Circuit Court for Montgomery County
Case No.: 398708-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 185

September Term, 2016

NATALIA SUWUH ANGKUW

v.

BRAD ERIC ROSENTHAL

Meredith,
Reed,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: October 3, 2017

On January 11, 2012, Natalia Suwuh Angkuw, appellant ("Ms. Angkuw"), suffered injuries when she was struck by a car as she walked from the parking lot toward the front door of a Safeway grocery store in Rockville, Maryland. Brad Eric Rosenthal, appellee ("Mr. Rosenthal"), was the driver of the car. Ms. Angkuw filed an action against Mr. Rosenthal sounding in negligence. At the close of a jury trial in the Circuit Court for Montgomery County, the jury found Mr. Rosenthal negligent and Ms. Angkuw contributorily negligent. But the jury also found that Mr. Rosenthal had the last clear chance to avoid the injury, and therefore, awarded Ms. Angkuw $42,401 for past medical expenses, $13,840 for lost wages, and $50,000 in damages for pain and suffering. Mr. Rosenthal filed a motion for judgment notwithstanding the verdict, arguing that the trial court erred in instructing the jury on the doctrine of last clear chance. The trial court concluded that the evidence was insufficient to generate the issue of last clear chance, and the court entered judgment notwithstanding the verdict ("JNOV") in favor of the Mr. Rosenthal. This appeal followed.

QUESTIONS PRESENTED

Ms. Angkuw presents two questions for our review:

1. Did the trial court err in setting aside the jury's determination that evidence and reasonable inferences indicated Appellee Rosenthal had the Last Clear Chance to avoid driving his car into Appellant Angkuw?

2. Did the trial court err in submitting contributory negligence instructions to the jury crafted from Md. Trans. Code Ann. §§ 21-503(d) and 21-506?

We conclude that the trial court's ruling on last clear chance was consistent with our precedent that requires a sequential, separate act of negligence. But we also conclude that the trial court erred in its instructions to the jury on the issue of contributory negligence, and that such error was not harmless. Accordingly, we will vacate the judgment entered by the circuit court and remand the case for a new trial.

FACTS AND PROCEDURAL HISTORY

At approximately 7 p.m. on the night of January 11, 2012, Ms. Angkuw stopped at the Safeway at Fallsgrove Shopping Center to pick up some dinner items. It was dark and raining, but there were lights on in the parking lot and the stores. She parked and exited her car, and began walking toward the store. Ms. Angkuw was wearing black pants and a houndstooth jacket that had a black-and-white pattern, and she was carrying an open black umbrella. At the end of the row of cars where she had parked is an area of the parking lot that serves as a road between the parking aisles and the stores in the shopping center. The parties sometimes referred to this area of the parking lot as a service road for the shopping center. According to Ms. Angkuw, she stopped before entering the service road, and looked to her left, then to her right, then to her left again. Seeing no cars, Ms. Angkuw began to cross the service road. She was not in a marked crosswalk, but testified that she "was walking toward" a crosswalk.

Ms. Angkuw testified that she had not reached the crosswalk when she felt "something hit me on my right side. I didn't know what it was. The next thing I knew I ended up on the ground." Ms. Angkuw had been struck by a car driven by Mr. Rosenthal.

Ms. Angkuw testified that she neither saw nor heard Mr. Rosenthal's car before it knocked her to the ground. Ms. Angkuw sustained a broken knee as a result of the impact. She also lost time from work, and incurred medical bills.

Mr. Rosenthal testified that he, too, had gone to Safeway at around 7 p.m. on the night of January 11, 2012. Mr. Rosenthal went into the grocery store, made his purchases, and returned to his car. Mr. Rosenthal testified that it was raining and it was dark. Mr. Rosenthal backed his car out of his parking spot in the same aisle where Ms. Angkuw had parked, and he drove toward the Safeway store. He stopped at the end of the row of parked cars, where the parking aisle meets the service road, and, he testified, "I looked left. I looked right. Seeing no cars, no people I turned left." He acknowledged that he did not look to his left again before he proceeded in that direction. And he admitted that he never saw Ms. Angkuw until after he felt his vehicle strike her with the front bumper of his car. He explained that his attention was focused upon a pedestrian he saw further ahead and to the right.

There are three painted crosswalks on the area of the service road adjacent to the Safeway; two run diagonally from an end of a parking aisle toward entrances on the outermost ends of the storefront, and, between those two crosswalks, a third crosswalk runs from the end of a parking aisle to the store in a perpendicular manner. Mr. Rosenthal testified that his car "[p]assed through that center crosswalk and that's when I felt something and heard a scream and stopped my car immediately." Mr. Rosenthal testified

that he had his windshield wipers on, was going between five and ten miles per hour, and drove on the service road for only "a few seconds" before the accident occurred.[1]

Ms. Angkuw filed suit against Mr. Rosenthal, asserting that he had been negligent in the operation of his vehicle. Mr. Rosenthal defended, asserting that he was not negligent, but that, even if he was negligent, Ms. Angkuw was contributorily negligent. Mr. Rosenthal's motion for judgment at the close of Ms. Angkuw's case was denied. Mr. Rosenthal renewed the motion at the close of his own case, and the court reserved. Thereafter, the court instructed the jury.

Two instructions are the source of the issues Ms. Angkuw raises in this appeal. First, at Mr. Rosenthal's request, and over Ms. Angkuw's objection, the court gave an instruction relative to contributory negligence that included language pieced together from provisions of Md. Code (1977, 2012 Repl. Vol.), Transportation Article ("Trans."), §§ 21-503(d) and 21-506. Second, at Ms. Angkuw's request, and over Mr. Rosenthal's objection, the court instructed the jury on the doctrine of last clear chance. The jurors were given a copy of all of the judge's instructions.

The jury returned a verdict finding that Mr. Rosenthal was negligent and that Ms. Angkuw was contributorily negligent, but that Mr. Rosenthal had had the last clear chance to avoid the accident. Accordingly, the jury's verdict was in favor of Ms. Angkuw in the

[1] Ms. Angkuw testified that she was struck prior to reaching the middle crosswalk; Mr. Rosenthal, however, testified that he passed through the middle crosswalk before he struck her. Appellant does not contend that she was *in* a crosswalk when Mr. Rosenthal hit her.

total amount of $106,241.87, consisting of $42,401.87 in past medical bills; $13,840.00 in lost wages; and $50,000 in non-economic damages.

After judgment was entered on the verdict, Mr. Rosenthal filed a motion for judgment notwithstanding the verdict pursuant to Maryland Rule 2-532, arguing that the last clear chance doctrine did not apply as a matter of law to this case, and that the court had erred in instructing the jury on this doctrine. Ms. Angkuw filed an opposition.

On March 16, 2016, the court filed an opinion and order granting Mr. Rosenthal's motion for judgment notwithstanding the verdict based upon the trial court's conclusion that the doctrine of last clear chance was "not available under the facts of this case." The trial judge explained that he reached this conclusion because: "Defendant did not have a 'fresh opportunity,' of which he was aware, to avert the consequences of the accident." The court explained that, "in this case, Defendant's negligence was but one brief and continuing event . . . ." Having concluded that the doctrine of last clear chance did not apply, the trial court ruled that the jury's finding of contributory negligence barred Ms. Angkuw's recovery, and the court entered judgment, notwithstanding the verdict, in favor of Mr. Rosenthal. This appeal followed.

STANDARD OF REVIEW

We review the grant of a motion for judgment notwithstanding the verdict *de novo*. As we explained in *Mahler v. Johns Hopkins Hosp., Inc.,* 170 Md. App. 293 (2006):

> [A motion for judgment notwithstanding the verdict] tests the legal sufficiency of the evidence, and is reviewed under the same standard as a judgment granted on motion during trial. A party is not entitled to judgment unless evidence on the issue and all inferences fairly deducible therefrom,

> when viewed in the light most favorable to the party against whom the motion is made, are such as to permit only one conclusion with regard to the issue. To this end, we must assume the truth of all credible evidence and all inferences of fact reasonably deductible from the evidence supporting the party opposing the motion. [I]f there is any competent evidence, however slight, leading to support the plaintiff's right to recover, the case should be submitted to the jury and the motion for directed verdict or the motion for judgment n.o.v. denied.

Id. at 317-18 (citations and quotation marks omitted). "[I]n our analysis, we will reverse the grant of the JNOV if there is any evidence from which the jury could have reached the conclusion that it reached." *Carter v. Senate Masonry, Inc.*, 156 Md. App. 162, 164 (2004) (en banc).

With respect to a challenge to jury instructions, appellate

> inquiry into whether a jury instruction was appropriately given requires that we determine whether the instruction correctly stated the law, and if so, whether the law was applicable in light of the evidence before the jury. *Landon,* 389 Md. at 224, 884 A.2d at 153, quoting *Wegad v. Howard St. Jewelers, Inc.,* 326 Md. 409, 414, 605 A.2d 123, 126 (1992); *Holman v. Kelly Catering, Inc.,* 334 Md. 480, 495–96, 639 A.2d 701, 709 (1994).

Goldberg v. Boone, 396 Md. 94, 122 (2006).

In *Barksdale v. Wilkowsky*, 419 Md. 649, 669-70 (2011), the Court of Appeals summarized the requirements for a successful challenge to an erroneous instruction in a civil case:

> [A] party challenging an erroneous jury instruction in a civil case must demonstrate to the court why the error was prejudicial. **An erroneous instruction may be prejudicial if it is misleading or distracting for the jury, and permits the jury members to speculate about inapplicable legal principles**. *See Fry* [*v. Carter*], 375 Md. [341] at 355, 825 A.2d at 1050 [(2003)]. **An error may also be prejudicial if the error, by itself, could have precluded a finding of liability where one was warranted**. *See LNC Invs.*[*v. First Fid. Bank, N.A.*], 173 F.3d 454 [(2nd Cir. 1999)]. We have also

> recommended a non-exclusive, four-factor list for the reviewing court to consider. *See Nat'l Medical Transp. Network* [*v. Deloitte & Touche*]*,* 72 Cal.Rptr.2d [720] at 731 [(1998)]. **Moreover, in certain cases, the mere inability of a reviewing court to rule out prejudice, given the facts of the case, may be enough to declare an error reversible**. *See Traynor*, *supra* at 64.[2] The reviewing court, in considering these issues, should engage in a comprehensive review of the record, and base its determination on the nature of the instruction and its relation to the issues in the case.

(Emphasis added.)

The non-exclusive four-part test referenced by the Court of Appeals in *Barksdale* was described by the Court as follows:

> At least one California court has undertaken the hard task of outlining the objective factors that a court can consider. *See Nat'l Med. Transp. Network v. Deloitte & Touche*, 62 Cal. App. 4th 412, [432,] 72 Cal. Rptr. 2d 720 (1998). In considering whether an erroneous jury instruction was prejudicial, the court listed the following factors:
>
> > (1) the degree of conflict in the evidence on critical issues; (2) whether respondent's argument to the jury may have contributed to the instruction's misleading effect; (3) whether the jury requested a rereading of the erroneous instruction or of related evidence; . . . and [4] the effect of other instructions in remedying the error.
>
> *Id*. at 731. Although we are hesitant to ascribe [sic] to any exclusive list of factors, given the patchwork of harmless error cases, we believe this four factor list is helpful.

419 Md. at 669 (footnote omitted).

[2] Traynor, Roger J., *The Riddle of Harmless Error (*The Ohio State University Press, 1970*)*. Justice Traynor served as an Associate Justice of the California Supreme Court from 1940-1964, and Chief Justice from 1964-1970.

DISCUSSION

In this appeal, Ms. Angkuw makes two arguments: 1) that the court erred in granting the JNOV because, she argues, the evidence was sufficient to support the jury's finding that Mr. Rosenthal had failed to avail himself of a last clear chance to avoid the collision with Ms. Angkuw; and 2) that the court's contributory negligence instruction referencing Trans. §§ 21-503(d) and 21-506 was erroneous and prejudicial. We conclude that the trial court did not err in ruling that the evidence was insufficient to support the jury's finding of a last clear chance to avoid the collision; but, because the court erred in instructing the jury relative to violation of a statute that may very well have provided the basis for the jury's finding of contributory negligence, the case must be remanded for new trial.

I. Last Clear Chance.

With respect to the issue of last clear chance, the trial judge instructed the jury:

> A plaintiff cannot recover if the plaintiff's negligence is a cause of the injury. . . . A plaintiff who was contributorily negligent may nevertheless recover if the plaintiff was in a dangerous situation and thereafter the defendant had a fresh opportunity of which defendant was aware to avoid injury to the plaintiff and failed to do so.

When the trial judge offered the parties an opportunity to make objections to the instructions it had just given, Ms. Angkuw's counsel raised no complaint regarding the instruction the court had given regarding the doctrine of last clear chance. Counsel for Mr. Rosenthal, however, stated: "Objection to the last clear chance instruction, Your Honor." That objection was "noted and overruled."

This instruction was very similar to MPJI-Civil 19:15 (5th ed. 2017), which provides:

> A plaintiff who was contributorily negligent may nevertheless recover damages if the plaintiff was in a dangerous situation caused by the negligence of the defendant and the plaintiff, and thereafter the defendant had a fresh opportunity of which the defendant was aware to avoid injury to the plaintiff but failed to do so.

Numerous Maryland cases have similarly described the doctrine of last clear chance as requiring a sequential, fresh opportunity for the defendant to avoid the plaintiff's injury. *E.g.*, *Wooldridge v. Price*, 184 Md. App. 451, 462 (2009); *Nationwide Mutual Insurance Co. v. Anderson*, 160 Md. App. 348, 357-58 (2004); *Carter, supra*, 156 Md. App. at 168-69.

After the verdict was returned, Mr. Rosenthal moved for JNOV, and argued that, even if he was negligent in failing to see Ms. Angkuw before running into her, there was no evidence from which the jury could have found a fresh opportunity for him to avoid the accident. The court agreed, and entered JNOV.

Although we have strained to find evidence of a "fresh opportunity" for avoidance of the accident that might support the jury's verdict, we are unable to perceive from the evidence presented at trial that there was more than one continuous act of negligence on the part of Mr. Rosenthal in failing to keep a proper lookout that was a cause of the accident. *See* MPJI-Civil 18:3 (5th ed. 2017) ("A driver of a motor vehicle has a duty to keep a proper lookout. The driver must reasonably observe traffic and other conditions that confront him or her."). Ms. Angkuw did not see or hear his vehicle before it hit her, and

her testimony provided no evidence of a fresh opportunity for avoidance. And Mr. Rosenthal, the only other witness at trial, testified that he did not see Ms. Angkuw before the front bumper of his car knocked her down. Although his failure to see what was there to be seen supports the jury's finding of negligence, we cannot distinguish that act of negligence from any other act of negligence on his part that proximately caused the accident.

Ms. Angkuw argues, in the alternative, that we should revisit the concurring opinion in *Carter*, in which Judge Peter B. Krauser, joined by Judge Joseph F. Murphy --- two former Chief Judges of our Court --- argued that Maryland should abandon any requirement that the defendant commit two sequential acts of negligence, and instead, focus exclusively on whether the defendant had the *last* clear chance to avoid the accident without regard to whether there had been some earlier act of negligence on the part of the defendant. *Carter, supra*, 156 Md. App. at 175. Judge Krauser urged the Court to follow the approach adopted by the North Carolina Supreme Court in *Vernon v. Crist*, 291 N.C. 646, 654-55, 231 S.E.2d 591, 595 (1977) ("In this jurisdiction last clear chance is 'but an application of the doctrine of proximate cause.' *Exum, supra*, 272 N.C. at 578, 158 S.E.2d at 854. If defendant had the last clear chance to avoid injury to the plaintiff and failed to exercise it, then his negligence, and not the contributory negligence of the plaintiff, is the proximate cause of the injury. . . . 'The only negligence of the defendant may have occurred after he discovered the perilous position of the plaintiff.'"). But no Maryland case since *Carter* has adopted that approach, and *stare decisis* precludes us from doing so in this case.

We cannot foresee whether the evidence on this point might somehow differ at a retrial, but the evidence that was presented at the last trial, even when considered in the light most favorable to Ms. Angkuw, was insufficient to support the jury's finding that Mr. Rosenthal had a fresh opportunity to avoid the accident.

II. Contributory Negligence.

At trial, the court instructed the jury that "[a] plaintiff cannot recover if the plaintiff's negligence is a cause of the injury."

The court also gave the following instructions, upon Mr. Rosenthal's request, and over Ms. Angkuw's objection, relative to the claim that Ms. Angkuw was contributorily negligent:

> [BY THE COURT]: . . . **The violation of a statute which is a cause of the plaintiff's injuries or damages is evidence of negligence.**
>
> **I'm now going to read to you from some statutes that may be applicable in this case.** Pedestrian means an individual afoot. Crosswalk means that part of a roadway that is distinctly indicated for pedestrian crossing by lines or other markings.
>
> Highway includes rights of way, roadway surfaces, roadway subgrades, shoulders, median dividers, drainage facilities and structures, related storm water management facilities and structures, roadway cuts, roadway fills, guardrails, bridges, highway grade separation structures, railroad grade separations, tunnels, overpasses, underpasses, interchanges, entrance plazas, approaches, and other structures forming an integral part of a street, road or highway including bicycle and walking paths.
>
> And second any other property acquired for the construction, operation or use of the highway. Right of way means the right of one vehicle or one pedestrian to proceed in a lawful manner on a highway in preference to another vehicle or pedestrian. **If a pedestrian crosses a roadway at any point other than in a marked crosswalk or in an unmarked crosswalk at**

> **an intersection, the pedestrian shall yield the right of way to any vehicle approaching on the roadway. [Trans. §21-503(a).]**
>
> **A pedestrian may not cross a roadway intersection diagonally unless authorized by a traffic control device for crossing movements. If authorized to cross diagonally, a pedestrian may cross only in accordance with the traffic control device. [Trans. §21-503(d).]**
>
> Where a sidewalk is provided, a pedestrian may not walk along and on an adjacent roadway. [Trans. §21-506(a)]. Where a sidewalk is not provided, a pedestrian who walks along and on a highway may walk only on the left shoulder[,] if practicable[,] or on the left side of the road[way][,] as near as practicable to the edge of the roadway[,] facing any traffic that might approach from the opposite direction. [Trans. §21-506(b).]

(Emphasis added.)

At the conclusion of the court's instructions, the trial judge invited counsel to state any exceptions. Ms. Angkuw's counsel lodged the following objections, which were overruled:

> The plaintiff would object to the . . . violation of the statutes instruction. Specifically, we would object to the inclusion of ["A] pedestrian may not cross a roadway intersection diagonally unless authorized by a traffic control device for crossing.["] That's not in the case. That's not an intersection. That is for a four way intersection where someone cuts across the middle. And we would generally object to the inclusion of those statutes in the instructions.

On appeal, Ms. Angkuw complains that the instruction pursuant to Trans. § 21-503(d) – prohibiting crossing an intersection diagonally -- should not have been given because, "at no point while she was walking from the parking lot toward the closest crosswalk did Ms. Angkuw cross a roadway intersection, let alone diagonally cross an intersection." In his brief, Mr. Rosenthal "concedes that this instruction should not have been given, as there was no intersection involved when appellant crossed diagonally across

the service road." We, too, agree with the parties that the instruction pursuant to Trans. § 21-503(d) was not generated by the evidence, was not applicable to the facts of this case, and should not have been given.[3]

Despite conceding that the instruction regarding crossing diagonally was inapplicable, Mr. Rosenthal contends that any error by the trial court in instructing the jury regarding that alleged act of negligence on the part of Ms. Angkuw was harmless because there was clear and convincing evidence of Ms. Angkuw's contributory negligence in failing to yield the right of way when crossing the service road outside the crosswalk.

But, even if the evidence at trial was sufficient to generate a jury issue on the question of contributory negligence, this was clearly not a case in which the court could rule as a matter of law that Ms. Angkuw was contributorily negligent. As the Court of Appeals stated in *Campfield v. Crowther*, 252 Md. 88, 93 (1969):

> Contributory negligence is the neglect of the duty imposed upon all men to observe ordinary care for their own safety. It is the doing of something that a person of ordinary prudence would not do, or the failure to do

[3] Ms. Angkuw also complains that the instructions based on Trans. § 21-506(a) and (b) were erroneously given. She contends that the instruction pursuant to § 21-506(a) – requiring a pedestrian to walk on a sidewalk -- was inapplicable and prejudicial because there "was no sidewalk provided alongside the traffic lanes which appellant crossed." And she contends that the instruction quoting § 21-506(b) – requiring a pedestrian to walk "only on the left shoulder . . . or as near as practicable to the edge of the roadway" -- was inapplicable because, she contends, the service road that is part of the shopping center's parking lot is not a "highway" within the meaning of the statute. Because Ms. Angkuw's exceptions to the jury instructions did not preserve these arguments, we will not consider them. *See* Maryland Rule 2-520(e), which provides: "No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly *after the court instructs the jury*, stating distinctly the matter to which the party objects and the grounds of the objection." (Emphasis added.)

> something that a person of ordinary prudence would do, under the circumstances. The conduct of the plaintiff which falls below this standard of care must be a legally contributing cause cooperating with the defendant's negligence in bringing about injury to the plaintiff. The plaintiff, however, is not bound to anticipate every possible injury which might occur and every possible eventuality.

(Citations omitted.)

The *Campfield* Court stated: "It is only when the minds of reasonable persons cannot differ on the issue of contributory negligence, that the trial court is justified in deciding the issue as a matter of law." *Id*. at 92-93. *See Belleson v. Klohr*, 257 Md. 642, 646 (1970) ("Appellant argues strenuously that the evidence in this case showed appellee guilty of contributory negligence as a matter of law and it was error to let this case go to the jury on that issue. . . . [I]n considering whether a directed verdict for defendant was proper, the evidence and inferences properly deducible therefrom must of course be viewed in a light most favorable to the plaintiff. If there is any competent evidence, however slight, leading to support the plaintiff's right to recover, the case should be submitted to the jury.").

Furthermore, although Mr. Rosenthal argued that Ms. Angkuw was required by Trans. § 21-503(a) to "yield the right of way to any vehicle approaching on the roadway," the mutual duties of care owed by a driver and a pedestrian are more accurately described in MPJI-Civil 23:2 (5th ed. 2017), which provides:

> The law imposes upon the operators of vehicles and pedestrians using a public street or highway the duty to exercise ordinary care. These duties are mutual, reciprocal, and equal. Vehicle operators must exercise ordinary care so as to avoid injuring others and pedestrians must exercise ordinary care to ensure their own safety. When persons are using, or about to use a public street or highway either as vehicle operators or pedestrians, they have a duty to keep a proper lookout in order to protect themselves and others.

> What constitutes a proper lookout is determined by the particular facts of the case.

The evidence in this case did not clearly establish that, as a matter of law, Ms. Angkuw failed to observe "ordinary care for [her] own safety." *Campfield, supra*, 252 Md. at 93. The question was appropriate for submission to the jury, and Ms. Angkuw was entitled to have the issue considered upon proper instructions.

The Court of Appeals explained in *Barksdale, supra*, 419 Md. at 669: "An erroneous instruction may be prejudicial if it is misleading or distracting for the jury, and permits the jury members to speculate about inapplicable legal principles." The instruction based upon Trans. § 21-503(d) --- which Mr. Rosenthal concedes was inapplicable --- was such an instruction. The erroneous instruction permitted the jury to consider an issue that was not generated by the evidence, and the arguments made by defense counsel at trial encouraged the jury to focus on the inapplicable statute (that prohibits crossing an intersection diagonally). Mr. Rosenthal's counsel, in closing argument, said, *inter alia*: (1) "There is negligence in that she is walking ***diagonally***"; (2) "She is walking ***diagonally*** and we know that she is walking towards the left entrance of the store"; (3) "But basically you hear about the impact and we hear that she is walking towards the store and she is walking ***diagonally***"; and (4) "So in terms of negligence, she is not in a crosswalk. She is walking ***diagonally*** away from once she enters into the right travel lane." These repeated references to Ms. Angkuw crossing on a diagonal enhanced the substantial probability that the inapplicable instruction that it was a violation of a statute to cross an intersection diagonally influenced this jury to find that Ms. Angkuw was contributorily negligent. *Cf. Barksdale,*

supra, 419 Md. at 673 (Court of Appeals ruled that the Barksdale "ha[d] carried her burden of showing prejudice" caused by an erroneous jury instruction because, under the circumstances, "the Court cannot determine whether the jury actually relied on the impermissible jury instruction"). Accordingly, we will reverse and remand for a new trial.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. CASE REMANDED FOR NEW TRIAL. COSTS TO BE PAID BY APPELLEE.