence of negligence" and not proof of negligence. See MPJI-Cv 18:4, 19:7 (both relying on *e.g., Brady v. Ralph M. Parsons Co*., 82 Md. App. 519, 537 (1990)). For ease of use, the Standing Committee on Pattern Jury Instructions of the Maryland State Bar Association, in preparing the MPJI-Cv repeated the same instruction in both the chapter on "Motor Vehicles" (Chapter 18) and the Chapter entitled, "Negligence – General Concepts" (Chapter 19). The Standing Committee specifically provided in connection with MPJI-Cv 19:7 that: "*Note*: This instruction is identical to MPJI-Cv 18:4." To avoid confusion, however, we refer to both MPJI-Cv 18:4 and MPJI-Cv 19:7 as the pattern "violation of statute" instruction throughout this Opinion.

contributory negligence; and (3) denying his motion for Judgment Notwithstanding the Verdict. We address each of these issues in turn.[3]

I. Jury Instructions

Rubenstein alleges error with respect to two separate jury instructions: (1) the giving of a non-pattern jury instruction derived from TR § 21-801; and (2) the failure to give the pattern violation of statute instruction. When reviewing a trial court's decision to grant or deny a requested jury instruction, we consider "whether the requested instruction was [1] a correct exposition of the law, [2] whether that law was applicable in light of the evidence before the jury, and [3] finally whether the substance of the requested instruction was fairly covered by the instruction actually given." *Malik v. Tommy's Auto Serv., Inc.*, 199 Md. App. 610, 616 (2011). The decisions to give and not to give jury instructions are both reviewed under an abuse of discretion standard. *S & S Oil, Inc. v. Jackson*, 428 Md. 621, 640 (2012).

A. The Non-Pattern Jury Instruction

Section 21-801 of the Transportation ("TR") Article of the Maryland Code provides that:

[3] The State advances an alternative ground for affirming the trial court based on a lack of evidence to support an inference that the State had notice of the downed stop sign before the accident. Because we conclude that the trial court did not err in instructing the jury, allowing the jury to consider the question of contributory negligence, nor in denying Rubenstein's Motion for Judgment Notwithstanding the Verdict, we elect not to reach the State's alternative argument with respect to notice.

> (a) A person may not drive a vehicle on a highway at a speed that, with regard to the actual and potential dangers existing, is more than that which is reasonable and prudent under the conditions
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> (b) At all times, the driver of a vehicle on a highway shall control the speed of the vehicle as necessary to avoid colliding with any person or any vehicle or other conveyance that, in compliance with legal requirements and the duty of all persons to use due care, is on or entering the highway.
>
> (c) Consistent with the requirements of this section, the driver of a vehicle shall drive at an appropriate, reduced speed when approaching and crossing an intersection at which cross traffic is not required to stop by a traffic control device.
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> (d) Consistent with the requirements of this section, the driver of a vehicle shall drive at an appropriate, reduced speed when approaching and crossing a railroad grade crossing.
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> (e) Consistent with the requirements of this section, the driver of a vehicle shall drive at an appropriate, reduced speed when approaching and going around a curve.
>
> (f) Consistent with the requirements of this section, the driver of a vehicle shall drive at an appropriate, reduced speed when approaching the crest of a grade.
>
> (g) Consistent with the requirements of this section, the driver of a vehicle shall drive at an appropriate, reduced speed when traveling on any narrow or winding roadway.
>
> (h) Consistent with the requirements of this section, the driver of a vehicle shall drive at an appropriate, reduced speed when any special danger exists as to pedestrians or other traffic or because of weather or highway conditions.

At trial, the circuit court took language from subsections (b) and (c) and combined them into the following non-pattern jury instruction:

> A person driving a motor vehicle shall control their speed to avoid colliding with other vehicles, taking into account the

> actual and potential dangers that exist. This includes reducing their speed when approaching and crossing an intersection at which cross traffic is not required to stop.

Rubenstein's argument, boiled down, is that this non-jury instruction misstates the law and doesn't apply factually, because he thinks that subsection (c) only applies when *neither* of the two cross streets has a traffic control device. He bases this understanding on his reading of *Warren v. State*, 164 Md. App. 153 (2005).

1. The Legal Meaning of TR § 21-801(c)

In *Warren*, Chief Judge Barbera, while sitting as a judge of this Court, recited TR § 21-801 and then paraphrased subsections (c) through (h) as setting out specific conditions requiring a reduced speed:

> when there is special danger to pedestrians or other traffic, poor weather conditions, and when approaching any of the following: **an intersection at which traffic is not controlled by a traffic control device**; a railroad crossing; a curve; a crest of a hill; or when traveling on a narrow or winding road.

Warren, 164 Md. App. at 162-63 (emphasis added). Critically for Rubenstein's argument, then-Judge Barbera omitted the word "cross" from her paraphrase. From that deletion, Rubenstein posits that subsection (c) should now be interpreted as applying only when neither of the two roads coming to an intersection are controlled by a traffic control device. In effect, Rubenstein argues that *Warren* provides a judicial gloss limiting the applicability of subsection (c).

We disagree. The unambiguous language of subsection (c) provides that motorists must drive at an appropriate, reduced speed "when approaching and crossing an

intersection at which *cross* traffic is not required to stop by a traffic control device." TR § 21-801(c) (emphasis added). By its text, it applies irrespective of whether the road a driver is traveling on is controlled by a traffic device, and its application is determined only by whether the cross street is subject to a traffic control device. When searching for statutory meaning "if the words of a statute clearly and unambiguously delineate the legislative intent, … [w]e need investigate no further but simply apply the statute as it reads." *Price v. State*, 378 Md. 378, 387 (2003). The language of subsection (c) is clear and unambiguous.

Moreover, there is nothing in *Warren* that compels an opposite result. In *Warren*, this Court was concerned with interpreting TR §21-801(a) and, as part of that analysis, contrasted the "more general" nature of subsections (a) and (b) with the more specific nature of subsections (c) through (h). It was only in that context, not as a definitive interpretation of subsection (c), that this court paraphrased subsection (c). We hold, therefore that the trial court's non-pattern jury instruction based on TR § 21-801(c) was a correct statement of law.

2. Sufficiency of the Evidence to Trigger the Application of TR § 21-801(c)

Rubenstein also argues that the trial court erred in giving this jury instruction because it was not supported by the evidence. Specifically, Rubenstein argues that "there was no evidence presented to the jury as to what, if any, traffic control device governed cross traffic [on Route 77]." In fact, Frederick County's Exhibits 1-5 were pictures of the scene of the accident from which it was possible for the jury (and this Court) to determine

that there is no traffic control device—stop sign or stop light—that controls traffic along Route 77 at its intersection with Stottlemeyer Road. We, therefore, reject Rubenstein's suggestion that the non-pattern jury instruction was not factually supported.

Far from being an abuse of discretion, we conclude that the non-pattern jury instruction was both a correct statement of the law, and was applicable in light of the evidence.

B. Alleged Failure to Give Pattern Jury Instruction on Violation of a Statute

Rubenstein also urges that the trial court abused its discretion in refusing to give a model pattern jury instruction regarding the effect of violation of a statute: "[t]he violation of a statute, which is a cause of [Rubenstein's] injuries or damages, is evidence of negligence." MPJI 18:4; 19:7.[4] We find that this issue is not preserved for appeal, and therefore, do not reach the merits.

Rubenstein waived his right to challenge the trial court's decision not to give the violation of statute instruction because he himself withdrew his request for the instruction and subsequently failed to challenge the instruction's omission. On the first day of trial, when the trial court was discussing jury instructions, Rubenstein volunteered to withdraw his request for the pattern violation of statute instruction.

> [Rubenstein's Counsel]: Yeah, we'll withdraw that. There was no statute involved.

[4] As described in note 2, *above*, MPJI-Cv 18:4 and 19:7 are identical.

The trial court confirmed Rubenstein's withdrawal of his request for this instruction on the second day of trial:

> The Court: And [Rubenstein] withdrew 19[:]7, ah, under the category of negligence.

At the end of trial, when the parties were discussing jury instructions with the trial court, specifically whether the pattern violation of statute instruction would be given, Rubenstein did not request that it be given or object to the trial court's decision not to give it. In fact, after an exchange with the trial court, Rubenstein stated with respect to the pattern violation of statute instruction: "Your Honor, I'll withdraw it. That's fine." Because Rubenstein voluntarily withdrew his request for the instruction, and subsequently did not request that it be provided, this issue was not preserved for appeal and is waived. Md. Rule 2-520(e); *Gittin v. Haught-Bingham*, 123 Md. App. 44, 49 (1998) (holding that "to preserve his contentions concerning the law that should have governed the jury's deliberations, appellant was required to note exceptions to the trial court's jury instructions.").

Therefore, we decline to reach Rubenstein's allegation of error with respect to the pattern violation of statute instruction.

II. Consideration of the Question of Contributory Negligence

Rubenstein argues the trial court erred in allowing the jury to decide whether he was contributorily negligent. Rubenstein asks this Court to hold that there was insufficient evidence for the jury to determine that a reasonable person would have acted differently given the factual scenario presented. The State and County, conversely, argue that

Rubenstein's breach of (1) a driver's duty to both observe carefully the road in front of him and be reasonably aware of what is occurring along the sides of the street; and (2) a driver's duty to reduce speed when approaching an intersection at which cross traffic is not required were sufficient for a jury to determine: "that a reasonable person would have seen the warning sign and intersection ahead, and would have slowed his vehicle with enough time to see the bent stop sign and come to a stop." Given the evidence available at trial, we hold that the trial court did not abuse its discretion in submitting the issue of contributory negligence to the jury.

The Court of Appeals has held that "[b]efore the doctrine of contributory negligence can be successfully invoked, it must be demonstrated that the injured party acted, or failed to act, with knowledge and appreciation, either actual or imputed, of the danger of injury which his conduct involves." *Thomas v. Panco Mgmt. of Md., LLC*, 423 Md. 387, 418 (2011) (quoting *Menish v. Polinger Co.,* 277 Md. 553, 560 (1976)). When evaluating whether the issue of contributory negligence was properly submitted to the jury, we view the evidence in the light most favorable to the defendant:

> In deciding whether the trial court should have ruled as a matter of law that [the plaintiff] was not contributorily negligent, we view the evidence and the reasonable inferences that might be drawn from the evidence in the light most favorable to the [State]. Ordinarily, contributory negligence is a question of fact that is for the jury to decide. Only when no reasonable person could find in favor of the plaintiff on the issue of contributory negligence should the trial court take the issue from the jury.

McQuay v. Schertle, 126 Md. App. 556, 569 (1999) (internal citations omitted). In submitting the question of contributory negligence to a jury, even "meager evidence of negligence is sufficient to carry the case to the jury." *Malik v. Tommy's Auto Serv., Inc.*, 199 Md. App. 610, 620 (2011).

We conclude that the following facts, taken together, were sufficient to allow the trial court to submit the question of contributory negligence to the jury:

- Testimony that Rubenstein was traveling at least 40 miles per hour;
- Pictures of a "stop sign ahead" warning sign that was visible 500 feet before the intersection;
- Pictures of the downed stop sign from which the jury could, in its discretion, have found that the sign was sufficiently visible to put Rubenstein on notice;
- Pictures of the back of the stop sign on *southbound* Stottlemeyer Road, which was visible on the opposite side of Route 77 and from which a motorist might have inferred the requirement to stop on northbound Stottlemeyer Road.

We hold that these facts cumulatively, if perhaps "meager," were nonetheless sufficient to allow the question to be submitted to the jury. In so doing, we are distinguishing this case from cases cited by Rubenstein in which there was no evidence that the plaintiff's actions played a role in causing the accident. *See Myers v. Bright*, 327 Md. 395 (1992); *Rosenthal v. Mueller*, 124 Md. App. 170 (1998). We briefly review those cases to highlight their distinguishing features.

In *Myers*, the Court of Appeals found that plaintiff's speed could not have been a proximate cause of an accident. The Court made that determination because, regardless of whether plaintiff was obeying the speed limit, the accident would still have occurred. *Myers*, 327 Md. at 400-01. In so holding, the Court merely affirmed a line of cases holding that excessive speed, in and of itself, need not trigger the issue of contributory negligence. *See, e.g., Alston v. Forsythe,* 226 Md. 121, 130 (1961). Of course, we do not disagree. Here, it is Rubenstein's speed in conjunction with other factors listed above, that trigger the question of contributory negligence for the jury.

In *Rosenthal*, this Court took pains to distinguish the finding of negligence and the finding of causation or contribution – and held that only when both are proven does the issue of contributory negligence arise. 124 Md. App. at 177-78. *Rosenthal* made it plain "that even when a plaintiff's negligence is established, an independent issue still remains with respect to causation: [n]egligence that does nothing to cause a mishap cannot create accountability." *Id.* at 178 (internal citation omitted). Rubenstein's case, however, is different because it was Rubenstein's negligence — failing to observe the road, failing to be reasonably aware of what was occurring along the sides of the road, and failing to slow before entering the intersection where cross traffic was not controlled by a traffic control device — that caused the mishap. Here, the negligence could be found to have caused the accident.

Contrary to Rubenstein's argument, the jury could have determined that a reasonable person, unfamiliar with the area, seeing the warning sign, and seeing an

intersection ahead, would have slowed before the intersection with enough time to see the bent stop sign and an approaching vehicle on Route 77. Moreover, he could have seen the downed stop sign or the back of an octagonal sign across Route 77. Given the evidence available at trial, we hold that the trial court did not abuse its discretion in submitting the issue of contributory negligence to the jury.

III. Denying the Motion for Judgment Notwithstanding the Verdict

Rubenstein argues that there "was no evidence beyond mere speculation that could have properly persuaded the jury that [Rubenstein] was negligent" and, therefore, that the trial court erred by denying his motion for judgment notwithstanding the verdict. The State and County refute this assertion by pointing to the same evidence that allowed the jury to properly consider the issue of contributory negligence.

When determining the propriety of a trial court's denial of a Motion for Judgment Notwithstanding the Verdict ("JNOV") we apply the following standard of review:

> We assume the truth of all credible evidence on the issue, and all fairly deducible inferences therefrom, in the light most favorable to the party against whom the motion is made. Consequently, if there is any evidence, no matter how slight, that is legally sufficient to generate a jury question, the case must be submitted to the jury for its consideration.

McClure v. Lovelace, 214 Md. App. 716, 725 (2013) *aff'd sub nom. Amalgamated Transit Union v. Lovelace*, 441 Md. 560 (2015); *see* Md. Rule 2-532 (defining the standard for granting a Motion for Judgment Notwithstanding the Verdict). A motion for judgment notwithstanding the verdict tests the legal sufficiency of the evidence and if there exists

"any competent evidence, however slight," from which the jury could have found as they did, that a JNOV would be improper. *Scapa Dryer Fabrics, Inc. v. Saville*, 418 Md. 496, 513 (2011) (internal quotation omitted).

The jury could have found Rubenstein violated his duty to act reasonably while driving given the following: (1) Rubenstein's speed of at least 40 miles per hour; (2) Rubenstein's passing of the "stop sign ahead" warning sign, visible from 500 feet before the intersection; (3) Rubenstein's ability to see the downed, though, sufficiently visible stop sign; and (4) Rubenstein's opportunity to observe the back of the stop sign on southbound Sottlemeyer Road. The record demonstrates legally relevant and competent evidence of Rubenstein's contributory negligence. Whether Rubenstein was reasonable in his conduct and had the opportunity to avoid the accident were proper questions of fact for the jury to decide. Therefore, the trial court did not abuse its discretion or otherwise err in denying the motion for judgment notwithstanding the verdict.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.