IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 06/07/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

MARIA CHAVEZ CHAPA, Plaintiff/Appellant, v. ATC/VANCOM OF ARIZONA LIMITED PARTNERSHIP dba VEOLIA TRANSPORTATION PHOENIX, a limited partnership; MICHAEL WAYNE FISHER, Defendants/Appellees.	)	1 CA-CV 10-0347 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-007666

The Honorable Eileen S. Willett, Judge

REVERSED AND REMANDED

Robbins & Curtin, P.L.L.C. Phoenix
by Joel B. Robbins
Attorneys for Plaintiff/Appellant

Sanders & Parks, P.C. Phoenix
by Jeffrey L. Smith
Robin E. Burgess
Attorneys for Defendants/Appellees

P O R T L E Y, Judge

¶1 Maria Chavez Chapa challenges the jury verdict in favor of ATC/Vancom and bus driver Michael Wayne Fisher (collectively "Veolia").[1] She contends that the trial court erred by giving an assumption of the risk jury instruction. For the following reasons, we reverse the verdict and remand for a new trial.

FACTS AND PROCEDURAL HISTORY[2]

¶2 A westbound city bus stopped just west of Central Avenue on Indian School Road to let passengers get off and on. The driver closed the bus doors as Chapa was walking along the side of the bus. Chapa unsuccessfully attempted to get the driver's attention by either waiving her arm or banging on the side of the bus. As the bus began to pull out of the bay, Chapa fell, was subsequently run over by the bus's left rear tires, and suffered serious injuries to her pelvis and legs.

¶3 Chapa filed a lawsuit, but the jury rendered a defense verdict. After an unsuccessful motion for a new trial, Chapa filed this appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

---

[1] The bus company is owned by ATC/Vancom and does business as Veolia.

[2] We view the facts in a light most favorable to sustaining the verdict. *See Inch v. McPherson*, 176 Ariz. 132, 136, 859 P.2d 755, 759 (App. 1993).

DISCUSSION

¶4 "We review jury instructions as a whole to determine whether the jury was properly guided in its deliberations." *State Farm Fire & Cas. Ins. Co. v. Grabowski*, 214 Ariz. 188, 192, ¶ 13, 150 P.3d 275, 279 (App. 2007). We also view the evidence "in the light most favorable to the requesting party, and if there is any evidence tending to establish the theory posed in the instruction, it should be given even if there are contradictory facts presented." *Willet v. Ciszek-Olson*, 170 Ariz. 230, 231, 823 P.2d 97, 98 (App. 1991) (quoting *Andrews v. Fry's Food Stores of Ariz.*, 160 Ariz. 93, 95, 770 P.2d 397, 399 (App. 1989)). Conversely, when there is no substantial evidence to support an instruction, it is reversible error to give the instruction. *Herman v. Sedor*, 168 Ariz. 156, 158, 812 P.2d 629, 631 (App. 1991); *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 539, 647 P.2d 1127, 1137 (1982). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support'" a verdict. *State v. Fulminante*, 193 Ariz. 485, 493, ¶ 24, 975 P.2d 75, 83 (1999) (quoting *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990)).

¶5 Implied assumption of the risk requires proof of the following elements:

> (1) There must be a risk of harm to plaintiff caused by defendant's conduct or by the condition of the defendant's land or chattels;
>
> (2) Plaintiff must have actual knowledge of the particular risk and appreciate its magnitude; and
>
> (3) The plaintiff must voluntarily choose to enter or remain within the area of the risk under circumstances that manifest his willingness to accept that particular risk.

Hildebrand v. Minyard, 16 Ariz. App. 583, 585, 494 P.2d 1328, 1330 (1972) (citations omitted); *see also* Restatement (Second) of Torts § 496C (1965).

¶6 In *Hildebrand*, we applied the Restatement approach to assumption of the risk. There, Hildebrand, hired to repair a bucket loader, positioned the loader so that it partially obstructed a roadway. *Hildebrand*, 16 Ariz. App. at 584, 494 P.2d at 1329. Although warned to move the loader, Hildebrand saw there was enough room for vehicles to pass. *Id*. Later, he was killed when a tractor struck the loader. *Id*.

¶7 During the wrongful death trial, the jury was instructed that the decedent assumed the risk of injury by placing the loader in the roadway. *Id*. In analyzing the issue on appeal, we found that assumption of the risk and contributory negligence are often conflated. *Id*. at 585-86, 494 P.2d at 1330-31. Specifically, we stated:

> Contributory negligence arises when the plaintiff fails to exercise due care. Assumption of risk arises regardless of the due care used. It is based, fundamentally, on consent. Contributory negligence is not. In the implied assumption of risk situation the consent is manifested by the plaintiff's actions after he has been informed of the nature and magnitude of the specific danger involved.

Id. at 585, 494 P.2d at 1330 (citation omitted).[3] We concluded that the "failure to fully appreciate and comprehend the consequences of one's acts is not properly a matter of assumption of risk but, rather, a matter of contributory negligence." *Id*. at 586, 494 P.2d at 1331.

¶8 As a result of the analysis and the absence of evidence of consent, we found that the defendant failed to show that Hildebrand had impliedly consented to the tractor driver's negligence or that he had actual knowledge of the specific danger that caused his death. *Id*. At most, Hildebrand "failed

---

[3] Examples of consent where the plaintiff agreed to take a chance include:

> [A]ccept[ing] employment knowing that he is expected to work with a dangerous horse; or ride in a car with knowledge that the brakes are defective and the driver incompetent; or . . . enter a baseball park, sit in an unscreened seat, and thus consent that the players proceed with the game without taking any precautions to protect . . . from being hit by the ball.

Hildebrand, 16 Ariz. App at 585, 494 P.2d at 1330-31; *see* Restatement (Second) of Torts § 496C cmt. g, illus. 1-6.

to fully appreciate the consequence of his conduct, . . . [which] would constitute contributory negligence and not assumption of the risk." *Id*. As a result, we reversed and remanded the case for a new trial.

¶9 Nearly a decade later in *Garcia v. City of South Tucson*, we reaffirmed the *Hildebrand* analysis, and noted that "[a] general knowledge of 'a danger' is not sufficient" to instruct the jury on assumption of the risk. 131 Ariz. 315, 319, 640 P.2d 1117, 1121 (App. 1981). There, the plaintiff, a Tucson police officer, while responding to the home of a gunman who was randomly firing, was shot in the back by a South Tucson police officer. *Id*. at 317, 640 P.2d at 1119. We affirmed the damages verdict and rejected the argument that the trial court should have given an assumption of the risk instruction because the plaintiff knew that standing on the gunman's front porch was a dangerous place. *Id.* at 319, 640 P.2d at 1121.

¶10 Here, Chapa alleged that the bus driver negligently moved the bus from the curb while she was on the sidewalk. For the assumption of the risk doctrine to apply, Veolia must have demonstrated that Chapa knew and understood the risk of trying to catch a bus and had freely chosen to encounter the risk. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, § 68, at 487 (5th ed. 1984). The record, however, does not support that she assumed the risk of being run over by the bus.

¶11 Although Chapa had been a school bus driver for six months in 1974 and may have been generally aware that she could fall if she attempted to stop the bus, there was no evidence that she contemplated or consented to Veolia's purported negligence. In fact, Chapa testified that she did not know the bus was going to move when she attempted to stop it. Moreover, even assuming that Chapa knew that she was unsteady on her feet, her purported knowledge does not suggest that she assumed any risk that the bus driver would be negligent. Keeton et al., *supra*, § 68, at 489. At most, she was contributorily negligent but did not assume any risk.[4] *See Hildebrand*, 16 Ariz. App. at 586, 494 P.2d at 1331. Consequently, the trial court erred when, over Chapa's objection, it gave the assumption of the risk jury instruction.

---

[4] The Restatement provides:

> In order for assumption of risk to be implied from the defendant's conduct, it must be such as fairly to indicate that the plaintiff is willing to take his chances. . . . A plaintiff, for example, who dashes into the street in the middle of the block, in the path of a stream of cars driven in excess of the speed limit, certainly does not manifest consent that they shall be relieved of the obligation of care for his safety. This is merely contributory negligence, and not assumption of risk.

Restatement (Second) of Torts § 496(C) cmt. h.

¶12 Veolia argues, however, that *Galindo v. TMT Transport, Inc.*, 152 Ariz. 434, 733 P.2d 631 (App. 1986) supports the instruction. *Galindo*, however, highlights the fact that where a person dies and cannot testify about his subjective appreciation of the dangers, both contributory negligence and assumption of the risk instructions may be appropriate to allow the jury decide the facts and apply the appropriate law.

¶13 There, the decedent, who had a history of mental illness and was on an outing from the Arizona State Hospital, ran out in front of a moving gasoline tanker on the freeway, which was described as "an attempt to tackle the truck." *Id.* at 435, 733 P.2d at 632. At the conclusion of the trial, the court instructed the jury to "apply different considerations in determining whether assumption of the risk had been proven and whether it should be applied." *Id*. at 437, 733 P.2d at 634. The jury was also instructed that "a person assume[d] the risk of injury when he voluntarily expose[d] himself to the specific danger which cause[d] his injury and which he knows about and understands." *Id*. (Emphasis omitted.) On appeal from the defense verdict, the decedent's mother argued that the evidence did not support the assumption of the risk instruction. We affirmed because:

> The instruction on assumption of the risk permitted the jury to take into account [the decedent's] mental deficiency as one of the factors to consider together with all of the other evidence. However, the issue of [the decedent's] state of mind and its effect on the application of the doctrine of assumption of the risk was properly left to the jury for its determination.

Id.

¶14 Here, unlike *Galindo*, Chapa survived her fall, and testified without contradiction about her subjective appreciation of the dangers in catching a bus. There was no evidence that she "consented" to Veolia's purported negligence of moving the bus from the curb. Consequently, the assumption of the risk instruction was inappropriate to the facts of this case. We therefore reverse and remand for a new trial.

¶15 Additionally, Chapa challenges two evidentiary rulings — whether the trial court erred when it allowed evidence of Chapa's prior falls and whether it erred by precluding standard of care testimony of the Veolia accident investigator. Because we are remanding the matter for a new trial, we express no opinion and, on remand, the trial court may address them, if they arise. *See Dancing Sunshines Lounge v. Indus. Comm'n*, 149 Ariz. 480, 482, 720 P.2d 81, 83 (1986).

CONCLUSION

¶16 Based on the foregoing, we reverse the verdict and remand for a new trial.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
LAWRENCE F. WINTHROP Judge

/s/
_____
SHELDON H. WEISBERG, Judge