

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2488

September Term, 2005

CHANDRA GOLDSTON

v.

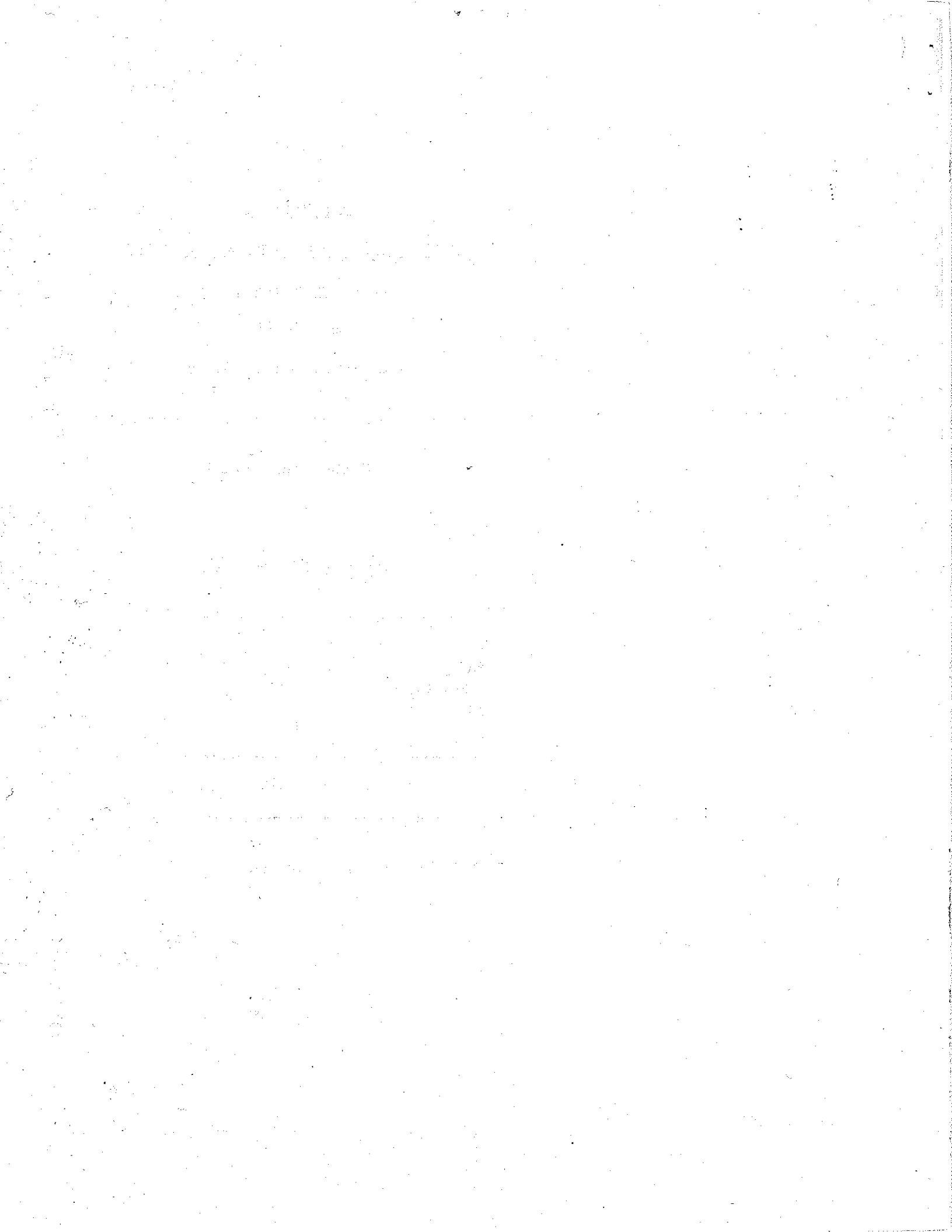
ADAMA KEBE, ET AL.

Murphy, C.J.,
Adkins,
Barbera,

JJ.

Opinion by Adkins, J.

Filed: November 29, 2006



Chandra Goldston, appellant, unsuccessfully sued the Washington Metropolitan Area Transit Authority ("WMATA")¹, appellee, for indemnification when a jury in the Circuit Court for Prince George's County held her liable to Adama Kebe, appellee, for a motor vehicle accident that occurred on an icy access road at the Naylor Road Metrorail station in Prince George's County. Goldston presents three challenges to the judgment in favor of appellee Adama Kebe and exonerating appellee WMATA, which we restate as follows:

- I. Did the trial court err in denying Goldston's motion for judgment notwithstanding the verdict or in the alternative for a new trial?
- II. Was there sufficient evidence of Goldston's negligence to support the verdict against her?
- III. Was the jury's special verdict finding both WMATA and Goldston negligent irreconcilably inconsistent with its special verdict finding that WMATA did not proximately cause the accident or plaintiff's injuries?

We find no error and affirm the judgment.

FACTS AND LEGAL PROCEEDINGS

Adama Kebe sued Goldston for injuries she sustained on February 24, 2003. Goldston filed a third party complaint for indemnity and contribution against WMATA. Kebe then amended her complaint to add WMATA as a defendant.

¹WMATA is an interstate compact agency and instrumentality of Maryland, Virginia, and the District of Columbia, which operates the Metrorail and Metrobus systems in the Washington, D.C. metropolitan area. See Md. Code (2001), § 10-204 of the Transportation Article.

A jury found both Goldston and WMATA negligent, but that Goldston alone was the proximate cause of Kebe's injuries. The trial court denied Goldston's motion for judgment notwithstanding the verdict or in the alternative for a new trial. From the judgment awarding Kebe \$346,046.53 against her, Goldston noted this timely appeal.

Evidence At Trial

Donna Grier, the WMATA station manager at Naylor Road Metro, testified that she arrived for work at about 5:00 a.m. on February 24, 2003. As part of her duties, she reported that "the roadway was icy" at the Naylor Road "parking lot," at about 6:30 a.m., both to the maintenance center, who "said landscaping was on the way," and to "bus central." She also recorded these conditions and reports in her station manager's logbook. She "had no idea," however, whether anyone came to the station to treat the roadway for ice.

Kebe testified that she "felt ill" as she drove to work that same morning. Kebe pulled her car over, stopping "near the curb on the right-hand side of the roadway" accessing the Naylor Road station. "[T]here was a little bit of space in between the car and the curb" due to "snow" but the car was as "close to the curb as possible." She did not observe any ice or snow of the traveled portion of the access road.

After sitting in her vehicle for about 15 minutes, she felt

better and attempted to resume her commute. She was unable to do so, however, because her front passenger side tire was stuck in snow that was piled up along the curb.

Kebe got out of her car to examine the problem. Although she removed snow three times, with a shovel she kept in her trunk, the car remained stuck. During this time, she "noticed that several vehicles had driven past [her] vehicle, including two Metro buses."

She asked the driver of a Metro bus "parked right in front of [her] car" for assistance. His efforts to push the vehicle while Kebe accelerated in drive and reverse were similarly unsuccessful. When the bus driver sat in the driver's seat with the driver side door open, Kebe "walk[ed] to the rear of the vehicle to avoid ongoing traffic." Kebe stepped behind the rear of her car while the driver tried to extricate her car from the snow, "[b]ecause there was a lot of snow on the grass and on the ground and [she] felt . . . safe and away from traffic[.]"

While attempting to extricate her car from the snow, Kebe saw "approximately ten to fifteen cars" and two Metro buses drive past without incident. She did not observe any "sliding on the road or . . . any trouble negotiating the curve where [her] car was stopped[.]"

About "five minutes later" she was struck from behind by Goldston's vehicle. Kebe never saw the approaching car. She suffered "severe lacerations of the soft tissues of the lower part

of the leg, foot and ankle and an open fracture of the left heel bone," requiring orthopedic surgery to install three screws, and hospitalization until March 9, followed by physical therapy.

Goldston testified² that she was driving her daughter to the Metro station that morning. She left home earlier than usual that day in her manual transmission Mazda Tribute, because she was concerned about road conditions. When she entered the station access road at approximately 7:15 to 7:25 that morning, she saw Kebe standing behind her vehicle. She was traveling in second gear, at approximately 10 mph, and did not slow down because she did not "think that was a problem."

As she proceeded into a curve in the access road, Goldston's car began to slide. She was unable to stop or to steer her vehicle to the left, away from Kebe. Believing that when a vehicle begins to slide on ice, "you are supposed to steer away from the way that you are going" and "gently" press the brakes, the first thing Goldston did was to turn her steering wheel to the left, "but it seemed like it was sliding more towards her car." After "a couple of more feet," she "turned it the other way[,]" to the right toward Kebe, "but it was still sliding in the same direction." The brakes did not stop the slide. She sounded her horn during the slide, but it was too late. According to Goldston, she did not see any ice on the road before the accident, but when she got out of her car, she

²Goldston was called as a witness by Kebe, then recalled in her own defense.

slipped on ice and observed ice on the area of the road where she had traveled.

Corporal O'Tooni of Prince George's County Police Department responded to the accident at approximately 7:30 a.m. He observed snow on the sides of the roadway and "patchy ice" on the access road, with some puddles having iced over the night before. O'Tooni's vehicle did not slide in the area where the accident occurred, and he had no trouble stopping. Nor did he slide on ice when he exited his vehicle in that area, or otherwise observe any other vehicle slide during the 45 minutes to one hour that he was at the scene. At the point where the accident occurred, the access roadway was approximately 60 feet wide and the speed limit was 25 mph. Parking was not permitted in that area. Kebe's car was parked one to two feet away from the curb.

O'Tooni noted in his accident report that Goldston was going "too fast for conditions." Before leaving the scene, the officer asked his dispatcher to call the WMATA "and have them throw some salt down to avoid any further mishaps in the area."

Jerome Caldwell, WMATA Assistant Supervisor for Plant Maintenance, testified that he has supervisory duties involving snow and ice removal at 24 stations, including the Naylor Road station. He reviewed the WMATA procedures for snow and ice inspection after a storm. From his experience, it is not possible to cover every single inch of ice on the WMATA roadways.

The Verdict And Post-Trial Motions

The jury returned special verdicts in favor of Kebe against Goldston and in favor of WMATA on Kebe's complaint and Goldston's third party complaint. The jury determined that Goldston was negligent in the operation of her vehicle, that WMATA was negligent in the maintenance of the road, and that Kebe was not contributorily negligent. But the jurors also found that WMATA's negligence was not a proximate cause of Kebe's injuries.

Goldston moved for judgment notwithstanding the verdict, arguing that "as a matter of law, there was insufficient evidence upon which a reasonable juror could find negligence on her part." In the alternative, Goldston asked for a new trial. WMATA opposed the motion on the ground that the jury concluded that, "if Ms. Goldston had been driving reasonably under the conditions, this accident would not have happened." In support, WMATA cited Goldston's own testimony "that she saw [Kebe] well before the accident occurred, but she never slowed her speed" and then "turned her [steering] wheel to the right which is contrary to the common defense driving techniques." After a hearing, the trial court denied those motions because it was "not convinced that the jury decision is wrong[.]"

DISCUSSION

I. and II.

JNOV And Sufficiency Of The Evidence

Goldston asserts that her motion for JNOV should have been granted because there was insufficient evidence to establish that she was negligent, given that "the only act of negligence asserted against [her] was the manner in which she operated her vehicle in icy conditions." In her view, the uncontradicted observations by both Cpl. O'Tooni and the station manager, that there were icy conditions in the vicinity of the collision prevent a finding of negligence. She asserts that, when the icy conditions are considered in conjunction with Goldston's own testimony that she was traveling just 10 mph in second gear in the moments before she began to slide, that she had not encountered any prior difficulty with ice on the road, and that she did not see the ice on the road before her car began to slide, there was insufficient evidence of negligence to go to the jury. We shall hold that the trial court did not err in denying JNOV because there is sufficient evidence to support the jury's finding that Goldston was negligent.

A motion for judgment notwithstanding the verdict (JNOV) "tests the legal sufficiency of the evidence." *Impala Platinum Ltd. v. Impala Sales (U.S.A.), Inc.*, 283 Md. 296, 326 (1978). Thus, appellate challenges to the denial of a JNOV and to the sufficiency of the evidence present the same issue. Our task is to determine whether "there is any legally relevant and competent

evidence, however slight, from which a rational mind could infer [the] fact in issue[.]” *Id.* at 328. To do this, we must view the evidence in the light most favorable to Kebe and WMATA, as the prevailing parties, which means that we shall assume the truth of all evidence and inferences that tend to support the jury’s finding that Goldston was negligent. See *Lusby v. First Nat’l Bank of Md.*, 263 Md. 492, 499 (1971).

Goldston explicitly rests her JNOV/sufficiency challenge on the premise that her testimony was binding on appellees because it was given in Kebe’s case-in-chief, due to the plaintiff calling her as a witness.³ See *Williams v. Wheeler*, 252 Md. 75, 79-80 (1969) (“in the absence of contradiction or impeachment, the testimony of the defendant (called by the plaintiff) stood on the record as the explanation of how the accident occurred”); *Proctor Elec. Co. v. Zink*, 217 Md. 22, 32 (1958) (under former Maryland statute, “when adverse parties have been called and their testimony not contradicted, this Court has held that the uncontradicted

³Under Md. Rule 2-532(a), a party in a jury trial “may move for judgment notwithstanding the verdict only if that party made a motion for judgment at the close of all the evidence and only on the grounds in support of the earlier motion.” WMATA argues that Goldston waived her right to challenge the sufficiency of the evidence showing proximate cause, because the sole grounds for her motion for judgment was that there had been no testimony “regarding any negligent operation of [her] vehicle.” We disagree.

At the close of Kebe’s case in chief, Goldston moved for judgment on the ground that there was no “testimony at all regarding any negligent operation of [Goldston’s] vehicle.” The court reserved its ruling on that motion. At the close of all evidence, Goldston renewed her motion for judgment at the close of Kebe’s case-in-chief, “for the same reason.” In her motion for JNOV, Goldston similarly limited her argument to challenging the negligence finding. We therefore do not read Goldston’s sufficiency challenge as directed to the jury’s proximate cause finding.

testimony was binding on the party who had called the opposite party").

We reject Goldston's attempt to revive such a "witness voucher" rule.

At common law the voucher rule provided that the party calling a witness vouched for the credibility and veracity of that witness's testimony. *Patterson v. State*, 275 Md. 563, 570 (1975). The party calling the witness, pursuant to the voucher rule, could not impeach or discredit its witness by offering proof of prior contradictory statements. *Id.* If the calling party became disappointed by the witness's testimony or if the evidence adduced from the witness was not beneficial to the calling party, he or she could not impeach the witness without a showing of something more.

Walker v. State, 373 Md. 360, 383 (2003). But "[t]he voucher rule is no longer a part of Maryland law." *Id.* at 384. Instead, "the credibility of a witness may be attacked by any party, including the party calling the witness." Md. Rule 5-607 ("This Rule eliminates the common law 'voucher rule'"). As the *Walker* Court recognized, the voucher rule fell because "[t]he rationale for the common-law rule was never very persuasive," given that "a party does not necessarily vouch for a witness; in fact, a party may have no choice but to call an adverse witness in order to prove a case." *Walker*, 373 Md. at 384 n.6 (quoting commentary to Fed. Rule of Ev. 607).

Indeed, the rigid vouching rule posited by Goldston was disapproved long before the adoption of Rule 5-607, for reasons

applicable to this case and articulated in the very case Goldston relies on:

The testimony of a witness may be contradicted or discredited by circumstances as well as by statements of other witnesses, and **a jury is not bound to accept a witness' testimony as true if it contains improbabilities, or if there are reasonable grounds for concluding that it is erroneous.** It is the jury's duty to take into consideration all the evidence, whether circumstantial or otherwise, tending to disprove any statement of fact made by a witness in the course of his testimony, and thus determine the weight or credibility to be given to such statement. . . . There can be no doubt that one who produces a witness may prove the truth of material facts by any other competent evidence even though the effect of the testimony is directly to contradict his own witness. This is done not to impeach the witness, but to show he was mistaken. As one Court said: **"(T)he testimony of a single witness * * * need not be believed if the witness is interested, or his statements, even if uncontradicted, are * * * so improbable as to require explanation. If a fair argument can be made against the probability of his story, his credibility presents a question for the jury. Even if they do not think that he intended to speak falsely, still they may reject his testimony if they are satisfied that he was mistaken * * * (for any) reason springing from the evidence."**

Proctor Elec., 217 Md. at 32-34 (emphasis added and citations omitted); see *Williams*, 252 Md. at 80. See also *Hanna v. Emergency Medicine Assocs., P.A.*, 77 Md. App. 595, 603, cert. denied, 315 Md. 691 (1989) ("we are aware of no rule which says that testimony must be directly refuted or rebutted"). For these reasons, the jury was entitled to discredit some or all of Goldston's testimony,

including her claims that she was traveling only 10 mph and that the accident was due solely to the icy road conditions.

Goldston's status as a defendant provided the jury with reason to scrutinize her account of what happened. See *Proctor Elec.*, 217 Md. at 33. WMATA elicited testimony from Goldston that called into question her credibility regarding the accident, both generally and specifically with respect to her speed on the icy roadway. At trial, Goldston admitted that she was "not good with distances[,] " giving the jury cause to doubt her testimony regarding distance-related matters, including her speed heading into the curve where Kebe was stopped, and the distance car slid before she turned her steering wheel in Kebe's direction. Goldston's testimony that she was traveling 10 mph in second gear, and that she lost all control of her car was also challenged. When asked about her deposition testimony that she did not remember what gear she was traveling in, and that her vehicle "was never out of control" but rather just skid to the right upon impact," Goldston admitted that her memory was better "six months ago" when the deposition was taken. Further, her credibility may have been damaged by the discrepancy between her trial testimony that she did not remember seeing a Metro crew treat the road that day, and her deposition testimony that she saw a Metro crew salt or sand the road while she waited at the scene of the accident.

Goldston also ignores that she herself provided testimony that

a jury reasonably could view as evidence of negligence. For example, a jury might find her claim to be traveling only 10 mph improbable in light of her testimony that she was traveling in second gear. Most significantly, jurors might have concluded that Goldston mishandled her vehicle when she hit the icy road, by misapplying her brakes, steering her vehicle toward Kebe, and/or failing to sound her horn in time to alert Kebe to the danger. Goldston testified that she was generally aware of the challenging early morning road conditions that day, as evidenced by her testimony that she began her commute earlier than usual due to her uncertainty about them. She admitted seeing Kebe, not slowing down, and turning her steering wheel in a manner that could have contributed to her loss of control. She also admitted that many other cars drove over the same portion of the roadway that she claims sent her into an "unavoidable" slide - without slipping.

Finally, the record also contains other evidence that the jury was free to credit at Goldston's expense. Kebe and Cpl. O'Tooni undermined Goldston's testimony that she could not avoid either the ice or losing control of her vehicle, by describing the many cars and buses they watched travel the same road without incident, both before and after Goldston hit Kebe. Cpl. O'Tooni and Kebe agreed that no other vehicle traveling past them, during the 15 minutes before the accident through approximately one hour after it, slid on ice or snow.

In these circumstances, we cannot say that the jury was obligated to believe Goldston's testimony that she was traveling 10 mph or that there was nothing she could have done to avoid hitting Kebe. Based on this record, moreover, we conclude that there was sufficient evidence to support the jury's finding of negligence against Goldston.

III. Irreconcilable Proximate Cause Verdicts

"Negligence . . . is not actionable by itself; to be actionable it must be a proximate cause of the injury claimed." *Proctor Elec.*, 217 Md. at 30. Goldston argues that the jury's special verdict finding that her negligent driving was the proximate cause of the accident "is irreconcilably inconsistent" with the verdicts finding negligence but no proximate cause as to WMATA.⁴ See, e.g., *Southern Mgmt. Corp. v. Taha*, 378 Md. 461, 488 (2003) (In civil cases, "[w]here the answer to one of the questions in a special verdict form would require a verdict in favor of the plaintiff and an answer to another would require a verdict in favor

⁴WMATA argues that Goldston is barred from raising this inconsistency argument, because she failed to object before the jury was discharged. On this waiver issue, we again side with Goldston.

Goldston's post-trial motion asserted that "the existence and finding of negligence on WMATA's behalf compels a verdict of, at a minimum, concurring negligence and that WMATA was jointly and severally liable." In any event, the Court of Appeals has held that, "[i]n the absence of a rule requiring trial judges to resolve verdict inconsistencies prior to the release of the jury, the parties in Maryland courts should not be precluded from . . . raising the issue of irreconcilably inconsistent verdicts by post-judgment motion." *Southern Mgmt.*, 378 Md. at 492.

of the defendant, the verdict is irreconcilably defective").

We agree with WMATA and Kebe that the proximate cause findings are not inconsistent, because there was sufficient evidence from which a reasonable juror could conclude that Goldston's negligent driving, rather than WMATA's negligent maintenance, caused the accident. The evidence of Goldston's negligence, as discussed above, also could support a finding that the accident resulted from Goldston "going too fast for conditions" and/or mishandling her vehicle when she hit the ice. On this record, a jury could find that, although WMATA was negligent in failing to properly maintain portions of the roadway, including failing to clear the roadside snowbank in which Kebe's vehicle became stuck, nonetheless travelers could safely drive this portion of the access road, at slower speeds than Goldston. In particular, the uncontradicted evidence that no vehicle other than Goldston's slid on the same portion of the access road, either before or after the accident, could have persuaded jurors that Goldston's negligent operation of her vehicle was the sole proximate cause of the accident.

**JUDGMENT AFFIRMED. COSTS TO BE
PAID BY APPELLANT.**