Circuit Court for Harford County
Case No. 12-C-16-003155

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2363

September Term, 2017

GREGORY DICKERSON

v.

STREAMSIDE ASSOCIATION, INC.

Arthur,
Beachley,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.
Dissenting Opinion by Arthur, J.

Filed: April 17, 2019

On April 14, 2016, Gregory Dickerson, appellant, fell into a pothole while walking on Harrpark Court in Edgewood, Maryland. As a result of the injuries sustained during the fall, his right little finger was amputated. On November 29, 2016, Mr. Dickerson filed a complaint in the Circuit Court for Harford County alleging that the owner of the property, appellee Streamside Association, Inc. ("Streamside"), negligently failed to: (1) "divert him away from" the pothole, "(2) properly maintain the road . . . in a manner suitable for pedestrian traffic, and/or[,] (3) warn [Mr.] Dickerson . . . of the dangerous condition." Streamside moved for summary judgment on October 13, 2017, asserting that Mr. Dickerson assumed the risk of injury and/or was contributorily negligent as a matter of law. On October 27, 2017, Mr. Dickerson filed his opposition to the motion for summary judgment and requested a hearing. The parties discussed this motion briefly at a pretrial conference on November 16, but no further hearings were held. On January 8, 2018, the circuit court, in a written opinion, granted Streamside's motion for summary judgment. Mr. Dickerson noted a timely appeal, and presents the following three questions for our review:

1. Did the trial court err, as a matter of law, by granting the Motion for Summary Judgment without conducting a hearing as [Mr. Dickerson] requested?

2. Based upon the evidence, did the trial court err in concluding that, as a matter of law, [Mr. Dickerson] was contributorily negligent?

3. Based on the evidence, did the trial court err in concluding that, as a matter of law, [Mr. Dickerson] assumed the risk of his injuries?

For the reasons discussed below, we hold that Mr. Dickerson waived his hearing request and was contributorily negligent as a matter of law. Because the circuit court

properly granted summary judgment based on Mr. Dickerson's contributory negligence, we need not address whether Mr. Dickerson assumed the risk of his injuries as a matter of law.

FACTS AND PROCEEDINGS[1]

On April 14, 2016, at approximately 9:00 p.m., Mr. Dickerson left his residence on Harrpark[2] Court to walk to a nearby 7-Eleven with two neighbors. Mr. Dickerson had resided on Harrpark Court for about two years and walked to this particular 7-Eleven at least once or twice a week. He also walked the relevant portion of this route to pick his son up from school two or three times a week. Because Mr. Dickerson has neither a car nor a driver's license, he walks, rides the bus, or uses taxis for transportation.

About a week before the incident, there was a fire in one of the townhouses on the right-hand side of the block, which resulted in debris blocking the sidewalk immediately in front of that house. Other than debris blocking this portion of the sidewalk, Mr. Dickerson's path was clear on the night of the incident. Mr. Dickerson testified that it was dark and that he was not using a flashlight. The street light, however, was apparently working properly.

[1] Because we are "review[ing] the record in the light most favorable to [Mr. Dickerson] and constru[ing] any reasonable inferences that may be drawn from the facts against [Streamside]," all facts are taken from either Mr. Dickerson's deposition or his answers to interrogatories. *See Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 294 (2007) (quoting *Myers v. Kayhoe*, 391 Md. 188, 203 (2006)).

[2] The street is referred to as both "Harrpark" and "Harr Park" in the record. Mr. Dickerson, in his complaint, answer to interrogatories, and briefs, uses "Harrpark." We adopt this spelling.

When Mr. Dickerson approached the debris on the sidewalk, he left the sidewalk, crossed the street, and began walking on the left side of Harrpark Court. Although Mr. Dickerson could have returned to the sidewalk after walking past the debris, he kept walking in the street on the left side of Harrpark Court, reasoning that he "still would have had to cross over because you have to go left to get to the 7-Eleven." As Mr. Dickerson and his neighbors were walking and talking, his left foot went into a pothole next to a storm drain. Mr. Dickerson fell into the pothole and as he "tried to grab the ground," his "finger went back and snapped." Mr. Dickerson initially thought his finger was broken, but quickly realized that it was squirting blood. After Mr. Dickerson's neighbors walked him back to his house, an ambulance transported him to the hospital. Due to the severity of the injury, Mr. Dickerson's right little finger was amputated.

On November 29, 2016, Mr. Dickerson filed a complaint against Streamside alleging that Streamside was negligent in failing to

> (1) divert him away from those portions of the road and/or pavement that created a hazardous condition, (2) to properly maintain the road and/or pavement in a manner suitable for pedestrian traffic, and/or (3) warn [Mr.] Dickerson, and all pedestrians lawfully on the premises, of the dangerous condition of the road and/or pavement.

On October 13, 2017, Streamside moved for summary judgment, asserting that Mr. Dickerson had "assumed the risk of falling in the roadway when he actively chose not to utilize the pedestrian sidewalk available to him" and that even if he did not assume the risk of his injuries, he "was contributorily negligent and such negligence was [a] proximate cause of his injuries." On October 27, 2017, Mr. Dickerson filed an opposition to Streamside's summary judgment motion and requested a hearing. Although the pending

motion for summary judgment was briefly discussed at a pretrial conference on November 16, 2017, the court never held a hearing to specifically consider that motion. On January 8, 2018, the circuit court granted summary judgment, ruling that Mr. Dickerson, as a matter of law, was not only contributorily negligent, but that he had also assumed the risk of his injury. Additional facts will be provided as necessary to resolve the issues presented in this appeal.

STANDARD OF REVIEW

We review a trial court's grant of summary judgment *de novo*. *Koste v. Town of Oxford*, 431 Md. 14, 25 (2013) (quoting *D'Aoust v. Diamond*, 424 Md. 549, 574 (2012)). The Court of Appeals has explained the appellate standard of review on a motion for summary judgment as follows:

> Summary judgment is appropriate where "there is no genuine dispute as to any material fact" and "the party in whose favor judgment is entered is entitled to judgment as a matter of law." Maryland Rule 2–501(f). "In granting or denying a motion for summary judgment, a judge makes no findings of fact." *King v. Bankerd*, 303 Md. 98, 111, 492 A.2d 608, 615 (1985). The appellate court will "review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party." *Myers v. Kayhoe*, 391 Md. 188, 203, 892 A.2d 520, 529 (2006). "In reviewing a grant of summary judgment under Md. Rule 2-501, we independently review the record to determine whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law."

Hill v. Cross Country Settlements, LLC, 402 Md. 281, 294 (2007).

DISCUSSION

I. Mr. Dickerson Waived His Request for a Hearing

On appeal, Mr. Dickerson argues that the circuit court erred when it did not conduct

a hearing as he requested pursuant to Md. Rule 2-311(f). Streamside responds that Mr. Dickerson waived this request during the November 16, 2017 pretrial conference. We agree with Streamside.

Md. Rule 2-311(f) states that:

> A party desiring a hearing on a motion, other than a motion filed pursuant to Rule 2-532, 2-533, or 2-534, shall request the hearing in the motion or response under the heading "Request for Hearing." The title of the motion or response shall state that a hearing is requested. Except when a rule expressly provides for a hearing, the court shall determine in each case whether a hearing will be held, but the court may not render a decision that is dispositive of a claim or defense without a hearing if one was requested as provided in this section.

It is undisputed that Mr. Dickerson properly requested a hearing pursuant to Rule 2-311(f) in his response to Streamside's motion for summary judgment. Accordingly, the court would normally be required to afford Mr. Dickerson a hearing before granting summary judgment against him. However, we conclude that Mr. Dickerson waived his request for a hearing on the motion. At the November 16, 2017 pretrial conference, the following exchange occurred:

> THE COURT: All right. This is in for a pretrial conference today, but I do see there is a motion for summary judgment that was filed by the defense but no request for a hearing, unless I missed that somewhere.
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> [STREAMSIDE'S COUNSEL]: You are correct, Your Honor. The defense in our initial motion did not request a hearing. We had wanted it --
>
> [MR. DICKERSON'S COUNSEL]: Your Honor, [Mr. Dickerson] put in a request for hearing only, obviously, if it need be.
>
> THE COURT: Okay. Then I probably would not hold a hearing. I think the issues seem rather straightforward to me. But it's in for a pretrial conference today, and typically I meet with counsel back in the grand jury room, but

since I was here on the bench and you walked in, we might as well go ahead and try to resolve any issues here in the courtroom.

So, you've had an opportunity to talk since the order -- schedule was put in place. Have you come to any agreement on anything in this matter?

[STREAMSIDE'S COUNSEL]: I think other than, you know, we don't have any discovery issues or anything like that.

THE COURT: No outstanding discovery?

[STREAMSIDE'S COUNSEL]: We are working on an expert -- how, we're going to speak about that, how the expert testimony will be provided as well, but I don't think any outstanding discovery.

[MR. DICKERSON'S COUNSEL]: Yeah. And any outstanding discovery, we are working together. I mean, our offices have worked together many times before.

THE COURT: Okay. All right. Then I will just send you upstairs to the Assignment Office to get a trial date then. And in the meantime, I'll probably do an opinion on the motion for summary judgment. Okay.

[MR. DICKERSON'S COUNSEL]: Thank you, Your Honor.

[STREAMSIDE'S COUNSEL]: Understand, thank you, Your Honor.

Although Mr. Dickerson's counsel advised the court that he had requested a hearing, he did not object to the court's suggestion that a hearing was not necessary. In response to the court's question about whether a hearing had been requested, he responded that he "put in a request for [a] hearing *only, obviously, if it need be*." (Emphasis added). After the court stated "[t]hen I probably would not hold a hearing. I think the issues seem rather straightforward to me[,]" Mr. Dickerson's counsel did not say anything, thus appearing to acquiesce to the court's determination that a hearing was unnecessary. Later, after the court said "in the meantime, I'll probably do an opinion on the motion for summary judgment[,]" Mr. Dickerson's counsel's response was simply "Thank you, Your Honor."

We conclude that Mr. Dickerson waived his right to have a hearing on the motion because he acquiesced to the court's suggestion that a hearing was not necessary. *See* Md. Rule 8-131(a); *Chimes v. Michael*, 131 Md. App. 271, 288 (2000) (quoting *Clayman v. Prince George's Cty.*, 266 Md. 409, 416 (1972)) (stating that the purpose of Md. Rule 8-131(a) is to "require counsel to bring the position of his client to the attention of the lower court . . . so that the trial court can . . . possibly correct any errors in the proceedings."). Because Mr. Dickerson failed to clearly articulate to the court his desire for a hearing on the motion, any right to a hearing was waived.

II. Mr. Dickerson Was Contributorily Negligent as a Matter of Law

On appeal, Mr. Dickerson argues that the court erred in granting summary judgment based on his contributory negligence. In his view, the evidence generated disputed facts that required resolution by a jury. In his appellate brief, he points to seven pieces of evidence to show that he was walking carefully on Harrpark Court on the night of the accident: (1) "that he was not aware of and did not see the pothole until after his fall"; (2) "that prior to his fall he felt comfortable walking down the paved portion of Harrpark Court"; (3) "that at the time of his fall it was dark and the area where he fell was not well lit"; (4) that he "could not use the sidewalk because it was blocked with debris from a recent fire"; (5) "that at the time of his fall he was walking normally and looking straight ahead"; (6) "that at the time of his fall, he was using reasonable caution and was alert to his surroundings"; and (7) that "[n]o warning signs were posted to warn invitees, like [himself], of the hazardous condition located on Harrpark Court." Mr. Dickerson argues that these facts, when construed in a light most favorable to him as the non-moving party,

show that he was not contributorily negligent as a matter of law, and therefore summary judgment was improper.

In Maryland, "it [is] the well-established law . . . that a plaintiff who fails to observe ordinary care for his own safety is contributorily negligent and is barred from all recovery, regardless of the quantum of a defendant's primary negligence." *Harrison v. Montgomery Cty. Bd. of Educ.*, 295 Md. 442, 451 (1983). With respect to contributory negligence, the Court of Appeals has stated that "[o]ne is charged with notice of what a reasonably and ordinarily prudent person would have foreseen and so must foresee what common experience tells may, in all likelihood, occur, and to anticipate and guard against what usually happens." *McManamon v. High's Dairy Prods. Corp.*, 230 Md. 370, 372 (1963). More recently, in *Woolridge v. Abrishami*, we held that

> Contributory negligence is the neglect of duty imposed upon all men [and women] to observe ordinary care for their own safety and refers not to the breach of a duty owed to another, but rather to a failure of an individual to exercise that degree of care necessary to protect him or her self.

233 Md. App. 278, 302 (internal citations and quotation marks omitted) (quoting *Coleman v. Soccer Ass'n of Columbia*, 432 Md. 679, 696 (2013)), *cert. denied*, 456 Md. 92 (2017). For contributory negligence to be found as a matter of law, the injured party's action must be "distinctive, prominent[,] and decisive" and must be of a sort "about which reasonable minds would not differ as to its negligent character[.]" *Dix v. Spampinato*, 28 Md. App. 81, 106 (1975). "Where one leaves a place of safety to venture into a place or posture of danger, and is harmed[,] . . . the venturesome one often has been held to be guilty of contributory negligence as a matter of law." *Willis v. Ford*, 211 Md. App. 708, 717 (2013)

(quoting *Martin v. Sweeney*, 207 Md. 543, 548 (1955)).

Although contributory negligence and assumption of the risk are "closely related and often overlapping defenses," they are distinct from one another. *Schroyer v. McNeal*, 323 Md. 275, 280 (1991). In *Schroyer*, the Court of Appeals, drawing on its precedent, described the distinction thusly:

> The distinction between contributory negligence and voluntary assumption of the risk is often difficult to draw in concrete cases, and under the law of this state usually without importance, but it may be well to keep it in mind. Contributory negligence, of course, means negligence which contributes to cause a particular accident which occurs, while assumption of the risk of accident means voluntary incurring that of an accident which may not occur, and which the person assuming the risk may be careful to avoid after starting. Contributory negligence defeats recovery because it is a proximate cause of the accident which happens, but assumption of the risk defeats recovery because it is a previous abandonment of the right to complain if an accident occurs.
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> * * *
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> Whether they overlap or not, the critical distinction between contributory negligence and assumption of the risk is that, in the latter, by virtue of the plaintiff's voluntary actions, any duty the defendant owed the plaintiff to act reasonably for the plaintiff's safety is superseded by the plaintiff's willingness to take a chance. Consequently, unlike the case of contributory negligence, to establish assumption of the risk, negligence is not an issue—proof of negligence is not required. The plaintiff need only be aware of the risk, which he or she then voluntarily undertakes.

Id. at 281-83 (internal citations and quotations omitted).

With these principles in mind, we turn to the instant case. We begin by noting the existence of an applicable statute. Md. Code (1977, 2012 Repl. Vol.), § 21-506(a) of the Transportation Article ("TR") provides: "Where a sidewalk is provided, a pedestrian may not walk along and on an adjacent roadway." In *Anne Arundel Cty. v. Fratantuono*, 239

Md. App. 126, 142 (2018), we noted that TR § 21-506(a) "is designed to prevent pedestrians from walking in streets."[3] Here, the evidence is undisputed that Mr. Dickerson could have used the sidewalk after he had safely navigated his way around the fire debris blocking the sidewalk. Indeed, Mr. Dickerson walked on the sidewalk until he encountered the debris. Although no Maryland case has examined the legal effect of a pedestrian violating TR § 21-506(a), in *Whitt v. Dynan* we determined that a violation of the predecessor to TR § 21-506(b) did not constitute contributory negligence as a matter of law. 20 Md. App. 148, 154 (1974). In *Whitt*, the plaintiff pedestrian was struck by a car as he was walking on a roadway in an area where there were no sidewalks. *Id*. at 150-51. The defendant argued that the plaintiff was contributorily negligent as a matter of law because he was walking with his back toward approaching traffic rather than walking on the left side of the roadway facing oncoming traffic as required by the statute. *Id*. at 152-53. We held that the pedestrian's violation of the predecessor to TR § 21-506(b) constituted "evidence of negligence, but is not negligence as a matter of law." *Id.* at 162. We similarly hold that Mr. Dickerson's violation of TR § 21-506(a) is merely evidence of negligence, not negligence as a matter of law. That determination, however, does not end our inquiry because other extant undisputed facts, when combined with a statutory violation, may be sufficient to constitute contributory negligence as a matter of law.

Our research has failed to reveal any Maryland case where a pedestrian has elected

[3] Although we recognize that the primary purpose of the statute is to protect pedestrians from vehicles using the roadway, the statute nevertheless clearly requires pedestrians to use the sidewalk where available.

to walk on the street rather than use an available sidewalk and was then injured by a road hazard. The only factually similar case our research uncovered is a recent Indiana intermediate court decision, *Brown v. City of Indianapolis*, 113 N.E.3d 244 (Ind. Ct. App. 2018). There, after attending the Indianapolis 500, Mr. Brown, his wife, and friends were walking to a friend's car parked nearby. *Id*. at 246. Mr. Brown initially used the designated sidewalk, but eventually left the sidewalk to walk on the street. *Id.* As he was walking on the street, Mr. Brown stepped into a pothole, fell, and was injured. *Id.* Mr. Brown sued the city for negligence and the trial court entered summary judgment in the city's favor. *Id.* at 248.

In affirming the trial court's grant of summary judgment, the Indiana Court of Appeals held, in relevant part, that Mr. Brown was contributorily negligent as a matter of law. *Id*. at 252. The court initially noted that an Indiana statute provided that "If a sidewalk is provided and the sidewalk's use is practicable, a pedestrian may not walk along and upon an adjacent roadway." *Id*. at 251. Under Indiana law, the violation of a statutory safety regulation creates a rebuttable presumption of negligence, not negligence as a matter of law. *Id.* The court proceeded to review the undisputed evidence that: (1) Mr. Brown left the sidewalk and was walking in the roadway when he fell; (2) at the time of the fall, all lanes of the roadway were designated for vehicular traffic; and (3) a police officer was directing pedestrians to move to the sidewalk. *Id*. at 252. In upholding the trial court's grant of summary judgment, the appellate court held that the circumstances present there

rendered Mr. Brown contributorily negligent as a matter of law.[4] *Id.*

Although we recognize that the *Brown* facts are not identical to those present here, we find the *Brown* court's analysis instructive and conclude that Mr. Dickerson was contributorily negligent as a matter of law because, even when construing the facts in the light most favorable to him, "reasonable minds would not differ as to [the] negligent character" of his actions[.]" *Dix*, 28 Md. App. at 106. First, Mr. Dickerson violated TR § 21-506(a) by deciding to walk on the street after he passed the fire debris even though the sidewalk was available. As previously stated, the violation of a statute, though not conclusive, creates some evidence of negligence. *Whitt*, 20 Md. App. at 162. Independent of the statutory mandate, when Mr. Dickerson left the sidewalk, he left "a place of safety to venture into a place or posture of danger[.]" *Willis*, 211 Md. App. at 717 (quoting *Martin*, 207 Md. at 548). Mr. Dickerson's election to walk in the street rather than return to the sidewalk constituted a "distinctive, prominent[,] and decisive" decision that was a proximate cause of his injuries. *Dix*, 28 Md. App. at 106.

In our view, Mr. Dickerson's decision to walk on a dark street without a flashlight

[4] Although the *Brown* court noted that the "party who lost in the trial court has the burden of demonstrating that the grant of summary judgment was erroneous," the court recognized that its standard of review was the same as the trial court's and "[a]ny doubt as to any facts or inferences to be drawn therefrom must be resolved in favor of the non-moving party." 113 N.E.3d at 248. Our research indicates that the Indiana summary judgment standard is similar to Maryland's. *See Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) ("Drawing all reasonable inferences in favor of . . . the non-moving parties, summary judgment is appropriate 'if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'").

or other device to illuminate his path constituted contributory negligence as a matter of law. Although Mr. Dickerson correctly points out that there is no evidence that he knew of the *specific pothole* that caused his fall, that fact does not obviate the inference that he reasonably should have been aware of the potential for potholes in the street. That inference is strengthened by evidence that Mr. Dickerson had lived in the residential development for two years and that he frequently walked on the sidewalk in the area where the incident occurred. Furthermore, while Mr. Dickerson does not have a driver's license and does not own a car, his deposition revealed that he regularly used bus or taxi transportation. That Mr. Dickerson traveled the roadways in this fashion supports the inference that a reasonable person in his position would know that there are defects, including potholes, in the road. We also note that the pothole was next to a storm drain, another potential hazard to pedestrians walking on the street. Because Mr. Dickerson "is charged with notice of what a reasonably and ordinarily prudent person would have foreseen," *McManamon*, 230 Md. at 372, he is charged with knowledge of the potential existence of a pothole in the street and the corollary hazard such a pothole would present to a person walking on the street at night.

In conclusion, the uncontroverted evidence demonstrated that Mr. Dickerson failed to exercise that degree of care and caution which a reasonable and prudent person would have exercised to ensure his or her own safety. We therefore affirm the circuit court's grant of summary judgment in favor of Streamside based on Mr. Dickerson's contributory

negligence.[5]

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

[5] We agree with the dissent's analysis and conclusion that the circuit court's judgment cannot be upheld on the ground that Mr. Dickerson assumed the risk of his injuries as a matter of law.

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(Senior Judge, Specially Assigned),

JJ.

Dissenting Opinion by Arthur, J.

Filed:

I respectfully dissent, because I cannot conclude that a reasonable jury was required to find that Dickerson was contributorily negligent.

I begin with the facts, viewed in the light most favorable to Dickerson. At about 9:00 p.m. on a November evening, Dickerson left his house, on a narrow, suburban cul de sac, to walk to nearby convenience store. He started out on the sidewalk, on the right-hand side of the street, until his path was blocked by a pile of debris. To avoid the debris, he had to move down to the street. Because he was going to turn left at the end of his street, he did not walk back to the sidewalk on his right when got past the debris. Instead, he crossed the (empty) street and walked along the curb on the left side. He was alert and was looking ahead. He was injured when he tripped and fell in a pothole, which he did see not until he had fallen. The circuit court concluded that these facts established Dickerson's contributory negligence as a matter of law.

"Ordinarily, the issue of contributory negligence is a question of fact for the jury to resolve." *Woolridge v. Abrishami*, 233 Md. App. 278, 302 (2017) (citing *McQuay v. Schertle*, 126 Md. App. 556, 569, 730 A.2d 714 (1999)); *accord Willis v. Ford*, 211 Md. App. 708, 716 (2013); *Faith v. Keefer*, 127 Md. App. 706, 746 (1999). "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." *Woolridge v. Abrishami*, 233 Md. App. at 302. In other words, a court may hold that a plaintiff was contributorily negligent as a matter of law only if the evidence "was of such a character as to leave no room for difference of opinion thereon by reasonable minds." *Baltimore Transit Co. v. State ex rel. Castranda*, 194 Md. 421, 434 (1950); *accord Faith v. Keefer*, 127 Md. App.

at 746; *Campbell v. Montgomery County Bd. of Educ*., 73 Md. App. 54, 64 (1987); *see also Dix v. Spampinato*, 28 Md. App. 81, 106 (1975) ("contributory negligence will not be declared as a matter of law unless the act is distinctive, prominent and decisive about which reasonable minds would not differ as to its negligent character"), *aff'd*, 278 Md. 34 (1976).

Perhaps because of the exacting standard that a defendant must meet to establish that a plaintiff was contributorily negligent as a matter of law, there are relatively few cases in which appellate courts have affirmed a decision to take the issue of contributory negligence from the jury. In support of its conclusion that Dickerson was contributorily negligent as a matter of law, the majority cites one: *Dix v. Spampinato*, 28 Md. App. 81 (1975), *aff'd*, 278 Md. 34 (1976). A brief review of the facts in *Dix* will convey an idea of the type of case in which no reasonable person could reach any conclusion other than that the plaintiff was contributorily negligent.

In *Dix* the plaintiff was attempting to cross Reisterstown Road, "a four lane dual highway," with "no grass or concrete median strip." *Id.* at 82. It "was raining very hard," *id.* at 84, and visibility was "poor." *Id.* at 89. The plaintiff did not use the marked crosswalk, but crossed "between intersections," about 200 feet north of the crosswalk. *See id.* at 82. After the plaintiff had reached the centerline, the driver of an oncoming vehicle, a Volkswagen bus, stopped and signaled for her to cross. *Id.* at 83. Although the Volkswagen obscured the plaintiff's view of oncoming traffic in the final lane that she would have to cross, she continued across the road. *Id.* at 84. She was struck and injured by an oncoming car in the lane next to the one in which the Volkswagen had stopped.

See id. She did not recall whether she had looked for oncoming traffic after she began to walk in front of the Volkswagen. *Id.*

On that rather aggravated set of facts, this Court upheld a decision to grant a motion for judgment in the defendants' favor on the ground that the plaintiff was contributorily negligent as a matter of law. *Id.* at 109. Our predecessors reasoned that "in moving from a place of safety into the path of danger at a time when the movement of traffic lawfully upon the highway did not afford a safe opportunity for passage[,]" the plaintiff committed a "distinctive, prominent and decisive" act of negligence, "about which reasonable minds would not differ." *Id.*[1]

The facts of this case are a bit different from those of *Dix*. Dickerson was not trying to cross a busy, four-lane highway in the rain, 200 feet from a marked crosswalk; he was walking down an empty suburban cul de sac – a narrow street that had no outlet. It was nighttime, but as the majority says, "the streetlight was apparently working properly." He did not proceed blithely into the path of danger without looking where he was going, as the plaintiff did in *Dix* when she crossed into a lane of traffic without being able to see whether any cars were coming toward her; he says that he was paying attention to where he was going, and we are required to credit his testimony for purposes of summary judgment. Contrary to the majority's assertion, the record discloses no "distinctive, prominent and decisive" act of negligence that is in any way comparable to

[1] Even on those facts, however, two judges of the Court of Appeals concluded that there was a triable issue of fact as to contributory negligence, because, in their view, the plaintiff could have relied on the Volkswagen driver's hand signal to conclude that her path was clear. *Dix v. Spampinato*, 278 Md. at 39 (Eldridge, J., dissenting).

the *Dix* plaintiff's decision to cross into a lane of highway traffic without being able to see what was coming toward her.

In reasoning that Dickerson was contributorily negligent as a matter of law, the majority begins by citing Md. Code (1977, 2017 Repl. Vol.), § 21-506(a) of the Transportation Article, which states that, "[w]here a sidewalk is provided, a pedestrian may not walk along and on an adjacent roadway." The majority correctly concedes that Dickerson's violation of this statute does not amount to contributory negligence as a matter of law, but is only evidence of negligence. In fact, in the circumstances of this case, the violation of statute is tepid evidence at best, because the purpose of § 21-506(a) is not to protect pedestrians from tripping in potholes on negligently maintained streets. Rather, the purpose is to allocate the use of the roadway as between vehicles and pedestrians, as evidenced by the statute's placement among the "rules of the road" in Title 21 of the Transportation Article. Had Dickerson been run over by a car, truck, bus, motorcycle, bicycle, or scooter while he was walking in the street, § 21-506(a) would have had a direct bearing on his right to recover damages. It has little, if any, bearing, however, on his right to recover in this case.

Employing the language of the cases that have upheld a conclusion of contributory negligence as a matter of law, the majority goes on to reason that Dickerson moved from "a place of safety" when he opted to keep walking in the street once he had gotten past the debris that was blocking the sidewalk. It is actually more accurate to say that Dickerson did not return to "a place of safety" when he had a chance, because he had already been driven from the "place of safety" when the debris forced him off the

sidewalk. In any event, even if we accept that there is some evidence of negligence because Dickerson violated a statute by walking in the street, it adds little to say Dickerson was negligent in failing to return to a place of safety by walking in the street. The decision to remain in the street is substantively identical to the violation of the statute.

In my judgment, the majority's remaining points do not transform this case from one in which a jury could find contributory negligence into one in which a jury would have no choice but to find contributory negligence. First, the majority reasons that because Dickerson lived on the street, he should have known that it had potholes. Second, the majority reasons that the incident occurred at 9:00 p.m., but Dickerson did not have a flashlight or other device to illuminate his path. Yet, I know of no authority for the proposition that a person is contributorily negligent as a matter of law if he walks on a lighted suburban street, after dark, without a flashlight; or if he has less than a photographic memory of every pothole or defect in the path. Whether alone or in conjunction with the other considerations cited in the majority opinion, these factors do not add up to contributory negligence as a matter of law.

I am unpersuaded by the majority's reliance on *Brown v. City of Indianapolis*, 113 N.E.3d 244 (Ind. Ct. App. 2018). First, the injured plaintiff in that case was not just walking in the street in arguable violation of a safety ordinance; he had apparently ignored or disobeyed or a police officer's order to get out of the street. *Id*. at 252. Second, the Indiana court appears to have decided that case under a summary judgment standard that differs from ours. As the majority recognizes, in Indiana the violation of a

statute creates a rebuttable presumption of negligence (*id*. at 251) and is not merely evidence of negligence as it is in Maryland. In addition, as the majority recognizes, in Indiana the "party who lost in the trial court has the burden of demonstrating that the grant of summary judgment was erroneous." *Id.* at 248. I sense that this Indiana standard is different from the standard in Maryland, where the appellate court stands in the trial court's shoes and asks whether the admissible evidence, when viewed in the light most favorable to the non-moving party, shows genuine disputes of material fact. *See*, *e.g*., *Peninsula Regional Med. Ctr. v. Adkins*, 448 Md. 197, 216 (2016).

In this case, it may well have been advisable for Dickerson to change direction and walk up to the sidewalk once he had passed the debris.[2] It would also have been advisable for the decedent in *Davis v. Board of Educ. of Prince George's County*, 222 Md. App. 246, 267 (2015), not to attempt to cross a four-lane highway, at rush hour, without using the crosswalk, but this Court held that she was not contributorily negligent as a matter of law in doing so. In fact, it is not at all difficult to assemble cases in which persons have been held not to have been contributorily negligent as a matter of law despite their ill-considered actions. *See*, *e.g*., *Willis v. Ford*, 211 Md. App. 708, 718 (2013) (plaintiffs, whose stalled car was rear-ended on a busy highway, at night, by the defendant-driver, were not contributorily negligent as a matter of law in remaining in the car and attempting to re-start it instead of exiting the car); *Goss v. Estate of Jennings*, 207

[2] Of course, Dickerson could also have injured himself while crossing the grass, in the dark, in an effort to get back to the sidewalk. In those circumstances, his adversary could argue that he was contributorily negligent because he returned to the alleged place of safety and did not remain in the street.

Md. App. 151, 165 (2012) (inmate, picking up litter along highway, was not contributorily negligent as a matter of law even though he ran directly in front of a truck in an attempt to get to a place of greater safety); *Azar v. Adams*, 117 Md. App. 426, 436-38 (1997) (pedestrian was not contributorily negligent as a matter of law even though she crossed a divided, multi-lane highway away from the intersection and did not foresee that a car exiting a parking lot across the road would turn into her path); *Union Mem'l Hosp. v. Dorsey*, 125 Md. App. 275, 286 (1999) (plaintiff was not contributorily negligent as a matter of law even though she tripped and fell after entering a dark room that was filled with leaking garbage bags).[3]

It is completely understandable why Dickerson would remain in the empty, paved, and lighted street rather than go out of his way to climb back up to the sidewalk. He was going to turn left in a few steps when he reached the end of the street, and he would be going in the wrong direction if he turned right to walk back to the sidewalk. Unlike the plaintiffs in *Dix*, *Davis*, or *Goss*, Dickerson did not have to worry about traffic on his narrow, deserted suburban street. Nor is there any reason to believe that Dickerson would have been able to see the path any better on the sidewalk than he could on the street. In these circumstances, a jury could reasonably conclude that Dickerson was not negligent or that his negligence, if any, did not cause or contribute to his injuries.

Because the majority affirms the grant of summary judgment on the ground that Dickerson was contributorily negligent as a matter of law, it does not discuss the

[3] Each of these cases cites additional cases in which careless plaintiffs have nonetheless not been held to have been contributory negligent as a matter of law.

principal ground on which the circuit court granted summary judgment – assumption of the risk.[4] In my assessment, however, the judgment cannot be upheld on the ground that Dickerson, as a matter of law, assumed the risk of his injuries.

"[T]o establish the defense of assumption of risk, the defendant must show that the plaintiff: (1) had knowledge of the risk of the danger; (2) appreciated that risk; and (3) voluntarily confronted the risk of danger." *ADM Partnership v. Martin*, 348 Md. 84, 90-91 (1997) (collecting authorities). Thus, for example, a plaintiff assumed the risk of a fall as a matter of law when she knowingly and voluntarily walked across an ice- and snow-covered walkway. *See, e.g.*, *Schroyer v. McNeal*, 323 Md. 275, 288-89 (1991); *accord Morgan State Univ. v. Walker*, 397 Md. 509, 518-19 (2007); *ADM Partnership v. Martin*, 348 Md. at 102-03; *compare Poole v. Coakley & Williams Constr. Co.*, 423 Md. 91, 125-26 (2011) (trial court erred in entering summary judgment against plaintiff who slipped on black ice, because there was insufficient evidence of plaintiff's actual subjective knowledge of the risk, and it was unclear that a person of normal intelligence in his position must have understood the danger of black ice beneath a stream of water); *Thomas v. Panco Mgmt. of Md., Inc.*, 423 Md. 387, 401-02 (2011) (trial court erred in granting motion for judgment against plaintiff who slipped and fell on ice, where evidence suggested that ice may have been invisible). A court may not dispose of a claim as a matter of law on the ground of assumption of the risk unless the undisputed evidence

[4] In the circuit court's opinion, contributory negligence was an afterthought. In support of its conclusion that Dickerson was contributorily negligent as a matter of law, the court cited only one case (*Roundtree v. Lerner Dev. Co.*, 52 Md. App. 281 (1982)), and that case concerns assumption of risk, not contributory negligence.

and all permissible inferences therefrom clearly establish that the plaintiff knew and fully understood the risk. *Poole v. Coakley & Williams Constr. Co.*, 423 Md. at 120.

In this case, Dickerson's adversary, the homeowner's association, has no direct evidence that Dickerson knew about the particular pothole that he fell into or that he walked into that pothole with full knowledge and appreciation of the risk of falling. Instead, the association contends that Dickerson "must have" known of this particular pothole because he regularly walked down his street (albeit on the sidewalk, on the opposite side of the street, when it was not blocked by debris). The short answer to that contention is that it is a disguised jury argument about Dickerson's alleged negligence, not an argument that Dickerson knowingly and voluntarily assumed the risk of his injuries as a matter of law.

It is true that, in a case involving assumption of the risk, "a plaintiff will not be heard to say that he [or she] did not comprehend a risk which must have been obvious[.]" *Gibson v. Beaver*, 245 Md. 418, 421 (1967); *accord Morgan State Univ. v. Walker*, 397 Md. at 519; *ADM Partnership v. Martin*, 348 Md. at 91. For example, "[t]he danger of slipping on ice" is "one of the 'risks which any one of adult age must be taken to appreciate[,]'" *Schroyer v. McNeal*, 323 Md. at 284 (quoting W. Prosser, *Handbook of the Law of Torts* § 55, at 310 (2d ed. 1955)), so a plaintiff will not be heard to deny that he or she was unaware of that risk. But claiming not to have memorized the exact location of every pothole on one's street is not exactly the same as claiming not to have understood that ice is slippery.

In summary, I agree that, on the record in this case, a jury would be free to find that Dickerson was contributorily negligent, but I do not accept the proposition that the jury was compelled to make that finding. Nor do I accept that he, as a matter of law, assumed the risk of his injuries. Consequently, I would reverse the grant of summary judgment. The homeowner's association may prevail at trial, but it was not entitled to prevail on summary judgment.